

STATEMENT OF TESTIMONY

L-89-1

100TH CONGRESS
1ST SESSION

H. R. 816

For the relief of Larry Land, Marie Land, Brian Land, Keith Land, Patricia Vandenberg, Lorri Vandenberg, James W. Land, Lois Land, Tamra Lee Land, Sandra Gay Land, Vincent James Land, Viola Hollenbaugh, William L. Phinney, Senior, Emily V. Phinney, Lora Phinney, and William L. Phinney, Junior

IN THE HOUSE OF REPRESENTATIVES

January 28, 1987

Mr. Brown of Colorado introduced the following bill; which was referred to the Committee on the Judiciary

100TH CONGRESS
1ST SESSION

H.RES. 61

To refer H.R. 816 to the Chief Commissioner of the United States Court of Claims.

IN THE HOUSE OF REPRESENTATIVES

February 2, 1987

Mr. Brown of Colorado submitted the following resolution; which was referred to the Committee on the Judiciary

The Rocky Mountain Arsenal is located in the Northeast portion of the Denver metropolitan area near Stapleton International Airport. It was established in 1942 to manufacture items related to the war effort -- primarily chemical agents. GB-Nerve Gas was manufactured from 1953 to 1956.

Until 1955, wastes from the Arsenal were disposed into unlined basins. As a result, the shallow ground water aquifer was contaminated. This contamination was discovered in the early 1950's and numerous claims for damages to property lying west of the Arsenal were satisfied by the Army.

In December, 1971, Larry Land purchased 75 acres of land approximately one mile north of the Arsenal for the purpose of maturing calves. Calves introduced to the property became sick within one to two weeks with symptoms similar to pneumonia. As the sickness continued, the animals would lose motor control and die within 5 to 7 days. Of 520 animals on the property, approximately one-half died. The survivors all exhibited teeth damage and did not further mature. Tests on diet and water and for contagion were conducted by Dr. Robert Scott, D.V.M. and it was established that the sickness was caused by the water and the cattle were being poisoned.

In addition to the cattle, sixteen persons, ranging in age from infants to 62 years, consumed the same water. Each of these persons had or have abnormal medical histories with various complaints consistent with organophosphate poisoning, some of which symptoms persist to this date. Medical treatment at that time was sought but not received since the nature and source of the poisoning was unknown. A toxicologist retained by the Lands has advised that he believes that these people as a group will experience a higher than average incidence of birth defects, liver ailments and cancers.

At the time of the occurrence in 1972, the matter was the subject of much notoriety in the Rocky Mountain Region. No help was received from the Army because the Army denied all responsibility. Such denial was based upon a work done by Petri and Smith in 1956 which indicated that the area of contamination would not reach the Land's property. The Army continued to assert this position even in the light of conclusive proof that the report was erroneous.

Assistance was received from the Colorado Health Department which did extensive, but routine, testing. No test was run at that time which would have disclosed organophosphates in the water.

In February, 1975, counsel for the Lands (Mr. Samuel McClaren, Esq.) filed claims on their behalf with the Army. These claims were based in large part upon a ground water study of the Arsenal performed by Dr. Leonard Konikow of the United States Geological Survey which was released to the public in January, 1975. Dr. Konikow's work shows the ground water movement pattern to be much more complicated than the study of Petri and Smith, and established the probability, if not a certainty, of contamination of the well on the Land property. The Colorado Department of Health in a report released April 3, 1975 concluded that wastes from the Arsenal had contaminated an area of 30 square miles of which 25 square miles are off the Arsenal property.

There were several meetings with Arsenal personnel and the Land's counsel, Mr. McClaren, during the Spring and Summer of

1975. As a result of these meetings, a brief water testing program on the Land's property was initiated. In June of 1975, DIMP, a hydrolysis by-product of the destruction of nerve gas was found in the Land well water samples. The program was thereafter abandoned when the Army would not agree to a scientific approach to further testing.

The off-post detection and other contaminants prompted the Colorado Department of Health to issue three Cease and Desist Orders in April of 1975 that required an immediate stop to surface and subsurface discharge from the Arsenal.

Claims were filed with the Army in February, 1975, for administrative relief. Substantial delays were encountered in acting upon the administrative claims, which were lost, then denied, then reinstated, and finally denied in 1980. It was the Army's position at that time that

"...no pollution to the area occurred due to government activities, with Shell Company being the primary lessee since 1951. This position is substantiated by numerous technical studies made of the area, considering the operations of the Army, and their effect, if any, on the surrounding area." (See attached Exhibit "A")

The Lands had earlier, in 1972, filed a lawsuit against Shell Oil Company in Colorado State Court for these personal injuries. The action had been removed to Federal District Court by Shell Oil Company. Following several adverse procedural rulings, Shell Oil Company was dismissed as a Defendant. After such dismissal, Federal jurisdiction was defeated, and the case was sent back to the Colorado State Court, where the files were apparently misplaced. The Lands at that time were out of funds to further prosecute that civil action.

The only way to viably further pursue the Lands' case was to join the United States Army in the claim against Shell Oil Company. Both had jointly contributed for decades to the pollution of the Rocky Mountain Arsenal.

A lawsuit would have been brought against Shell Oil Company if the U. S. Army could have been joined in such action. Mr. Land's limited financial resources permitted only one suit. The Army could not be joined in an action against Shell Oil Company for the following reasons:

I. The Army could be sued only if its actions fell under the provisions of the Federal Tort Claims Act, 28 U.S.C. §26711, et seq.

II. The Federal Tort Claims Act is not applicable for the following reasons:

1. It does not apply to "nuisance" tort claims. It applies only to negligence. This would be a "nuisance" type of case were the parties in this case normal litigants.
2. It does not apply to conduct exercised under statutes and regulations. The Department of the Army adopted regulations applying to the facility.
3. It does not apply to discretionary functions or duties. Discretion at the planning level is not actionable. The most probable source of pollution was the discharge basins. The design and use of such basins was discretionary.

Many subsequent studies North of the Arsenal have confirmed that, indeed, chemical contaminants did flow north from the Arsenal through the groundwater underneath the Lands' property. (See Report of Battelle Columbus Laboratories, Columbus, Ohio, "Conceptual Design of the North Boundary Containment System," Rocky Mountain Arsenal, Denver, Colorado, October, 1979, Part 1.0 thereof, attached.) In the late 1970s and early 1980s, the Army spent extensive funds to construct an

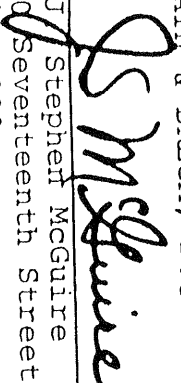
underground waterflow containment barrier. The Army has recognized and admitted the pollution problems of the effluents flowing to the North of the Arsenal. Further, the U. S. Government has admitted at least co-responsibility for the pollution surrounding the Arsenal by publicly proposing the entry of a Consent Decree by the U. S. District Court for the District of Colorado. (See U.S. v. Shell Oil, 83C2379, "Synopsis of Proposed Consent Decree," attached.)

At the same time that Mr. McClaren was bringing to the attention of the Army in 1975 the teachings of the new Dr. Konikow report, the Army was denying its results and effects. Recently-discovered information reveals that Shell Oil Company and the Army met with Dr. Konikow in April of 1975, and reached a conclusion that the Lands' claims of nerve gas or similar contamination were valid - yet this information was apparently purposefully withheld from the Lands, the media, and members of Congress. (See attached April 24, 1975 letter of Shell Pipeline Corporation.) Equity demands that the Lands be given recourse in the Federal Court of Claims.

Respectfully submitted,

ROATH & BREGA, P.C.

BY


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