

IMPLICATIONS OF THE NINTH CIRCUIT'S RECENT "CULVERT CASE" FOR GOVERNMENT AND PRIVATE ENTITIES RESPONSIBLE FOR CONDITIONS THAT LIMIT SALMON RUNS IN THE PACIFIC NORTHWEST

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The Ninth Circuit Court of Appeals ("Ninth Circuit") recently affirmed an injunction issued by the District Court for Western District of Washington ordering the State of Washington to repair or replace thousands of State owned culverts blocking salmon runs and habitat.^[1] The decision is part of the long-running *United States v. Washington* litigation, but breaks new ground and arguably has broader implications than the decades of prior decisions in the litigation interpreting the treaty fishing rights of Indian tribes in Washington State. The prior decisions either were limited to allocation of a particular fishery between tribal and non tribal fishers or involved in-water construction that prevented access to treaty-protected fishing areas. The current decision mandates changes in the built environment to promote conditions that will support salmon recovery. While the "Culvert Case" by its terms applies to culverts owned by Washington State, the equitable principles upon which it is based could apply more broadly to other government and private entities that own, manage, and/or control structures, including tide gates, floodgates, and dams, which block or diminish salmon runs, or other treaty-protected resources, in the Pacific Northwest. The Culvert Case, however, is fact specific and it is essential for regulators and private parties to understand the decision's limits to avoid the impulse to apply it outside the scope of the injunction issued by the court.

BACKGROUND

The Culvert Case is the most recent in a line of cases interpreting and defining the treaty-protected fishing rights of Northwest Indian tribes, known as *United States v. Washington*, which have been ongoing since the 1970s. In 2001, twenty-one tribes brought a new sub-proceeding alleging State owned culverts blocking salmon from their spawning grounds infringe upon the tribes' treaty-protected fishing rights. The Culvert Case is the successor to a 1985 ruling by the Ninth Circuit refusing to interpret the tribes' treaty fishing rights as imposing a broad environmental servitude. In that case, the district court ordered Washington to refrain from degrading the environment in ways that could deprive the tribes of their treaty-protected fish allocation.^[2] The Ninth Circuit reversed, holding it would only evaluate the tribes' claim of a right to protection of fish habitat if presented with concrete facts underlying a particular dispute.^[3]

Other *United States v. Washington* decisions create bright-line rules for determining liability. For example, the physical invasion of treaty-protected fishing areas, such as the complete displacement of fishing grounds with a dock and terminal, violates treaty rights and, to ensure a moderate living, tribes have a right to fifty percent of the annual catch in western Washington.^[4] The Culvert Case on the other hand is equitable in nature, and it remains to be seen how the case will translate into a liability standard that could be used to resolve other cases involving environmental degradation and treaty fishing rights. Nonetheless, the Culvert Case and its 1985 predecessor clarify that courts will apply the equitable principles upon which the Culvert Case is based when provided with concrete facts evidencing degradation of treaty-protected fishing environs.

WHAT THE CULVERT CASE SAYS

The Ninth Circuit affirmed the district court's injunction requiring the State to repair and replace State owned culverts prohibiting free passage of fish to spawning grounds and other critical habitat. The court interpreted the tribes' treaty right to a moderate living to include protection of fishery habitat from man-made degradation.^[5] It found that such degradation includes culverts owned by the State of Washington that block free passage of salmon. The court agreed with the district court's finding of a significant decrease in salmon stocks in the State since 1985, and emphasized evidence showing barrier culverts block hundreds of thousands of salmon from reaching their spawning grounds.^[6] The court had a plethora of State produced evidence upon which to base its ruling. Indeed, the State produced reports and studies demonstrating its culverts were diminishing salmon runs.

MEANING AND IMPLICATIONS OF THE CULVERT CASE

What the Culvert Case seems to make clear is that the right of a treaty tribe to earn a moderate living includes the concomitant right to a sufficient number of fish to provide and sustain that living. The right extends to the protection of fish habitat from human caused environmental degradation, and mandates the correction of conditions negatively impacting fish to promote habitat health and fish abundance. When a dispute over man-made environmental degradation of fish habitat arises in a particularized context, the courts will likely examine the dispute consistent with the Culvert Case.

The court relied extensively on reports and studies developed by the State of Washington to support the conclusion that State owned culverts damage fish passage in ways that violate treaty-protected fishing rights and prohibit fish access to spawning grounds and other critical habitat.^[7] As such, it is worth considering that reports and other documents produced by private parties and public entities, related to both current and proposed structures and facilities, may be used as evidence of a treaty violation.

The decision and the district court injunction it upholds, however, leave many questions regarding its prospective application unanswered. The court did not enunciate a clear standard for determining whether particular conduct amounts to a violation of treaty-protected fishing rights. For instance, the Ninth Circuit relied on the district court's finding that barrier culverts are directly responsible for a portion of salmon habitat degradation causing declines in salmon runs,^[8] but the court did not explain how much degradation a tribe would need to show or delineate a set of facts a tribe must prove to obtain an injunction like the one issued in the case. The court also failed to identify or describe what other factors or infrastructure, if any, could contribute to diminished salmon runs and thus infringe upon treaty-protected fishing rights.

The Culvert Case may have broad ramifications, but it also has its limits. It potentially implicates tide gates, floodgates, dams, and stream flow or river temperature changes caused by or attributable to state, local government, or private-party actions. It could impact the development of habitat for a number of purposes, including housing, recreational, and industrial projects. The Culvert Case is, however, still grounded in equitable principles that require a clear and distinct showing of an actual impact on fish passage and treaty-protected fishing rights and a balancing of the interests and hardships of the parties before the court. Regulators and private parties must be aware of this requirement and take it into consideration when applying the Culvert Case to future scenarios and causes of action.

Notes:

- [1] *United States v. Washington*, No. 13-35274, slip op. at 7 (9th Cir. June 27, 2016).
- [2] *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985) (en banc).
- [3] *Id.* at 1357.
- [4] *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974).
- [5] *Id.* at 31–33.
- [6] *United States v. Washington*, No. 13-35274, slip op. at 45 (9th Cir. June 27, 2016).
- [7] The court cited to the following conclusion from one of the State's reports "Fish passage and human made barriers such as road culverts is one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington." *Id.* at 44.
- [8] *Id.* at 51.

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