

NOT DESIGNATED FOR PUBLICATION

No. 105,178

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

GORDON BARNHARDT, LARRY HAVERFIELD, and
ELIZABETH HAVERFIELD,
Appellees,

v.

BOARD OF COUNTY COMMISSIONERS OF
LOGAN COUNTY, KANSAS,
Appellant.

MEMORANDUM OPINION

Appeal from Logan District Court; JACK L. LIVELY, judge. Opinion filed July 13, 2012.
Affirmed.

James M. McVay, of Great Bend, for appellants.

Randall K. Rathbun, of Depew Gillen Rathbun & McInteer LC, of Wichita, for appellees.

Michael D. Irvin, of Manhattan, for *amicus curiae* Kansas Farm Bureau.

Before BUSER, P.J., ATCHESON, J., and KNUDSON, S.J.

Per Curiam: The district court has permanently enjoined the Board of County Commissioners of Logan County (County) from eradicating an infestation of prairie dogs on a ranch commonly referred to as the Haverfield Complex. Gordon Barnhardt owns 1,370 acres of grassland within the complex, which contains approximately 600 acres of prairie dog towns. Larry and Elizabeth Haverfield own 6,720 acres of grassland within the complex, containing in excess of 5,000 acres of prairie dog towns. The complex is

also home for approximately 50 black-footed ferrets reintroduced to Kansas by the United States Fish & Wildlife Service (FWS). The ferrets survive by eating prairie dogs and living in burrows that prairie dogs dig.

The district court granted summary judgment to Barnhardt and the Haverfields because the black-footed ferrets are a protected species under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, and the County's eradication of "all prairie dogs, as required [in K.S.A.] 80-1202, would result in the death of the Black-Footed Ferrets [in the complex]." The district court also noted it was uncontroverted that only employees of the FWS and the property owners within the complex were authorized to incidentally take ferrets within the property. Accordingly, the court concluded the County should be enjoined from exercising its statutory authority to eradicate the prairie dogs pursuant to K.S.A. 80-1202.

Three issues are raised on appeal: (1) Did the district court err in finding that the ESA preempts the County from eradicating the infestation of prairie dogs within the complex; (2) did the district court err in finding that the eradication of prairie dogs within the complex would constitute an unlawful take of the black-footed ferret; and (3) did the district court err in finding that the FWS arbitrarily and capriciously abused its discretion in the implementation of the black-footed ferret release program within the complex?

We affirm the decision of the district court. The ESA preempts the County from a unilateral eradication of all prairie dogs within the complex. An 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. Whether an eradication of some of the prairie dogs can be undertaken to meet the legitimate concerns of other ranchers with land adjacent to or in close proximity to the complex, and constitute a lawful taking that is approved by the FWS, can only be addressed with the participation of necessary federal authorities through negotiation or federal litigation. A state court with only state

actors lacks jurisdiction to resolve the underlying issues. Consequently, the district court's imposition of an injunction will not be disturbed.

DISCUSSION OF ISSUES

The County argues the district court erred when it found that the ESA preempted K.S.A. 80-1202. Because prairie dogs are essential to the survival of endangered black-footed ferrets, the district court found that eradication of all prairie dogs under K.S.A. 80-1202 was in irreconcilable conflict with the ESA's obligation to ensure the survival of black-footed ferrets.

The doctrine of preemption, which is derived from the Supremacy Clause of the United States Constitution, invalidates state laws that interfere with, or are contrary to, federal law. U.S. Const. art. VI, paragraph 2; *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 294, 255 P.3d 1186 (2011). Analytically, there are two types of preemption: express and implied. And there are additional analytical subcategories under implied preemption to further assist judicial analysis. Although the categories are useful analytical tools, they are not rigidly distinct from each other and the categories often overlap. 292 Kan. at 294-95.

"[E]xpress preemption . . . applies when Congress makes its intent known through explicit statutory language." *Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. at 295. Congress has expressly addressed the scope of preemption under the ESA. See *Man Hing Ivory and Imports, Inc. v. Deukmejian*, 702 F.2d 760, 763 (1983). The United States Code provides, in relevant part:

"(f) Conflicts between Federal and State laws

"Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this

chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined." (Emphasis added.) 16 U.S.C. § 1535 (2006).

The FWS passed explicit regulations to implement the ESA with respect to the endangered black-footed ferret. See 50 C.F.R. § 17.84(g) (2011). Specifically, the regulations provide that "[n]o person may take [black-footed ferrets] in the wild in the experimental population area." 50 C.F.R. § 17.84(g)(2) (the regulation lists a number of exceptions, but the County does not contend its proposed action qualifies for any recognized exception). The FWS's environmental assessment classified the complex as an experimental-population site for black-footed ferrets. To the extent the state statute would result in the taking of black-footed ferrets on the complex, the ESA expressly preempts K.S.A. 80-1202.

For purposes of the federal statute, a "take" is defined broadly and means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2006). The FWS further defines "harm" within the definition of "take" as any act that causes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3(c) (2011). An incidental taking occurs when an endangered species is not purposefully taken but is taken as a result of lawful activity. 50 C.F.R. § 17.3. As already stated, if the County exterminated all prairie dogs within the complex, that would

incidentally disrupt the normal behavioral patterns of the black-footed ferrets with respect to food and shelter.

The County argues on appeal that under K.S.A. 80-1202 it has discretion to exterminate prairie dogs in a manner that avoids harming black-footed ferrets within the complex. This argument fails. K.S.A. 80-1202 requires that "the township trustees of the several townships in this state infested by prairie dogs may enter upon the lands so infested in their respective townships and make diligent efforts to *exterminate all prairie dogs* thereon." (Emphasis added.) If the township does not fulfill its statutory duty, then the trustees are guilty of a misdemeanor. K.S.A. 80-1208.

The balance of hardships always tips in favor of protecting endangered species. See *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1073 (9th Cir. 1996). In this case, the district court correctly determined that the County's attempt to fulfill its obligation under K.S.A. 80-1202 was in irreconcilable conflict with federal law. So the district court did not err in finding federal law preempted K.S.A. 80-1202, as the proposed eradication does constitute an unlawful taking of the black-footed ferret.

The County does contend on appeal that it contemplated only a partial extermination within the core of the complex that would not significantly impair or degrade the black-footed ferret's food supply or habitat. Consequently, the County argued summary judgment should not have been granted.

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude

summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal the court applies the same rules, and where the court finds that reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." *Osterhaus v. Toth*, 291 Kan. 759, Syl. ¶ 1, 249 P.3d 888 (2011).

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 County argues that it will coordinate with the FWS and the landowners to exterminate in a manner that will not harm the black-footed ferrets or significantly modify or degrade the ferret's habitat or impair its breeding, feeding, or sheltering behavioral patterns. This argument is not persuasive as a legal reason to support the grant of an order in favor of the County to enter the complex and poison prairie dogs.

The County attempts to analogize the facts of this case to *Cold Mountain v. Garber*, 375 F.3d 884 (9th Cir. 2004). In *Cold Mountain*, the court affirmed a summary judgment against Cold Mountain because it failed to establish a causal connection between helicopter noise and a bald eagle's alleged failure to reproduce. Although the studies suggested that bald eagles fled from noise, the studies never linked this flight from noise to a decrease in reproduction. Absent the necessary causal connection, there was no genuine issue of material fact. 375 F.3d at 890.

The County attempts to mirror the *Cold Mountain* holding (arguing the lack of definitive causal connection between exterminating prairie dogs and harm to ferrets creates a disputed material fact as to whether a taking will occur). But in this case, the facts are distinguishable. Unlike frightening an eagle, the County seeks to exterminate the food and shelter of the black-footed ferrets. Ferrets will not survive without food and shelter. Although both the extent of the harm and the ability to mitigate it is speculative at this point, the causal connection between the extermination of prairie dogs and the harm to ferrets is clear. As stated in *Babbitt*, "A reasonably certain threat of imminent harm to

a protected species is sufficient for issuance of an injunction under . . . the ESA." 83 F.3d at 1066.

Whether the County's proposed extermination would not constitute an incidental taking is a federal question. There are two avenues available to obtain relief under the ESA. The United States Supreme Court indicated that any final agency decision is reviewable under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704 (2006). Also, the citizen-suit provision of 16 U.S.C. § 1540(g) (2006) provides an avenue for relief specific to the ESA. *Bennett v. Spear*, 520 U.S. 154, 174-75, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

It has been held the APA provides for review exclusively within the jurisdiction of the federal courts. See *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989); *Federal Nat. Mortg. Ass'n v. LeCrone*, 868 F.2d 190, 193 (6th Cir. 1989). Accordingly we hold the district court did not have jurisdiction to hear the County's claims under the APA.

Additionally, 16 U.S.C. § 1540(c) grants only the federal district courts of the United States jurisdiction over citizen suits arising under the ESA. And even if the statute's express jurisdictional grant does not foreclose concurrent state-court jurisdiction, 16 U.S.C. § 1540(g)(2)(A)(i) requires a party raising a claim under the statute to send notice to the Secretary of the Interior and any alleged violator, and then wait 60 days before commencing suit. It is established that a party alleging a claim must designate facts in the record to support it. *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 283, 225 P.3d 707 (2010). Nothing in the record shows that the County has complied with the required notice. As such, the district court was correct that it did not have jurisdiction to entertain the County's allegations under 16 U.S.C. § 1540(g). See *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1509 (D. Or. 1991).

In summary, the ESA preempts K.S.A. 80-1202 because the eradication may constitute an unlawful taking within the meaning of the act. The County's speculation as to whether it could effectively exterminate some but not all of the prairie dogs within the complex without harming the black-footed ferrets is insufficient to preclude summary judgment. It is not for a state court to make a definitive determination. 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.

Affirmed.