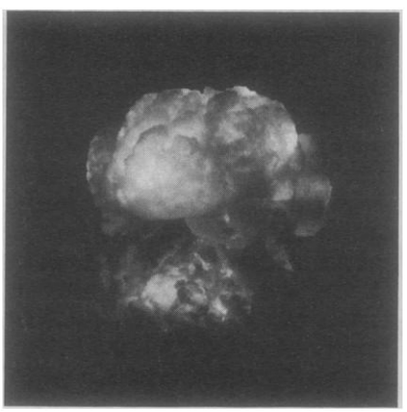
Government Wins Appeal in Lawsuit on Fallout

A landmark ruling that the U.S. government had suppressed critical evidence in a lawsuit emanating from atom bomb tests in the 1950's has now been overturned by a higher court. In the initial opinion, issued last August by federal district court judge A. Sherman Christensen, the government was said to have practiced fraud and deceit during a 1956 trial to avoid responsibility for the deaths of several thousand sheep that had grazed on fallout-laden pastures near the atom bomb test site in Nevada. Agents of the government were accused of withholding key facts, misrepresenting data, and pressuring those who knew the true story to revise their opinions (*Science*, 5 November 1982, p. 545).

Several weeks ago, in a stunning reversal of Christensen's ruling, the U.S. Court of Appeals in Denver declared flatly that there is no evidence whatever of government fraud in the case. "We find nothing to demonstrate that misleading answers were made. . . . There is no basis in the record to suggest that anything was withheld. . . . The plaintiffs . . . were unable to make a case against anyone concerned" and Christenson's opinion resulted merely from "an abuse of discretion."

Bruce Findlay, one of the attorneys representing the Nevada sheepmen, remarks that it is almost as if the appellate court was reviewing a different case. The effect of the new ruling is to derail—and possibly terminate—an attempt by his clients to win a new trial, which Christensen had ordered, as well as to dim considerably the prospects that his law firm will be compensated for its 1000 hours of work in the case. "I think it's likely that there will by a further appeal," Findlay says, although his firm has not yet decided whether the claim would stand a better chance in a rehearing before the same court or before the U.S. Supreme Court.

The appellate court dwells in its 18-page decision on the failure of the sheepmen in the initial trial to make adequate use of scientific data that might have damaged the government's case, such as two internal Atomic Energy Commission (AEC) reports in 1953 on the results of experiments with sheep and radiation at a federal laboratory in Hanford, Washington. The reports indicated that radiation-poisoned sheep and fetal lambs experienced symptoms similar to those experienced by the sheep and fetal lambs owned by the plaintiffs. The plaintiffs argued that data from these reports was illegally suppressed, but the government claims that they were disclosed sufficiently by virtue of having been listed as references in another report which concluded that no such experimental similarities existed. The Justice Department, in its appellate court brief, said that it is perverse and nonsensical to suggest that "the government's experts should have thrust forward information they considered scientifically irrelevant."



Unlike Christensen, Judges Oliver Seth, Robert McWilliams, and Ewing Kerr sided with the government. "The simple response to the charge that [the government's] answers were non-responsive is that plaintiffs did not move to compel further answers," the Justice Department had argued. The appellate court agreed: "Information, data reports, maps, experiments, and witnesses were all available to plaintiffs at the first trial" in 1956, they said in the appellate court decision. "If they did not choose to use it that was a decision they made."

Similarly, there was evidence at the time of the initial trial that government officials had changed their positions during the course of the AEC's investigation. "The plaintiffs were familiar with all the background data as hereinabove described," the appellate court said. "With this familiarity they chose not to seek additional answers or clarifications."

In their appeal, the sheepmen are likely to argue that even though some of the key evidence was indeed available, the significance of it was difficult to determine, except by asking government experts. The question, Findlay says, is "not whether it was available, but whether it was available in a manner that had any meaning for this particular case. At the time, most of the people who were coping with this information on a familiar basis were government employees. Anything we got came either from people who were instructed not to talk or who were thoroughly briefed in advance on the government's position."

—R. JEFFREY SMITH

Private Groups Enunciate "Baby Doe" Principles

The Justice Department has decided to appeal a court decision that has foiled the federal government's attempts to intervene in the case of Baby Jane Doe. Because the infant, born on 11 October, has a series of grave birth defects, doctors and the child's parents decided to forgo surgery that might merely prolong her life.

Meanwhile, a group of nine organizations concerned with the rights and treatment of handicapped newborns has, after months of discussion, produced a statement of "Principles of Treatment of Disabled Infants." Among the signatories are the American Academy of Pediatrics (AAP) and the Association for Retarded Citizens (ARC). The statement is noteworthy in that it marks improved relations between medical groups and organizations representing the handicapped. The two factions disagree with each other in many respects, as evidenced in the continuing battle over the "Baby Doe" regulations which call for extensive federal intervention in the nursery (*Science*, 23 September, p. 1269).

The recent statement is an affirmation of the rights of ill and disabled newborns. It says, for example, "when medical care is clearly beneficial, it should always be provided." The statement also acknowledges that "it is ethically and legally justified to withhold medical or surgical procedures