**ORAL ARGUMENT REQUESTED**

Nos. 14-4151 and 14-4165

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,
*Plaintiff-Appellee*,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.
*Federal Defendants-Appellants*,

and

FRIENDS OF ANIMALS,
*Intervenor-Defendant-Appellant*.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CASE NO. 2:13-CV-00278-DB
THE HONORABLE DEE BENSON

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# INTERVENOR-APPELLANT'S OPENING BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Intervenor-Appellant, Friends of Animals, is a non-profit incorporated since 1957 in the state of New York with offices in Dairen, CT, New York, NY, Ashville, NC and Centennial, CO. Pursuant to Federal Rule of Appellate Procedure 26.1, Friends of Animals represents that it does not have any parent entities and does not issue stock.

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## STATEMENT OF RELATED CASES

This case has not previously been before this Court and Friends of Animals is not aware of any related case in this Court or any other court.

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346 because the action involved the federal government as the Defendant, and it arose under the laws of the United States. This Court has jurisdiction pursuant to 16 U.S.C. § 1291 because this appeal is from a final order of the United States District Court for the District of Utah. Appellant appeals Honorable Dee Benson's November 5, 2014 Order Granting Summary Judgment in favor of the Plaintiff, People for the Ethical Treatment of Property Owners ("PETPO"), which constitutes a final order that disposed of all claims. *PETPO v. U.S. Fish & Wildlife Service, et al.,* 2:13-cv-00278-DB, ECF 68. Friends of Animals and the Federal Defendants filed timely notices of appeal on November 26, 2014 and December 30, 2014, respectively, and within sixty days of the District Court's decision. Fed. R. App. P. 4(a)(1)(B).

## ISSUES FOR REVIEW

This action involves the issuance of a "special rule" on August 2, 2012, by the U.S. Fish and Wildlife Service (the "Service"), a federal agency housed within the Department of Interior, pursuant to Section 4(d) of the Endangered Species Act (16 U.S.C. § 1533(d)) to allow for limited take (*e.g.,* killing or capture) of Utah prairie dogs, a species that has been listed as either endangered or threatened for nearly four decades. Plaintiff, PETPO, filed a Motion for Summary Judgment arguing that the regulation of Utah prairie dog takes through the Special 4(d) violates of the Commerce Clause (Article 1,

Section 8, Clause 3) of the U.S. Constitution. Honorable Judge Benson of the United States District Court for the District of Utah, granted PETPO's motion for Summary Judgment and found that Congress has no authority to authorize the Service to issue special rules to regulate take of Utah prairie dogs on private lands in Utah.

The following issues are raised on appeal:

1. Did the plaintiff have Article III standing to bring a facial challenge to the Special 4(d) rule for the Utah prairie dog where even if the District Court grants all the relief requested, PETPO's members' alleged harms would not be redressed because federal rules not being challenged in this litigation would be triggered that are more restrictive, prohibiting all take of prairie dogs on private land?
2. Is the challenged rule part of a comprehensive scheme under the Endangered Species Act to regulate endangered and threatened species that has a substantial relation to interstate commerce, and, thus, a valid use of Congress' commerce clause power under the Supreme Court's holding in *Gonzales v. Raich,* 545 U.S. 1 (2005)?
3. Does the listing of the Utah prairie dog as a threatened species under the Endangered Species Act, and the subsequent use of a special rule to limit the take of prairie dogs on private land, have a substantial relationship to interstate commerce where, as here, the record before the District Court demonstrates the value of Utah prairie dogs to animal tourism, scientific research, literature and poetry, and the protection of interrelated natural resources?

## INTRODUCTION

In the District Court, PETPO couched this action as a narrow constitutional dispute over federal regulation of a single species—the Utah prairie dog—on private lands in the state of Utah. But what is really on display here is a difference of opinion over the value of America's natural heritage. On one side, PETPO tends to view members of the animal kingdom to be valueless unless they can be reduced to mere "commodities;" if an animal cannot be sold or traded, then it is no more than a mere pest to be eradicated to make way for human development. On the other side, there is Friends of Animals, the Service, numerous scientists, and millions of Americas who recognize that protection of all members of the North American biota—from the smallest fungi to the greatest of mammals—is essential to biodiversity and to human economic health. In fact, the Utah prairie dog, with its immeasurable value to the western grassland ecosystems, is a textbook illustration for this irrefutable proposition.

While the District Court sided with PETPO, it did so by ignoring the clear intent of Congress to regulate economic activities that threatened the continued existence of species like the Utah prairie dog. There is little doubt that the Endangered Species Act ("ESA") was passed for the purpose of protecting our nation's flora and fauna from commercial exploitation to preserve it as a resource—both economic and otherwise—for future generations. As the House Report from 1973 explained:

> As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable. . . .

H.R. Rep. No. 93-412 at 143 (attached hereto as "Addendum B").

Notably, to date every court that has proceeded to address the constitutionality of any part of the ESA on commerce clause grounds has turned back the challenge based on the legislative history and text of the ESA. The Court should follow suit here, as there is simply no basis for concluding that Congress overstepped its constitutional authority by authorizing the regulation of economic activities that threaten the continued existence of the Utah prairie dog or any other wholly intrastate species.

## STATEMENT OF THE CASE

### A. General Overview.

In this action, PETPO "contends that the federal government has no constitutional authority to regulate the take of Utah prairie dog on non-federal land, and thus no authority to prevent PETPO's members from protecting their property and other interests against the harms that prairie dog activity creates." Appellants' Joint Appendix (hereinafter, "APLT_APP") at 15. Specifically, in its Petition for Review of Agency Action ("Petition"), filed in the District Court, PETPO asserts two claims. First, an Administrative Procedure Act ("APA") claim that the Service's regulation of Utah prairie dogs on private lands is not in accordance with law, 5 U.S.C. § 706(2)(A), or is contrary to any constitutional right, power, privilege, or immunity, *id.* § 706(2)(B). *Id.* at 31-33. The crux of PETPO's APA claim is that such regulation violates the commerce clause. *Id.* Second, and in the alternative, a claim that the rule violates the Tenth Amendment to the U.S. Constitution. *Id.* at 32-34.

In the District Court, PETPO's claims were argued in cross-motions for summary judgment. Memorandum Decision and Order (hereinafter, "Order") at 2 (a copy is attached hereto as Addendum A). After briefing and oral

argument, the District Court granted summary judgment in favor of PETPO (presumably on the APA claim), holding that:

> Although the Commerce Clause authorizes Congress to do many things, it does not authorize Congress to regulate takes of a purely intrastate species that has no substantial effect on interstate commerce. Congress similarly lacks authority through the Necessary and Proper Clause because the regulation of takes of Utah prairie dogs is not essential or necessary to the ESA's economic scheme.

*Id*. at 16. The District Court did not address PETPO's Tenth Amendment claim.

## B. Legal Background: The Federal Endangered Species Act.

The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species . . .." 16 U.S.C. § 1531(b) (2013). The ESA defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3) (2013).

However, the protective provisions of the ESA do not do anything to conserve a species until that species is officially "listed" as either threatened or endangered under the terms of the Act. 16 U.S.C. § 1533 (2013). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is listed as "threatened" if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

The Secretary of Interior ("Secretary") is required to list as either threatened or endangered any species facing extinction due to any one, or any combination of, the following five factors: (1) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting the species' continued existence. 16 U.S.C. § 1533(a)(1)(A)-(E). In considering these factors, the Secretary must use only "the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination." 50 C.F.R. § 424.11(b) (2013).

Once a species is listed, the ESA provides strong legal protection to encourage the species' recovery. For example, the ESA requires the Secretary to designate critical habitat for all threatened and endangered species concurrently with their listing and subsequently to develop recovery plans for such species. 16 U.S.C. § 1533(a)(3), 1533(f). The ESA also requires that all federal agencies "carry out programs for the conservation" of threatened and endangered species and consult with the Secretary in order to ensure that their actions are "not likely to jeopardize the continued existence" of such species or "result in the destruction or adverse modification" of their critical habitat. 16 U.S.C. § 1536(a)(1), (2) (2013).

Finally, the ESA prohibits any person from "taking" an endangered species.[1] 16 U.S.C. § 1538(a)(1)(B) (2013). This prohibition on take is not automatically extended by the statute to threatened species. However, the Service is authorized by Section 4(d) of the ESA to develop what are called "special rules" to regulate—including limiting or prohibiting take—species listed as threatened. 16 U.S.C. § 1533(d). Under this statutory provision, the Service promulgated a regulation in 1979 that clearly applies the Section 9 take prohibitions to all listed threatened species. 50 C.F.R. § 17.31 (2013). This so-called "general 4(d) rule" applies to threatened species **unless** the Service promulgates a special 4(d) rule that applies to a specific threatened species. In such a case, the species' specific special rule takes precedent over the general 4(d) rule.

## C. Factual Background.

### 1. Description Of Utah Prairie Dog.

The Utah prairie dog (*Cynomys parvidens*) is a member of the squirrel family (*Sciuridae*) of rodents native to the semiarid shrub-steppe and grassland habitats of Utah. 77 Fed. Reg. 46159-46161 (Aug. 2, 2012). The species' native range is limited to the southwestern quarter of Utah in Iron, Beaver, Washington, Garfield, Wayne, Piute, Sevier, and Kane counties. 77 Fed. Reg. at 46161. The total length of an adult Utah prairie dog is approximately 10 to 16 inches, and the weight of an individual ranges from 1 to 3 pounds. 77 Fed. Reg. 46160. Utah prairie dogs range in color from cinnamon to clay, with dark markings above the eyes and white on the tip of the tail. Id.

[1] To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

The Utah prairie dog is a highly social, intelligent species, organizing themselves into social groups called clans. 77 Fed. Reg. at 46160. A clan consists of an adult male, several adult females, and their offspring. Id. Clans maintain geographic territorial boundaries although they will use common feeding grounds. *Id.* Members of a clan spend approximately 59 percent of their time feeding; 25 percent of their time in alert behavior, including predator watch and intruder monitoring; 2 percent of their time in social interactions between clan members; and the remainder of their time in various activities such as grooming, digging and burrow maintenance, and inactivity. *See* *http://www.fws.gov/mountain-prairie/species/mammals/utprairiedog/* (*citing* Wright Smith 1978).

**2. The Utah Prairie Dog's History Under The Endangered Species Act.**

The Utah prairie dog's total numbers were estimated to be about 95,000 in the 1920's. 49 Fed. Reg. 22330 (May 29, 1984). By 1982, this population of animals fell to an estimated 10,000 adult animals. *Id.* This decline was caused by poisoning programs to eradicate the species, habitat alteration from conversion of lands to agricultural crops, unregulated shootings, drought, and disease. *Id.*; 77 Fed. Reg. at 46161. As a result, the Utah prairie dog was listed as an endangered species on June 4, 1973. 38 Fed. Reg. 14678.

On November 5, 1979, the Utah Division of Wildlife Resources ("UDWR") petitioned the Service to remove the Utah prairie dog from the List of Endangered and Threatened Wildlife. 49 Fed. Reg. 22330. The Service found that UDWR's petition contained substantial scientific and commercial information, and the species was reclassified as threatened on May 29, 1984 (49 Fed. Reg. 22330), with a special 4(d) rule to allow take of prairie dogs on

agricultural lands. This special rule was amended on June 14, 1991 (56 Fed. Reg. 27438), to increase the amount of regulated take throughout the species' range. On August 2, 2012, after consideration of the available information and public and peer review comments, the Service again revised the established exemptions to prohibited take for the Utah prairie dog. 77 Fed. Reg. 46158. This special rule expanded upon who is permitted to take; enlarged the locations in which direct take is allowed; added site-specific limits on the amount of direct take; shortened the timing for allowable take; created an exception if human safety or significant human culture/burial grounds are threatened; provided an exemption for the incidental take when the situation involves agricultural activities; and increased restrictions upon methods for direct take in areas of close proximity to conservations. *Id.* The new special rule also changed the upper annual permitted take limit of 6,000 animals to not allowing the percentage of take to "exceed 10 percent of the estimated range-wide population annually; and, on agricultural lands, may not exceed 7 percent of the estimated annual range-wide population annually." *Id.*

**3. Continued Threats To The Utah Prairie Dog**.

The Service notes that although the Utah prairie dog was down-listed from endangered to threatened in 1984, threats remain across the range of the Utah prairie dog. 49 Fed. Reg. at 22332. These threats include the following: disease, urban expansion, over-grazing, cultivated agriculture, vegetation community changes, invasive plants, off-highway vehicle and recreational uses, climate change, energy resource exploration and development, fire management, poaching, and predation. 76 Fed. Reg. 36061 (June 2, 2011). While the trends for the Utah prairie dog population appear to be stabilizing or increasing the species existence continues to hinge on protections provided by the ESA. *See* 76 Fed. Reg. at 36056-36059.

## STANDARD OF REVIEW

As this Court reiterated just last year:

> The APA also compels us to "set aside agency action, findings and conclusions found to be . . . contrary to constitutional right." 5 U.S.C. § 706(2)(B). "Because constitutional questions arising in a challenge to agency action under the APA fall expressly within the domain of the courts, we review de novo whether agency action violated a claimant's constitutional rights."

*Direct Communs. Cedar Valley, LLC v. FCC (In re FCC 11-161)*, 753 F.3d 1015, 1041 (10th Cir. 2014) (*quoting Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 802 (10th Cir. 2010)).

## SUMMARY OF ARGUMENT

The District Court's determination that regulation of the take of Utah prairie dogs should be overturned for any of four alternative reasons. First, PETPO lacks standing to bring this suit because even if it ultimately succeeds on obtaining a judicial determination that regulation of the take of Utah prairie dogs runs afoul of the Constitution, such a determination would only apply to the special 4(d) rule. PETPO has not challenged the general 4(d) rule, which contains more stringent take prohibitions, and any facial challenge to that rule is time barred. Accordingly, any relief obtained from the setting aside of the special rule will not redress PETPO's members' injuries.

Second, the ESA is a comprehensive regulatory scheme that does in fact have an aggregate, substantial relation to interstate commerce. Protection of endangered and threatened species in collectively contribute to the economy through animal tourism, scientific research, literature and poetry, and by protecting the health of interrelated natural resources for current and future generations. The District Court erred by requiring the Service to demonstrate

that Utah prairie dogs alone have a substantial relationship to interstate commerce.

Third, the ESA was intended to be a statute that directly regulates economic activities like the very ones PETPO and its members seek to pursue (agriculture, development, etc.) in order to protect species. Time and time again, Congress has made it clear that the ESA is needed because human economic activities pose one of the greatest threats to biodiversity.

Finally, even if the Court were to consider PETPO's more narrow argument—that regulation of the Utah prairie dog itself has no relationship to interstate commerce—that issue was wrongly decided by the District Court. The District Court relied upon evidence from outside the administrative record, which is not proper in an APA case. If the administrative record was insufficient with regard to the issue (which would not be surprising given that commerce clause challenges to the ESA were seemingly settled at the time the special rule was issued in 2012), the proper remedy was for the District Court to remand the rule back to the agency for additional fact finding.

## ARGUMENT

### A. PETPO Lacks Standing To Bring Its APA Claim.

To demonstrate standing to sue under Article III of the Constitution, PETPO must show that: (1) its members have suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *SUWA v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013). Here, however, PETPO cannot show that even complete success on its APA

claim will reduce the alleged harm suffered by its members, *i.e.*, denial of their right to use and develop their property. APLT_APP at 15 (Petition for Review ¶ 2.) The reason for this it is clear: even if PETPO succeeds, **stricter federal rules** would come into play that would bar **all** take of prairie dog on private land.

As noted above, two separate federal rules potentially regulate take of Utah prairie dog on private land. *Supra* pp. 7-8. The first is the special rule promulgated under Section 4(d) of the ESA that applies **only to Utah prairie dogs**. Under the special rule, take of Utah prairie dogs is not prohibited completely, but is regulated with regard to the amount and circumstances of the take. 77 Fed. Reg. 46158. The second is a general Section 4(d) rule that applies **to all species listed as threatened under the ESA**. Under this rule, take is prohibited completely, unless the party seeking to take an animal first obtains a permit under Section 10 of the ESA. 50 C.F.R. § 17.31 (2013); *see also Reservation Ranch v. United States*, 39 Fed. Cl. 696, 704 n.5 (Fed. Cl. 1997) (recognizing that the general take prohibition applies on private lands).

The District Court appears to believe that both of these rules are challenged by PETPO. Order at 8 ("If PETPO is successful in this suit, the federal government will have no authority to regulate the take of the Utah prairie dog on non-federal land, whether through special rule 4(d) or the general rule 4(d)."). In reaching this conclusion, the District Court glosses over two important set of facts. First, PETPO's allegations in its Petition are aimed only at the constitutionality of the revised special 4(d) rule issued by the Service on August 2, 2012. While the APA claim is vague as to what agency action is actually being challenged, PETPO dedicates 18 full paragraphs describing the special rule (APLT_APP at 18-22 (*Id*. at 14 (¶¶ 20-38), and numerous other paragraphs explain how the special rule harms its members

(*Id*. at 24 (¶48), 25-26 (¶59), 27 (¶66), and 29 (¶¶ 82 and 86). Nowhere in the Petition did PETPO even discuss the general 4(d) rule.

Second, any **facial** attack—as has been brought by PETPO here—on the general rule is time barred, as that rule was last amended in 1979 (44 Fed. Reg. 31580 (May 31, 1979)). As a general rule, the APA describes the exclusive mechanism—unless Congress specifically provides for an alternative mechanism in another applicable statute—for a court to review the actions of federal administrative agencies. *See Webster v. Doe,* 486 U.S. at 607 n.* (Scalia, J., dissenting). The APA does not, however, create an independent basis of subject-matter jurisdiction. *See Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1531 (10th Cir. 1990). Instead, it allows for judicial review of final agency action only if there is also an independent basis for subject-matter jurisdiction. *See Jarita Mesa Livestock Grazing Ass'n v. United States Forest Serv.,* 2014 U.S. Dist. LEXIS 160258 at *67-68 (D.N.M. Oct. 22, 2014) (*citing Colo. Dep't of Soc. Servs. v.Dep't of Health & Human Servs.,* 558 F. Supp. 337, 339 (D. Colo. 1983)). What the APA does do is provide for a waiver of sovereign immunity, stating that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. This waiver is limited, however, by the applicable statute of limitations. As the APA does not contain any specific time limitation for seeking judicial review, such actions are guided by 28 U.S.C. § 2401(a), which provides "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[2] *Impact Energy Res.,*

[2] Under the APA, a cause of action generally accrues at the time of a "final agency action." *Sierra Club v. Slater,* 120 F.3d 623, 631 (6th Cir. 1997); 5 U.S.C.

*LLC v. Salazar*, 693 F.3d 1239, 1245-46 (10th Cir. 2012). And, of course, limitations and conditions upon which the federal government consents to be sued must be strictly construed in favor of the agency. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 41 (D.D.C. 2010)(*citing Soriano v. United States,* 352 U.S. 270, 276 (1957)); *see also Block v. North Dakota,* 461 U.S. 273, 287(1983) (holding that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, "those conditions must be strictly observed, and exceptions thereto are not to be lightly implied").

While it does not appear that this Court has taken up the precise issue, other Courts have concluded that facial challenges to agency regulations on constitutional grounds similarly must be brought under the APA. *See Jarita Mesa Livestock Grazing Ass'n.,* 2014 U.S. Dist. LEXIS 160258 at *105-06 (that this case "alleges constitutional violations as well as statutory ones does not take it outside of the APA"); *Camp v. United States BLM*, 17 F. Supp. 2d 1167, 1169 (D. Or. 1998) ("Plaintiff's APA and Fifth Amendment claims are barred by the six year statute of limitations"). This does not mean that someone whose constitutional rights have been violated by agency final action is without any potential remedy. As the Ninth Circuit has stated:

> In our view, [*Oppenheim v. Coleman,* 571 F.2d 660 (D.C. Cir. 1978)] strikes the correct balance between the government's interest in finality and a challenger's interest in contesting an agency's alleged overreaching. If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to bring a policy-

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§ 704. Similarly, a cause of action challenging an agency regulation generally accrues when the regulation is published in the Federal Register. *Dunn-McCampbell Royalty Interest, Inc. v. National Park Serv.,* 112 F.3d 1283, 1287 (5th Cir. 1997).

> based facial challenge to the government's decision, that too must be brought within six years of the decision. . . . If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint **for review of the adverse application of the decision to the particular challenger**. Such challenges, by their nature, will often require a more "interested" person than generally will be found in the public at large.

*Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991).

In other words, an individual suffering constitutional injury from a regulation **as applied** to that individual by the federal government may have a renewed claim under the APA. *See Dunn-McCampbell Royalty Interest,* 112 F.3d at 1287 ("It is possible, however, to challenge a regulation after the limitations period has expired, provided that the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority"). To sustain such a challenge, however, "the claimant must show some direct, [new] final agency action involving the particular plaintiff within six years of filing suit." *Id*.

The case at bar is a good example of why the Fifth, Ninth and D.C. Circuits all require that after the 6-year limitations period expires, a plaintiff can only challenge a regulation as it is specifically applied to her by the agency. Presumably, what concerns PETPO's members the most is the application of the ESA's Section 9 take prohibition to them personally. PETPO's members don't seem concerned over the listing of Utah prairie dogs as threatened, or that the take of Utah prairie dogs on public lands will remain illegal under the general 4(d) rule. But the prohibitions on take of Utah prairie dogs—on both

private and public land—attached at the time of the listing (May 29, 1984).[3] Certainly the government (and the public generally) have an interest in the finality of regulatory actions that took place three decades ago. On the other hand, if a PETPO member is unhappy with the take restrictions as they apply to Utah prairie dogs on her land, she is free to seek an individualized incidental take permit under Section 10 of the ESA. *See generally*, *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (discussing the nature of incidental take permits under the ESA). It may be that the agency and the applicant can agree on mutually acceptable terms to such a permit, alleviating the need for judicial action. If not, and the permit as requested is denied, final agency action will have occurred, through which the aggrieved party might have the right to challenge the constitutionality of the take prohibitions as applied to her.

In any case, to the extent PETPO is found to have asserted a facial challenge to the general 4(d) rule (in addition to the special 4(d) rule), that challenge is time bared.[4] As a result, even if the District Court's finding that the

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[3] Although not important to this appeal, Friends of Animals concedes that this listing action constituted final agency action that might have allowed a timely challenge of the listing decision, the special 4(d) rule, and possible the general 4(d) rule as well, as applied to Utah prairie dogs.

[4] PETPO may assert that it has raised an as applied claim in as much as it alleges specific harms to specific members. But there are a few problems with such an argument. First, PETPO has not identified any specific final agency action applying the take prohibition, or denying relief from the prohibition, to a specific member or members. *Dunn-McCampbell Royalty Interest,* 112 F.3d at 1288 ("An 'as applied' challenge must rest on final agency action under the APA."). The only final agency action identified in the Petition for Review was the promulgation of the most recent Utah prairie dog special 4(d) rule in 2012. But that regulation **reduced** restrictions on take of Utah prairie dog on private lands. Second, the APA claim as a whole has been presented by PETPO as a facial, policy-based challenge. *See, e.g.,* APLT_APP at 22 (Petition ¶ 38) (PETPO members "are each directly injured by the 4(d) Rules requirement that they

regulation of take of Utah prairie dog on private land is unconstitutional was a correct application of the commerce clause (which it was not), the general 4(d) rule cannot be struck down. And as the general rule is far more restrictive than the special rule, PETPO's member's injuries cannot be redressed through this action. Accordingly, the Court should reverse the District Court and dismiss this action for lack of Article III standing.[5]

### B. Congress Has Authority Under The Commerce Clause To Protect Wholly Intrastate Species Under The ESA.

As an initial matter, Friends of Animals concurs with what is no-doubt one of the principal arguments made by the federal government in this appeal—that the District Court's reliance on *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), was misplaced. The proper context for resolution of PETPO's APA claim is to be found in

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obtain a permit, or satisfy any other conditions, before taking the prairie dog on non-federal land"); APLT_APP at 25 (Petition ¶ 53) ("The Utah prairie dogs threaten the desecration of graves, including Dan Webster's, if they cannot be effectively removed and kept from the Cedar City Cemetery. This threat causes Brenda and Daniel Webster distress."); APLT_APP at 26 (Petition ¶ 60) ("The Lamoreauxs fear imminent enforcement and prosecution from the Service for illegal take of the Utah prairie dog should they choose to protect their interests, and therefore have refrained and will continue to refrain from otherwise acting to protect their interests."); APLT_APP at 130 (PETPO member asserting "I would like to protect my property by removing prairie dogs"); APLT_APP at 144-45 (Cedar City Corporation expressing desire to have prairie dogs captured and removed from public facilities).

[5] Even if this Court were to find that it was possible to redress all or part of PETPO's alleged injury, and thus standing has been established, the District Court's remedy (finding regulation of all take on private land unconstitutional) was too broad. The District Court cannot vacate a regulation (the general rule) that has not been challenged by PETPO, or the challenge of which is time barred for reasons discussed above. This too is sufficient reason to overturn the District Court.

*Gonzales v. Raich*, 545 U.S. 1 (2005). In that case, the Supreme Court recognized three categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate purely local activities that substantially affect interstate commerce. *Id.* at 16-17 (citations omitted).

As the federal government argued below (and assuredly will do in its Opening Brief to this Court), up until the District Court decision in this case, it was well-established that Congress has the constitutional authority to protect endangered and threatened species wherever they occur. Five Circuits have evaluated and dismissed post-*Lopez* Commerce Clause challenges to the application of ESA Sections 4 and 9 to intrastate species. *See San Luis*, 638 F.3d 1163 (delta smelt), *cert. denied*, 132 S. Ct. 498 (2011); *Alabama-Tombigbee*, 477 F.3d 1250 (Alabama sturgeon), *cert. denied*, 552 U.S. 1097 (2008); *GDF*, 326 F.3d 622 (six species of subterranean invertebrates), *cert. denied*, 545 U.S. 1114 (2005); *Rancho v. Viejo*, 323 F.3d 1062 (arroyo toad), *cert. denied*, 540 U.S. 1218 (2004); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* ("*NAHB*") *v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands Flower-Loving fly), *cert. denied*, 524 U.S. 937 (1998). *San Luis* and *Alabama-Tombigbee* evaluated these challenges in light of *Raich's* interpretation of Congress's Commerce Clause authority to regulate noncommercial intrastate activity as an essential part of a comprehensive statutory scheme that bears a substantial relation to commerce. On the other hand, as the government will assert, the District Court in this case erred by focusing on whether regulating take of Utah prairie dog **alone** had a substantial effect on interstate commerce; instead, the court

should have examined, as other courts have done, whether Congress had a rational basis for concluding that the regulation of take of all listed endangered and threatened species in the nation (both intra- and inter-state species) **in the aggregate** will substantially affect interstate commerce." *Raich*, 545 U.S. at 22.

Friends of Animals does not intend to duplicate the government's arguments regarding the District Court's errors regarding this particular application of *Raich*. Instead, Friends of Animals seeks to shed light on another misunderstanding of the ESA that appears to confuse PETPO and the District Court; namely, that through the ESA Congress did not directly intend to "regulate . . . things in interstate commerce." *Id*. at 16-17. In this regard, the District Court wrongly determined "the parties agree that the first two [*Raich*] categories do not apply, [and accordingly] the court's analysis will focus solely on the third [ ] category." Indeed, Friends of Animals disputed as much in its briefs below, as well as at oral argument in the District Court. *See* Addendum C attached hereto. In actuality, it was argued below that (1) the activity at which the statute is directed **is** commercial or economic in nature and (2) the link between the prohibited conduct and a substantial effect on interstate commerce is **not** attenuated.[6] *See United States v. Grimmett*, 439 F.3d 1263, 1272 (10th Cir. 2006).

[6] This Court has also said other factors to consider in evaluating Congress' use of commerce clause authority are whether: the statute contains an express jurisdictional element involving interstate activity that might limit its reach or Congress has made specific findings regarding the effects of the prohibited activity on interstate Commerce. *Grimmett*, 439 F.3d at 1272. However, neither are determinative. *Id*. ("failure of the jurisdictional element effectively to limit the reach of the statute is not determinative"); *Raich*, 545 U.S. at 21

### 1. PETPO Wrongly Defines The Nature Of The Regulated Activity At Issue In This Case.

One reason that PETPO and the District failed to comprehend that Congress intented to directly regulate things in interstate commerce through the ESA is their narrow view of the nature of the activity regulated by the ESA (as well as the special 4(d) rule). As the District Court put it, the special 4(d) rule regulates the "take" of Utah Prairie dog. Order at 8. The purpose of the ESA, however, is not principally to regulate the killing of species that are at risk of extinction. As Congress has made clear, its overriding goal in enacting the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b); *see also Wyoming Farm Bureau Fed'n v. Babbitt,* 199 F.3d 1224, 1237 (10th Cir.2000) (citing H.R. Conf. Rep. No. 97–835, 97th Cong., 2d Sess. at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2871) ("In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species.")); *Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 184 (1978) (noting that the plain intent of Congress in enacting the Endangered Species Act was to halt and reverse the trend toward species extinction, whatever the

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("While congressional findings are certainly helpful . . . and [we will consider them] in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.").

cost); *Village of Kaktovik v. Watt,* 689 F.2d 222, 233 (D.C. Cir.1982) (recognizing environmental protection as the sole objective of the Endangered Species Act).

In other words, Congress sought through the ESA to address the mounting evidence that: (1) economic development was destroying the habitat on non-human animals and (2) commercial use of plants and animals was increasing. H.R. Rep. No. 93-412 at 143-44 ("[T]he pace of species disappearance is accelerating. As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwilling) [we risk the future of even more genetic heritage]").

In response, the ESA set up a comprehensive regulatory program to protect species and their habitats from continued human economic growth. At the heart of this scheme is a detailed process for identifying and listing endangered and threatened species (16 U.S.C. § 1533(b)), for identify habitat critical to a listed species survival (*id*.), and for the development of species specific recovery plans (*id*. § 1533(f)). The ESA also sets forth several mechanisms to prevent the further loss of habitat and species by restricting both private and public use of both, including the take prohibition in Section 9, incentives for federal-state cooperation to protect listed species (16 U.S.C. § 1535), and direct obligations on federal agencies to make sure their activities don't harm listed species further (*id*. § 1536).

Again, properly defining the nature of the regulatory activity is important to resolution of PETPO's constitutional claims. In this regard, the pivotal point in this case is not "that no enumerated powers authorize Congress to regulate take of an animal that is purely intrastate and that has no commercial market." Order at 8. It is that the language of the statute, its

application in the real world, and its legislative history, all reveal that Congress adopted the ESA because it placed recreational, aesthetic, scientific, and economic value on all species, and accordingly sought to directly regulate other economic activities that, if left unchecked, would continue to undermine the preservation of the Utah prairie dog.

**2. Congress Enacted The ESA To Restrict Economic Activities That Threaten To Undermine The Nation's Wildlife And Biodiversity.**

The legislative history as well as the very text of the ESA illustrate that Congress was keenly aware when it passed the Act that biodiversity and human economic health are vitally linked. As the House Report makes clear:

> From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask. . . .
>
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be cautious.

H.R.REP. NO. 93–93-412 at 143-44; *see also National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1052-53 (D.C. Cir. 1997)("The variety of plants and animals in this country are, in a sense, a natural resource that commercial actors can use to produce marketable products. . . . [E]ndangered plants and animals are valuable as sources of medicine and genes. Fifty percent of the most frequently prescribed medicines are derived from wild plant and animal species. Such medicines were estimated in 1983 to be worth over $15 billion a year. . .. In addition, the genetic material of wild species of plants and animals is

inbred into domestic crops and animals to improve their commercial value and productivity.").

To protect these natural assets for current and future generations, the ESA unequivocally **does** regulate interstate commerce in several ways. First, the ESA directly regulates economic activities by the permitting and licensing process. Section 7 of the ESA, provides that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat of such species . . ..

16 U.S.C. § 1536(a)(2). In enacting Section 7, Congress specifically had in mind the harm that economic development can cause to both endangered species and the habitats that are critical to those species' survival and recovery. As the Supreme Court recognized:

> In shaping legislation to deal with the problem [of damage to the chain of life and loss of currently unknown economic values of species through extinctions], Congress started from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat.' Of these twin threats, Congress was informed that the greatest was destruction of natural habitats. Witnesses recommended, among other things, that Congress require all land-managing agencies 'to avoid damaging critical habitat for endangered species and to take positive steps to improve such habitat.' Virtually every bill introduced in Congress during the 1973 session responded to this concern by incorporating language similar, if not identical, to that found in the present § 7 of the Act."

*TVA v. Hill*, 437 U.S. 153, 179 (1978) (internal citations omitted). In short, Section 7 of the ESA is directed at regulating economic activities that can cause

habitat destruction, loss of species, and a reduction on our nation's natural heritage.

The ESA also directly regulates interstate commerce in endangered and threatened species. Section 9 of the ESA provides, in pertinent part, that:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to-
>
> (A) import any such species into, or export any such species from the United States; . . .
>
> (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species, taken in violation of [Section 9's prohibitions on "take" of endangered species]; (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species; (F) sell or offer for sale in interstate or foreign commerce any such species . . ..

16 U.S.C. § 1538(a)(1) (emphasis added). Such statutory prohibitions on "the interstate possession . . . of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Raich*, 545 U.S. at 26.

Finally, as made clear by the very rule at issue here, application of the ESA take prohibitions are directed at economic activity. Thus, the special 4(d) rule regulates agricultural activities that may result in the take of prairie dogs, except where exempted as a standard agricultural practice. *See* 50 C.F.R. § 17.40(g)(5). PETPO acknowledges this in its Petition for Review asserting that "[w]hile the 4(d) Rule refers to agricultural lands . . . as 'exempt' from the take prohibition, these lands are subject to significant restrictions on the take of the Utah prairie dog." APLT_APP at 20-23 (Petition ¶¶ 20, 36-37). Likewise, PETPO acknowledges that the special rule is regulating the construction of homes and business, all of which are part of interstate commerce. APLT_APP at 26-27

(Petition ¶¶ 63-64, 70-71). In short, the Court need only look at the history of the rule to see that one of the primary purposes of the original rule was to find a balanced approach to protecting the prairie dog through the regulation of economic activities like agriculture. *See* 49 Fed. Reg. at 22330 (previous regulation of take was affecting the agricultural community, costing farmers about $1.5 million annually).

### 3. Congress Enacted The ESA To Protect The Economic Value Of The Nation's Wildlife And Biodiversity.

The District Court, parroting PETPO, was quite adamant that Utah Prairie dogs (and presumably ever other animal with no direct commercial use) have no commercial value, and that their take is not an economic activity. Order at 8. In other words, under the District Court's analysis, a species has value only if it can be eaten, used for its skin or other parts, hunted for sport, or otherwise can be commercially profitable. The ESA, however, was not enacted to protect animals only so they can be used commercially; the act instead recognizes that it is important to protect all species because they can contribute directly to commerce without exploitation.

In the court below, Federal Defendants explained one such benefit of species protection—ecological tourism. APLT_APP at 167-71. While at first blush, it might seem logical to assume that most seek to view more majestic animals like whales, birds of prey, wolves, etc. (many of which also need ESA protection), in fact the viewing of odd, but unusual species, also fuels tourism and economic revenue. Creatures with unique behaviors or abilities, like frogs, spiders, fish, and, yes, prairie dogs, often draw human attention to the point that vacation plans are made around the possibility of viewing such animals. *See, e.g.*, *Top 10 weird and exotic animals of Costa Rica*, Fox News (Oct. 11,

2013), *available at* http://www.foxnews.com/travel/2013/10/11/top-10-weird-and-exotic-animals-costa-rica (last visited April 14, 2015). Indeed, as other courts have recognized, endangered species can be the object of tourism, an interstate market obviously affected by a species' decline and extinction. *Gibbs v. Babbitt*, 214 F.3d 483, 494 (4th Cir. 2000)*; see also Utah v. Marsh*, 740 F.2d 799, 803-04 (10th Cir. 1984)(upholding the constitutionality of Section 404 of the Clean Water Act against a commerce clause challenge after finding that the regulated activity provides for substantial recreational opportunities, including "the opportunity to observe, photograph, and appreciate a variety of bird and animal life.").

An even more direct connection between the ESA and interstate commerce can be found in the connection between species protection and scientific research. As one court recognized:

> Congress has determined that protection of any endangered species anywhere is of the utmost importance to mankind, and that the major cause of extinction is destruction of natural habitat. In this context, a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.

*Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985, 994-995 (D. Haw. 1979) (*citing Brown v. Anderson,* 202 F.Supp. 96 (D. Alaska 1962) (indirectly supporting the proposition that federal power over wildlife derives from the interstate movement of persons utilizing or studying wildlife)); *see also United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996) (rejecting Commerce Clause challenge to Bald and Golden Eagle Protection Act on same grounds).

Obviously, an "interstate market-scientific research- . . . generates jobs," and, thus, the ESA, which protects species that are the focus of such research, substantially affects that interstate market. *Gibbs,* 214 F.3d at 494; *see also infra* Part III.B. In fact, Congress expressly provided for scientific research of listed species in Section 10, which guides the Service's issuance of permits for activities that would otherwise be unlawful under Section 9. Section 10 provides that "[t]he Secretary may permit, under such terms and conditions as he shall prescribe . . . any act otherwise prohibited by [Section 9] of this title for scientific purposes or to enhance the propagation or survival of the affected species . . .." 16 U.S.C. § 1539(a)(1). The Service regularly issues permits for all kinds of scientific research of endangered and threatened species. *See*, *e.g.*, 79 Fed. Reg. 8473 (Feb. 12, 2014); 79 Fed. Reg. 6917 (Feb. 5, 2014).

The District Court, of course, found that the connection between interstate commerce and either recreation or research was too attenuated to justify Congress' use of the Commerce Clause. Order 12-13 ("After all, scientific research has also been conducted and books have also been published about both guns and women. Nevertheless, the Supreme Court ruled that federal regulation of gun possession and violence against women is beyond Congress' Commerce Clause power.") The difference here, of course, is that unlike the statutes before the Supreme Court on gun control and gender-based violence, **Congress explicitly has recognized the economic value of scientific research into endangered and threatened species**. *See* H.R.REP NO. 93-412, at 4-5; 16 U.S.C. § 1539(a)(1); *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985, 994-995 (D. Haw. 1979). Without ESA protection many species could go instinct, which would render research on the species impossible.

### C. THE DISTRICT COURT'S CONCLUSION THAT THE UTAH PRARIE DOG ALONE HAS NO VALUE TO INTERSTATE COMMERCE WAS NOT BASED UPON THE ADMINISTRATIVE RECORD.

As set forth above, the District Court erred in its focus on whether or not the Utah prairie dog, when examined in isolation, has present or potential commercial value, the regulation of which could affect interstate commerce. Even so, if it were necessary to evaluate whether the Utah prairie dog is substantially related to interstate commerce, such an inquiry, in the context of an APA facial challenge, is limited to the administrative record that was before the agency. *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1564 (10th Cir.1994). The District Court, however, allowed PETPO, as well as Friends of Animals, to submit declarations regarding both the negative and positive economic impacts of regulating the take of Utah Prairie dogs. APLT_APP at 138-64 and 172-92. To be honest, when the case was pending there was some uncertainty as to whether an APA claim that rests on an allegation that the agency action violated the Constitution was limited to record review. One court that considered the issue in this Circuit had concluded "no," and even allowed for discovery. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Service*, 921 F.Supp.2d 1137, 1204 (D.N.M. 2013); *see also Wolfe v. Barnhart,* 446 F.3d 1096, 1004 n.6 (10th Cir. 2006) (acknowledging that the court below had gone outside the record to examine the constitutional aspects of an APA claim). However, the *Jarita* decision was ultimately changed by that court on a motion for reconsideration brought by the U.S. Forest Service. It was determined on reconsideration that all the procedural aspects of the APA, including record review, apply to constitutional issues raised in an APA claim. *Jarita Mesa Livestock Grazing Ass'n.,* 2014 U.S. Dist. LEXIS 160258 at *105-06. If this Court concurs with the *Jarita* decision, and believes that the court below properly

focused on the Utah prairie dogs relation to interstate commerce, it should remand this case back to the District Court to consider the issue based solely on the administrative record. If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Weight Loss Healthcare Ctrs. of Am., Inc. v. OPM*, 655 F.3d 1202, 1212 (10th Cir. 2011).

If the Court does not concur with the *Jarita* decision, it must review the District Court's decision *de novo*. In this regard, there is ample extra-evidence before the Court that Utah prairie dogs directly contribute to interstate commerce, primarily through prairie dog tourism and scientific research.

**1. The Utah Prairie Dog Has A Substantial, Direct Contribution To Interstate Commerce.**

The Service has identified two significant contributions that the Utah prairie dog makes to interstate commerce. First, prairie dog related tourism generates revenue for airlines, railroads, hotels, campgrounds and restaurants both in and out of Utah. APLT_APP at 167-171. Second, prairie dogs are very important to the ecological health of western grasslands, an immense economic resource that provides for additional recreational and commercial opportunities. *Id.*; *see also* Conner, Seidl, VanTassell, and Wilkins, United States Grasslands and Related Resources: An Economic and Biological Trends Assessment (2001), available at http://twri.tamu.edu/media/256592/unitedstatesgrasslands.pdf (last visited April 14, 2015).

Friends of Animals asserts that restricting take (and thus protecting) the Utah prairie dog also protects the species direct contribution to interstate commerce as the subject of substantial scientific research and publication. For example, one Friends of Animals member, Dr. John Hoogland, is about to embark on his 41st year of research with prairie dogs. ALT_APP at 173 (Declaration of Dr. John L. Hoogland in Support of Friends of Animals' Response to Plaintiff's Motion for Summary Judgment (hereinafter, "Hoogland Decl.") at ¶¶ 2, 8). In this time, Dr. Hoogland has studied all four species that inhabit the western United States: Utah prairie dogs, black-tailed prairie dogs, Gunnison's prairie dogs, and white-tailed prairie dogs. *Id*. (¶ 8). This includes and entire decade that was devoted solely to fieldwork in Utah working with Utah prairie dogs. Collectively, Dr. Hoogland and his assistants have devoted over 185,000 man-hours of research. *Id.*

The work of Dr. Hoogland, his assistance, and others[7] have contributed to the interstate economy in a multitude of way. First and foremost, is the financial support he has received in the form of research from foundations, non-profits, and government agencies. *Id.* at 174 (¶ 9). He has received over 60 such grants from organizations like the National Science Foundation, the

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[7] Dr. Hoogland is not the only scientist that has researched and written about prairie dogs. *See, e.g.,* Elmore, R. D., and T. A. Messmer. 2006. *Public perceptions regarding the Utah Prairie*
*Dog and its management: Implications for species recovery*, Berryman Institute Publication No. 23. Utah State University, Logan, *available at* http://extension.usu.edu/files/publications/publication/pub_8990805.pdf (last visited April 14, 2015); and Curtis, R. and Frey, S. (2013) *Effects of vegetation differences in relocated Utah prairie dog release sites*, Natural Science, 5, 44-4, *available at* http://www.scirp.org/journal/PaperInformation.aspx?paperID=32012#.UwODTHkmVjY (last visited April 14, 2015).

Denver Zoological Foundation, the Ted Turner Foundation, and the states of Colorado and New Mexico, to name just a few. Id. These grants have supported assistants, students, and Dr. Hoogland in their research of prairie dogs. *Id.* (¶ 10). Moreover, just this year, the National Science Foundation granted Dr. Hoogland funds to continue and expand his research for an additional 5 years. *Id.*

But the grants, which go to pay for interstate travel and salaries for Dr. Hoogland and his assistants, are just one aspect of how Utah prairie dog research contributes to the economy. Based upon his fieldwork, Dr. Hoogland has already published one book, edited another, and is about to release a second book this year. *Id*. at 177-78 (¶ 21). He has also authored over 60 scientific articles on prairie dogs. *Id*. at 178 (¶ 22). And his work has contributed to a cascade of projects by others that further contribute to interstate commerce. For example, because competition, infanticide, and inbreeding are major issues in behavioral ecology and population biology that affect humans and other social animals, research by other scientists studying these subjects routinely include his publications. *Id.* at 179 (¶ 27). Each of these scientists are also relying on grant money, and seeking to make a living from their work. The popular press also is curious about Dr. Hoogland's work. Publications such as *The New York Times, ABC News, Washington Post, Cleveland Plain Dealer, Chicago Sun Times, Detroit Free Press, Science, ScienceNow, National Geographic*, and *Le Generaliste*, to name a few, have highlighted his discoveries. *Id.* (¶ 28). Clearly these publications are all seeking a profit and are engaged in interstate commerce. *See, e.g., Chen v. China Central Television*, 2007 WL 2298360 at *5 (S.D.N.Y. Aug. 9, 2007)("The broadcast of television programs and the dissemination of news, however, are clearly

activities by which private individuals and corporations engage in commerce.").

Dr. Hoogland's work has also been documented in two commercial books: Todd Wilkinson, LAST STAND: TED TURNER'S QUEST TO SAVE A TROUBLED PLANET (2013), and Terry Tempest Williams, FINDING BEAUTY IN A BROKEN WORLD (2008). APLT_APP at 180 (Hoogland Decl. at ¶ 29). The later author, Terry Tempest Williams is a hugely successful author who resides in Utah, and is currently the Annie Clark Tanner Scholar in Environmental Humanities at the University of Utah. *Id*. (¶ 30). Her writings have appeared in *The New Yorker*, *The New York Times*, *Orion Magazine*, and numerous anthologies worldwide as a crucial voice for ecological consciousness and social change. *Id.* Ms. Tempest-Williams joined Dr. Hoogland in his 2004 field season with Utah prairie dogs at Bryce Canyon National Park in Utah. *Id.* (¶ 31). Specifically, Williams assisted for two weeks in June 2004 with all aspects of their research: livetrapping, eartagging, marking, and release and observations of marked individuals. In her book, *Finding Beauty in a Broken World*, she extensively documents her research with Dr. Hoogland, as well as his work as a whole. The book was a finalist for the 2009 Orion Book Award, and remains in worldwide circulation today. *Id.*

Dr. Hoogland's research has also been the subject of, or featured in, several movies and television videos. Of these, five videos specifically document his research of Utah prairie dogs (Population Biology of Prairie Dogs (Japanese Television, 2003); Prairie Dog Squad (National Geographic Society, 2002); Celebrity Crusaders (Animal Planet Network, 1999); Underdogs: Prairie Dogs Under Attack (Turner Television, 1998); Maryland's Prairie Dog Companion (Maryland Public Television, 1997); Catching the Last Prairie Dog (Australian Wildlife, 1996); Plague in Prairie Dog Colonies (Utah Television

Network, 1995)). For three of these television productions, film crews and producers spent three days filming Utah prairie dogs with Dr. Hoogland in the field. APLT_APP at 178 (Hoogland Decl. at ¶ 24). Clearly, the film industry is also a major contributor to our nation's economy. *See FCC v. League of Women Voters*, 468 U.S. 364, 376, (1984)(holding it clear that under the Commerce Clause, Congress can regulate broadcast communication).

Dr. Hoogland also lectures on his work throughout the United States. APLT_APP at 179 (Hoogland Decl. at ¶ 26). He has attended several scientific symposiums, and has discussed his findings with professors and students at numerous colleges and universities. In all cases, the host institutions pay for his travel related expenses. *Id.*

Lastly, but possibly most significant, Dr. Hoogland's research has helped protect western grassland, which as noted above is an immense economic resource. The prairie dog (all species) is a keystone species, and that means that it has a profound impact on its grassland ecosystem. *Id*. at 175-76 (¶ 14). Prairie dogs serve as prey for terrestrial predators such as American badgers, black-footed ferrets, bobcats, coyotes, and long-tailed weasels, and for avian predators such as ferruginous hawks, golden eagles, northern goshawks, prairie falcons, and Swainson's hawks. *Id.* Their burrows provide homes for a diverse array of animals, such as black-footed ferrets, burrowing owls, bullsnakes, tiger salamanders, and hundreds of species of insects and spiders. The burrows also improve cycling of water and other nutrients. The subsoil exposed by excavations at colony-sites promotes the growth of certain plants, such as the aptly-named prairie dog weed, that do not commonly grow elsewhere. *Id.* Prairie dog research can greatly assist other scientists and conservationists in preventing degradation to, and in some cases help recovery of, grassland ecosystems. *See id.* at 176 (¶ 15).

### 2. The ESA Take Restriction Of The Utah Prairie Dog Is Directed At Activity That Is Commercial Or Economic In Nature.

As noted above, one of the primary reasons for passage of the ESA was Congress' recognition that the primary causes of extinction are the killing of animals and destruction of their natural habitat by humans. As a result, the ESA statutory prohibitions and requirements are aimed at curtailing such activities and help recover listed species.[8] *Id*. Thus, the take prohibition also curtails two other forms of commercial exploitation of Utah prairie dogs that, while having very little value for most Americans, sadly contributes to interstate commerce. The first is the sport shooting of prairie dogs, known as "red mist." *See* APLT_APP at 183-84 (Declaration of Priscilla Feral in Support of Friends of Animals' Response to Plaintiff's Motion for Summary Judgment (hereinafter, "Feral Decl.") at ¶ 6). This so-called "sport" results in the sales of ammo, and in some cases state-issued licenses that generate revenue. Moreover, there are commercial outfitters that offer guided "hunts" of prairie dogs for a fee. *Id.*

Second, prairie dogs have long been subjected to poisoning by commercial exterminators who are paid by landowners to get rid of these animals. *See id.* at 183-84 (¶ 6). Again, PETPO not only ignores this aspect of the regulation, but offers no reason to believe that commercial exterminators would not be used against Utah prairie dogs if they succeed in this action. Certainly PETPO's own members seem like eager customers. *See, e.g.*

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[8] The Supreme Court recognizes that "Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity." *Gonzales v. Raich*, 545 U.S. 1, 19 n. 29 (U.S. 2005) (citations omitted). Here, it is necessary to apply ESA protection to the Utah prairie dog to prohibit commercial exploitation.

APLT_APP at 130 (PETPO member asserting "I would like to protect my property by removing prairie dogs"); APLT_APP at 144-45 (Cedar City Corporation expressing desire to have prairie dogs captured and removed from public facilities).

### D. Neither The ESA Nor The Regulation Of Utah Prairie Dogs By The Federal Government Infringes On The Traditional Rights Of The States.[9]

The federal government has a long history of regulating wildlife. See generally Michael J. Bean & Melanie J. Rowland, THE EVOLUTION OF NATIONAL WILDLIFE LAW (3d ed. 1997). Although examples of federal regulation date back to the 1800s, Congress took an increasingly active role in wildlife protection in the 20th century with the passage of the Lacey Act of 1900, 16 U.S.C. §§ 3371-3378 and 18 U.S.C. § 42; the Migratory Bird Act of 1913, Act of March 4, 1913, ch. 145, 37 Stat. 828, 847 (repealed 1918); the Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-711 ("MBTA"); and the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. The ESA passed in 1973 to replace the Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (repealed 1973), and the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, § 9(a), 83 Stat. 281 (repealed 1981), represents the culmination of the federal government's longstanding interest in and commitment to the conservation of America's wildlife resources.

The Supreme Court has affirmed the federal government's role in wildlife protection when it upheld the MBTA in *Missouri v. Holland*, 252 U.S. 416 (1920). Writing for the seven-member majority, Justice Oliver Wendell

[9] While the District Court did not address PETPO's Tenth Amendment claim, Friends of Animals provides the following argument in the event the claim is revived during the course of this appeal.

Holmes penned a stirring defense of federal power to protect wildlife: "But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain." 252 U.S. at 435; *see also Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (upholding national power to protect wildlife and stating "[the] assumption that the national commerce power does not reach migratory wildlife is clearly flawed"). And most recently, the Court affirmed the shared nature of federal and state power over wildlife in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) ("[A]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers.").

Although the federal government has broad authority under the Commerce Clause, in conjunction with the Necessary and Proper Clause, to protect all endangered species, including intrastate species and those with no current commercial value, this does not mean the ESA has no limiting principles or is inconsistent with federalism. First, "endangered wildlife regulation has not been an exclusive or primary state function" but is instead "an appropriate and well-recognized area of federal regulation." *Gibbs*, 214 F.3d at 500. As the *Gibbs* court held, "[i]t is as threatening to federalism for courts to erode the historic national role over scarce resource conservation as it is for Congress to usurp traditional state prerogatives in such areas as education and domestic relations." Id. at 505. Secondly, the ESA does not purport to protect all wildlife, but only threatened and endangered species that the states themselves have proven unable adequately to protect and restore. In

this regard, the ESA explicitly provides for state cooperative agreements, 16 U.S.C. § 1535, and relies in substantial part on the adequacy of state regulatory mechanisms in listing species for federal protection. 16 U.S.C. § 1533. It is at heart a cooperative federalism statute that protects the economic values of wildlife and regulates the negative impacts of economic activities on wildlife. Accordingly, the ESA's regulation of wildlife is bounded by the type of limiting principles that Justice Scalia discussed in his *Raich* concurrence and is consistent with our federalist system. A ruling to the contrary would truly "turn federalism on its head." *Gibbs*, 214 F.3d at 505.

## CONCLUSION

For reasons set forth above, Friends of Animals requests that the Court reverse the District Court's November 11, 2014 Order granting summary judgment in favor of PETPO on its APA claim.

## REQUEST FOR ORAL ARGUMENT

Pursuant to 10th Cir. R. 28.2(C)(4), Appellant requests oral argument because this action involves Constitutional questions that the Tenth Circuit has not previously addressed.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,105 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced type using Microsoft Office 2013 in 14-point Cambria.

## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with the respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Total Defense Internet Security Suite, Security Center Version 9.0, last updated 4/9/2015, and according to the program are free of viruses.

Date: April 14, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 14, 2015, I electronically filed the foregoing Opening Brief with the clerk of the court using the CM/ECF system, which will send notification of such to the attorneys of record.

S/ Michael Harris
Michael Harris

# ADDENDUM A:

# MEMORANDUM DECISION AND ORDER

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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| PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,<br>Petitioner and Plaintiff,<br><br>vs.<br><br>UNITED STATES FISH AND WILDLIFE SERVICE; et al.,<br>Respondents and Defendants,<br><br>and<br><br>FRIENDS OF ANIMALS,<br>Respondent-Intervenor. | MEMORANDUM DECISION AND ORDER<br><br>Case No. 2:13-cv-00278-DB<br>Judge Dee Benson |

Plaintiff People for the Ethical Treatment of Property Owners ("PETPO") filed the instant lawsuit against United States Fish and Wildlife Service, Daniel M. Ashe, in his official capacity as Director of the United States Fish and Wildlife Service, Noreen Walsh, in her official capacity as Regional Director of the United States Fish and Wildlife Service's Mountain Prairie Region, the United States Department of the Interior, and Sally Jewell, in her official capacity as Secretary of the Interior (collectively "Defendants"), challenging the constitutional authority of the federal government to regulate take of the Utah prairie dog on non-federal land under the

Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. Friends of Animals ("FoA") has intervened as a Defendant. The case is now before the court on the parties' opposing motions for summary judgment. The parties agree that there are no genuine issues of material fact that would preclude the court from ruling, as a matter of law, on the merits of this case.

The court heard oral argument on the motion and cross-motion on September 11, 2014. At the hearing, PETPO was represented by Jonathon C. Wood. Defendants were represented by Mary Hollingsworth. FoA was represented by Michael Harris. Prior to the hearing, the court considered the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to the motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

## BACKGROUND

The Utah prairie dog is an animal whose population is located exclusively in southwestern Utah. (FWS' Mot. for Summ. J. at 6.) Nevertheless, the federal government began protecting the prairie dog as an endangered species in 1973, pursuant to the Endangered Species Conservation Act of 1969. 38 Fed. Reg. 13678.

Later that same year, Congress replaced the Endangered Species Conservation Act with the ESA. The ESA was enacted by Congress "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). A species is considered "endangered" if it is "in danger of extinction throughout all or

a significant portion of its range," and is considered "threatened" if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532 (6), (20). Section 9 of the ESA protects endangered species from unauthorized "take," possession, delivery, transportation, receipt, or sale. Id. § 1538(a)(1)(A)-(F). Section 4(d) of the ESA authorizes the Secretary of the Interior to "issue such regulations as he deems necessary and advisable to provide for the conservation of" threatened species. Id. § 1533(d). This is often done by creating a special section 4(d) rule to protect the particular threatened species. (FWS' Mot. for Summ. J. at 5-6.)

On January 4, 1974, the Utah prairie dog's listing as an endangered species was incorporated into the ESA. In 1984, the U.S. Fish and Wildlife Service ("FWS") reclassified the Utah prairie dog as a threatened species and issued a special section 4(d) rule to govern the protection of that animal. 49 Fed. Reg. 22330. The rule authorized the "take" of 5,000 prairie dogs annually on certain lands in Iron County, as long as the takes were consistent with Utah State law. Id. at 22331. The rule was amended in 1991 to increase the limit of authorized take to 6,000 prairie dogs annually and to expand the geographic scope of authorized take to include all private lands within the region. (FWS' Mot. for Summ. J. at 8.)

On August 2, 2012, the FWS revised the special rule to its current form. 50 C.F.R. § 17.40(g) (the "rule".) Under this revision, take of the Utah prairie dog is authorized only by permit and only on "agricultural lands, [private property] within [.5 miles] of conservation lands, and areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites." Id. The rule does not permit take of the Utah

prairie dog on any federal land.[1] Id.

In context of the ESA, the term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any endangered or threatened animal, as listed in the ESA. 15 U.S.C. § 1532(19). Furthermore, the term "harm" within the definition of "take" includes any "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. Consequently, where no permit has been issued, the rule prevents anyone from undertaking any activity that would injure or kill a Utah prairie dog or significantly impair its habitat.

PETPO filed this action on April 18, 2013, alleging under the Administrative Procedures Act ("APA") that FWA's special rule governing the Utah prairie dog is "contrary to a constitutional right, power, privilege, or immunity and not in accordance with law." (Compl. ¶¶ 99-100.) PETPO asserts that Congress does not have the authority to regulate take of the Utah prairie dog on non-federal land. Specifically, PETPO argues that the Commerce Clause and the Necessary and Proper Clause fail to authorize such regulation because the Utah prairie dog is located exclusively within the state of Utah and because take of the prairie dog does not substantially affect interstate commerce. (Id. ¶¶ 101-110.) PETPO subsequently moved for summary judgement.

Defendants responded by filing a cross-motion for summary judgment, contending that

[1]However, the authorization of takes in "areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites," does not exempt federal land. Id. at (g)(2).

PETPO lacks standing to bring this case because its injuries will not necessarily be redressed by a final decision in its favor. Defendants further contend that even if PETPO has standing, Congress is authorized to regulate the Utah prairie dog through the Commerce Clause and the Necessary and Proper Clause. (FWA's Mot. for Summ. J. at 20.)

Defendants assert that every United States circuit court of appeals that has heard a similar case has upheld Congress' authority to regulate the take of purely intrastate species. See San Luis & Delta-Mendota Water Authority v. Salazar, 638 F.3d 1163 (9th Cir. 2011); Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007); GDF Realty Investments, LTD. v. Norton, 326 F.3d 622 (5th Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbit, 130 F.3d 1041 (D.C. Cir. 1997). Relying on these cases, Defendants present three arguments in support of congressional authority for the special rule governing take of the Utah prairie dog.

First, the rule has a substantial effect on interstate commerce because many of the proposed activities that have been prohibited by the rule are commercial or economic in nature. For example, Defendants' demonstrate that the rule has prevented several proposed agricultural activities and land development plans. (Id. at 31-32.)

Second, Defendants argue that because the Utah prairie dog has biological and commercial value, any takes of the animal have a substantial effect on interstate commerce. As far as biological value, Defendants argue that prairie dogs perform many functions that contribute to the ecosystem. For example, prairie dogs improve the soil where they burrow and "golden eagles, large hawks and bobcats, are . . . known to prey on prairie dogs." (Id. at 29.) As

far as commercial value, Defendants assert that the prairie dog attracts some interstate tourism. (Id. at 29-30.) FoA additionally emphasizes that the prairie dog has been the subject of scientific studies and commercially published books. (FoA Mot. for Summ. J. at 12-15.)

Finally, Defendants argue that the Necessary and Proper Clause authorizes special rule 4(d) because the regulation of takes of Utah prairie dogs is essential to the economic scheme of the ESA. Defendants assert that even if regulation of the take of the Utah prairie dog is not essential to the economic scheme of the ESA on its own, it becomes essential when aggregated with the regulation of take of other intrastate non-commercial species: "Excluding from protection all intrastate species–68% of all listed species–or even all species with no current commercial or economic value, would substantially frustrate the ESA's comprehensive scheme to protect listed species." (FWA's Mot. for Summ. J. at 40.)

Asserting that Congress is thus authorized to regulate the take of the Utah prairie dog on non-federal lands, Defendants ask the court to grant their cross-motion for summary judgment and to deny PETPO's motion for summary judgment.

## DISCUSSION

### Standing

Defendants argue that the court should grant its cross-motion for summary judgment because PETPO lacks judicial standing to bring this case. An organization has standing to bring a suit on behalf of its members if "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Friends of the Earth, Inc. V. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000) (citation omitted.) The organization's members would have standing in their own right only if they can demonstrate three elements: injury in fact, traceability, and redressability. In this case, Defendants refute PETPO's standing on the grounds that "PETPO cannot establish the third element of standing," (e.g. redressability).[2]

To satisfy the redressability requirement, PETPO must show that "there is a least a 'substantial likelihood' that the relief requested will redress the injury claimed . . . ." Baca v. King, 92 F.3d 1031, 1036 (10th Cir. 2012) (citation omitted). Defendants claim that PETPO fails to make this showing because there are other laws in place that will prevent the organization's members from engaging in activities that would "take" prairie dogs even if the court rules that special rule 4(d) is not a valid exercise of Congressional authority. (FWS' Mot. for Summ. J. at 13-14.) Defendants specifically argue that even if special rule 4(d) is struck down as unconstitutional, the limitations imposed by two laws would still apply: Utah Admin. Code R657-19-6, which is the state law governing the take of prairie dogs; and, 50 C.F.R. ¶ 17.31 ("general rule 4(d)"), which is the general federal law governing the take of threatened animals. Both of these laws would act as barriers to prevent PETPO's members from carrying out potential construction plans and other activities.

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[2]To satisfy the first two elements, PETPO asserts that its members have been injured by this rule in a variety of ways. For example, some of its members "are no longer eligible to obtain take permits under the special 4(d) rule because the 2012 revision does not allow permits to be issued for private property other than" the land listed in the rule. (Plaintiff's Mot. for Summ. J. at 12.) PETPO emphasizes that the rule consequently "prevents these property owners from constructing single-family homes, developing car dealerships, and pursuing other commercial development on their private property," because such activities would constitute an unauthorized take of the Utah prairie dog under the rule. (Id. (internal citations omitted).)

PETPO responds by asserting that "a plaintiff can seek redress even if the challenged regulation is one of multiple obstacles to her desired action," Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 260-64 (1997), and that "[t]he requested relief would bring PETPO's members one important step closer to being able to use their property as they wish or to more efficiently provide government services to the residents of Cedar City." (PETPO's Mot. for Summ. J. at 5.) The court agrees.

If PETPO is successful in this suit, the federal government will have no authority to regulate the take of the Utah prairie dog on non-federal land, whether through special rule 4(d) or the general rule 4(d). Moreover, even though state law may still regulate the take of the Utah prairie dog in the absence of a federal regulation, the presence of an additional barrier to PETPO's ultimate desired result does not prevent the court from removing an initial barrier. See Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. at 260-64. Consequently, PETPO has satisfied the redressability requirement and has standing in this case.

**Constitutional Authority to Adopt Special Rule 4(d)**

At the heart of the dispute between the parties in this case is whether one of the enumerated powers in the Constitution authorizes Congress–and, through congressional delegation, the FWA–to regulate take of the Utah prairie dog on non-federal land. PETPO argues that no enumerated powers authorize Congress to regulate take of an animal that is purely intrastate and that has no commercial market. Defendants concede that the Utah prairie dog is a purely intrastate animal, but contend that Congress is nevertheless authorized to regulate take of the prairie dog under the Commerce Clause and the Necessary and Proper Clause.

The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. 1, § 8. At one point in time, Congress' Commerce Clause power seemed to be virtually unlimited, leading one scholar to "wonder why anyone would make the mistake of calling it the Commerce Clause instead of the 'hey-you-can-do-whatever-you-feel-like clause.'" Judge Alex Kozinski, *Introduction to Volume 19*, 19 HARV. J. L. PUB. POL., 1, 5 (1995). This changed with the United States Supreme Court's rulings in United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000).

In Lopez, the Court clarified that, although the categories are broad, there are only three "categories of activity that Congress may regulate under its commerce power." 514 U.S. at 558-59.

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

Id.

After articulating these categories, the Court examined whether the Commerce Clause authorized Congress to enact the Gun-Free School Zones Act of 1990–which forbade an individual from knowingly possessing a gun in a place that the individual knew, or had reason to believe, was a school zone. Id. Finding that the regulated activity (possessing a gun in a school zone) did not fit into any of the three categories, the Court ruled that the Act was unconstitutional. Id.

In Morrison, the Court clarified what it did in Lopez. Morrison, 529 U.S. 598, 609-612. Focusing its analysis purely on the third Lopez category, the Court stated that it had relied on four considerations when determining that the Commerce Clause could not authorize the gun possession law. Id. First, the gun possession law was non-economic and criminal in nature. Id. at 610. Second, "the statute contained 'no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.'" Id. at 611 (quoting Lopez, 514 U.S. at 562). Third, the act's legislative history did not contain any "express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." Id. at 611-12. The Court clarified that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." Id. at 614. Fourth, "our decision in Lopez rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated." Id. at 612. Relying on these same considerations, the Court ruled that the Commerce Clause did not authorize Congress to create a civil remedy for victims of gender-motivated crimes. Consequently, the relevant parts of the Violence Against Women Act of 1994 were declared unconstitutional.

Because the parties in the present dispute agree that the first two Lopez categories do not apply, the court's analysis will focus solely on the third Lopez category. Applying the relevant considerations as presented in Morrison, it is clear that the Commerce Clause does not authorize Congress to regulate takes of Utah prairie dogs on non-federal land.

The court agrees with PETPO's claim that the rule is non-economic because "the Service

is regulating every activity, regardless of its nature, if it causes harm to a Utah prairie dog." (PETPO's Mot. for Summ. J. at 24.) Additionally, it is undisputed that the rule in question does not contain any jurisdictional element that would limit its reach to takes that have an explicit connection to interstate commerce. (FWS' Mot. for Summ. J. at 12.) It is also undisputed that there are no express congressional findings regarding the effects upon interstate commerce of taking a Utah prairie dog. Id. Finally, as will be demonstrated below, all of Defendants' arguments purporting to establish a link between Utah prairie dog takes and a substantial effect on interstate commerce are attenuated.

Defendants' argument that the rule has a substantial effect on interstate commerce because it has frustrated several proposed agricultural and commercial activities misses the mark. The proper focus of the "substantial effect" test is the "regulated activity." See Gonzales v. Raich, 545 U.S. 1, 23 (2005). Illustratively, the Supreme Court ruled that Congress could regulate the purely local growth and consumption of wheat or marijuana because those activities altered the national market for those commodities. Raich, 545 U.S. 1; Wickard v. Filburn, 317 U.S. 111 (1942). However, the Court ruled that Congress could not regulate the possession of a gun in a known school zone, even though the regulation of that activity affected commerce in a variety of ways (e.g. people could not sell guns in a school zone). Lopez 514 U.S. 549 (1995); see also Morrison 529 U.S. 598 (2000). In other words, the question in the present case is whether take of the Utah prairie dog has a substantial effect on interstate commerce, not whether the regulation preventing the take has such an effect. Consequently, the fact that PETPO members or other persons are prohibited from engaging in commercial activities as a result of

special rule 4(d) is irrelevant to the Commerce Clause analysis.

Furthermore, Defendants' argument concerning the biological value of the Utah prairie dog is insufficient to demonstrate that take of the prairie dog has a substantial effect on interstate commerce. The Court acknowledges that the Utah prairie dog may have an effect on the ecosystem. Nevertheless, as aptly observed by Chief Judge Sentelle, "[T]he Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems.'" National Ass'n of Home Builders v. Babbitt, 327 U.S. App. D.C. 248, 272 (D.C. Cir. 1997) (Sentelle, J., dissenting). If Congress could use the Commerce Clause to regulate anything that *might* affect the ecosystem (to say nothing about its effect on commerce), there would be no logical stopping point to congressional power under the Commerce Clause. Accordingly, the asserted biological value of the Utah prairie dog is inconsequential in this case.

Defendants' arguments concerning the commercial value of the Utah prairie dog is also insufficient because the purported value is too attenuated to support the premise that take of the prairie dog would have a substantial effect on interstate commerce. Even if Defendants' presumption that "tourism websites would not feature a species that was of no interest to visitors" is true, there is no evidence that tourism in southern Utah would be negatively affected by takes of the Utah prairie dog on non-federal land. In fact, all of the websites cited by Defendants specifically refer to the animals' presence in national parks of forests.

The fact that scientific research has been conducted and books have been published about the Utah prairie dog is similarly too attenuated to establish a substantial relation between the take of the Utah prairie dog and interstate commerce. After all, scientific research has also been

conducted and books have also been published about both guns and women. Nevertheless, the Supreme Court ruled that federal regulation of gun possession and violence against women is beyond Congress' Commerce Clause power. See Morrison, 529 U.S. at 601-02, 613-17; Lopez, 514 U.S. at 560-66.

Finally, as stated by the U.S. Court of Appeals for the Fifth Circuit (which ultimately upheld Congress' authority to regulate takes of intrastate noncommercial species for different reasons), "[t]he *possibility* of future substantial effects of the [intrastate noncommercial species] on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster." GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622, 638 (2003) (citing Morrison, 529 U.S. at 612).

Defendants' final argument, that the Necessary and Proper Clause authorizes special rule 4(d) because the rule is essential to the economic scheme created by the ESA, also fails upon close examination. This argument is based on the Supreme Court's ruling in Raich that a regulation may be upheld when it is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 545 U.S. at 24-25.

Although the ESA itself regulates some economic activity, the rule in question is not necessary to the statute's economic scheme. Defendants emphasize that the Supreme Court cited the federal regulation of the take of bald and golden eagles as an example of congressional power that is clearly authorized by the Commerce Clause. (FWS' Mot. for Summ. J. at 21 (citing Raich, 545 U.S. at 26 n.36).) The Court's bald eagle example is not surprising because it

is consistent with the Court's ruling in Raich. 545 U.S. 1.

At issue in Raich was whether Congress was authorized to regulate the purely local growth and consumption of marijuana. Because it was clear that a national market for marijuana already exists, the Court found that Congress has the power to regulate activities that have a substantial effect on that market. Id. at 17-22. Such activities obviously include growing marijuana, which leads to a greater national supply of the product, as well as consuming it, which affects the national demand for the product. Congress was consequently authorized to regulate any growth or consumption of marijuana in the United States, including any such activity that occurs exclusively within one state. Id. If Congress was not able to regulate those local activities, its ability to regulate the national market would be frustrated. Id. The same is true with regulating takes of bald eagles because there is a national market for bald eagles and bald eagle products. If Congress is not authorized to regulate purely intrastate takes of bald eagles, its attempt to regulate the market for bald eagles will be frustrated.

The present case, on the other hand, differs significantly from Raich in one important way that makes any appeal to the Necessary and Proper Clause futile: takes of Utah prairie dogs on non-federal land–even to the point of extinction–would not substantially affect the national market for any commodity regulated by the ESA. The only evidence that suggests that the prairie dog's extinction would substantially affect such a national market is Defendants' assertion that golden eagles, hawks, and bobcats are "known to prey on prairie dogs." (FWS' Mot. for Summ. J. at 29.) However, Defendants do not claim that the Utah prairie dog is a major food source for those animals, and those animals are known to prey on many other rodents, birds,

and fish. In other words, there is no evidence that the diminution of the Utah prairie dog on private lands in Utah would significantly alter the supply or quality of animals for which a national market exists. Therefore, congressional protection of the Utah prairie dog is not necessary to the ESA's economic scheme.

The court also rejects Defendant's argument that the regulation of takes of Utah prairie dogs can be aggregated with the regulation of takes of every other intrastate non-commercial species to satisfy the Necessary and Proper Clause. The court sees no reason to consider such aggregation. PETPO is not asking the court to invalidate the regulation of takes of all intrastate non-commercial species on all lands, but just the regulation of takes of Utah prairie dogs on non-federal ground. Moreover, there is no evidence that the extinction of the Utah prairie dog would cause any other species to lose value or likewise become extinct. Although Congress might be authorized to unlimitedly regulate takes of intrastate non-commercial species whose extinction would subsequently cause the extinction of other species (especially the extinction of commercial species), that is simply not the case before the court. Instead, Defendants essentially ask the court to find that takes of Utah prairie dogs substantially affect interstate commerce solely because the prairie dog has been grouped with a number of other species, whose extinction also may or may not substantially affect interstate commerce. Such effect is far too attenuated to suggest that regulating takes of Utah prairie dogs is a necessary part of the ESA's economic scheme. Consequently, the court in this case declines to aggregate the regulation of takes of all intrastate non-commercial species.

For these reasons, the court finds that Congress has no authority to regulate takes of Utah

prairie dogs on non-federal land.

**SUMMARY AND CONCLUSION**

Although the Commerce Clause authorizes Congress to do many things, it does not authorize Congress to regulate takes of a purely intrastate species that has no substantial effect on interstate commerce. Congress similarly lacks authority through the Necessary and Proper Clause because the regulation of takes of Utah prairie dogs is not essential or necessary to the ESA's economic scheme.

PETPO's Motion for Summary Judgment is GRANTED, with prejudice.

Defendants' Cross-Motion for Summary Judgment is DENIED, with prejudice.

IT IS SO ORDERED

DATED this 4th day of November, 2014.

Dee Benson
United States District Judge

# ADDENDUM B:

# H.R. REP. NO. 93-412

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 93–412

# ENDANGERED AND THREATENED SPECIES CONSERVATION ACT OF 1973

JULY 27, 1973.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mrs. SULLIVAN, from the Committee on Merchant Marine and Fisheries, submitted the following

## REPORT

[To accompany H.R. 37]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 37) to provide for the conservation, protection, and propagation of species or subspecies of fish and wildlife that are threatened with extinction or likely within the foreseeable future to become threatened with extinction, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendment to the text of the bill strikes out all after the enacting clause and inserts in lieu thereof a substitute which appears in the reported bill in italic type.

The other amendment modifies the title of the bill to make it conform to the changes made by the amendment to the text.

### PURPOSE OF THE LEGISLATION

There is presently in effect a series of Federal laws designed to protect species of fish and wildlife which may face extinction without that protection. The first of these laws was passed in 1966 and the second in 1969; at the time they were enacted, they were adequate to meet the demands as they then existed.

Subsequent events, however, have demonstrated the need for greater flexibility in endangered species legislation, more closely designed to meet their needs. In response to this need, legislation was proposed in the last Congress, but failed of passage. The Congress is now in a position to move in this critical area.

H.R. 37, as amended, combines features of the Administration bill (H.R. 4758), and the original H.R. 37. It is designed to widen the protection which can be provided to endangered species under the laws now on the books.

The principal changes to be effected by the new legislation include:

1. It extends protection to animals which may become endangered, as well as to those which are now endangered.
2. It permits protection of animals which are in trouble in any significant portion of their range, rather than threatened with worldwide extinction.
3. It makes taking of such animals a Federal offense.
4. It eliminates existing dollar ceilings ($15 million, already consumed) on acquisition of critical habitat areas.
5. It gives management authority for marine species to the Department of Commerce.
6. It authorizes the use of counterpart funds, where proper.
7. It allows states to adopt more restrictive legislation than the Federal laws.
8. It clarifies and extends the authorities of the Department of Agriculture to assist landowners to carry out the purposes of the Act.
9. It directs a study of the problems involved in the domestic regulation of trade in endangered plants.

A recent international Convention produced a draft treaty which responds to the needs of endangered species and imposes a worldwide pattern of restrictions upon the unfettered trade in species of animals and plants which may face extinction. The legislation considered and reported by the Committee attempts to work into this framework those steps which may be necessary or desirable to accomplish this purpose as well.

## Legislative Background

According to the Department of the Interior, there may be more than 100 species of fish and wildlife which are presently threatened with extinction within the United States. The recently concluded international Convention on International Trade in Endangered Species of Wild Fauna and Flora listed 375 species of animals as imminently threatened with extinction throughout the world and another 239 species of animals as not yet threatened with extinction but requiring additional controls over their trade.

The threat to animals may arise from a variety of sources; principally pollution, destruction of habitat and the pressures of trade. For the most part, United States executive and legislative attention in recent years has concentrated upon the latter factor in attempting to enforce legislation designed to reduce or eliminate the financial incentives to trading in endangered species of fish and wildlife.

Prior to enactment of endangered species legislation, United States efforts to protect fish and wildlife were concentrated on enforcement of the Lacey and Black Bass Acts, which made it illegal for any person to transport in interstate commerce any fish or wildlife taken in violation of national, state or foreign laws. These Acts are still on the books, and some conservationists feel that they are even now inadequately utilized in the interests of protecting endangered species.

In 1966 the Congress adopted the first "Endangered Species Preservation Act" (P.L. 89–699). This Act directed the Secretary of the Interior to carry out a program to conserve and encourage the growth

of replacements for selective species of *native* fish and wildlife that he found to be threatened with extinction. Addressing itself to the issue of habitat protection, the Act also consolidated and expanded the authority of the Secretary of the Interior relating to the administration of the National Wildlife Refuge System.

The next step took place when the 91st Congress enacted the Endangered Species Conservation Act of 1969 (P.L. 91–135). This Act expanded the 1966 Act in several ways:

(1) It authorized the establishment of a list of fish and wildlife threatened with extinction and prohibited the importation from foreign countries of any such species. Exceptions were provided to allow importations for scientific, educational, zoological, and/or propagational purposes and to allow one-year economic hardship exemptions in specified cases.

(2) It made it unlawful to buy or sell any animal taken in violation of the laws of any State or foreign country.

(3) It increased the authorization for funds to a limit of $2.5 million per area, or $5 million per year, with a total overall ceiling of $15 million.

(4) It designated certain ports of entry for the importation of fish and wildlife and their products.

In the years since 1969, the need for further amendment of the domestic endangered species legislation has become clear. Accordingly, the Administration proposed a bill for this purpose in the 2nd Session of the 92nd Congress (H.R. 13081), to substitute a new and more comprehensive endangered species act for those enacted in 1966 and 1969. Hearings were held on that legislation, but due to lack of time neither body acted upon it.

The Administration bill was reoffered early this year as Executive Communication No. 442 and introduced by Mr. Dingell for himself and several other members as H.R. 4758. Mr. Dingell had earlier introduced, for himself and others, an alternative form of legislation based on the 1972 hearings (H.R. 37). These bills, and a number of similar and identical bills, were before the Committee when it held hearings on this question on March 15, 26 and 27, 1973.

These hearings were held on the heels of an international meeting of technical experts and national representatives in Washington on these and similar questions in February and March. This meeting was a direct outgrowth of earlier U.S. endangered species legislation, which had mandated such an international ministerial meeting for the purpose of developing effective international controls on the unrestricted trade in endangered species. The result of that meeting was the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973—a Convention which has been widely acclaimed as eminently successful in devising forceful and practical mechanisms for controlling these problems.

Essentially, the Convention requires creation of 3 types of endangered species lists:

Appendix I lists species of animals and plants imminently threatened with extinction which are or may be affected by trade and which therefore may be traded only upon approval by the countries of both import and export, when not to be used for commercial purposes.

Appendix II lists species of plants and animals which are not yet necessarily threatened with extinction but which may become so unless subjected to strict regulation. Export permits only will be required for trade in species on Appendix II.

Appendix III is provided as a means for countries to list species protected within their jurisdiction for the purpose of preventing or restricting their exploitation, whether or not these species are threatened with extinction. These will also require an export permit, once listed.

Because of the short interval between the conclusion of the Convention and the consideration of this legislation, it was not possible to develop a complete consensus on the additional steps that might and should be taken to implement the Convention. Technically, of course, it is unnecessary to do this since the Convention has not yet been ratified and is not yet effective. It was and is the Committee's view, however, that it would be proper for this country to take every appropriate step at this time to bring our own laws into conformity with the Convention procedures, so that no further legislation will be necessary to implement it, once it has become effective.

## Background and Need for the Legislation

Throughout the history of the world, as we know it, species of animals and plants have appeared, changed, and disappeared. The disappearance of a species is by no means a current phenomenon, nor is it an occasion for terror or panic.

It is however, at the same time an occasion for caution, for self-searching and for understanding. Man's presence on the Earth is relatively recent, and his effective domination over the world's life support systems has taken place within a few short generations. Our ability to destroy, or almost destroy, all intelligent life on the planet became apparent only in this generation. A certain humility, and a sense of urgency, seem indicated.

From all evidence available to us, it appears that the pace of disappearance of species is accelerating. As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage.

The value of this genetic heritage is, quite literally, incalculable. The blue whale evolved over a long period of time and the combination of factors in its background has produced a certain code, found in its genes, which enables it to reproduce itself, rather than producing sperm whales, dolphins or goldfish. If the blue whale, the largest animal in the history of this world, were to disappear, it would not be possible to replace it—it would simply be gone. Irretrievably. Forever.

One might analogize the case to one in which one copy of all the books ever printed were gathered together in one huge building. The position in which we find ourselves today is that of custodians of this building, and our choice is between exercising our responsibilities and ignoring them. If these theoretical custodians were to permit a madman to enter, build a bonfire and throw in at random any volume he

selected, one might with justification suggest that others be found, or at least that they be censored and told to be more careful in the future. So it is with mankind. Like it or not, we are our brothers' keepers, and we are also keepers of the rest of the house.

From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulation in humans was found in a common plant. Once discovered, and analyzed, humans could duplicate it synthetically, but had it never existed—or had it been driven out of existence before we knew its potentialities—we would never have tried to synthesize it in the first place.

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.

The institutionalization of that caution lies at the heart of H.R. 37, as ordered reported to the Congress. Several scores of nations have similarly endorsed the need for comparable legislation within their own countries by signing the recent Convention which takes a giant step in this direction.

Man can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat.

Clearly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our own civilization. On the other hand, there are certain areas which are critical which can and should be set aside. It is the intent and purpose of this legislation to see that our ability to do so, at least within this country, is maintained. H.R. 37 articulates and enhances this purpose and ability.

Restrictions upon the otherwise unfettered trade in these plants and animals are a significant weapon in the arsenal of those who are interested in the protection of these species. The recent international Convention on International Trade in Endangered Species of Wild Fauna and Flora was directed primarily at this problem; most of the provisions of H.R. 37 are also designed to deal with the problem in one way or another.

It is paradoxical that the scarcer an animal may be, the more people may be willing to pay to acquire it. The great whales may be said to have been involuntary beneficiaries of such an equation; the same is true of the so-called "spotted cats"—tigers, jaguars, cheetahs and others—whose skins have been sought by furriers and hunters around the world. The inevitable effect of this popularity has been to make them scarce, and perhaps to endanger their survival.

Their very scarcity and value, however, may be used as a lever to promote their protection. If the countries in which these and other valuable animals may be found are sufficiently alert and enlightened, this should encourage them to maintain healthy and viable stocks of these animals as a resource. The nurture and protection of these resources may ultimately prove to be the greatest incentive for their protection. H.R. 37 encourages such programs in a number of ways.

Honesty compels us to admit that steps taken by H.R. 37 to close the U.S. market to trade in endangered and threatened species may not be sufficient, in and of themselves, to remove pressure and thus to allow these species to recover. Passage of this legislation is, however, of importance—both because the United States is an important market, and because of the precedent that it will create. The Convention was especially significant in this respect; it was built upon the model that had already been created in this country, and it exerts a strong pressure upon other countries to follow suit.

Existing United States legislation was, when first proposed and adopted, adequate to meet the pressures upon endangered species at the time. Changing patterns of trade and exploitation have, however, created a situation in which this legislation is no longer entirely adequate. At times, present laws are too broad, and at others, they are too narrow and restrictive.

The events of the past few years have shown the critical nature of the interrelationships of plants and animals between themselves and with their environment. Another word for the study of these interrelationships is "ecology." The hearings proved (if proof is still necessary) that the ecologists' shorthand phrase "everything is connected to everything else" is nothing more than cold, hard fact.

In practically every circumstance endangered species are at the outer selves pushed out of that environment, harried and hunted by those edges of the circumstances in which they evolved. They find themselves pushed out of that environment, harried and hunted by those who would use them for their own advantage. Any program for the protection of endangered species must necessarily concern itself with more than a simple "hands-off" attitude toward the animals and plants themselves.

Such an attitude lies at the heart of the legislation here presented to the House. The basic purpose of the Act is clearly stated in the legislation; to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, protected or restored. In furtherance of this purpose, the bill declares a policy that Federal agencies are to use the authorities that are available to them in carrying out the objectives of the bill.

During the hearings on the legislation, it became apparent that there was little controversy as to the need for a bill of the types before the Committee. Both H.R. 37 and H.R. 4758, the Administration bill, followed essentially the same pattern; and as reported by the Committee, H.R. 37 adopts elements of both.

The principal areas of discussion during the hearings and in markup of the legislation centered on the proper role of the state and Federal governments with regard to endangered species programs, and the protection of plants. As regards both of these issues, there is fairly general agreement on the nature of the problem, but there was no clear agreement as to the best course to follow.

# ADDENDUM C:

# Excerpts of the Transcript, Motion Hearing, 2:13-CV-278DB (Sept. 11, 2014)

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT )
OF PROPERTY OWNERS, )
Plaintiff, )
vs. ) CASE NO. 2:13-CV-278DB
UNITED STATES FISH and WILDLIFE )
SERVICE, et al., )
Defendants. )
_____)

BEFORE THE HONORABLE DEE BENSON

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September 11, 2014

Motion Hearing

A P P E A R A N C E S

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| For Plaintiff: | JONATHAN C. WOOD<br>930 G Street<br>Sacramento, California |
| For Defendant:<br>United States Fish and Wildlife Service | MARY HOLLINGSWORTH<br>601 D Street N.W.<br>Washington, D.C. |
| For Intervenor Defendant: | MICHAEL HARRIS<br>7500 East Arapahoe Road<br>Suite 385<br>Centennial, Colorado |
| Court Transcriber: | Ed Young<br>351 South West Temple<br>Room 3.302<br>Salt Lake City, Utah 84101-2180<br>801-328-3202 |

MS. HOLLINGSWORTH: I would just like to reiterate again that P.E.T.P.O. made a call about how to raise these arguments. It does not challenge the Endangered Species Act and it does not even state that it is an improper exercise of the Commerce Clause and it does not challenge Section 4 or Section 9. That is important. This is one single application.

We do think that there is commercial value to the prairie dog, and we also think that the take of the prairie dog does affect commerce, but it does not matter if it substantially affects it because you can aggregate it with the take of all listed species. Almost every challenge to the application of the Endangered Species Act has been regarding the application of the take to an intrastate species. It is well established that the take itself is economic in nature or affects --

THE COURT: Substantially affects --

MS. HOLLINGSWORTH: Yes.

THE COURT: -- in the aggregate --

MS. HOLLINGSWORTH: Okay.

THE COURT: Thank you very much.

Mr. Harris, did you want to say anything?

MR. HARRIS: If I can?

THE COURT: Please.

MR. HARRIS: Thank you, Your Honor.

I am going to pose a different take on this as well. As you know, under Raich the Supreme Court, in discussing Congress's authority under the Commerce Clause, said there is three different sets of authority there, right? One is that Congress can regulate the channels of interstate commerce; second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons and things in interstate commerce; and, third, that Congress has the power to regulate activities that substantially affect interstate commerce.

I would suggest here, Your Honor, that in passing the Endangered Species Act in 1972, Congress was intending to regulate a number of different types of instrumentalities and commodities in interstate commerce, the species being one of them, and I will get to that in a second, but also they were intending to regulate economic activities that were impacting species. That is, it does not really matter if the species is wholly intrastate or not. The actual activities that they are regulating, economic development, is intrastate and they clearly have that authority.

I would direct the Court to the E.S.A. and the text of the E.S.A. itself. Section 9 of the E.S.A. prohibits the interstate trade in threatened and endangered wildlife. That is itself an economic activity. In fact, in Raich the court said that that type of prohibition on a

particular type of interstate trade is not only a valid exercise but an extremely common one and it is codified in the E.S.A.

Likewise, Your Honor, Section 10 sets up a permitting and licensing process that regulates the take and regulates the very activities that the plaintiff's members are so outraged that they can't perform, development, per se. Congress clearly understood that you had to regulate, and I know you mentioned earlier that the assumption may be that Congress's power is to promote commerce, but that is not necessarily true. In some circumstances Congress may want to dampen or restrict the economic development in interstate commerce in order to protect some type of other goal that it may have or value that it may see.

I would suggest that if you look at those two sections of the statute, it is a direct economic regulatory scheme. It is regulating the building of interstates out there, it is regulating the building of dams, it is regulating the building of airports and parking lots and everything else to protect what Congress has deemed to be a national priority.

I would also say, although I personally don't think of all species as commodities, I think Congress did see them as commodities. I think Congress saw them as commodities when it said don't trade them in Section 9.

While they may say, well, there is no market for Utah prairie dogs at this moment, that does not mean that there would not be a market.

In fact, Your Honor, in other states where the prairie dogs are not listed, including Colorado, where I am from, we have a market in them and they shoot them. People guide people out there to shoot them. There is a market in ammunition and a market in hiring the guide to take you out there, and so clearly Congress also saw that the species were a commodity.

Now, I think they were thinking of them in more of a positive term, as Ms. Hollingsworth already mentioned, and I think Congress was more concerned about their inherent value, and I think in the legislative history the house report says the value of this generic heritage and species is quite literally incalculable. So clearly they were thinking about the value of species that might disappear from the earth and the value we may lose because of that.

There is also obviously value in other forms like recreation, and I know you have read Dr. Hoogland's declaration about his research, but both of those are commodities as well. I think, for instance, your characterization of the tourism and recreation being sort of an attenuated commodity is a little unfair. That would be like saying national parks are not commodities. They

clearly are. They generate a ton of revenue for the communities that they are in. The viewing of wildlife is a multimillion dollar -- the word I'm --

THE COURT: Business.

MR. HARRIS: -- business. That is correct.

I know there are a lot of people that would think why would anybody come to see a rodent in Utah, and I am sure the plaintiff and their members feel that way, but the reality is that species with unique characteristics often drive some of the most interest among those who like to be in wildlife and nature.

As Dr. Hoogland discusses, this is one of the most unique animals on earth. Their level of skills and communications is par only to possibly dolphins and whales and humans. There are a lot of reasons why people want to come and see the prairie dogs in their natural environment and in the State of Utah.

Second of all, the research side of it, and while obviously education is a commodity, and it is sort of attenuated to see research as a commodity, but it is. It generates a ton of grant funding, like Dr. Hoogland has received for over 25 years, to research prairie dogs, and he has written books and he has given interviews and he has done the lecture circuit. He has had at least four documentaries done, and at least three of which were filmed

here in Utah, and so I think Congress had to look at it both ways. Congress did see not only the species as a commodity, but also the associated impact that the loss of the species could have on the national economy, but it also intended to directly regulate the economic development that would affect them.

If I could just say on the standard issue, Your Honor, I partly agree with the plaintiff and I partly agree with the defendant. I do believe there should be a reduced redressability standard here. I don't think it is under Arlington Heights. It think it is under Luhan because of the nature of this regulated activity, and it is always more speculative if you were to remand something back for further review or something like that and whether or not the government would redress the plaintiff's injuries, but I do think they have a big problem here with redressability and it is not because of the State of Utah.

The plaintiff suggests that the blanket 4(d) Rule in 50 C.F.R. 17.31 does not apply and I don't understand that. It facially applies to whether the species is on public or private property. Here is the problem. Unless you were to throw out the entire E.S.A., and if you were to throw out that special rule, you are actually making it worse for them, because the special rule was intended to provide more relief from the take prohibition under Section

9 than does the blanket rule at 50 C.F.R. 17.21. It says that all of the take provisions apply, and under the special rule, they get a certain amount of take that they are allowed each year for different activities. So you're not only redressing it, but you're going to heighten their injury if you were to remove that. They have not addressed that at all.

They do suggest a couple of things. One, they suggest that, well, we want both rules gone. First of all, it would be time barred to do a facial challenge of the blanket rule. That was last amended in 1979. If it is as applied, that is the blanket rule as applied to the Utah prairie dog, that is not in their complaint. They never made that argument in any brief. In fact, and this is the third reason, we have had that conversation with them when we were doing the status conference and the scheduling order, and what are you actually challenging and they said we are just challenging the special rule. I asked them again at the motion to intervene hearing before Magistrate Judge Wells and they repeated that same assertion, and I'm sure that transcript is available.

Thank you, Your Honor.

THE COURT: Well, thank you very much, Mr. Harris.

Mr. Wood, anything to respond?

MR. WOOD: If I may, I would like to make two