

## Alaska Enviro Suit Shows Gov't Is A Tough Tort Defendant

By **Brandon Matsnev** (October 7, 2020, 4:35 PM EDT)

On Sept. 4, the U.S. Court of Appeals for the Ninth Circuit decided *Nanouk v. U.S.*, which features a helpful statutory analysis for environmental lawyers. Also, its basic facts might turn the heads of excitable sci-fi readers: A Cold War-era U.S. military installation allegedly leaked mysterious chemicals onto the lands of unsuspecting citizens.

The Federal Tort Claims Act permits claims for monetary damages against the U.S. for injury or loss of property caused by the wrongful acts of federal employees.[1] This waiver of sovereign immunity, however, is limited by the discretionary function exception, which preserves immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." [2]



Brandon Matsnev

In other words, one can sue the federal government in tort when a federal employee is legally required to take a certain nondiscretionary action that results in damage. Where an action involves an element of judgment or choice, though, it cannot be the basis of a lawsuit. The rationale for this exception is that it would be inappropriate for courts to second-guess discretionary judgments based on social, economic or political policy.

But what is the result where the government might have just messed up? Can it rely on this exception to dismiss a lawsuit based on a mistake, where the mistake was in some sense discretionary?

In *Nanouk*, the Ninth Circuit answered in the negative, holding that the exception does not apply to what can best be described as ordinary negligence in the performance of a site remediation. Thus, where the action is the result of simple carelessness rather than a policy analysis, it can be the basis of a lawsuit.

The plaintiff held a 160-acre Alaska Native Allotment near the North River Radio Relay Station, an old U.S. Air Force communications facility. Operated by government contractors, the station was part of a network of radio relay sites built to enable early warning of possible Soviet air attacks.

After new satellite technology rendered the network obsolete, the station was closed in 1978. In 1981 the government determined that the facility, like many similar stations, was contaminated by polychlorinated biphenyls, or PCBs. But the Air Force focused on cleaning more dangerous sites, and it

was not until the 1990s that the government got its bearings straight and resumed remediation, although its efforts proceeded at a glacial pace.

In 2003, the plaintiff notified the government of strong odors on a trail she used to access the cabin on her property. After an investigation, the government found a "hot spot" of PCBs on the trail and later discovered more contamination around the plaintiff's cabin. The plaintiff sued the federal government in 2015 for trespass and negligence.

In her complaint, she contended (1) that the Air Force had not properly overseen the station's contractors, who dumped PCBs on the ground; (2) failed to remediate the contamination at the time of abandonment and through the 1980s; and (3) conducted an insufficient cleanup in the 1990s. After the close of discovery, the U.S. moved to dismiss the complaint, arguing that the discretionary function exception barred the claims. The district court agreed, dismissing the action.

On appeal, the Ninth Circuit affirmed only in part, and reinstated the plaintiff's action. After reminding that it is the government's burden to prove the exception, the court applied a two-step analysis to each of the three government actions giving rise to the plaintiff's tort claims.

The first step asks whether the action was truly discretionary, or instead mandated by statute, regulation or policy. The second step asks whether, even if discretionary, the action was grounded in social, economic or political policy. If the answer to either question is no, a claim will survive.

As to the first allegation that the government did not properly oversee its contractors, the court held the discretionary function exception barred this claim. The court concluded that no law prescribed how the government was to oversee contractors' waste disposal activities, and the government's judgment in deciding how closely to supervise contractors was the product of a reasonable policy analysis.

As to the plaintiff's claim that the government negligently abandoned the station, the court held that no directive governed the government's actions here either, and that the Air Force's conduct post-closure was a policy decision to prioritize the most dangerous sites.

Finally, the court considered the government's insufficient cleanup of the station in the 1990s and resulting failure to discover the hot spot of PCBs. Application of the second step here yielded a different result. The court held that the government failed to show its actions were based on policy considerations. Rather, it appeared that after the government decided to remediate the station in the 1990s, it simply failed to follow through with this decision. As a result, the plaintiff's tort claims based on this delay survived dismissal.

This case offers several helpful takeaways for those considering a tort lawsuit against the federal government, whether for negligent site remediation or otherwise. Most importantly, discretionary government action that yields an unfortunate result does not necessarily give rise to a tort claim, so long as a policy led to that action. It is easy to see why this rule can make the government a particularly difficult tort defendant.

In *Nanouk*, for example, the government could not be held liable for negligent supervision of contractors because its decision on how closely to supervise them was based on policy. Any such argument from a private defendant would be ill-advised, to say the least — a defendant's intentionally and admittedly hands-off approach to supervision would constitute the plaintiff's case-in-chief, not the primary defense. But so long as the government can logically explain its reasoning for a certain discretionary measure, it

cannot be sued in tort, no matter how destructive the consequences of that measure.

Also, a court seems highly unlikely to question the merits of a policy that allegedly underlies government action. If the government produces enough evidence to show that an employee acted based on certain economic policies, for example, a court will not engage in a lengthy analysis of whether the action can be perfectly justified based on those policies. The legislature created the exception to prevent this very analysis, whose proper place is on the Senate floor, not in a judge's chambers.

This approach mirrors the rational basis test in constitutional law, in which a court will refuse to strike down economic legislation as long as the legislation is rationally related to a legitimate government interest. Practitioners should be careful, therefore, not to bring a lawsuit that involves arguing that a policy is misguided. If a policy — any policy — exists to justify a nondiscretionary action, it will likely trigger the discretionary function exception and bar the claim.

Relatedly, addressing the exception will require the plaintiff to expend additional resources. In a tort action against the government, issues will arise that transcend the run-of-the-mill elements of duty, breach, causation and damages. Much of discovery will focus not on the isolated facts giving rise to a negligence claim — e.g., who spilled what and when — but on the broader historical and political context in which those facts took place.

A client needs to understand that developing this narrative, and ultimately discrediting the government's framing of it, will take time and energy. In an ordinary case, for example, a video of chemical dumping in full view of a defendant's permissive employees could be strong evidence of negligence. But in a case against the government, resting one's laurels on the existence of an incriminating video, while ignoring the policy context explaining the video, might lead to dismissal.

Lastly, despite the power of the exception, the government is unlikely to dispose of a tort action early in litigation on the basis of it. Again, it is the government's burden to prove that the exception applies.

This proof requires a sufficient amount of discovery practice, including document production and deposition testimony. This practice will serve to answer relevant questions, including whether a government employee had a choice to take a certain action, whether the action was based on a reasoned policy analysis, and what exactly those policies were.

Indeed, a court is unlikely to be persuaded that the discretionary function exception applies based on one single document or affidavit, no matter how relevant. Thus, while the discretionary function exception is certainly an obstacle to recovery, the government will not be in a position to wield its full force in an early dispositive motion.

---

*Brandon P. Matsnev is an associate at Manko Gold Katcher Fox LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] See 28 U.S.C. § 1346(b)(1).

[2] 28 U.S.C. § 2680(a).