UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 19-35116

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
District Judge Ralph R. Beistline

PLAINTIFF-APPELLANT EMILY NANOUK'S REPLY BRIEF

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I. The Government Has Not Borne Its Burden.

A. The Court Misallocated the Burden to Prove That Exceptions to the FTCA Barred Mrs. Nanouk's Claim.

The burden to prove an exception to the FTCA's waiver of immunity is squarely on the government. *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). And the record must support the weight of that burden. *Young v. United States*, 769 F.3d 1047, 1057 (9th Cir. 2014); *See also In re Glacier Bay*, 71 F.3d 1447, 1450 (9th Cir. 1995) ("When the record does not show that a decision is based on such policy considerations, the [discretionary function] exception does not apply."). The government's arguments must fail if the government does not provide support in the record for its burden. Yet here, lacking facts and support, the government foists the burden onto Mrs. Nanouk to *remove* discretion.

The government's attempt to shift the burden to Mrs. Nanouk's elderly shoulders is unsupportable in law and fact.[1] The government bears the burden of

[1] Contrary to the government's assertions, the record demonstrates that many locals, not just Mrs. Nanouk, "regularly traversed the site for berry picking and hunting" and used the road to access the surrounding area. FER 132; FER 134; FER 135. And whether Mrs. Nanouk was aware of NR White Alice ("NR") when selecting her allotment does not lessen the government's liability. In fact, the government has a unique federal trust responsibility to Natives for land, like hers, held in trust and restricted title. *See Bear Med. v. U.S. ex rel. Sec'y of Dep't of Interior*, 241 F.3d 1208, 1219–20 (9th Cir. 2001) (fiduciary duty of federal trust responsibility extended to individual Natives in FTCA claim).

proving an exception to the FTCA for each alleged action. *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002) ("[t]he proper question to ask is not whether the government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance") (quoting *Glacier Bay*, 71 F.3d at 1451).

The government similarly tried and failed to shift the burden in *Prescott*. There, this Court denied immunity where the government did not meet its burden of showing that each individual action plaintiff alleged was grounded in policy. 973 F.2d at 703. Here, too, the government relies on broad assertions that it is immune because its actions were based on policy without pointing to evidence in the record. The district court erred in granting that immunity.

B. The Government Mischaracterized the Complaint.

The government mischaracterized Mrs. Nanouk's complaint, stating that it focused only on two sets of actions: "(1) the disposal of waste at the North River Station during its operation, and (2) environmental remediation of the North River Station." Government Response Brief ("Response") 20. The government ignores allegations relating to its duties as a landowner and its years-long abandonment of the site. *Cf.* Second Amended Complaint, Further Excerpts of Record ("FER") 1-7 ¶5, ("buildings, debris, and thousands of 55-gallon fuel drums were left in the area"); *Id.* ¶ 11 (released hazardous substances onto allotment); *Id.* ¶ 13 (imposed

institutional controls); *Id.* ¶ 16 (trespass and hazardous substances); *Id.* ¶ 20 (nuisance).

Mrs. Nanouk demonstrated to the district court that specific regulations and policies eliminated discretion. *See* Opening Br. 5-14. She pointed out binding duties and terms specified in relevant contracts governing the government's responsibilities to inspect site conditions, and identified the government's responsibilities to maintain the property upon the contractors' departure in 1978. *Id.* The district court, and the government's response, ignored this record.[2]

C. The District Court Erred in Finding That Evidence of Trespass and Pollution on Mrs. Nanouk's Allotment Were Additional Claims Swept Within the Scope of Discretionary Activity.

The district court erroneously held that Mrs. Nanouk's allegations of governmental pollution on her property were absent from her complaint and "would, in any event, fall within the scope of discretionary activity of the Air Force in maintaining and remediating the North River facility." ER 6. First, the district court erred in stating that these allegations were not in the complaint. The

[2] Mrs. Nanouk alleges claims against the government for the actions and omissions of its employees (i.e.: government failed to oversee contractors; properly secure property; prevent trespass and nuisance onto Mrs. Nanouk's neighboring property). Contrary to the government's assertion, her complaint does not fail because she does not identify a specific employee. No discretionary decisions exist to review because the Air Force did not create a record. Moreover, "negligence is simply irrelevant to the discretionary function inquiry." *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989) (examining 28 U.S.C. § 2680(a)).

Second Amended Complaint specifically alleges trespass and nuisance by pollution and contamination. FER 5-6. And it alleges abandoned buildings, debris, and drums. FER 2.

Second, the district court failed to make findings sufficient to determine any basis in the record supporting the discretionary function exception. The government presented no evidence that it exercised discretion grounded in policy when it discarded the contamination and debris and abandoned the property. "For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *United States v. Gaubert*, 499 U.S. 315, 324–25 (1991). Mrs. Nanouk has made such allegations in her complaint and briefings. The court must determine "whether the evidentiary record … establishes the non-existence of a genuine issue of material fact with respect to the discretionary function question."[3] *See Prescott*, 973 F.2d at 702.

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[3] The government contends that because it determined that the contamination is remediated Mrs. Nanouk suffered no harm. The extent of harm is properly a matter for trial, not a motion to dismiss for lack of subject matter jurisdiction. But that argument is contradicted by the record. *See* Opening Br. 15-16 (noting presence of hazardous materials signs, land use controls, public stigma and mental and physical harm).

II. The Discretionary Function Exception Does Not Apply.

A. There Was No Discretion Because the Air Force Failed to Comply with Mandatory and Specific Directives.

Contrary to the government's assertions, federal law contains numerous specific and mandatory directives on property management, quality control, environmental regulation, and PCBs. Mrs. Nanouk demonstrated the reach of those statutes and regulations. The government's failure to respond demonstrates that it has not met its burden.

1. Property Management Regulations Applied and Were Violated.

The Government Accounting Office ("GAO") admonished the Air Force in 1980 that binding regulations imposed responsibilities of a landowner on the holding agency, which "shall retain custody and accountability" and "shall perform the physical care, handling protection, maintenance, and repairs of such property pending its transfer to another agency or its disposal." FER 98. The GAO emphasized that the regulations did not allow the Air Force to simply abandon real or personal property. *Id.* And clearly the regulations were specific: the Air Force had to take specific actions including a written finding and destruction of government-owned improvements if it wished to abandon the property. *Id*. In that same report, the GAO reproached the Air Force for abandoning the White Alice sites, including North River White Alice ("NR"). FER 94-95.

The GAO also confirmed that the failure to follow these regulations created hazards of pollution and contamination. FER 100, 103. Large quantities of chemicals, including PCBs, were abandoned along with other personal property at the sites. FER 103-105.

2. PCB Regulations Applied and Were Violated.

The government concedes that by 1978, mandatory regulations specifically regulated and banned PCBs. Response 5. These required the Air Force to secure transformers and lubricants containing PCBs. FER 103. The GAO warned the Air Force about the presence of PCBs and other "dangerous chemicals" prolific at the abandoned White Alice sites, including NR. FER 103-104. The GAO warned of ongoing violations of specific PCB regulations and cited those regulations. FER 103. From 1978 to 1985, when the transformers and PCB storage barrels were removed, the Air Force continued to violate PCB regulations and the law. ER 108. The government's contention that no PCB rule was applicable before 1978 is a non-sequitur.

In 1976, the Toxic Substances Control Act banned PCBs nationwide. P.L. 94–469 § 6(e)(2)(A), Oct. 11, 1976, 90 Stat 2003. The Air Force was on clear notice that PCBs were toxic. The government's reliance on the absence of regulations specifically naming PCBs is thus misplaced because other regulations for hazardous substances and waste control also applied. By 1972, the Air Force

had enacted regulations for pollution control, with a definition that clearly applied to PCBs: "environmental pollution is the presence of … *chemical* … agents." *See* Opening Br. at 6. The Air Force regulations extend to lubricants that contained PCBs – which were chemicals – regardless whether the label "PCB" was included in the regulations.

And by 1965, the Air Force had defined "potentially toxic substances" as a category that encompassed PCBs: "[a]ny chemical substance, such as a solvent, fuel, lubricant ... or industrial chemical that is detrimental to the human body, animals, or plant life and whose presence could create a major ecological change." FER 70. The Air Force understood that "little is known of [chemical agents and materials'] potential toxicity … or … contaminating effect." ER 92. Thus, the Air Force created this and other regulations to prohibit pollution caused by potentially toxic substances, including lubricants containing PCBs. *See* FER 70.

3. The Air Force Failed to Follow Mandatory Environmental Pollution Regulations.

Mrs. Nanouk identified directives in AFR 19-1 that were specific and mandatory (safe disposal of pollutants; prompt spill and pollution incident reports; environmental status reports). Opening Br. 8-9, 21. The government does not contest that AFR 19-1 was mandatory. Nor does the government dispute the specific directives Mrs. Nanouk identified. Rather, the government broadly claims

that AFR 19-1 contained general policy statements, and because it contained policy statements, its directives were not mandatory and specific. Response 23. The government exclusively relies on those broad policy statements, ignoring the specific directives.

But, regulations often contain both broad policy goals and specific directives. The presence of policy goals does not negate specific directives. *Botell* is illustrative. In *Botell*, mandatory procedures in a national park included "documenting all annual inspections and establishing all abatement dates in a written report." *Botell v. United States*, No. 2:11-CV-01545-TLN, 2013 WL 3941004, at *6 (E.D. Cal. July 30, 2013). The director of that park had discretion to alter those safety policies. *Id.* But the fact that the director could alter safety policies did not render the policies themselves discretionary. *Id.* So too here, Mrs. Nanouk cites to several specific requirements in AFR 19-1, including reporting requirements like those in *Botell*. Those directives are specific and leave no room for discretion.

Nor does the government respond to the mandatory directives in AFR 161-22 requiring Air Force to maintain records of monitoring and insure that "all materials (including … petroleum products, and other chemical and biological agents) are used, stored, and handled to avoid or minimize the possibilities of water and air pollution." FER 68, 69. Nor to AFR 161-18 requiring "approved

procedures for collection and disposal of waste to prevent and control air and water pollution and general environmental contamination at all facilities." FER 70.

Those requirements are specific enough to eliminate discretion. For example, in *Navarette v. United States* a requirement in a safety program that required "[d]angerous terrain conditions, such as drop-offs, etc., will be properly marked or fenced" was sufficiently specific and mandatory to render governmental discretion inapplicable. 500 F.3d 914, 917 (9th Cir. 2007). AFR 161-22's requirements to take handling precautions and AFR 161-18's requirements to follow approved procedures use mandatory language and are similarly specific.

The GAO confirmed that the Air Force created environmental hazards at White Alice sites by not securing "[l]arge quantities of petroleum products." FER 105. The GAO also noted the presence of physical hazards that the Air Force created at White Alice sites, observing that the Alaska Air Command made no effort to minimize physical hazards at the sites when closing them. FER 105. The GAO attributed the resulting hazards to the Air Force, not the contractors. FER 106.[4]

[4] "AAC [Alaska Air Command] has failed to protect and maintain property at closed White Alice sites and has failed to prepare equipment and supplies for storage. … Large quantities of petroleum products and hazardous chemicals are at the sites. Frequent visits by trespassers were evident …. Hazardous chemicals and unsafe conditions, coupled with easy access, may result in personal injury or environmental damage and significant cost to the Government …." FER 22, 24.

Despite these clear warnings, the Air Force persisted in ignoring the regulations. *See* FER 108. Neither the discretionary function exception nor the contractor exception immunizes this failure.

4. The Air Force Failed to Follow Mandatory Quality Control and Waste Management Regulations.

The military quality management regulation, MIL-Q-9858, also contained both broad objectives and specific and mandatory requirements. The requirements included maintaining records for quality control and records of supplies. ER 119, 121.

In a similar situation, this Court found that a policy that required snow removal "once per year in late February or March" and imposed specific duties on military staff to "insure all … common areas are free of trash, snow and ice" and report conditions to a higher authority was sufficiently specific and mandatory to eliminate governmental discretion. *Bolt v. United States*, 509 F.3d 1028, 1032 (9th Cir. 2007).[5]

Similarly in *Myers v. United States*, provisions in a military manual were specific enough to eliminate governmental discretion when they directed that the

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[5] The government's response argues that the reasoning in *Bolt* does not apply because the Army, not a contractor, was responsible for the failure to maintain Army property in *Bolt*. Response 42. But the Air Force was responsible for similar duties at NR, including conducting inspections.

safety plan "shall" be reviewed by a "competent person" and that military personnel "shall ensure that plans are reviewed and accepted." 652 F.3d 1021, 1029 (9th Cir. 2011). The panel in *Myers* found "competent person" was specific enough to eliminate discretion. *Id.*

So too here, MIL-Q-9858 required inspections and records. But no records exist. ER 55; ER 8. Government personnel attested that spill logs were not kept. ER 113. Inspections were mere show.[6] The government has taken the unsupported position that nothing in MIL-Q-9858 required the Air Force to adhere to an exact course of action. Response 25. But the government fails to explain why the regulations' requirements to keep records and conduct adequate inspections and testing are not specific and mandatory.

If a mandatory policy or regulation requires an action, the government employee does not have discretion whether to take that action. *See Myers*, 652 F.3d at 1029. This holds true even if the policy or regulation does not specify how the action is to occur. *Id*. This Court found the government's similar arguments in *Myers* did not satisfy the first prong of the discretionary function analysis. *Id.* at

[6] *See, e.g.*, FER 9 (former inspector describing typical inspection practices stated he and other inspectors didn't use the inspection form prescribed by the Air Force because it would be "ridiculous," stating "the people who wanted the forms wanted to make sure we covered all areas"); FER 8 (inspector "[m]ight glance at an engine log or two" and "might chat with the site supervisor and ask him for his maintenance records").

1030. As in *Myers*, the issue here is that government employees responsible failed to implement those duties properly, if at all.

B. There Is No Blanket Immunity for Military Waste Disposal During the Cold War.

The government asserts that the Air Force should have blanket immunity for military waste disposal at NR. Not so. No circuit-level precedent supports this claim. Rather, the government bases its assertion on cases outside this Circuit.

The government relies on *Aragon v. United States* to assert that military exigencies cloak governmental actions in discretion. 146 F.3d 819 (10th Cir. 1998). But in *Aragon*, the Tenth Circuit placed the burden on the plaintiff to prove that the government's manner of washing down airplanes on an active military base in wartime was not grounded in policy. *Id.* at 827. As several courts have recognized, the Tenth Circuit's reasoning in *Aragon* is simply inconsistent with this Circuit's precedent. *See Garcia v. United States*, No. CV 04-0498 RB/LCS, 2005 WL 8163849, at *7-8 (D.N.M. June 30, 2005), *aff'd sub nom. Garcia v. U.S. Air Force*, 533 F.3d 1170 ("the Tenth Circuit has not, and would not, subscribe to the Ninth Circuit's views. . . *Whisnant* is not persuasive because it is inconsistent with Tenth Circuit jurisprudence. *Aragon* is particularly instructive."); *In re Camp Lejeune North Carolina Water Contamination Litig.*, 263 F. Supp.3d 1318, 1346 n. 119 (N.D. Ga. 2016) ("The Eleventh Circuit does not apply the burden in the same

manner as the Ninth Circuit."); *OSI v. United States*, 285 F.3d 947 (11th Cir. 2002) (finding Ninth Circuit precedent incompatible with *Aragon*).

The Ninth Circuit approach aligns with the purpose of the FTCA. Individuals such as Mrs. Nanouk should not bear the burden of society when they are disproportionately harmed by government actions. *See Terbush v. United States*, 516 F.3d 1125, 1135 (9th Cir. 2008) ("in adopting the FTCA, Congress sought to prevent the unfairness of allowing the public as a whole to benefit … while allocating the entire burden of government employee negligence to the individual, leaving him destitute or grievously harmed") (internal quotation and citation omitted).

The government appears to assert that it is immune for poisoning the land because the poison arose from military waste. In arguing for such sweeping immunity, the government fails to cite binding case law or support in the record. And the government makes no response to the record evidence cited by Mrs. Nanouk of failures in inspection, record-keeping, and property maintenance. *See supra* § II.A. The government cites no military justification for such failures.

The other cases the government cites for its proposed exception for military waste are likewise off the mark and out of circuit. In fact, none of the cases the government relies on supports its premise that it is immune for the mishandling of toxic chemicals. *Contrast Loughlin v. United States*, 286 F.Supp.2d 1 (D.D.C.

2003), *aff'd*, 393 F.3d 155 (D.C. Cir. 2004) (Army's method of disposal at a chemical test site on active military base where governing authorities were guidance documents); *Waverley View Inv'rs, LLC v. United States*, 79 F. Supp.3d 563, 575 (D. Md. 2015) (waste disposal on an active Army base where the Army followed prescribed practices); *Pieper v. United States*, 713 F.App'x 137, 140 (4th Cir. 2017) (unpublished *per curiam* opinion finding plaintiffs did not prove Army's method of hazardous chemical disposal was not discretionary where Army followed standard practices); *Camp Lejeune*, 263 F.Supp.3d at 1350 (manner in which objective to deliver clean drinking water was to be achieved was left to the agency). Here in contrast, the district court expressly found that contaminants were not adequately disposed. ER 5.

Even if the "military exigency immunity" existed, that would not immunize the government in this case. NR was a civilian-operated radio relay station. It was not active during war time. It was never an active military base. Nor has it been active at all since 1978.

Clutching for straws, the government cites two distinguishable district court cases from this Circuit to support its proposed blanket immunity. Those decisions do not support the proposition that military waste disposal deserves some special exemption. *City of Lincoln v. United States*, 283 F. Supp. 3d 891, 903 (E.D. Cal. 2017) (Air Force not liable for introducing hazardous waste to a city-owned dump

when it followed accepted waste disposal practices); *Shea Homes v. United States*, 397 F.Supp.2d 1194, 1199 (N.D. Cal 2005) (state regulation that required taking "all immediate steps necessary to protect public health and safety, and the environment" did not "prescribe a specific course of action"). Neither case implicated the government's obligations as a landowner. Nor did either case involve allegations that the military failed to ensure safe conditions on its own property.

C. The Government's Actions Were Not Grounded in Policy.

The broad exception proposed by defendant for "Air Force decisions made during the Cold War regarding contaminant disposal," Response 26, is contrary to this circuit's precedent that requires each action be examined and defendant to show that the action is "grounded in social, economic, or political policy." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). It is not sufficient to show that a choice was involved. "The balancing of policy considerations is a necessary prerequisite." *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987). The challenged action is not susceptible to policy analysis when the decision or action is "totally divorced" from the alleged policy concerns. *Young*, 769 F.3d at 1057.

1. No Policy or Regulation Granted Discretion to Contaminate.

The government claims it is entitled to a presumption that its acts were grounded in policy because no violation of a mandatory and specific directive was identified. Response 32. But the government misunderstands the presumption. That presumption only exists if a policy or regulation grants a government employee discretion. *Terbush* is instructive: "we recognize Gaubert's presumption of actions *taken in furtherance of a regulatory regime's goals* to be 'grounded' in the policy of the regulatory regime." 516 F.3d at 1134 (emphasis added). The presumption of discretion does not apply to all government decisions that are not barred by a specific and mandatory directive. Rather, the presumption applies only when actions are grounded in the policy of the regulation at issue – that is, actions taken in furtherance of a regulatory regime's goals. In this case, the government is not acting as a regulator. This Court should not presume discretion.

The government attributes its mistaken assertion to this Circuit's decision in *Chadd*. The circumstances there stand in stark contrast to those here. In *Chadd*, a regulation specifically mandated that the government employee exercise discretion. *Chadd v. United States*, 794 F.3d 1104, 1110-11 (9th Cir. 2015) (discretion where manual specifically indicated many factors park supervisor must consider in controlling dangerous animals and management plan indicated different contexts required different options). But here, the government argues that no regulations

applied to the disposal of PCBs. If, as the government argues, no regulations applied, then the government is not entitled to a presumption that a discretionary act is grounded in policy considerations.

Terbush further instructs: "there still must be some support in the record that the decisions taken are "susceptible" to policy analysis for the discretionary function exception to apply. On this point, the government bears the burden. It is not sufficient for the government merely to waive the flag of policy as a cover for anything and everything it does that is discretionary in nature." *Id.* Mrs. Nanouk pointed to specific and mandatory directives in regulations. She identified specific governmental actions and omissions that did not comply. In response, the government failed to identify authorities that provided the Air Force with discretion to ignore those regulations.

2. The Air Force's Abandonment Was Not Discretionary.

The government is wrong in asserting that the record does not support Plaintiff's allegation that the Air Force abandoned the site. Response 37. The government's own sources confirm the abandonment many times over:

- "The North River RRS has been abandoned since 1978…" FER 126.
- "The site is now abandoned and heavily vandalized…" FER 127.
- "Abandoned vehicles" at North River site. FER 100.

- "The above described Tract L Parcel No. 1 on which rests a vehicle maintenance shop and a dormitory both constructed in 1967, having presently been abandoned and in a state of disarray." ER 102.
- "Instead we have been left abandoned with a toxic waste as dangerous as the "Love Canal." ER 103.
- "Scavenging of equipment and building materials has occurred since this site was abandoned in 1978…" ER 107.
- "The Alaska District proposes to remove HTM and debris from this abandoned Air Force Installation…" FER 124.
- "A well near a tributary of the Unalakleet River, once used to supply the WACS site, is now abandoned." FER 125.
- "The Army Corps of Engineers demolished the abandoned buildings and structures … in 1993 and 1995." FER 122.
- "From 1978 to 1984 the site was unmanned. Potentially hazardous materials used at the facility were left on-site." FER 135.

The government seeks to avoid its responsibilities as a landowner by pointing out that contractors did waste disposal. But the government conflates two separate issues. The failure to secure governmental property after ending the project is distinct from the government's failure to ensure that the contractor properly disposed of waste during operations. The government provides no

rationale for ignoring its responsibilities as landowner. In fact, its cited authorities support Mrs. Nanouk's position that the government's routine responsibilities as a landowner are not protected discretionary acts. *See Waverley View*, 79 F.Supp.3d at 575 (distinguishing "prosaic acts and omissions made by the [government] as an administrator or *landowner*" from "fundamental choices about how best to test and discard experimental munitions developed during wartime" which were discretionary) (quoting *Loughlin*, 286 F.Supp.2d at 23 n. 19) (internal quotations omitted) (emphasis added). The government provides no response to this Court's caution that the "danger that the discretionary function exception will swallow the FTCA is especially great where the government takes on the role of a private landowner." *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir.2002) (government liable for failure to maintain property when neighboring property was damaged).

The government acted as a negligent neighbor. It brought dangerous chemicals onto its property and then abandoned those chemicals and the property. The PCB spill may have occurred years after the government abandoned the site. *See* FER 120 (dating spill between 1957-1982).

The government offers no policy rationale for the abandonment, only for the delay in reporting the abandonment to Congress. It offers no support in the record

to show that the abandonment was grounded in policy. Clearly the government has not met its burden to show the discretionary function applied to the abandonment.

3. The Retroactively Manufactured Policy Reason of Military Exigency Is Not Grounded in Policy Nor Is It Grounded in The Record.

The government has manufactured a policy decision to employ contractors at the expense of safety. The government claims that this was necessary because of military exigencies during the Cold War. The decision to employ contractors was unquestionably a discretionary decision. But the government has not shown – nor can it – that this decision encompassed a decision to provide contractors wide latitude at the expense of safety because of the harsh conditions of Alaska. The facts contradict this claim.

a. The Government Was Not Compelled to Hire Contractors and Sacrifice Environmental Safety Because Alaska Was Too Big and Cold.

The record does not support the government's claim that military exigencies forced the Air Force into a policy decision to employ contractors because of the harsh conditions.[7]

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[7] The government misleads with several statements referring to the "harsh Alaska climate." Response 26. The government states: "*Because of these conditions*, the Air Force made the policy decision that contractors were necessary and retained contractors … 'with the minimum governmental support' and 'in lieu of military manning.' SER 174." The unstamped page they include in their SER has no reference to such conditions. In fact, a review of all contracts and operational plans

In fact, the contract does indicate a policy reason for employing contractors.[8] The record shows that at its outset the White Alice system was designed to provide commercial long-distance services in Alaska to be used by both civilians and the military. FER 72, 74. The Air Force was by design the provider of commercial communications in Alaska, using private contractors and the White Alice network. FER 12. White Alice was designed with the ultimate purpose of commercial sale in mind. FER 74. The 1967 Alaska Communications Disposal Act required the Air Force exit the commercial communications business. FER 72, 78. The property at North River was no longer part of the system by 1978 and was not disposed of as part of the sale of the communications network, but remained within the ownership and responsibility of the Air Force. FER 80.

Although the decision to employ contractors was discretionary, that decision was based on commercial considerations including retaining a high resale value. Thus, the underlying policy was the opposite of the government's disingenuous

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shows no references to the harsh climate or size of Alaska as claimed by the government. Plaintiff has included these documents in full at FER 10-67.

[8] The contract assumes that the system would "be operated *with sufficiently high standards to insure maximum sale potential to a commercial communications company* …. The criteria for the design and construction of the system *has been based on ultimate sale to and operation by a commercial communications company*. This principle will be adhered to in expansions, operations, and maintenance of the system *during any interim period of governmental ownership*." FER 12 (emphasis added).

argument presented here – that contractors were given discretion to ruin the government investment because of military exigency. The government fails to provide any foundation in the record for the claim that military decision makers determined that the harsh conditions in Alaska required employing contractors without supervision or controls.

b. The Government Contracts Incorporated Specific and Mandatory Requirements and Regulations That Eliminated Discretion.

The government contends that if there were no directives that were mandatory and specific to PCBs, the Air Force was free to let its contractors exercise judgment in their hazardous waste disposal. The record demonstrates the opposite is true.

The contracts required contractors to follow stringent regulations and policies. *See* Opening Br. 6-7. Any deviations from pre-approved procedures or maintenance and operation instructions had to be approved in writing by the Air Force. FER 56, 59. The record is devoid of any such deviations.

The contracts incorporated safety standards and imposed quality control and environmental obligations. *See, e.g.* FER 58 (maintenance and repair standards); "FER 57 (quality control standards); FER 58 (records to be maintained per regulations); FER 58 (accountability and control of property in compliance with regulations); FER 58-59 (maintain records in compliance with regulations).

No discretion exists "if the government incorporates specific safety standards in a contract which impose duties on the government's agent." *Kennewick*, 880 F.2d at 1026 (citing *Camozzi v. Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 290 (9th Cir.1989)). As here, in *Kennewick* and *Camozzi* government employees failed to ensure governmental contractors followed specific safety requirements incorporated into the governmental contracts. *Id.* This Court found the government was not immune for those failures.

Nor is the government excused under the discretionary function for failing to ensure that a contractor complies with safety provisions when the contract includes mandatory language assigning oversight responsibilities to the contracting officer, a government employee. *Routh v. United States*, 941 F.2d 853, 855 (9th Cir. 1991). This is so, even if specific and mandatory safety standards are not incorporated into the contract. *Id.*

Here, the Air Force failed to ensure that contractors complied with binding regulations and contract requirements. These failures are "not the kind of broader social, economic or political policy decision[s] that the discretionary function exception is intended to protect." *Sutton v. Earles*, 26 F.3d 903, 910 (9th Cir. 1994); *see also Faber v. United States*, 56 F.3d 1122, 1125 (9th Cir. 1995) ("It would be wrong to apply the discretionary function exception in a case where a low-level government employee made a judgment not to post a warning sign…").

That is, the failure to monitor contractors and enforce safety and environmental standards was not part of the project design but rather negligent implementation of the Air Force's plan by the personnel on the ground.

The government characterizes this case as discretionary because it 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 Alaska sites." Response 15. But, the government points to no evidence that the Air Force made such a determination, or even considered the question. In fact, the government questions whether Air Force decision makers even had reason to know PCBs were hazardous. *See* Response 5. The government has not borne its burden to provide support in the record, and it has questioned the basis for the policy decision it asserts. This purported policy justification is "totally divorced" from the government's actions and not entitled to immunity. *Cf. Young*, 769 F.3d at 1057.

D. Actions Taken As Part of Environmental Remediation Were Not Discretionary.

The district court erred in conferring blanket immunity for remediation by holding, without support in the record, that "it cannot be seriously doubted that discretion was exercised, policy analyzed and judgment employed." ER 5.

First, the government can have no immunity for remediation activities if it was not actually doing remediation. And the government's own records show otherwise:

1. In 1995: "Besides asbestos in and on the buildings, there is PCB and POL contaminated soil; capacitors and resistors containing PCBs; and drums with various amounts and types of liquids." FER 130.
2. In 1995: "Additional sampling should be performed to adequately characterize the extent and severity of contamination. FER 131.
3. In 1996: History of Operations from Environmental Restoration Program Management Action Plan, FER 128 (emphasis added):
    - 1957-1978 - WACS (communication system);
    - 1978-1982 – None
    - 1982-1985 – Restoration (PCB removal, building demolition)
    - 1986-1995 – None
    - 1996 – Demolition and cleanup
4. In 2001: "Sample results from these past investigations indicate that contamination from past activities is present at the installation. FER 129.
5. In 2004: "There were several areas from previous site reviews that were never investigated…" FER 133.

6. In 2010: Alaska Department of Environmental Conservation reported that additional cleanup was needed and scheduled to take place in 2011. FER 122.

Second, the district court erred in declaring a sweeping exemption for environmental remediation rather than examining the individual actions and non-actions. The government's actions in remediation must be examined one by one.

Like its justification for a special military exigency exemption, the government's response to the cases presented by Mrs. Nanouk is to assert that environmental remediation demands treatment completely different than any of the cases decided in this circuit.[9] But the government refuses to admit the applicability of *Myers*, in which this Circuit held the Navy liable for actions in environmental remediation after contamination from military activities. The government recognizes that *Myers* is consistent with Ninth Circuit law. But, because its holding is inconvenient, the government asserts that *Myers* is not relevant. The government would instead follow the unpublished, non-precedential decision in *Welsh v. U.S.*

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[9] This appeal concerns Plaintiff's FTCA claims and does not include claims under CERCLA, which has a different statutory scheme for analyzing discretion. While CERCLA was included as a cause of action in the Complaint, the parties did not brief CERCLA below, and the district court made no findings on the CERCLA claim in its decision, nor was it the basis for dismissal, Although CERCLA was raised by the government in its brief, CERCLA is not applicable to the instant claims because the site was not subject to CERCLA until 2003.

Army, 2009 WL 250275 at *3 (N.D. Cal. 2009), *aff'd* 389 F.App'x 660 (9th Cir. 2010) (Army closed out base and performed environmental cleanup under non-binding guidelines that identified common sense approaches and general practices).

This reasoning is unpersuasive. The proper approach is to determine whether the decisions are protected decisions grounded in policy considerations or unprotected considerations made when implementing policy. *Kennewick*, 880 F.2d at 1031. In *Kennewick*, the government's decisions in designing a canal, even though negligent, were shielded under the discretionary function exception. *Id.* at 1026. But negligent construction of the canal was not shielded because the contracting officer failed to follow contract specifications and require the contractor to excavate unsuitable materials during construction. *See id.* at 1030. Although the contract officer was given discretion in deciding whether to remove the materials, those decisions were not based on policy judgments but on technical, scientific, engineering considerations. *Id.* at 1031. Similarly, here, there is no showing that the government's actions or inactions in remediation were other than based on technical, scientific, engineering considerations.

The government raised the spectre of cost. But simply because government actions would "significantly raise[] the cost" is not sufficient to place its decisions within the realm of permissible policy decisions. *See id*. The fact that a government

action affects costs does not make a decision discretionary, because "virtually all government actions affect costs." *Id*.

It is undisputed that the government did not remove the open transformers containing PCBs until 1985. Response 7. It is undisputed that it was not until 2003 that the government finally discovered and began remediation of an area containing 40,000 times the permissible level of PCBs at NR and adjacent to Mrs. Nanouk's property. Response 10. And it is undisputed that Mrs. Nanouk's property continues to be designated in "Area C", an area of contamination and response even though the government has asserted in its briefing that the remediation is complete. Response 11-12. The government has simply not carried its burden. The government's remediation efforts (or lack thereof) are not entitled to immunity.

III. The Contractor Exception Does Not Apply.

A. Once Contractors Left The Site in 1978, the Government Had Sole Responsibility to Secure and Care for the Property.

The government claims immunity under the contractor exception, because the station was operated by contractors until 1978. But the government has had the responsibilities of a landowner since the outset of the project. It has been over forty years since the operational contractors departed. The government has not shown – nor can it – that anyone except the Air Force was responsible for the property since 1978.

The government blames the contractor for the condition of the sites. Response 6. Such blame is misplaced; the government retained oversight at all times. The contracts contained specific provisions on termination. FER 53. The government has produced no evidence - nor even claimed - that contractors failed to comply with their responsibilities upon closure of the sites. Thus the government itself is responsible for the manner in which the sites were left.

The government's argument that it hired a caretaker does not help. The caretaker had no authority. His only duties were to inspect the site, perform security checks, and "submit written reports to the Real Property Officer, Elmendorf AFB, Alaska." FER 86. The Air Force acknowledged caretakers were "limited in their authority and can only provide a reporting service." FER 88. The GAO notified the Air Force of violation of regulations, noting that contract caretakers did not fulfill the Air Force's responsibilities because they did not prevent vandalism or removal of government property, only reported incidents to the Air Force. FER 101.

And the caretakers did report widespread evidence of vandalism at White Alice sites, including NR. FER 102. Yet the government provided no evidence that it took action in response to those reports.

Contractor immunity does not apply.

B. Before 1978, the Government Retained Responsibilities and Oversight.

The government's contention that it did not retain control over the contractor's activities is directly contradicted by the detailed requirements in the contracts. *See* FER 56 (responsible for complying with Air Force instructions, manuals, and administrative and operational procedures); FER 56, 59 (written Air Force approval required); FER 57 (duty to assist Air Force personnel inspections of real and installed property) FER 59 (Air Force must approve projects involving real property). Additionally, the government incorporated regulations and policies into the contract, which places an onus on the government to ensure compliance. *See supra* § II.C.3.b.

The district court made no findings to support its determination that "the contractor exception would apply, as well." ER 6. As support in the record, the government parses provisions in the contract relating to operation and maintenance. The government ignores the multiple contractual provisions on supervision and oversight. The government has the burden to prove the exception applies, with support in the record – it has not.

CONCLUSION

The Federal Tort Claims Act was not intended to shift the risk of environmental harm to a single individual such as Mrs. Nanouk. The government's position that it has borne its burden on the basis of an invented military-exigency-

during-the-Cold-War exception to the FTCA is belied by the statutes, regulations and contracts that form the record in this case. The government is not immune from the harm caused to its neighbor at the North River site. This dismissal should be reversed and the case remanded to the District Court for further proceedings, including trial.

DATED this 30 day of October, 2019.

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FOR THE NINTH CIRCUIT

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