

Environmental Law Update

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US District Court Judge Orders Washington Highway Culverts Opened for Fish Passage

Federal district court Judge Ricardo Martinez has issued a permanent injunction requiring the Washington State Department of Transportation (“WSDOT”), the Washington State Department of Natural Resources, and the Washington State Parks and Recreation Commission to remove barriers to fish passage in hundreds of state-highway culverts over the next 17 years. The March 29 decision (“Culvert case”) is the latest in a legal case dating back to the 1970s, in which Native American tribes in Washington state have sought to enforce their treaty fishing rights. While the decision does not apply to county roads or other barriers that might exist, it provides important guidance for future actions that could broaden the ruling’s application beyond state-owned highway culverts.

The Culvert case first arose in 2001, when 21 tribes asked the federal court to rule that the state of Washington has a treaty-based duty to preserve fish runs, and to compel the state to repair or replace culverts that impede salmon migration to or from spawning grounds. In 2007 the court ruled for the tribes and declared that the 1850s-era treaties imposed a duty on the state to refrain from building or operating culverts under state-maintained roads that hinder fish passage. Judge Martinez then held a seven-day trial in October 2009 on the remedies and heard final arguments in June 2010, but delayed ruling while the parties tried to negotiate a settlement, which they were unable to do.

The tribes contended that their treaty right, as interpreted by the courts, to make a moderate living from fishing, prohibits the state from maintaining culverts that restrict salmon access and reduce the numbers of fish available for tribal harvest and that the state’s culverts, as currently designed, built and operated, violate that treaty right. The state argued that neither the treaties nor the numerous court decisions interpreting the treaties reasonably require the replacement of culverts, that the state has opened hundreds of miles of stream habitat in the past 15 years, and that blocked culverts are not the primary factor limiting salmon production in Western Washington. Indeed, the state said it had been trying to construct more fish-friendly culvert designs even before the tribes filed their 2001 request, but that doing so is expensive. Gov. Jay Inslee has requested a \$35 million appropriation in the state’s next two-year capital budget to fund culvert upgrades.

Judge Martinez said that reducing the salmon harvests by tribal and non-tribal fishers will not result in substantial increases in salmon production unless accompanied by gains in habitat, particularly spawning grounds. The court said, “state-owned barrier culverts are so numerous and affect such a large area that they have a significant total impact on salmon production.” The court found that the total number of culverts that are classified as barriers to fish habitat has increased, despite the efforts of WSDOT to correct some blockages. “Extrapolation from these data would lead to the untenable conclusion that under the current state approach, the problem of WSDOT barrier culverts in the Case Area will never be solved.”

Accordingly, the court issued a permanent injunction that orders the state to:

- Complete within six months a list of all culverts under state-owned roads in Western Washington that are salmon barriers;
- Make ongoing efforts to assess and identify culverts under state-owned roads that become partial or full barriers to salmon passage;
- Ensure that any new culverts and future construction be in compliance with standards set out in the injunction to provide fish passage;
- Provide fish passage at each barrier culvert on the list owned by WSDOT, the Washington State Department of Natural Resources, and the Washington State Parks and Recreation Commission by October 31, 2016; and
- Provide fish passage at each WSDOT-owned or operated barrier culvert within 17 years, if the barrier has 200 lineal meters or more of salmon habitat upstream of the first natural passage barrier, and provide fish passage at culverts with less than 200 lineal meters of upstream salmon habitat at the end of the culvert’s useful life or sooner as part of a highway project.

The court gave WSDOT an option to defer correction of an aggregation of culverts that cumulatively bar no more than 10 percent of the total salmon habitat upstream, subject to the state satisfying certain conditions. There also are exceptions if, in “rare circumstances,” the state has to deviate from design standards due to an emergency involving an immediate threat to life, the public, property, or of environmental degradation, and a correction using required design standards cannot be implemented in time to forestall the threat, or the existence or extraordinary site conditions.

The state could appeal the decision to the Ninth Circuit, but it would face an uphill battle with the numerous previous rulings on the scope of the treaties. Although the ruling applies only to culverts under state-owned roads, the court’s interpretation of the scope of the obligations under the treaties could form the basis for seeking similar relief against culverts under county-owned or city-owned roads and streets, as well as supporting challenges to other non-road impediments to fish habitat, such as property development, stormwater pollution and wetlands.

**For more information, please contact the Environmental Practice Group at
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