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United States v. Phillips, 356 F.3d 1086 (9th Cir. 2004)

United States v. Phillips, 356 F.3d 1086 (9th Cir. 2004) (affirming the jury conviction of a Montana land owner for violations of, and conspiracy to violate, the Clean Water Act, but vacating and remanding district court's sentence and penalties for re-sentencing).

David Phillips appealed his conviction in the United States District Court for the District of Montana ("district court") for multiple violations of the Clean Water Act ("CWA"), conspiracy to violate the CWA, and determination of sentence. A Montana jury found Phillips guilty of CWA violations when he diverted a creek adjacent to land he owned to fill twenty man-made ponds on his property. The government also cross-appealed the sentencing decision, claiming that the district court erred in its interpretation of several sections of the United States Sentence Guidelines. The United States Court of Appeals for the Ninth Circuit reviewed the appeal and affirmed the conviction, but upheld the government's claims of error to vacate the sentence for re-sentencing.

Phillips co-owned a large plot of land in Montana as a potential subdivision investment. During August 1996, in order to attract potential investors to the land, Phillips hired and instructed several employees to dig and fill twenty ponds. Phillips failed to obtain required permits for the work, and instructed his employees to lie and tell visitors that permits were filed. Knowing that an existing mine adit on the property was inadequate to fill the ponds before several investors were to tour the land, Phillips instructed employees to build and conceal a french drain that diverted water from a nearby creek, through the ponds, and back out to the creek, even though Phillips had no water rights to the adjacent creek.

Downstream neighbors reported the diversion when they noticed the creek drying up and depositing dark brown sediment. State water authorities investigated Phillips' property and found significant land disturbance, poorly constructed ponds, unstable soil berms, and ditches connecting the ponds together to the creek. In addition, authorities found that Phillips had failed to stabilize soil banks, causing erosion of sediment and mine tailings in the creek downstream.

In a pretrial motion, Phillips challenged the jurisdiction of the criminal conviction, claiming that the district court must construe a water of the United States as only those waters navigable-in-fact. Phillips maintained that because the creek was not navigable-in-fact, the government lacked jurisdiction. The court held the district court properly considered the question of jurisdiction as a matter of law and, using the long-standing interpretation of the Army Corps of Engineers and other circuit courts, properly decided to include waters tributary to navigable waters as subject to jurisdiction. Since the district court only found that the creek was jurisdictional, and left to the jury the issue of determining whether and where the crime had occurred, the district court preserved Phillips' constitutional right to a jury determination of the elements of his crimes.

Additionally, both parties contested the sentencing. Using the federal sentencing guidelines, the district court had calculated a sentence of thirty-three to forty-one months and awarded \$43,000 for cleanup expenses to Ron Burgess, the subsequent owner of the property, after Phillips failed to make payments. The government, in its appeal, argued that the district court erred when it refused to increase Phillips' offense level for any Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") cleanup expenses related to the mine tailings. Interpreting the plain language of the guidelines as well as other circuits' case law, the court determined that a penalty award must include CERCLA-related expenses. Despite the overlap in coverage between CWA convictions and CERCLA regulation, depriving the government of cleanup costs because it proceeded under one type of law and not the other would undermine the congressional scheme of environmental laws.

Further, the court determined that the district court improperly considered evidence that Phillips attempted to coerce co-owner Larry Zinger from being a witness. The district court refused to increase the offense level under the obstruction of justice guideline because Phillips' threats to Zinger had not materially impeded the investigation. The court held that Phillips' attempt to influence Zinger triggered the guideline to increase the offense level, and did not require proof of materiality.

The government also challenged the district court's heartland analysis when it considered Phillips' prior state prosecution and internal agency memoranda and legislative history to apply downward departures to the sentencing determination. A downward departure is a reduction in sentence, and the district court can depart from the guideline range only when an aggravating or mitigating circumstance exists. According to the court's holding, the district court exceeded the limits imposed under the sentencing guidelines when it considered internal agency memoranda. The court held that Phillips' prior state prosecution, which was only a fine, was not an aggravating or mitigating circumstance to warrant downward departure.

Finally, the district court denied restitution to the United States Environmental Protection Agency, finding that the government was not a victim entitled to recover. The Ninth Circuit held that the decision was in error, and the government can be considered a victim for restitution purposes. However, the government is only able to receive restitution for those costs incurred as a direct and foreseeable result of Phillips' wrongful conduct, not for costs incurred during the regular investigation of the criminal prosecution.

Overall, the Ninth Circuit affirmed Phillips' conviction of violations under the CWA and conspiracy to violate the CWA, holding that the district court properly considered the issue of jurisdictional waters as a matter of law in its pretrial motion and did not impede Phillips' constitutional rights in its jury instructions. The Ninth Circuit affirmed the conviction, but also ruled in favor of the government's cross-appeal that the sentence determination was improper, and thus

remanded to the district court for re-sentencing.

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TENTH CIRCUIT

Pittsburgh County Rural Water Dist. No. 7 v. City of McAlester, 358 F.3d 694 (10th Cir. 2004) (holding that federal law preempts state or local statutes that deprive a water district of the right to provide water to customers within the district so long as the water district is indebted to the federal government under 7 U.S.C. § 1926 and provides water service to customers of the district).

Pittsburgh County Rural Water District No. 7 (“District”) sued the City of McAlester (“McAlester”), a competing water provider, and additional entities in the United States District Court for the Eastern District of Oklahoma. The District alleged that McAlester violated its rights under 42 U.S.C. § 1983 by restricting its ability to provide water to customers within a protected area designated by 7 U.S.C. § 1926 and that McAlester violated federal and state antitrust law by refusing to sell water to the District. The District requested a declaratory judgment regarding McAlester’s ability to market water in the District’s territory, and injunctions requiring McAlester to continue selling water to the District. The district court granted McAlester summary judgment on some of the District’s claims, dismissed the remaining claims under section 1926, and dismissed both the District’s federal and state antitrust claims. The United States Court of Appeals for the Tenth Circuit held section 1926 could protect the District’s rights, and remanded the case to the district court for determination. The court also held that section 1926 did not entitle the District to an injunction requiring McAlester to sell the District water, and dismissed the District’s claim that McAlester violated antitrust laws because the District failed to prove McAlester acted as a monopolist.

The District is an Oklahoma water association incorporated by the Pittsburgh County Commissioners to provide water for rural residents. An amendment to section 1926 authorized the Farmers Home Administration (“FMHA”) to loan money to water associations so that they could assist with water development, use and conservation allowed the District to finance its actions. Section 1926 prohibits outside entities from limiting the area serviced by indebted water districts either by inclusion of the serviced area within another provider’s service area, or by granting a franchise for service in the area served by the indebted district. The District borrowed money from FMHA in 1967 and remained indebted until 1989. The District again borrowed money from FMHA in 1994. The District serviced areas both within and outside the borders of McAlester.

Following the District’s first federal suit against McAlester, the