

Utah District Court Strikes Down Regulation of Purely Intrastate Species on Private Land

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People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service; et. al.,
(11/05/14, 2:13-cv-00278-DB)

In a significant Endangered Species Act case, the **Utah District Court has ruled that Congress may not regulate** take of the threatened **Utah prairie dog**, a purely intrastate species, on non-federal land. The court found that the challenged regulation went beyond the scope of the Commerce Clause because it was a non-economic regulation and the take of prairie dog does not have a substantial effect on interstate commerce.

The court rejected the government's argument that the prairie dog affects interstate commerce because it has biological value to the ecosystem, commercial value for tourism, and scientific and research value. According to the court, these links to interstate commerce were too hypothetical and attenuated to support the regulation. The court also rejected the government's argument that the regulation has a significant effect on interstate commerce because it serves to limit agricultural and commercial activities on land occupied by the prairie dog. The proper focus of the Commerce Clause analysis is the regulated activity (in this case, take of the species), not the regulation itself.

The court also found that the regulation went beyond the scope of the Necessary and Proper Clause because protection of the prairie dog is not essential to the Endangered Species Act's economic scheme. It reasoned that take of the prairie dog on non-federal land—even to the point of extinction—would not substantially affect the national market for any regulated species or commodity.

The decision is significant because the Fourth, Fifth, Ninth, Eleventh, and D.C. Circuits have already upheld the regulation of purely intrastate species against similar constitutional challenges. If the decision is appealed to the Tenth Circuit and upheld, it will create a split of authority among the circuits, perhaps increasing the likelihood of Supreme Court review of the issue.

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