

SCOTUS RULES THAT YAKAMA TREATY PREEMPTS WASHINGTON TAX

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On March 19, 2019, the United States Supreme Court issued its decision in *Washington State Department of Licensing v. Cougar Den, Inc.*, holding that the right to travel provision of the Yakama's treaty with the United States prohibits the state of Washington from imposing a fuel import tax on a tribal corporation that transports fuel from Oregon to the Yakama Reservation. Fundamental to the Court's ruling is that the treaty right to travel includes the right to bring goods to and from market.

The decision is notable for two primary reasons. First, Justice Gorsuch's concurrence suggests that tribal treaty rights may have found a new advocate in the Supreme Court. While Justice Gorsuch is a conservative justice, his opinion is more in line with the viewpoints traditionally associated with liberal members of the Court, and indicates he may lead the Court to articulate strong tribal treaty rights based on the way tribes understood those rights when they negotiated and signed treaties with the United States. Second, the case could open the door to on-reservation economic growth and development opportunities. The Yakama Nation might, for example, purchase timber or lumber in Oregon or Idaho, then transport those goods on state highways to the Yakama Reservation, and not be subject to certain state taxes. We will continue to monitor developments in this area of law.

BACKGROUND

Cougar Den is a fuel company owned by a member of the Yakama Nation and incorporated under tribal law. The company buys fuel in Oregon, transports it to the Yakama Reservation via a public highway in the state of Washington, and then sells it to tribal businesses on the reservation. [1] From March to October 2013, Cougar Den transported more than five million gallons of fuel through Washington to the Yakama Reservation. Cougar Den did not pay taxes on any of that fuel.

In December 2013, the Washington State Department of Licensing assessed Cougar Den with \$3.6 million in unpaid taxes, penalties, and licensing fees for transporting the fuel from Oregon into Washington. [2] Washington imposes its fuel tax when fuel is removed from the terminal rack or imported into the state. [3] The tax is not on the possession or importation of fuel, but on its transportation. [4] The fuel tax generates over \$1.5 billion each year for the state. [5]

Cougar Den argued that a clause in the 1855 treaty between the United States and the Yakama Nation preempts Washington's fuel tax. Specifically, Cougar Den relied on the "right to travel" provision, which reserves for tribal members "the right, in common with citizens of the United States, to travel upon all public highways." [6]

The Yakima County Superior Court ruled that the fuel tax violated the tribe's right to travel guaranteed by the 1855 treaty. Washington sought direct review with the Washington Supreme Court, which also ruled in favor of Cougar Den. [7] Washington then appealed to the U.S. Supreme Court, which granted review.

THE SUPREME COURT'S DECISION

In a 5-4 decision, the Court held that the Yakama treaty prohibits the state of Washington from imposing its fuel import tax on Cougar Den. [8] Justice Breyer, joined by Justices Sotomayor and Kagan, relied upon the Washington Supreme Court's interpretation of the tax, as well as the historical record, in reaching its conclusion that the treaty preempted the tax. The court concluded that the Yakama understood the treaty right to travel as including "the right to travel with goods for purposes of trade" and that "to impose a tax upon traveling with certain goods burdens that travel." [9] Justice Breyer explained that the tax applies to Cougar Den "only because [it] happen[s] to transport goods on a highway while en route to [the] reservation. And it is the practical effect of the state law that we have said makes the difference." [10] Justice Breyer also clarified that the holding does not deprive the state of its power to regulate when necessary for conservation or its power to regulate to prevent danger to the health or safety of tribal members and nonmembers alike. [11]

Justice Gorsuch, in a concurrence joined by Justice Ginsberg, took a more straightforward approach, stating that the Court's only "job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact." [12] He concluded that the state tax "is about taxing a good as it passes to and from market—exactly what the treaty forbids." [13]

Justice Gorsuch also noted that ultimately "this case just tells an old and familiar story. The state of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The state is now dissatisfied with the consequences of one of those promises. . . . But today and to its credit, the court holds the parties to the terms of their deal. It is the least we can do." [14]

Justice Roberts dissented, joined by Justices Thomas, Alito, and Kavanaugh, arguing that "[b]ecause Washington is taxing Cougar Den for possessing fuel, not for traveling on the highways, the State's method of administering its fuel tax is consistent with the treaty." [15]

NOTES:

[1] Brief for Respondent at 2, *Washington State Department of Licensing v. Cougar Den, Inc.*, a Yakama Nation Corp., No. 16-1498 (Sept. 17, 2018).

[2] Washington also argues that tens of millions of dollars in later assessments are stayed pending the outcome of the case. Brief for Petitioner at 11, *Washington State Department of Licensing v. Cougar Den, Inc.*, a Yakama Nation Corp., No. 16-1498, (Aug. 9, 2018).

[3] Washington's current fuel tax statutes are located in Chapter 82.38 RCW.

[4] *Washington State Department of Licensing v. Cougar Den, Inc.*, ___ 586 U.S. ___, 2019 WL 1245535, at *4 (Mar. 19, 2019)

[5] Brief for Petitioner at 6, *Washington State Department of Licensing v. Cougar Den, Inc.*, a Yakama Nation Corp., No. 16-1498, (Aug. 9, 2018).

[6] Treaty with the Yakama Nation, art. III, 12 Stat. 951, 953 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

[7] *Cougar Den, Inc. v. Washington State Department of Licensing*, 188 Wash. 2d 55, 392 P.3d 1014 (2017).

[8] *Washington State Department of Licensing v. Cougar Den, Inc.*, ___ 586 U.S. ___, 2019 WL 1245535, at *2 (Mar. 19, 2019).

[9] *Id.* at *7-*8.

[10] *Id.* at *5.

[11] *Id.* at *9.

[12] *Id.* at *12.

[13] *Id.* at *11.

[14] *Id.* at *14.

[15] *Id.*

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