

RODENTS WINNING WAR WITH LANDOWNERS

Supreme Court asked to tear down rule giving animals protection at playgrounds, airport, cemetery

27th September 2017



The U.S. Supreme Court is being asked to tear up an appeals-court decision that gives the federal government unlimited power to deprive people of their private property in its efforts to protect a population of rodents whose numbers are surging.

The case involves an effort in Cedar City, Utah, to protect residences, playgrounds, an airport and a cemetery from damage caused by the local species of prairie dog.

Federal bureaucrats had designated the Utah prairie dog, a rodent that lives only in Utah but has a population of tens of thousands, as protected.

That meant nothing could be done to “harm” the rodents without special federal permission, such as removing their burrows from cemeteries or airport runways, or building homes where they occupied the land. Or even being on land where they live.

Landowners filed a lawsuit challenging the far-reaching protection order. In the case brought by the Pacific Legal Foundation on behalf of the People for the Ethical Treatment of Property Owners, a district judge ruled the government's claim the animals had "substantial" impact on "interstate commerce" was bunk and threw it out.

But then the 10th U.S. Circuit Court of Appeals reinstated the rule, leading to PLF's appeal to the U.S. Supreme Court.

PLF attorney Jonathan Wood explained the Constitution limits the federal government's powers to "those expressly listed."

However, the 10th Circuit's decision to give the government "extreme, limitless" authority over private property is wrong, he said.

"For decades, a federal regulation kept the people of southwestern Utah from doing things that the rest of us take for granted in our own communities. They were blocked from building homes, starting small businesses, even protecting playgrounds, an airport, and the local cemetery from a disruptive, tunneling rodent – the Utah prairie dog. Moreover, the federal regulation stopped the state from pursuing the species' recovery," he explained about the current controversy.

"That changed in 2015 when a federal court struck down the unconstitutional regulation. Since then, Utah has worked with property owners to conserve the species by moving prairie dogs from areas that cannot provide a forever home to public conservation lands.

"Utah's conservation program worked. The two years it has been implemented have coincided with the two highest population counts for the species since surveys began in the '70s. But the benefits of Utah's conservation program go beyond mere numbers. The state has also funded the creation and improvement of prairie dog habitat on state lands where they can be permanently protected. Finally, real progress is being made towards the species' long-term recovery."

Then the 10th Circuit stepped in and "construed the Commerce Clause to allow federal bureaucrats to regulate activity that isn't interstate commerce, doesn't affect interstate commerce, and is not necessary to regulate commerce."

"The 10th Circuit recognizes no limits on federal power but instead allows Congress to regulate whatever it wants for any reason," he said.

He explained that PLF believes that should not be the rule of the land, and the group is asking the Supreme Court justices to agree.

"The Utah prairie dog regulation simply has nothing to do with interstate commerce. There is no market for the species nor any economic activity involving it. Thus, the regulation cannot be justified as necessary to regulate interstate commerce. The Court should restore the state's successful conservation program – and constitutional limits on federal power," Wood said.

PLF client and PETPO spokesperson Derek Morton said decades of federal regulation "have created a lot of conflict but haven't brought us any closer to a long-term plan to protect the Utah prairie dog."

“The future of the species is on public conservation lands managed by state biologists, not backyards, playgrounds and other residential areas,” Morton said.

It was U.S. District Judge Dee Benson who threw out the federal agency’s claim that it could impose its rules and restrictions on private land at the trial court.

She found: “Although the Commerce Clause authorizes Congress to do many things, it does not authorize Congress to regulate takes of a purely intrastate species that has no substantial effect on interstate commerce. Congress similarly lacks authority through the Necessary and Proper Clause because the regulation of takes of Utah prairie dogs is not essential or necessary to the [Endangered Species Act’s] economic scheme.

“The federal government may take whatever measures it likes on its own property, in order to protect the prairie dog,” Wood continued. “But it can’t violate the U.S. Constitution by taking away the property rights of private citizens or local governments,” she said.

The judge warned of the consequences of deciding any other way.

“If Congress could use the Commerce Clause to regulate anything that *might* affect the ecosystem (to say nothing about its effect on commerce), there would be no logical stopping point to congressional power under the Commerce Clause.”