Utah Court Bucks the Trend: Holds Congress Lacks Power to Regulate Intrastate Species on Private Land

11.10.2014 | By Benjamin Z. Rubin

Contrary to every federal court of appeal decision that has addressed the issue, a federal court in Utah has held that the broad authority of the U.S. Fish and Wildlife Service (Service) to regulate "take" of threatened species under the Endangered Species Act (ESA) does not extend to an intrastate species. *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.,* No. 2:13-cv-00278, Doc. No. 68 (Utah D.C., Nov. 4, 2014). Given the strong likelihood of an appeal and the substantial contrary authority, which includes decisions by the Fourth Circuit, Fifth Circuit, Ninth Circuit, Eleventh Circuit, and D.C. Circuit Courts of Appeal, the long-term impact of the Utah court's decision is still very much up in the air. However, for the time being, private property owners in Utah have scored an unprecedented victory.

When a species is classified as "endangered" under the ESA, the "take" prohibition set forth in section 9 of the ESA is automatically triggered. However, the same is not true when a species is listed as "threatened" under the ESA. Instead, section 4(d) of the ESA authorizes the Service to issue such regulations "deem[ed] necessary and advisable to provide for the conservation of such species." The Service also has the discretion to extend the "take" prohibition set forth in section 9 of the ESA to the threatened species.

In 2012, relying on section 4(d) of the ESA, the Service issued a special rule for the threatened Utah prairie dog, a species that only inhabits Utah. The rule authorized "take" of the species by permit only on "agricultural lands, [private property] within [.5] miles of conservation lands, and areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites." Thus, if a private land development project would result in the "take" of a prairie dog, the rule would prohibit that development if the property owner was unable to obtain a permit from the Service.

A group known as People for the Ethical Treatment of Property Owners (PETPO) sued the Service under the federal Administrative Procedures Act, alleging that the Service lacked the authority to regulate a purely intrastate species on non-federal land. In defense of the special rule, the Service argued that the Commerce Clause and the Necessary and Proper Clause of the U.S. Constitution allow Congress to regulate the prairie dog on private land because such regulation has a "substantial relation" to interstate commerce. Specifically, the Service asserted that the rule was justified based on the three following independent grounds: (i) many of the proposed activities that are prohibited by the special rule such as commercial development are economic in nature, and therefore there is a substantial relation to interstate commerce; (ii) because the prairie dog has biological and commercial value, any take of the species substantially affects interstate commerce; and (iii) regulation of take of the prairie dog is essential to the economic scheme of the ESA and therefore authorized under the Necessary and Proper Clause.

As to the Service's first substantive argument, the court explained that the question is not whether the special rule substantially affects commercial activity, but whether "take" of prairie dogs substantially affects interstate commerce. Thus, the Service could not rely on the fact that the rule prohibits property owners from engaging in commercial activities to demonstrate a substantial relation to interstate commerce; instead, the Service needed to show that "take" of prairie dogs, in and of itself, substantially affects interstate commerce.

The court also rejected the Service's second argument, that the rule is valid because the prairie dog has biological and commercial value, finding that the connection was "too attenuated to establish a substantial relation between the take of the Utah prairie dog and interstate commerce." Specifically, while the court acknowledged that the species affects the ecosystem by providing food for other species and that it has been the subject of scientific research and published books, it ultimately found the Service's argument wanting, stating that "[i]f Congress could use the Commerce Clause to regulate anything that *might* affect the ecosystem . . . , there would be no logical stopping point to congressional power under the Commerce Clause. Accordingly, the asserted biological value of the Utah prairie dog is inconsequential in this case." The court also found that the Service's claim of "commercial value" was simply not supported by the evidence, as there was no evidence that tourism in Utah would suffer from "take" of the prairie dog on non-federal land.

Finally, the court rejected the Service's third argument, that the prairie dog rule is essential to the economic scheme of the ESA, because it found that take of the species would not substantially affect the national market for any commodity regulated by the ESA. The court distinguished the special rule for prairie dogs from the Service's special rule for the take of bald eagles by noting that there is a national market for bald eagle products, whereas there is no national market for the prairie dog. Consequently, unlike the prairie dog, even purely intrastate take of bald eagles substantially affects the interstate market for the species. The court also found that the prairie dog is not a major food source for any federally protected species for which a national market exists, and thus the fact that the bald eagle and other protected species may prey on the prairie dog is inadequate to justify the rule.

Accordingly, the court held that the neither the Commerce Clause nor the Necessary and Proper Clause of the U.S. Constitution authorizes the take of "purely intrastate species that has no substantial effect on interstate commerce" and whose regulation "is not essential or necessary to the ESA's economic scheme."

While the Utah court's decision is certainly significant, one should not forget that there are a number of decisions in a variety of federal appellate courts that have rejected the underlying logic of the decision. As

explained by another district court within the Tenth Circuit, the same Circuit that Utah is in, addressing a similar ESA issue, "[t]ime and again the courts of the United States have upheld the regulatory powers of Congress under the Commerce Clause; woe be the court that deviates from this broad and well defined concept of Article I powers." *Wyoming v. U.S. Dep't of Interior*, 360 F.Supp.2d 1214, 1242 (D.C. Wyo. 2005), affirmed on separate grounds by 442 F.3d 1262 (10th Cir. 2006).