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## Native Species Protection Act

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The Utah prairie dog was pushed to the verge of extinction in the early 20<sup>th</sup> century due to human development and a federal extermination campaign sponsored by the USDA. Consequently, the Utah prairie dog was listed under the Endangered Species Act (ESA) of 1973. The population then grew from 3,300 to more than 20,000 over the next decade, and its status under the act changed from “endangered” to “threatened.”<sup>1</sup> The population has exploded since then, with state surveys estimating it at around 90,000 today.<sup>2</sup>

The explosion in Utah prairie dog growth has been attributed to the fact that they now reside predominantly in suburbs and farmland, as opposed to shrubs and grasslands— their natural habitat. As of 2010, approximately 70 percent of Utah prairie dogs reside on private property<sup>3</sup>, largely thanks to the environment created by human development.

The ESA prohibits any activity that affects a single member of an endangered species, even on private property, without a federal permit. However, getting an ESA permit on private land is prohibitively difficult. Furthermore, federal management of the species under the ESA prevented state biologists from moving prairie dogs from residential areas to state conservation lands.

In 2013, People for the Ethical Treatment of Property Owners and the Pacific Legal Foundation filed a lawsuit against the U.S. Fish and Wildlife Service, challenging the regulation’s constitutionality. They argued that the power contained in the Commerce Clause cannot be stretched to authorize federal regulation of activity that is not interstate commerce, does not affect interstate commerce, and is unnecessary to the regulation of interstate commerce.

In 2014, a federal district court agreed, declaring the regulation unconstitutional. The judge reasoned that because there is no market for Utah prairie dogs or any economic activity involving them, choosing to regulate anything that *might* affect the ecosystem would lead to “no logical stopping point to congressional power under the Commerce Clause.”<sup>4</sup>

Unfortunately, in March 2017, the Tenth Circuit overturned Judge Benson’s District Court decision.<sup>5</sup> When the plaintiffs appealed their decision to the Supreme Court, their application for the writ of certiorari was denied.<sup>6</sup> This bill seeks to resolve the issue legislatively, by restricting the species that can be considered endangered to ones for which there is a market and interstate commerce nexus.

### Bill Specifics

- The bill amends the ESA to define “intrastate species” as
  - A species that is found entirely within the borders of a single State; and is
  - Not part of a national market for any commodity
- Specifies that intrastate species cannot be subject to the ESA and any other regulations

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<sup>1</sup> <https://www.nps.gov/bcr/learn/nature/upd.htm>; <https://www.govinfo.gov/content/pkg/FR-2012-08-02/pdf/2012-18284.pdf>

<sup>2</sup> <https://www.deseretnews.com/article/865676843/Utah-wildlife-managers-lament-prairie-dog-ruling.html>

<sup>3</sup> <https://www.perc.org/2017/12/09/a-prairie-home-invasion/>

<sup>4</sup> <https://pacificlegal.org/wp-content/uploads/pdf/people-for-the-ethical-treatment-of-property-owners-v-fish-and-wildlife-service/PETPO-Order-on-Cross-Motions-for-Summary-Judgment-11-5-14.pdf>, p. 12.

<sup>5</sup> <https://www.ca10.uscourts.gov/opinions/14/14-4151.pdf>

<sup>6</sup> <https://pacificlegal.org/case/people-for-the-ethical-treatment-of-property-owners-v-fish-and-wildlife-service/>