

## Chronology of culvert litigation

2001	Tribes file sub-proceeding of U.S. v Washington regarding culverts
2007	Judge Martinez agrees with claim
2009	Trial occurs to determine remedy
Mar 2013	Judge Martinez issues 'injunction' outlining remedy
Jun 2016	State Appeals to 9 <sup>th</sup> Circuit court of appeals – appeal denied
May 2017	9 <sup>th</sup> Circuit denies state's request for rehearing en banc
Aug 2017	State Appeals to U.S. Supreme Court
Jun 2018	U.S. Supreme Court issues 4-4 decision – lower court decision remains

## Overview of “Permanent Injunction Regarding Culvert Correction”

### US District Court – Western District of Washington at Seattle

### United States of America, et al, v State of Washington, et al

#### March 2013

- September 2013 – Deadline to prepare a list of case area barriers in consultation with the Tribes.
- October 2016 – Deadline for WDFW, Dept of Natural Resources, and State Parks to fix all their barrier culverts.
- March 2030 – WSDOT's deadline to fix barriers with 200 meters or more of upstream habitat.
- In order of preference, state directed to avoid the stream crossing where possible; build a bridge; or use stream simulation design which represents best available science.
- WSDOT required to correct culverts with less than 200 meters of upstream habitat at the end of useful life or sooner as part of highway projects.
- WSDOT can defer culverts with up to 10 percent of the total blocked upstream habitat until the end of useful life or sooner as part of highway projects.
- Required to make ongoing efforts to identify and assess culverts that become barriers; monitor effectiveness of corrections; and maintain culverts to prevent barriers. Required to correct newly identified barriers 'within a reasonable period of time'.
- Implementation requires significant tribal coordination.





1 Ordered, adjudged and decreed that the State of Washington, the Washington State  
2 Department of Transportation (WSDOT), the Washington State Department of Fisheries and  
3 Wildlife (WDFW), the Washington State Department of Natural Resources (DNR), and the  
4 Washington State Parks and Recreation Commission (State Parks), their agents, officers,  
5 employees, successors in interest, and all persons acting in concert or participation with any of them  
6 (Defendants), are permanently enjoined and restrained to obey, to respect, and to comply with all  
7 rulings of this Court in this subproceeding and with each provision of this injunction, subject only  
8 to such modifications as may be approved by the Court in the future.

10 1. As used in this injunction, the word "culvert" shall mean any structure, other than a full-  
11 span bridge or tide gate, that is constructed to convey water beneath a roadway, and shall also  
12 include associated fishways or other fish passage structures, and bridges built to replace any culvert  
13 that is subject to this injunction. The word "salmon" shall mean any of the six species of  
14 anadromous salmonids of the genus *Oncorhynchus*, commonly known as chinook, chum, coho,  
15 pink, and sockeye salmon, and steelhead.

17 2. Within six months of the date of this injunction, the Defendants, in consultation with the  
18 Plaintiff Tribes and the United States, shall prepare a current list, or lists if different by agency (the  
19 List), of all culverts under state-owned roads within the Case Area existing as of the date of this  
20 injunction, that are salmon barriers. In compiling the List, the Defendants shall use the barrier  
21 assessment methodologies in the Fish Passage Barrier and Surface Water Diversion Screening  
22 Assessment and Prioritization Manual (WDFW 2000) (WDFW Assessment Manual).

24 3. In addition to compiling the List, the Defendants shall make ongoing efforts to assess and  
25 identify culverts under state-owned roads in the Case Area that become partial or full barriers to  
26 salmon passage after the entry of this Injunction, using the WDFW Assessment Manual or any later

1 state barrier assessment standards, provided such standards are consistent with the terms of this  
2 injunction.

3 4. Any new culvert constructed by the Defendants in the future on salmon waters within the  
4 Case Area and any future construction to provide fish passage at State barrier culverts on such  
5 waters shall be done in compliance with the standards set out in this injunction.  
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7 5. By October 31, 2016, WDFW, DNR, and State Parks shall provide fish passage in  
8 accordance with the standards set out in this injunction at each barrier culvert on the List located on  
9 lands owned or managed by those agencies in the Case Area.

10 6. Within 17 years of the date of this injunction, WSDOT shall provide fish passage in  
11 accordance with the standards set out in this injunction at each barrier culvert on the List owned or  
12 managed by WSDOT if the barrier culvert has 200 lineal meters or more of salmon habitat  
13 upstream to the first natural passage barrier.  
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15 7. WSDOT shall provide fish passage in accordance with the standards set out in this  
16 injunction at each culvert on the List having less than 200 lineal meters of upstream salmon habitat  
17 at the end of the culvert's useful life, or sooner as part of a highway project, to the extent required  
18 by other applicable law.

19 8. Notwithstanding the provisions of paragraph 6, above, WSDOT may defer correction of  
20 an aggregation of culverts that cumulatively comprise barriers to no more than 10 % of the total  
21 salmon habitat upstream of those WSDOT culverts that would otherwise be subject to correction on  
22 the schedule set forth in Paragraph 6, but only upon fulfillment of the following conditions: In  
23 consultation with the Plaintiff Tribes and the United States, the Defendants shall develop and  
24 complete an assessment of the amount of salmon habitat upstream of each WSDOT barrier culvert  
25 on the List for which a "full physical survey," as described in § 3.4 of the WDFW Assessment  
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1 Manual, has not been completed as of the date the List is compiled. In conducting the assessment,  
2 the Defendants shall use the full physical survey methodology or such other methodology as the  
3 parties may agree upon. Each correction deferred by this provision shall be corrected to the  
4 standards of this injunction at the end of the culvert's useful life, or sooner as part of a highway  
5 project, to the extent required by other applicable law. In undertaking the corrections, the  
6 Defendants shall be guided by the principle of providing the greatest fisheries habitat gain at the  
7 earliest time. The Defendants may utilize the "Priority Index" methodology described in the  
8 WDFW Assessment Manual in determining the sequence of correction if they so desire.

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10 9. In carrying out their duties under this injunction, the Defendants shall design and build  
11 fish passage at each barrier culvert on the List in order to pass all species of salmon at all life stages  
12 at all flows where the fish would naturally seek passage. In order of preference, fish passage shall  
13 be achieved by (a) avoiding the necessity for the roadway to cross the stream, (b) use of a full span  
14 bridge, (c) use of the "stream simulation" methodology described in *Design of Road Culverts for*  
15 *Fish Passage* (WDFW, 2003) or *Stream Simulation: An Ecological Approach to Providing Passage*  
16 *for Aquatic Organisms at Road-Stream Crossings* (U.S. Forest Service, May 2008), which the  
17 parties to this proceeding have agreed represents best science currently available for designing  
18 culverts that provide fish passage and allow fluvial processes. Nothing in this injunction shall  
19 prevent the Defendants from developing and using designs other than bridges or stream simulation  
20 in the future if the Defendants can demonstrate that those future designs provide equivalent or  
21 better fish passage and fisheries habitat benefits than the designs required in this injunction.  
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24 10. In rare circumstances, Defendants may deviate from the design standards in paragraph  
25 9, above, if they can establish or the parties agree that use of the standards required in paragraph 9  
26 is not feasible because of: (a) an emergency involving an immediate threat to life, the public,

1 property, or of environmental degradation, and a correction using the required design standards  
2 cannot be implemented in time to forestall that threat; or (b) the existence of extraordinary site  
3 conditions. If a design standard other than that specified in paragraph 9 is used, in addition to  
4 providing the best feasible fish passage at the barrier site, the Defendants shall mitigate for the  
5 impacts of deviating from the standards of this injunction so that the resulting correction plus any  
6 mitigation provides at least the same net benefit to the salmon resource as would have occurred had  
7 the correction applied the required standards.  
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9 11. The Defendants shall provide fish passage in accordance with the standards set out in  
10 this injunction within a reasonable period of time: (a) when any culvert corrected under the  
11 injunction remains a barrier culvert after attempted correction, or again becomes a barrier culvert  
12 following an initially successful correction, or (b) when any culvert is newly identified as a salmon  
13 barrier culvert after the initial completion of the List.  
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15 12. The Defendants shall monitor their implementation of the injunction, and evaluate  
16 whether their efforts to provide fish passage at their salmon barrier culverts are effective in meeting  
17 the standards of this injunction. The Defendants shall take reasonable steps to maintain their  
18 culverts in such a manner as to prevent development of fish barriers and to protect salmon habitat.  
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20 13. The Defendants shall provide the interested Tribes with sufficient notice of State barrier  
21 culvert inventory, identification of previously unidentified State barrier culverts, assessment, and  
22 potential or actual State barrier culvert correction activities to permit the Tribes to monitor and  
23 provide effective recommendations for compliance with the requirements of this injunction.  
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25 14. The Court shall retain continuing jurisdiction over this subproceeding for a sufficient  
26 period to assure that the Defendants comply with the terms of this injunction.

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Respectfully submitted this 29<sup>th</sup> day of January, 2010.

PLAINTIFF-INTERVENOR TRIBES

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By: s/ SAMUEL J. STILTNER, WSBA # 7765



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THE UNITED STATES OF AMERICA

By: s/ PETER C. MONSON  
United States Department of Justice

**ORDER**

Is it so ORDERED this 29<sup>th</sup> day of March 2013.



RICARDO S. MARTINEZ  
UNITED STATES DISTRICT JUDGE

