

# Are local and county culverts in legal danger?

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August 13, 2019



A U.S. court injunction requires that Washington state remove hundreds of fish barriers by 2030. However, it is unlikely a similar lawsuit will be filed against individual cities and counties for those culverts also in need of replacement. Photo: freepik.com

As state lawmakers consider ways to generate the money needed to replace hundreds of fish barriers on roads managed by the Washington State Department of Transportation (WSDOT), another dilemma they face is deciding the scope of that work.

While there are 415 barriers that need to be removed by 2030 as part of a U.S. court injunction, there are not only hundreds of other culverts on WSDOT roads that need fixing – but thousands of fish barriers elsewhere in the state on city and county roads. Although some state officials recommend focusing primarily on culverts affected by the court decision regarding funding options, local and county government advocates believe the state should use the opportunity to replace other nearby culverts that impact the same fish habitat. According to the Washington Department of Fish and Wildlife, for every fish barrier on a WSDOT road, there are two other barriers downstream and five upstream.

“These culverts are all on the same stream system. A fish frankly doesn’t know the difference between a city, county, state or private culvert,” Jane Wall said. She is the managing director of the Washington State Association of County Engineers and the Washington State Association of Counties.

“It makes no sense from our perspective that the state would address a culvert in the middle of a system when we know there are blockages that are upstream or downstream that would open habitat.”

However, aside from the ecological benefits of removing additional barriers to fish passage, there is also the legal risks stemming from the 1855 Treaty of Point Elliott between the United States and Native American tribes in the Puget Sound area. Under the treaty, the tribes retained traditional fishing rights while conceding most land in western Washington. It was on the basis of that treaty 21 tribes sued the state in 2001, arguing that the fish barriers were depriving them of the salmon harvest guaranteed to them. An injunction was issued in 2016 to remove 416 barriers by 2030, which was upheld by a split U.S. Supreme Court decision in 2018.

By doing so, the courts made the issue of salmon survival an integral part of tribal fishing rights. In an [amicus brief](#) submitted to the court on behalf of the Washington State Association of Counties (WSAC) and Association of Washington Cities (AWC), former State Attorney General Rob McKenna wrote that should the injunction be upheld, the same argument could be applied to counties. According to AWC, there are 3,200 fish barriers on county roads within the injunction area, with a price tag of \$7.7 billion to remove. There are another 900 barriers elsewhere in the state. However, neither cities nor counties have dedicated revenue sources for road departments, and though the state Fish Passage Removal Board has recently provided grants to some projects, it has never been fully funded.

If forced to remove their culverts just as the state is required to do, McKenna warned that “some (counties) would face the prospect of bankruptcy.”

The same outcome might be applied to cities if they were slapped with an injunction. According to AWC, there are 1,391 city-owned fish passage sites in the area affected by the injunction, with 707 in need of replacement. The cost to remove them all: \$4.2 billion. There are also 200 barriers outside the injunction area.

“Counties are very aware of the reality and the risks of a lawsuit,” Wall said. “The precedent has been set now. We’re aware, and that is part of the reason we want to be really responsive and actually address blockages.”

Nevertheless, AWC Legislative & Policy Analyst Shannon McClelland wrote in an email that the same approach used against the state would be impractical with other jurisdictions. Also, it’s not certain whether all counties or cities could be collectively included in a single lawsuit.

If that is the case, “a tribe or tribes would have to sue each city,” McClelland wrote. “As such, we believe cities could be vulnerable; but given the length of time the case against the state took to achieve finality, it’s uncertain whether a tribe or tribes would have the appetite for another lawsuit. We’d prefer to proactively address a coordinated watershed solution, with the state...to achieve the goal of the injunction – restored access to fish habitat.”

Wall said that a watershed approach to fixing barriers also makes financial sense. “I don’t think taxpayers will be very happy at the end of the day if the state dumps \$3.8 billion into the problem and they’re not actually going to get results.”