

Ninth Circuit Rules Tribal Treaty Rights Obligate State to Ensure Harvestable Fish Are Available

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Last week, the U.S. Court of Appeals for the Ninth Circuit held that the state of Washington violated tribal treaty obligations by building and maintaining barrier culverts that block 1,000 linear miles of streams suitable for salmon habitat. *United States v. State of Washington*, ___ F.3d ___, No. 13-35474, 2016 WL 3517884 (9th Cir. June 27, 2016). The latest in a decades-old court battle regarding the scope and extent of tribal treaty fishing rights, this decision raises serious questions for the development community regarding how treaty rights may affect state and federal permitting processes.

A Century of Dispute and Nearly a Half Century of Litigation

For more than 100 years, Pacific Northwest Indian Tribes (Tribes) and the state of Washington have disagreed about the extent of tribal fishing rights under the Stevens Treaties. In 1970, the United States brought suit against the state of Washington on behalf of the Tribes, seeking to clarify the scope of those rights. The Ninth Circuit's decision this June is part of that litigation.

The initial litigation in the 1970s was divided into two phases. In *Washington I*, the district court determined that the Tribes had a treaty right to take up to 50 percent of the annually harvestable fish. *United States v. State of Washington*, 384 F. Supp. 312, 327-28 (W.D. Wash. 1974), *aff'd Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). Related litigation also established the basis under the Stevens Treaties for Tribes, in cooperation with the state of Washington, to act as "co-manager" of Washington's salmon and steelhead fisheries and hatchery programs.

In *Washington II*, the district court held that hatchery fish must be included in determining the share of salmon to be allocated to the Tribes. *United States v. State of Washington*, 506 F. Supp. 187, 197 (W.D. Wash. 1980). The Ninth Circuit upheld this portion of the decision in 1985 in *Washington III*. *United States v. State of Washington*, 759 F.2d 1353 (9th Cir. 1985) (en banc). But the Ninth Circuit would go on to overturn *Washington II*'s holding that the Tribes' right to "a sufficient quantity of fish to satisfy their moderate living needs" entailed a "right to have the fishery habitat protected from man-made despoliation." The Ninth Circuit rejected the district court's attempt to create an environmental servitude enforceable by a tribe throughout public and private relinquished lands. *United States v. State of Washington*, 759 F.2d 1353 (9th Cir. 1985) (en banc). The Ninth Circuit decided that the issue was "too broad and varied to be resolved in a general and undifferentiated fashion, and that the issue of human-caused environmental degradation must be resolved in the context of particularized disputes."

For more than 30 years, Tribes have maintained that tribal treaty rights included the right to protect fish and fish habitat from man-made despoliation. This issue was raised again in a suit brought by the Tribes against the state of Washington in 2001 that sought to have state-owned fish-passage-blocking culverts removed or replaced with salmon-friendly culverts. *United States v. State of Washington*, No. CV 70-9213, 2013 WL 1334391, (W.D. Wash. Mar. 29, 2013).

In this litigation, the district court agreed with the Tribes' arguments that their fishing rights under the Stevens Treaties "imposed a duty upon the state of Washington 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" to the Tribes. The district court ordered the Washington State Department of Natural Resources, Washington State Parks and Recreation Commission, and Washington Department of Fisheries and Wildlife to correct all identified barrier culverts by the end of October 2016 and required the Washington State Department of Transportation to correct many of its barrier culverts by 2030.

Ninth Circuit Holds that the State's Culverts Violate Treaty Obligations

In its June 27 decision, the Ninth Circuit affirmed the district court's decision and held that the state violated its treaty obligations by building and maintaining culverts that degrade fish habitat. Under the decision, the state is required to

replace culverts that impede salmon passage. Culverts owned or managed by the Department of Fisheries and Wildlife, Department of Natural Resources and Parks and Recreation Commission must be replaced or repaired by October 31, 2016. In addition, the Washington State Department of Transportation must replace the culverts it owns or manages if the culvert affects 200 lineal meters or more of upstream salmon habitat by 2030.

The following key principles flow from this case.

First, determining whether certain development activities violate treaty rights will require a case-by-case analysis. The Ninth Circuit did not expressly embrace an environmental servitude as a blanket rule. Rather, the court held that the state's obligation will depend on all of the facts presented in the particular dispute before the court. The record evidence in the culvert case was sufficient to establish that the culverts resulted in a substantial reduction in fish populations by impeding access to spawning and feeding grounds. The court also held that the state's intent in maintaining the culverts was not relevant. The state's treaty obligation requires it to ensure that enough fish would be available to the Tribes to sustain a "moderate living."

Second, federal approval of development does not mean that treaty obligations have been met. The Ninth Circuit rejected the state's argument that the United States had waived tribal treaty rights or was estopped from enforcing them. The state argued that it had relied on the federal government's approval of highway projects with culvert designs to conclude that it had satisfied its treaty obligations. The Ninth Circuit confirmed that Treaty rights can only be abrogated by act of Congress that clearly expresses Congress' intent to abrogate such rights.

Third, courts will infer that treaties include environmental protections even if not expressly stated. Courts have historically construed treaties in favor of tribes and the Ninth Circuit did so in this case by interpreting them to include protections against environmental degradation that exceed those set forth in federal and state law.

Implications

Although the decision is facially limited to state-owned and -operated facilities that affect fish passage, it is likely that the decision will be extended to political subdivisions of the state that engage in actions that impede fish passages. This ruling opens the door for additional actions alleging that the state or state agencies have violated tribal treaty rights by despoiling fishing habitat and indicates the court is willing to uphold habitat remediation as a remedy.

If this decision can be interpreted as requiring the state to protect fish and fish habitat from man-made despoliation, it is unclear whether that duty would extend to how the state regulates lands and waters subject to the treaties, and the extent to which the state (and its political subdivisions) must protect fish and fish habitat when issuing permits for private development. The decision may be particularly problematic for developers from a cumulative-effects perspective.

Many treaties contain language securing rights to fish and hunt that is similar to the language in the Stevens Treaties addressed by the Ninth Circuit. If this decision is an indication of how courts might address natural resource damages claims for past or "ongoing" violations of an "environmental servitude," we are likely to see many more suits that rely on treaty rights to demand remediation or prevent future development.

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