No. 19-35116

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMILY NANOUK,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Alaska
No. 3:15-CV-00221-RRB

BRIEF OF THE APPELLEE

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Emily Nanouk identified the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1), as her sole basis for subject matter jurisdiction. Appellee's Supplemental Excerpt of Record (SER) 3. The district court granted Defendant-Appellee United States' motion to dismiss for lack of subject matter jurisdiction on December 12, 2018. Appellant's Excerpt of Record (ER) 3. Ms. Nanouk timely filed a notice of appeal on February 11, 2019. ER 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that Appellant's tort suit based on environmental contamination to her property caused by the operation of a nearby Air Force facility during the Cold War is barred by the FTCA's discretionary function exception.
2. Whether the district court correctly dismissed Appellant's suit for the additional reason that the United States has not waived its sovereign immunity for the actions of contractors.

STATEMENT OF THE CASE

This appeal arises out of a case in which the United States Air Force conducted a successful environmental remediation of Appellant's property near the site of a former military base, the North River Radio Relay Station (North River

Station), located outside Unalakleet, Alaska. SER 2-7, 639, 646. To reach her property, Appellant repeatedly traveled through the North River Station on vehicles. SER 134-40. The path Appellant took on Air Force property passed over a "hot spot" of spilled polychlorinated biphenyl (PCB) and trichlorobenzene (TCB). SER 140-41. Appellant's vehicular traffic led to the spread of low-level PCB contamination from Air Force property onto her property. SER 504. After being notified of the issue, the Air Force promptly removed the contamination from Appellant's property and has ensured that the North River Station poses no threat to human health or the environment. SER 501, 646. Appellant challenges discretionary policy decisions made during the operation and remediation of the North River Station. SER 6-7.

I. Historic Use of the North River Station

The Cold War era North River Station was formerly one of seventy White Alice Communications System (White Alice) sites in Alaska. SER 159, 167. The North River Station was originally constructed in 1957-58 and remained in operation until 1978. SER 485.

When built in the mid-1950s, White Alice was critical to the United States' national defense. SER 166. The nation was entering the Cold War. *See* SER 429. By 1949, the Soviet Union had acquired the atomic bomb and the capability to deliver them to the United States using long-range strategic bombers flown from

Siberian airfields. SER 560, 564. Because the most probable route of Soviet bombers in an attack on the continental United States was from the north, reliable communication with Alaska was essential to provide adequate warning of an impending attack. SER 232, 564. Even seconds gained by an early warning from Alaska "could be the margin of American victory—or the measure of defeat." SER 191. But communication systems in Alaska at the time were primitive; calls could not always be placed and were frequently dropped. SER 154.

White Alice was the United States' solution to establish reliable communication with Alaska. SER 232. By using tropospheric scatter (*i.e.*, reflecting radio signals off the troposphere) and a large parabolic dish to receive the signal, White Alice could carry hundreds of conversations simultaneously up to 200 miles. SER 232-33. The system was state-of-the-art and expensive, costing over $250 million in the 1950s unadjusted for inflation. SER 249. The North River Station alone cost $3 million—a staggering amount for the time that set the precedent for other stations. SER 159. Unlike traditional radio transmission, White Alice was not susceptible to atmospheric interference or interference from magnetic storms. SER 232, 429. White Alice enabled reliable and direct contact between Aircraft Control and Warning sites in Alaska, radar stations along the North American Arctic coastline, and the North American Air Defense Command in Colorado. SER 566.

Due to the harsh and remote locations in which the White Alice stations had to be placed in Alaska, such as the North River Station, the United States relied on contractors to build and operate them. SER 173-74, 193. The conditions made resupply and operation of White Alice stations difficult and dangerous. SER 165, 233, 436, 593. For example, one Air Force service member in Unalakleet stated that the only way to move between buildings at the same site during the winter was by using ropes strung waist-high between buildings as guidewires. SER 593. In light of the conditions and the wide area in which White Alice had to operate, the Air Force concluded that it did not have the capability "to maintain and operate a system of this scope from military resources." SER 173. As a result, "[c]ontractor operation and maintenance [was] considered necessary." SER 174. The Air Force retained contractors "to operate and maintain all White Alice communication facilities . . . with the minimum governmental support" and "in lieu of military manning." SER 174. *See also* SER 219.

The maintenance and safe operation of high voltage equipment at White Alice stations necessitated the use of transformer oil containing PCB. SER 169. The contractors purchased the PCB and were responsible for its disposal as part of their maintenance and operational duties. SER 169, 231. By contract, the contractors had responsibility for "[m]angement of the physical maintenance and operation," SER 219, and "[m]aintaining and operating refuse disposal facilities,"

SER 223. The contractors did not treat PCB differently than other waste. SER 169. Occasional PCB spills likely occurred given the high volumes of transformer oil needed to operate White Alice. SER 364, 701.

At the time of the North River Station's operation from 1958 to 1978, no regulation governed the disposal of PCB or TCB. SER 169. The first rules regulating PCB were not in effect until 1978. 43 Fed. Reg. 7,150. Most regulations governing disposal and recordkeeping were not in place until July 1979. 44 Fed. Reg. 31,514. TCB was not regulated until 1981. 46 Fed. Reg. 27,473-502. Air Force manuals in effect during the relevant time period set policy goals for environmental pollution, but the policies did not direct government employees to take a specific course of action or specifically govern disposal of PCB or TCB. ER 86-92; SER 236 (identifying Air Force policy to assess environmental consequences of actions "at the earliest stage practicable").

II. Closure and Remediation of the North River Station

Despite its success, White Alice became obsolete due to the advent of satellite technology. SER 160, 170. In 1967, Congress passed the Alaska Communications Disposal Act, Public Law 90-135, to transfer ownership of White Alice sites from the government. SER 160.

In 1978, the North River Station ceased operations. SER 170, 485. The Air Force took steps to maintain the site by hiring a caretaker to inspect the station on a

weekly basis, SER 244, 247, and by posting "OFF LIMITS" and "WARNING, RESTRICTED AREA" signs so that it was "highly improbable that any individual could trespass on the site grounds without seeing the signs," SER 245. But contractor employees had left the site abruptly, abandoning equipment and supplies, SER 170, and some vandalism and pilfering occurred. SER 244-48.

After operations at the North River Station ended, the Air Force sought to dispose of the facility by ceding the property to the Unalakleet Native Corporation, which owned the surrounding land. SER 485; ER 46. But the General Services Administration stopped the property transfer due to concerns about PCB and other chemicals left behind by contractors. SER 262. The Unalakleet Native Corporation also made clear that it would not receive contaminated property. SER 278-79. As a result, the North River Station remained in government hands for environmental remediation.

The initial cleanup of the North River Station in the early 1980s occurred under the Department of Defense's Installation Restoration Program. SER 303. Under the Installation Restoration Program, the U.S. Army Corps of Engineers, an agency that assists with environmental remediation of former military sites, removed hazardous materials and debris from the North River Station. SER 303. The Army Corps removed approximately 500 gallons of transformer oil, empty fuel drums, PCB-contaminated soil, and other hazardous waste. SER 307, 677. By

September 1985, the Army Corps completed initial cleanup of the North River Station. SER 283, 677. An inspection by the Army Corps and Woodward-Clyde Consultants, a government contractor, concluded that although debris remained on the property, the "environmental damage and cost to remove it [was] far greater than letting the debris degrade." SER 292.

Plans for further remediation of the North River Station after the initial cleanup became subject to the Defense Environmental Restoration Program (DERP) established in 1983. SER 303. Under DERP, the Department of Defense remained committed to the complete environmental cleanup of all current and former military bases. *See* 54 Fed. Reg. 43,104. But, due to the number of military bases in need of remediation, it was "not technically or economically feasible to undertake remedial actions at all sites simultaneously." *Id.* DERP therefore prioritized environmental remediation of sites on a "worst first" basis. *Id.* The North River Station, in remote Alaska, received a low priority for remediation compared to other sites but remained in the program. SER 477.

In 1990, the Army Corps surveyed the North River Station and identified PCB-contaminated soil and other hazardous substances. SER 313-14. The Army Corps issued a public notice to federal and state agencies, local governments, the Unalakleet Native Corporation, and newspapers to receive public input on potential remediation. SER 310-11. In November 1991, the Army Corps recommended the

removal of contaminated soil and other hazardous substances and the demolition of structures at the North River Station. SER 303, 310.

In 1993, the Army Corps hired a contractor, Martech USA, Inc., to implement the remedial actions. SER 464. Martech began the cleanup but failed to complete the remediation and filed for bankruptcy the following year. SER 464. The Army Corps then retained two other contractors, CH2M Hill and Woodward-Clyde Consultants, to reassess the property. SER 357, 395. The contractors documented the continued presence of "RESTRICTED AREA" signs. SER 422.

In 1995, the Army Corps retained Aman Environmental Construction, Inc. ("ACEI") to complete the environmental cleanup. SER 464. But before it could finalize a report on its activities, ACEI also went out of business. SER 440, 451. Reviewing an ACEI draft report, the Air Force and the Army Corps had concerns about the completeness of ACEI's work. SER 440, 451. The ACEI draft report inadequately described remedial activities and lacked sampling data. SER 464.

In 2001, the Air Force issued a new plan for environmental remediation of the North River Station. SER 442. The plan did not rely upon ACEI's prior work and instead recommended new sampling and evaluation of the site. SER 443-51.

III. Discovery of Limited PCB Contamination on Appellant's Property

In 1970, while the North River Station was still active, Appellant, a member of the Unalakleet Native Corporation, applied for a 160-acre allotment under the

Alaskan Native Allotment Act, 43 U.S.C. § 1634, in the vicinity of the North River Station. ER 10. When she submitted her application, Appellant was aware of the North River Station and that it was an Air Force site. SER 624-25. Indeed, Plaintiff had visited the North River Station when it was in operation. SER 624-25.

As depicted in Figure 1 below, Appellant chose an allotment located several hundred feet south of the North River Station. ER 46; SER 491. Separating Air Force property and Appellant's property is land owned by the Unalakleet Native Corporation. SER 491. Appellant initially reached her property using a river on the

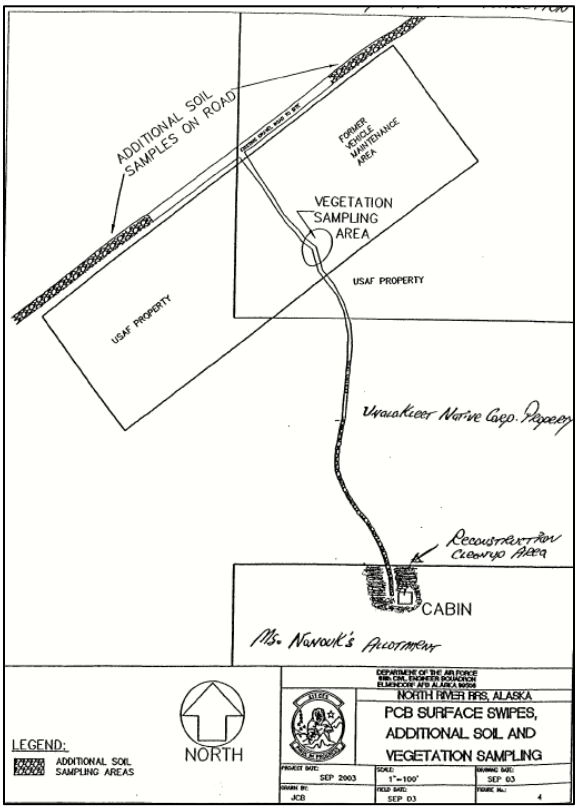

Figure 1: Excerpt Diagram of Properties. See ER 46.

south side of the allotment. ER 10. Appellant used the property to fish and forage but generally did not stay on it overnight. ER 10. In the 1980s, after the North

River Station closed, Appellant constructed a small 12 feet by 16 feet cabin on or near the northwestern corner of her property, as seen in Figure 1. ER 11. Appellant placed her cabin there because it was near the road from Unalakleet to the North River Station. SER 626. From the road, Appellant would cross over Air Force and Unalakleet Native Corporation property to reach her allotment. SER 626.

In July 2003, while the Air Force was remediating the North River Station, the Air Force was notified of a spot on Air Force property that had an apparent stain and sweet-smelling odor. SER 490, 504. Subsequent testing revealed that the area was a "hot spot" of PCB-contaminated soil with concentration levels as high as 40,000 parts per million (ppm). SER 490, 499-501. *Supra* Figure 1 ("Vegetation Sampling Area" on Air Force property is approximate location of hot spot).

To evaluate the extent of contamination around the hot spot, the Air Force took soil samples in an elliptical area around the visible contamination. SER 491. The Air Force also collected soil samples at regular intervals along a trail that passed over the hot spot on Air Force property to Appellant's cabin. SER 491. Soil sampling indicated that low-level PCB contamination had spread from the hot spot on Air Force property along the trail due to vehicular traffic. SER 499-501.

Contamination had spread because for years Appellant had driven from the main access road leading to the North River Station, over Air Force property, and over the property of the Unalakleet Native Corporation to reach her cabin. SER

134-41. Appellant's path happened to pass over the hot spot on Air Force property, SER 140-41, and "PCBs were imprinted on the soil from the wheels, much as a printing press would work," SER 504. Appellant had noticed an odor from the area on Air Force property when she started building her cabin in the 1980s but continued traveling over Air Force property until 2003. SER 132, 140-41.

For purposes of environmental remediation, the Air Force designated a contiguous area around the hot spot, along the trail, and a small portion of Appellant's property around her cabin as "Area C." SER 499. The Air Force responded with "lightning speed" by immediately prioritizing Area C for remediation and diverting resources from cleanup of other areas at the North River Station. SER 501, 646. Within a couple months, the Air Force had removed four 55-gallon drums and 24 cubic yards of contaminated soil in addition to taking dozens of soil samples. SER 490-91. Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Air Force had the right to enter Appellant's property for environmental investigation and remediation. 28 U.S.C. § 9604(e)(3). Notwithstanding, the Air Force also obtained Appellant's written permission to enter for remediation and to install fencing on affected areas of her property. SER 479.

Contamination on Appellant's property had been limited. Samples from the cabin's surface did not reveal PCB contamination. SER 491. Only one sample

around the cabin taken directly in front of the door tested positive for PCB at less than 4 ppm. SER 491. For reference, PCB cleanup levels established by the U.S. Environmental Protection Agency (EPA) permit up to 25 ppm in low occupancy areas. 40 C.F.R. § 761.61(a)(4)(i). Even at these low levels, the Air Force agreed to remediate Appellant's property to 1 ppm, the level requested by the State of Alaska based on EPA's most conservative standard for high occupancy areas. SER 639, 646. 40 C.F.R. § 761.61(a)(4)(i). Testing did not identify TCB on Appellant's property. *See* SER 490-91, 511.

Testing of Appellant and her family did not reveal any physical injury as a result of PCB contamination. The State of Alaska, with support from the United States, conducted a study to measure PCB levels in the blood of Unalakleet residents, including Appellant and her family. SER 674, 679. The study concluded that PCB levels were below levels associated with ill health effects and were similar to those of people in other parts of Alaska and other parts of the United States. SER 674, 679.

IV. Remediation of Limited PCB Contamination on Appellant's Property

By the end of 2005, the environmental remediation of Appellant's property was complete. SER 646. Testing confirmed that PCB levels on her property were below Alaska's cleanup standard of 1 ppm. SER 646. Because the most conservative cleanup criteria had been met, the Alaska Department of

Environmental Conservation (ADEC) found that Appellant's property "can be used for unrestricted use" including for hunting activities. SER 642. No fencing or other land-use controls remained on Appellant's property after 2005.[1] SER 642-43, 646. In total, the Air Force spent over $2.5 million remediating Area C. SER 535.

After successfully remediating Appellant's property, the Air Force kept its commitment to complete the remediation of the North River Station, and continued to work on Air Force property. No further work was done on Appellant's property, and ADEC did not recommend that the Air Force take any additional action. SER 650. The only remaining fencing or other land-use controls are on Air Force property; Appellant's property is not affected by the work on Air Force property. SER 642-43. In addition, there is no risk from ongoing work on Air Force property to Appellant's property. SER 650. According to ADEC, the Air Force has done everything feasible to remediate PCB at Area C and it does not pose a threat to human health or the environment. SER 648.

In August 2013, despite the completion of remedial efforts on her property, Appellant wrote to the Air Force expressing concern that PCB contamination remained on her property. SER 543. In September 2013, the Air Force sent a contractor, Jacobs Engineering, to conduct follow-up tests for PCB in Area C,

[1] Appellant contends the government instituted land-use controls on her property that continue to this day. Appellant's Br. 15. The record does not support her contention. ADEC has cleared her property "for unrestricted use." SER 642.

including Appellant's property. SER 550. The tests confirmed that the cleanup in 2003-05 had "sufficiently removed PCB contamination and met ADEC regulatory cleanup criterion," SER 553, an assessment with which Appellant's own environmental risk assessor agreed. ER 52.

Despite the 2013 test results, Appellant filed suit in 2015 alleging trespass and nuisance against the United States under the FTCA, 28 U.S.C. § 1346(b)(1), for "releas[ing]" hazardous substances onto her property. SER 5. In September 2018, after completing full merits and expert discovery, the United States filed a motion to dismiss for lack of subject matter jurisdiction, which the district court granted. ER 3. The district court held that the discretionary function exception deprived it of subject matter jurisdiction because the Air Force's decisions "made during the Cold War regarding contaminant disposal, as well as subsequent remedial efforts, fall within the discretion of the Air Force in terms of the timing, manner, and means of remediation." ER 5. Further, "[w]hile one might debate the speed of the Air Force's efforts . . . it cannot be seriously doubted that discretion was exercised, policy analyzed, and judgment employed" and that PCB contamination on Appellant's property had been fully remediated. ER 5-6. The district court further held that the United States cannot be liable for the actions of contractors and stated that the United States cannot be held strictly liable. ER 5-6.

This appeal followed.

SUMMARY OF THE ARGUMENT

This case involves environmental contamination centered on Air Force property that was formerly the site of a strategically important Cold War era military communications facility in a remote part of Alaska. That environmental contamination has now been successfully remediated. As the district court correctly recognized, Appellant's lawsuit fails at the threshold. The suit challenges discretionary, policy-based decisions of the Air Force in establishing the facility, entrusting its management (including waste disposal) to contractors during the Cold War, and overseeing environmental remediation efforts, all of which is subject to the FTCA's discretionary function exception. The suit also seeks compensation based on the acts of contractors and on the basis of strict liability, both of which are not permitted under the FTCA. The district court's judgment should be affirmed.

First, the discretionary function exception shields the exercise of policy judgment from tort liability. As the district court recognized, at its core, this case is about the Air Force's judgment that using White Alice to secure reliable communications and to monitor the threat of a potential Soviet attack was worth the environmental risk from the attendant use of PCB and TCB at remote Alaskan sites. Appellant fails to identify a mandatory and specific directive that the Air Force violated in making this judgment and carrying it out. The regulations and

provisions that Appellant identifies, rather than being specific and mandatory, in fact reserved discretion for Air Force employees and did not mandate that they take any particular actions. Moreover, the discretionary judgments made by the Air Force in initiating and carrying out the White Alice program and determining when and how to remediate the North River Station plainly were susceptible to policy analysis, with considerations such as national security, military priorities, protection of the environment, and relations with tribal and local authorities. These are precisely the kind of judgments that the discretionary function exception was designed to protect.

Second, the exclusion of liability for the conduct of contractors also bars Appellant's claim. The FTCA waives sovereign immunity only for the acts and omissions of government employees. Absent from the record is a negligent or wrongful act or omission by a government employee. Instead, Appellant cites the actions of contractors that operated the North River Station and contractors retained for environmental remediation. Appellant's argument that the United States may be liable for its own acts as a landowner misses the point. Although the United States can be liable under the FTCA for the actions of its own employees, the FTCA excludes liability for the acts of contractors, such as the contractors' waste disposal practices during the operation of the North River Station and the contractors' acts during the remediation of the North River Station.

Finally, plaintiff's suit fails because she identifies no negligence by a government employee—a requirement to invoke the FTCA's waiver of sovereign immunity. During discovery, Appellant admitted that she had no information as to whether the United States "was intentional, negligent, or reckless." SER 620. Appellant's admission was fatal to her FTCA claim.

STANDARD OF REVIEW

This Court reviews *de novo* a dismissal for lack of subject matter jurisdiction under the FTCA. *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016). This Court reviews any factual findings relevant to the determination of subject matter jurisdiction for clear error. *Id.*

ARGUMENT

Sovereign immunity shields the United States from suit and is jurisdictional in nature. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). It is axiomatic that the United States cannot be sued without its consent, and the terms of the United States' consent defines a court's limited jurisdiction to entertain suit. *Id.* The FTCA provides a limited waiver of the United States' sovereign immunity for cases sounding in tort based on a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The FTCA also includes several exceptions to the waiver of sovereign immunity. 28 U.S.C. § 2680.

Here, the district court correctly held that subject matter jurisdiction was lacking. As the district court summarized, "Air Force decisions made during the Cold War regarding contaminant disposal [at the North River Station], as well as subsequent environmental remedial efforts, fall within the discretion of the Air Force" and were policy-based decisions protected by the discretionary function exception to the FTCA. ER. 5. Indeed, as the district court recognized, "it cannot be seriously doubted that discretion was exercised, policy analyzed, and judgment employed, be it good or bad, in addressing the matter, in overseeing various contractors, and in determining when and how to proceed with remediation efforts." ER 6. Further, the district court correctly held that the FTCA does not waive sovereign immunity for the acts of contractors and correctly stated that the government cannot be held strictly liable. ER 5-7. *See also* SER 52-54, 126-28.

I. The District Court Correctly Held that It Lacked Subject Matter Jurisdiction Because the Discretionary Function Exception Applied.

The FTCA retains sovereign immunity for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. § 2680(a). The exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit." *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). Whether the United States was negligent is irrelevant; the exception applies "whether or not the discretion

involved be abused." 28 U.S.C. § 2680(a). The point of the exception is "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy." *Varig Airlines*, 467 U.S. at 814. The United States has, as sovereign, "reserved to itself the right to act without liability for misjudgment and carelessness in the formulation of policy." *Nat'l Union Fire Ins. v United States*, 115 F.3d 1415, 1422 (9th Cir. 1997).

The Supreme Court has set out a two-step analysis to determine the applicability of the discretionary function exception. *Terbush v. United States*, 516 F.3d 1125, 1129 (9th Cir. 2008) (citing *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988)).

First, the challenged conduct must involve "a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. If there is "a statute or policy directing mandatory and specific action," the exception cannot apply "because there can be no element of discretion." *Terbush*, 516 F.3d at 1129 (emphasis added). Moreover, "[t]he existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion." *Miller v. United States*, 163 F.3d 591, 595 (9th Cir. 1998). The mandatory language must also be specific in prescribing an exact "course of action for an employee to follow." *Terbush*, 516 F.3d at 1129.

Second, if discretion exists, the next question is whether the judgment exercised "is of the kind that the discretionary function was designed to shield." *Berkovitz*, 486 U.S. 536. Namely, the discretionary function exception applies to "decisions 'grounded in social, economic, or political policy.'" *Terbush*, 516 F.3d at 1129 (quoting *Varig Airlines*, 467 U.S. at 814). The focus of the inquiry is not on the government employee's "subjective intent in exercising the discretion . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991) (emphasis added). *See also Chadd v. United States*, 794 F.3d 1104, 1109 (9th Cir. 2015) (actions "'need not be actually grounded in policy considerations'"). Day-to-day operational decisions are protected by the discretionary function exception if the decisions required an exercise of choice or judgment; the exception is not limited to "policymaking or planning functions." *Gaubert*, 499 U.S. at 325.

The complaint in this matter focuses on two sets of actions for which Appellant seeks to hold the United States liable: (1) the disposal of waste at the North River Station during its operation, and (2) environmental remediation of the North River Station. Appellant also identifies acts, not alleged in her complaint, that she asserts support a finding of liability. Appellant's Br. 21-32. The discretionary function exception applies to all of the acts identified.

A. Waste Disposal at the North River Station Was an Exercise in Discretion Susceptible to Policy Analysis.

The district court correctly found that there was no "evidence of a mandatory and specific directive that the Air Force violated in dealing with hazardous waste" at the North River Station. ER. 6. Further, the Air Force's decision to rely on contractors for the disposal of chemicals needed to operate the White Alice was susceptible to—and in fact grounded in—policy analysis.

i. No Mandatory and Specific Directive Governed the Disposal of PCB or TCB during the North River Station's Operation.

The Air Force had the ability to exercise discretion in the disposal of PCB and TCB. Regulations governing the disposal of PCB and TCB did not exist during the operation of the North River Station between 1958 and 1978. SER 169. PCB was first regulated in 1978, 43 Fed. Reg. 7,150, and most rules governing PCB disposal were not in place until July 1979, a full year after the North River Station closed, 44 Fed. Reg. 31,514. Regulations governing the use and disposal of TCB were not in place until years later. 46 Fed. Reg. 27,473-502.

In the absence of mandatory and specific directives, the Air Force was free to let its contractors exercise judgment in the disposal of PCB and TCB. *See Terbush*, 516 F.3d at 1129 ("When a specific course of action is not prescribed . . . an element of choice or judgment is likely involved in the decision or action."). Indeed, the exercise of discretion was necessary in the era before regulations

governing the handling and disposal of PCB and TCB. SER 170. *See Waverley View v. United States*, 79 F. Supp. 3d 563, 573. (D. Md. 2015) (discretion where contaminants "were not subject to regulation until 1978 at the earliest"). *See also Pieper v. United States*, 713 F. App'x. 137, 140 (4th Cir. 2017) (absent mandatory and specific provisions "judgments had the necessary 'policy' dimension").

Appellant argues that Air Force Regulation 19-1 on Environmental Protection removed discretion and imposed mandatory duties. Appellant's Br. 21. A review of the regulation shows otherwise. Air Force Regulation 19-1 provides a general framework that "establishes a program for environmental protection" by stating policy and assigning responsibilities for the development of an environmental protection program. ER. 86. Air Force Regulation 19-1 explicitly reserved discretion for employees in implementing the environmental protection program. For example, the regulation identifies as a goal the abatement of pollution "consistent with the security interest of the nation" and assessment of environmental consequences of actions "at the earliest practicable stage." ER 87. This Court has previously held that similar language reserved discretion for government employees. *Chadd*, 794 F.3d at 1110 (removal of hazards to extent "practicable" and "consistent with congressionally designated purposes and mandates"). *See also Aragon v. United States*, 146 F.3d 819, 824 (10th Cir. 1998) ("'[A]s may be practicable' is a prime example of discretionary language").

As a document establishing general Air Force policy and objectives, Air Force Regulation 19-1 could not be specific and mandatory. "[O]bjectives and principles . . . do[] not create a mandatory directive." *OSI v. United States*, 285 F.3d 947, 952 (11th Cir. 2002). *See also Terbush*, 516 F.3d at 1131-32 ("framework" and "direction for management decisions" are not mandatory and specific); *Chadd*, 794 F.3d at 1110 ("management objectives" and "management alternatives" are not mandatory and specific); *Aragon*, 146 F.3d at 826 ("An objective, alone, does not equate to a specific, mandatory objective."). Moreover, in general, a regulation that requires the weighing of multiple interests, such as security and practicality, reserves discretion. *See Terbush*, 516 F.3d at 1132 (balancing of conservation and enjoyment of resources); *Nat'l Union Fire Ins.*, 115 F.3d at 1419 (balancing desirability of construction, commercial benefit, necessity, cost, and maintenance). A general provision, even one that may be relevant to waste disposal, does not remove discretion. *See Aragon*, 146 F.3d at 825 (discretion remained where Air Force Manual on industrial waste did not specifically govern TCE disposal); *City of Lincoln v. United States*, 283 F. Supp. 3d 891, 902 (E.D. Cal. 2017) (Air Force "Industrial Waste Manual" listed wastes that were of "primary concern" but did "not dictate how they should be treated").

Here, absent from Air Force Regulation 19-1's general framework was any mandatory and specific instruction. To be mandatory and specific, the regulation

must "specifically prescribe a course of action for an employee to follow" in the disposal of PCB or TCB. *Berkovitz*, 486 U.S. at 536. The fact that Air Force employees may have been bound by Air Force Regulation 19-1 or that the regulations "had to be followed" does not mean that they "contained specific mandatory instructions." *See In re Camp Lejeune*, 263 F. Supp. 3d 1318, 1350-51 (N.D. Ga. 2016). The focus of the inquiry is whether the regulation "prescribed a particular course of action." *Miller*, 163 F.3d at 594. Regulation 19-1 did not.

Appellant further argues that the Air Force's "failure to provide oversight and direction" to contractors operating the North River Station were decisions that fall outside the discretionary function exception. Appellant's Br. 24-25. But no mandatory and specific directive compelled the Air Force to take a specific course of action in the supervision of its contractors. Appellant—without any citation to the record—alleges that the United States breached "its own contract requirements" by failing to supervise its contractors' operation and waste disposal practices at North River Station. Appellant's Br. 26. In fact, the contract explicitly assigned "[m]angement of the physical maintenance and operation," SER 219, and "[m]aintaining and operating refuse disposal facilities," SER 223, to contractors. The contract did not require the Air Force to maintain supervision of these day-to-day contractor activities; indeed, retention of control would have defeated the

purpose of retaining contractors because the Air Force had concluded it did not have the capability to operate White Alice stations itself. SER 173.

Appellant further identifies MIL-Q-9858 as another potentially mandatory and specific directive that required "inspection, control, or oversight" of contractors. Appellant's Br. 38. MIL-Q-9858, which relates to contract procurement, was a broad policy document applicable to the Army, Navy, and Air Force that identified as an objective the creation of "a quality program by the contractor to assure compliance with the requirements of the contract." ER 22. MIL-Q-9858 is not mandatory and specific because its terms reserve discretion for the implementation of the objective, stating that employees should develop the quality assurance program in a way that was "effective and economical" and "in consonance with the contractor's and other administrative and technical programs." ER 22. As stated *supra*, instructions that require government employees to weigh multiple factors in making a decision are not specific and mandatory directives. Moreover, a document like MIL-Q-9858 that sets forth an objective is not a mandatory and specific directive. *See, e.g.*, *OSI*, 285 F.3d at 952. Finally, nothing in MIL-Q-9858 required the Air Force to adhere to an exact course of action with respect to White Alice, its contractors, or the disposal of any potentially hazardous substance.

ii. Waste Disposal at the North River Station Was Susceptible to Policy Analysis.

When the first prong of the discretionary function analysis is met, "it must be presumed that the agent's acts are grounded in policy." *Terbush*, 516 F.3d at 1130 (quoting *Gaubert*, 499 U.S. 325). Judgments exercised in executing broader policy decisions are themselves policy-based and are protected by the discretionary function exception. For example, in *Varig Airlines*, the discretionary function exception precluded suit not only for the agency's decision to conduct only spot-checks for safety, but for the alleged negligence of inspectors executing the spot-checking policy. 467 U.S. at 820. *See also Gaubert*, 499 U.S. at 323-24.

Here, the remote location of the North River Station as well as the harsh Alaskan climate made the operation and resupply of the base difficult. SER 165, 233, 436, 593. Because of these conditions, the Air Force made the policy decision that contractors were necessary and retained contractors to operate and maintain the North River Station "with the minimum governmental support" and "in lieu of military manning." SER 174. The Air Force had to balance the need for reliable communication with Alaska during the Cold War and the demands of operating in a remote and extreme climate. Under these circumstances, the district court correctly held that "Air Force decisions made during the Cold War regarding contaminant disposal" were subject to the discretionary function exception. ER 5.

Case law confirms that the "[d]isposal of waste on a military base involves policy choices of the most basic kind." *City of Lincoln*, 283 F. Supp. 3d at 904 (quoting *OSI*, 285 F.3d at 953). *See also Loughlin v. United States*, 286 F. Supp. 2d 1, 19 (D.D.C. 2003) (disposal of munitions "constitute discretionary decisions of the most fundamental kind"), *aff'd*, 393 F.3d 155 (D.C. Cir. 2004). Appellant argues otherwise by analogizing the government's waste disposal on a military base to cases involving negligent execution of routine maintenance as a landowner. Appellant's Br. 27, 29 (citing *O'Toole v. United States*, 295 F.3d 1029, 1036 (9th Cir. 2002) (failure to conduct "routine maintenance" of irrigation system); *Maalouf v. Swiss Confederation*, 208 F. Supp. 2d 31, 36 (D.D.C. 2002) (negligent installation of wire to secure tree). But those cases are inapposite in the context of a military base, as courts have repeatedly recognized.

"[T]he disposal of hazardous material is not the type of 'routine property maintenance'" excluded from the discretionary function exception. *In re Camp Lejeune*, 263 F. Supp. 3d at 1354. Cases "that involve environmental clean up" are unlike a "case involving minor housekeeping or routine maintenance" and implicate policy considerations. *Shea Homes v. United States*, 397 F. Supp. 2d 1194, 1200-01 (N.D. Cal. 2005). For one thing, "[t]he nature of the military's function requires that it be free to weigh environmental policies against security and military concerns." *City of Lincoln*, 283 F. Supp. 3d at 904 (quoting *OSI*, 285

F.3d at 953). Oftentimes, the military must "place security and military concerns above any other concerns." *Aragon*, 146 F.3d at 826. This is especially true where, as in this case, the North River Station "operated under military exigencies during . . . the Cold War." *Id. See also In re Camp Lejeune*, 263 F. Supp. 3d at 1354 ("the direction of resources on a military base during the Cold War is a classic illustration" of conduct "protected by the discretionary function exception").

The Air Force's decision to delegate day-to-day operations of the North River Station, including waste disposal practices, and to provide only nominal supervision was also susceptible to policy analysis. *See Varig Airlines*, 467 U.S. at 819-20 (supervising manufacturer compliance by "spot-checking" was exercise of discretion "of the most basic kind"); *Bibeau v. Pacific Northwest Research Foundation*, 339 F.3d 942, 945-47 (9th Cir. 2003) (supervision of government-funded research susceptible to policy analysis). Indeed, the record reflects the Air Force's policy analysis when it concluded that it was unable to directly operate or closely supervise White Alice stations. SER 173-74, 219.

Finally, the disposal of PCB and TCB in this case cannot be disentangled from the policy decision to create the hazard in the first place by building and operating White Alice in remote locations. *See Loughlin*, 286 F. Supp. 2d at 24 (operation of base in ongoing war effort was "intimately connected" with disposal of potentially toxic materials created at base). At the time of its construction, White

Alice was critical to monitoring the threat from the Soviet Union. SER 566. The discretionary function exception protects the Air Force's exercise of judgment to accept the environmental risks involved in the use of PCB and TCB in return for securing reliable communications with Alaska. *See Sanchez v. United States*, 671 F.3d 86, 103 (1st Cir. 2012) (courts should not interfere in exercise of discretion "particularly so in the running of military operations").

B. Environmental Remediation of the North River Station Was an Exercise of Discretion Susceptible to Policy Analysis.

Appellant also challenges the government's delay in remediating the North River Station. Appellant's Br. 29-32. But regulations implementing CERCLA, under which the United States remediated the North River Station, explicitly reserve discretion for government employees as to when and how to conduct an environmental remediation. 40 C.F.R. § 300.400(i)(3) ("[a]ctivities by the federal and state governments in implementing [a CERCLA hazardous substance response] are discretionary governmental functions"). Appellant does not seriously contend that the United States lacked discretion and focuses instead on the second prong of the Supreme Court's discretionary function analysis, whether the United States' judgment was susceptible to policy analysis. Appellant's Br. 29-32. She argues that environmental remediation is not susceptible to policy analysis because

it merely involves "matters of scientific and professional judgments." Appellant's Br. 30. Neither case law nor the record support her position.

Courts have rejected the notion that environmental remediation involves no more than "just pure matters of safety or scientific application." *Waverley*, 79 F. Supp. 3d at 577. Policy judgments are implicated when "evaluating and responding to public health and environmental hazards." *Welsh v. U.S. Army*, 2009 WL 250275 at *4 (N.D. Cal. 2009), *aff'd*, 389 F. App'x 660 (9th Cir. 2010); *Shea Homes*, 397 F. Supp. 2d at 1200 (same). Environmental remediation projects require "the very essence of social, economic, and political decision making." *Daigle v. Shell Oil*, 972 F.2d 1527, 1541 (10th Cir. 1992). The policy analysis includes weighing issues such as "the need for a prompt cleanup and the mandate of safety—with the realities of finite resources and funding considerations," *id.*, "public safety, health, environmental impact, resource constraints, regulatory constraints, and stakeholder input," *Waverley View*, 79 F. Supp. 3d at 577.

The cases Appellant relies upon did not present the same kind of policy considerations involved in the environmental remediation of a former military base. Appellant's Br. 30 (citing *Camozzi v. Roland/Miller & Hope*, 866 F.2d 287, 290 (9th Cir. 1989); *Whisnant v. United States*, 400 F.3d 1177, 1183 (9th Cir. 2005)). *Camozzi* involved an alleged failure to maintain worker safety at a construction site, 866 F.2d at 288, and *Whisnant* similarly involved an alleged

failure to maintain a safe workplace by failing to redress mold growth, 400 F.3d at 1183. Neither case, addressing discrete safety issues in certain workplaces, presented the kind of broad policy analysis implicated in environmental cleanup of hazardous materials at a former military base, such as security, cost constraints, local community input, and environmental impact on the surrounding area.

Appellant does not cite a case holding that environmental remediation of a former military base, in the absence of a violation of a mandatory and specific directive, is not susceptible to policy analysis. Appellant cites only one case involving environmental remediation. Appellant's Br. 30-31 (citing *Myers v. United States*, 652 F.3d 1021, 1031-33 (9th Cir. 2011)). In *Myers*, the Court held that the discretionary function exception did not apply because the Navy had violated an "unambiguously mandatory" requirement in a health and safety plan during its remedial efforts. 652 F.3d at 1029. Further, the Court held that the Navy's implementation of safety measures at the site of the environmental remediation was not susceptible to policy analysis because it involved only an exercise in professional judgment. *Id.* at 1032. In this respect, the focus on safety of the site of the environmental remediation in *Myers* was similar to cases of workplace safety, like *Camozzi* and *Whisnant*, which do not involve the broad policy analysis implicated in environmental cleanup decisions. *Supra*. Notably, in holding that the conduct in *Myers* was not susceptible to policy analysis, the Court

emphasized that it was examining the specific "nature of the actions in conducting the remediation project" in that case, namely the failure to provide for adequate site safety. *Id.* The Court did not suggest that decisions concerning an environmental remediation project overall could not be susceptible to policy analysis. *See id.*

Here, unlike *Myers*, the violation of a mandatory and specific directive has not been identified. Because no violation of a mandatory and specific directive has been identified, the United States in this case is entitled to a presumption that its acts had been grounded in policy. *See Terbush*, 516 F.3d at 1130. Further, the question here is not whether a decision regarding site safety was susceptible to policy analysis, but rather whether the environmental cleanup of the North River Station itself—such as when, how, and where to conduct the remediation—was susceptible to policy analysis. These broader decisions, which Appellant challenges, Appellant's Br. 29, are plainly grounded in policy. *See, e.g.*, *Welsh*, 2009 WL 250275 at *4, *aff'd*, 389 F. App'x 660 (9th Cir. 2010); *Daigle*, 972 F.2d at 1541; *Waverley View*, 79 F. Supp. 3d at 577.

Further, the record confirms that the United States repeatedly weighed policy choices during the remediation of the North River Station. After completing initial cleanup of the North River Station by 1985, the Army Corps exercised its judgment that the "environmental damage and cost to remove [remaining debris

was] far greater than letting the debris degrade." SER 292. The North River Station then became subject to DERP, under which environmental remediation of military bases proceeded on a "worst first" basis because the Department of Defense, in its judgment, concluded that it was "not technically or economically feasible to undertake remedial actions at all sites simultaneously." 54 Fed. Reg. 43,104; SER 303. Exercising discretion under DERP, the Department of Defense categorized the North River Station as a low priority compared to other sites needing cleanup. SER 477. When the North River Station became a focus for cleanup again in 1990, the Army Corps chose to hire contractors to complete the work. SER 464. Between 1993 and 1995, the Army Corps retained two contractors, both of which unfortunately went out of business before completing the task. SER 440, 451, 464.

The exercise of discretion resulted in the "lighting speed" cleanup of PCB that had spread to Appellant's property. SER 646. In 2001, the Air Force took over remediation of the North River Station. SER 442. In July 2003, the Air Force was notified of the PCB "hot spot" on Air Force property. SER 490, 499-501. Exercising its judgment, the Air Force diverted its limited resources from cleanup at other parts of the North River Station to investigate and remediate the hot spot and contamination that had spread to Appellant's property, an area designated for remediation purposes as Area C. SER 491, 501. The reallocation of limited resources to Area C meant that remediation in other parts of the North River

Station was not completed that year. SER 501 (noting none of the contamination in Area A was removed as a result). By 2005, environmental remediation of Appellant's property was complete. SER 646. According to ADEC, Appellant's property "can be used for unrestricted use," and there are no other actions the Air Force needs to take. SER 642, 646, 650. There are no institutional controls on Appellant's property, and there are no limits on the use of her property. SER 642.

In sum, the exercise of judgment as to when, where, and how to remediate environmental contamination at the North River Station involved more than mere scientific or professional judgment and was protected by the discretionary function exception. As the district court summarized, "While one might debate the speed of the Air Force's efforts over the years, it cannot be seriously doubted that discretion was exercised, policy analyzed, and judgment employed, be it good or bad, in addressing the matter, overseeing various contractors, and in determining when and how to proceed with remediation efforts." ER 6.

C. Additional Acts that Appellant Identifies Are Subject to the Discretionary Function Exception or Are Not Relevant.

Appellant refers to other actions by the United States, not alleged in her complaint, that she now asserts are relevant to a potential finding of liability. These actions are (1) the failure to secure the North River Station and warn of potential contamination after its closure, Appellant's Br. 24, 28, and (2) failure to maintain records from the time of the North River Station's operation, Appellant's Br. 7, 12.

As a preliminary matter, the alleged acts should not be considered because Appellant's additional theories and claims of tort liability were not included in her complaint, which only alleged trespass and nuisance. SER 2-7. *See Brumfield v. Fluor Hanford*, 224 F. App'x 561, 563 (9th Cir. 2007) ("new allegations" not raised in complaint "will not be considered for the first time on appeal"). Appellant raised her new theories of liability for the first time before the district court only in response to the United States' motion to dismiss. SER 70, 89. By then, discovery was complete, and Appellant never gave notice of her additional theories of liability during discovery. The district court appropriately dismissed Appellant's new theories of liability. *See* ER 6 (dismissing theories of other contamination not addressed in complaint nor discovery). *See also Pickern v. Pier 1 Imports*, 457 F.3d 963, 968-69 (9th Cir. 2006) (dismissal appropriate where theory of liability was not included in complaint); *E.F. v. Newport Mesa Unified Sch. Dist.*, 726 F. App'x 535, 538 (9th Cir. 2018) (dismissal appropriate where plaintiff had sufficient time to develop claim in discovery).

Because Appellant failed to allege her theories of liability in her complaint and failed to develop them during discovery despite ample opportunity to do so, there is no evidence in the record of a violation of a duty to warn or to keep records. Besides the absence of evidence for the violation of a duty, the acts that

Appellant identifies fall within the discretionary function exception or are simply not relevant to a potential finding of liability.

i. Securing Property and Warning of Potential Contamination Involve Exercises of Discretion Susceptible to Policy Analysis.

The Air Force had discretion and engaged in policy analysis when deciding how it would dispose of the North River Station after its closure and what resources to devote to maintaining it pending disposal. The Government Accounting Office (GAO) issued a report, cited by Appellant, Appellant's Br. 11-12, 21-23, in 1981 surveying the Air Force's maintenance of former White Alice stations that documents the Air Force's exercise of discretion and weighing of policy considerations.

As the GAO report explained, to dispose of real property, the Air Force had to report the property as excess to Congress. SER 252. To avoid inundating Congress with a report for each closed White Alice site, the Air Force chose to delay reporting many White Alice sites as excess until they could be disposed of together. SER 252. Readying many sites for disposal had been delayed because personal property remained on the sites and "funding constraints in early 1980 effectively ended further property removal." SER 252. Meanwhile, the Air Force did have "real property maintenance actions" in place to keep up the former White Alice sites and focused on "removing dangerous materials and eliminating other safety and environmental hazards." SER 254.

No mandatory and specific directive dictated an exact course of action that the Air Force had to take to maintain the North River Station. The only regulation Appellant cites is Chapter 101 of the Federal Property Management Regulations referred to in the GAO report. Appellant's Br. 22. Chapter 101 requires an agency to "retain custody and accountability for excess and surplus real property" by performing "physical care, handling protection, maintenance and repairs" pending transfer or disposal of property. Appellant's Br. 22; SER 257. The regulation is not mandatory and specific because it only sets forth "an objective or general standard" for the care of real property. *See Shea Homes*, 397 F. Supp. 2d at 1199. Although the regulation directs federal agencies to maintain properties, it lacks specificity in "the particular actions government employee(s) must take to satisfy the standard." *Id. See also Chadd*, 794 F.3d at 1111 (plan did not "specify how" management technique should be deployed); *Miller*, 163 F.3d at 595 (regulations did "not tell firefighters how to fight the fire").

At best, Chapter 101 of the Federal Property Management regulations required the Air Force to take some action for physical care and maintenance of real property, which the Air Force did. The record does not support Appellant's allegation that the Air Force "abandoned" the North River Station. Appellant's Br. 23. After the station's closure, the Air Force promptly retained a caretaker to inspect the site on a weekly basis. SER 244, 247. The Air Force also had buildings

"clearly marked with 'OFF LIMITS' signs" and "WARNING, RESTRICTED AREA" signs that made it "highly improbable that any individual could trespass on the site grounds without seeing the signs." SER 245. The GAO, which surveyed a number of White Alice sites in 1980-81, exercised its own "professional judgment" and policy analysis to conclude that the Air Force should have taken more action to secure the facilities, but the GAO acknowledged the Air Force had taken actions to secure former White Alice sites prior to its report. SER 253-54, 258.

The Air Force's decisions with respect to warnings about potential contamination at the North River Station also involved discretion and policy analysis. No mandatory and specific directive required the Air Force to issue any warnings, let alone dictate when, how, or what the Air Force was compelled to do to provide warnings. Appellant does not identify any such directive. Decisions about whether and when to warn are also susceptible to policy analysis. *See Terbush*, 516 F.3d at 1137. As this Court has noted, a decision to warn "cannot be boiled down to a simple recognition of the existence of some hazard. The entire process, including identifying hazards, determining which hazards require a warning, and determining how and when and where the warning should proceed, involves discretion." *Id. See also Loughlin v. United States*, 393 F.3d 155, 164 (D.C. Cir. 2004) (warning of buried munitions was susceptible policy analysis).

Decisions to warn about potential contamination from military bases are especially susceptible to policy analysis. As demonstrated by the cases Appellant cites, there are some situations in which a failure to warn is not susceptible to policy analysis because the warning may simply involve posting a sign. Appellant's Br. 28 (citing *Seyler v. United States*, 832 F.2d 120, 123 (9th Cir. 1987) (doubting that "any decision not to provide adequate signs" was susceptible to policy analysis); *Frasure v. United States*, 256 F. Supp. 2d 1180, 1190-91 (D. Nev. 2003) (citing *Seyler*)).[2] But where other considerations exist, decisions to warn are susceptible to policy analysis. *Bailey v. United States*, 623 F.3d 855, 862 (9th Cir. 2010) (danger of replacing signs on sand bars was valid policy interest). Warnings about contamination from military bases are susceptible to policy analysis because such warnings may involve consideration of a variety of factors, such as the risks that warnings might disclose the nature of military activities on the base or unduly alarm the public. *See, e.g.*, *Loughlin*, 286 F. Supp. 2d at 22 (collecting cases), *aff'd*, 393 F.3d at 164; *Daigle*, 972 F.2d at 1542-43; *In re Camp Lejeune*, 263 F. Supp. 3d at 1352; *Waverley View*, 79 F. Supp. 3d at 575.

[2] Appellant cites *Westfall v. Erwin*, 484 U.S. 292, 296 (1988) for the proposition that failure to warn is not "the product of a government policy" but negligence. Appellant's Br. 23. *Westfall* is not about the discretionary function exception. It is about whether an act needed to be discretionary in order for a government employee to be immune from suit. 484 U.S. at 293. *Westfall* has since been superseded by statute. 28 U.S.C. § 2679.

The one contrary case Appellant cites is *W.C. & A.N. Miller v. United States*, which held that failure to warn of buried munitions was not subject to the discretionary function exception where the U.S. Army "had already made a decision to warn" and was negligent in effectuating that decision. 963 F. Supp. 1231, 1242 (D.D.C. 1997). *See also* Appellant's Br. 28. A subsequent decision in the same district, however, has thoroughly disavowed *W.C. & A.N. Miller*, noting that the "factual predicate" of the decision was not correct and that the decision was "also legally flawed" by relying on outmoded distinctions between "planning" and "operational" decisions which the Supreme Court has firmly rejected. *Louglin*, 286 F. Supp. 2d at 25-26 (citing *Gaubert*, 499 U.S. at 325).

ii. Recordkeeping Requirements Have No Plausible Connection to Appellant's Alleged Injury.

It is "obvious" that a "directive must not only be specific and mandatory, it must also be relevant to the claims underlying the suit." *Loughlin*, 286 F. Supp. 2d at 18. Appellant alleges that the United States failed to comply with recordkeeping requirements for waste disposal at the North River Station. Appellant's Br. 7, 12. There is no evidence in the record that the Air Force violated any recordkeeping requirements. Some records have survived. SER 231. Others have been lost with time. SER 706. It is also unsurprising that the Air Force would not have access to operational records kept by a contractor decades earlier. Moreover, there is no plausible connection between operational recordkeeping and Appellant's alleged

harm. Whether or not contractors complied with a contract requirement to keep records, Appellant's Br. 7, had nothing to do with waste disposal practices at the North River Station or environmental remediation.

II. The District Court Correctly Held that It Lacked Subject Matter Jurisdiction Because Appellant's Claims Rely on Acts of Contractors.

The FTCA only waives sovereign immunity for the negligent or wrongful act or omission of an "employee of the Government." 28 U.S.C. § 1346(b)(1). The FTCA does not waive the United States' sovereign immunity for the actions of a contractor. *Edison*, 822 F.3d at 517-18. The act or omission of a government employee is an affirmative requirement to satisfy the FTCA's waiver of sovereign immunity. 28 U.S.C. § 1346(b)(1).

As Appellant concedes, contractors rather than government employees operated the North River Station and that it was under the contractors' "day-to-day control." Appellant's Br. 26. *See Logue v. United States*, 412 U.S. 521, 529 (1973) (no liability for contractor that had "day-to-day operations" of facilities). Critically, the Air Force did not retain responsibility for waste disposal at the North River Station. The Air Force hired contractors "to operate and maintain all White Alice communication facilities . . . with the minimum governmental support" and "in lieu of military manning." SER 174. By contract, contractors had responsibility for the "physical maintenance and operation" of facilities and the maintenance and operation of "refuse disposal facilities." SER 219, 223. *See also Howey v. United*

States, 481 F.2d 1187, 1188-89 (9th Cir. 1973) (observing contractor had "daily operational control of" White Alice station). Without a negligent or wrongful act by an employee of the United States, there can be no liability under the FTCA.

The authority Appellant cites is not to the contrary. She cites a number of cases that merely advance the truism that the United States can be liable for the conduct of its own employees. Appellant's Br. 33-34, 37 (citing *Edison*, 822 F.3d at 518 (United States can be liable "for its *own* acts or omissions" (emphasis original)); *O'Toole*, 295 F.3d at 1034-35 (direct liability of United States for failing to fund contractor); *Logue*, 412 U.S. at 532 (government employee can create liability under FTCA); *Howey*, 481 F.2d at 1188 (government directly liable for injury to contractor)). Appellant also cites a number of other cases that do not involve a contractor, and therefore, do not address the FTCA's exclusion of liability for acts of contractors. Appellant's Br. 33-35 (citing *Green v. United States*, 630 F.3d 1245, 1247-48 (9th Cir. 2011) (Forest Service failure to stop fire); *Bolt v. United States*, 509 F.3d 1028, 1035 (9th Cir. 2007) (Army Corps failure to plow snow); *Bartleson v. United States*, 96 F.3d 1270, 1275 (9th Cir. 1996) (Navy shelling of adjacent property); *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1123 (S.D. Cal. 2008) (federal agency trespass)[3]). None of these cases are

[3] Appellant describes *Quechan Indian Tribe* as "applying Ninth Circuit precedent to find liability for trespass may lie where governmental contractor negligently impacted sites outside of a right of way." Appellant's Br. 35. Not only

apposite because Appellant does not identify an act or omission by a government employee. Appellant's Br. 32-39.

Next, Appellant cites cases in which there was a contractor but the United States remained liable for the conduct of its own employees based on responsibilities that had not been assigned to the contractor. Appellant's Br. 25-27, 34-37 (citing *Edison*, 822 F.3d at 523 (government "took upon itself" responsibility for dealing with outbreak and "specifically directing" exclusion of contractors from response); *Bear Medicine v. United States*, 241 F.3d 1208, 1215 (9th Cir. 2001) (government liable for failure to provide for safety after retaining that responsibility from contractor); *McCall v. U.S. Dep't of Energy*, 914 F.2d 191, 195-96 (9th Cir 1990) (government employee created liability by being onsite giving instructions to contractor at time of injury); *Camozzi*, 866 F.2d at 292 ("USPS retained safety obligations under the contracts" that it failed to execute)). These cases are inapplicable because, as explained, the Air Force here did not retain responsibility for waste disposal at the North River Station. *Supra*.

Finally, Appellant argues that the United States is vicariously liable for the conduct of its contractors under a theory that the United States had a non-delegable duty for the safe disposal of PCB. Appellant's Br. 27-28 (citing *Dickerson v.*

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does the pin cite not lead to a page with citation to a Ninth Circuit decision, *Quechan Indian Tribe* did not involve a government contractor. 535 F. Supp. 2d 1072, 1123 (finding trespass by "Western," a federal agency).

United States, 875 F.2d 1577, 1583 (11th Cir. 1989) ("Under Florida law" employer had "nondelegable duty" to ensure safe disposal of PCB)). Even assuming a non-delegable duty would have existed as a matter of Alaska law, that theory of liability is not actionable under the FTCA. *See Wolcoff v. United States*, 539 F. App'x 801 (9th Cir. 2013). "[T]he United States can't be 'vicariously liable for the negligence of an independent contractor.'" *Id.*

Unable to identify an act or omission by a government employee during the operation of the North River Station, Appellant argues alternatively that the United States is directly liable for actions it took to remediate the North River Station after its closure in 1978, when contractors no longer operated the facility. Appellant's Br. 39. Appellant's argument ignores the record, which shows that contractors carried out most of the maintenance and remediation of the North River Station. This included work by the caretaker retained to inspect the facility, SER 244, 247, Woodward-Clyde which assessed the property, SER 283, and Martech and ACEI retained to conduct remediation, SER 464. The United States cannot be liable for their acts under the FTCA for the reasons just explained. For the reasons previously discussed *supra*, I.B, the United States' own decisions concerning when and how to remediate the North River Stations plainly fall within the scope of the discretionary function exception.

III. The District Court Correctly Dismissed the Complaint Because Appellant Relies on a Theory of Strict Liability.

The district court, in dismissing Appellant's action, adopted the United States' argument that subject matter jurisdiction was lacking due to Appellant's theory of strict liability. ER 7 (dismissing for "reason[s] set forth by the government" in its briefs). SER 52-54, 126-28 (argument in government's briefs). *See also* ER 5 (acknowledging "Defendant cannot be sued for strict liability under the FTCA"). Plaintiff failed to address this point at all, but it provides another basis for affirmance of the district court's judgment. It is well-settled that the FTCA does "not authorize suit against the Government on claims based on strict liability for ultrahazardous activity." *Laird v. Nelms*, 406 U.S. 797, 802-03 (1972).

Appellant admitted in discovery that she does not have "any information" as to whether the United States' conduct "was intentional, negligent, or reckless." SER 620. Appellant first raised negligence only in response to the United States' motion to dismiss. SER 75. The failure to identify any negligence was important because negligence is a requirement to invoke the FTCA's waiver of sovereign immunity. 28 U.S.C. § 1346(b)(1). Rather than identify negligent conduct, Appellant referred to a standard for strict liability. Appellant stated that "the storage and handling of hazardous materials is abnormally dangerous," SER 620, which is the standard for liability under Alaska's strict liability statute for the

release of hazardous substances, Alaska Stat. § 46.03.822, which is not actionable under the FTCA.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court affirm the district court's dismissal for lack of subject matter jurisdiction.

Dated: August 12, 2019

Respectfully submitted,

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Statement of Related Cases

(Circuit Rule 28-2.6)

Counsel for the United States is unaware of any related case pending before this or any other court.

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FOR THE NINTH CIRCUIT

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