



August 2007

www.klgates.com

Authors:

Bart J. Freedman

206.370.7655

bart.freedman@klgates.com

Kari L. Vander Stoep

206.370.7804

kari.vanderstoep@klgates.com

K&L Gates comprises approximately 1,400 lawyers in 22 offices located in North America, Europe and Asia, and represents capital markets participants, entrepreneurs, growth and middle market companies, leading FORTUNE 100 and FTSE 100 global corporations and public sector entities. For more information, please visit www.klgates.com.

State Owned Culverts Violate Treaty

On August 22, 2007, a federal district court in Seattle issued an important ruling regarding the scope of Northwest tribes' treaty fishing rights. Specifically, the court ruled that the tribes' treaty rights impose a duty on the state of Washington to preserve treaty fish runs by refraining from building or operating culverts under state-maintained roads that hinder fish passage. Order on Cross-Motions for Summary Judgment, *United States v. Washington*, Case No. CV 9213RSM (Aug. 22, 2007) ("Order"). [Click here to view order.](#)

In previous cases, federal courts had resolved that Northwest tribes were entitled to the lesser of 50 percent of Northwest fish runs or the amount sufficient to support a "moderate living." Since 1980, however, the federal courts had avoided deciding whether the state of Washington had a treaty-based duty to preserve and restore fish runs. In its opinion, the court concluded that the state does have such a duty, at least with respect to culverts under state roads.

According to the court, because the treaties grant the tribes a right to "take" fish, and not just a right to fish, the State has a duty to ensure that its actions do not diminish fish runs to the point that there are no fish to "take" sufficient to support the tribes' "moderate living." Order at 10. The court relied on its finding that "the representatives of the Tribes were personally assured during the [treaty] negotiations that they could safely give up vast quantities of land and yet be certain that their right to take fish was secure." Order at 11. As a result, the treaties carry "the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource. Such resource-degrading activities as the building of stream-blocking culverts could not have been anticipated by the Tribes." *Id.*

Although the court states that its order was narrow and did not create a "broad 'environmental servitude' or the imposition of an affirmative duty to take all possible steps to protect fish runs," the ruling may have broad implications whenever the tribes can marshal "sufficient facts" to show that a specific activity may be linked to diminished fish runs. As part of its ruling, the district court quoted a 1980 district court decision that had been vacated by the Ninth Circuit in 1985: "[T]he State [has] a burden 'to demonstrate that any environmental degradation of the fish habitat proximately caused by the State's actions (including the authorization of third parties' activities) will not impair the tribes' ability to satisfy their moderate living needs." Order at 6 (emphasis added). As a result, even though the court's summary judgment order is limited to the State's culverts, the tribes may argue that it also implicates the activities of local governments and private entities, and, in particular, infrastructure that may impair fish passage could be the subject of claims.

As of this writing, no decision has been made on a possible appeal to the Ninth Circuit Court of Appeals. Several aspects of the decision may be subject to challenge. The district court's causation standard is not clear. In particular, some may argue that the evidence before the district court was not sufficient to support a conclusion that state-owned culverts caused fish runs to decline, because many of the offending culverts likely were already in place during a period when the court noted that salmon catches were increasing. The court concluded, however, that the tribes did not have to link the culverts to diminished fish runs

from 1986 to 1999 to obtain a court order imposing a treaty duty on the State to repair and retrofit its culverts:

The State argues that the Tribes have produced no evidence that the blocked culverts “affirmatively diminish[] the number of fish available for harvest”. . . The Tribes’ showing that fish harvests have been substantially diminished, together with the logical inference that a significant portion of this diminishment is due to the blocked culverts which cut off access to spawning grounds and rearing areas, is sufficient to support a declaration regarding the culverts’ impairment of treaty rights.

Order at 5, 8. This aspect of the court’s order is cause for concern, because if it is interpreted broadly, it could permit the tribes to identify any activity or existing infrastructure that potentially impairs fish runs and demand removal or retrofit without specifically demonstrating that the activity or infrastructure is responsible for diminished fish harvest.

An appeal of the court’s ruling could also target the court’s adoption of the “moderate living” standard as the measure of the duty the State and others have to change activities or retrofit infrastructure that degrade fish runs. Prior decisions of the Ninth Circuit have indicated that the court may prefer a “reasonableness” test under which all parties must take “reasonable steps

commensurate with the resources and abilities of each to preserve and enhance the fishery.”

The court’s summary judgment order eliminates the need for a trial on the merits, which was scheduled to begin on September 24, 2007. However, further district court proceedings will be necessary to develop appropriate remedies. The tribes have requested the following relief: (1) an injunction prohibiting the State from constructing or maintaining any culverts that block fish passage to the tribes’ usual and accustomed fishing grounds, (2) an injunction requiring the State to identify all offending culverts within 18 months, and (3) an injunction requiring the State to repair and retrofit any offending culverts within five years. Order at 3.

This decision has substantial implications for public and private parties in the state of Washington. Press reports suggest that there will be an effort by tribes to apply the decision broadly. If no appeal is taken, the result could be considerable uncertainty by regulators as to how the decision should be interpreted.

K&L Gates comprises multiple affiliated partnerships: a limited liability partnership with the full name Kirkpatrick & Lockhart Preston Gates Ellis LLP qualified in Delaware and maintaining offices throughout the U.S., in Berlin, and in Beijing (Kirkpatrick & Lockhart Preston Gates Ellis LLP Beijing Representative Office); a limited liability partnership (also named Kirkpatrick & Lockhart Preston Gates Ellis LLP) incorporated in England and maintaining our London office; a Taiwan general partnership (Kirkpatrick & Lockhart Preston Gates Ellis) which practices from our Taipei office; and a Hong Kong general partnership (Kirkpatrick & Lockhart Preston Gates Ellis, Solicitors) which practices from our Hong Kong office. K&L Gates maintains appropriate registrations in the jurisdictions in which its offices are located. A list of the partners in each entity is available for inspection at any K&L Gates office.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

Data Protection Act 1998—We may contact you from time to time with information on Kirkpatrick & Lockhart Preston Gates Ellis LLP seminars and with our regular newsletters, which may be of interest to you. We will not provide your details to any third parties. Please e-mail london@klgates.com if you would prefer not to receive this information.

©1996-2007 Kirkpatrick & Lockhart Preston Gates Ellis LLP. All Rights Reserved.