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\$350 million award

Rocky Flats neighbors win lawsuit; defense asked to quiz jurors

By Karen Abbott, Charlie Brennan And John C. Ensslin, Rocky Mountain News
 February 15, 2006

Correction

This story should have said the woman at the right in the photo was Holly Shook, an attorney with Silver and Deboskey.

A federal jury awarded more than \$350 million Tuesday to thousands of neighbors of the former Rocky Flats nuclear weapons factory, despite plant operators' arguments that the decades of secret work there was careful, safe and vital to the defense of America during the Cold War.

"It's a tremendous verdict. We have been waiting for this for 16 years," said an elated Marilyn Cook, one of the seven neighbors of the plant who filed the class-action lawsuit on behalf of more than 12,000 other property owners. "It just feels wonderful."

But a lawyer for Rocky Flats operators Dow Chemical Co. and Rockwell International Corp. leaped immediately to his feet to challenge the verdict, alleging while the jurors still were seated that some of them may have bullied others into changing their votes.

Attorney David Bernick of Chicago demanded access to the jurors' deliberation notes and asked Colorado U.S. District



Joe Mahoney © News

Merilyn Cook smiles as she leaves federal court Tuesday in Denver after she and six other named plaintiffs won a \$352 million verdict on behalf of themselves and other property owners who say the former Rocky Flats weapons plant ruined their property values. Others in photograph are, from left, Sally Bartlett, wife of former mayor of Arvada Richard Bartlett; William Schierkolk, a plaintiff; and David F. Sorensen, of the law firm Berger & Montague, one of the attorneys for the plaintiffs. The woman at far right is an unidentified member of counsel team.

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Judge John Kane to let him question the jurors.

That angered one juror, a former Marine, who spoke up to protest what he saw as an improper intrusion into the deliberations process. The jurors deliberated for 17 days over several weeks.

"As a juror, I'm feeling insulted that we're even going into this," the juror said.

Kane refused to rule on the spot and dismissed court, then left the bench while Bernick was still arguing loudly for an investigation.

"These jurors are heroes," said plaintiffs' attorney Gary Blum. "To criticize them in open court and make an ex-Marine feel like he was insulted is totally inappropriate."

The judge later smuggled the jurors out of the downtown Denver federal courthouse so they could avoid the lawyers and journalists who were waiting for them at the public exits. Their names have not been made public.

Dow and Rockwell operated the former nuclear weapons factory under contract with the U.S. government, which owns it. Any damages eventually paid to the thousands of plaintiffs will be paid by the U.S. Department of Energy. The government also has paid the lawyers' fees for Rockwell and Dow, amounting to millions of dollars and still rising.

Kane told the lawyers he will confer with them Friday afternoon by telephone about the next steps in the case.

Bernick said he might not be able to participate because he has been summoned for jury duty in Chicago. "Mr. Bernick," Kane said, "it couldn't happen to a nicer guy."

The verdict was particularly satisfying for one lawyer who is no longer part of the case. Bruce DeBoskey, now the Anti-Defamation League's mountain states regional director, was a member of the firm that originally filed the lawsuit on Jan. 30, 1990.

DeBoskey was in the courtroom, seated with several of the plaintiffs, when the verdict was announced.

"What it really shows is the stamina of the plaintiffs," DeBoskey said afterward. "They're good

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citizens who represent a class of Colorado-ans who stood up for their rights. It took a lot of courage to stand up and fight these giant corporations, backed by the U.S. government, for what they believe in."

The plaintiffs contended that sloppily handled plutonium and other hazardous materials escaped from Rocky Flats onto their properties, about 25 square miles east of the weapons factory. They contended that the contamination was legally both a trespass and a nuisance, eating into their property values and their right to use and enjoy what they owned.

Rockwell and Dow said that harmless, minuscule amounts of plutonium escaped from the plant.

Environmentalists and some government officials had cautioned for years that the nuclear bomb factory 16 miles northwest of downtown Denver might not be as safe as its operators had insisted since it opened in the early 1950s. Many people had dismissed the cautions as exaggerated, but when FBI agents raided the plant early one summer morning in 1989, the plant's neighbors were alarmed.

Within days, Broomfield began digging a ditch to divert a stream that flowed through the plant away from the city's water supply. In Westminster, more than 100 angry residents showed up at a city council meeting to denounce their government for not being more careful about allowing development near the plant. Within months, the neighboring property owners filed the class-action lawsuit.

Rockwell pleaded guilty in 1992 to 10 federal environmental crimes - five felonies and five misdemeanors - and paid an \$18.5 million fine.

The weapons plant has been shut down. Its 6,500-acre site has undergone environmental cleansing and is slated to become a wildlife refuge. Most of the thousands of neighbors in the class-action lawsuit have moved elsewhere.

It took 15 years to bring the lawsuit to trial. Kane at one point found the entire U.S. Department of Energy in contempt of court for delays in turning over documents to the plaintiffs. Thousands of pages of documents that were turned over had information blacked out for what the government said were national security reasons.

The lawyers began delivering their opening statements on Oct. 11, 2005, to 12 jurors. One juror later was excused because of a family emergency. Another was excused during deliberations after she left the deliberation room in tears and said she didn't want to go back.

Bernick argued that the second juror's departure may have signaled that the jury's deliberations were improper.

The civil trial did not require a 12-member jury or a unanimous verdict; two dissenting votes would let any verdict stand, Kane said.

Questioned at Bernick's insistence about their votes on every item on the 30-page verdict form, the jurors disclosed that they voted 9-1 and 8-2 on many questions.

An example question: "Do you find that plutonium from Rocky Flats is present on the Class Properties" The jurors voted yes, 9-1.

Bernick said the juror who left in tears could have changed any of the 8-2 votes to an 8-3 vote, which would have changed the jury's decisions on those questions from yes to no.

But the jurors said they were unanimous in setting the amounts of damages they awarded: \$176,850,340 for reduced property values due to Dow's and Rockwell's trespass on the plaintiffs' properties by polluting them with plutonium; \$176,850,340 for plaintiffs' loss of use and enjoyment of their properties due to the plutonium nuisance created by Dow and Rockwell, and \$110,800,000 in punitive damages against Dow and \$89,400,000 in punitive damages against Rockwell.

The punitive damages total more than \$200 million, and Bernick said that's not allowed because they can't be more than the compensatory damages of \$176,850,340.

"This is a verdict that is clearly a deeply conflicted verdict," he said, calling the jury's decision "patently inconsistent with itself and inconsistent with the law."

He stopped short of saying Dow and Rockwell will appeal to the 10th U.S. Circuit Court of Appeals.

Lawyers for the homeowners appeared unworried about the complaints. As soon as Kane dismissed court they burst into broad grins, hugs and handshakes.

"First, we celebrate," said a smiling Louise Roselle, a Cincinnati lawyer on the plaintiffs' team. "It's the largest verdict I've ever had, so obviously we're very pleased. It's a victory for the people of Colorado," she said.

Plaintiffs' lawyer Peter Nordberg, a member of the Philadelphia firm of Berger & Montague, said even in the absence of a possible appeal by the operators of Rocky Flats, many procedural steps must unfold before any plaintiffs actually can collect anything.

"We are a ways from making out any checks to the class members," he said.

Plaintiffs' lawyer David Sorensen, also of Berger & Montague, said the plaintiffs' legal battle against Rockwell and Dow and their backer, the U.S. government, had "a real David and Goliath aspect."

"They had virtually unlimited resources to throw on us," he said.

Born of conflict

- **1951:**

The federal government selects Rocky Flats as a site for a nuclear weapons plant. Rocky Flats would go on to build more than 70,000 nuclear weapons and employ 6,000 people.

- **1952:** Operations begin with Dow Chemical Co. as prime contractor.

- **1953:** Plutonium processing begins.

- **1957:** A fire in Building 771 releases radioactive waste. Damage is estimated at \$818,000.

- **1967:**

Barrels are discovered to be leaking plutonium-laced chemicals into soil. Winds blow soil to the east.

- **1969:**

A more serious fire erupts in a plutonium processing building, sending radioactive smoke into the air. The 5 ½-hour blaze causes \$26.5 million in damage. Within a year, protests outside the plant's gate become a regular fixture.

- **1973:**
Colorado Health Department discovers radioactive tritium in Walnut Creek flowing through Rocky Flats.
- **1975:** Rockwell International replaces Dow as Rocky Flats operator.
- **1989:**
FBI and Environmental Protection Agency raid plant, looking for evidence of environmental violations.
- **1989:**
A special grand jury is convened to investigate alleged environmental crimes at Rocky Flats. It would meet for more than two years.
- **1989:** Rocky Flats is added to Superfund list.
- **1989:** Plutonium operations are permanently halted because of safety reasons.
- **1990:** EG&G takes over operation from Rockwell International.
- **1990:**
Residents in an area east of the plant file a civil suit, claiming the plant harms their property values.
- **1992:**
President George H.W. Bush announces the end of the W-88 missile program. The announcement signals the end of Rocky Flats.
- **1992:**
Rockwell, in a plea deal, admits 10 federal environmental crimes and is fined \$18.5 million.
- **1996:**
Grand jurors ask permission to break the silence required of them by law so they can testify before Congress.
- **2004:**
Colorado U.S. District Judge Richard Matsch refuses to let grand jurors break silence, but says required grand jury secrecy may not be appropriate social policy and that Congress could change it.
- **2005:** A federal court begins hearing the 15-year-old lawsuit filed by Rocky Flats neighbors.

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