

# AOK Legal Briefs



A Bald Eagle statue in front of the Riley County Courthouse in honor of All American Veterans.

Photo by Ron Klataske.

## Zimmerman vs. Wabaunsee County

In June 2004 the Wabaunsee County Commissioners adopted regulations which prohibit industrial-scale-wind-towers. They intended to preserve the rural quality of the county and protect property values, quality of life, and opportunities for nature-based tourism, as well as the environment.

A few landowners who had leases with windpower developers filed an appeal to the district court. After one false start in the district court, the Judge eventually ruled in favor of the county and upheld the regulations.

The case then went to the Kansas Supreme Court. Audubon of Kansas filed a friend-of-the-court brief. In October 2009 the court decided part of the questions favorably to AOK and scheduled certain other questions for additional argument. At that time Audubon of Kansas filed a second friend-of-the-court brief.

The Kansas League of Municipalities and the Kansas Association of Counties have also supported AOK's position. To date, the Court has not issued its opinion on the remaining questions. One result of this is that windpower developers have been blocked from proceeding with any projects in Wabaunsee County.

The case involves some novel questions never before decided in Kansas or elsewhere, and is being watched carefully across the country.

*— Dick Seaton, Attorney at Law  
AOK Vice Chairman for Legal Affairs*

## Defenders and AOK vs. EPA on Rozol Prairie Dog Bait

Rozol Prairie Dog Bait is a poison that should never have been approved by EPA for use in the landscape because that agency elected to disregard federal law established for the protection of endangered species and migratory birds. Tragically, the poison got its start with manufacturer-financed-field "studies" on its effectiveness for killing prairie dogs in Kansas and was sponsored for approval within Kansas and promoted next to Nebraska by a KSU wildlife extension specialist. The distributor LIPHATECH of Milwaukee, Wisconsin then published and widely distributed sales literature throughout the Great Plains citing the Kansas "endorsement." The threat of secondary poisoning to predators and scavengers that feed on dead or dying prairie dogs was never thoroughly studied or determined prior to EPA approval.

It became apparent that Rozol was a dire threat to raptors and mammals that fed on poisoned prairie dogs, including Black-footed Ferrets. Early documentation of secondary poisoning included a Bald Eagle killed in Nebraska.

Audubon of Kansas was one of the first conservation entities to sound the alarm and it was first done with a 71-page document filed with EPA in 2007. Much of the most disconcerting field documentation came from the work of field biologists in other states. Concerns were expressed by state agencies, the Western Association of Fish and Wildlife Agencies and the US Fish and Wildlife Service (USFWS) in letters to EPA in opposition to approval of Rozol Prairie Dog Bait.

With Jason Rylander, Senior Staff Attorney with Defenders of Wildlife (DOW), providing the legal expertise, DOW and AOK sued the EPA for approving the use of Rozol and ignoring federal safeguards under the Endangered Species Act (ESA), the Federal Insecticide Fungicide and Rodenticide Act, and the Migratory Bird Treaty Act. In a recent decision, a district court in the District of Columbia sided with Defenders and AOK, ruling that EPA had indeed violated the ESA by approving Rozol without first consulting with the US Fish and Wildlife Service over the potential impacts of Rozol on threatened and endangered species. Further, when EPA registered Rozol for use on prairie dogs in 2009, they elected to do so without notifying the public or providing the public an opportunity to make comments.

The final order in the case temporarily bars use of Rozol in four states, and EPA has agreed to complete consultation with USFWS over Rozol use in ten states to reduce the prospect of death to listed species. However, the consultation will be largely limited to consideration of threatened and endangered species – leaving the widespread threat of secondary Rozol poisoning exposure to Ferruginous Hawks, Golden Eagles, Swift Foxes, Badgers and many other forms of prairie life. Rozol contains the blood thinner chlorophacinone which causes death by internal hemorrhaging. When used on prairie dogs it often takes weeks to finally kill the animals. It is during the extended dying phase as well as after death that the poisoned prairie dogs can be readily consumed by other animals which in turn become exposed to the poison.