

WESTERN STATES WATER

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THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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LITIGATION/ENVIRONMENT

United States v. State of Washington/Salmon

Judge Ricardo Martinez, U.S. District Court for Western Washington at Seattle, held on August 22, that the State of Washington has violated tribal rights of taking fish secured in the Stevens Treaties, which the court determined impose a “duty upon the State 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 for Tribal harvest.” The court’s order followed unsuccessful mediation, and a Ninth Circuit Court decision vacating an earlier declaratory judgement as too broad. “This dispute, limited as it is to ‘only those culverts that block fish passage under State-owned roads’, is capable of resolution through the declaratory relief requested by the tribes.... A narrowly-crafted declaratory judgement such as the one requested here does not raise the specter of a broad ‘environmental servitude’ so feared by the State.”

The plaintiffs, initiating the matter in 2001, included the Suquamish, Klallam, Nisqually, Nooksack, Skokomish, Skagit, Tulalip, Lummi, Quinalt, Puyallup, Yakima and other tribes. They sought summary judgement to compel the State of Washington to repair or replace any culverts that are impeding salmon migration to or from spawning grounds, contending that a “significant reason for the decline of harvestable fish has been the destruction and modification of habitat needed for their survival.” One specific type of modification has been the placement of culverts rather than bridges where roadways cross rivers and streams. “According to the Tribes, culverts under State-owned or maintained roads block fish access to at least 249 linear miles of stream, thus closing off more than 400,000 square meters of productive spawning habitat, and more than 1.5 million square meters of productive rearing habitat ...[and that] by the State’s own estimates, removal of the obstacles...would result in an annual increase in production of 200,000 fish, many of which would be available for Tribal harvest.” Between 1974 and 1986, Tribal harvests of anadromous fish (salmon and steel-head) rose dramatically, eventually reaching 5 million fish, but by 1999 had fallen back to 1974 levels.

The material facts in the case are not in dispute. The State estimates 18% of culverts on land managed by the Department of Natural Resources were identified as barriers to anadromous fish passage in a 2000 inventory, and 120 barrier culverts have been identified out of the thousands passing under state roads. The court found the issue was then purely a legal one. The State answered “...claiming injunctive and declaratory relief against the United States for placing a disproportionate burden of meeting the treaty-based duty (if any) on the State.” The State also asserted that the United States has managed its own lands in such a way as to create a nuisance that unfairly burdens the State. The court eventually found that it lacked jurisdiction over the State’s counterclaims as the U.S. had not waived its sovereign immunity.

In 1976, the same court recognized the Tribes treaty-based right to a fair and equitable share of harvestable fish, and in 1980 turned to address the environmental issues and whether or not “the right of taking fish incorporates the right to have treaty fish protected from environmental degradation.” The district court then found that “implicitly incorporated in the treaties’ fishing clause is the right to have the fishery habitat protected from man-made despoilation,” and assigned to the State a burden “to demonstrate that any environmental degradation of the fish habitat proximately caused by the State’s actions (including the authorization of third parties’ activities) will not impair the tribes’ ability to satisfy their moderate living needs.”

The Ninth Circuit Court of Appeals reversed this portion of the district court’s order in 1982, rejecting the “environmental servitude created by the district court,” but finding “...the State and the Tribes must each take reasonable steps commensurate with the resources and abilities of each to preserve and enhance the fishery when their projects threaten then-existing levels.” Next, upon a request for rehearing *en banc* a divided 11-member court issued a *per curiam* decision vacating the district court’s declaratory judgement on the environmental issue as imprecise and lacking in a sufficient factual basis contrary to the exercise of sound judicial discretion. “The legal standard that will govern the State’s precise obligation and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.... Precise resolution, not general admonition, is the function of declaratory relief.” The district court will now proceed to determine how to implement an appropriate remedy.

WATER QUALITY/CONGRESSIONAL UPDATE

Clean Water Act

At the last WSWC meeting in Bozeman, Montana, several members were assigned the task of evaluating areas of common agreement for a statement regarding the Clean Water Act Restoration Act, as introduced in the House and the Senate (H.R. 2421; S. 1870), to redefine “waters of the United States.” Members were encouraged to provide the work group with comments. During an August 24 conference call, it was determined that given the disparate state positions, some in favor of the bill and some opposed, with others undecided, the Council would not be able to reach consensus or unanimity on any meaningful statement and should take no position. Rather as always, individual states are free to express their views through other forums. Staff was instructed to

continue to monitor further Congressional action and keep members apprised of future developments.

Rep. James Oberstar (D-MN) introduced H.R. 2421 on May 22, with 169 cosponsors, and S. 1870 was introduced by Senator Russ Feingold (D-WI) on July 25, with nineteen cosponsors. Senators Barbara Boxer (D-CA) and Ron Wyden (D-OR) are the only cosponsors to date from western states. H.R. 2421 has been referred to the House Subcommittee on Water Resources and Environment, under the Transportation and Infra-structure Committee, which Oberstar chairs. S. 1870 was referred to the Environment and Public Works Committee. No specific hearings or other action has yet been scheduled on either bill, but on July 17, Rep. Oberstar chaired a hearing on the jurisdictional scope and history of the Clean Water Act. He said, "This October marks the 35th anniversary of the modern Clean Water Act. This landmark environmental statute established a national commitment to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The hearing addressed "the intent of Congress over three decades ago in enacting this statute...." (<http://transportation.house.gov/news>)

WATER RESOURCES

California/Sacramento-San Joaquin Bay Delta

On August 21, California Governor Arnold Schwarzenegger brought together state water experts and over 30 stakeholder groups to discuss plans to fix deteriorating environmental conditions and infrastructure in and around the Sacramento-San Joaquin Bay Delta. "A healthy Delta is vital to our environment and it is vital to our economy today and far into the future." He was joined by Senator Dianne Feinstein (D-CA). She added, "The Delta is on the brink of disaster. And the decline of the Delta smelt is the canary in the coal mine. We must take action to prevent catastrophe in the future.... We cannot wait until we have a Katrina-like disaster to attack this problem. Twenty-five million Californians rely on the Delta for clean, safe water. It also irrigates hundreds of thousands of acres of Central Valley farm-land and it is the backbone of California's \$32 billion agricultural industry.... I look forward to working with Governor Schwarzenegger to develop immediate and sustainable solutions for the future of the Delta. The stakes are simply too high to fail." (Press Release 8/21)

Feinstein has endorsed the Governor's \$5.9B water infrastructure plan, including: a \$4.5B investment in additional surface and ground water storage to protect communities against flooding and to capture stormwater and snowmelt runoff to supply cities, farmers and businesses during drought; \$1 billion toward Delta restoration; \$250M toward restoration projects on the Klamath, San Joaquin and Sacramento Rivers, and the Salton Sea, with \$200M in grants to communities to help conserve water. The Governor has appointed a Delta Vision Blue Ribbon Task Force to develop a management plan, with a report on its findings and recommendations due January 1, 2008. The Delta Summit fell on the same day as an evidentiary hearing in Fresno before Judge Oliver Wanger related to the Delta smelt and pumping by the State Water Project. A decision, expected later this year, will have significant impacts on the Delta and water deliveries to other parts of the state (see WSW #1724).

MEETINGS

Utah Governor Jon Huntsman will address those attending, "Water Policies and Planning in the West: Ensuring a Sustainable Future," the WGA/WSWC Conference to be held in Salt Lake City, Utah on October 10-12, at the Sheraton City Centre. He will be joined by senior federal officials from the Departments of Commerce, Interior and the Environmental Protection Agency. Some 250 participants, including stakeholders, federal, state and local agency representatives, and water experts from across the West are expected to attend. Space is limited, so if you have not done so yet, register now online to ensure your spot at the meeting: <http://www.regonline.com/Checkin.asp?EventId=139310>. An updated agenda has been posted at the website <http://www.westgov.org>.

The cut-off date for room reservations for our block of rooms has been extended to September 16. The rate is \$109 single/double occupancy, and will be honored three days before group arrival and three days after group departure, based on availability. Reservation requests received after that date will be accepted on a space available basis, at the higher rate available at that time. Call the hotel's reservations department at 801-401-2000, and be sure to request the special rate. Space is limited, so please make reservations early.

Also, don't miss the August 29 registration deadline for the WSWC Water Information Management Systems (WIMS) Workshop, "Water Data, Water Planning, Water Rights and Decision Making," September 24-26, in Seattle, WA - co-hosted by the Department of Ecology. See www.westgov.org/wswc/meetings.html for details.

The WESTERN STATES WATER COUNCIL is an organization of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.