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United States v. Muckleshoot Indian Tribe, 235 F.3d 429 (9th Cir. 2000)

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Marine altered its plans subsequent to the notice. Therefore, the court concluded the district court possessed subject matter jurisdiction over NRDC's citizen enforcement suit.

The court of appeals then considered another aspect of the district court's subject matter jurisdiction—continuing violations. The Ninth Circuit stated that a court has jurisdiction over citizen suits where a plaintiff makes a good-faith allegation of continuous or intermittent violations. To establish a good-faith allegation, a plaintiff must prove either that violations continued after the filing of a complaint or a continuing likelihood of recurrence existed. Moreover, the court explained that such violations were ongoing until no real likelihood of repetition existed. The Ninth Circuit noted that the district court found Southwest Marine neither made inspections nor kept inspection records. Also, the district court concluded Southwest Marine maintained poor housekeeping during the action. As the district court's findings of fact were not clearly erroneous, the appellate court upheld both the district court's determination that ongoing violations occurred and its jurisdiction.

Furthermore, the court of appeals found the district court's injunction against Southwest Marine was proper. Southwest Marine argued the injunction constituted an abuse of discretion because requirements in the injunction were not contained in either the permits or the plans. The court of appeals declared the district court had broad latitude in fashioning equitable relief. While the district court could enforce violated standards, it could not impose measures that were either wholly unrelated to the violation or would override the permit's terms. The court concluded the requirements imposed by the district court were consistent with and complementary to the existing requirements.

Finally, the Ninth Circuit found the civil penalties imposed against Southwest Marine were not excessive. The appellate court noted that once a court concluded a CWA violation existed, civil penalties were mandatory. Therefore, the district court properly considered the offense's seriousness, the violation's benefits, any history of violations, good faith efforts, and the possible effect of the penalty before it imposed a fine of $1,000 per day of violation. The court also noted that the district court found Southwest Marine could offset the penalty by the cost of physical alterations. Because the civil penalty could be zero, the Ninth Circuit concluded the penalties were not excessive.

Sara Wagers

United States v. Muckleshoot Indian Tribe, 235 F.3d 429 (9th Cir. 2000) (holding incidental or occasional fishing by an Indian tribe's ancestors did not meet the "usual and accustomed" standard to establish fishing rights under treaty provisions).

In 1970, the United States and several western Washington Indian Tribes sued the State of Washington and others. The plaintiffs sought declaratory and injunctive relief to enforce off-reservation fishing rights the Indian tribes had reserved when they entered into treaties in the mid-1850s. The dispute involved the area of Washington west of the Cascade Mountains and north of the Columbia River drainage area, including the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas. After an extensive trial, in 1974 the United States District Court for the Western District of Washington adjudicated the treaty-reserved fishing rights of several tribes in a lengthy opinion known as the Boldt Decision.

Subsequent to that decision, the Muckleshoot Indian Tribe ("Muckleshoot") sought to open commercial fisheries west of the City of Seattle in an area of Puget Sound beyond Elliott Bay. In response, the Puyallup, Suquamish, and Swinomish Indian tribes ("Tribes") returned to district court in 1998 with a request for determination that the Muckleshoot's usual and accustomed fishing area did not include areas outside Elliott Bay according to the Boldt Decision. The district court granted the Tribes' motion for summary judgment, limited the Muckleshoot's usual and accustomed fishing area to Elliott Bay, and enjoined the Muckleshoot from fishing the saltwater outside the bay. The Muckleshoot appealed.

On appeal the case turned on Judge Boldt's finding that, prior to and during the time the Muckleshoot's ancestors entered into the Treaty of Point Elliott and Treaty of Medicine Creek, their usual and accustomed fishing places were primarily in Duwamish drainage rivers and "secondarily in the saltwater of Puget Sound." The Muckleshoot argued the text was unambiguous, because "Puget Sound" has a well-understood, common geographical meaning. The Tribes countered the phrase was ambiguous when examined in the context of the evidence before Judge Boldt. The Tribes contended Judge Boldt could not have intended to include the expansive area the Muckleshoot claimed as part of their usual and accustomed fishing waters.

The Ninth Circuit Court of Appeals agreed with the district court that the broad term "Puget Sound" was at odds with the evidence in the Boldt Decision record. The evidence included ethnographic data and anthropological reports. From this evidence, the court concluded the Muckleshoot were upriver people who primarily relied on freshwater fishing for their livelihoods. Nothing in the evidence indicated the Muckleshoot's ancestors had established any saltwater fishing sites beyond Elliott Bay. The record did find the Muckleshoot's ancestors engaged in some trolling for salmon when they descended the rivers to get shellfish on the beaches. However, their descent was restricted to the Duwamish River drainage, which empties only into Elliott Bay, because the Puyallup Tribe had exclusive territorial rights to river drainages leading to other parts of Puget Sound. Thus, any excursions by the Muckleshoot's ancestors beyond the bay were

incidental and occasional. Therefore, such activities did not meet the "usual and accustomed" standard the Boldt Decision used to adjudicate fishing grounds under the provisions of the treaties. Based on these findings, the appellate court affirmed the district court's grant of summary judgment to the Tribes.

Kathryn S. Kanda

UNITED STATES DISTRICT COURTS

Cmtys. for a Better Env't v. Tosco Ref. Co., No. C 00-0248, 2001 U.S. Dist. LEXIS 1161 (N.D. Ca. Jan. 26, 2001) (holding environmental organization's suit alleging Clean Water Act violations was moot because National Pollution Discharge Elimination System permit violations could not reasonably have been expected to recur after permit limits were revised and defendant sold refinery).

Tosco Refining Co. ("Tosco") owned and operated a refinery near Martinez, California ("Avon refinery"). In 1993, Tosco obtained a National Pollution Discharge Elimination System ("NPDES") permit from the California State Water Resources Board and the Regional Water Quality Control Board ("Regional Board") in order to discharge pollutants from the Avon refinery into the navigable waters of the San Francisco Bay. The Regional Board amended the permit in 1995 and again in February 2000, setting a limit for the allowable discharge of dioxins to a monthly average of 0.14 picograms per liter ("pg/l"). On June 21, 2000, the Regional Board again amended the effluent limitations for dioxins, raising it to 0.65 pg/l. On August 31, 2000, Tosco sold the Avon refinery to Ultramar Diamond Shamrock Corp. ("Ultramar"), and transferred the refinery's NPDES permit.

Community for a Better Environment ("CBE") alleged Tosco discharged dioxins from the Avon refinery at levels that exceeded 0.14 pg/l in violation of the NPDES permit and the Clean Water Act ("CWA"). CBE also asserted Tosco violated its dioxin monitoring, sampling, and reporting requirements established by the permits. Finally, CBE contended Tosco's dioxin emissions from the Avon refinery smoke stacks violated the California Water Code, and that the violations of the California Water Code and the CWA constituted an unfair business practice in violation of the California Business and Professions Code. Tosco filed a motion for summary judgment asserting the June 21, 2000 amendment to the permit's dioxin effluent limit and Tosco's sale of the Avon refinery eliminated Article III subject matter jurisdiction and rendered CBE's suit moot. CBE filed a cross motion for summary judgment.

The court determined Tosco bore the burden to establish CBE's suit was moot by showing it was absolutely clear the allegedly wrongful behavior could not reasonably recur. Tosco asserted it was absolutely