



# Kansas Supreme Court Rules Favorably for the Flint Hills

A view of Alma in the fall.

Article by **Dick Seaton**

**A**udubon of Kansas and its conservation partners have won a major legal victory for the Kansas Flint Hills. In *Zimmerman v. Board of Wabaunsee County Commissioners*, the Kansas Supreme Court considered and rejected a series of attacks on the county's prohibition against commercial wind farms. In two lengthy and unanimous opinions, written by Chief Justice Nuss, the Court held that the prohibition is a reasonable one, that it does not deprive those land owners with wind leases of any property rights, and that it does not discriminate against interstate commerce.

The decision is one of the first in the country, and establishes a precedent in Kansas. It should also be an important guide for other states considering such prohibitions.

Of course its importance here is limited to those counties which have zoning regulations, and not every Flint Hills county has them. Wabaunsee County has both zoning and a comprehensive land use plan. It established a temporary moratorium on such wind farms in November of 2002; and then in June of 2004, its commission voted, 2-1, to prohibit them.

Suit was then filed against the County by landowners who had leases with wind developers. They were joined in their claims by owners of wind rights who are not themselves land owners. After some back and forth between the District Judge in Alma and the county officials, the Judge dismissed all the claims of the Plaintiffs and their associates.

The Plaintiffs appealed to the Kansas Supreme Court in 2007. Audubon of Kansas filed a friend-of-the-court brief, together with the Kansas Wildlife Federation, urging the Court to uphold the county's prohibition. Protect the Flint Hills also filed a supporting brief. The Wind Industry and the Kansas Farm Bureau filed briefs urging reversal of the District Court's decision. Also filing a brief were the Kansas League of Municipalities and The Kansas Association of Counties.

The Supreme Court dealt with the case at length and in two separate opinions. First, in October 2009, it found that the county's action was reasonable, that it followed statutory procedures, that it didn't violate the Contract Clause of the U.S. Constitution, and that it was not preempted by federal law. The Court reserved ruling on two other issues and ordered new briefs and re-argument as to those issues.

Then in October of 2011 the Court determined, in a second opinion, that the prohibition does not constitute a "taking" of private property without due process of the law and does not discriminate against interstate commerce.

The Court said there was one remaining issue, which needed factual clarification, namely whether or not the regulations impose an excessive burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution. It sent that question back to the District Court for trial on that single question.

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**"The health of the eye seems to demand a horizon. We are never tired, so long as we can see far enough." – Ralph Waldo Emerson**



But in early 2012, the Plaintiffs and their associates who own wind rights dismissed their case rather than take it to trial. Thus after almost 10 years the case was completely resolved. It represents a major victory for conservation, and for preservation of the Flint Hills, which are the last major remnant of what was once a vast sea of Tallgrass Prairie in the central United States.

What are the lessons to be learned? First, to take advantage of the decision a county must have zoning regulations. Next, those regulations must include a comprehensive plan which emphasizes the need to protect and preserve the rural character of the county, and the aesthetic values of the landscape. These were critical factors relied on by the Court in upholding the Wabaunsee County regulations. Finally, a county commission adopting such a prohibition needs to make factual findings, with the assistance of its attorney, which support the plan and the prohibition.

At this point, the outlook for the Flint Hills is favorable. Governor Brownback, like his predecessor Governor Sebelius, has lent the weight of his office to protect the Flint Hills from industrial windpower development. He has actually expanded the informally-protected area established by her.

Meanwhile, wind developers have begun to look farther west in Kansas, where extensively cultivated landscapes are candidates for siting of commercial windpower projects without destroying ecological values associated with native prairies and wetlands (assuming they are avoided). Finally, Congress has balked at extending the production tax credit (PTC), which is an enormous cost to taxpayers. At some point this major subsidy may be pared back in recognition of budget limitations. Developers consider the tax credits essential to the viability of commercial wind developments. All in all, even in those counties which lack zoning, the outlook at this point is positive for those of us who seek to limit industrial wind farms in the Flint Hills.

**Dick Seaton** is an attorney in Manhattan. He served as assistant attorney general in the 1960's and then as university attorney at Kansas State for 38 years, while also maintaining a private practice. He represented the plaintiff in a successful free speech case in the U.S. Supreme Court in 1995. He served on the 2002-2004 Kansas Wind and Prairie Task Force designed to help deal with the issue of siting wind power facilities. He serves as Vice President for Policy and Legal Affairs for AOK. He lives adjacent to the Konza Prairie and advocates for the Flint Hills.

## Wonderful Things Happen in the Flint Hills

The Flint Hills of Kansas have long been a priority conservation focus for Audubon in Kansas. In 1989 Audubon initiated the proposal that led to the Congressional passage of the Act that established the **Tallgrass Prairie National Preserve** in 1996. Two key elements were a purchase agreement on the 10,984-acre Z-Bar Ranch held by Audubon and a shared vision with local community leaders. Building appreciation for the natural and pastoral values of this landscape, and the remaining Tallgrass Prairie, was our foremost objective of this new unit of the National Park Service system. That was also AOK's objective when preparing the *Tallgrass "Prairie Parkway" Wildlife and Natural Heritage Trail* brochure, which is still available in quantities from our office.

This year two facilities opened that will dramatically enhance education, appreciation and enjoyment of this unique area. The impressive **Flint Hills Discovery Center** opened in Manhattan in April, and the National Park Service opened the preserve's Visitor Center near the historic ranchstead north of Strong City in July. Earlier in June, Emily Hunter and all the other incredible folks involved pulled off the eighth annual **Symphony in the Flint Hills** – an event that attracts more than 6,000 attendees and volunteers to experience these prairie hills for an afternoon of educational events and an evening of music. AOK has been honored to be supportive with flora and fauna field trips, and to simply join in the day's hospitality.

Last year, as detailed in the Fall/Winter edition of *PRAIRIE WINGS*, Governor Sam Brownback designated the **Tallgrass Heartland**, as a substantial part of the Flint Hills that should not become marred by industrial windpower developments. He also initiated a Flint Hills Visioning Summit held in the Ritchie Lodge at Camp Wood YMCA on a picture-perfect day in May 2011, followed by a second summit this past January in Topeka. These events gave a big boost to the work of the **Flint Hills Tourism Coalition**, and helped to bring many additional stakeholders together for one celebratory and networking event.

It is heartening that so many individuals and organizations are enthusiastic about the Flint Hills. They share the hope that most of the scenic, ecological and cultural qualities will be retained for future enjoyment of residents (ranch and farm landowners and their neighbors in area communities) and visitors alike. AOK continues to advocate for an additional complementary recognition: that at least a portion of the Flint Hills – an area approximately the size of Vermont – be designated as a **National Heritage Area**. This would simply underscore the cultural importance of the area, as well as encourage greater appreciation for the area's history and heritage. It is a history of splendid stewardship by generations that have largely kept their heritage intact. There are currently 49 national heritage areas in the country.

Photos by Ron Klataske