Washington State Department of Transportation

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Fish Passage "Culverts" Litigation

This document provides a summary of the "Culverts" litigation and an overview of the State's efforts to address road culverts that are barriers to fish passage.

Introduction

Culverts can become barriers to movement of fish by changing the flow conditions of a river or stream where it crosses a road. When a culvert constricts the width of a stream, such as forcing the stream through a large corrugated pipe, conditions such as high flow velocity, large drops at the outfall or very shallow water depth can be created. These conditions can impede, and in some situations, completely block fish passage.

What is the basis and current status of the culvert litigation?

The culvert case is a federal court sub-proceeding of U.S. V. Washington and is directly related to the 1974 Boldt decision. The portion of the Boldt decision relevant to the culverts litigation involves the tribes' right to a "fair share" of the harvestable anadromous fish runs in the case area. In Boldt, the court interpreted the Stevens Treaties as entitling the tribes with traditional fishing places in the case area (most of Western Washington, excluding the Columbia River and Willapa Bay) to a fair share of the available harvest of salmon.

In 2001, the tribes filed the culverts sub-proceeding claiming state-owned culverts in the case area were blocking passage to substantial amounts of salmon habitat and were thereby reducing the amount of salmon that would otherwise be available for harvest. In 2007, Federal District Court Judge Martinez agreed with this claim and entered an order that the state was in breach of the tribes' treaty rights, to the extent that the state owns culverts that are barriers to the passage of salmon and thereby reduce the amount of harvest available to the tribes.

In October 2009, the court convened a trial to determine what remedy, if any, should be awarded to the tribes in light of the ruling that state-owned culvert barriers are in violation of the Treaty. The evidentiary hearing has concluded, and closing arguments were held in June 2010. A decision is expected in the near future.

Who is involved?

- **Plaintiffs**: United States, and 21 American Indian tribes. (Lummi, Nooksack, Swinomish, Upper Skagit, Sauk-Suiattle, Stillaguamish, Tulalip, Muckleshoot, Puyallup, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha Klallam, Makah, Quileute, Hoh, Quinault, and Yakama).
- **Defendant**: State of Washington [Washington State Department of Transportation (WSDOT), Department of Natural Resources (DNR), Washington Department of Fish and Wildlife (WDFW), and State Parks and Recreation Commission (State Parks) as landowning agencies].

What area is included in the recent culvert court case?

The court case applies to all Watershed Resource Inventory Areas (WRIA) in western Washington, with the exception of those that flow into the Columbia River and Willapa Bay. The affected watersheds are highlighted on the map at right.

Watershed Resource Inventory Areas 1 - 23

What are the tribes asking for?

- Correct WSDOT-owned barrier culverts that are blocking more than 200 linear meters of salmon habitat, within 20 years. (For DNR, WDFW and State Parks – complete work by 2016).
- Require state to either use wide, bottomless culverts or bridges at stream crossings using a design method known as "stream simulation."

What is the state doing to fix fish barriers?

WSDOT corrects fish barriers as part of transportation improvement projects and maintenance activities. In addition, WSDOT implements a stand-alone "Fish Passage Barrier Removal Program." This is a joint effort with WDFW to identify and remove high priority fish passage barriers that have the most benefit to fish. DNR has a program in place to remediate fish barriers on its land. The Salmon Recovery Funding Board also provides funding for remediation of non-state-owned barrier culverts.

Details on the WSDOT fish passage program can be found at: www.wsdot.wa.gov/Environment/Biology/FP/fishpassage.htm

How many fish barriers are there in the State Highway System?

A total of 6,514 culverts have been inventoried statewide (as of 1/11 which includes corrections from the 2010 construction season). Of these:

	Fish passage barriers	Existing barriers with significant habitat gain*	Number fixed
Statewide**	1,978	1,519	245
Relevant to case ***	1,067	855	183

***Significant habitat gain means more than 200 meters of upstream habitat**

****Salmon & Trout**

*****Salmon & Steelhead Only**

Are there fish barriers on other state-owned lands?

- State agencies which operate roads include DNR, WDFW and State Parks. These agencies are also involved in identifying and correcting culverts in their road systems that are barriers to fish.

How much might this cost?

- The total price tag for the relief requested by the tribes is in the range of $2 billion.

  > The following are rough cost estimates at the time of the trial to achieve the level of corrections that the Plaintiffs are seeking:

  - WSDOT – about $195 million per biennium, to fix WSDOT barrier culverts in 20 years
  - DNR – about $44.5 million to fix remaining barrier culverts by 2016
  - WDFW – about $12 million to fix WDFW barrier culverts by 2016
  - Parks – no cost estimate available
- The case arises at the same time the state is facing a serious budget shortfall. If the court orders the remedy the plaintiffs are requesting, this would mean a substantial re-arranging of the state's spending priorities.

Points to consider:

- A comprehensive plan for salmon restoration and recovery is already in place and working. The plan is based on the best available science and has been approved by the National Marine Fisheries Service. Barrier correction is part of that plan and is best done in concert with other restoration activities.
- It is speculative that accelerating barrier remediation will produce significant gains in salmon harvest. Even if all state-owned barriers were removed, other entities own barriers that are still blocking habitat. In many situations removing a state barrier would produce no additional salmon harvest because a non-state owned culvert on the stream system would still be a barrier. There is also no direct correlation between opening additional habitat and increasing the number of salmon available for harvest due to the large number of other pressures and variables related to the salmon lifecycle.
- State law already requires the state to repair and correct culverts which block fish passage. The state agrees that blocking culverts need to be removed and has programs in place. WSDOT has had a fish passage program in place since 1991 to inventory and prioritize fish barrier removals. It has improved access to more than 822 miles of potential fish habitat. DNR's program has been in place since 1999 and provided access to more than 461 miles of potential fish habitat.
- Total WSDOT budget for stand-alone (I-4) capital projects and fish barrier inventory and survey work in 2009-11 is $20.36 million. This number does not include money spent on fish barrier corrections that occur as part of larger highway construction projects or projects that correct culverts for structural reasons.

Before: *This undersized culvert beneath SR 104 in Jefferson County created a barrier to fish.*

During: *Crews backfill and compact soil on top of the newly installed culvert.*

After: *A stream simulation design was used at SR 104 to correct the barrier to fish passage.*

Contact information

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