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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

Petitioner and Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; et al.,

Respondents and Defendants,

and

FRIENDS OF ANIMALS,

Respondent-Intervenor.

Case No. 2:13-cv-00278-DB

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

Honorable Dee Benson

Pursuant to Federal Rule of Civil Procedure 56(a) and this Court's scheduling order of August 14, 2013, Plaintiff People for the Ethical Treatment of Property Owners respectfully moves this Court for an order granting Plaintiff summary judgment. Plaintiff has concurrently filed a memorandum in support of this motion, declarations, and a proposed order granting Plaintiff's Motion for Summary Judgment. This motion is made on the grounds that no triable issue of material fact exists. Thus, Plaintiff is entitled to judgment as a matter of law, a finding that the Defendant U.S. Fish and Wildlife Service (Service) does not have authority to regulate takes of the Utah prairie dog on private lands, and an invalidation and vacatur of the Service's special 4(d) Rule for the Utah prairie dog.

Plaintiff's Motion for Summary Judgment is based on the pleadings and papers filed in this action and this motion, as well as the accompanying memorandum, statement of undisputed facts, declarations, and any additional response, evidence, or argument that counsel will make at or before the hearing.

DATED: November 18, 2013.

Respectfully submitted,

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By /s/ Jonathan Wood
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Attorneys for Petitioner and Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing: PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS, Petitioner and Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE; et al., Respondents and Defendants, and FRIENDS OF ANIMALS, Respondent-Intervenor.	Case No. 2:13-cv-00278-DB **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Honorable Dee Benson

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Pursuant to this Court's scheduling order of August 14, 2013, Plaintiff People for the Ethical Treatment of Property Owners (PETPO) respectfully submits this Statement of Uncontroverted Facts and Memorandum of Points and Authorities in support of the Motion for Summary Judgment on their claims that the U.S. Fish and Wildlife Service's (Service) special 4(d) rule for the Utah prairie dog is contrary to the Administrative Procedure Act (APA) and Tenth Amendment to the U.S. Constitution on the grounds that it exceeds Congress' constitutional authority.

INTRODUCTION

The Commerce and Necessary and Proper Clauses do not vest Congress with plenary power. Rather, they authorize it to regulate economic activities that substantially affect interstate commerce, and—when necessary to ensure that the regulation of economic activities is effective—to regulate activities otherwise beyond its powers as part of a comprehensive scheme to regulate interstate commerce. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591-92 (2012) (*NFIB*). As the Supreme Court has warned, the failure to enforce these limits will "completely obliterate the Constitution's distinction between national and local authority" and will leave the courts "'hard pressed to posit any activity by an individual that Congress is without power to regulate.'" *United States v. Morrison*, 529 U.S. 598, 613, 615 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

The Service's special 4(d) rule regulating take of the Utah prairie dog does not respect these limits on the powers that Congress had the authority to delegate to the Service. It purports to regulate all takes of the threatened Utah prairie dog despite the facts that "take" is not an economic activity, the Utah prairie dog is a purely intrastate species with no commercial use or economic value, and the regulation of noneconomic forms of take is not necessary to ensure that any comprehensive regulatory scheme is effective as a regulation of commerce.

The APA requires final agency actions, like the adoption of a final rule, to be declared invalid if (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (b) contrary to any constitutional right, power, privilege, or immunity, (c) inconsistent with any statute, (d) adopted without compliance with required procedures, (e) unsupported by substantial evidence, or (f) unwarranted by the facts (if reviewed de novo). 5 U.S.C. § 706. PETPO challenges the special 4(d) rule as not in accordance with law and contrary to constitutional right, power, privilege, or immunity because it exceeds the federal government's authority under the Commerce and Necessary and Proper Clauses.[1] For the reasons that follow, this Court should declare this rule invalid under the APA and enjoin its enforcement.

In the alternative, the Court should declare the special 4(d) rule invalid under the Tenth Amendment. The Tenth Amendment protects both states and individuals from actions taken by the federal government in excess of its enumerated powers. *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011). This Court should declare the special 4(d) rule invalid and enjoin its enforcement under the Tenth Amendment as exceeding the federal government's powers under the Commerce and Necessary and Proper Clauses.

BACKGROUND

THE COMMERCE AND NECESSARY AND PROPER CLAUSES

The United States Constitution authorizes Congress "to regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3. Under Congress's commerce power, the federal

[1] Although the Tenth Circuit has never decided this issue, five other circuits have rejected constitutional challenges to the federal governments authority to regulate take. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). However, for the reasons explained herein, those decisions are contrary to Supreme Court precedent.

government may "regulate the channels of interstate commerce," "regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce," and regulate economic activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *Morrison*, 529 U.S. at 610.

The Constitution also authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution" any of its enumerated powers. U.S. Const. art. I, § 8, cl. 18. Pursuant to this authority, Congress can regulate noneconomic activities if necessary to avoid frustrating a comprehensive scheme to regulate commerce. *See NFIB*, 132 S. Ct. at 2591-92; *Raich*, 545 U.S. at 22; *id*. at 34-35 (Scalia, J. concurring).

ENDANGERED SPECIES ACT

The Endangered Species Act was adopted in 1973 for the purpose of protecting species threatened with extinction. H.R. Rep. No. 93-412, at 4-5 (1973). Pursuant to the act, the Service and the National Marine Fisheries Service list species as either endangered or threatened. 16 U.S.C. § 1533. A species is "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 "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 act requires listing determinations to be made on the basis of a five factor test. 16 U.S.C. § 1533(a)(1). These factors are: (a) the present or threatened destruction, modification, or curtailment of a species habitat or range; (b) overutilization for commercial, recreational, scientific, or educational purposes; (c) disease or predation; (d) the inadequacy of existing regulatory mechanisms; or (e) other natural or manmade factors affecting its continued existence. *Id*.

The ESA prohibits the "take" of endangered species, and imposes criminal penalties on anyone who violates this prohibition. 16 U.S.C. § 1531(b). "Take" is defined broadly as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The U.S. Supreme Court has further approved a sweeping interpretation of "harm" that includes habitat modifications that indirectly kill or injure members of the species. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-04 (1995). Anyone who knowingly violates this provision can be punished by a $50,000 fine and up to one year in prison. 16 U.S.C. § 1540(b).

Although the act only extends the take prohibition to species listed as endangered, it authorizes the Service to adopt regulations applying the provision to threatened species if necessary and advisable to provide for the conservation of such species. 16 U.S.C. § 1533(d). This authority is codified in section 4(d) of the act and regulations adopted pursuant to it are called 4(d) rules. *Id*. Rather than taking a species-by-species approach, the agencies have adopted a blanket 4(d) rule extending take protections to all threatened species, unless a more specific regulation applies. 50 C.F.R. § 17.31. Species specific 4(d) rules are referred to as special 4(d) rules. *See* 77 Fed. Reg. 46,158 (Aug. 2, 2012), AR 1735 (the final rule amending the special rule for the Utah prairie dog); *see also* 50 C.F.R. § 17.40(g) (the special 4(d) rule for the Utah prairie dog).

UTAH PRAIRIE DOG

Prairie dogs comprise five species of rodent, all of which are native to North America. AR 1737. Utah prairie dogs are the smallest species of prairie dogs and range in color from cinnamon to clay. *Id*. They have white or gray tipped tails and black eyebrows above each eye. *Id*. They are closely related to the white-tailed prairie dog, but are believed to be a separate species. *See id*.

Utah prairie dogs hibernate four to six months out of the year, during the winter. AR 1737. They usually emerge from hibernation in February or March. *Id*. Shortly after they emerge, Utah prairie dogs begin their mating season, which continues until early April. *Id*. A month later, approximately 97% of the female Utah prairie dogs will produce a litter ranging from one to seven pups. *Id*. Because of these large litter sizes, the population active during the summer months is much larger than that from the previous spring. *Id*.

Utah prairie dogs reside in semiarid shrub-steppe and grassland habitats. AR 1738. They are predominately herbivores, although they also eat insects. *Id*. They prefer to live in or around swales where moist herbaceous vegetation is available. *Id*. They require deep, well-draining soils where they can burrow deep enough to protect themselves from predators and temperature variation. *Id*. Currently, Utah prairie dogs are found in three recovery units: Awapa plateau; Paunsaugunt; and West Desert. AR 1739. These recovery units encompass portions of Iron, Piute, Garfield, Wayne, and Sevier counties. *Id*. Utah prairie dogs are only found in Utah. *Id*.

Although the historical size of the Utah prairie dog population is not known, it was greatly reduced by public and private eradication efforts beginning in the 1920s. *Id*. In 2010, the rangewide population was estimated at 40,666. AR 1746. This estimate is approximately double that of the population in 1985, which was 23,753. *Id*. The Service estimates that 75% of the present population is found on private property. AR 1739.

Utah prairie dogs reach maturity after one year, but have a high mortality rate during this time. AR 1737. Less than 50% of pups will survive to sexual maturity. *Id*. Approximately 20% of newborn pups are cannibalized by adult males. *Id*. Male Utah prairie dogs disperse to other colonies, causing them to suffer a higher rate of predation than females. *Id*. Predators include

coyotes, badgers, snakes, and raptors. AR 1738. Although female pups have a slightly lower mortality rate, few Utah prairie dogs live beyond five years. AR 1737.

Colonies are also susceptible to sylvatic plague. AR 1738. Plague can affect Utah prairie dogs either enzootically or epizootically. *Id*. Enzootic plague is an infection that persists among a population causing a continuous low rate of mortality. *Id*. Epizootic plague occurs when one enzootic host spreads plauge to more susceptible animals. *Id*. An epizootic plague event can cause mass die-offs, leading to local extirpations, small colony size, increased variation in colony size and distance between colonies. *Id*.

Over the last hundred years, Utah prairie dog populations have declined as a result of public and private eradication efforts using poison. *Id*. They have also been impacted by drought and conversion of habitat to agriculture and residences. *Id*. The soils most hospitable to the Utah prairie dogs are also preferred by farmers and ranchers. *Id*. Although the early influence of agriculture on Utah prairie dog habitat was to reduce the presence of swales, today, agricultural tilling practices make the land more hospitable by increasing the depth of soils and the presence of moist forbs. *Id*. Alfalfa crops allow Utah prairie dogs to grow faster and reduce the mortality rate during hibernation. *Id*. Farmers also reduce the presence of predators. *Id*. Although Utah prairie dog numbers would be higher in areas also preferred by agriculture, their densities in these areas are probably unnaturally high as a result of agricultural practices. *Id*.

A wide variety of human activities can cause the take of Utah prairie dogs. For instance, conservation groups have identified oil and gas exploration, the recreational use of all-terrain vehicles, and the maintenance and use of a Boy Scout camp as activities that harm or harass the species. AR 8115-8154.

HISTORY OF FEDERAL REGULATION OF THE UTAH PRAIRIE DOG

The Utah prairie dog was first listed as endangered under the Endangered Species Conservation Act of 1969—the predecessor to the ESA—on June 4, 1973. AR 1736. After the ESA was adopted, the Utah prairie dogs listing was incorporated under the act on January 4, 1974. *Id.* In 1984, the Service downlisted the species to threatened. *Id.* Simultaneously, the agency adopted a special 4(d) rule for the Utah prairie dog generally prohibiting take of the animal except that up to 5,000 takes on private lands could be permitted annually by the Utah Division of Wildlife Resources (UDWR). *Id.*; *see* 50 C.F.R. § 17.40(g) (the special 4(d) rule for the Utah prairie dog). This take was limited to certain portions of Iron County. AR 1745. In neither the original endangered listing nor the subsequent downlisting to threatened did the Service identify overutilization for commercial purposes as a threat to the Utah prairie dog. 38 Fed. Reg. 14,678 (June 4, 1973); 39 Fed. Reg. 1158 (Jan. 4, 1974); 49 Fed. Reg. 22,330 (May 29, 1984).

In 1991, the Service amended this rule, increasing the amount of annual take that could be permitted to 6,000. AR 1736. This amendment allowed take permits to be issued for any private property within the species range. *Id.* However, the UDWR has only permitted take on agricultural lands as a matter of state law and agency practice. AR 1749. Both the 1984 and 1991 rules allowed take because agricultural was allowing unnaturally large populations that were more susceptible to plague. AR 1736. They were also designed to reduce growing conflicts between the Utah prairie dog and private property owners. *Id.*

Recently, private conservation organizations have petitioned the Service to more restrictively regulate take of Utah prairie dogs. *Id.* In 2003, Forest Guardians filed a petition to reclassify the species as endangered. *Id.* After reviewing the petition, the Service determined that it did not contain sufficient information to indicate that reclassification may be warranted. *Id.* In 2005, Forest

Guardians again petitioned the Service regarding the Utah prairie dog, this time asking it to amend the special 4(d) rule to prohibit any permitted take of the species and to restrict translocation of prairie dogs from private to public property. *Id.* The Service denied that petition, but acknowledged that it was in the process of amending the special 4(d) rule. *Id.* After litigation over the 2003 petition resulted in a remand to the Service, it issued a revised finding that the petition did not present sufficient information to indicate that reclassification may be warranted on June 21, 2011. AR 1737.

THE 2012 REVISION TO THE SPECIAL 4(d) RULE FOR THE UTAH PRAIRIE DOG

On June 2, 2011, the Service announced a proposed rule to revise the special 4(d) rule. *Id.* That proposed rule would further limit how much take can be allowed and where, and exempt standard agricultural practices from take liability. *Id.* It was submitted for public comment and peer review. *Id.* On April 26, 2012, the Service announced that it was amending this proposal to allow take where Utah prairie dogs cause serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites. *Id.* This revised proposal also allowed entities other than the Utah Department of Wildlife Resources to issue take permits and changed the numerical limit on take. *Id.* The Service reopened the comment period for 30 days to allow public input on the revised proposal. *Id.* In the notice of this proposed rulemaking, the Service requested comments and suggestions regarding both how broadly it should regulate take of the Utah prairie dog and the manner in which it should be regulated. Proposed Rule Revising the Special Rule for the Utah Prairie Dog, 76 Fed. Reg. 31,906 (June 2, 2011), AR 1202. Comments were requested on where take should be allowed to occur, the amount of take that should be permitted, and the methods that should be authorized. *Id.*

On August 2, 2012, the Service issued a final rule revising the special 4(d) rule. AR 1748; *see* 50 C.F.R. § 17.40(g). The special 4(d) rule for the Utah prairie dog, as amended by this 2012 revision, is codified in regulations at 50 C.F.R. § 17.40(g). This 2012 revision changed the existing regulations in various ways, most notably by restricting permitted take to only certain types of private property—previously take could be permitted on any private property. *Id*. Under the 2012 revision, take may only be permitted on lands designated as agricultural under state law, lands within half a mile of conservation lands, and where the species creates serious safety hazards or disturbs the sanctity of human cultural or burial sites. *Id*. The 2012 revision also exempts otherwise legal activities associated with standard agricultural practices from take liability. *Id*. And it changed the total annual take that could be permitted from 6,000 to 10% of the estimated rangewide population—approximately 4,000 based on the 2010 estimate. AR 1734-1735. The revised special 4(d) rule also limits take to only certain methods—nonlethal trapping for translocation, lethal trapping, and shooting. AR 1754. Although the 2012 revisions authorize take, the Service has retained the power to immediately prohibit or terminate take notwithstanding the special 4(d) rule's authorization. AR 1756.

In order for take to be permitted on agricultural lands, the property owner must demonstrate to the permitting authority that Utah prairie dogs are physically or economically impacting the land. AR 1736. Even if they are, take cannot be permitted if it would extirpate the colony on these lands. *Id*. Total permitted take on agricultural lands also cannot exceed 7% of the total rangewide population estimate. AR 1752. The distribution of this take is further restricted to prevent concentration of this take or the extirpation of colonies. *Id*. Take on these lands is limited to half of a colony's estimated annual productivity—approximately 36% of the total estimated population

of the colony. *Id*. If a colony's estimated population is below 50, take cannot be permitted on these lands. *Id*.

Take may also be permitted on private property located with half a mile of conservation lands. AR 1749. In order for take to be permitted in these areas, a baseline population must first be established. *Id.* This baseline is the highest annual estimate on the property according to a UDWR survey taken within the five years prior to the establishment of the conservation lands. *Id*. If no UDWR surveys have been performed within that time, the baseline is the population estimate from the first survey performed after the conservation land is established. *Id*. The 2012 revision does not allow take on this category of private property to reduce the population below the baseline. *Id*. Additionally, total take for this category is limited to the remainder of the 10% of the annual rangewide population subject to take that isn't on agricultural lands. AR 1752.

Take is also allowed where the Service makes a prior written determination that the Utah prairie dog presents a serious human safety hazard—such as at an airport, recreational field, nursing home, or school—or disturbs the sanctity of a significant human cultural or burial site, if the lands where permission for take is sought are not necessary for the conservation of the species. AR 1749. Properties being developed for residential, commercial, or transportation uses are specifically excluded from this provision. *Id.* It also does not authorize take where property owners are concerned about the transmission of plague from prairie dogs to humans. *Id*.

Lethal take in these situations is a last resort. *Id*. First, the property owner must use all practicable measures to resolve conflicts between the Utah prairie dog and human safety or sanctity of cultural and burial sites. *Id*. These measures include filling in burrows with dirt, translocating prairie dogs pursuant to a Service-approved translocation protocol, and the construction of prairie-

dog proof fences. AR 1749-1750. Local communities or private property owners are responsible for constructing, maintaining, fixing and modifying these fences as demanded by the Service. AR 1750. However, the Service does not know of any way to engineer prairie-dog proof fences so that they cannot be breached. *Id*.

Take on other private property is no longer permitted under the special 4(d) rule but can only occur pursuant to an incidental take permit under section 10(a)(1)(B) and the associated habitat conservation plan. AR 1751. The Service requires private property owners to engage in mitigation in exchange for these permits, including by establishing conservation lands and paying into mitigation banks. *Id*.

Finally, the 2012 revision exempts normal agricultural practices from take liability. AR 1754. Normal agricultural practices include irrigating, plowing, discing, mowing, harvesting, and bailing, provided that the purpose for these activities is not the eradication of prairie dogs. AR 1755. Therefore, the exemption does not allow the owner of agricultural lands to intentionally take Utah prairie dogs. *Id*.

EFFECT OF THE 4(d) RULE ON PETPO'S MEMBERS

The revised 4(d) rule impacts PETPO and its members in a variety of ways. PETPO is a 501(c)(3) membership organization that represents the interests of private property owners and other persons suffering under overly burdensome regulations. Declaration of Derek Morton (Morton Decl.) ¶ 4. It was founded by Utah residents suffering under federal regulation of Utah prairie dog take. *Id*. ¶ 5. Its members have been denied their rights to use and develop their property because of these restrictions. *Id*. In order to promote awareness of these hardships, PETPO has engaged in an advocacy campaign to highlight the impacts of this species on Utah residents and the filing of this lawsuit. *Id*. ¶¶ 7-11, 14.

Some of PETPO's 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 that used in agriculture, within a half-mile of conservation lands or where Utah prairie dogs create serious human safety hazards or threaten significant human cultural or burial sites. Declaration of Mark Bradshaw (Bradshaw Decl.) ¶ 8; Declaration of Bruce Hughes (Hughes Decl.) ¶ 8; Declaration of Kevin Childs (Childs Decl.) ¶ 15. The special 4(d) rule, as amended in 2012, prevents these property owners from constructing single-family homes, Childs Decl. ¶¶ 6, 9, developing car dealerships, Bradshaw Decl. ¶ 4, and pursuing other commercial development on their private property, Hughes Decl. ¶ 6. Take could only be authorized under the revised special rule if conservation lands were established near these properties. Bradshaw Decl. ¶ 9; Hughes Decl. ¶ 9; Childs Decl. ¶ 15; *see* AR 1749; 50 C.F.R. § 17.40(g). But, even if such lands were established, take would only be allowed to keep the existing prairie dog population on these properties from growing. Bradshaw Decl. ¶ 9; Hughes Decl. ¶ 9; Childs Decl. ¶ 15. Under no circumstances would the special 4(d) rule authorize sufficient take to allow these property owners to pursue their development plans. Bradshaw Decl. ¶ 8; Hughes Decl. ¶ 6; Childs Decl. ¶ 15; *see* AR 1749; 50 C.F.R. § 17.40(g). They could only develop their property pursuant to an incidental take permit from the Service, which would entail delays and costs associated with the permit application process and costly mitigation. Bradshaw Decl. ¶ 8; Hughes Decl. ¶ 9; Childs Decl. ¶¶ 7, 11-13; AR 1751.

PETPO's members also include farmers whose ability to pursue their livelihoods is made more difficult by the special 4(d) rule. For example, the Lamoreauxs own a 200-acre farm that has been occupied by Utah prairie dogs since the mid-1990s. Declaration of Dean Lamoreaux

(Lamoreaux Decl.) ¶¶ 4-5. Although the exemption for normal agricultural practices protects the Lamoreauxs from prosecution for takes that result from these activities, it does not allow them to take steps to protect their property—including their valuable equipment—from the effects of the Utah prairie dog. Lamoreaux Decl. ¶¶ 6, 9; AR 1755; 50 C.F.R. § 17.40(g). These effects include damage to the Lamoreauxs' swathers, balers, and bale wagons, lost equipment time while this equipment is damaged, and the costly repairs associated with fixing that damage. Lamoreaux Decl. ¶¶ 6-8. Protection against these injuries can only be obtained by taking Utah prairie dogs pursuant to one of the permits available for agricultural lands under the special 4(d) rule. Lamoreaux Decl. ¶ 10; AR 1755. But, in order to avail themselves of this option, they must first attempt other ineffective measures, like the construction of a prairie dog fence. Lamoreaux Decl. ¶ 10. And they can only obtain permits to engage in this take if there is room under the 7% cap. *Id.*; AR 1755. Therefore, permission for the Lamoreauxs to protect their property through take comes at the expense of their neighbors to do the same, and vice versa. Lamoreaux Decl. ¶ 10; AR 1755.

The special 4(d) rule also frustrates the ability of PETPO member Cedar City Corporation, the municipal government for Cedar City, Utah, to provide recreational and other facilities for the community. Declaration of Joe Burgess for Cedar City (Cedar City Decl.) ¶ 5. The presence of Utah prairie dogs on the city's properties pose difficulties in the operation of the municipal airport, sports fields, golf course, and the local cemetery. *Id.* Utah prairie dogs have occupied and disturbed the runway and taxiway safety zones at the municipal airport, creating a hazard for planes taking off and landing and causing the city to suffer additional expenses to maintain these areas. Cedar City Decl. ¶¶ 12-14. Areas in city-owned sports fields that have been occupied by prairie dogs have to be fenced off for the protection of children, limiting the space available for play. Cedar City Decl. ¶ 6. Maintenance costs of the city's golf course are increased due to the pockmarked driving range,

equipment damaged by Utah prairie dog mounds and burrows, and repairs to the irrigation system. Cedar City Decl. ¶¶ 7-10. Although Utah prairie dogs have likewise increased maintenance costs at the Cedar City Cemetery, their gravest effects have been the disruption of the site's solemnity, funerals interrupted by the animal's barking, and the destruction of flowers left by mourners at loved ones' headstones. Cedar City Decl. ¶¶ 15-18. The Utah prairie dogs' impacts on the cemetery affect more than just the city. PETPO members like Brenda Webster also suffer from watching what was intended to be their loved ones' final resting place disturbed and dug up by the prairie dog, and the remembrances they leave eaten or destroyed. Declaration of Brenda Webster ¶ 6. Although the city is eligible to resort to take to protect these properties because they are human cultural or burial sites, it can only do so with written approval from the Service after first attempting any practicable measures that the Service demands, including the installation and improvement of prairie dog fences at city expense. AR 1749; Cedar City Decl. ¶ 19. Until the Service is satisfied that take is necessary, the city must continue to suffer damage to its property and unnecessary maintenance costs. Cedar City Decl. ¶ 19.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

In order to prevail on its APA claim, PETPO must establish that the special 4(d) rule, as amended by 77 Fed. Reg. 46,158 (Aug. 2, 2012), AR 1735, is not in accordance with law, 5 U.S.C. § 706(2)(A), or contrary to any constitutional right, power, privilege, or immunity, 5 U.S.C. § 706(2)(B). Alternatively, it can show that the special 4(d) rule violates the Tenth Amendment to the U.S. Constitution. U.S. Const. amend. X.

To establish entitlement to judgment on either of these grounds, PETPO must show that the Service's regulation of the Utah prairie dog exceeds Congress' authority under the Commerce

Clause. *Morrison*, 529 U.S. at 608-19; *Lopez*, 514 U.S. at 559-68. The uncontroverted facts supporting this showing are:

1. The special 4(d) rule regulates noneconomic activity that results in harm to Utah prairie dogs. AR 1735.

2. The Service has never identified overutilization for commercial purposes as a threat to the Utah prairie dog. AR 1735; 49 Fed. Reg. 22,330; 39 Fed. Reg. 1158; 38 Fed. Reg. 14,678.

3. The special 4(d) rule contains no jurisdictional element. AR 1735; 50 C.F.R. § 17.40(g).

4. There are no express legislative findings in the special 4(d) rule regarding the effects of Utah prairie dog takes on interstate commerce. AR 1735; 50 C.F.R. § 17.40(g).

5. There are no express legislative findings in the Endangered Species Act regarding the effects of Utah prairie dog takes on interstate commerce. 16 U.S.C. §§ 1531-1544.

Additionally, PETPO must show that the special 4(d) rule cannot be sustained under the Necessary and Proper Clause. *NFIB*, 132 S. Ct. at 2591-92; *Raich*, 545 U.S. at 22. The uncontroverted facts supporting this showing are:

1. The special 4(d) rule regulates any activity that results in harm to Utah prairie dogs, regardless of the nature of the activity. AR 1735; 50 C.F.R. § 17.40(g).

2. The special 4(d) rule is not a comprehensive economic scheme. AR 1735; 50 C.F.R. § 17.40(g).

3. The special 4(d) rule does not regulate the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. AR 1735; 50 C.F.R. § 17.40(g).

4. The Endangered Species Act is not a comprehensive economic scheme. 16 U.S.C. §§ 1531-1544.

5. The Endangered Species Act was enacted to conserve species and biodiversity, not to regulate the production, distribution, and consumption of commodities for which there is an established and lucrative interstate market. 16 U.S.C. § 1531(b).

ARGUMENT

Summary adjudication must be granted if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The initial burden of showing that there is no genuine issue of fact rests on the moving party. *Reed v. Bennett*, 312 F.3d 1190, 1194 (10th Cir. 2002). Here, PETPO is entitled to judgment as a matter of law because the uncontroverted facts demonstrate that the special 4(d) rule exceeds the federal government's authority under the Commerce and Necessary and Proper Clauses.

I

THE COMMERCE CLAUSE DOES NOT AUTHORIZE THE FEDERAL GOVERNMENT TO REGULATE NONECONOMIC ACTIVITIES THAT DO NOT HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE

The Supreme Court has recognized three categories of activity that Congress is empowered to regulate under the Commerce Clause. First, Congress has the authority to regulate the use of the channels of interstate commerce. *Lopez*, 514 U.S. at 558. Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id*. And third, Congress is authorized to regulate those economic activities "that substantially affect interstate commerce." *Id*. at 559; *see also Morrison*, 529 U.S. at 608-09. The applicability of these categories is examined in the High Court's *Lopez* and *Morrison* decisions.

A. Under *Lopez*, the Regulated Activity Must Substantially Affect Interstate Commerce

Alfonso Lopez, Jr., was indicted for violating the Gun-Free School Zones Act of 1990. *Lopez*, 514 U.S. at 551. That act made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A). Lopez, a 12th-grade student, was paid $40 to bring a concealed handgun to school, and did so. *Lopez*, 514 U.S. at 551. He was arrested and charged with violating the Gun-Free School Zones Act. *Id*.

Lopez sought to dismiss the indictment as beyond the commerce power of Congress. *Id*. But the district court upheld the act, holding that § 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce." *Id*. at 551-52. On appeal, however, the Fifth Circuit reversed and held that "'section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause.'" *Id*. at 552 (quoting *United States v. Lopez*, 2 F.3d 1342, 1367 (5th Cir. 1993)). The Supreme Court affirmed. *Id*.

Starting with first principles, the Court observed that the "Constitution creates a Federal Government of enumerated powers." *Id*. This principle was "'adopted by the Framers to ensure protection of our fundamental liberties'" by maintaining the balance of power between the states and the federal government so as to reduce the risk of abuse from either side. *Id*. (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). As for the enumerated power delegated to Congress "'[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' Art. I, § 8, cl. 3," the Court emphasized the inherent limitations found in the very language of the Clause. *Lopez*, 514 U.S. at 552-53.

When the Court first defined the commerce power in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), it recognized that

> "[c]omprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one . . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State."

Lopez, 514 U.S. at 553 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194-95). Another inherent limitation to the commerce power, recognized by the Court, was that the commerce power is the power to regulate or to "'prescribe the rule by which commerce [itself] is to be governed.'" *Lopez*, 514 U.S. at 553 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 196).

In *Lopez*, the Court reiterated that the commerce power is "subject to outer limits." *Id*. at 557. What are those limits? The Court cited the admonition of *Jones & Laughlin Steel* that the commerce power is constrained by our dual system of federal and state government and may not be stretched to encompass "indirect and remote" effects on interstate commerce so as to extinguish "'the distinction between what is national and what is local and create a completely centralized government.'" *Id*. (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)).

The Court also took pains to characterize *Wickard v. Filburn*, 317 U.S. 111 (1942), as the "most far reaching example of Commerce Clause authority over intrastate activity." 514 U.S. at 560. As the Court emphasized, that case involved economic activity and a statute directed at regulating a market for a commodity. *Id*. The Court concluded that it had always observed the constitutional structure, even in those cases where the congressional enactment was upheld based on "substantial effects," and that the inquiry in such cases was "to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id*. at 557.

After laying the foundation of a limited commerce power, the Court had no difficulty finding that the Gun-Free School Zones Act exceeded Congress' Commerce Clause authority and was constitutionally invalid. The framework the Court followed in reaching this conclusion is simple and straightforward.

First, the Court looked at the object of § 922(q) and observed that it did not purport to regulate the use of channels of interstate commerce or prohibit the interstate transportation of a commodity through the channels of commerce. *Id*. at 559. Likewise, it could not be justified as a regulation to protect an instrumentality of interstate commerce or a thing in interstate commerce. *Id*. at 561. If § 922(q) was to be upheld, it would have to be under the third category of Commerce Clause enactments—"as a regulation of an activity that substantially affects interstate commerce." *Id*. at 559.

The Court looked at the text of the statute and found that, unlike the act in *Wickard*, § 922(q) by its own terms had "nothing to do with 'commerce' or any sort of *economic* enterprise, however broadly one might define those terms." *Id*. at 561 (emphasis added). This obvious conclusion was compelled by the act's treatment of the mere possession of a firearm in a school zone as a crime.

The Court next considered whether § 922(q) contained a "jurisdictional element" that would ensure on a case-by-case basis that the possession of a firearm substantially affects interstate commerce. *Id*. For that determination, the Court turned again to the language of the act and found that it did not provide an express requirement that would "limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id*. at 562. Because no substantial effect was "visible to the naked eye," in the text of the act itself, the Court also looked to the legislative history to locate any express congressional findings that demonstrated Congress' belief that the possession of a gun in a school zone substantially affected interstate commerce. *Id*. at 562-63. But the Court found none.

Nevertheless, the government argued that Congress could rationally have concluded that § 922(q) did substantially affect interstate commerce because possession of a gun in a school zone may result in violent crime and violent crime interferes with the national economy in two respects:

(1) violent crime increases the cost of insurance throughout the nation and (2) violent crime deters people, from traveling to unsafe areas. *Id*. at 563-64. The government also argued that guns in school undermine the learning environment, producing less productive citizens, which hurts the national economy. *Id*. at 564. To underscore the limitations on the commerce power, the Court addressed the implications of those arguments.

The government's "costs of crime" argument would have justified regulation of any activity that might lead to violent crime no matter how remote the connection to interstate commerce. *Id*. Likewise, the government's "national productivity" argument, would authorize regulation of anything related to individual economic productivity. *Id*. If these arguments were accepted, the Court would have been "hard pressed" to find any individual activity that Congress could not regulate under the commerce power. *Id*. "[D]epending on the level of generality," the Court observed, "any activity can be looked upon as commercial." *Id*. at 565.

This was the flaw in the government's arguments; they provided no logical stopping point to congressional authority and converted the commerce power into a general police power. *Id*. at 567. To accept these arguments, the Court explained, "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local." *Id*. at 567-68 (citing *Gibbons* and *Jones & Laughlin Steel*). Therefore, it rejected the cost of crime and national productivity effects as too attenuated. *Lopez*, 514 U.S. at 564.

B. *Morrison* Affirmed That the Regulated Activity Must Substantially Affect Interstate Commerce

Morrison is instructive because of what it says about the Supreme Court's decision in *Lopez*. The Violence Against Women Act of 1994 provided a federal civil remedy for victims of gender-motivated violence and stated that "persons within the United States shall have the right to

be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). A district court dismissed a suit brought under this provision because it determined that § 13981 was an invalid Commerce Clause enactment. The en banc court of appeals and the Supreme Court both affirmed.

Returning to "first principles," the Supreme Court reaffirmed that all laws passed by Congress must find authority in the Constitution and that the powers of Congress are limited. *Morrison*, 529 U.S. at 607. As the Court emphasized, "even under our modem, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *Id*. at 608.

Because § 13981 focused "on gender-motivated violence wherever it occurs" and was not directed at the instrumentalities of interstate commerce or interstate markets, or even things or persons in interstate commerce, the majority determined that the act could only be sustained as a regulation of activity that substantially affects interstate commerce. *Id*. at 609. To conduct its analysis, the Court concluded that *Lopez* provided the appropriate framework. *Id*.

According to the Court in *Morrison*, four factors contributed to the decision in *Lopez*. The first factor was that the statute, by its terms, had nothing to do with commerce or an economic enterprise; that is, the act did not purport to regulate an economic activity. *Id*. at 610. The second factor was that the act 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 611-12 (quoting *Lopez*, 514 U.S. at 562). This factor was important to establish that the act was in "pursuance of Congress' regulation of interstate commerce." *Id*. at 612. The third factor was that neither the statute "nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce" of the regulated activity.

Id. And, the fourth factor was that the connection between the regulated activity and a substantial effect on interstate commerce was remote. *Id*.

With this framework, resolution of the *Morrison* case was clear. *Id*. at 613. First, the statute, by its terms, had nothing to do with commerce: "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id*. As a result, gender-motivated crimes are not the type of activity that, through repetition elsewhere, would substantially affect interstate commerce. *Id*. at 610-11. Not even *Wickard*'s aggregation principle was availing. *Id*. at 611 n.4.

This was critical to the outcome of the case. As the majority observed, the noneconomic, criminal nature of the prohibited activity in *Lopez* was central to its decision in that case. *Id*. at 610. But the Court in *Morrison* did not stop there. To further illustrate the importance of this factor, the Court stated, as a matter of historical fact, that it had upheld federal regulation of intrastate activity based on its "substantial effects" on interstate commerce only when the regulated activity was economic in nature. *Id*. at 611, 613.

Next, the Court held that the Violence Against Women Act did not contain an express "jurisdictional element" establishing that Congress was attempting to regulate interstate commerce. *Id*. at 613. Rather than limit its reach to a discrete set of gender-motivated violent crimes that had an explicit connection with or effect on interstate commerce, § 13981 was drawn too broadly and included purely intrastate violent crime. *Id*. The language of the act did not support the conclusion, therefore, that § 13981 was adequately tied to interstate commerce. *Id*.

Unlike the situation in *Lopez*, however, the Violence Against Women Act was supported by congressional findings that gender-motivated violence affects interstate commerce. *Id*. at 614. These findings were insufficient because they relied on a "method of reasoning" that obliterates the distinction between what is national and what is local and which the Court had already rejected in

Lopez. *Morrison*, 529 U.S. at 615. The Court was unwilling to allow Congress to regulate noneconomic activity, such as gender-motivated acts of violence, based only on that activity's attenuated effects on interstate commerce. *Id*. at 617.

II

TAKE OF THE UTAH PRAIRIE DOG IS NOT AN ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

Which of the three categories of activity that Congress is empowered to regulate under the Commerce Clause is at issue here should be determined, as it was in *Lopez* and *Morrison*, by looking at the terms of the challenged provision. The special 4(d) rule makes it unlawful for any person to engage in any activity which harms any Utah prairie dogs. 50 C.F.R. § 17.40(g); AR 1748. By its terms, the challenged provision does not purport to regulate a channel of interstate commerce or an instrumentality or thing in interstate commerce. Therefore, the special 4(d) rule may only be sustained as a regulation of activity that "substantially affects interstate commerce." *See Lopez*, 514 U.S. at 559.

The Service has no authority under the Commerce Clause to regulate the taking of a noncommercial, intrastate species like the Utah prairie dog. The effects of take of this species are so insubstantial that to permit federal regulation "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

A. The Special 4(d) Rule Regulates *Any* Activity That Results in the Take of a Utah Prairie Dog

The first step in determining "whether the regulated activity 'substantially affects' interstate commerce," *Lopez*, 514 U.S. at 559, is to define the "regulated activity" at issue. *Morrison*, 529 U.S. at 610. *Morrison* and *Lopez* indicate that the proper focus is on the activity that is directly

prohibited or regulated by the explicit terms used in the statute. Here, the Service is regulating every activity, regardless of its nature, if it causes harm to a Utah prairie dog. *See* 50 C.F.R. § 17.40(g); AR 1748. Thus, in this instance, this Court must analyze whether takes of the Utah prairie dog substantially affect interstate commerce.

The Fifth Circuit's Analysis in *GDF Realty Investments Ltd. v. Norton* is instructive on this point. 326 F.3d at 634. That case concerned a Commerce Clause challenge to the regulation of the take of six species of invertebrates found only within two counties in Texas. *Id.* at 624. The particular plaintiff was stymied from pursuing a commercial development, but the court recognized that the proper consideration was the full scope of activity being regulated, not a particular activity which may, coincidentally, be economic. *Id*. at 634. The court recognized that "the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances. But, Congress, through ESA, is not directly regulating commercial development." *Id*. This analysis is compelled by the reasoning in *Lopez*, where the Supreme Court considered Congress' authority to regulate possession of a handgun in a school zone generally, giving no consideration to the coincidental fact that Lopez was paid to carry the gun to school. *See Lopez*, 2 F.3d at 1345. Nevertheless, two of the circuit courts to deny challenges to the federal governments authority to regulate take have focused exclusively on the particular economic activity that the plaintiff was being prevented from engaging in. *See Rancho Viejo*, 323 F.3d at 1072-73; *Gibbs v. Babbitt*, 214 F.3d 483; *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041. Just as the Fifth Circuit looked at "Cave Species takes [] in order to assess [the] effect on interstate commerce," *GDF Realty*, 326 F.3d at 634, so too must this Court consider the activity being regulated as defined by the regulation—all activities which take, *i.e.*, harm, a Utah prairie dog.

B. The Regulation of Takes of the Utah Prairie Dog, an Intrastate, Noncommercial Rodent, Does Not Involve the Regulation of Economic Activity and Fails the *Lopez* and *Morrison* Standards for "Substantial Effects"

Under *Lopez* and *Morrison*, the courts look at four factors to determine if the regulated activity "substantially affects" interstate commerce: (1) Is the challenged federal regulation in furtherance of commerce or an economic enterprise; that is, does the regulation purport to regulate an economic activity? *Morrison*, 529 U.S. at 610. (2) Is the federal regulation supported by an express "jurisdictional element" which might limit its reach to a discrete set of activities that "additionally have an explicit connection with or effect on interstate commerce?" *Id*. at 611-12. (3) Is the federal action backed by express legislative "findings regarding the effects upon interstate commerce" or the regulated activity? *Id*. at 612. And, (4) is the connection between the regulated activity and substantial effect on interstate commerce attenuated? *Id*. The purpose of this overall inquiry is to determine "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 557.

1. The Take of the Utah Prairie Dog Is Not an Economic Activity

The first inquiry under the *Lopez* and *Morrison* "substantial effects" analysis is whether the regulated activity is "some sort of economic endeavor." *Morrison*, 529 U.S. at 611. A statute which regulates activity which "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms" is constitutionally suspect. *See Lopez*, 514 U.S. at 561; *United States v. Patton*, 451 F.3d 615, 624-25 (10th Cir. 2006).

The judiciary is charged with ensuring "enforceable outer limits" by declaring certain intrastate activities to be noneconomic. *See Lopez*, 514 U.S. at 566. "Under our written Constitution

. . . the limitation of congressional authority is not solely a matter of legislative grace." *Morrison*, 529 U.S. at 616.

Thus, the Court in *Lopez* scrutinized whether the legislation purported to regulate noneconomic activity. *See* 514 U.S. at 567. In *Lopez*, "Congress made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id*. at 551 (quoting 18 U.S.C. § 922(q)(1)(A)). The Court ruled that "possession of a gun in a local school zone [the activity as defined in the statute] is in no sense an economic activity." *Lopez*, 514 U.S. at 567. In *Morrison*, the Court stated that it was "clear" that "[g]ender-motivated crimes of violence [again, the activity as defined in the statute] are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613.

Likewise, the take of a Utah prairie dog is not an economic activity. As the Service has consistently recognized since the species was listed, Utah prairie dogs are not overutilized for commercial purposes. AR 1734; 49 Fed. Reg. 22,330; 39 Fed. Reg. 1158; 38 Fed. Reg. 14,678. Activities that can result in the take of a Utah prairie dog differ fundamentally from economic activities like intrastate coal mining, intrastate extortionate credit transactions, restaurants using substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat.

Although some takes of Utah prairie dogs can result from economic activities. The Service prohibits takes of all Utah prairie dogs without regard to whether the activity is economic or whether the take effects interstate commerce. *See* AR 1748; 50 C.F.R. 17.40(g). In this regard, this case is indistinguishable from *Lopez*. Whereas particular incidences of possession of a handgun in a school zone *could* be for economic reasons—as Lopez's was—the activity regulated by the statute was not defined to reach economic activity, but would only do so coincidentally. *Lopez*, 514 U.S. at 551,

561. The same is true here. The special 4(d) rule applies to such noneconomic activities as the recreational use of all-terrain vehicles and recreational shooting, among many others. *See* AR 1748; 50 C.F.R. § 17.40(g). AR 8115-8154. Paradoxically, economic activity—normal farming practices—are the only type of activity specifically exempted from the special 4(d) rule. AR 1754-1755. Indeed, the take of this species is a local activity that cannot fairly be described as economic. *See* AR 1738 (noting that the Utah prairie dog is found only within three counties within Utah). Whereas certain intrastate activities are economic, the noncommercial nature of the Utah prairie dog necessitates a finding that takes of the species are not quintessentially an economic activity.

2. Neither the ESA Nor the Special 4(d) Rule Contain a "Jurisdictional Element" That Would Limit the Prohibition to Takes That Have an Explicit Connection to Interstate Commerce

Lopez and *Morrison* next require courts to consider whether the authorizing statute for federal regulation contains an "express jurisdictional element which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562; *see Morrison*, 529 U.S. at 611-12.

Although the government could have limited its take prohibition to takes that substantially affect interstate commerce, it did not do so. AR 1748; 50 C.F.R. § 17.40(g). Therefore, the regulation of Utah prairie dog takes does not include any sort of jurisdictional limit that would ensure that the regulation prohibits a take that substantially affects interstate commerce. *See Morrison*, 529 U.S. at 613.

3. The Regulation of Utah Prairie Dog Takes Is Not Supported by Express Legislative Findings Regarding the Effects of Takes of This Intrastate, Noncommercial Species

The third inquiry under *Lopez* and *Morrison* is whether the authorizing statute for federal regulation or the statute's legislative history contains "express congressional findings" regarding the

regulated activity's effects upon interstate commerce. *Lopez*, 514 U.S. at 562. However, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614.

There are no legislative findings regarding the effects of takes of intrastate, noncommercial endangered or threatened species on interstate commerce. *See* 16 U.S.C. §§ 1531-1544; 50 C.F.R. § 17.40(g); AR 1734. Congress' silence is confirmed by the Service's final rules listing the Utah prairie dog as endangered, threatened, and adopting the special 4(d) rule which contain no findings that demonstrate a relationship between takes of this species and any interstate commercial activity. *See* AR 1734; 49 Fed. Reg. 22,330; 39 Fed. Reg. 1158; 38 Fed. Reg. 14,678.

While the legislative history of the ESA suggests that Congress was concerned with the "incalculable" value of endangered species' genetic heritage, this is far from an express finding that takes of particular species substantially affect interstate commerce. *See* H.R. Rep. No. 93-412, at 4 (1973). Congress has provided no clear explanation for why a take of the Utah prairie dog would substantially affect interstate commerce. *See Lopez*, 514 U.S. at 563.

Moreover, to rely on the "incalculable" value of endangered species' genetic heritage in order to justify this application of congressional legislation would ignore the Supreme Court's instruction to disregard "method[s] of reasoning that . . . [are] unworkable if [courts] are to maintain the Constitution's enumeration of powers." *Morrison*, 529 U.S. at 615. Here, the Court must not rely on this biodiversity rational and the potential economic consequences flowing from biodiversity. *But see San Luis & Delta-Mendota*, 638 F.3d at 1175; *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *GDF Realty*, 326 F.3d at 638-39. Instead, the Court may rely solely on express findings that the regulated activity itself affects interstate commerce. *See Morrison*, 529 U.S. at 612. Here, neither Congress nor the Service has made any

express findings that threatened or endangered species takes generally, or Utah prairie dog takes specifically, substantially affect intestate commerce.

4. The Connection Between Takes of the Utah Prairie Dogs and Interstate Commerce Is Attenuated

The final consideration under the *Lopez* and *Morrison* "substantial effects" analysis is whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated. *See Morrison*, 529 U.S. at 613. Congress may not rely on "every attenuated effect upon interstate commerce" to justify federal regulation under the Commerce Clause. *See id*. at 615. Given the breadth of activities regulated by the special 4(d) rule and the intrastate, noncommercial nature of the Utah prairie dog, sustaining the government's power under the Commerce Clause because there is a connection between takes of this species and interstate commerce would "completely obliterate the Constitution's distinction between national and local authority." *Id.*

The Court in *Morrison* emphasized this distinction in response to the government's argument that Congress can regulate gender-motivated crime because violent crime as a whole substantially affects interstate commerce. *See id*. There were two central problems with this argument. First, the argument "follow[ed] the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the states' police power) to every attenuated effect upon interstate commerce." *Id*. The government's position contained no effective limits, even though "the but-for causal chain must have its limits in the Commerce Clause area." *Id*. at 616 n.6. The government's reasoning was rejected because it would have allowed Congress "to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.* at 615.

Second, the Court emphasized that aggregating the effects of any noneconomic activity was inappropriate. *Id*. at 613. Reminding the government that the Constitution requires a distinction

between what is national and what is local, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617.

Likewise, in this instance, if the federal government can regulate takes of a wholly intrastate, noncommercial species like the Utah prairie dog, there is no activity that the government could not regulate. The attenuated reasoning connecting these takes to interstate commerce based on biodiversity would similarly justify federal regulation of whole areas of historical state authority and could "obliterate the distinction between what is national and what is local." *Lopez*, 514 U.S. at 557. Recent courts to sustain the federal government's authority to regulate take have relied on this attenuated biodiversity reasoning—takes could lead to species extinction, which will reduce biodiversity, which is related to commerce because ecosystems are valuable and lost species might hold the secret to medical cures and other things of value. *See, e.g.*, *San Luis & Delta-Mendota*, 638 F.3d at 1175. But as the Tenth Circuit explained in *United States v. Patton*, "any use of anything might have an effect on interstate commerce, in the same sense in which a butterfly flapping its wings in China might bring about a change of weather in New York." 451 F.3d at 628. When interpreting Congress' enumerated powers, the Tenth Circuit has heeded Thomas Jefferson's warning that an overly expansive notion of cause and effect in interpreting these powers can obliterate their limits:

> "Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built?'"

Id. (quoting Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), *in* 10 *The Writings of Thomas Jefferson* 165 (Albert Ellery Bergh ed., 1903)). Sustaining the special 4(d) rule on the

basis of the attenuated biodiversity rationale would require just the type of expansive cause and effect reasoning that the Tenth Circuit has forbidden. *Patton*, 451 F.3d at 628.

Indeed, the purely local and noncommercial nature of the Utah prairie dog precludes any federal regulation of this species. As the Supreme Court has emphasized time and again, "[t]he Constitution requires a distinction between what is truly national and what is truly local," and the ESA provides no exception to this fundamental rule. *See Morrison*, 529 U.S. at 617-18 (citing *Lopez*, 514 U.S. at 568, and *Jones & Laughlin Steel*, 301 U.S. at 30). The take of a Utah prairie dog "[is] not, in any sense of the phrase, [an] economic activity." *Morrison*, 529 U.S. at 613. This Court should recognize as much by holding that such takes do not substantially affect interstate commerce.

III

NEITHER THE SPECIAL 4(d) RULE NOR THE ENDANGERED SPECIES ACT IS A COMPREHENSIVE ECONOMIC SCHEME AIMED AT REGULATING INTERSTATE COMMERCE

Whereas the Commerce Clause authorizes the federal government to regulate economic activities having a substantial effect on interstate commerce, the Necessary and Proper Clause permits it to regulate noneconomic activities, but only if failing to do so will frustrate a comprehensive scheme to regulate commerce. *See NFIB*, 132 S. Ct. at 2591-92 (explaining that the *Raich* standard is a test arising under the Necessary and Proper Clause); *Raich*, 545 U.S. at 22; *id.* at 34-35 (Scalia, J. concurring). The Supreme Court in *Gonzales v. Raich* explained when the government may regulate intrastate noncommercial activity. 545 U.S. 1. *Raich* considered the constitutionality of "a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 26. According to the Court, the challenged regulation was an "essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity

were regulated." *Id*. at 24-25 (emphasis added). Although Congress may pursue many purposes when regulating economic activity under the Commerce Clause, *see, e.g.*, *Champion v. Ames*, 188 U.S. 321 (1903) (upholding federal regulation of the interstate trafficking of lottery tickets "for the protection of public morals" under the Commerce Clause), it cannot rely on the Necessary and Proper Clause to pursue these broader purposes. Otherwise, the Necessary and Proper Clause would obliterate the limits on Congress' powers because, so long as part of a comprehensive scheme regulated some economic activity, Congress could pursue any goal and regulate any noneconomic activity it desires. Such a result is belied by the decisions in *Lopez*, *Morrison*, and *NFIB*. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (explaining that if the Necessary and Proper Clause is not limited it will become a "pretext . . . for the accomplishment of objects not intrusted to the government").

The special 4(d) rule satisfies neither of *Raich*'s requirements. The Endangered Species Act does not regulate "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market," and failure to regulate Utah prairie dog takes would not undercut any economic regulatory scheme. *See Raich*, 545 U.S. at 26.

In *Raich*, the Court considered the Controlled Substances Act's (CSA) "categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes." *Id*. at 15. The Court's opinion addressed whether Congress' decision to include and regulate a narrow, intrastate, noncommercial "class of activities" within a larger regulatory scheme was constitutionally deficient. *See id*. at 26.

Answering in the negative, the Court explained that Congress' regulation of the noncommercial production and consumption of marijuana was permissible due to the CSA's regulation of a substantial interstate market. The CSA was an ambitious attempt "to combat the

international and interstate traffic in illicit drugs," and "Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Id.* at 12-13.

In analyzing the statutory structure of the CSA, the Court noted that its decision in *Wickard*, was "of particular relevance." *Raich*, 545 U.S. at 17. Similar to the CSA in *Raich*, the Agricultural Adjustment Act (AAA) in *Wickard* had been applied to regulate the local and noncommercial production and consumption of wheat. *See id.* at 17-19 (discussing *Wickard*, 317 U.S. at 115-18). In both the CSA and AAA, Congress had "enacted comprehensive legislation to regulate the interstate market in a fungible commodity." *Raich*, 545 U.S. at 22.

The Court summarized its statutory analysis by holding that the regulation of a local, noncommercial activity could be sustained if there exists "a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id*. at 26.

Far from serving to control an established and lucrative interstate market in endangered species, the ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Congress' concern was not in regulating a substantial market in endangered species, but in protecting various species from extinction. *See id.* § 1531(a).

Unlike the statutes at issue in *Wickard* and *Raich*, the ESA is not "quintessentially economic." *See Raich*, 545 U.S. at 25. While the ESA is indeed comprehensive, it is not comprehensive in the economic sense. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) ("[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."). Although, the Ninth Circuit recently sustained a challenge to the Service's authority to regulate takes under *Raich*, it failed to

consider whether the full scope of the Service's regulation of take is necessary to avoid frustrating any comprehensive economic scheme. *San Luis & Delta-Mendota*, 638 F.3d at 1175. Instead, that court ended its analysis once it decided that the ESA is a comprehensive scheme. *Id.* And finally, the Ninth Circuit did not consider whether the Necessary and Proper Clause limits the purposes that must be frustrated by the failure to regulate noneconomic activity in order for *Raich* to apply. *See id.* Because Raich pertains only to statutes that regulate commodities for which there is an established and lucrative interstate market, it is inapplicable to this case. In addition, the federal government's inability to regulate take of the Utah prairie dog would in no way frustrate any comprehensive scheme to regulate commerce. This lack of authority only frustrates its ability to pursue other, non-Commerce Clause ends—protecting biodiversity and conserving species—which it cannot rely on the Necessary and Proper Clause to pursue. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 421.[2]

CONCLUSION

The Service issued the special 4(d) rule for the Utah prairie dog based on its putative authority to regulate takes of this species. Under the Commerce Clause, however, the Service has no such authority because Utah prairie dog takes are not an economic activity that substantially affects interstate commerce. The special 4(d) rule also cannot be sustained under the Necessary and

[2] "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat.) at 421.

Proper Clause because neither it nor the ESA is a comprehensive scheme to regulate commerce. Accordingly, the special rule should be declared invalid and its enforcement enjoined.

DATED: November 18, 2013.

Respectfully submitted,

MATT MUNSON
DAMIEN M. SCHIFF
JONATHAN WOOD

By /s/ Jonathan Wood
JONATHAN WOOD

Attorneys for Petitioner and Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing: MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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Petitioner and Plaintiff,

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UNITED STATES FISH AND WILDLIFE SERVICE; et al.,

Respondents and Defendants,

and

FRIENDS OF ANIMALS,

Respondent-Intervenor.

Case No. 2:13-cv-00278-DB

DECLARATION OF MARK BRADSHAW IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Mark Bradshaw, hereby declare as follows:

1. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a resident of Cedar City, Utah.

3. I am a member of People for the Ethical Treatment of Property Owners.

4. I own an investment property in Cedar City, which I would like to develop into a car dealership.

5. Utah prairie dogs are present at the property.

6. Due to their presence, I am unable to use or develop my property. I do not believe that a car dealership can be constructed on the property without causing the take of Utah prairie dogs.

7. The presence of Utah prairie dogs also makes the property impossible to sell, unless I accept a greatly reduced price. I believe that potential purchasers are discouraged from buying the property because the presence of prairie dogs will prevent them from using or developing the property.

8. My property does not fall within one of the categories for which the 4(d) Rule allows permitted take. Therefore, the rule injures me by forbidding me from removing Utah prairie dogs to develop my property.

9. The 4(d) Rule would only allow me to take Utah prairie dogs if a conservation area is established within half a mile of my property. But even if one was established, the rule would only allow me to take prairie dogs to prevent their number on my property from growing. Under no circumstances would the rule allow me to remove them entirely so that I could develop my property.

10. I would like to protect my property by removing the Utah prairie dogs, but fear prosecution by the Service for an illegal take. As a result, I have refrained, and will continue to refrain, from protecting my interests.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed this 14 day of November, 2013, at Cedar City, Utah.

Mark Bradshaw

MARK BRADSHAW

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing: DECLARATION OF MARK BRADSHAW IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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Case No. 2:13-cv-00278-DB

DECLARATION OF JOE BURGESS IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Joe Burgess, hereby declare as follows:

1. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am the mayor of the Cedar City Corporation, and I am authorized to sign this declaration on its behalf.

3. Cedar City Corporation is the municipal government for Cedar City, Utah.

4. Cedar City Corporation is a member of People for the Ethical Treatment of Property Owners.

5. As a municipal government, Cedar City Corporation owns and operates numerous public facilities for the benefit of local residents, including recreational areas, a golf course, airport, and cemetery. The restrictions imposed on Utah prairie dog take by the Fish and Wildlife Service's 4(d) Rule complicates the Corporation's ability to operate these facilities.

6. Utah prairie dogs dig and burrow on the city's recreational areas, including sports fields. Because of the resulting safety hazards, Cedar City Corporation has to fence off areas of these fields, limiting the space available to local children to recreate.

7. Utah prairie dogs also occupy the municipal golf course. They chew through the wiring in the irrigation system. As a result of this damage, Cedar City Corporation has had to repair or replace parts of this system.

8. The prairie dogs have pockmarked the driving range, making it more difficult for the Corporation's employees to retrieve balls and maintain the range.

9. Utah prairie dog holes have damaged the Corporation's mowing equipment.

10. I believe that the additional maintenance, irrigation, and equipment costs average $5,000 to $6,000 per year.

11. In addition to these increased costs, the Utah prairie dogs have made the course grounds less suitable and created a safety hazard for employees and guests.

12. Utah prairie dog mounds create severe hazards at the Cedar City Regional Airport, particularly in the runway and taxiway safety zones. In case of a mechanical problem, these zones must be flat.

13. Mounds and burrows also create a constant need for additional maintenance at the airport. Cedar City Corporation had to purchase additional equipment and task employees to regularly grade the airport's grounds to deal with ruts and mounds, significantly increasing its costs. The Corporation must engage in these costly efforts to address the symptoms of the Utah prairie dog on the airport grounds, because the 4(d) Rule prevents it from removing them.

14. Complying with a 2009 habitat plan negotiated between the Federal Aviation Administration and the Service required the Corporation to forego $325,000 of airport improvement funds. These funds were intended for badly needed improvements at the airport. The Corporation had to accept these costs because of the burdens imposed by the predecessor to the 4(d) Rule.

15. For the last 12 years, most of that under the predecessor to the 4(d) Rule, Utah prairie dogs have occupied Cedar City Cemetery. Their presence interferes with Cedar City Corporation's ability to maintain the cemetery. Their burrows have broken the cemetery's roads and grounds, causing damage to the Corporation's equipment and vehicles. Increased costs and lost equipment time have made it more difficult for the Corporation to maintain the cemetery grounds.

16. Utah prairie dogs also threaten the solemnity of Cedar City Cemetery. Earlier this year I was informed that they interrupted a funeral by barking loudly and incessantly during the service. I believe that this disruption caused great stress for the attendees, including the unfortunate widow.

17. Utah prairie dogs threaten grave sites. Their burrows create an uneven ground that is more difficult to traverse for visitors, especially the elderly and disabled.

18. Utah prairie dogs chew and eat flowers and other remembrances left by mourners. Prairie dogs have also contributed to overcrowding because they occupy areas into which the cemetery planned to expand.

19. The 4(d) Rule's restrictions prevent Cedar City Corporation from adequately protecting Cedar City Cemetery from the Utah prairie dog. The Corporation has tried to limit the prairie dog's invasion by installing a "prairie dog fence," but these efforts have failed. Building this fence and other maintenance related to the Utah prairie dog have cost the cemetery approximately $3,000 per year. Under the 4(d) Rule, the Corporation must continue to pursue these unsuccessful efforts. It forbids the Corporation from capturing and removing the prairie dogs that threaten this sacred site.

20. Although many of Cedar City Corporation's properties are eligible for permitted take of Utah prairie dogs under the 4(d) Rule, it must first suffer significant costs and delays before receiving a permit. These costs and delays are injuries that it cannot avoid under the 4(d) Rule.

21. If not restrained by the 4(d) Rule, the Corporation would like to capture the Utah prairie dogs and remove them from these public facilities. However, it fears imminent enforcement and prosecution from the Service for illegal take should it do so. Because of this fear, the Corporation has refrained from acting to protect its interests and the interests of local residents.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed this 14th day of November, 2013, at Cedar City, Utah.

Joe Burgess

JOE BURGESS
CEDAR CITY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing: DECLARATION OF JOE BURGESS FOR CEDAR CITY CORPORATION IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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FRIENDS OF ANIMALS,

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Case No. 2:13-cv-00278-DB

DECLARATION OF KEVIN CHILDS IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Kevin Childs, hereby declare as follows:

1. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a resident of South Jordan, Utah.

3. I am a member of People for the Ethical Treatment of Property Owners.

4. Les Childs was my father and passed away on October 9, 2013. I am an owner of Equestrian Pointe, a residential subdivision in Cedar City, Utah.

5. Utah prairie dogs are present at the property.

6. Due to their presence, I am unable to sell lots in the subdivision. An unbuilt lot that has been invaded by prairie dogs loses much of its value because a home cannot be built on it until the prairie dogs are removed—at best a time-consuming, and costly, process.

7. The 4(d) Rule's restrictions on Utah prairie dog take are too severe for removal to be economically feasible. Instead, vacant lots that have been occupied by the prairie dog remain unsold and vacant.

8. In 2009, I found purchasers for two lots in the subdivision, worth more than $100,000 each. These sales fell through because nearby prairie dogs posed too great a risk to the purchasers. If they moved onto the property after the sale, the purchasers would not be able to construct their dream homes.

9. Their fears were not unreasonable. I sold two residential lots which were invaded by hundreds of Utah prairie dogs in 2010, before homes could be constructed on them. The predecessor to the 4(d) Rule made it economically infeasible to remove such a large population prior to development. Because they cannot be developed, these properties have no value and warn off potential buyers.

10. Realtors must warn potential buyers of the prairie dog risk, increasing the difficulty of selling these lots further.

11. I have tried to protect my property from the Utah prairie dogs by constructing prairie dog fencing. This fencing has cost me in excess of $10,000.

12. Prairie dog fences don't work. Utah prairie dogs moved onto properties protected by the fence anyway.

13. Utah prairie dog mounds and the fences that can't keep them at bay are unsightly. These eyesores contribute to the further decline in the value of undeveloped lots.

14. Because my property is not within one of the categories for which the 4(d) Rule allows permitted take, it forbids me from removing Utah prairie dogs from my property.

15. Under the 4(d) Rule, my property could become eligible for take permits if a conservation area is established within half a mile of it. But this would only allow me to keep the existing Utah prairie dog population from growing. Under no circumstances would the 4(d) Rule allow me to remove all of the prairie dogs from my property so that I could develop it.

16. I would like to protect my property by removing the Utah prairie dogs, but fear prosecution by the Service for an illegal take. As a result, I have refrained, and will continue to refrain, from protecting my interests.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed this 10th day of November, 2013, at Southern Towns, Utah.

Kevin Childs

KEVIN CHILDS

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing: DECLARATION OF KEVIN CHILDS IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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Respondent-Intervenor.

Case No. 2:13-cv-00278-DB

DECLARATION OF BRUCE HUGHES IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Bruce Hughes, hereby declare as follows:

1. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a resident of Cedar City, Utah.

3. I am a member of People for the Ethical Treatment of Property Owners.

4. I own a 3.4 acre parcel in Cedar City. I purchased this parcel to provide income during my retirement.

5. Several years ago, Utah prairie dogs showed up on this property.

6. Before the collapse of the real estate market, I attempted to develop the property. However, I was unable to do so because the presence of Utah prairie dogs prevented me from obtaining a building permit. With the decline in the market, I have been denied this opportunity to profit from my investment thanks to the prairie dog.

7. When I sought the building permit, there were approximately 50 Utah prairie dogs on my property. Under the predecessor to the current 4(d) Rule, there was a county-wide limit on the number of takes that could occur. To remove the prairie dogs, I would have had to sign up on a waiting list, which could take years before I would ever receive permission.

8. I am informed and believe that the 4(d) Rule removes even this costly and time-consuming process. Because my property is not within half a mile of a conservation area, it is not eligible for even a permitted take.

9. I am informed and believe that the 4(d) Rule would only allow permitted take on this property if a conservation area were established nearby. But even then I would have to suffer a similarly costly and time-consuming permit process. And the rule would only allow me to resort to permitted take to prevent the Utah prairie dog population on my property from growing. Under no circumstances would it allow me to remove the prairie dogs entirely so that I could develop the property.

10. I continue to own the property, which I cannot develop or sell because the 4(d) Rule prevents me from removing the prairie dogs.

11. I would like to protect my property by removing the Utah prairie dogs, but fear prosecution by the Service for an illegal take. As a result, I have refrained, and will continue to refrain, from protecting my interests.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed this 14 day of November, 2013, at Cedar City, Utah.

BRUCE HUGHES

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing: DECLARATION OF BRUCE HUGHES IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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DECLARATION OF DEAN LAMOREAUX IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Dean Lamoreaux, hereby declare as follows:

1. I have personal knowledge of the following facts and if called upon to do so could competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a resident of Cedar City, Utah.

3. I am a member of People for the Ethical Treatment of Property Owners.

4. My spouse and I own a 200-acre farm in Cedar City. We purchased it in 1990, and have actively farmed it ever since.

5. When we purchased the property, there were no Utah prairie dogs present. But in the mid 1990s, they began to appear.

6. The presence of Utah prairie dogs has caused significant damage to our farming equipment. We have had to repair our swathers, balers, and bale wagons because of damage from prairie dog mounds and burrow cave-ins.

7. Once, our baler become stuck due to a burrow cave-in. Because of the equipment's size and weight, we had to hire someone to come to our farm and lift the equipment out of the hole. We had to suffer this expense because any other method of removing the baler would have caused it to break.

8. Utah prairie dog mounds dull and break the knives of our swather. Repair costs and lost equipment-time burden our ability to operate the farm.

9. Although the 4(d) Rule exempts our farming activities from prosecution for take, it prohibits us from preventing this damage to our equipment. We cannot capture and remove the Utah prairie dogs from our property under the rule.

10. I am informed and believe that we can pursue permits to remove the Utah prairie dogs under the 4(d) Rule, but the rule restricts total take on agricultural lands to 7% of the recovery unit population. This means that we cannot address the prairie dogs' effects without significant delay,

and must first construct a prairie dog fence. Further, we cannot resort to lethal take unless we first exhaust our ability to translocate them.

11. We would like to protect our property and our farm by removing the Utah prairie dogs that have moved there, but fear prosecution by the Service for illegal take. As a result, we have refrained, and will continue to refrain, from protecting our interests.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed this 13 day of November, 2013, at Cedar City, Utah.

Dean Lamoreaux

DEAN LAMOREAUX

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing: DECLARATION OF DEAN LAMOREAUX IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

Petitioner and Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; et al.,

Respondents and Defendants,

and

FRIENDS OF ANIMALS,

Respondent-Intervenor.

Case No. 2:13-cv-00278-DB

DECLARATION OF DEREK MORTON IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Derek Morton, hereby declare as follows:

1. I have personal knowledge of the following facts and if called upon to do so could competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a resident of Cedar City, Utah.

3. I am the spokesperson for People for the Ethical Treatment of Property Owners (PETPO).

4. PETPO is a 501(c)(3) membership organization that represents private property owners and other persons and entities subject to overly burdensome regulations.

5. PETPO was founded by Utah residents who suffer as a result of the regulation of Utah prairie dog take. Its members have been denied their rights to use and develop their property because of the restrictions contained in the 4(d) Rule, are burdened by the effects of these restrictions on their local communities, and have loved ones buried in a cemetery threatened by the prairie dog.

6. PETPO has 200 members including residents and property owners in southwestern Utah, as well as the municipal government for Cedar City, Utah.

7. It engages in advocacy campaigns by writing and publishing articles based on its research. It also makes presentations to its members and the public on matters involving property rights and the Endangered Species Act.

8. I and other PETPO members have published op-eds in state and local newspapers and been interviewed by media across the country regarding the Utah prairie dog.

9. I and other PETPO members have been regular guests on local talk radio shows to discuss the impacts of the Utah prairie dog.

10. Representatives of PETPO have met with elected officials at the city, county, state, and federal level to discuss the impacts that Utah prairie dog regulations have on its members.

11. Representatives have also met with officials from the U.S. Fish and Wildlife to discuss these concerns.

12. I have personally met with the head of the Utah Prairie Dog Recovery Implementation Program to discuss these issues and ways to reduce the burdens of these regulations on local property owners.

13. I have visited some of the sites established for Utah prairie dog translocation to gain a better understanding of how those sites are being used to contribute to the growth of Utah prairie dog populations without burdening private property owners.

14. PETPO has held public meetings to inform the public about the issues relating to the Utah prairie dog, PETPO's activities, and that this species should be protected by translocating animals to public lands where they can be permanently protected without unfairly burdening property owners.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed this 14 day of November, 2013, at CEDAR CITY, Utah.

DEREK MORTON

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing: DECLARATION OF DEREK MORTON IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

Petitioner and Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; et al.,

Respondents and Defendants,

and

FRIENDS OF ANIMALS,

Respondent-Intervenor.

Case No. 2:13-cv-00278-DB

DECLARATION OF BRENDA WEBSTER IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Brenda Webster, hereby declare as follows:

1. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a resident of Cedar City, Utah.

3. I am a member of People for the Ethical Treatment of Property Owners.

4. Last year, I buried my late husband Dan in the Cedar City Cemetery.

5. Utah Prairie dogs have occupied an area of the cemetery near the grave site.

6. They dig up the earth surrounding the graves, leaving ruts and mounts. I think this makes the cemetery less peaceful and pleasant.

7. I am concerned that, if the cemetery's Utah prairie dog problem is not addressed, they will disturb gravesites, possibly Dan's.

8. I am distressed by this possibility.

9. Should I or the cemetery operator attempt to protect the gravesites of Dan and those with whom he rests, I fear that we would be prosecuted for illegal take of the Utah prairie dog by the Fish and Wildlife Service.

10. Although the cemetery is within one of the categories eligible for take permits under the 4(d) Rule, the rule does not allow take unless you first attempt expensive and time-consuming measures like constructing an unsightly prairie dog fence. After these measures fail, take can only be used to protect the prairie dog after a permit is granted, adding additional costs and delays.

11. Because of the 4(d) Rule's restrictions, and this fear of prosecution, the cemetery has not been adequately protected from the Utah prairie dog.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed this 14th day of November, 2013, at Cedar City, Utah.

Brenda Webster

BRENDA WEBSTER

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013, I electronically filed the foregoing: DECLARATION OF BRENDA WEBSTER IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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/s/ Jonathan Wood
JONATHAN WOOD

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS, Plaintiff, vs. UNITED STATES FISH AND WILDLIFE SERVICE, et al., Defendants, and FRIENDS OF ANIMALS, Respondent-Intervenor.	**(PROPOSED) ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Case No. 2:13-cv-00278-DB

Claim One of Plaintiff People for the Ethical Treatment of Property Owners' (PETPO) Complaint for Declaratory and Injunctive Relief alleges that the Defendant U.S. Fish and Wildlife Service's (Service) 4(d) Rule, 50 C.F.R. § 17.40(g) as amended by 77 Fed. Reg. 46,158 (Aug. 2, 2012), regulating take of the Utah prairie dog violates the Administrative Procedure Act because it exceeds Congress' Commerce Clause authority. Having established that there is no triable issue of material fact and that PETPO is entitled to the requested relief as a matter of law, PETPO's request for declaratory and injunctive relief is hereby granted.

Claim Two of PETPO's complaint alleges that the 4(d) Rule violates the Tenth Amendment for the same reason. Having established that there is no triable issue of material fact and that

PETPO is entitled to the requested relief as a matter of law, PETPO's request for declaratory and injunctive relief is hereby granted.

Additionally, PETPO's request for the costs of litigation and reasonable attorneys' fees in the amount of _____ is granted.

Signed _____.

BY THE COURT

_____
HONORABLE DEE BENSON
U.S. DISTRICT JUDGE