

## **Another Potential Lightning Boldt—THE CULVERT CASE**

*by Lynda V. Mapes*

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Twenty tribes have filed a federal lawsuit that could be as far reaching in its effect on fisheries as the Boldt decision of 1974.

That landmark court decision established the tribes' right to at least half the catch based on treaties signed with the U.S. government more than 100 years ago. The other half goes to nontribal fishermen.

The lawsuit was filed against the state of Washington in U.S. District Court in Seattle over culverts that block fish passage.

The suit has everyone from the governor to the attorney general and the governor's top salmon adviser worried.

At the very least, the legal action could compel the state to spend hundreds of millions of dollars to repair state highway culverts that affect fish runs for Western Washington tribes – a tall order in a state strapped for highway funds.

But the impact could potentially be far greater. At its most potent, the case could establish a broader state duty to address any state-authorized activity that hurts salmon survival, from water use to timber practices and development.

In a memorandum from tribal attorneys to a mediator attempting to fend off the suit last September, the tribes made it clear their goal was not just getting culverts fixed, but also “to have the treaty right to protect fish habitat acknowledged by the state of Washington.”

Gov. Gary Locke and Attorney General Christine Gregoire issued a joint statement yesterday decrying the lawsuit.

“We are aware this case has potential significance beyond the culvert issue,” Locke and Gregoire wrote in their statement. “A favorable ruling for the tribes could impose a duty that may affect other public roadways, public facilities and lands and even the regulation of land use and water.”

Locke has requested \$40 million for repair in the coming two-year budget to begin work on nearly 2,400 culverts statewide. State officials have identified the culverts as needing repair or replacement during the next 20 years for the benefit of fish.

“We are disappointed that the tribes feel litigation is necessary to bring about the improvements we all strive for,” Locke and Gregoire said. “Litigation will serve to siphon valuable time, money and energy away from the vital task of saving salmon.”

The suit would require the state to identify the culverts within 18 months of a court ruling. Those culverts – it's not clear how many – would have to be repaired within five years, and maintained in perpetuity. Further, no new culverts that harm fish passage could be built.

The repairs are expensive, averaging \$250,000 per culvert, according to Paul Wagner, biology- program manager for the state Department of Transportation.

Culverts are built and maintained by a range of state agencies, as well as local governments. State agencies are in various stages of identifying, designing, funding and making repairs to culverts that block or impair fish passage.

Improperly built or maintained culverts can block fish in a number of ways. If the culvert is too steep, water will rush through in a current too fast for salmon to fight. Other culverts have too little water for salmon to swim.

Some culverts are too high above the streambed for even the hardiest salmon to jump into.

Rep. Jim Buck, R-Joyce, chairman of the House Republican Caucus, said the suit has damaged relationships. "I feel sad about this lawsuit. We were making a good-faith effort to put aside the animosity between Indians and non-Indians and this one just shoots that out of the saddle."

Curt Smitch, the governor's top salmon aide, said the suit, if successful, could require the state to consult with tribes on virtually any land use that affects their ability to make a "moderate living" from salmon fishing.

"We don't believe this is about culverts. We think it's about what duty we have under the treaty to provide the tribes authority over any activity that would impact the environment," Smitch said. "We see this as Boldt II, not a culvert lawsuit."

The lawsuit is potentially a more powerful tool than the Endangered Species Act (ESA) for a couple of key reasons.

First, it could affect streams and rivers everywhere in Washington with a state highway culvert that affects runs for Western Washington tribes. The ESA only protects streams that are home to fish listed for protection.

Second, the ESA only requires fish runs to be restored to the point that they are no longer on the brink of extinction.

The lawsuit seeks to restore habitat to the point it supports enough salmon to successfully sustain commercial, cultural and subsistence fishing.

Tribal leaders say they were pushed to file the suit by a catastrophic collapse of fish runs.

Today tribes are catching no more fish than they were before federal Judge George Boldt's 1974 decision establishing their right to half the catch in rivers.

"The tribes have lost everything they gained in the Boldt decision," said Phil Katzen, Seattle attorney for the tribes.