

Federal District Court Declares Washington Tribes' Treaty Fishing Right Requires the State of Washington to Refrain from Building or Operating Culverts that Block Fish Passage

On August 22nd, the U.S. District Court for the Western District of Washington issued a summary judgment order declaring that the Western Washington Tribes' treaty right of taking fish imposes a duty upon the State of Washington to refrain from building or maintaining any culverts that block anadromous fish migration. *United States v. Washington* (W.D. Wash. Aug. 22, 2007). Specifically, U.S. District Court Judge Martinez declared that "the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest." *Id.* The court emphasized that its decision is not a broad "environmental servitude," but is a "narrow directive to refrain from impeding fish runs in one specific manner [i.e., culverts]." *Id.*

BACKGROUND

In 2001, the Western Washington Treaty Tribes, along with the United States, initiated this matter as a subproceeding in the longstanding *United States v. Washington* litigation. This litigation, which has been ongoing since 1970, involves determining the scope of the Tribes' treaty fishing right. The relevant

treaties (commonly referred to as the Stevens Treaties) were negotiated by the federal government in the 1860's. In general, the original lawsuit involved three key issues: (1) whether the treaties' fishing clause entitles the Tribes to a specific allocation of fish; (2) if such an allocation is required, whether hatchery-bred fish are included in the allocation; and (3) whether the right of taking fish incorporates the right to have treaty fish protected from environmental degradation. After these issues were bifurcated, the Tribes, in Phase I of the litigation, successfully established that the treaties provided them with a right to take up to 50% of the "harvestable" fish. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

In Phase II of the *United States v. Washington* litigation, the court considered the reserved hatchery and environmental issues. In 1980, the district court considered the environmental component and held that "implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoilation." *United States v. Washington*, 506 F. Supp. 187, 190 (W.D. Wash. 1980). On review, the Ninth Circuit rejected the "environmental servitude" created by the district court, but recognized that the State



Sockeye salmon.

and Tribes must take reasonable steps to preserve and enhance fishery resources. *United States v. Washington*, 694 F.2d 1374, 1389 (9th Cir. 1982). Subsequently, the Ninth Circuit, rehearing the issue *en banc*, vacated the district court's order as being "imprecise in definition and uncertain in dimension." *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985). While rejecting the imposition of a broad "environmental servitude," the court left open the possibility that a specific duty may exist depending upon the facts of a particular case for its definition and articulation. *Id.*



Culvert


Sixteen years later, in this subproceeding, the Tribes requested a declaratory judgment establishing: (1) that the Stevens Treaties impose a duty on the State to refrain from diminishing the number of fish passing through, to or from the Tribes' usual and accustomed fishing grounds by construction and/or maintenance of culverts; and (2) that the State had violated, and continues to violate, the duty owed to the Tribes under the Stevens Treaties. In addition, the Tribes requested a prohibitory injunction which would prevent the State from constructing or maintaining any culverts which may impact salmon, and a mandatory injunction requiring the State to identify within 18 months all culverts which impact salmon and repair or replace the identified culverts within five years. The district court has limited the scope of the subproceeding to only include culverts blocking fish passage under State-owned roads.

In response to the Tribes' request, the State acknowledged that many of its older culverts hinder fish passage. Over the past decade, the State has made substantial efforts to repair or replace these culverts. The State has estimated that it would cost hundreds of millions of dollars to remedy the remaining fish-blocking culverts.

DISTRICT COURT'S DECLARATORY ORDER

In the declaratory order, the court narrowly defined the issue as whether the Tribes' treaty-based right of taking fish imposed on the State a duty to refrain from diminishing fish runs through the construction/maintenance of culverts that block fish passage. In doing so, the court considered whether the Ninth Circuit's prior rejection of a broad, treaty-based "environmental servitude" precluded the Tribes' current request for relief. The court concluded that the Tribes had presented sufficient facts to meet the requirements for issuance of a declaratory judgment.

In assessing the State's duty under the Stevens Treaties, the court first found that a treaty must be construed in the sense in which it would be understood by the Tribes. The court focused on the Stevens Treaties' language referencing the "right of taking fish." The court concluded that this language would not have been



understood by the Tribes as merely reserving an opportunity to try and catch fish. Instead, the court found the government's intent and the Tribes' understanding was that the Tribes would be able to meet their own subsistence needs forever with fish.

To be meaningful, the court found that the Tribes' promise to cede their land in exchange for the right to take fish carried the implied promise that the government would not take actions that would significantly degrade the resource. As such, the court concluded that the Stevens Treaties impose a duty upon the State to refrain from building or maintaining culverts in such a way as to block the passage of fish upstream or down, to or from, the Tribes' usual and accustomed fishing places. The court specifically noted that “[t]his is not a broad ‘environmental servitude’ or the imposition of an affirmative duty to take all possible steps to protect fish runs . . . but rather a narrow directive to refrain from impeding fish runs in one specific manner.” *United States v. Washington* (W.D. Wash. Aug. 22, 2007).

The court further concluded that the State of Washington currently owns and operates culverts that violate its duty under the Stevens Treaties.

IMPLICATIONS

The court specifically stated that the ruling was limited to the facts before it. Depending upon the ultimate remedy adopted by the court, this ruling will have significant impacts on the programs and budgets of the Washington State Department of Transportation and other state agencies, as the agencies reprioritize funding to remedy the deficient culverts.

Because of its significance to the State, it is also likely that this ruling will be appealed. Unless reversed on appeal, it is likely that the Tribes with a treaty fishing right will attempt to rely upon and expand this ruling to address other environmental and natural resource issues.

FOR ADDITIONAL INFORMATION

For additional information on this case, or to discuss potential implications of the decision, please contact Matthew Love or Ivy Anderson in our Seattle, Washington office at (206) 623-9372.

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