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IN THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH
CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

Plaintiff,

v.

UNITED STATES FISH & WILDLIFE SERVICE, et al.,

Defendants,

and

FRIENDS OF ANIMALS,

Defendant-Intervenor.

Civil No. 2:13CV278EJF

FRIENDS OF ANIMALS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Honorable Dee Benson

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INTRODUCTION

While the Plaintiff, People for the Ethical Treatment of Property Owners ("PETPO"), couches this action as a constitutional dispute, 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 the 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 ("FoA"), the Federal Defendants, thousands of 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 prairie dog, with its immeasurable value to the western grassland ecosystems, is a textbook illustration for this irrefutable proposition.

Fortunately, the Court need not take sides on this dispute, for Congress has already done so. 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:[1]

> 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. . . .

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 and deny PETPO's Motion for Summary Judgment for three reasons. First, the ESA is a comprehensive regulatory scheme that does in fact

[1] H.R.REP NO. 93-412, at 4-5.

have a substantial relation to interstate (and international) commerce. Protection of endangered and threatened species contributes to the economy through animal tourism, scientific research, literature and poetry, and by protecting the health of interrelated natural resources. Second, 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 has no relationship to interstate commerce—that fact is clearly disputed by competent evidence presented by both the Federal Defendants and FoA. Under such circumstances, summary judgment is not appropriate under Fed. R. Civ. P. 56.

ARGUMENT[2]

I. PETPO LACKS STANDING TO CHALLENGE THE SPECIAL 4(d) RULE FOR THE UTAH PRAIRIE DOG.

To demonstrate standing to sue under Article III of the Constitution, PETPO must show that: 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). FoA agrees with the Federal Defendants that in this case, PETPO cannot show that even if the Court grants all the relief requested, that its members' alleged harm would be removed. Federal Defendants' Opp. to Plaintiff's Motion for Summary Judgment and

[2] FoA concurs with, and adopts by reference, the Federal Defendants' Factual and Legal Background Sections in their Opposition to Plaintiff's Motion for Summary Judgment. FoA also adopts by reference the Federal Defendants' Response to PETPO's Statement of Facts.

Cross-Motion for Summary Judgment (hereinafter, "Fed. Defs.' Opp. Br.") at 18-19. However, FoA does not assert, as do the Federal Defendants, that the reason for this is due to the fact that the State of Utah also regulates the take of Utah prairie dogs. *Id*. at 19-20. In FoA's view, it is not necessary for the Court to consider the role of state law in its standing analysis.[3] Here, it is clear, that even if PETPO succeeds, **stricter federal rules** would come into play that would bar **all** take of prairie dog on private land. While that would relieve PETPO's members from burden of having to obtain a permit to take prairie dogs, it would not redress the overriding harm claimed by its members: the denial of their rights to use and develop their property because of the federal government's take prohibition on Utah prairie dogs. Memorandum in Support of Plaintiff's Motion for Summary Judgment (hereinafter, "Pl's. MSJ Memo") at 11.

PETPO's Complaint and its Motion for Summary Judgment is aimed at the constitutionality of the revised Section 4(d) rule issued by FWS on August 2, 2012, a rule that regulates only the take of Utah prairie dogs. *Id*. at 14 ("In order to prevail on its APA claim, PETPO must establish that the special 4(d) rule, as amended by 77 Fed. Reg. 46158 (Aug. 2, 2012) [ ], is not in accordance with the law [ ], or contrary to any constitutional right, power, privilege or immunity . . .. Alternatively, it can show that the special 4(d) rule violates the Tenth Amendment to the U.S. Constitution."); *see also* Complaint (ECF at 1) at ¶¶ 20-38.[4] This rule provides substantial relief from the ESA's take provisions for a wide variety of private property owners seeking to remove or exterminate Utah prairie dogs. *See* 50 C.F.R. § 17.40(g); *see also* Fed. Defs.' Opp. Br. at 8-11. However, as PETPO concedes, FWS

[3] FoA also asserts that it is not proper for the Federal Defendants to assume that the State of Utah will continue to enforce its take prohibition if PETPO prevails. The state rules where enacted as a result of the Utah prairie dog's status under federal law, in large part to allow the state to participate in the federal regulatory scheme. In any event, FoA does not join the Federal Defendants on this aspect of their argument.

[4] Counsel for PETPO stated on the record at the hearing held on October 28, 2013 on FoA's Motion to Intervene that its Complaint was limited to challenging the constitutionality of the Aug. 2, 2012 special 4(d) rule.

previously promulgated a "blanket 4(d) rule" that extends all Section 9 take prohibitions to threatened species, like the Utah prairie dog. Pl's. MSJ Memo at 4; 50 C.F.R. § 17.31. This blanket rule does not provide for the exceptions afforded property owners under the special rule PETPO is attacking. In other words, if PETPO is successful, and the special 4(d) rule for the Utah prairie dog is thrown out on constitutional grounds, what will be left is the blanket 4 (d) rule. That rule has not been challenged in this action. Under such circumstances, PETPO cannot establish redressability. *See Wyo. Sawmills v. U.S. Forest Serv.*, 383 F.3d 1241, 1246 (10th Cir. 2004) (plaintiff could not establish redressability where, even with a favorable order, agency would be under no obligation to redress plaintiff's alleged harm); *Coalition for Responsible Regulation, Inc. v. EPA*, 884 F.3d 102, 146 (D.C. Cir. 2012) (per curiam) (noting that plaintiff must show that "there is a substantial probability that they would not be injured and that, if the court affords the relief requested, the injury will be removed").

II. CONGRESS HAS POWER UNDER THE COMMERCE CLAUSE TO PROTECT WHOLLY INTRASTATE SPECIES AS PART OF A COMPREHENSIVE SCHEME TO CONSERVE THE NATION'S WILDLIFE AND BIODIVERSITY.

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

FoA agrees with PETPO on one aspect of its case—it is important for the Court to accurately define the nature of the regulated activity at issue. Pl's. MSJ Memo at 23. But PETPO's definition of this regulated activity—the "take" of Utah Prairie dog (*id*. at 1, 24)—misconstrues the ESA and the regulation of threatened species. The purpose of the ESA 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 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).

For these reason, the ESA sets up a comprehensive regulatory program, which at its heart involves 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 a species specific recovery plans (*id*. § 1533(f)). *See Alabama-Tombigbee Rivers Coal. V. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007)(recognizing that Section 4's listing process is an **essential** part of the ESA regulatory scheme because "the decision to list a species as endangered or threatened is a necessary precondition to the protections afforded under the Act."). Certainly, the take prohibition in Section 9 of the ESA is an important aspect of the species protection once they are listed, but so are the provisions of the Act setting out mechanisms for federal-state cooperation to protect listed species (*id*. § 1535) and requiring that federal agencys place species protection at the forefront of all their activities (*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, as PETPO puts it, that the ESA and legislative history are "silent of effects of take on

intrastate, non-commercial endangered and threatened species on interstate commerce." Pl's. MSJ Memo at 28. Instead, the point (as other courts have found) 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 species and broader ecosystem protection. It is the context of this comprehensive scheme that the Court must examine FWS' regulatory actions to help conserve the Utah prairie dog.

B. The ESA Was Enacted To Acknowledge That Protection Of Our Natural Heritage Is Vitally Connected To Our Nation's Future Economic Health.

FoA concurs with, and incorporates by reference, FWS' position that the ESA is a comprehensive scheme that has a substantial relation to interstate commence. Fed. Defs.' Opp. Br. at 25-28. FoA also agrees with the government that the proper vehicle to consider the constitutionality of the ESA and regulation of Utah prairie dogs is the Supreme Court's holding in *Gonzales v. Raich,* 545 U.S. 1 (2005). *Id.* at 23-24. FoA seeks to add, however, important information not contained in the government's brief to show that it was unambiguously Congress' intent to pass such a comprehensive scheme to protect endangered and threatened species for the very purpose of regulating interstate (and international) commerce.

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. 93–412, at 4–5 (1973); *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.").

Moreover, 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).[5]

With these provisions, Congress clearly intended to curtail the lucrative national and international trafficking in endangered species, which continues to be a problem today. *See* http://www.whitehouse.gov/the-press-office/2013/07/01/executive-order-combating-wildlife-trafficking (last visited Feb. 18, 2014). 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. Moreover, it is important to note the constitutionality of the ESA and its application "does not turn on the present or potential commercial value" of every listed species looked at alone.

[5] Similar prohibitions apply to commerce involving endangered plants. 16 U.S.C. § 1538(a)(2)(A), (C), (D) (forbidding import or export; delivery, receipt, carrying, transportation, or shipment in the course of a commercial activity; or sale or offer for sale of endangered plants).

Alabama-Tombigbee Rivers Coalition, 477 F.3d at 1276. As the *Alabama-Tombigbee* court concluded: "Even if we found a commercial nexus completely lacking [for a particular intrastate species], we could not 'excise individual applications of a concededly valid statutory scheme.'" *Id*. (*quoting* Raich, 545 U.S. at 72).

C. In Casting A Broad Safety Net To All Listed Species, Congress Recognized That All Species Contribute To Commerce, Even Those That Are Not Exploited For Commercial Gain.

PETPO is quite insistent that the Utah prairie dog has no commercial value, and that its take, is not an economic activity. Pls.' MSJ Memo at 1, 23-27. While PETPO never actually explains why it reaches this conclusion, it appears that PETPO believes Utah Prairie Dogs have no commercial value because human consumption is not a factor in their demise. *Id*. at 7 and 15 (asserting that the U.S. Fish and Wildlife Service has never concluded that "overutilization for commercial purposes" is a threat to the Utah prairie dog). In other words, PETPO seems to see value in a species only if it can be eaten, used for its skin or other parts, hunted for sport, or otherwise can be commercially profitable. Sadly, as will be explained in below (*infra* Part III.B), Utah prairie dogs actually are subject to such economic exploitation, and under the ESA Congress has sought to curtail that exploitation through regulation. But more importantly, the ESA 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.

The Federal Defendants have already explained one such benefit of species protection—ecological tourism. (Fed. Defs.' Opp. Br. at 28-30). 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 Feb. 17, 2014); J.D. Rinne, *14 Weird Animals You Can Travel to See* (Aug. 6, 2009), *available at* http://www.budgettravel.com/feature/090806_WeirdAnimals,6167/ (last visited Feb. 17, 2014); *see also 51 Great Places To See Wildlife*, USA Today (undated), *available at* http://travel.usatoday.com/destinations/great-american-outdoors/51-great-places-for-wildlife/49702682/1 (last visited Feb. 17, 2014). 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 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 FWS 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). FWS 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). This research undoubtedly contributes to economic commerce. *See, e.g.*, *infra* Part III.A.

III. THE UTAH PRARIE DOG HAS VALUE IN INTERSTATE COMMERCE.

As set forth in Part II above, the issue here "does not turn on the present or potential commercial value" of the Utah prairie dog considered alone. Consequently, there is no need for the Court to delve into the question of whether this species by itself has a substantial relation to interstate commerce. However, if that were necessary, there is ample evidence before the Court that the Utah prairie dog is substantially related to interstate commerce in two ways.[6] First, Utah prairie dogs directly contribute to interstate commerce, primarily

[6] As a general rule, a court's review of final agency action under the Administrative Procedure Act ("APA") is limited to the administrative record that was before the agency. *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1564 (10th Cir.1994). However, the Tenth Circuit has recognized that where a Plaintiff also asserts the agency's action violates the Constitution, the parties are not limited to the record. *See Wolfe v. Barnhart*, 446 F.3d 1096, 1004 n.6 (10th Cir. 2006); *see also Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest*

through prairie dog tourism and scientific research. Second, as a result of the listing of the Utah prairie dog as threatened, FWS regulates the commercial exploitation of these animals.

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

The Federal Defendants have already 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. Defs.' MSJ Memo at 29-30. 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.* at 28-29; s*ee 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 Feb. 17, 2014).

FoA asserts that the Utah prairie dog also contributes to interstate commerce as the subject of substantial scientific research. For example, one of FoA's members, Dr. John Hoogland is about to embark on his 41st year of research with prairie dogs. Declaration of Dr. John L. Hoogland in Support of FoA's Response to Plaintiff's Motion for Summary Judgment (hereinafter, "Hoogland Decl.") at ¶¶ 2, 8. In this time, Dr. Hoogland has studied

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Service, 921 F.Supp.2d 1137, 1204 (D.N.M. 2013) (The Court is fully aware of the tension that exists between allowing a standalone First Amendment claim for declaratory relief and the APA claims). FoA is not aware, however, of any case like the one at bar where the Plaintiff's APA claim is virtually identical to its non-APA constitutional claim. Under this circumstance it would be patently unfair to allow the Plaintiff to avoid evidence that pertains to the constitutionality of a statute by trying to hide under the APA. In addition, as discussed above, PETCO's attack is not even so much on a specific final agency action as much as it is an attack on the Federal Defendants' authority to regulate Utah prairie dogs under the ESA. As such, the Court should also consider the evidence proffered outside of the record.

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*. at ¶ 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 ¶ 9. He has received over 60 such grants from organizations like the National Science Foundation, the 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*. at ¶ 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. Base upon his fieldwork, Dr. Hoogland has already published one book, edited another, and is about to release a second book this year. *Id*. at ¶ 21. He has also authored

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[7] Dr. Hoogland is not the only scientist that has researched and written about prairie dogs. *See* 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 Feb. 18, 2014); Ritchie, M.E., Zablan, M., Bodenchuk, M., Bolander, R., Bonebrake, R., Grandison, K., McDonald, K. 1997. *Utah prairie dog interim conservation strategy*, U.S. Fish and Wildlife Service, Salt Lake City, Utah, *available at* http://biology.syr.edu/faculty/ritchie/ritchie_research4.htm (last visited Feb. 18, 2014); 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 Feb. 18, 2014).

over 60 scientific articles on prairie dogs. *Id*. at ¶ 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 ¶ 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*. at ¶ 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). 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*. at ¶ 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*. at ¶ 31. Specifically, Williams assisted for two weeks in June 2004 with all aspects of their research: livetrapping, eartgging, 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*. at ¶ 31.

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. *Id*. at ¶ 24. Clearly, the film industry is 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. *Id*. 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 ¶ 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 ¶ 15.

B. The ESA Listing 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. *See Supra* Part II.B. As a result, the ESA statutory prohibitions and requirements are aimed at curtailing such activities and help recover listed species.[8] *Id*.

Here, the Federal Defendants have already identified that FWS plainly regulates two commercial activities that contribute to interstate commerce that result in both prairie dog deaths and loss of habitat: agriculture and property development. Defs' MSJ Memo at 31-34. The Federal Defendants, however, do not mention 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* Declaration of Priscilla Feral in Support of FoA's 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.* Indeed, other subspecies of prairie dogs continue to be hunted in Utah

[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.

(http://wildlife.utah.gov/wildlife-news/42-utah-wildlife-news/1098-no-prairie-dog-shooting-after-april-1.html) and PETPO offers no reason to doubt that this activity would not extend to Utah prairie dogs without federal regulation under the ESA.

Second, prairie dogs have long been subjected to poisoning by commercial exterminators who are paid by landowners to get rid of these animals. *See* Feral Decl. at ¶ 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.* ECF No. 55-2 (PETPO member asserting "I would like to protect my property by removing prairie dogs"); ECF 55-3 (Cedar City Corporation expressing desire to have prairie dogs captured and removed from public facilities); ECF No. 55-2 (PETPO member alleging that the rule prevents removal of prairie dogs from property, which "makes the property impossible to sell"); *see also* AR12266 (PETPO comment to proposed amendment to 4(d) rule, complaining that, as written, the rule would prevent members from removing prairie dogs).

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IV. NEITHER THE ESA NOR THE REGULATION OF UTAH PRAIRIE DOGS BY THE FEDERAL GOVERNMENT INFRINGES ON THE TRADITIONAL RIGHTS OF THE STATES.

Notably missing from PETPO's argument is an important historical fact: 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. 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), the ESA 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 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.

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CONCLUSION

For the reasons set forth above, and in the Federal Defendants' Response to Plaintiff's Motion for Summary Judgment, FoA requests the Court deny PETPO's Motion for Summary Judgment and grant summary judgment to the Federal Defendants.

Respectfully submitted this 18th day of February 2014.

___s/ Michael Harris_____
Michael R. Harris
Joel Ban
Attorneys for Proposed-Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **RESPONSE TO PETCO'S MOTION FOR SUMMARY JUDGEMENT** was e-filed through the ECF system this 18th day of February 2014.

___s/ Michael Harris_____
Michael R. Harris