

# Insurers don't have to pay for Highway 99 tunnel delays, WA Supreme Court rules

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After a 2013 breakdown, the tunnel-boring machine Bertha was taken apart and put back together. Here, workers in 2015 watch the 57.5-foot diameter cutter head and drive unit being rotated into a vertical position to then be lowered into a pit for reassembly. Bertha didn't resume digging until 2016 and broke through next to Seattle Center in April 2017. (Ellen M. Banner / The Seattle Times, file)



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Insurance companies don't have to reimburse Washington state for its costs during the two years the new Highway 99 tunnel was delayed, as a result of the boring machine

Bertha's breakdown during construction, the [Washington State Supreme Court](#) has ruled.

In a unanimous [decision released Thursday](#), the justices rejected the state's argument that delays in finishing the tunnel were a type of physical damage that fell under the insurance policy. Justices sent the case back to lower courts for insurers, contractors and the state to argue further over other kinds of damages.

For the people of Washington state, who funded the Highway 99 tunnel project mainly through gas taxes, the ruling has no immediate impact.

So far, taxpayers aren't on the hook for tunnel overruns, because the state won a separate jury trial in Thurston County, in which contractors sought hundreds of millions of public dollars.

The world's biggest tunnel drill, named after former [Seattle Mayor Bertha Knight Landes](#) (1926 to 1928), overheated next to Pier 48 on Dec. 6, 2013, and didn't resume digging until 2016 after a massive repair effort. It then broke through next to Seattle Center in April 2017. The 2-mile, double-decker tunnel opened to traffic Feb. 4, 2019.

The Supreme Court ruling Thursday, which upholds an appeals court ruling last year favoring insurers, is just one thread in a tangle of claims and counterclaims.

"Our reaction to this decision is that it is a step in a lengthy legal process," said Kris Rietmann Abrudan, spokesperson for the Washington State Department of Transportation.

She said WSDOT may face another trial, because contractor Seattle Tunnel Partners has asked the state Supreme Court to hear its appeal of the Thurston County case — in which jurors not only denied STP a potential \$300 million claim, but ordered the partnership to pay WSDOT \$57 million for the state's own costs to staff the project through the delays.

In the Thurston County case, STP blamed Bertha's breakdown on a vertical steel pipe the state had installed in the ground years earlier, to measure groundwater. This June, an [appeals court ruling](#) upheld the jury decision favoring WSDOT.

The insurance dispute adds another twist.

A consortium of eight insurers has [refused to pay for tunnel cost overruns](#). They denied coverage to both STP and WSDOT, both policyholders turned adversaries. Insurers argued in 2017 that Bertha, whose rotating cutter head measured 57 feet, 3 inches diameter, was "underdimensioned" from the outset, to turn such tremendous volumes of muck. Insurers further accused STP of inventing a theory that Bertha was wrecked by the steel groundwater-monitoring pipe.

Executives for the machine's maker, Hitachi Zosen of Osaka, Japan, [vehemently denied the slams at Bertha's fitness for duty, in a Seattle Times interview](#), while emphasizing their commitment to spend money and thousands of worker hours to finish the job. Direct parts and labor costs, to include new bearing seals, a main circular gear and tons of reinforcing steel, were estimated at around \$143 million for the repairs.

That dispute is at the core of Thursday's ruling.

Losses caused by Bertha's "own explosion, mechanical or electrical breakdown, failure breakage or derangement" are excluded from coverage, [according to the insurance policy](#).

Justices agreed with insurers that alleged defects in Bertha's design are "an internal cause" of damage that (if proven) the insurers don't need to cover.

The Supreme Court also rejected STP's argument the policy promised to cover the "final" and "full" costs. Justices said that language meant only the direct cost to repair Bertha, if the damage was external. "It does not extend coverage to costs associated with delay or with 'extending the project,'" their ruling said.

Likewise, justices rejected WSDOT's view that construction delays — which the state claimed are [worth \\$44 million](#) — count as insured damage. That figure was an expert's estimate of WSDOT expenses related to repair and restart of the machine, Abrudan said. The state argued that the stuck tunnel machine deprived WSDOT "use of the tunnel."

"The deprivation, dispossession, or injury must be physical," the ruling said. "This means the loss must have a material existence, be tangible, or be perceptible by the senses."

The project insurance team consists of Great Lakes Reinsurance, Zurich American Insurance, Starr Surplus Lines Insurance, Indian Harbor Insurance, Allianz Global Corporate & Specialty, Torus Insurance, PartnerRe Ireland Insurance Ltd., and certain partners at Lloyd's London.

The STP companies are Tutor-Perini of California and Dragados USA, who have moved on to new road, bridge and transit jobs around the country.

Thursday's court decision leaves expensive questions for insurers, STP and WSDOT. For instance, if operator errors or the steel pipe caused the machine breakdown, who pays and what amounts?

The tunnel replaced the elevated [Alaskan Way Viaduct](#), which was built in 1953 and cracked during a 2001 earthquake. Project costs including design, road lanes at interchanges, and viaduct demolition total about \$3.3 billion.

Soon after its 2019 opening, the tunnel attracted 75,000 daily vehicle trips, similar to the viaduct, before new tolls, a pandemic, and work-from-home slashed demand, which remains down by [35% as of mid-2022](#). A [large waterfront boulevard](#), with pedestrian walkways and parks overlooking Elliott Bay, is still under construction.

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