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With This Tie, There Is a Winner: 4-4 SCOTUS Ruling Results in Victory for Native Americans and a Clear Mandate for Washington to Correct Culverts

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In most instances, a tie means there is no winner and no loser. Not so with the U.S. Supreme Court's 4-4 tie in the "Culverts Case" (one branch of the sprawling *U.S. v. Washington* case) on June 11, 2018. Instead, by effectively affirming the Ninth Circuit decision below, this tie is a significant win for the United States and twenty-one Native American Tribes ("Tribes") and a significant loss for Washington State.

While the "Culverts Case" label implies a narrow scope, the potential effects of the Supreme Court's tie could in fact be widespread and significant—both in Washington and the Pacific Northwest at large.

Case Background: The heart of the Culverts Case centers on the meaning and scope of 1850s Stevens Treaties between the Governor of Washington Territory and the Tribes. Under the Stevens Treaties, the Tribes surrendered large areas of land and waters adjacent to those areas (the "Case Area"; what is now Washington State). In return, the Stevens Treaties reserved fishing rights for the tribes. Specifically, the Stevens Treaties secured the Tribes' "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens."

The origins of the Culverts Case begin in 1970, when the United States, on its own behalf and as trustee for several of the tribes, sued Washington State in federal district court, seeking "an interpretation of the [Stevens] [T]reaties and an injunction requiring the State to protect the Indians' share of the anadromous fish runs."^[i] Multiple tribal plaintiffs joined in the suit. The district court bifurcated the proceedings into two phases:

Phase I: The district court: (1) established the locations of the tribes' "usual and accustomed" fishing grounds, (2) held that the tribes could take up to 50% of the harvestable fish from those grounds, and (3) issued an injunction prohibiting contradictory state regulation.^[ii]

Phase II: The district court expressly retained jurisdiction to address additional unresolved issues arising out of the Stevens Treaties in Phase II.^[iii]

In 2001, as part of Phase II litigation, the Tribes filed a "Request for Determination" (in effect a complaint, labeled as subproceeding "culverts") against Washington State, alleging that culverts under state roads violated the "right of taking fish" provision of the Stevens Treaties by restricting salmon passage and reducing the number of salmon available for the Tribes. Specifically, the Tribes alleged that hundreds of culverts constructed and/or maintained by state agencies obstruct salmon passage to productive salmon rearing habitat (by preventing migration of juvenile fish to rearing areas or salt water) and salmon spawning habitat (by preventing the return of adult fish to spawning beds). In turn, the Tribes alleged, the reduction of productive fish habitat reduces the number of fish available to the Tribes. The Tribes further alleged that the Stevens Treaties impose a duty on Washington State "to refrain from diminishing, through the construction or maintenance of culverts under State owned roads and highways, the number of fish that would otherwise return to or pass through the tribes' usual and accustomed fishing grounds and stations, to the extent that such diminishment would impair the tribes' ability



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to earn a moderate living from the fishery.”^[iv] The federal government joined in the action.

Summary of Decisions: The District Court for the Western District of Washington issued an injunction directing Washington State to correct culverts prohibiting free passage of fish to spawning grounds and other critical habitat.^[v]

On appeal, the Ninth Circuit:

1. Held that the Tribes’ rights under the Stevens Treaties include protection of fish habitat from man-made degradation. The Stevens Treaties, the court ruled, impose a duty on Washington State to refrain from constructing and maintaining culverts under state roads that block or restrict passage of salmon to and from fish habitat. The Ninth Circuit explained:
“The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them. . . . We therefore conclude that in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Stevens Treaties.”^[vi]
2. Upheld the District Court’s dismissal of Washington State’s “cross-request” (in effect, a counterclaim) for an injunction. The injunction requires the United States “to fix and thereafter maintain all culverts built or maintained by [the United States] . . . before the State of Washington is required to repair or remove any of its culverts.” The Court agreed the “cross request was barred by sovereign immunity [and that] Washington did not have standing to assert treaty rights belonging to the Tribes.”^[vii]
3. Affirmed the District Court’s injunction. The court found that the District Court did not abuse its discretion in “enjoining Washington to correct most of its high-priority barrier culverts within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons.”^[viii]

The Supreme Court granted certiorari. Justice Kennedy did not participate in the decision due to his prior involvement in a different aspect of the *U.S v. Washington* case. By issuing a 4-4 tied per curium opinion on June 11, 2018, the Supreme Court effectively affirmed the Ninth Circuit.

Implications of Decision: The Culverts Case may have implications that extend well beyond culverts. The immediate implications of the decision are that Washington State must replace culverts that block or impeded fish passage to/from spawning grounds and other critical habitat. The estimated costs of carrying out this directive exceed \$1 billion.

The broader implications include influencing judicial interpretation of similar treaties in other states (especially those in the Pacific Northwest) as well as possible repercussions for other state, local, or private party actions here in Washington.

The Ninth Circuit interpreted the Tribes’ fishing rights under the Stevens Treaties to essentially include: (1) the protection of fish habitat from human caused degradation, and (2) the right to corrective action where prior (or ongoing) human activities cause degradation. In this case, the degradation was state maintained culverts.

However, the same rationale and equitable principles that underpin the Ninth Circuit’s decision could be applied to other forms of human causes of fish habitat degradation, such as dams, floodgates, logging activities, or construction activities. This case could theoretically support, for example, a request for the removal of state maintained dams causing fish habitat degradation.

Looking ahead, the application of this decision will be fact specific. The Ninth Circuit did not provide a bright-line rule for how much human caused degradation is sufficient to violate the Stevens Treaties and warrant an injunction. Instead, application in other contexts will require careful analysis of the equitable principles underlying the decision, examination and comparison of the sufficiency of evidence demonstrating actual impact on fish habitat, and an understanding of the balancing of interests the court will undertake.

Local governments, developers, and utilities that may be concerned about possible risk and exposure should consult with legal counsel. At B&D, we can provide informed exposure assessments, strategies for risk reduction, and assistance with resolving possible conflicts well before they lead to costly litigation.

[i] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 669-670 (1979).

[ii] *United States v. Washington*, 384 F. Supp. 312, 332-333, 343-344, 413-420 (W.D. Wash. 1974), aff’d, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

[iii] *Id.* at 418-419.

[iv] Request for Determination, C.A. E.R. 1008-1021.

[v] Specifically, the injunction required Washington to create a list of culverts under state-owned roads that are salmon barriers, using a methodology adopted by the WDFW. All culverts maintained by state agencies other than the WSDOT were to be fixed by October 2016. For culverts maintained by WSDOT, most of the high-priority barrier culverts were to be fixed within 17 years, while the remaining culverts could be corrected at the end of the culverts' useful life or in connection with other highway projects.

[vi] *United States v. Washington*, No. 13-35274, slip op. at 29, 33 (9th Cir. June 27, 2016).

[vii] *Id.* at 37.

[viii] *Id.* at 59. The Court rejected Washington's arguments that the injunction was too broad, was inconsistent with equitable principles, impermissibly intruded into state government operations, and violated principles of federalism, as well as arguments that the District Court failed to defer to Washington State's expertise and failed to properly to take costs into account.

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