

# DEPEW GILLEN RATHBUN & McINTEER, LC

ATTORNEYS AT LAW  
8301 EAST 21ST STREET NORTH, SUITE 450  
WICHITA, KANSAS 67206-2936

SPENCER L. DEPEW  
DENNIS L. GILLEN  
JACK SCOTT MCINTEER  
RANDALL K. RATHBUN  
DAVID W. NICKEL  
NICHOLAS S. DAILY  
CHARLES C. STEINCAMP  
TONY L. ATTERBURY

TELEPHONE (316) 262-4000  
FAX (316) 265-3819  
E-MAIL dg@depewgillen.com

November 29, 2005

Ms. Andrea Wyrick  
Logan County Attorney  
710 W. 2<sup>nd</sup> Street  
Oakley, KS 67748

RE: Property Owned by Robert G. Barnhardt, Larry Haverfield, and Gene Bertrand

Dear Ms. Wyrick:

This firm is counsel to the above individuals, all of whom own property in Logan County which is inhabited by prairie dogs. I am in receipt of your letter of November 22, 2005, concerning an eradication of prairie dogs which Logan County officials apparently intend to commence on December 1, 2005. Our clients strenuously object to this planned action and you should be advised that these landowners will avail themselves of any and all legal remedies they possess against the County and any individuals who come on their property to attempt this planned eradication.

Based upon my experience as United States Attorney for Kansas in the mid 1990s, I can tell you that any individual using Rozol for prairie dog control, as well as the county itself, is being exposed to severe criminal penalties in several ways. First, FIFRA prohibits the usage of any federally registered rodenticide in a manner inconsistent with its label. The label requires that this rodenticide not be used where cattle can graze. Based upon our investigation, the County has not been fencing off areas in which Rozol is being applied. I personally prosecuted FIFRA violations as U.S. Attorney and I can tell you that the criminal fines for violating a label are serious. We are in the process of making a prosecution referral to the EPA/CID for ongoing FIFRA violations in the application of this pesticide in Logan County.

The potential FIFRA violations, however, are not the County's most pressing problem at this time. I was privileged to develop a very good working relationship with the US Fish and

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Wildlife Service when I was U.S. Attorney. As you are no doubt aware, the US Fish and Wildlife Service is charged with enforcing federal migratory bird hunting regulations. However, the US Fish and Wildlife enforcement has much broader powers than simply enforcing hunting regulations. As I am sure you also know, Fish and Wildlife is charged with enforcement of the Federal Migratory Bird Treaty Act (MBTA). The MBTA contains severe criminal sanctions for anyone who is involved in the "taking" of a migratory bird. This would of course include raptors, larks, burrowing owls and any number of other migratory birds that inhabit the area around the prairie dog burrows.

The definition of taking in the Tenth Circuit is very broad. I prosecuted a number of oil operators for taking owls and other migratory birds that died in exposed oil pits around tank batteries. As these oil operators learned, there is no intent requirement for violation of the act. Simply undertaking an act which leads to the death of a migratory bird is a taking and subjects an individual to severe fines and imprisonment.

The very broad construction of the MBTA utilized in this federal circuit is well demonstrated in the criminal case of *United States v. Moon Lake Electrical Association, Inc.*, 45 F.Supp.2d 1070, (D. Co 1999). *Moon Lake* involved a prosecution of an electric company for the alleged taking of golden eagles and Ferruginous hawks and arose out of Moon Lake's supply of electricity to an oil field near Rangely, Colorado. The oil field was mostly treeless, making Moon Lake's power poles preferred locations for raptors. The government filed criminal charges against the company arising out of the deaths of a number of eagles and hawks over a 29 month period by electrocution death on the power poles. Moon Lake argued that the electrocutions—even if they did actually occur—did not constitute a violation of the MBTA because the electrocutions were unintentional and the corporation had no *mens rea* required for the conviction. The court rejected the argument noting that the plain language of the Act indicated that Congress was not intending to regulate only intentionally harmful conduct. *See, 16 USC §703*. The court noted that the MBTA prescribes taking and killing "by any means or in any manner." It is interesting to note that the court, in rejecting the arguments of the utility company, relied upon *United States v. Van Fossan*, 822 F.2d 636 (7<sup>th</sup> Cir. 1990), a case which affirmed the conviction of a homeowner under the MBTA for inadvertently poisoning two grackles and two doves with strychnine. I have enclosed a copy of *Moon Lake* for your review

As you know, the FIFRA registered rodenticide Rozol is being used as a supplemental use under this label for prairie dog control. As noted above, it is a violation of federal law to apply Rozol in a manner inconsistent with its label. The label requires the applicator to collect and properly dispose of all dead animals found above the ground. This is of course going to be virtually impossible over the extended acreages on which the County intends to apply this pesticide. An

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additional complicating factor is that several EPA studies<sup>1</sup> have shown that Rozol requires multiple feedings by the target animal over several days to cause mortality. This results in a delayed mortality for prairie dogs which provides an extended time frame for exposure to non-target animals. Ingestion of poisoned carcasses by other animals have led to a number of documented secondary poisonings. The label requirement to bury all poisoned animals found on the surface necessitates intensive and extensive searches over a prolonged time frame, given the nature of this toxicant's actions. I doubt that the County's applicators understand the several criminal consequences that would follow a secondary poisoning of a raptor. I personally observed over a dozen Ferruginous hawks in the area of the prairie dog towns I visited last week on my client's properties. The area also is frequently inhabited by golden eagles.

In the interest of full disclosure, I should advise you that the remains of a red tailed hawk was recently found in close proximity to a Rozol treatment. The carcass is currently undergoing laboratory analysis to determine if this was a secondary poisoning from feeding on a poisoned prairie dog. Obviously, should we determine the hawk's death was caused from Rozol, we will proceed with having this matter prosecuted to the fullest extent. I have again this morning confirmed with a Special Agent of the US Fish and Wildlife Service that they will prosecute any takings related to secondary poisonings from prairie dog deaths. He told me that they view the prosecution of takings under the MBTA to be their highest priority.

I hope this letter does not sound unduly harsh; however, it is important that I convey to you in as clear terms as possible, that my clients intend to avail themselves of every legal remedy they have to protect their legal interests. They are cognizant that not all landowners view the situation as do they. My clients are willing to consider some sort of mitigation on the boundary of their property to limit expansion or controlling prairie dogs that colonize lands outside their property. Likewise, Audubon of Kansas, Inc. has expressed a willingness to raise private funds or seek stewardship grants to assist landowners with the cost of limiting expansion of prairie dogs that colonize lands immediately adjacent to project lands which are currently being included in a proposed blackfoot ferret recovery program my clients are discussing with the US Fish and Wildlife Service.

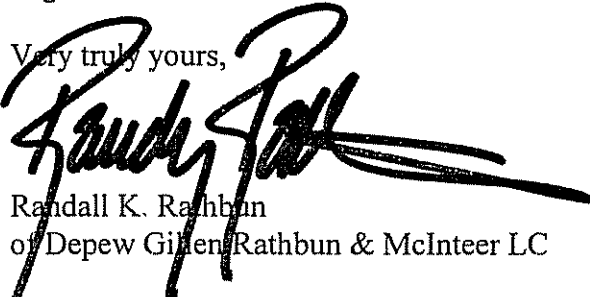
If you believe it would be beneficial, my clients and I would welcome the opportunity to sit down with you and Denny Mackley and discuss how we might help avoid potential civil and criminal liability for the County. Thank you in advance for your consideration.

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<sup>1</sup>US EPA, "Potential Risks of Nine Rodenticides to Birds and Nontarget Mammals: A Comparative Approach;" (2004); US EPA, "Reregistration Eligibility Decision (RED) Rodenticide Cluster" (1998).

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Very truly yours,



A handwritten signature in black ink, appearing to read "Randall K. Rathbun". The signature is stylized with a large initial "R" and a long horizontal flourish extending to the right.

Randall K. Rathbun  
of Depew Gilman Rathbun & McInteer LC

RKR:kgm