

Nos. 14-4151 and 14-4165

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

*Plaintiff-Appellee,*

-v.-

U.S. FISH AND WILDLIFE SERVICE, *et al.*,

*Federal Defendants-Appellants,*

and

FRIENDS OF ANIMALS,

*Intervenors-Defendants-Appellants.*

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ON APPEAL FROM THE U.S. DISTRICT COURT  
FOR THE DISTRICT OF UTAH

Case No. 2:13-cv-00278 (Hon. Dee Benson)

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**FEDERAL DEFENDANTS-APPELLANTS' MOTION  
FOR A TEMPORARY STAY OF APPELLATE PROCEEDINGS**

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## **I. Introduction and Summary**

Pursuant to Federal Rule of Appellate Procedure 27 and Tenth Circuit Rule 27, Defendants-Appellants the U.S. Fish and Wildlife Service et al. (the Service) respectfully move this Court for a temporary stay of appellate proceedings for a period of 135 days for the Department of the Interior to assess whether it should revise the rule that is the subject of the instant litigation. If the Court will not issue this stay, we alternatively ask that it extend the period of time in which to file a response to the pending *en banc* petition by an additional 30 days.

In this case, People for the Ethical Treatment of Property Owners, or PETPO, challenge the constitutionality of a rule that the Service issued on August 2, 2012, to conserve the Utah prairie dog, a species listed as threatened under the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 *et seq.* *Final Rule Revising the Special Rule for the Utah Prairie Dog*, 77 Fed. Reg. 46,158 (Aug. 2, 2012) (the Section 4(d) Rule or the Rule). The implementation of the Section 4(d) Rule has been suspended on nonfederal land since November 6, 2014, when the district court ruled in favor of PETPO. On March 29, 2017, a panel of this Court issued an opinion and order reversing the district court and upholding the Rule. *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, 852 F.3d 990 (10th Cir. 2017). However, the Rule remains suspended

until the mandate issues. Presently pending before the Court is PETPO's petition for rehearing *en banc*, the Service's response to which is due on June 29, 2017.

Given that nearly five years have passed since the Service issued the Rule and nearly three years have passed since it was last implemented on nonfederal land, the Department of the Interior has determined that a review of the Rule is appropriate, and will complete this review within 135 days, *i.e.*, by November 3, 2017. *See* Attachment A, Memorandum from the Acting Assistant Secretary for Fish and Wildlife and Parks to Acting Director, U.S. Fish and Wildlife Service, June 22, 2017. In conducting this review, the Service will consider whether any new information, including the impacts of the State's conservation efforts and the effect of the Rule's suspension following the district court's judgment, warrants revisiting the Rule and taking further administrative action. *Id.*

The Service requests a stay while it conducts this review because the review may result in a decision to take administrative action that would render PETPO's challenge moot and eliminate the need for further judicial review of this matter. Assuming this motion is granted, the Service will notify the Court of its determination as to whether further administrative action is warranted before the stay expires. In the Service does decide to initiate a new rulemaking, we may then come back to this Court to seek an additional stay to cover the rulemaking time period.

Counsel for the Service has conferred with counsel for all other parties to this litigation, and is advised that, as to the request for a stay, PETPO will not oppose the request, and Defendant-Intervenor-Friends of Animals will oppose the request. As to the request in the alternative for an additional 30-day extension of time, counsel is advised that it is unopposed by both PETPO and Friends of Animals. If the Service's extension request is granted, we respectfully request that the due date for Friends of Animals' response be extended by the same 30-day period.

**II. A temporary stay would further the interests of judicial economy.**

Courts have broad discretion to stay proceedings and to defer judicial review in the interest of justice and efficiency. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936), *quoted in Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 879 n.6 (1998); *see also Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (premature and unnecessary judicial review “would hardly be sound stewardship of judicial resources”).

On June 22, 2017, the Acting Assistant Secretary for Fish and Wildlife and Parks issued a memorandum directing the Acting Director of the U.S. Fish and Wildlife Service to review the 4(d) Rule and report back within 120 days as to

whether any change in circumstances warrants revisiting the Rule and a related General Conservation Plan (GCP) that is currently in development. Attachment A. The Department of the Interior will then decide within an additional 15 days whether to initiate a new rulemaking.

As mentioned above, implementation of the Section 4(d) Rule on nonfederal land has been suspended since the district court entered judgment in favor of PETPO on November 6, 2014. Since May 8, 2015, Utah prairie dog take has been regulated by the State's Utah Prairie Dog Management Plan and accompanying regulations in the Utah Administrative Code R657-70, "Taking Utah Prairie Dogs." *See Amicus Curiae Brief of Utah, Alaska, Arizona, Colorado, Idaho, Kansas, Montana, South Dakota, and Wyoming* at 1-2, 13-17. In conducting its review of the 4(d) Rule, the Service will consider the impacts of Utah's conservation efforts and the suspension of the Section 4(d) Rule, as well as any other available new information. Attachment A. This review may result in a decision to take further administrative action that could render PETPO's challenge moot. In that instance, the need for any party to seek further review of the panel decision would be eliminated. The requested stay would accordingly further the interests of judicial economy.

### III. Conclusion.

For the foregoing reasons, the Service respectfully requests that the Court temporarily stay any further proceedings in this case for 135 days. Assuming this motion is granted, the Service will notify the Court before the stay expires of its determination as to whether further administrative action is warranted.

If the Court denies the request for a stay, the Service respectfully requests that it be given 30 days from the date of the Court's order to file its response to PETPO's petition for rehearing *en banc* to permit additional review by Department of the Interior and Department of Justice officials.

Respectfully submitted,

/s/ Anna T. Katselas

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June 22, 2017

90-8-6-07542

## ADDITIONAL CERTIFICATIONS

I hereby certify that:

(1) there is no information in this document subject to the privacy redaction requirements of 10th Cir. R. 25.5; and

(2) hard copies of this document are not required to be submitted to the Court (2015 ECF User's Manual at pp. 17); and

(3) this document was scanned with System Center Endpoint Protection, version 1.245.1208.0, updated June 22, 2017, and according to the program the document is free of viruses.

*/s/ Anna T. Katselas*

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## CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2017, I filed a copy of the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Tenth Circuit by using the CM/ECF system. All registered case participants are CM/ECF users and will be electronically served by the CM/ECF system.

/s/ Anna T. Katselas

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# **ATTACHMENT A**




## United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

JUN 22 2017

### Memorandum

To: Acting Director, U.S. Fish and Wildlife Service

From: Acting Assistant Secretary for Fish and Wildlife and Parks 

Subject: Endangered and Threatened Wildlife; Review of the Special Rule for the Utah Prairie Dog

In 1984, the FWS reclassified the Utah prairie dog from endangered to threatened and first established a special rule (a “4(d) rule”) for the animal’s conservation. It was amended in 1991 and again in 2012. 50 C.F.R. § 17.40(g). The last 5-year review was completed in May 2012. The 2012 4(d) rule amendments addressed allowable take, the method of take, seasonal limitations, and added incidental take exemptions for standard agricultural practices. 77 F.R. 46158 (August 2, 2012). The amendments followed litigation over FWS’s 2007 decision not to reclassify the Utah prairie dog as endangered, litigation that implicated the issue of whether the amount of take allowed under the 1991 rule was biologically sound. Much of the 4(d) rule is in effect administered by the Utah Division of Wildlife Resources and other entities approved by FWS.

People for the Ethical Treatment of Property Owners, or PETPO, challenged the 4(d) rule as unconstitutional. In November of 2014, the district court ruled in favor of PETPO, finding the rule unconstitutional with respect to the regulation of take of the Utah prairie dog on non-federal land. Following that decision, the 4(d) rule and corresponding Habitat Conservation Plans (HCP) were no longer implemented. Since May 8, 2015, Utah prairie dog take has been regulated by the State’s Utah Prairie Dog Management Plan and the accompanying regulations in the Utah Administrative Code R6547-70 (“Taking Utah Prairie Dogs”).

On appeal, in March of 2017, the Tenth Circuit reversed the district court, upholding the legality of the rule. *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, 852 F.3d 990 (10th Cir. 2017). The litigation remains pending.

I understand that once the mandate issues from the Tenth Circuit, the 2012 4(d) rule will come back into effect to be implemented by the State and the FWS and that FWS is working on a comprehensive range-wide General Conservation Plan (GCP) to replace the HCPs. An HCP for Iron County is viable for approximately eighteen more months, but two low effect HCPs (one for Iron County and one for Garfield County) have expired. The 4(d) rule, the Iron County HCP, and the GCP will allow authorization or exemption of prairie dog take, take that would be otherwise prohibited under 50 C.F.R. § 17.31.

Five years have passed since the 4(d) rule has been in effect and since FWS has conducted a 5-year review. New information, to include regarding conservation efforts by the State, and the effect of the suspension of the implementation of the 4(d) rule after the district court's decision, may be available to inform the appropriate scope of the rule. In light of these circumstances, I hereby instruct you to review the special rule for the Utah prairie dog and report back within 120 days as to whether there is any new information that would warrant a change to the FWS's 2012 determination that it deemed the Section 4(d) rule for the Utah prairie dog "necessary and advisable to provide for the conservation of [this] species." This includes, but is not limited to, any change in circumstances that have arisen with the development of the GCP, the judicially mandated suspension of the implementation of the 4(d) rule, or new information about the species that would warrant re-visiting the rule and the GCP. After receiving the report, a determination will be made within 15 days as to whether a new rule making process should be initiated.