

# Feds, tribes say farm groups overreacting to culvert case

## U.S. Supreme Court asked to reject appeal

By **DON JENKINS**  
Capital Press

Lawyers for the U.S. Department of Justice and Puget Sound tribes say Western farm groups are mistaken to think a court order directing Washington to replace fish-blocking culverts foreshadows trouble for agriculture.

The department and tribes, in briefs filed Monday, asked the U.S. Supreme Court to let stand the order by the 9th U.S. Circuit of Appeals, arguing that the directive isn't a fore-runner to restricting farming, removing dams or reordering water rights.

"The court held only that the state cannot maintain cul-

verts that block fish passage, a decision that has no implications for land use," according to the brief filed on behalf of 20 tribes.

The briefs respond to an appeal filed by Washington Attorney General Bob Ferguson, challenging an order to replace more than 800 culverts under state roads. The appeals court ruled the culverts reduce fish runs and violate treaty rights. The Supreme Court has yet to decide whether to take on the case.

The state estimates fixing the culverts will cost nearly \$2 billion, but the bigger issue is whether the order sets a precedent for tribes to challenge other structures or practices that could harm fish.

The Washington, Oregon, Idaho and Montana Farm Bureaus filed briefs in September asking the Supreme Court to hear the appeal,



U.S. Supreme Court

The U.S. Department of Justice and Puget Sound tribes filed briefs Nov. 27 asking the U.S. Supreme Court not to hear Washington state's appeal of a court order to remove more than 800 fish-blocking culverts. Farms groups are urging the court to hear the appeal, arguing the order sets a precedent for restricting farming, removing dams and reordering water rights.

as did seven states, led by Idaho. The farm groups and states argue the case has far-reaching implications, particularly in Western states with treaty tribes, and should be decided by the Supreme Court.

The Justice Department and tribes downplayed the case's importance and asked the Supreme Court to reject the appeal without a hearing.

The tribes and Justice Department sought to rebut Appeals Court Judge Di-

arumuid O'Scannlain, who accused the court of discovering new rights in 19th century treaties and "fashioning itself a 21st century environmental regulator."

The order was based on "concrete facts" related to culverts, and wasn't a broad demand to protect fish habitat, according to the Justice Department. "Hence, Judge O'Scannlain's assertion that any activity that negatively affects fish habitat could be an 'automatic treaty violation' is wrong."

The pending case is rooted in a lawsuit initiated in 1970 against Washington by the U.S. government on behalf of the tribes. Previous court rulings guaranteed tribes up to 50 percent of the fish harvest, but litigation related to the supply of fish continues.

Another point of con-

attention is whether the order to remove culverts conflicts with the U.S. Supreme Court's Fishing Vessel ruling in 1979. The court in that case ruled that Puget Sound tribes were entitled to half the catch, unless a tribe dwindled to "just a few members." Then, according to the court, a 50 percent share would be "manifestly inappropriate" and could be reduced, as long as the share was enough for tribal members to make a "moderate living."

The state argues the appeals court misinterpreted the decision as a guarantee that there would be enough fish for a moderate living.

The tribes argue the Fishing Vessel ruling was about sharing the fish and that the pending case is about whether the state can build roads across streams and destroy fish runs.

## Judge: No 'blanket immunity' for aspiring pot growers facing lawsuit

By **MATEUSZ PERKOWSKI**  
Capital Press

Oregon's "right to farm" law doesn't provide aspiring marijuana growers with "blanket immunity" from a lawsuit filed by grape-producing neighbors in Yamhill County, a judge has ruled.

Yamhill County Circuit Judge John Collins has denied a motion to dismiss a complaint against the marijuana operation planned by Steven and Mary Wagner, and their son Richard.

A nearby vineyard owner, Momtazi Family LLC, claimed the marijuana odors would damage wine grapes with "foul-smelling particles" and sought an injunction against cultivation of the psychoactive crop.

The lawsuit was joined by Harihari and Parvathy Mahesh, neighbors who haven't yet planted a vineyard but plan to do so.

Last month, the Wagners asked the judge to throw out the lawsuit because there was no evidence that marijuana odors would cross property lines and because the planned marijuana operation wasn't yet definite.

"You don't get to file a lawsuit with no facts, sheer conjecture, pure speculation about what will happen," said Allison Bizzano, their attorney, during oral arguments on Oct. 11 in McMinnville, Ore.

Richard Brown, attorney for the plaintiffs, countered that it's common to enjoin activities that haven't yet occurred but that would cause damage.

"If the court allows them to develop the property first, it's the equivalent of letting them pull the trigger," Brown said.



Mateusz Perkowski/Capital Press

Marijuana plants grow in a high tunnel at a farm near McMinnville, Ore. A judge has refused to dismiss a lawsuit filed by neighbors against a planned marijuana operation in Oregon's Yamhill County.

The judge sided with the plaintiffs on this issue, ruling that an injunction can be a preventive remedy meant to "stay the lawless hand before it strikes the blow," based on a legal precedent from 1914.

"While this language from an old case might be seen as somewhat arcane today, the principle remains: A party may seek injunctive relief not just to halt an ongoing harm, but also to head off that harm if the harm can reasonably be predicted to occur in the reasonably near future," he said.

The judge also disagreed with the defendants that the case is barred by the "right to farm" law, which prohibits its nuisance and trespass lawsuits against common farming practices.

A provision from that law clarifies that it doesn't protect against lawsuits alleging "damage to commercial agricultural products."

# Water year off to a good start in Eastern Oregon, SW Idaho

By **SEAN ELLIS**  
Capital Press

BOISE — Snowpack levels in southwestern Idaho and Eastern Oregon basins are well above normal, a good sign for the thousands of farmers in the region who depend on those basins to provide the water they need for their crops.

The amount of water carried over in area reservoirs after the 2017 water year that will be available for irrigators in 2018 is also significantly higher than normal.

"We're looking good so far. If it continues, we're going to have a fairly good year" in 2018, said Tim Page, manager of the Boise Project Board of Control, which provides water to 167,000 acres and five irrigation districts in southwestern Idaho.

In the Boise River basin, snowpack levels were 160 percent of normal as of Nov. 21 and the Boise River system's reservoirs had 250,000 acre-feet of carryover water, well above normal.

As of this week, there was enough water in the system to equal about 50 percent of the project's total water right, up from the 36 percent that is typical for this time of year, Page said.

"Things can change quickly but so far it's looking pretty good," he said.

Snowpack in the Payette River basin is 207 percent of normal. It's 188 percent of normal in the Weiser River basin and 191 percent of normal in the Owyhee River basin.

Ron Abramovich, a regional water supply specialist with the Natural Resources Conservation Service, said some snow measuring sites have 20-30 percent of what their typical April 1 peak is.

"Snowpack is off to a good start," he said.

The Owyhee Reservoir,



Sean Ellis/Capital Press File

A sugar beet field in Eastern Oregon. A full water allotment for the first time in four years has made a big difference for farmers who depend on the Owyhee Reservoir to irrigate their crops. Basins in southwestern Idaho and Eastern Oregon have above-average amounts of snowpack for this time of year, and area reservoirs have higher than normal amounts of carryover water from the 2017 season.

which provides irrigation water to 118,000 acres in Eastern Oregon and part of Idaho, has 434,000 acre-feet of carryover water, which equals 61 percent of the reservoir's capacity.

That's up significantly from 200,000 acre-feet at this time last year and well above the typical 300,000 acre-feet for this time of year, said Owyhee Irrigation District Manager Jay Chamberlain.

Farmers who get their wa-

ter from the Owyhee Reservoir suffered through several years of drought and reduced water supplies until last year and 2018 is shaping up to be another good year, Chamberlain said.

The excellent start to the water year means the district may have to release water for flood control early next year, "but that's a good problem to have," he said. "I'll take that kind of problem any day over what we had the past several years."

The Payette River system's reservoirs have about 450,000 acre-feet of carryover water, which is 71 percent of full capacity and well above the 325,000 acre-feet that could typically be expected this time of year, said watermaster Ron Shurtleff.

"We're getting a great start and carryover is excellent," he said. "The Payette River basin could weather a pretty modest winter and still come out fine" for 2018.

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