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TENTH CIRCUIT: ESA ENFORCEABLE ON PRIVATE LAND, EVEN FOR STRICTLY INTRA-STATE SPECIES

The Ruling -- On March 29, 2017, the 10th Cir. Court of Appeals issued its opinion in the much-watched PETPO v. FWS case (10th Cir. Nos. 14-4151 & 14-4165), ruling that the Endangered Species Act (ESA) prohibition on "taking" listed species is enforceable on nonfederal land, even as to listed species found only within one State. The ruling overturned a Utah federal district court decision that held it was unconstitutional to apply an ESA section 4(d) "Special Rule" for the threatened Utah prairie dog to nonfederal property. (4(d) rules generally incorporate the ESA prohibitions applicable to endangered species under 50 C.F.R. § 17.21 to species listed as threatened, unless a "Special Rule" has been promulgated, in which case the latter applies.) The Court rejected the argument that neither the Commerce Clause nor the Necessary and Proper Clause grant Congress power to prohibit take of the Utah prairie dog on private land, and the United States Fish and Wildlife Service (FWS) cannot issue a regulation to the same effect.

The Facts -- The Utah prairie dog, originally classified as an endangered species, is exclusive to Utah with approximately three-fourths of the species inhabiting nonfederal land. In 1987, the Utah prairie dog was reclassified as a threatened species under the ESA and issued a Special Rule 4(d) to regulate its take. In 2012, the FWS revised Special Rule 4(d) to permit take of a Utah prairie dog only by permit, in designated locations, and in permissible amounts and methods. See 50 C.F.R. § 17.40 (g).

Procedural History -- In April 2013, People for the Ethical Treatment of Property Owners (PETPO) filed an action in federal district court challenging the constitutionality of the FWS's Special Rule. The district court granted summary judgment for PETPO, holding that neither the Commerce Clause nor the Necessary and Proper Clause authorize Congress to regulate take of the Utah prairie dog on nonfederal land. The Tenth Circuit affirmed the district court as to standing, but reversed and remanded the district court's holding that the challenged regulation is not authorized by the Commerce Clause.

Analysis – The Tenth Circuit found that PETPO's claims ultimately implicated the ESA's grant of authority to the Secretaries of the Interior and of Commerce to issue regulations that extend take prohibitions to threatened species. The Court reasoned that if Congress lacked this authority, then the ESA does not permit any regulation of prairie dog take.

The Tenth Circuit disagreed with the lower court's rationale that the regulated activity has no substantial effect on interstate commerce. The district court reasoned that the take of the Utah prairie dog on nonfederal land is not commercial or economic activity, so the Special Rule has minimal, if any, effect on interstate commerce. Alternatively, the Tenth Circuit reasoned that even if the activity in a particular case may not be regarded as commerce, or if it has a minimal effect on commerce, the activity may still be reached by Congress. The Commerce Clause authorizes regulation of a noncommercial, purely intrastate activity that is an essential part of a broader regulatory scheme which as a whole, has "a substantial relation to interstate commerce." Thus, the Tenth Circuit needed only to find that "Congress had a rational basis to believe that such a regulation constituted an essential part of a comprehensive regulatory scheme that, in the aggregate, substantially affects interstate commerce."

The Court concluded the ESA has a substantial relation to interstate commerce, because the "regulation of take of endangered and threatened species is directly related to—indeed, arguably inversely correlated with—economic development and commercial activity." The Tenth Circuit also found that Congress had a rational basis to regulate purely intrastate species, as essential to the ESA's comprehensive regulatory scheme, noting piecemeal exclusion of purely intrastate species would severely undercut the ESA's conservation purposes. The Circuit Court held that "the regulation on nonfederal land of take of a purely intrastate species [] under the ESA is a constitutional exercise of congressional authority under the Commerce Clause." Therefore, since Congress has the congressional authority to adopt such regulations, Congress may delegate this authority to the Secretary of Interior. (The Court abstained from analyzing the Special Rule under the Necessary and Proper Clause because it was upheld under the Commerce Clause).

Implications – PETPO arguably expands the scope of permissible regulation having substantial relation to interstate commerce under the Commerce Clause. The opinion may also be the clearest pronouncement on justifying ESA coverage for intrastate species based on a substantial relation to interstate commerce. The ramifications of what may be a fairly amorphous standard are difficult to predict, except for the likelihood that this Commerce Clause rationale will extend beyond the ESA's 4 (d) Rule.

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