

# AOK Applauds Appeals Court Decision

## Kansas Court of Appeals Supports Position of Landowners Hosting Reintroduction of Black-footed Ferrets

July 2012 - Audubon of Kansas applauds the decision of a Kansas Court of Appeals panel that affirmed an earlier decision by Senior Judge Jack Lively, which permanently enjoined the Board of County Commissioners of Logan County from eradicating prairie dogs on approximately 10,000 acres of ranchland owned by Larry and Bette Haverfield, Gordon Barnhardt and Maxine Blank.

Prairie dog colonies are scattered over several thousand acres of rangeland on these jointly managed ranches, making it the largest and possibly the most ecologically important Black-tailed Prairie Dog complex in the state of Kansas. It serves as a principle focus for the reintroduction of federally endangered Black-footed Ferrets in Kansas. This small predator relies almost exclusively on prairie dogs for prey and lives in the burrows they create.

After being regarded as extinct in the state for fifty years, fourteen captive-raised ferrets were released on the Haverfield/Barnhardt complex in December 2007. Several additional releases followed, and the ferrets have been reproducing in the wild on the property and another nearby reintroduction site.

As argued by attorney Randall Rathbun on behalf of the landowners – who wanted to retain prairie dogs, the ferrets and other wildlife on their land – the Endangered Species Act (ESA) preempts the county from unilateral eradication of prairie dogs within the complex. Eradication as “authorized” under K.S.A. 80-1202 would destroy the food supply and habitat of the Black-footed Ferret, constituting an unlawful taking under the ESA.

In summary, the Court of Appeals declared that the ESA preempts K.S.A. 80-1202 because eradication may constitute an unlawful taking within the meaning of the act. The district court was correct that it did not have jurisdiction to determine the issues the County has presented that clearly fall under federal jurisdiction. The court decision stated that, “The County’s contention lacks legal merit because it is an attempt to do an end run around the ESA and the protection afforded the black-footed ferret.”

The Logan County Commission began a campaign to force landowners throughout the county to eradicate prairie dogs in the summer of 2005. During the past seven years the commission has hired and sent extermination contractors and a county employee to



Larry and Bette Haverfield and Gordon & Martha Barnhardt. Notice the recently released Black-footed Ferret peaking out of the burrow!

– Photo courtesy of USFWS

the Haverfield ranch complex with mandates that the land be poisoned with toxicants including Rozol® Prairie Dog Bait and Phostoxin, a dangerous gas that kills everything in treated burrows. The Logan County Commission and the Kansas Farm Bureau have spearheaded litigation to force landowners to comply with eradication orders. The landowners have defended their interests in various court proceedings.

It was hoped that the recent Kansas Court of Appeals decision would bring the seemingly endless barrage of litigation against the ranch landowners, and their rights to retain wildlife on their land to a close.

Audubon of Kansas and other wildlife conservation organizations have argued in the Kansas Legislature that the eradication statutes (K.S.A. 80-1202) used by counties to force landowners to poison prairie dogs, enacted more than a century ago, is antiquated and should be repealed. When eradication mandates are imposed, they drastically infringe on private property rights and promote extinction of wildlife when conservation and support for stewardship should be the state’s role – rather than promoting extinction.

In filings and arguments before the Court of Appeals hearing, Logan County commissioners contended that if the landowners failed to eradicate the prairie dogs at least they should adopt the same management and control strategy employed by The Nature Conservancy at the 16,800-acre Smoky Valley Ranch preserve.

A detailed article on the other aspects of the controversy was published in the 2011 Fall/Winter edition of *Prairie Wings* magazine. Entitled “CONSERVATION of Prairie Dogs and Reintroduction of Black-footed Ferrets REQUIRES COURAGE”, the article can be viewed online at <http://www.prairiewingsmagazine.org>.

Never mind that different entities involved in ranchland management have different objectives.

In an effort to accommodate the County Commissioners and critical neighbors, and stay within an established management plan to keep the prairie dog complex to about 2,000 acres or a bit more, TNC has maintained an established strategy of eliminating prairie dogs within a half mile of the boundary. Additionally, designated areas within the complex have been poisoned to provide areas that can be “filled in” with any growth of the population – possibly deterring expansion outward. Although Commissioner Carl Uhrich acknowledged in the first court trial that his preference would be for total elimination, this approach was advocated by Mr. Uhrich and the county’s “expert” wildlife extension witness in the first trial in November 2006.

Needless to say, if prairie dogs were poisoned back a half mile from all of the 27 miles of property line around the Haverfield/Barnhardt/Blank ranch complex, there wouldn’t be enough area left for a serious Black-footed Ferret recovery program. That, of course, is the second objective and ongoing thought process in the commissioners’ destructive pursuit, and

that of the Kansas Farm Bureau – which filed an Amicus brief, and assisted with other aspects of opposition to the ranch landowners.

Except for limited boundary control with Zinc Phosphide (not Rozol®), Larry Haverfield and Gordon Barnhardt prefer to rely on Ferruginous Hawks, Bald and Golden Eagles, Black-footed Ferrets, Swift Foxes, Coyotes and Badgers to help keep prairie dog numbers in check on the ranch complex. Control beyond this property (and that of TNC’s land) is provided without any cost to neighboring landowners by APHIS with funding from a partnership including USFWS, KDWP&T and TNC.

Following word of the decision by the Kansas Court of Appeals an avid anti-prairie dog person with no interest in property near the Haverfield/Barnhardt Ranch, and with only limited property interest near the TNC property, organized several opponents to ask the commissioners to appeal the decision. In early August, the county filed a Petition for Review with the Kansas Supreme Court, stating in traditional legal language that, “The County prays that the lower courts are reversed and the matter is set for trial.”

## Black-Footed Ferret Counts in Kansas



The two recent Black-footed Ferret (BFF) nighttime spotlight surveys demonstrate that, with sufficient habitat, the reintroduced animals are adapted to survive extreme drought and many of the dangers that threaten this small but specialized prairie-dog predator. The results also reveal that the protection afforded to the prairie-dog colonies that provide food and shelter to the ferrets has been incredibly valuable to this endangered species. Although adversely impacted by several years of drought and a substantial decline in prairie dog numbers in the winter of 2010-11, the BFF population has proved to be sustainable and had substantial reproduction on the Haverfield/Barnhardt/Blank (Haverfield Ranch) complex this year (2012).

A BFF litter survey was conducted by a group of interns in August who devoted 15 nights to spotlighting on the two reintroduction sites. They observed four litters with 13 BFF kits, along with four females on the Haverfield Ranch, plus an additional four solitary adults. One adult was observed on the TNC Smoky Valley Ranch.

A fall survey was conducted with the involvement of 36 volunteers between September 25 and October 4. Thirty-four BFFs were observed on the Haverfield Ranch, consisting of 14 juveniles (8 females and 6 males), 14 adults (8 females and 6 males) and six that were not captured. The survey also confirmed the likelihood that there were five BFF litters on the Haverfield Ranch this year.

Five BFFs were located on the TNC property, one adult female, one adult male and three unknowns. Twelve newcomers were brought in from the captive-rearing facilities and released on the TNC Smoky Valley Ranch to boost the population there. The release of these new recruits brought the known population going into the winter to a total of 51, with 17 now on the TNC property and 34 on the Haverfield Ranch.

Spring and fall surveys are organized by Dan Mulhern, project leader with the U.S. Fish and Wildlife Service. The large number of volunteers from as far away as Massachusetts is an incredible testament to the value placed on this recovery effort by people from Kansas and across the country.