

# *One person can make a difference...*

## *and everyone should try*



Larry on his motorcycle among his steers moving from one pasture paddock to another. He utilizes year-round rotational grazing.

Article by **Randy Rathbun**

**T**his is a story about a man. Although it involves prairie dogs, Black-footed Ferrets, the Logan County Commission, and the Kansas Court of Appeals, it is essentially the story of one man. It is a story of conviction, of perseverance and, in the end, justice.

This is a story about Larry Haverfield of Logan County, Kansas. Most folks who live east of the Mississippi cannot understand the beauty of western Kansas. Ask those people what they most remember about the drive along Interstate 70 west of Hays and they usually will ponder a bit before mentioning the world's largest prairie dog, which now hides behind a makeshift screen in Oakley, Kansas. Oakley is the largest town in Logan County and also serves as the county seat, having won that honor in 1963, beating out Russell Springs in what had become a nasty feud.

When you get off the interstate at Oakley and head south and west you cannot help but notice the interesting geography in the area. West of the Monument Rocks Chalk Pyramids is Lone Butte, which stands as a sentinel over southwest Logan County. Larry and Bette Haverfield's ranch lies at the base of the butte and spreads over almost 7,000 acres.

### **Western Kansas Ranchers Meet Wichita Lawyer**

I am proud of my roots in Ellsworth County. I grew up on a farm south of Ellsworth where the rich soil of Rice County gives way to the rolling hills of the Smoky Hills River basin. I have never thought of myself as a big-city lawyer, but I imagine I was perceived that way when Larry and Bette Haverfield and their adjoining landowner, Gordon Barnhardt came to my Wichita office in early November 2005. The County Attorney of Logan County, Andrea Wyrick, had just sent them a demand letter warning that if they had not begun "eradication" of prairie dogs on their ranch, the Logan County Prairie Dog Director would start the eradication for them and would bill them for the costs.

Larry and Bette are true salt-of-the-earth west Kansas ranchers. Larry was dressed in overalls and I quickly thought of my granddad. The Haverfields were very friendly but seemed a bit uncomfortable in the office of a Wichita environmental litigator. But when Larry began to talk about his beliefs I was captivated. The Haverfields are true Teddy Roosevelt conservationists. Larry spoke with passion about the value of every species on their land.

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1 John F. Kennedy

Larry's background is not exactly the stuff of a Horatio Alger's novel, but it is quite impressive and stands as a testament to the American ideals of hard work and ingenuity paying off. At age fourteen, Larry started in the cattle business near Scott City, feeding them before and after school. He jokes that he married his "trophy wife" Bette, because he was captain of his high school basketball team. At the age of 27, Larry and Bette borrowed the money to purchase 2,000 acres of pasture in southern Logan County and to this day they run steers. Larry and Bette have built the operation to a total of 6,700 acres owned and about 3,000 more rented for a Texas-sized ranching operation approaching 10,000 acres.

I was so impressed with the Haverfields that I agreed that day to do what I could to protect them from the County Commissioners in Logan County, who collectively were very straightforward in their beliefs that the only good prairie dog was a dead prairie dog. At the time though, we had no idea that this legal battle would not be limited to Logan County. Before it was over, the Haverfields and Barnhardts would be neck deep in a legal battle involving not only the taxpayers' coffers of Logan County against them, but also the Kansas Farm Bureau, the Mountain States Legal Foundation (a foundation made notorious by former USDI secretary James Watt), and the Kansas Department of Wildlife & Parks.

We immediately fired off a strongly worded, three-page letter to the County Attorney warning the county of the severe penalties under the Federal Insecticide, Fungicide and Rodenticide Act for violations of the Rozol label, which they planned to use for the extermination. The

**"In the confrontation between the stream and the rock, the stream always wins- not through strength but by perseverance."**

**— H. Jackson Brown**

label at that time precluded its use in the vicinity of grazing cattle and I noted that the County had been ignoring that restriction. The strongest arrow in our quiver, however, was the well-known secondary poisoning characteristic of Rozol, which arises from raptors' feeding on poisoned prairie dogs or the remains of dead prairie dogs that have died on the surface. In general it takes prairie dogs about twelve days to die once they have ingested a lethal dose of Rozol. We warned of the criminal liability that could arise from the death of the Ferruginous Hawks that rely on prairie dogs as a food source as well as the Golden Eagles that frequent the area at times.

When the County Attorney received our letter she punted the matter back to the County Commission for a response. The Commission's response was to schedule an open meeting to discuss what it referred to as the "prairie dog issue." The meeting was a donnybrook, with the anti-prairie dog forces vastly outnumbering the few environmentalists that had the courage to show up. Scorn was heaped down upon Larry as he spoke about the value of prairie dogs in our ecosystems, and on another courageous rancher who managed a complex of colonies within 1,800 acres of rangeland on his 10,000-acre ranch. Larry's reference to prairie dogs as a keystone species and its essential role in the life of Ferruginous Hawks, Burrowing

Owls and other short-grass species was met with blank stares and disapproving grumbles from the crowd that had been whipped to a frenzy by the Kansas Farm Bureau. The Colby Free Press noted that Larry was outnumbered 100 to one in a similar meeting the previous August—but that it fazed him not in the least.

The County would not budge from its reliance on a century-old statute found at K.S.A. 80-1202. This statute provides that in counties "infested" by prairie dogs, "township trustees may enter upon the lands so infested in their respective townships and make diligent efforts to exterminate all prairie dogs thereon." The statute allows the cost of the extermination to be taxed against the property.

Even though Larry was resolute, he was not unwilling to attempt to reach an amicable solution to the stalemate. After receiving information from Audubon of Kansas on management strategies that have diminished expansion of colonies onto neighboring land, Larry immediately began building a 30-yard vegetative buffer around most of the 22-mile perimeter of the Ranch. Research in South Dakota had reported promising results from the use of vegetative buffers to impede prairie dog emigration, based upon the instinctual fear of prairie dogs to enter into tall grass where they are more vulnerable to predators.



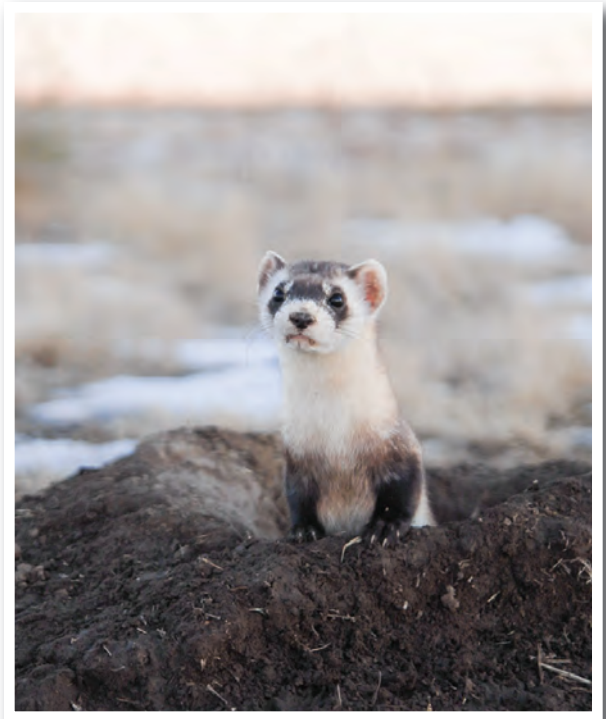
## Enter the Black-footed Ferret

In September of 2005, Gordon Barnhardt and Larry Haverfield invited the Executive Director of Audubon of Kansas, Ron Klataske, to visit the property to determine if there was any way in which Audubon of Kansas (AOK) could join with these ranch landowners in the effort to keep the county from eradicating the prairie dogs and much of the associated wildlife. Klataske had been on the Black-footed Ferret Recovery Plan team two decades earlier, and he had been a member of the broad-based committee that developed the Kansas Black-tailed Prairie Dog Management and Conservation Plan between 2000-2002.

Larry provided a tour of the ranchland, and the show of wildlife was incredible—including Pronghorns, Black-tailed Jack Rabbits, Burrowing Owls, hawks and eagles, and information on the abundance of Swift Foxes utilizing the property. Prairie dogs provided or enhanced the habitat and/or were the prey for these and many other species of shortgrass prairie wildlife. It was immediately apparent that this prairie dog complex fulfilled one of the top goals of the state's prairie dog plan—scattered colonies extended over 5,000 acres.

It was also apparent that this complex was likely the most suitable location in the state for reintroduction of Black-footed Ferrets. Within two months a joint letter from these landowners, and three others was prepared and addressed to the U.S. Fish and Wildlife Service (USFWS) requesting consideration of this and two other ranches for ferret reintroduction.

USFWS biologists toured the property and began a year-long process of evaluation with field studies and planning. The Haverfields and Barnhardts signed a five-year cooperative agreement for a special Section 10 experimental reintroduction of ferrets on the complex under the Endangered Species Act with the United States Fish & Wildlife Service in late November 2006. The agreement called for USFWS to provide Black-footed Ferrets for release on the Complex. The owners agreed that they would grant access to the property and would notify the service of any activity that might result in harm to the ferrets.



Black-footed Ferrets, now an object of both scorn and adoration in western Kansas, were almost an afterthought like the Passenger Pigeon, the California Golden Bear (*Ursus arctos californicus*, an extinct subspecies of the grizzly) and countless other species that no longer inhabit this planet. A member of the weasel family, it remains the rarest land mammal in North America. Although known by Native Americans, it was first discovered and described for science as a species in 1851, fittingly by John James Audubon. The Black-footed Ferret population decreased throughout the 1900s because of the plummeting number of prairie dogs due to poisoning campaigns and conversion of prairies to cultivation. Prairie dogs are essential for Black-footed Ferret survival in the wild because they make up virtually all of their diet. Additionally, sylvatic plague has decimated prairie dog colonies in many areas in western states in recent decades--and it is equally as deadly to Black-footed Ferrets. By the mid 20th Century these ferrets were believed to be nearly extinct, and presumed to be extinct in 1979 when the last one in captivity at the time died at the Patuxent Wildlife Research Center. Then in September 1981 a farm dog in Wyoming brought a dead one to the ranchstead and left it as a trophy for its owner. An astute taxidermist recognized the ferret and immediate efforts by wildlife officials resulted in locating the last known



Larry Haverfield releases one of the first Black-footed Ferrets reintroduced in Kansas in December 2007--fifty years after the last confirmation of a BFF in Kansas. This site is on the Barnhardt property.

—Ron Klataske photos

**“Good ideas are not adopted automatically. They must be driven into practice with courageous patience.”**

**– Admiral Hyman Rickover**

wild population. The Black-footed Ferrets at that location reached a peak population of 128 individuals, but it then crashed. The United States Fish & Wildlife Service and Wyoming Fish and Game Department captured the surviving eighteen and launched a captive breeding program that soon achieved astounding results. There are now an estimated 500 Black-footed Ferrets in the wild in sites in the western United States, Canada and Mexico.

Although these ferrets appear like friendly, almost cuddly, little creatures they are actually silent assassins. They are very solitary little mammals that are deadly nocturnal hunters. They spend most of their lives underground in prairie dog colonies until they wander out in search of their next prey. A ferret kills prairie dogs by biting their neck—with the back being a safer place than the front. This hunting takes place at night in the prairie dog burrows, most likely catching the prairie dogs in dreamland.

### **“All rise, the District Court of Logan County, Kansas...”**

After a year of attempting to resolve the matter amicably, the County fired the first volley in the legal battle by filing a civil action on January 7, 2007 in the District Court of Logan County seeking an injunction which would prohibit the Haverfields and Barnhardts from grazing cattle when the County was attempting to come onto their property to poison the prairie dogs with Rozol. The Kansas Farm Bureau quickly filed a motion to file a brief in support of the injunction with the consent of the County.

We responded, noting that the Haverfields and Barnhardts had entered an agreement with the USF&W to allow the reintroduction of Black-footed Ferrets on their properties under the authority of the Endangered Species Act of 1973. We argued that as of 2003, over 1800 ferrets had been reintroduced into the wild and that the USF&W believed this Complex was an ideal small reintroduction site.

The legal challenge by Logan County was made more difficult by what we viewed as a win-at-any-cost mentality by the Commissioners. Early on, one of the three Commissioners himself had gone onto nearby land and treated prairie dogs with Rozol in violation of the label restrictions on season of application, a violation of federal law. Clearly unrepentant, he received only a slap on the wrist from the Kansas Department of Agriculture. But it was a clear indication from the start of the lengths the commissioners would go to kill prairie dogs and halt the reintroduction of the endangered species.

The County sought to vilify Larry as a contrarian who was simply a troublemaker. They conveniently ignored the fact that the Haverfields and Barnhardts had spent over \$10,000 in 2006 poisoning prairie dogs on the perimeter of their property in an attempt to keep them from emigrating to their neighbors' land. They removed 240 acres from production in building the vegetative barrier around the perimeter of the complex. The toll on the Haverfields was emotional as well as financial. However, not once did they weaken in their resolve to see the struggle through.

In August 2007, as we prepared for trial we received an interesting call from the County's counsel. The County, which was seeking an injunction to “permanently enjoin said nuisance”, had apparently concluded that the case was not in the position that they wanted. The County seemed to prefer that the Haverfields and Barnhardts be in the position of seeking injunctive relief in response to trespassing by the County onto their property to kill prairie dogs. Accordingly, they offered to dismiss the case if the landowners would simply stipulate that they had been given notice to eradicate the prairie dogs and had refused to do so. That, of course, had never been denied by the landowners so the County dismissed the case.

By the fall of 2007, getting ferrets to the complex was a high priority for the USFWS. The reintroduction effort had been stalled along the way, reportedly by

Senator Roberts who—at the request of the Kansas Farm Bureau—had blocked the Service from publishing the environmental assessment in the Federal Register. Once the assessment had been published, it would take a couple months to fulfill that administrative process.

But before that could happen, the County would take action that brought the matter right back into court.

### **The County Steps up the Attack**

The Logan County Commission did not waste much time in making another attack on the Complex. Starting after “business hours” as the courts recessed for Labor Day weekend, on Friday, September 7, 2007 a private exterminator hired by the County once again began an effort to wipe out the prairie dog population on the Complex—but this time it resorted to a much more deadly pesticide. The County applied for a permit from the Kansas Department of Wildlife and Parks to use Phostoxin pellets in the prairie dog burrows. With the endorsement of the K-State Extension Service's “wildlife specialist,” the Kansas Department of Wildlife and Parks quickly granted the permit, and conveniently forgot to give notice to the Haverfields about what was going to soon happen on their property.

Phostoxin is a highly toxic fumigant that is placed in burrows and then all possible escape routes from the burrows are plugged with sand bags or simply covered with dirt. He used plastic trash bags partially filled with sand, and they littered the landscape for months. Everything in the burrows dies quickly, including Cottontail Rabbits, Swift Foxes, Ornate Box Turtles and Burrowing Owls—which are protected under the Migratory Bird Treaty Act.

The exterminator worked feverishly through the weekend, covering as much ground and killing as many prairie dogs as possible before we could get a restraining order on Tuesday. When the Shawnee County Courthouse opened on Tuesday



**Plastic bags partially filled with sand cover prairie dog burrows across hundreds of acres, littering the landscape with plastic above ground and serving as burial markers for all that lived in the burrows at the time of the application of Phostoxin--a poisonous gas.**

morning, I obtained a temporary restraining order prohibiting further use of the fumigant without a hearing on the legality of the use. Officials with the Kansas Department of Wildlife and Parks quickly disclaimed any interest in the fight and left the matter up to the County to defend.

The temporary injunction granted by Judge Charles Andrews in Topeka precluded the use of Phostoxin on the property until further order of the Court. Logan County moved to vacate that order and sought injunctive relief itself to prevent "the plaintiffs from interfering with the County's prairie dog extermination program."

The case proceeded to a hearing on November 20 before Judge Andrews. The parties spent a full day calling witnesses. We relied heavily on the testimony of Larry Haverfield and of Mike Lockhart, a former employee of USFWS who had worked for years in the reintroduction program and was a walking encyclopedia on Black-footed Ferrets. Mike told the judge of the interest USFWS had in the site and how it could be an ideal location for a relatively small-acreage reintroduction site. The County's evidence continued to focus on the parade of horrors caused by the prairie dog "infestation."

The County's witnesses included Carl

Uhrich, Commission Chairman, and Charles Lee, the K-State Extension Wildlife Specialist. They pushed the philosophy that prairie dog poisoning should extend at least a half mile from all boundaries and numbers further diminished even within the colonies that remained. That would have left few prairie dog colonies intact. They cited the willingness of The Nature Conservancy to adopt Lee's aggressive approach within and surrounding the Smoky Valley Ranch Preserve utilizing Rozol--and as later disclosed, Phostoxin as well.

Incredibly, after the hearing we learned that the County had sent an exterminator onto Larry's property to clandestinely poison 500 acres of prairie dog colonies with Rozol in the week before the hearing, an incursion was only realized later because a pasture gate had been left open. The poisoning of the lands owned by the Haverfields, Barnhardts and Maxine Blank resumed on the day before the hearing when Larry and Bette left their ranch to travel 350 miles to the hearing. This first hearing was held on Larry's 71st birthday.

The exterminator actually sat behind our table in the courtroom, along with the



**In an area still littered with plastic bags from the Phostoxin application, a few months later a County employee applies Rozol Prairie Dog Bait to every open burrow he can find within the buffer area surrounding and within the Haverfield Ranch complex.**

Kansas Farm Bureau's attorney and the anti-prairie dog entourage he had assembled. Not one word of this conduct was mentioned by the County. The hypocrisy of this was astounding: the County argued that it needed injunctive relief and yet days before the hearing their hired exterminator came onto the ranch complex and poisoned 500 acres of prairie dog colonies

This incursion was not discovered until after the Haverfields returned home. We wasted no time communicating the County's conduct to the Court, which had taken the matter under advisement.

While we awaited the Court's decision, things were happening within the USFWS that we knew nothing about. The agency had studied the public comments to the reintroduction and concluded that a Section 10 reintroduction was warranted. On the evening of December 18, 2007, fourteen ferrets were released in the complex. It had been fifty years since these

mammals had been documented in Kansas. Because of the ongoing controversy, the agency sought to have a low-key reintroduction, notifying only the landowners—and then the County Commissioners, followed by the media. With the ferrets came assistance with control of prairie dogs on surrounding properties—at no cost for the landowners. It evolved into a contract with the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) wildlife section, which hired a local man to do the job. To the surprise of very few, some of the surrounding landowners refused this assistance because it was being offered by the federal government – and they wanted extermination of prairie dogs and ferrets in the area, not just annual control. Some insisted that Rozol be used, rather than Zinc Phosphide, because they knew Rozol Prairie Dog Bait would not only kill prairie dogs, but Black-footed Ferrets. In fact Rozol kills a wide range of predators that feed on poisoned prairie dogs, including Badgers and Bald Eagles.

On March 8, 2008, we received the order we hoped for. Judge Andrews' decision on the County's request for a temporary restraining was short and to the point: the County would be limited to treatment in the ninety-foot vegetative perimeter around the complex. The County's prairie dog control agent was soon applying Rozol in the burrows within this boundary area and sending the Haverfields and Barnhardts the invoices.

Nothing much happened for a year and we began to hope that the County had had enough of the courtroom. Even though the

County had somehow talked their liability insurance carrier into paying their new lawyer, Jim McVay from Great Bend, it seemed the Commissioners were losing a bit of their zeal to litigate. Then in January 2009, the County gave us notice that they were going to come onto the Complex and exterminate prairie dogs. It was as though the hearing in November had never happened. The Kansas office of the U.S. Fish and Wildlife Service was apparently prepared to acquiesce and a biologist was en route to try to trap ferrets so they wouldn't be killed.

We quickly sought an order from Judge Andrews precluding the County's threat and it was granted.

The County at that point concluded they needed a different judge and sought an order transferring the case back to Logan County, since the State was no longer a party to the case. None of the district judges in that area were interested in handling the matter so the state appointed Kansas Senior Judge, Jack Lively. I knew Judge Lively from his days

as a District Judge in Coffeyville and knew he was a no-nonsense, former military man that expected the parties to show up prepared and not to waste the Court's time. I had absolutely no idea how he would be on federalism issues, but I felt comfortable that he would read the briefs carefully and consider our arguments—and that is really all a litigant can ask for.

Our position was very straightforward. We felt that the County was attempting to make a collateral attack on the USFWS's judgment to reintroduce Black-footed Ferrets by use of the century-old Kansas prairie dog eradication statute. I remembered back to my old Constitution Law class and the many cases dealing with federal preemption and the supremacy clause. The Congress of the United States had enacted the Endangered Species Act (ESA) with the express purpose of conserving endangered and threatened species. The U.S. Supreme Court had ruled that the ESA was the most comprehensive legislation for the preservation of endangered species ever enacted by any



Larry and Bette Haverfield, Gordon and Martha Barnhardt pictured on the ranch complex following a BFF release in 2008. Note the BFF!

**Strength is Happiness.**  
Strength is itself  
victory. In weakness  
and cowardice there  
is no happiness.

When you wage a struggle, you might win or you might lose. But regardless of the short-term outcome, the very fact of your continuing to struggle is proof of your victory as a human being.

– Daisaku Ikeda

nation. As such, any state law that threatened the extinction of a federally endangered species must give way to the ESA. The Courts had construed this protection to extend to habitat modification and degradation. The County's position was that they were going to eliminate the prairie dogs and had no intention of killing ferrets, and that the USFWS should simply remove them.

I believed with all my heart that we were right and so I decided to take the unusual step of moving for judgment as a matter of law by filing a motion for summary judgment. This procedure is used as a shield by defendants to avoid the expense of a trial in most cases that get filed, but is hardly ever used as a sword by plaintiffs. I did not know whether Judge Lively would be disposed to deny the County their trial on the facts. But I knew we could quickly bring this matter to the appellate courts if I could convince him that there were no factual issues remaining and that summary judgment was appropriate.

On September 17, 2010 the parties argued the motion to Judge Lively. He listened intently as McVay and I argued with a great deal of passion as to our respective positions. Three days later, we got our decision. The Judge ruled that there were no facts to be decided at a trial and that he could decide the case as a matter of law. He held that there was an "irreconcilable conflict" between the ESA and the state eradication statute. He noted that the Black-footed Ferret is totally dependent upon prairie dogs for their survival and that the ESA prohibits any act that would result in significant habitat modification or degradation that significantly impairs its central behavior patterns, including breeding, feeding or sheltering.

Our hope that this would bring an end to the litigation was short-lived. The

County had an automatic right to appeal to the Kansas Court of Appeals and it soon filed its notice of appeal. Jim McVay is a good and experienced lawyer and could see that a change of argument was needed. Suddenly the "only good prairie dog is a dead prairie dog" folks became the new kinder and gentler Logan County that wanted to work with all parties to simply do a little exterminating. It now claimed that it wanted to work "in harmony to address the concerns of the federal government in protecting the ESA program." We, of course, were not going to let that argument slide by unopposed. We pointed out to the Court that the statute the defendant relied upon required the complete eradication of prairie dogs. We reminded the Court that up until its recent deathbed conversion, the County had argued that it was required to comply with the statute or face claims that it was ignoring its statutory duty. The Farm Bureau, of course, chimed in by filing an Amicus Curiae brief with an attack on the USFWS.

The Court of Appeals heard oral argument in the Pawnee County Courthouse on May 15, 2012. I decided to go after the County hard on its change of tune and repeatedly hammered away on that theme. McVay tried to move away from the statute and now argued a general right of the County to abate a nuisance. The Court of Appeals was having none of it and repeatedly asked McVay about the conflict between the Kansas statute and the ESA. I felt good after the argument but I had also learned in 35 years of practice that questions at oral argument by the Court can be misleading in terms of where the Court is headed.

On July 13, 2013, we got our answer. The Court upheld Judge Lively's decision – noting that its deathbed conversion to only do a partial extermination was simply an attempt to do



**Larry and Bette Haverfield pause for a requested photo outside the Pawnee County Courthouse after the Court of Appeals heard oral argument on May 15, 2012.**

an "end run around the ESA." It held that the ESA preempted K.S.A 80-1202 because the eradication could constitute an unlawful taking under the ESA and that the district court did not have jurisdiction to determine such an issue.

The County had one last arrow in its quiver which it let loose on August 8, 2012 by seeking review of the Court of Appeals decision by the Kansas Supreme Court. The granting of review of Court of Appeals decision by the Supreme Court is somewhat rare, but it does happen. We learned in September 2013, that the Supreme Court, without comment, declined to hear the case. Thus, the decisions of Judge Andrews, Judge Lively and the Kansas Court of Appeals stand.

There are many lessons one can take from this litigation, which stretched on for over six years. The most powerful lesson though is that an individual seeking protection of environmental interests can stand up to a local government and require it to follow the law—even if the federal government seems timid in protecting these rights. The Haverfields and Barhards never backed down for a minute from the fight. One of the great joys of my career has been fighting for them.



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