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The Recent “Culvert Decision” in *United States v. Washington* Is Likely To Have Significant Implications For Government and Private Entities

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On March 29, 2013, United States District Judge Ricardo S. Martinez ordered the State of Washington to replace culverts under State owned roads that block the passage of salmon to critical habitat. The court earlier found those culverts violated tribal treaty rights. The so-called “Culvert Case” holds that the Stevens treaties of 1855 require protection of the environment in ways designed to increase the viability of treaty-protected fish. The decision has potentially far-reaching effects for the State of Washington as well as for local governments and private parties.

The immediate effect of Judge Martinez’s March 29th ruling is that the State must replace culverts that impede the passage of fish to their spawning grounds. The ruling imposes economic costs, estimated at upwards of \$1 billion, upon the State, as it must fund the construction of the replacement culverts. The ruling is also likely to have regulatory impacts on the State, tribes, and the United States during its implementation, as well as on the court, which will monitor implementation of the ruling. The long-term effects of the decision, however, may be broader. It potentially applies to a host of local government and private party actions, including construction and maintenance of other infrastructure that has historically altered the environment.

What the March 29th Ruling Says

The ruling requires the State to replace culverts that block fish passage with culverts that allow free passage of fish. It gives the tribes and the court supervisory roles in ensuring State compliance with its mandates. The ruling specifically states that blocked culverts are only one cause of salmon habitat degradation, and, in his August 2007 ruling, Judge Martinez acknowledged the potential for other contributing factors to diminished fish runs. Although the tribes had not established that blocked culverts had affirmatively reduced salmon populations, Judge Martinez nevertheless concluded “that if culverts block fish passage so that they cannot swim upstream to spawn, or downstream to reach the ocean, those blocked culverts are responsible for some portion of the diminishment.”¹ He further found that the treaties carried “the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource.”² What the ruling does not say is what exactly a tribe must show in order to obtain an injunction like the one Judge Martinez issued on March 29th. That is to say, Judge Martinez did not delineate a clear causation standard for determining whether particular conduct may violate treaty rights.

¹ *United States v. Washington*, NO CV 9213RSM, 2007 WL 2437166, at *3 (W.D. Wash. Aug. 22, 2007).

² *Id.* at *10.

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What the March 29th Ruling Means

Previous decisions in *United States v. Washington* are applicable to easily identifiable facts, such as the physical invasion of treaty protected fishing areas or allocation of catch between treaty and non-treaty fisherman on a fifty-fifty basis. The facts necessary to satisfy the standard enunciated by Judge Martinez in the Culvert Case are, on the other hand, not well established. Since Judge Martinez’s ruling does not create a clear standard for determining whether a treaty violation has taken place, it leaves open the question of other sources of liability.

While the specific facts in the Culvert Case pertain to barrier culverts under State-maintained roads, Judge Martinez’s March 29th ruling has potentially far wider application. Whether the ruling creates a broad environmental servitude remains to be seen, however, state governments, local governments, tribes and private parties must consider the potential created by the March 29th ruling for litigation regarding other historical changes to the environment, e.g., tide gates, flood gates, and dams. The ruling also potentially applies to stream flow or river temperature changes caused by or attributable to state or local governments or private party actions. It may require federal, state and local regulators to consult with tribes on a broad range of permit issues. In turn, it potentially impacts the development of habitat for a number of purposes, including housing, recreational, and/or industrial uses. Ultimately, the potential impacts could be numerous and far-reaching.

Considerations Going Forward

While all impacts of Judge Martinez’s March 29th ruling remain to be seen, it appears that the Culvert Case may be the start of a significant new chapter in the 40 year *United States v. Washington* saga. The ruling may impact local governments and private parties in a number of concrete ways, and ways not yet imagined. If you are interested in the further implications of Judge Martinez’s March 29th ruling, please contact Bart J. Freedman.

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