Clark v. United States

No. C85-97TB (660 F. Supp. 1164) (W.D. Wash. April 20, 1987)

The court holds that the federal government is liable to residents in the vicinity of McChord Air Force Base near Tacoma, Washington, for local groundwater contamination caused by the Air Force's negligent disposal of hazardous materials. The Air Force's actions do not fall within the discretionary function exception of the Federal Tort Claims Act because Air Force manuals mandate that the selection of landfill and burn pit sites be conducted with consideration of any possible effects on groundwater and in accordance with state law. The court next holds that the government breached its duty to plaintiffs not to dispose of hazardous waste in a manner that would contaminate area groundwater. Although plaintiffs failed to prove common law negligence, the government's violation of Washington statutes and Air Force regulations constituted negligence per se. Finally, the court holds that the government's negligence proximately caused plaintiffs to suffer loss of rental income, diminution of their property values, loss of the use and quiet enjoyment of their property, emotional distress and mental anguish, and the cost of plumbing repair.

[A related opinion appears at 16 ELR 20057.]

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[17 ELR 21178]

BRYAN, District Judge.

THIS MATTER having come on before the undersigned Judge of the above-entitled Court for trial, and the Court having heard the oral testimony presented, having reviewed the documentary evidence admitted, having heard oral argument from all parties, and being otherwise fully advised in the premises, now, therefore, enters the following:

FINDINGS OF FACT

1.

The Court's oral decisions on December 22, 1986, December 23, 1986, and January 7, 1987, attached hereto, are incorporated by this reference as though fully stated herein.

2.

Plaintiffs Edwin Nojd and Genevieve Nojd are husband and wife, and the parents of plaintiffs Marta Vinnedge and Norma Crouse. Norma Crouse is presently a resident of Spanaway, Washington, and Marta Vinnedge is presently a resident of Seattle, Washington.

3.

Plaintiff Mary Clark, a single woman, is the widow of Harvey Clark and the mother of plaintiff Janice Butler. Janice Butler is the mother of minor plaintiffs Alan McArthur and Aaron Frank. Plaintiff John Gravatt, a single man not related to the other plaintiffs, has been a tenant on the Clark property since 1977.

4.

Plaintiffs Edwin and Genevieve Nojd are the owners of approximately five (5) acres of land ("Nojd Property") in American Lake Gardens, an unincorporated area south of Tacoma, Pierce County, Washington. American Lake Gardens borders on McChord Air Force Base, an installation owned and operated by defendant United States of America. Since 1947, Edwin and Genevieve Nojd have resided on the Nojd Property, the legal description of which is as follows:

Parcel 1, acquired June 12, 1957: Beginning on the North line of Section 23, Township 19 North, Range 2 East, W.M. at a point 467.85 feet East of the Northwest corner thereof, thence on a line if continued would intersect the East and West centerline of said Section 23, at a point 488.28 feet East of the quarter section of the West side of said section, South 32.18 feet to the true place of beginning for this description; thence continuing on said line South 600 feet, thence East at right angles to the last course 330; thence North at right angles to the last course 600 feet; thence West 300 feet to the true place of beginning, in Pierce County, Washington.

Parcel 2, acquired April 13, 1967: Beginning at a point 712.85 feet East of the Northwest corner of Section 23, Township 19 North, Range 2 East of W.M., thence South 32.18 feet to the point of beginning; thence South 600 feet; thence East 85 feet, thence North 600 feet, thence West 85 feet to point of beginning; in Pierce County, State of Washington.

5.

There are three residences on the Nojd Property: 6507 — 146th Street S.W.; 6511 — 146th Street S.W.; 6419 — 146th Street S.W. Edwin Nojd, Genevieve Nojd and Norma Crouse resided at 6507 — 146th Street S.W. from 1947 through January 1963. Marta Vinnedge resided at 6507 — 146th Street S.W. from April 1951 through January 1963. From January 1963 until the present, Edwin and Genevieve Nojd have resided at 6511 — 146th Street S.W. Norma Crouse resided at that address from January 1963 until 1966, and from 1970 until 1971. Marta Vinnedge resided at that address from January 1963 until 1969, from 1973 until 1978, and from 1979 to 1980.

6.

Marta Vinnedge and Norma Crouse have been frequent and regular visitors to their parents' property, and during the course of such visits have consumed water on a frequent and regular basis. One well on the Nojd Property provides water to 6419 and 6507 — 146th Street S.W., and a second well provides water to 6511 — 146th Street S.W. The two wells are approximately 200 feet apart. Edwin Nojd, Genevieve Nojd, Norma Crouse and Marta Vinnedge have all at various times consumed water from wells on the Nojd Property serving 6511 — 146th Street S.W. and 6507 — 146th Street S.W. On occasion, water from the well serving the residences at 6507 and 6419 — 146th Street has been pumped directly to the Nojd residence at 6511 — 146th Street, the last such instance after 1980. A relative resided at 6507 — 146th Street until 1970, and all Nojd plaintiffs visited regularly and consumed water while so doing.

7.

Plaintiff Mary Clark is the owner of approximately ten (10) acres of land ("Clark Property") in American Lake Gardens, said property legally described as follows:

East five (5) acres of the following described property: Beginning on the North line of Section 23, Township 19 North, Range 2 East, W.M.,at a point 797.83 feet East of the Northwest corner of said section; thence on a line which if continued would intersect the East and West centerline of said section at a point 818.28 feet East of the quarter corner of the West side of said section South 632.09 feet; thence at right angles to the last course East 324.19 feet; thence with the same meridian of reference, North 68 degrees 03'00" East 184.30 feet; thence North 73 degrees 06'00" East 172.32 feet; thence North 514.28 feet to North line of Section 23, at a point 1,457.85 feet East of the Northwest corner thereof; thence on said North line West 650 feet to the point of beginning.

Also beginning on the North line of Section 23, Township 19 North, Range 2 **[17 ELR 21179]** East, W.M. at a point 1457.85 feet East of the Northwest corner of said section; thence on a line which if continued will intersect the East and West center of said section at a point 1478.28 feet East of quarter section corner on the West side of said section South 514.28 feet; thence with same meridian of reference North 73 degrees 6'00" East 332.49 feet; thence North 64 degrees 51'00" East 143.85 feet; thence North 355.05 feet to the North line of Section 23, at a point 1906.20 feet East of the Northwest corner of said section; thence on said North line West 448.35 feet to point of beginning except roads; situate in the County of Pierce, State of Washington.

8.

The Mary Clark property contains: A main residence (6117 — 146th Street S.W.); a rental house (6107 — 146th Street S.W.); a duplex located at 6111-6113 — 146th Street S.W.; a garage; and a stable with a tack room. Mary Clark has resided at 6117 — 146th Street S.W., Tacoma, Washington from 1948 to the present. John Gravatt has resided on the Clark property from 1977 to the present. Janice Butler resided on the Clark property from 1950 through 1968, from 1969 to 1975, from 1977 to 1981 and from August 1985 to the present. Allen McArthur was born in 1969 and Aaron Frank in 1976. They have resided on the Clark property when their mother (Butler) did so. The plaintiffs consumed well water while residing on the property until 1983.

9.

The Nojd property located at 6507 — 146th Street S.W. has been rented to tenants since 1963. The Nojd property located at 6419 — 146th Street S.W. has been rented to tenants since 1975.

10.

Prior to the discovery of contaminated water in 1983, plaintiff Mary Clark had tenants residing on her property in her rental units. Since 1983, John Gravatt has remained as a tenant; Janice Butler and her two children became tenants in August 1985. Mary Clark would not accept rent from John Gravatt after they were advised not to use the well water for drinking or cooking in March 1983, although he offered to continue paying rent. Janice Butler and her family have not paid rent since they moved to the property in August 1985.

11.

Since 1938, the defendant United States of America has operated a military reservation known as McChord Air Force Base ("McChord") at Pierce County, Washington. Over a period of years, the defendant has disposed of some part of its waste materials at landfill sites and burn pits on McChord.

12.

In December 1982 or January 1983, plaintiff Mary Clark notified Air Force officials at McChord that she was concerned her water might be contaminated. The Air Force did not respond to her concerns in a manner which was satisfactory to Clark. Thereafter, plaintiff Clark contacted the Tacoma-Pierce County Health Department to sample her water drawn from wells on her property. The Tacoma-Pierce County Health Department contacted the EPA, which actually tested Clark's well water for contamination in late January 1983. Clark was advised not to consume the water while waiting for the EPA's test results. After the EPA had received water test results from the Clark property in March 1983, Mary Clark, her family and tenants were advised not to consume water drawn from wells on the Clark Property.

13.

The two wells providing a domestic water supply to the Nojd Property were tested by the EPA in March of 1983. After the results were received by the EPA, Edwin and Genevieve Nojd and their tenants were advised not to consume water drawn from these two wells. Marta Vinnedge and Norma Crouse were informed by their parents of the contamination and of the advice concerning consumption of water.

14.

In May 1983, after the well water on the Nojd and Clark Properties had been analyzed by the EPA, Edwin Nojd, Genevieve Nojd, Mary Clark, John Gravatt and Janice Butler were immediately informed by representatives of the Tacoma Pierce County Health Department that their water supplies contained trichloroethylene ("TCE"), a possible carcinogen. The remaining plaintiffs received the same information soon thereafter.

15.

It is stipulated that the contaminants trichloroethylene ("TCE"), and a derivative of TCE; 1, 2 trans dichloroethylene ("DCE") have been found in wells on the Nojd Property in the following amounts on the dates indicated:

*3*6419 - 146th S.W.

Date	DCE	TCE
5/21-2, 1984	/	/
8/28-9, 1984	/	/
10/23, 1984	/	/
11/27, 1984	/	
1/28-9, 1985	No results	No results

2/20, 1985	/	/
4/8-9, 1985	14.1	7.9
4/23, 1985	/	/

*3*6507 - 146th S.W.

Date	DCE	TCE
5/21-22, 1984	17	7.7
8/28-9, 1984	12.4	8.9
10/23, 1984	/	/
11/27, 1984	No results	No results
1/28-9, 1985	NC	NC
2/20, 1985	/	/
4/8-9, 1985	/	/
4/23, 1985	16.5	9.2

*3*6511 - 146th S.W.

Date	DCE	TCE
5/21-22, 1984	2.3	ND
8/28-9, 1984	0.3	ND
10/23, 1984	/	/
11/27, 1984	No results	No results
1/28-9, 1985	TR	ND
2/20, 1985	/	/
4/8-9, 1985	/	/
4/23, 1985	1.7	ND

In the above representation, concentrations are in micrograms per liter (ug/1), the slash (/) means "no sample," "ND" means "none detected," "TR" means "trace," "NC" means "not confirmed," and "no results" means "sample exceeded holding time."

16.

It is stipulated that TCE and DCE have been discovered in wells on the Clark Property in the following amounts on the dates indicated: **[17 ELR 21180]**

*6*6117 - 146th S.W., Tacoma, Washington

	Testing	Well ID & Sample	Well ID & Sample

Date	Agency	TCE	Depth	DCE	Depth
2/1/83	EPA	7.9	N	66	N
		12.0	S	33	S
4/18/83	USAF	8.9	N	83	N
		10.8	S	36.7	S
5/31/83 & 6/1/83	EPA	10		155	
6/22/83	EPA	7.5	30 ft.	55.0	30 ft.
		15.0	32 ft.	114.0	32 ft.
		5.4	35 ft.	169.0	35 ft.
		5.8	37 ft.	180.0	37 ft.
		6.2	40 ft.	193.0	40 ft.
		2.1	42 ft.	88.0	42 ft.
6/23/83	EPA	1.2	45 ft.	50.0	45 ft.
		1.M	47 ft.	31.0	47 ft.
		1.M	50 ft.	11.0	50 ft.
		1.U	52 ft.	8.1	52 ft.
6/27/83	EPA	1.U	92 ft.	1.U	92 ft.
		1.U	97 ft.	1.U	97 ft.
		1.M	100 ft.	3.5	100 ft.
12/20/83	USAF	9.6		23.1	
1/24/84 - 2/2/84	EPA (by E&E)	10	W1B W1C	8.4 123.0	W1B W1C
5/21/84 - 5/2/84	USAF	5.7		14.0	
8/28/84 - 8/29/84	USAF	9.2		13.5	
11/27/84	USAF	No results		No results	
12/11/84	USAF	0.7	W1A	2.5	W1A
		2.3	W1B	18.7	W1B
		13.7	W1C	24.7	W1C
		ND	W2A	ND	W2A
		ND	W2B	ND	W2B
		0.5	W3A	3.2	W3A
		0.5	W3B	0.4	W3B
		1.0	W4A	5.9	W4A
		7.3	W4B	30.7	W4B
		2.7	W4C	12.1	W4C
1/30/85	USAF	1.2		3.3	
2/14/85	USAF	8.2		NR	
6/11/85	Am Test	19	W1C-40 ft.	50	W1C-40 ft.
		1.0	W1B-78 ft.	30	W1B-78 ft.
6/11/85	USAF	1.0	W1B-78 ft.	14	W1B-78 ft.
		7.9	W1C-40 ft.	70.0	W1C-40 ft.

		ND	W2A-38 ft.	ND	W2A-38 ft.
		ND	W1B-19 ft.	ND	W1B-19 ft.
		ND	W3A-43 ft.	NC	W3A-43 ft.
		3.2	W3B-15 ft.	NC	W3B-15 ft.
		ND	W4A-117 ft.	ND	W4A-117 ft.
		2.8	W4B-74 ft.	11.0	W4B-74 ft.
		3.8	W4C-35 ft.	28.0	W4C-35 ft.
6/11/85	USAF QC	15	W1C-40 ft.	61	W1C-40 ft.
		ND	W4A-117 ft.	ND	W4A-117 ft.
6/17/85	USAF QC	3.2	W3B-15 ft.	NC	W3B-15 ft.
7/9/85	USAF	14	W1C-40 ft.	27	W1C-40 ft.
		NC	W3A-43 ft.	NC	W3A-43 ft.
		ND	W4A-117 ft.	ND	W4A-117 ft.
7/9/85	USAF QC	ND	W2B-19 ft.	ND	W2B-19 ft.
		ND	W4A-117 ft.	ND	W4A-117 ft.
7/12/85	USAF	NC	W1B-78 ft.	23	W1B-78 ft.
		ND	W2A-38 ft.	ND	W2A-38 ft.
		ND	W2B-19 ft.	ND	W2B-19 ft.
		3.5	W3B-15 ft.	NC	W3B-15 ft.
		NC	W4B-74 ft.	5.1	W4B-74 ft.
		5.0	W4C-35 ft.	32	W4C-35 ft.
7/12/85	USAF QC	NC	W1B-78 ft.	20	W1B-78 ft.
7/12/85	USAF	NC	W1B-78 ft.	23	W1B-78 ft.
		7.9	W1C-40 ft.	70	W1C-40 ft.
		ND	W2A-38 ft.	ND	W2A-38 ft.
		ND	W2B-19 ft.	ND	W2B-19 ft.
Undated	EPA (Sample No. J2124)	26	W1C-depth unknown	20	W1C-depth unknown

Results expressed in micrograms per liter Well depths noted when available

USAF = United States Air Force

EPA = Environmental Protection Agency

E&E = Environmental and Ecology, Inc., an EPA contractor

Am Test = Am Test, Inc.

N = North well

S = South well

U = below one microgram

M = detected at less than 1 microgram per liter but quantification at this level is unreliable

ND = none detected

NC = none confirmed

NR = unable to confirm; please submit another sample

17.

It is stipulated that iron has been found in the wells on the Clark Property in concentrations of 4410 (north well) and 2480 (south well) on February 1, 1983; and 4648 on May 31, 1984; and 2297 on February 14, 1985. All concentrations referenced are in micrograms per liter.

18.

TCE and DCE are classified by the United States Environmental Protection Agency and the State of Washington as extra-hazardous substances. The EPA's recommended contaminant level for TCE is zero micrograms per liter, and it is classified by the EPA as a probable human carcinogen. The EPA's maximum contaminant level for TCE is 5 micrograms per liter, and the "action level" for the Tacoma-Pierce County Health Department is 2.7 micrograms per liter. The EPA's recommended maximum contaminant level for DCE is 70 micrograms per liter for lifetime exposure.

The EPA's recommended contaminant level for TCE is zero because as a matter of public policy EPA sets recommended levels at zero for any chemical classified as a probable human carcinogen. The maximum contaminant level, in contrast, is set by balancing public health concerns with factors such as the costs associated with preventing or cleaning up contamination. The Tacoma-Pierce County Health Department's "action level" for TCE was set at the estimated 1 in 1 million excess death level; in other words, the concentration which, if consumed over a lifetime of 70 years, would cause one excess death in a population of one million people.

19.

There is ongoing research concerning the potential health hazards of TCE, but there have not been conclusive studies conducted on the carcinogenicity of this contaminant. One study by the National Cancer Institute, and a followup study by the same group, did find an elevated incidence of liver tumors among a certain strain of laboratory mouse which has an inherent propensity to develop liver tumors. Other animal studies have failed to show any association between exposure to TCE and cancer.

20.

A complete "clean-up" of TCE ground water contamination on the property at issue has not, to date, been successfully accomplished. It is possible to remove TCE from a water supply system, such as is now being done with Tacoma's municipal water supply; but it may not be possible to prevent TCE from leaching into an underground water aquifer.

21.

It is stipulated that the contaminants at issue (TCE, DCE and iron) which have been found in plaintiffs' wells originate from past disposal of hazardous waste on McChord at sites underneath the present golf course (golf course landfill and burn pit sites).

22.

The defendant had exclusive control of these waste disposal facilities. These golf course sites were operated from 1951 through the 1960s. TCE disposed of at the golf course sites has leached and may still be leaching into the groundwater beneath **[17 ELR 21181]** these sites, and has migrated and may still be migrating down gradient to the Nojd and Clark properties. TCE and DCE have polluted domestic water supplies of the Clark and Nojd properties. Iron originating from the golf course landfill sites has made the Clark well water unsightly and has damaged plumbing fixtures and pipes.

23.

After being advised that their water was contaminated in March 1983, Edwin and Genevieve Nojd decided to provide their own domestic water supply by hauling water from other sources. This continued until the spring of 1984. Thereafter, Edwin and Genevieve Nojd were provided bottled water by the defendant until their property was connected to the public water supply in July 1986. Mary Clark and her tenant plaintiffs provided their own domestic water by hauling water from other sources until the spring of 1984, after which they were provided bottled water by the defendant until their property was connected to a public water supply in August 1986.

24.

At no time since Edwin Nojd and Genevieve Nojd were notified that their water contained a possible human carcinogen have they, Marta Vinnedge or Norma Course consumed water drawn from wells on the Nojd Property. Well water has been used for quick showers and washing dishes.

25.

Mary Clark and the plaintiffs on her property have not consumed any water drawn from wells on the Clark Property since they were notified that the water contained a possible human carcinogen. Mary Clark did not use the well water for baths, showers or washing. Other plaintiffs on the Clark property made only limited occasional use of well water for non-drinking purposes after the contamination was discovered.

26.

The EPA began an immediate investigation into the water contamination of American Lake Gardens in the spring of 1983. In March 1984, the EPA determined that a possible source of the contamination was McChord. The EPA tendered responsibility for the pollution, and its cleanup, to the United States Department of Defense in 1986.

27.

The defendant continued until December of 1985 to deny that available facts proved conclusively that it was the sole source of the contamination at American Lake Gardens.

28.

The EPA has declared American Lake Gardens to be a "Superfund Site," a designation given to sites with serious contamination. Of the approximately 367 Super-fund Sites nationwide in August 1984, the American Lake Gardens site was third or fourth from the bottom of the list of priorities. There were a total of ten sites in the State of Washington, three or four of them in the Tacoma area.

29.

In August 1982 the results of a preliminary study prepared by an Air Force contractor and based on interviews and document research only, indicated that the landfill site on the golf course might contain potentially harmful wastes and that if that were true there would be a high potential for groundwater contamination and migration off base. This preliminary study was followed by actual field work, and the results of this study by another Air Force contractor were released in 1985. The results confirmed that the landfill site was the probable source of the contamination found by the EPA at American Lake Gardens in March 1983.

30.

TCE is a cleaning solvent which was used for various purposes at McChord. Prior to 1950, the substance was known as dangerous and poisonous in occupational settings involving sustained exposure to high concentrations of TCE, but specific adverse health effects resulting from chronic exposure were not generally understood. Prior to 1950 it was generally known that TCE was not fit to consume and that it should not be in a water supply. The defendant was or

should have been aware that substances such as TCE should not be in a water supply.

31.

DCE is a "break-down" product of TCE, and the presence of DCE in groundwater tends to indicate that TCE has been present in the groundwater for an extended period of time.

32.

Prior to 1950, it was common knowledge that groundwater could be polluted and that the pollution could travel great distances from the site of the original contamination. Further, it was generally known prior to that time that percolation, a process by which substances disposed of would leach into the underlying groundwater, could occur and that groundwater needed to be protected from deleterious leachates.

33.

The appropriate standard of care in waste disposal in the 1950s was to treat TCE as a hazardous substance in disposing of the contaminant so as not to pollute groundwater.

34.

The defendant had certain manuals (Trial Exhibits 21, 22, 23, 24, 46 and 89) which had the force and effect of government regulations, and which set out the standards and requirements governing waste disposal on military installations. These manuals made it mandatory that the effect on groundwater be considered when siting and operating waste disposal facilities on military installations. For example, plaintiffs' Trial Exhibit 21 (AFM 88-11 Chapter 5, § 504C) requires that the location of the fill should be such that run-off can be disposed of without polluting surface or sub-surface water supplies. Plaintiffs' Trial Exhibit 46 (War Department Technical Manual 5-634, October, 1946, § III), sets forth the mandatory requirement not to select sites which have surface or sub-surface drainage to the water supply. Plaintiffs' Trial Exhibit 23 specifically requires that waste disposal must not contribute to a public nuisance, with specific reference to water. Other Air Force manuals in evidence as trial exhibits similarly convey a policy on the part of the Air Force to avoid contamination of groundwater.

35.

Aircraft fuel, oils, cleaning fluids, hydraulic fluids, and similar wastes, some probably containing TCE, were disposed of by burning in burn pits. Effluent from garbage, paint, liquid wastes or materials easily converted into liquid wastes, which probably included TCE, were disposed of at the landfill.

36.

The defendant did not segregate materials nor inspect them with a requisite degree of care before disposing of refuse in the golf course landfill sites. There were no special precautions or instructions to persons hauling refuse, and there was no close control over what type of materials were to be placed in the dump sites. The dump sites were not always covered and standing water would occasionally appear in the excavation.

37.

Air Force policy and regulations required that disposition of liquid hazardous waste, such as TCE, be done by private contractor in a salvage operation off base. However, on frequent occasion, without record-keeping, some unknown amount of TCE was disposed of at the golf course landfill and burn pit sites. Every Friday Air Force employees would place unseparated, non-segregated liquid waste which commonly included TCE, in these pits for various periods of time, sometimes exceeding one day, before burning it. Because burn times were sometimes delayed and because one golf course burn pit was sited on gravel, it is reasonable to conclude that some of the **[17 ELR 21182]** liquid waste would percolate into the ground prior to burning. The effect of the possible contamination of underlying groundwater was not considered at the time that these burn pits were established, although the Air Force's own

regulations made such consideration mandatory, and despite the fact that relevant Washington State Administrative Code provisions dictated that the location of burn pits had to be such as to prevent pollution of underlying groundwater.

38.

The defendant knew or should have known that the disposal of liquid wastes such as TCE at landfill sites, or pouring of liquid wastes into burn pits, could result in groundwater contamination.

39.

Relevant Air Force manuals set out standards and requirements for the siting and operation of sanitary land fills and burn pits at McChord. These manuals contain a mandatory requirement that the presence of groundwater and the possible effects on groundwater must be considered in the siting and operation of dumps and burn pits on an Air Force Base. Despite these clear directives, defendant deviated from these standards by siting landfills and burn pits in areas susceptible to water contamination, and failing to consider the effects on groundwater in the siting and operation of the subject landfills and burn pits.

40.

The contamination of plaintiffs' well water resulted because the dump sites and burn pits were not sited or operated in accordance with government regulations.

41.

It is probable that if the defendant had reasonably considered the effect of such landfill siting on the underlying ground water, as was required by the Air Force regulations, the contamination of plaintiffs' groundwater would not have occurred.

42.

The laws and public policy of the State of Washington, as reflected in R.C.W. 70.54.-010 and R.C.W. 90.48.010-.080, and in 1960's standards for water quality as set forth in W.A.C. 372-12-030, is that all persons have a strong duty to avoid polluting natural groundwater. This public policy is intended to maintain the highest possible standards to insure the purity of all waters of the state.

43.

The acts and omissions of the defendant in siting and operating the dump sites and burn pits on McChord deviated from the appropriate standard of care; that is, defendant failed to exercise ordinary care. Defendant's acts included acts which a reasonably careful person would not do under the same or similar circumstances. Defendants omissions included omissions which a reasonably careful person would not have omitted under the same or similar circumstances. Defendants acts and omissions were proximate causes of plaintiffs' damages.

44.

The defendant has not shown justification or excuse for its failure to abide by the laws and public policy of Washington which prohibit contamination of a water supply; such failure was not due to any cause beyond defendant's control which ordinary care could not have guarded against.

45.

The plaintiffs have not met their burden of proving common law negligence. However, the plaintiffs have met their burden of showing that the defendant violated the relevant Washington statutes, Washington administrative regulations, and Air Force manuals having the force of regulations; that these violations were a proximate cause of

the contamination of plaintiffs' well water; therefore, that the defendant was negligent. The defendant has not advanced sufficient justification for its acts for this Court to excuse defendant's negligence.

46.

The determination to have dumpsites on McChord was discretionary with the defendant. This discretion was, however, limited by the Air Force manuals which required that the effect on groundwater be considered in making decisions regarding the siting and operation of landfills.

47.

It was not discretionary for the defendant to fail to consider the effect on groundwater of siting and operating the dump sites and burn pits.

48.

There was no voluntary act or contribution on the part of plaintiffs to the contamination of their respective properties by TCE or DCE.

49.

It was foreseeable that the siting and operation of the golf course landfill and burn pits without consideration for potential groundwater pollution could result in the contamination of plaintiffs' property and could cause injury to the plaintiffs.

50.

By its pollution of plaintiffs' groundwater the defendant has caused damage to the plaintiffs and to the property of the plaintiffs.

51.

The negligence of the defendant proximately caused a diminution in the value of plaintiffs' property. Since under the laws of the State of Washington a willing buyer would have to be informed of the contamination, this information would result in a "chilling effect" on the value of the property because a buyer would pay less for contaminated property than for uncontaminated land.

52.

Although all plaintiffs have now been connected to a public water supply, due in primary part to the efforts of defendant, the value of the property connected to a public water supply is not substantially different from the value of the same property utilizing private wells, and connecting the plaintiffs' properties to the Lakewood Water District did not confer any additional special benefit on the properties.

53.

The negligence of the defendant proximately caused a decrease in rental income to plaintiffs. Edwin and Genevieve Nojd lost $915 rental income from tenants as a result of a need to lower the rent due to the lack of potable water. Mary Clark suffered a loss of twenty percent (20%) rental value for each of her three rental units for forty-one months, for a total amount of rental loss of $4,920. The twenty percent rental loss is determined with full recognition of Mary Clark's efforts, or lack thereof, to mitigate damages.

54.

By the contamination of the plaintiffs' property which was proximately caused by defendant's negligence, the value of plaintiff's property has been diminished by an undivided twelve and one-half percent (12 1/2%) of the total value of

plaintiffs' real property. This results in a loss of value to the Nojd property, appraised without pollution at $200,000.00, of $25,000.00. Loss to the Clark property, appraised without pollution at $215,000.00, is $26,875.00.

55.

The negligence of the defendant was a proximate cause of damage to the plumbing of the Clark properties in an amount of $7,500.00.

56.

The negligence of the defendant proximately caused Mary Clark to purchase water in an amount of $92.00.

57.

The negligence of the defendant on McChord did not proximately cause the physical injuries sustained by plaintiffs Mary Clark and Janice Butler which occurred when they were hauling water to their residences.

58.

The negligence of the defendant proximately caused inconvenience to all plaintiffs residing in American Lake Gardens after the spring of 1983.

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59.

For approximately one year, Edwin Nojd obtained water for his property one or two times per week, with each trip taking one or one and one-half hours. With his time reasonably valued at $5 per hour, Edwin Nojd is entitled to compensation of $520.00. Plaintiff Mary Clark should similarly be awarded compensation of $520.00 for her efforts in obtaining water.

60.

The negligence of the defendant on McChord proximately caused the plaintiffs daily problems with having contaminated tap water. Under the circumstances here presented, reasonable compensation for lack of tap water and resulting inconvenience is $5.00 per day per person for the plaintiffs Nojds, Clark, and Butler. Plaintiffs Edwin and Genevieve Nojd are each entitled to $5,925.00 for the period of time for which they did not have pure tap water. Plaintiff Mary Clark is entitled to $6,150.00 for the period of time for which she did not have pure tap water. Plaintiff Janice Butler is entitled to $1,825.00 for the period of time for which she did not have pure tap water. Alan McArthur and Aaron Frank are each entitled to $40.00 per month for being deprived of pure tap water and resulting inconvenience, an amount totalling $480.00 each. Plaintiff John Gravatt is entitled to $2.50 per day for the period of time that he was deprived of tap water and for resulting inconvenience, an amount of $3,075.00.

61.

The negligence of the defendant proximately caused each of the plaintiffs to suffer emotional distress as a result of their belief they may have consumed contaminated water, said belief having been caused or contributed to by the statements of defendant's agents.

62.

The perceived risks of the plaintiffs, although reasonable under the circumstances, were greater than the actual risks, if any, in having consumed the contaminated water. The plaintiffs were not exposed to any actual risk greater than 1 in 1 million. The actual risk was probably much less, and may be zero.

63.

The emotional distress caused to each plaintiff was within the foreseeable nature of the harm resulting from the defendant's acts and omissions on McChord.

64.

The plaintiffs' reactions were those of reasonable people similarly situated and normally constituted. Each plaintiff's emotional distress is of the type of mental suffering that is reasonable under the circumstances of having consumed water they suspected was contaminated.

65.

Each plaintiff displayed objective symptoms of emotional distress. The objective symptoms were of the type and kind that could be sensed or seen.

66.

Each plaintiff will continue to suffer emotional distress for some relatively short, but indefinite, period of time, but the plaintiffs have now all been informed of the actual health risks, if any, involved in consuming the contaminated water and such information should alleviate their emotional distress in time.

67.

The acts and omissions of the defendant proximately caused each plaintiff emotional distress, and reasonable compensation for such emotional distress is awarded in the following amounts: Genevieve Nojd, $25,000.00; Edwin Nojd, $15,000.00; Marta Vinnedge, $5,000.00; Norma Crouse, $5,000.00; Mary Clark, $25,000.00; Janice Butler,$5,000.00; Aaron Frank, $1,000.00; Alan McArthur, $1,000.00; and John Gravatt, $1,000.00.

From the foregoing findings of fact, the Court now makes the following:

CONCLUSIONS OF LAW

1.

This Court has jurisdiction over the parties and the subject matter of this action.

2.

This action was brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"). The FTCA is a limited waiver of sovereign immunity which defines the terms, conditions and scope of the sovereign's consent to tort suits for money damages. Subject to the reservations of sovereign immunity found in the FTCA, the Act grants the federal district courts exclusive jurisdiction over civil actions for personal injury or death caused by the negligent or wrongful act or omission of any government employee acting within the scope of his or her employment, in circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b).

3.

Among the reservations of sovereign immunity found in the FTCA is the discretionary function exception, 28 U.S.C. § 2680(a), which provides that the waiver of sovereign immunity does not encompass claims based upon a federal agency or government employee's exercise or performance, or failure to exercise or perform, a discretionary function or duty, whether or not the discretion involved is abused.

4.

The common law torts of employees of federal agencies are not within the scope of acts intended for exemption under

28 U.S.C. 2680(a).

5.

In an action under the Federal Tort Claims Act, the question whether the plaintiff's complaint states a cause of action is to be determined according to the law of the state in which the injury sought to be made a basis of recovery was sustained. If plaintiff can show the federal agency also failed to follow its own regulations, such failure is relevant in assessing whether there was a breach of duty to the plaintiff which constitutes negligence per se.

6.

Relevant Air force manuals set out standards and requirements for the siting and operation of land fills and burn pits at McChord. Although the determination to have a landfill is a discretionary function, these manuals, including Exhibits 21, 22, 23, 46 and 88, contained planning and operational requirements that were not discretionary. It was mandatory that the presence of groundwater and the possible effects on groundwater must be considered in the siting and operation of landfills and burn pits. Consideration of the effects on groundwater was not discretionary within the meaning of 28 U.S.C. § 2680(a), but was a mandatory requirement.

7.

The defendant had a duty, the same duty attributable to a private person, to follow various Washington state statutes and Washington Administrative Code regulations concerning water pollution. This duty was recognized in applicable Air Force manuals.

8.

RCW 70.54.010, 7.48.140(2), 90.48.010 — .020 and -.080, and WAC 372-12-010 — .030 set out the law and public policy of the State of Washington with respect to water pollution. These statutes made it incumbent upon all persons in the State of Washington to maintain the highest standards in water quality. Read together, the referenced statutes and regulations set forth a standard of care which banned those acts which would cause or tend to cause pollution of groundwater.

9.

The above-referenced Washington statutes and regulations, as effective during the 1950's and 1960's, were concerned with future pollution of groundwater, as well as present pollution.

10.

R.C.W. 90.48.010 required that the Air Force use all known available and reasonable methods to prevent pollution to groundwater, and the Air Force did not comply with this statute.

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11.

Underground water is among the types of water protected by the applicable Washington statutes. Substances which the statutes forbid to be discharged in such a way as would pollute or tend to pollute groundwater include the chemical TCE.

12.

The Washington Administrative Code, as effective in the 1950's, and 1960's, adopted standards for waste oil disposal in WAC 372-16-130. Defendant disposed of TCE and waste oil mixed together at burn pits on McChord. The pertinent Washington Administrative Code provisions dictated that the location of these burn pits had to be such as to prevent any possible pollution of underlying groundwater.

13.

The statutes and regulations of the State of Washington, as well as defendant's own regulations, made it mandatory for the defendant to consider the effect of groundwater in selecting and operating waste disposal facilities on McChord.

14.

The plaintiffs have established by a preponderance of the evidence that the defendant's conduct resulting in plaintiffs' injury was not the type of conduct sought to be protected by the United States Congress in its adoption of the Federal Tort Claims Act "Discretionary Function Exception," 28 U.S.C. § 2680(a).

15.

The statutes and regulations of the State of Washington, as well as the government's own regulations, set forth the appropriate standard of care with respect to the siting and operation of the landfill sites and burn pits at McChord.

16.

The appropriate standard of care for disposal of liquid hazardous waste in the 1950's and 1960's was to dispose of liquid contaminants by means other than in sanitary landfills or open dump pits.

17.

The defendant had a duty to refrain from disposing of TCE in a manner such as to result in contamination of the groundwater beneath McChord, and subsequently the groundwater of American Lake Gardens. This duty extended to all plaintiffs.

18.

By its conduct in disposing of TCE in a manner inconsistent with its own regulations and in derogation of the reasonable standard of care for disposal of such a contaminant, the defendant proximately caused actual damage to the plaintiffs by the pollution of the groundwater beneath their property.

19.

It was foreseeable that groundwater pollution would result from defendant's failure to abide by state statutes and regulations, and by defendant's failure to follow its own regulations governing water pollution.

20.

It is stipulated that the sites beneath the golf course on McChord Air Force Base are the source of the TCE pollution in the plaintiffs' wells, and that the iron buildup in Mary Clark's plumbing was due to pollution from those McChord sites.

21.

The plaintiffs have not established by a preponderance of the evidence that the defendant has committed the tort of trespass against the plaintiffs, because the plaintiffs have not shown the requisite intent.

22.

The tort of nuisance was not analyzed as a separate cause of action in this case because in order for nuisance to be actionable, the Federal Tort Claims Act requires a showing of negligence or wrongful act. Negligence has been analyzed separately and plaintiffs have not separately shown what otherwise amounts to such a wrongful act.

23.

The tort of negligence is a legitimate cause of action under 28 U.S.C. § 2680(a).

24.

When under local law the conduct of the wrong-doer would be regarded as negligence per se, the same rule is applicable to the United States as would be applicable to a private person. Such a stringent result may flow from violation of a statute or from other extreme wrong doing.

25.

Although Washington statute and administrative code provisions and defendant's own regulations established the appropriate standard of care, the plaintiffs had the burden of proving negligence.

26.

The plaintiffs have not met their burden of proving common law negligence. However, the plaintiffs have met their burden of showing that the defendant violated the relevant Washington statutes and regulations in Air Force manuals, that this violation was the proximate cause of the contamination of plaintiffs' well water, therefore that the defendant was negligent per se and that the defendant has not advanced sufficient justification for its acts for this court to excuse defendant's negligence.

27.

The plaintiffs have established by a preponderance of the evidence that the defendant had a duty to refrain from contaminating plaintiffs' property, that defendant's acts and omissions have violated the duty and proximately caused injury to the plaintiffs, thereby resulting in a finding, as a matter of law, that the defendant was negligent.

28.

The plaintiffs have established by a preponderance of the evidence that the acts and omissions of the defendant have proximately caused injury to the plaintiffs, by loss of rental income, diminution in plaintiffs' property values, loss of the use of quiet enjoyment of plaintiffs' property, the emotional distress and mental anguish of each plaintiff, and the costs associated with the need to replumb residences to the Clark property due to iron buildup in the pipes.

29.

This litigation did not consider possible future medical conditions of Plaintiffs. Therefore, if any plaintiff develops a future medical condition involving physical injury proximately caused by his or her exposure to any contaminants disposed of at McChord, said plaintiff should not be prevented from suing defendant for damages resulting from the medical condition, and his or her claims are not barred by this action.

30.

Judgment shall be entered against the defendant as follows: $25,915.00 for the community of Edwin Nojd and Genevieve Nojd; $21,445.00 for Edwin Nojd; $30,925.00 for Genevieve Nojd; $5,000.00 for Norma Crouse; $5,000.00 for Marta Vinnedge; $71,057.00 for Mary Clark; $6,825.00 for Janice Butler; $1,480.00 for Aaron Frank; $1,480.00 for Alan McCarthur; and $4,075.00 for John Gravatt.
