

SCOTUS: Yakama Treaty Travel Right Preempts Washington State's Fuels Tax

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April 5, 2019

On March 19, 2019, the Supreme Court, in *Washington State Dep't of Licensing v. Cougar Den, Inc.*, (*Cougar Den*) held that the right-to-travel provision in a Yakama Indian treaty preempts application of a state motor fuels tax on a tribal business, Cougar Den, Inc. The case involves two strands of federal Indian law jurisprudence: interpretation of Indian treaties and state taxing authority over activities of Indians and Indian tribes. Although the case represents an endorsement of the traditional way of interpreting Indian treaties, the Justices did not agree as to the conclusions to draw from the language and history of the Yakama treaty.

After a brief statement of facts, this sidebar provides an analysis of the Supreme Court's decision in *Cougar Den*. It first discusses state taxing authority over activities of tribal Indians. Next, it provides a brief description of the Washington motor fuels tax. It then turns to the 1855 Treaty and the principles that courts have used to interpret Indian treaties. Next, the sidebar identifies the basic points in each of the opinions written by the Justices in *Cougar Den*. Finally, the sidebar addresses potential implications of the case and possible considerations for Congress.

Statement of Facts

Cougar Den, Inc., a business owned by a Yakama tribal member, imports gasoline from Oregon, trucks it to the reservation on state highways, and resells it to on-reservation tribal retailers. The State of Washington taxes gasoline imported into the state. The [1855 Treaty](#) between the Yakama Nation (Tribe) and the United States guarantees the Tribe the "right, in common with citizens of the United States, to travel upon all public highways." Cougar Den successfully contended that the treaty exempts it from the tax. The case affirms a 2017 [decision](#) of the Washington State Supreme Court that included uncontested factual findings on the importance to the Yakamas in 1855 of being free to travel for trading purposes and representations made to them at the time of the negotiations. Those findings were adopted by the courts below based on a 1997 federal district court [case](#).

State Taxing Authority over Tribal Activity

The authority of a state to tax Indian tribes and tribal Indians differs depending upon whether the activity is conducted on- or off-reservation. In 1976, in *Moe v. Confederated Salish & Kootenai Tribes*, the Court held that state taxing authority over on-reservation activity generally requires that the legal incidence of the tax falls on persons other than the tribe or its members. Off-reservation activity, however, is a different

Congressional Research Service

7-5700

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LSB10281

matter. In 1973, in *Mescalero Apache Tribe v. Jones*, the Court upheld a New Mexico gross receipts tax on an off-reservation tribal ski resort, stating that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.”

Although *Cougar Den* involves a state tax imposed on off-reservation activity like the tax the Court upheld in *Mescalero*, the case arises as states have had difficulty collecting judicially upheld taxes on tribal retailers selling goods to non-Indians on Indian reservations. States have been unable to collect these taxes without tribal cooperation because tribal sovereign immunity bars suits against a tribe absent tribal waiver or congressional consent. In *Oklahoma Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe*, decided in 1991, the Court held that tribal sovereign immunity barred a state’s enforcement action to compel a tribe to remit taxes collected by tribal retailers on sales to non-Indians.

In 2005, in *Wagnon v. Prairie Band Potawatomi Nation*, the Court upheld a non-discriminatory Kansas motor fuels tax applied to off-reservation distributors who would later resell the fuel to Indian tribal retailers for on-reservation sales. Important to the Court’s reasoning were: (1) the fact that state law specified that the legal incidence of and the liability for paying the tax fell on the distributor; and (2) that the transaction being taxed—the receipt of the motor fuels in Kansas by the distributor—took place off-reservation.

Washington’s Motor Fuels Tax

The Washington motor fuels tax is similar to the Kansas tax the Court upheld in *Wagnon*. Washington enacted the tax after a 2007 federal district court [decision](#) held that Washington could not assess an earlier version of the tax against tribal wholesalers because the tax’s legal incidence fell on tribal retailers. Washington enacted the *Cougar Den* version of the motor fuels tax as a means of ensuring that the legal incidence of the tax fell on the wholesalers’ activities off-reservation. Unlike the earlier version of the motor fuels tax, the *Cougar Den* tax does not require distributors to pay the tax and pass it on to retailers, and it is imposed off-reservation on wholesalers. It is non-discriminatory and is levied on the first possession of motor vehicle fuel within the state by importers who transport the fuel by highway or rail. If the fuel is transported by pipeline or vessel, the tax is imposed on wholesalers off-loading fuel from in-state terminals, not on the pipeline or vessel operator who transported the fuel to the terminal. Currently, all 24 Indian tribes in Washington, other than the Yakama Tribe, have negotiated [fuel tax agreements](#) to collect and remit the motor fuels tax to the state.

The 1855 Yakama Treaty and General Principles Governing Treaty Interpretation

[Article III](#) of the 1855 Yakama Treaty contains two clauses. The first states that “if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them.” The second states “as also [is secured to them] the right, in common with citizens of the United States, to travel upon all public highways.” There is a distinction between the two clauses. The first provides for “free access . . . to the nearest public highway;” while the second provides a right to travel on public highways “in common with citizens of the United States.”

The phrase “in common with citizens of the United States” is found in another clause in Article III. That clause guarantees to the Yakamas “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . .” and has figured in several Supreme Court cases. In 1905’s *United States v. Winans* (*Winans*), the Court interpreted the language broadly to give effect to how the Indians must have understood it given their historical reliance on fishing for culture, subsistence, and commerce,

holding tribal fishermen immune to a state trespass action for entering private lands to access their accustomed fishing sites. In a 1979 decision, *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, the Court construed the “in common with” treaty language to mean that “both sides have a right, secured by treaty, to take a fair share of the available fish.” However, the Court has held that a state may impose reasonable regulations on tribal treaty fishing as necessary for conservation of the natural resource, but that other non-conservation fishing regulations, such as a non-discriminatory license requirement (*Tulee v. Washington*), are impermissible.

Canons of Construction for Interpreting Indian Treaties

According to the Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, courts must “give effect to the terms [of a treaty] as the Indians themselves would have understood them,” considering “the larger context that frames the [t]reaty, including ‘the history of the treaty, the negotiations, and the practical construction adopted by the parties.’” In construing Indian treaties, the Court has repeatedly stated that “any doubtful expressions in [treaties] should be resolved in the Indians’ favor.” Nonetheless, decisions of the Court have counseled that courts must take care not to extend treaty language beyond what it is intended to cover. In *Oklahoma Tax Comm’n v. Chickasaw Nation*, for example, the Court held that treaty language guaranteeing freedom from state law to the Chickasaw Nation and its members “within their limits” could not be stretched by “liberal construction” beyond its stated geographic limit. The Court thus held that Oklahoma could tax tribal members living outside of the Chickasaw Nation’s borders.

The Cougar Den Opinions

The Two Opinions of the Majority

In *Cougar Den*, in two separate opinions, a five-Justice majority agree that the Yakamas would have understood the treaty language as guaranteeing them the right to travel freely on the public highways to and from market with goods. Both the three-Justice plurality opinion, written by Justice Breyer, joined by Justices Sotomayor and Kagan, and the concurring opinion, written by Justice Gorsuch joined by Justice Ginsburg, hold that the state fuel tax is preempted by the treaty because the tax is a tax on goods being transported by truck from an out-of-state market to the Yakama reservation. The three-Justice plurality opinion reaches this conclusion by determining that the Washington tax is an impermissible burden on the treaty right-to-travel. The concurring opinion relies on uncontested facts showing that the Yakama would have understood the treaty to protect a right to travel with goods to market. As a result, the concurring opinion leaves open the possibility that identical language in other treaties could be interpreted differently.

Justice Breyer’s plurality opinion examines the state taxing provision and concludes, in agreement with the interpretation of the Washington Supreme Court, the tax was taxing travel because “the State must prove that Cougar Den traveled by highway . . . to apply its tax.” The plurality determines that the “treaty’s right to travel on the public highways includes the right to travel with goods for purposes of trade,” and that the tax “burdens that travel,” and is, therefore, preempted. It supports this conclusion by referring to judicial interpretations of the phrase “in common with” in treaty fishing rights cases beginning with *Winans* and to the record of treaty negotiations that included the importance of trade to the Yakamas and assurances made to them. The plurality opinion speculates on the possibility that, as in the fishing rights cases, state conservation measures may be possible and health and safety regulations may not be ruled out.

Justice Gorsuch’s concurring opinion emphasizes the “binding” and “unchallenged factual findings” that, to the Yakamas, the right-to-travel provision was understood to provide them with use of the highways to move their goods free of fees or taxes. The concurring opinion stresses that the 1855 treaty cemented “a

bargain-basement deal”: the Yakamas ceded a vast expanse of land “worth far more than an abject promise that they would not be made prisoners on their reservation.” With respect to the question of whether interpreting the right to travel to include a right to be free of certain burdens on that travel jeopardizes the ability of the state to regulate highway safety or to prohibit contraband, Justice Gorsuch’s opinion [notes](#) that highway safety measures have not yet been challenged and there is some evidence that the Yakamas “*expected*” health and safety laws so they could share the highways with non-Indians.

The Two Dissenting Opinions

The four dissenters—Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh, signed on to the principal [dissenting opinion](#), which was written by the Chief Justice. According to the dissenters, as the Yakamas interpreted the treaty, it was securing their ability to “continue to travel to the places where they traded,” not to provide a “mobile reservation” and, therefore, because the fuels tax is not a highway tax, it is not preempted. Justice Kavanaugh wrote a [separate dissent](#), which was joined by Justice Thomas, agreeing that the tax was not a highway tax and, therefore, not preempted, because, the plain meaning of the language “in common with” secures for the Yakamas merely the right to travel on public highways equally along with others, free of discriminatory highway regulations.

Chief Justice Roberts in the primary dissent [characterizes](#) the right-to-travel provision as “ensur[ing] that the Yakamas enjoy the same privileges when they travel with goods as when they travel without them. It is not an additional right to possess whatever goods they wish on the highway, immune from regulation and taxation.” According to the dissent, the treaty fishing rights cases involved state regulations or laws that “[actually blocked](#)” a tribe from exercising the right and, accordingly, only a highway toll or other measure that prevented the Yakamas from using the highway would violate the treaty. The dissent [opines](#) that, in negotiating the treaty, the Yakamas “did not intend to . . . insulate the goods they carried from all regulation and taxation . . . transform[ing] their vehicles into mobile reservations.” The dissent also [criticizes](#) the majority opinions for setting forth what has not previously been recognized, “a health and safety exception to reserved treaty rights,” and possibly opening the way for states to impose health and safety measures in the context of treaty fishing rights.

In dissenting, Justice Kavanaugh [notes](#) that the Treaty refers to “*free access*” from the reservation and travel on the highways “*in common with* citizens of the United States” and faults the majority opinions for overlooking the distinction. According to Justice Kavanaugh, the right secured by the Yakamas was “the right for . . . tribal members to travel on public highways on equal terms with other U.S. citizens,” i.e., subject to nondiscriminatory highway regulations. That interpretation is at variance with the broader construction of the “in common with language” in the fishing rights cases beginning with *Winans*.

Implications and Considerations for Congress

In general, the case does not appear to change traditional jurisprudence on the interpretation of Indian treaties or on the ability of states to tax activities of Indians off-reservation. With respect to the issue of treaty interpretation, only two Justices would impose a plain meaning textual analysis on language guaranteeing the Yakamas a right to travel. All of the other Justices, in their opinions, employ [Supreme](#)

Court jurisprudence to the effect that courts are to interpret Indian treaties as the Indians would have understood them. Because the case involves language found in only **two other Indian treaties** and relies on **uncontroverted findings** specific to negotiations with the Yakamas, the direct impact of the decision is likely to be limited. Congress may monitor any litigation that results from Washington amending its motor fuels tax law or to test the extent of its authority to impose health and safety highway regulations or interdict contraband being carried by Yakama Indians. Although this case does not disturb the standards that the courts have applied to taxation of Indian activity on- and off-reservation, Congress may choose to take the opportunity to review those rules.