APPEAL NOS. 14-4151, 14-4165

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

vs.

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

and

FRIENDS OF ANIMALS,
Intervenor Defendants-Appellants.

On Appeal from the United States District Court
For the District of Utah
Case No. 2013-cv-00278-DB

BRIEF OF WYOMING ASSOCIATION OF CONSERVATION DISTRICTS, WYOMING FARM BUREAU FEDERATION, WYOMING STOCK GROWERS ASSOCIATION, WYOMING WOOL GROWERS ASSOCIATION AND UTAH FARM BUREAU FEDERATION AS *AMICI CURIAE* ON BEHALF OF THE PLAINTIFF-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Wyoming Association of Conservation Districts, Wyoming Farm Bureau Federation, Wyoming Stock Growers Association, Wyoming Wool Growers Association and Utah Farm Bureau Federation are nongovernmental corporate parties which do not have any parent corporations or publicly held corporations that own ten-percent (10%) or more of their stock.

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The Wyoming Association of Conservation Districts provides leadership for the conservation of Wyoming's soil and water resources, promotes the control of soil erosion, promotes and protects the quality of Wyoming's waters, promotes wise use of Wyoming's water and all other natural resources, preserves and enhances wildlife habitat, protects the tax base and promotes the health, safety and general welfare of the citizens of the State of Wyoming through a responsible conservation ethic.

The Wyoming Farm Bureau Federation is a general agriculture organization with more than 2,600 member families. Its members work together to develop agricultural resources, policy, programs and services to enhance the rural lifestyle of Wyoming. The Wyoming Farm Bureau Federation is organized, controlled and financed by members who pay annual dues.

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[1] Pursuant to Fed.R.App.P. 29(c)(5), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amici curiae*, their members, or their counsel) contributed money that was intended to fund its preparation or submission. Pursuant to Fed.R.App.P. 29(a), all parties have consented to the filing of this brief.

This organization provides a means by which farmers and ranchers work together for the benefit of the agriculture industry. Its policies cover a broad range of issues and include the interests of everyone in Wyoming who is directly or indirectly affected by agriculture.

The mission of the Wyoming Stock Growers Association is to serve the livestock business and families of Wyoming by protecting their economic, legislative, regulatory, judicial, environmental, custom, and cultural interests. The Wyoming Stock Growers Association pursues its mission of advocacy primarily through effective lobbying at both state and national levels by volunteer leadership and experienced staff. The Association maintains a legal fund to enable it to initiate, defend or support litigation on critical issues with the potential to have a major impact on its members' ranching enterprises.

The Wyoming Wool Growers Association is one of the foremost agricultural organizations in the State of Wyoming, working with others to protect, preserve and enhance the lamb and wool industry and the ranching community and lifestyle of Wyoming and the West. This is done through a variety of methods and activities, from working with legislators, governmental officials and the

general public to assure that decision makers and the public have accurate and complete information about the industry, to working directly with producers to educate and inform them on the latest technology or production practices which serve to enhance their operations and increase their profitability and sustainability. The Wyoming Wool Growers Association has been an active partner with the State of Wyoming and its citizens in caring for, enhancing and adding value to the renewable resources of the State. These continue to be among the most important goals and objectives of the Association and its producer members and supporters.

The Utah Farm Bureau Federation is a non-profit corporation organized under the laws of the State of Utah, formed in 1916 to promote, protect and assert business, economic, social and educational interest of its members. The Utah Farm Bureau Federation is Utah's largest farming and ranching organization consisting of member families located in all 29 counties. Many of the 28,000 member families are direct descendants and/or successors-in-interest of the pioneers who settled Utah. The organization provides a mechanism by which farmers and ranchers work together on a broad range of issues for the benefit of the

industry covering a broad range of topics for those who are directly or indirectly affected by agriculture.

SUMMARY OF THE ARGUMENT

The Utah prairie dog resides entirely within the boundaries of the State of Utah and has no discernible effect on interstate commerce. Consequently, the federal government has no constitutional authority to regulate the taking of Utah prairie dogs on non-federal land under the Endangered Species Act. The purported commercial and biological value of the Utah prairie dog is inadequate to demonstrate that taking of the Utah prairie dog has a substantial effect on interstate commerce. There is no evidence that the taking of the Utah prairie dog on private lands in the State of Utah would significantly impact other species for which a national market exists.

Finally, due to budget shortcomings, ESA statutory deadlines and citizen-suit litigation, the federal government is ill-equipped to provide suitable resources to ensure the protection and recovery of wholly intrastate endangered species. The federal government is well known for its slow and bureaucratic methods of implementing any policy. Rather, protecting wildlife is peculiarly within the police

power of the individual states, each of which has great latitude in determining what means are reasonable and appropriate for the protection and recovery of endangered species residing within their respective boundaries. Individual states are innovative governments that can best respond to their unique circumstances and species endangerment as opposed to a federal task force far removed from the local scene.

Consequently, based on the foregoing, the judgment of the District Court should be affirmed in its entirety.

ARGUMENT

I. Incidental Taking of a Purely Intrastate Species On Private Land Does Not Constitute Interstate Commerce.

A regulated activity's effect on interstate commerce must be both direct and substantial to withstand scrutiny under the Commerce Clause. See United States v. Patton, 451 F.3d 615, 625 (10th Cir. 2006). "Where the regulated activity is not commercial in nature, Congress may regulate it only where there are 'substantial' and not 'attenuated' effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce." Id., quoting United States v. Morrison, 529 U.S. 598,

614-15 (2000). This standard is unlikely to be satisfied when the regulation regulates intrastate — *i.e.*, activity that occurs wholly within a single state — noneconomic activity. See United States v. Riccardi, 405 F.3d 852, 866 (10th Cir. 2005). Accordingly, "where the activity subject to regulation is both intrastate and non-economic is the Court likely to find it beyond congressional power." See id.

As its name suggests, the Utah prairie dog occurs only within the State of Utah. The United States Fish and Wildlife Service concedes that the Utah prairie dog is a purely intrastate animal. See People for the Ethical Treatment of Property Owners v. United States Fish and Wildlife Service, Case No. 2013-cv-00278-DB, 2014 WL 5743294, at *4 (D. Utah Nov. 4, 2014). Moreover, the Utah prairie dog does not travel through channels of interstate commerce and it has no recognizable impact on interstate commerce. Due to the fact that the Utah prairie dog only occurs within the boundaries of the State of Utah and has no discernible effect on interstate commerce, the federal government has no constitutional authority to regulate the taking of Utah prairie dogs on non-federal land under the Endangered Species Act.

A. The Commerce Clause Does Not Permit Broad Regulation of Activities That Do Not Affect Interstate Commerce.

The Commerce Clause gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." See U.S. CONST. art. I, § 8. At one point in time, the power of Congress under the Commerce Clause appeared to be virtually unlimited. See Hon. Alex Kozinski, Introduction to Volume Nineteen, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995). However, this seemingly unlimited power was narrowed by the United States Supreme Court in United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000).

In Lopez, the Supreme Court determined that there are only "three categories of activity that Congress may regulate under its commerce power." See United States v. Lopez, 514 U.S. at 558-59. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress may regulate those activities having a substantial relation to interstate commerce. See id. In

Morrison, the Supreme Court further clarified that if Congress is not regulating the channels or instrumentalities of interstate commerce, or things moving in interstate commerce, its Commerce Clause power is limited to regulating economic activities that, in the aggregate, have a non-attenuated and substantial effect on interstate commerce. See United States v. Morrison, 529 U.S. at 610 (emphasis added).

The regulation of the Utah prairie dog by the United States Fish and Wildlife Service is not a valid exercise of power under the Commerce Clause, because it neither satisfies the "substantial effect" standard articulated in Morrison, nor does it fall into any of the three categories articulated in Lopez. That is to say, the Utah prairie dog does not travel through channels of interstate commerce, it is not an instrumentality of interstate commerce, and it does not have a substantial relationship to interstate commerce.

Ultimately, there are no enumerated powers authorizing Congress to regulate the taking of an animal that is purely intrastate and that has no commercial market. "The Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the

ends Congress seeks by the regulation of commerce." National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2646 (2012) (Scalia, J., dissenting). In determining whether the regulated intrastate activity substantially affects interstate commerce, "substantial" must be understood to have reference not only to a quantitative measure but also to qualitative ones; effects which are too indirect, remote, or attenuated — or are seen only by piling "inference upon inference" — are not substantial. See United States v. Bird, 124 F.3d 667, 683 n. 11 (5th Cir. 1997).

The power of Congress to regulate intrastate activities is more limited than its power to regulate the instrumentalities and channels of interstate commerce. Whereas Congress may regulate any instrumentality or channel of interstate commerce, the Constitution permits Congress to regulate only those intrastate activities that have a substantial effect on interstate commerce. Further, federal regulation of intrastate activity must regulate activity that is economic in nature. See United States v. Morrison, 529 U.S. at 610. This limitation recognizes that if the federal government is allowed to encroach upon noneconomic areas of State concern, federal regulation will crowd out state legislation in

contravention to the Constitution's federalist dynamic. See United States v. Lopez, 514 U.S. at 595 (Thomas, J., concurring) (noting that the power to regulate "intrastate commerce " which substantially affects interstate commerce does not sanction federal regulation of intrastate "activities" unrelated to commerce).

Here, in regards to the taking of a wholly intrastate endangered species, the government has enunciated no nexus whatsoever to interstate commerce and the evidence does not establish that the taking of a Utah prairie dog from private lands implicates interstate commerce in any way. To be sure, the taking of a solitary Utah prairie dog from private lands in the State of Utah does not substantially affect the status, protection or recovery of a separate endangered or threatened species in other states. There is no established connection between the taking of the Utah prairie dog from private lands in the State of Utah and its impact on the scientific, travel, publication or medical industries. Any claim that the taking of a Utah prairie dog from private lands in one state rises to a "substantial relationship" to interstate commerce is far too attenuated to pass muster. The mere possibility of future substantial effects on interstate commerce is simply too

hypothetical and attenuated from the regulation in question to meet Constitutional requirements.[2]

B. The Court Should Focus on Whether the Activity Being Regulated Substantially Affects Interstate Commerce, as Opposed to the Regulation Itself.

The proper focus of the "substantial effect" test is measured by the activity being regulated. See Gonzales v. Raich, 545 U.S. 1, 23 (2005). The regulated activity is the taking of the Utah Prairie dog. Accordingly, the question in the present case is whether the taking of the Utah prairie dog itself has a substantial effect on interstate commerce; not whether the regulation preventing the take has such an effect.

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[2] This is typically known as the "butterfly effect" and is best portrayed by *The Little Old Woman and Her Pig,* in The Tall Book of Nursery Tales (1972). The little old woman had been stymied in her attempt to get home because her recalcitrant pig refused to cross a stile. So the old woman gave water to a haymaker for a wisp of hay to give to a cow for some milk to induce a cat to begin to kill a rat that began to gnaw a rope that began to hang a butcher who began to kill an ox who began to drink some water that began to quench a fire that began to burn a stick that began to beat the dog who began to bite the pig who jumped over the stile in a fright. See United States v. Wang, 222 F.3d 234, 239 (6th Cir. 2000) (citation omitted). While this sequence of events got the little old woman home that night, such a causal chain will not suffice to justify prohibition of a taking of a wholly intrastate species of wildlife.

For example, in Rancho Viejo, LLC v. Norton, the district court upheld an order, from the United States Fish and Wildlife Service, directed to a developer to remove a fence from its own property in order to accommodate the movement of arroyo toads, a species of neither migratory habit nor commercial use. See Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1064-65 (D.C. Cir. 2003). The district court's holding that the taking of a non-commercial, intrastate species may be constitutionally regulated by the federal government under the authority of the Commerce Clause was affirmed on appeal. See id., at 1079-80. However, in dissent from a denial of rehearing *en banc*, then Circuit Judge John G. Roberts, Jr. cautioned that because the panel focused on the challenged regulation rather than the activity being regulated, the circuit's decision was suspect. See Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting) (stating that "the panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating "Commerce . . . among the several States."). "Looking primarily beyond the regulated activity . . . would 'effectually obliterate' the limiting purpose of the

Commerce Clause," and under such an approach, "the facial challenges in Lopez and Morrison would have failed." See GDF Realty Inv., Ltd. v. Norton, 326 F.3d 622, 634-35 (5th Cir. 2003).

Consequently, this Court should analyze the effect of the activity being regulated here – the taking of the Utah prairie dog from private property – not the challenged regulation in itself. Congress may not regulate activity (*i.e.*, the taking of a Utah prairie dog) solely because non-regulated conduct (*i.e.*, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce. See id., at 634.

> True, 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. (emphasis in original). While the prohibition of taking the Utah prairie dog may prevent or interfere with commercial development, the ESA does not directly regulate these activities. Therefore, the commercial motivations of land developers or property owners is entirely irrelevant to whether or not the taking of a Utah prairie dog has a substantial effect on interstate commerce.

C. The Purported Commercial and Biological Value of the Utah Prairie Dog is Insufficient to Demonstrate That Take of the Utah Prairie Dog has a Substantial Effect on Interstate Commerce.

The United States Fish and Wildlife Service argues that the rule, despite regulating an exclusively intrastate species, has a substantial effect on interstate commerce, because many of the proposed activities that have been prohibited by the rule are commercial or economic in nature. The government argues that the Utah prairie dog has some biological value, and because the Utah prairie dog has some biological value any taking of the animal must have a substantial effect on interstate commerce.

However, "the Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems.'" See National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting). If Congress could use the Commerce Clause to regulate any intrastate entity or activity that might affect an ecosystem (to say nothing about its effect on commerce), that there would be no foreseeable stopping point to congressional power under the Commerce Clause. See id.

The mere potential for a substantial biological impact is simply not enough to advance the government's argument. At present, the Utah prairie dog has no quantifiable biological value that impacts interstate commerce. The government relies heavily on the potential "unknown value" of the Utah prairie dog to make their case. However, under this theory, literally anything could conceivably become an object of commerce at some point in the future. See National Ass'n of Home Builders v. Babbitt, 130 F.3d at 1058 (Henderson, J., concurring). If this court accepted this argument, it would have the effect of giving the federal government the authority to regulate any activity. See A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) ("There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. . . . Activities local in their immediacy do not become interstate and national because of distant repercussions.").

Finally, the government contends that the Utah prairie dog is a tourist attraction. The Fish and Wildlife Service supports their contention by citing to the number of nonresidents reported observing, photographing and feeding small animals (which may or

may not include the Utah prairie dog) in National Parks, like Bryce Canyon and Capital Reef. However, the government's evidence that the Utah prairie dog is a legitimate tourist attraction is inconclusive, at best. More importantly, the government ignores the fact that National Parks, where the majority of the Utah prairie dogs are being observed, are federal enclaves; enclaves that would remain unaffected by the take of the Utah prairie dog on privately owned lands.

II. A *De Minimis* Commercial Consequence is Not a Justifiable Basis for Regulation of Intrastate Species.

The burden is on the government to show that a rule, affecting a purely intrastate non-commercial species, has more than a *de minimis* impact on commercial activity. As set forth above, the activity being regulated must bear a substantial relation to interstate commerce. Here, however, "neither the actors nor their conduct has a commercial character." See United States v. Morrison, 529 U.S. at 611, quoting United States v. Lopez, 514 U.S. at 580 (Kennedy, J., concurring). Accordingly, the government's evidence that the Utah prairie dog has more than a *de minimis* impact on commercial activity is insufficient. The government

cannot meet its burden of producing enough evidence to support a reasonable inference that interstate commerce has been or will be affected.

The Utah prairie dog has no commercial value. The United States Fish and Wildlife Service has not made any findings that the taking of the prairie dog substantially affects interstate commerce. Rather, it has consistently concluded that the prairie dog is not used commercially and is not at risk due to commercial over-utilization.

The argument advanced by government is based on the Supreme Court's ruling in Gonzales v. Raich that a regulation may be upheld when it is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." See Gonzales v. Raich, 545 U.S. 1, 24-25 (2005). However, this Court has been careful not to aggregate too liberally for fear that it could convert the Commerce Clause into an unlimited federal power. See United States v. Patton, 451 F.3d at 622 ("If we entertain too expansive an understanding of effects, the Constitution's

enumeration of powers becomes meaningless and federal power becomes effectively limitless.").

In Gonzales v. Raich, the issue was whether Congress was authorized to regulate the purely local growth and consumption of marijuana. Because it was clear that a national market for marijuana already exists, the Court found that Congress has the power to regulate activities that have a substantial effect on that market. See Gonzales v. Raich, 545 U.S. at 17-22. Such activities obviously include growing marijuana, which leads to a greater national supply of the product, as well as consuming it, which affects the national demand for the product. Congress was consequently authorized to regulate any growth or consumption of marijuana in the United States, including any such activity that occurs exclusively within one state. See id. If Congress was not able to regulate those local activities, its ability to regulate the national market would be frustrated. See id.

This case differs markedly from Gonzales v. Raich, because the Utah Prairie Dog, unlike marijuana, is not an essential part of a larger regulation of economic activity. As the district court noted: "takes of Utah prairie dogs on non-federal land – even to the point

of extinction – would not substantially affect the national market for any commodity regulated by the ESA." See People for the Ethical Treatment of Property Owners v. United States Fish and Wildlife Service, 2014 WL 5743294, at *8. The district court continued: "the only evidence that suggests that the prairie dog's extinction would substantially affect such a national market is Defendants' assertion that golden eagles, hawks, and bobcats are 'known to prey on prairie dogs.'" See id. (citation omitted). However, the government fails to account for the fact that the Utah prairie dog is not a major food source for those animals, as those animals are known to prey on many other species, besides the Utah Prairie dog. See id. (emphasis added). In other words, there is no evidence that the taking of the Utah prairie dog on private lands in Utah would significantly impact other species for which a national market exists. See id. It follows that congressional protection of the Utah prairie dog is not necessary to the ESA's economic scheme.

The government does not provide enough evidence to make a compelling inference that interstate commerce will endure more than a *de minimis* commercial impact upon the taking of the Utah prairie dog. That is to say, when aggregated, the ESA's

comprehensive scheme to protect listed species would not truly be frustrated. Therefore, the federal government has no authority to prevent private landowners from protecting their property and other interests against the harms that the Utah prairie dog activity creates.

III. State and Local Regulation of Wildlife is the More Practical and Effective Approach to Environmental Stewardship.

The District Court ruled properly, because issues surrounding endangered species protection and habitat conservation for species existing solely within a state are better suited for state regulation and not according to federal mandate or oversight. The preemption of existing state wildlife protection regulations for purely intrastate species is not within the purview of the ESA and is beyond the constitutional scope of federal environmental regulation. See Daniel J. Lowenberg, The Texas Cave Bug and the California Arroyo Toad "Take" on Constitution's Commerce Clause, 36 St. Mary's L.J. 149, 190 (2004).

Protecting the "wildlife of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection." See Baldwin v. Fish and

Game Comm'n of Montana, 436 U.S. 371, 391 (1978), citing Lacoste v. Department of Conservation, 263 U.S. 545, 552 (1924). Today, states are equipped with species protection laws and regulations that make the role of the federal government in local wildlife habitat protection issues extraneous, redundant, and inefficient. See Lowenberg, 36 St. Mary's L.J. at 190, n. 217; see also Ala. Const. amend. 543 § 3(b) (establishing the Alabama Forever Wild Land Trust to acquire and maintain "areas supporting threatened or endangered species"); Col. Rev. Stat. § 24-33-111(2)(a) (creating a species conservation trust fund for species listed as threatened or endangered under state or federal law); N.J. Rev. Stat. § 13:8c-2 (creating a state habitat preservation trust fund "for endangered, threatened, and other rare species . . . necessary to preserve this biodiversity"); Tex. Nat. Res. Code Ann. § 201.001 (declaring it is "the public policy and in the public interest of the State of Texas to protect and preserve all caves on or under any of the land in the State of Texas"); and Wyo. Stat. § 23-2-103 (declaring it is policy of the state "to provide an adequate and flexible system for control, propagation, management, protection and regulation of all Wyoming wildlife").

Specifically, the Utah Department of Natural Resources has promulgated extensive regulations governing the taking of the Utah prairie dog. See Utah Admin. Code R657-19-6. The regulations require that a person taking a Utah prairie dog obtain a certificate of registration from the state and provide recordkeeping and reporting. See id. In addition, the regulations establish how an animal may be taken and provide penalties for violations. See Utah Admin. Code R657-19-6 through R657-19-11. Utah's Department of Natural Resources also holds a Species Protection Account within its general fund. See Utah Code Ann. § 79-2-303. Money in the account may be appropriated by the state legislature to develop species protection measures, obtain biological opinions, conduct studies and research species. See id.

Recognizing the importance of state-specific conservation efforts, the states have independently acted to conserve species unique to their jurisdiction without the oversight of federal agencies. Laws and regulations are currently in place at the state level for the protection and recovery of endangered species. With their ability to swiftly promulgate new legislation and administrative rules to address sensitive species, the states are undoubtedly more

adept to protect and recover intrastate species than is the federal government.

The District Court's decision was proper in light of the federal government having no interest in wholly intrastate endangered species. Utah state and local governments have created effective programs and policies to ensure that endangered species within the state are protected and ultimately recovered. State and local governments have always been more equipped with policy innovation and efficiency in addressing local and state issues, and endangered species are no exception.

A. The Federal Government Cannot Effectively Manage Intrastate Endangered Species.

State expertise and responsiveness to in-state problems are far more favorable and effective than oversight from detached federal authorities who have far more issues to address in the national purview. As a result of budget shortcomings, ESA statutory deadlines and citizen-suit litigation, it seems unlikely that the federal government possesses the resources necessary to protect the wholly intrastate endangered species from extinction. The

federal government is well known for its slow and bureaucratic methods of implementing any policy.

Foremost, the United States Fish and Wildlife Service is responsible for the recovery of approximately 1,570 species listed as either endangered or threatened under the ESA in the United States, in addition to considering whether to list a perpetually increasing number of other species. In comparison, the State of Utah has only forty-three species listed under the ESA for which to concentrate conservation and recovery efforts.[3]

The federal government does not have the resources to properly regulate intrastate species listed under the ESA. The government's budget for the listing program has never been sufficient to address the entire backlog. See Benjamin Jesup, Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements, 14 Vt. J. Envtl. L. 327, 341 (2013) (explaining since the inception of the ESA, the USFWS has faced a backlog of listing actions as a result of the Smithsonian report recommending that the USFWS consider over 3,000 plant species

[3] The State of Wyoming only has twelve listed species.

alone for listing). The United States Fish and Wildlife Service itself has attributed its failure to designate critical habitat for species as a result of budgetary shortcomings directly attributed to litigation costs from environmental and other groups. See Jennifer Lee, Money Gone, U.S. Suspends Designations of Habitats, N.Y. TIMES, May 29, 2003, at A18; see also U.S. Dept. of Interior, Press Release: Endangered Species Act Broken – Flood of Litigation over Critical Habitat Hinders Species Conservation (May 28, 2003). Forced with responding to constant lawsuits and recovering over 1,500 species, the Fish and Wildlife Service does not have the resources or budget to effectively manage wholly intrastate species. The Fish and Wildlife Service's entire budget is at constant risk of depletion by litigation-driven listings and designations. The bottom line: the Fish and Wildlife Service cannot sustain listing and regulating intrastate species in light of its limited resources. See Candee Wilde, Evaluating the Endangered Species Act: Trends in Mega-Petitions, Judicial Review, and Budget Constraints Reveal A Costly Dilemma for Species Conservation, 25 Vill. Envtl. L.J. 307, 321 (2014).

B. Individual States are Better Equipped to Effectively Manage Intrastate Endangered Species.

On the other hand, allowing states greater freedom to create policy specific to the needs of their environments and species within them provides for greater innovation. States are innovative governments that can best respond to their unique circumstances and species endangerment as opposed to a federal task force far removed from the local scene. See Nicholas Primo, Federal v. State Effectiveness: An Analysis of the Endangered Species Act and Current Potential Attempts at Reform, 7 Pepperdine Policy Rev. Art. 5 (2014).

Further, states are able to experiment with different programs. Eventually, other states will adopt the most effective program to resolve the issues affecting their endangered species. See Jeffrey H. Wood, Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species after SWANCC, 19 J. Land Use & Envtl. L. 91, 116 (2003). States better understand the unique characteristics of their ecosystems and economy, and they can use this understanding to resolve issues affecting both. See id. A one-size-fits-all approach to protecting intrastate species is

poor policy in light of demographic variation, localized culture, differing geography, varied economic strengths, and limited federal resources. See id.

Congress can avoid constitutional violations by using its spending power to encourage states to take actions the federal government deems necessary to safeguard intrastate species. See id., at 120. As a result, the federal government may focus its efforts on protecting interstate species existing in larger populations, leading to a more efficient and effective use of conservation resources. See id. For these reasons, the United States Court for the District of Utah's decision was proper in light of the federal government having no interest in or jurisdiction to regulate wholly intrastate endangered species.

CONCLUSION

Based on the foregoing, the judgment of the District Court should be affirmed in its entirety. The federal government lacks any authority under the United States Constitution to regulate the taking of a purely intrastate species.

Respectfully submitted this 22nd day of May, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief (exclusive of the corporate disclosure statement, table of contents, table of authorities, and any certificates of counsel) contains 5,183 words as determined by Microsoft Word 2010.

I also hereby certify that an electronic file of this Brief has been submitted to the Clerk via the Court's CM/ECF system. The file has been scanned for viruses and is virus-free. In addition, the brief contains no information subject to the privacy redaction requirements of either Fed.R.App.P. 25(a)(5) or 10th Cir. R. 25.5.

Respectfully submitted,

/s/ Karen Budd-Falen
Karen Budd-Falen

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I further certify that I have also filed with the Clerk of the Court seven (7) paper copies of this Brief by sending them to the Court via Federal Express.

/s/ Karen Budd-Falen
Karen Budd-Falen