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NO.
STATE OF NEBRASKA
OFFICIAL
SEP 8 1994
DEPT. OF JUSTICE

DATE: September 2, 1994

SUBJECT: Retrocession of Federal Legislative Jurisdiction Over the Cornhusker Army Ammunition Plant - Environmental Issues

REQUESTED BY: The Honorable E. Benjamin Nelson
Governor, State of Nebraska

WRITTEN BY: Don Stenberg, Attorney General
Lauren L. Hill, Assistant Attorney General

The Governor's office has initiated negotiations with the United States Army regarding retrocession to the State of exclusive legislative jurisdiction over the Cornhusker Army Ammunition Plant ["CAAP"]. *See* 10 U.S.C. § 2683 (1983). The CAAP is comprised of 11,936.08 fee acres and is located near Grand Island, Nebraska. In a prior opinion, we advised you of the procedures required for effecting retrocession. *See* Op. Att'y Gen. No. 94-013 (March 9, 1994). You have now asked us to determine whether express language is necessary to clarify that the State, by accepting legislative jurisdiction, is in no way agreeing to accept environmental liability incurred by the federal government due to its use of the CAAP property.

Federal Government Use of the Property

The history of state and federal jurisdiction over the CAAP was set forth in our prior opinion. *See* Op. Att'y Gen. No. 94-013. Presently, the federal government is vested with exclusive legislative jurisdiction over the property. The following facts

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regarding the CAAP property were established pursuant to an agreement entered into by the U.S. Environmental Protection Agency, the United States Army, and the Nebraska Department of Environmental Quality:

- The CAAP is a United States Army Armament, Munitions, and Chemical Command facility which was constructed in 1942 for the production of conventional munitions. Alternating between periods of activity and inactivity, it has been in standby status since October, 1973;

- Principle activities conducted at the CAAP included the loading, assembling, and packing of conventional munitions, and the production of ammonium nitrate fertilizer;

- During periods of munitions production, wastewater contaminated with explosives was deposited into fifty-six earthen surface impoundments;

- Extensive groundwater contamination exists beneath the CAAP and in a plume extending downgradient from the CAAP approximately 3-1/2 miles beyond the eastern boundary of the facility;

- Contaminants which have been identified in the ground water include the following explosive compounds: Cyclotrimethylene Trinitramine (RDX), 2-4-6 Trinitrotoluene (2-4-6 TNT), 2-4 Dinitrotoluene (2-4 DNT), 2-6 Dinitrotoluene (2-6 DNT), 1-3-5 Trinitrobenzene (1-3-5 TNB), and Trichloroethylene (TCE);

- Approximately 9-1/2 billion gallons of ground water have been contaminated by explosive compounds originating from the site;

- Since July 22, 1987, when the CAAP was listed on the National Priorities List, 42 U.S.C. § 9605 (Supp. 1994), it has been a Hazardous Substance Superfund site. *See* 26 U.S.C. § 9507 (Cum.Supp. 1994).

Federal Facility Agreement, Docket No. VII-90-F-0004, United States Environmental Protection Agency, p. 11-16 (1990).

Potential Liability

Expansive environmental liability provisions are found in both state and federal law. *See* "Environmental Protection Act," Neb. Rev. Stat. § 81-1501 to § 81-1532 (1987, Cum.Supp. 1992 & Supp. 1993); "Comprehensive Environmental Response, Compensation, and Liability Act of 1980" (as amended by the "Superfund Amendments and Reauthorization Act of 1986," P.L. 99-499), 42 U.S.C. § 9601 to § 9675 (1983 & Supp. 1994); "Resource Conservation and Recovery Act" (as amended by the "Hazardous and Solid Waste Amendments of 1984," P.L. 98-616), 42 U.S.C. § 6901 to § 6922k (1983 & Supp. 1994). You have not asked us to, nor do we, assess the potential liability of the State of Nebraska under each of these statutes. Our review of these measures, however, leads us to concur with your staff's initial assessment that no specific statute exists which expressly shields the state from additional environmental liability in a retrocession transaction.

The federal government asserts that there is "no connection between a change in legislative jurisdiction and any previous environmental liability at [the] CAAP." Letter to Governor Nelson from the Department of the Army, January 24, 1994. The federal government relies on the aforementioned Federal Facilities Agreement when contending that "currently there is a negotiated agreement between the State of Nebraska and the [f]ederal [g]overnment covering environmental restoration efforts on [the] CAAP." *Id.* We have thoroughly reviewed the Federal Facilities Agreement. We note three concerns with relying solely upon this Agreement to resolve future liability disputes with the federal government. First, the Agreement in no way addresses the retrocession issue. Next, the Agreement addresses only the extent of the federal government's environmental liability for damages caused by groundwater contamination. Finally, the findings of fact and determinations made by the parties within the Agreement are limited by the following disclaimer: "None of these findings are admissions by CAAP or the Army for any purpose, including the extent of CAAP compliance with applicable Federal or State environmental laws, nor are they in any way legally binding on any party." Federal Facilities Agreement at pps. 11 & 16.

A potential for increased liability exists with heightened state involvement in the CAAP property. Based upon this fact and upon the disclaimers contained within the only agreement executed between the state and federal governments with regard to the CAAP, we recommend that, if you choose to effect retrocession of legislative jurisdiction over this property, then express language be contained within both your Executive Order and the United States government's formal offer which specifies that the State of Nebraska in no way accepts responsibility for liability incurred by the federal government due to its operation of the CAAP

property.

We note that the January 24, 1994, letter authored by the Chief of the Corps of Engineers' Real Estate Division, does not likely constitute a binding offer of retrocession by the "appropriate federal authority" as required by Neb. Rev. Stat. § 84-168 (Supp. 1993). Therefore, we recommend that any document constituting a formal offer of retrocession by the federal government specify that it is the U.S. Army's intent to continue to be responsible for any and all environmental actions that need to be undertaken at the CAAP property. If for no other reason, inclusion of such an express provision would clarify the State's intent in entering into this transaction.

Respectfully submitted,

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24-14-14.op

Approved by:

Attorney General