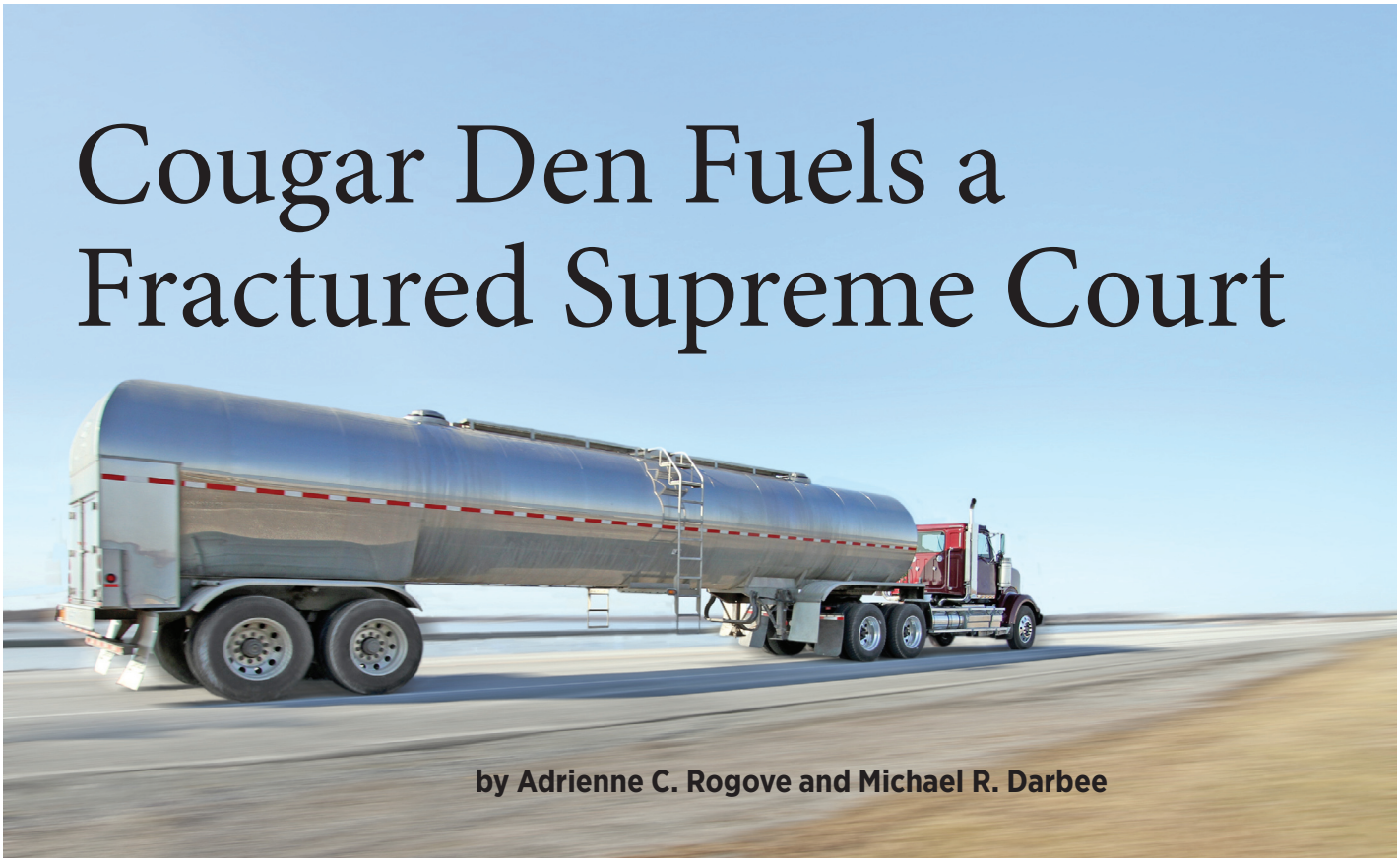
Cougar Den Fuels a Fractured Supreme Court



by Adrienne C. Rogove and Michael R. Darbee

A recent United States Supreme Court tax case is a lesson in United States history, American Indian law, federal preemption and, of course, tax law. A Washington State statute taxes "motor vehicle fuel importer[s]" who use "ground transportation" to bring fuel into the state. An 1855 treaty between the United States and the Yakama Nation guarantees the tribe "the right, in common with citizens of the United States, to travel upon all public highways." A member of the Yakama Nation and principal of a Yakama-incorporated fuel distribution business challenged the state's assessment of a $3.6 million tax on its operations.

In *Washington State Department of Licensing v. Cougar Den, Inc.*, the Court addressed the issue of whether the 1855 treaty preempts the state tax. In a fractured decision with unconventional judicial alliances, the Court held that the treaty preempts the state tax law because the tax impermissibly burdens rights under the treaty. The four separate opinions (including a plurality, a concurrence, and two dissenting opinions) show the justices diverging on several issues, including: 1) whether the tax is on *travel with*, or *possession of*, fuel on state highways; 2) the nature of the right reserved in the treaty; and 3) the value of the Court's precedents.

Cougar Den and the Fuel Tax

First, the facts. Cougar Den, Inc. is a wholesale fuel importer.[1] It is owned by Kip Ramsey, a member of the Yakama Nation, and is incorporated under Yakama law.[2] The company's business involves purchasing fuel in Oregon, driving along 27 miles of Washington State highway, and then selling the fuel to retail locations on the Yakama reservation.[3] The on-reservation gas stations, in turn, sell fuel to the general public.

In 2013, Washington State assessed Cougar Den $3.6 million in taxes, penalties, and licensing fees based on its fuel import tax and licensing law.[4] The law imposes taxes on wholesale fuel suppliers in two ways. First, if the seller transports fuel into the state via pipeline or vessel, it qualifies as a 'bulk transfer.' A bulk transfer of fuel is taxed when the fuel is first sold or removed from the terminal and loaded onto a ground transport. Second, if the seller transports fuel into the state through means other than bulk transfer, the state taxes the fuel when it enters the state.[5]

Cougar Den appealed the assessment, with mixed results. An administrative law judge (ALJ) held the tax was pre-empted; the Department of Licensing reversed the ALJ; the Washington Superior Court reversed the department; and the Washington Supreme Court affirmed the superior court's decision, holding that the tax was pre-empted by the 1855 treaty between the United States and the Yakama Nation.[6]

Background of the Yakama Tribe and American Indian Law

On appeal to the United States Supreme Court, the justices issued their opinions based on a common core of undisputed principles.

First, the Court previously set forth several settled principles regarding the taxation of Indian tribes. As a starting point, "Indian tribes and individuals generally are exempt from state taxation within their own territory."[7] But if the legal incidence of a tax falls on non-Indian persons on an Indian reservation, the Court must engage in a balancing test to determine if the tax is preempted.[8] Outside of Indian reservations, tribes and their members are subject to nondiscriminatory taxes unless there is a federal law or treaty that preempts those taxes.[9] Under settled canons of construction, tax exemptions in favor of Indian tribes are construed liberally.[10]

Second, the Court addressed language in the treaty regarding the tribe's right to travel. As relevant here, Article III of the Yakama Nation Treaty of 1855 provides:

> [I]f 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; as also the right, in common with citizens of the United States, to travel upon all public highways.[11]

The language of the treaty receives an additional gloss based on two canons of construction unique to Indian law. The first canon is that "[t]reaties are broadly interpreted, with doubtful or ambiguous expressions resolved in the Indians' favor."[12] The second is that "Indian treaties must be interpreted as the Indians would have understood them."[13] The reason for this second rule reflects the coercive environment under which all Indian treaties were so-called 'negotiated.' As the Court has explained:

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them.[14]

Third, although the Court had not previously addressed the right to travel provision in the treaty, on three previous occasions it addressed a similar provision regarding the tribe's fishing rights.[15] Aside from the provision at issue in this case, Article III of the treaty also states:

> That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States....[16]

Notably, both the right-to-travel and right-to-fish provisions secure to the tribe its rights "in common with citizens of the United States." In *United States v. Winans* and *Seufert Bros. Co. v. United States*, the Court held that the right-to-fish provision preempted a state trespass law. In both cases, the Court reasoned it would otherwise be impossible to exercise the treaty-protected right to fish at a "usual and accustomed place" without committing a trespass.[17] And in *Tulee v. Washington*, the Court held the right-to-fish provision preempted a nondiscriminatory fishing licensing fee. There, the

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Court reasoned the licensing fee impermissibly charged the Yakamas "for exercising the very right their ancestors intended to reserve."[18]

Fourth, there is an historical record concerning the treaty negotiations. At first blush, this seems too good to be true. Indeed, the Ninth Circuit has observed that "[a] quest for historical truth is always a difficult undertaking."[19] Here, however, the Court had "the benefit of a set of unchallenged factual findings" from an earlier district court litigation.[20]

In 1855, the tribe granted the United States title to roughly 10 million acres of land (nearly one-fourth of Washington State) in exchange for $200,000, certain improvements to the remaining Yakama land, and a reservation of other rights.[21] Before the treaty was signed, the Yakama were 'inveterate traders.' The United States representatives at the negotiations understood that travel was essential to the tribe's way of life, and encouraged the tribe to accept the proposed boundaries on the reservation because of the access to public highways.[22] That access would allow the tribe "to go on the roads, [and] to take…things to market."[23]

The Justices' Decisions

With this background in mind, the justices issued four opinions: a three-justice plurality, a two-justice concurrence, and two dissenting opinions.

In the plurality opinion, Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan determined the treaty preempted the tax. First, the plurality characterized the tax as a fee on "*travel* by ground transportation with fuel."[24] As support for this view, the plurality pointed to the Washington Supreme Court's interpretation of the tax, which is authoritative on matters of state law.[25] The plurality also observed that the contrary view (*i.e.*, characterizing the tax as a tax on *possession*) was over-inclusive. For example, the plurality noted that the tax does not apply to the first seller to possess fuel in the state if the fuel is imported through bulk transfer.[26] Instead, the plurality argued, the fee was a travel tax because it falls on the seller "only because they happened to transport goods on a highway while en route to their reservation."[27]

Second, the plurality determined that the tax on travel burdened a right reserved to the tribe under the treaty. Based on the historical evidence, the plurality concluded that the United States and the tribe understood the treaty to preserve the right to travel for trade.

Third, the plurality recognized that the Court's precedents interpreted the phrase "in common with" as broader than an antidiscrimination right. Instead, in the right-to-fish cases, that phrase "conferred upon the Yakamas continuing rights, beyond those which other citizens may enjoy."[28] Because the treaty protects the right to travel on highways with goods, and because the statute taxes travel, the plurality found the state law burdened the treaty right and was preempted.

In the concurring opinion, Justices Neil Gorsuch and Ruth Bader Ginsburg also determined that the treaty preempted the tax, but did so on narrower grounds. The concurrence recognized that its "job in this case is to interpret the treaty as the Yakamas originally understood it in 1855."[29] To perform that task, it relied heavily on the historical record and factual findings in *Yakama Indian Nation v. Flores*, another federal case interpreting the right-to-travel provision in the treaty.[30] And, according to the concurrence, the historical record was binding on the Court under the doctrine of collateral estoppel, an issue the other opinions failed to address.[31]

In the concurrence's view, the record in *Yakama Indian Nation* showed the treaty guaranteed the right to travel *and* the right to move goods freely, using United States roads. Therefore, whether the tax fell on *travel with* or *possession of* fuel was a distinction without a difference, because "it's impossible to *transport* goods without *possessing* them."[32]

The concurrence emphasized the unequal bargaining power between the United States and the tribe during the treaty negotiations. The historical record showed the treaty was negotiated in a trading language comprised of "about 300 words," which "no Tribe used as a primary language."[33] When the negotiations were complete, the treaty was memorialized in English—"a language that the Yakamas could neither read nor write"—and contained words and phrases that "had no adequate translation in the Yakamas' own language."[34]

In the Court's first of two dissenting opinions, Chief Justice John Roberts dissented and was joined by Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh. Justice Roberts maintained that the state law taxed the *possession of*, not the *travel with*, fuel. To illustrate, the dissent explained that the tax applies irrespective of the *distance* a seller travels with fuel.[35]

Chief Justice Roberts' dissent also criticized the plurality's reliance on the Court's right-to-fish cases. According to Chief Justice Roberts, those cases preempted state trespass laws that "made illegal the act of fishing at a traditional location."[36] But he argued those cases are materially different from a tax on the possession of commercial quantities of fuel because "[t]he tax…does not resemble a blockade or a toll."[37] He also attacked the concurrence's reading into the treaty negotiations a right that did not exist (*i.e.*, the right to "insulate the goods they carried from all regulation and taxation").[38]

Justice Kavanaugh penned the Court's second dissenting opinion, which was joined only by Justice Thomas and diverged from the other opinions on more fundamental grounds. Justice

Kavanaugh argued that the phrase "in common with" simply espoused a nondiscrimination principle (*i.e.*, that the tribe could use United States highways "on equal terms with other U.S. citizens").[39] Under that reading, the tax was a nondiscriminatory regulation on highway travel and was not preempted.

To reach this conclusion, Justice Kavanaugh compared the phrase "free access" (used to describe the tribe's access to roads connecting the reservation to public highways), with the phrase "in common with" (used to describe the tribe's travel on public highways). This difference in language, the dissent argued, means the tribe's *access* to public highways was free from government interference of any kind, while the tribe's *use* of public highways was only subject to a nondiscrimination principle. The problem with this reading is that it ignores the Court's precedents regarding the treaty, as well as the canons of construction unique to Indian tax law.

This case is significant not for the questions it answered, but for those it did not answer. Indeed, the Court failed to generate a majority opinion, which paves the way for more disputes over the meaning of the treaty. In addition, the justices' disagreements involved issues beyond the scope of this article, such as whether the state has the power to impose nondiscriminatory regulations on members of the tribe while travelling on public roads. For example, does the treaty preempt state regulation on the transport of contaminated produce (such as apples) or contraband (such as firearms)? These questions must wait for another case. For now, all that is known for certain is that Cougar Den is exempt from the state's $3.6 million tax assessment. ⚖

Endnotes

1. *Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1007 (2019) (Breyer, J., plurality opinion).
2. *Id.*
3. *Id.*
4. *Id.*; Wash. Rev. Code §§ 82.36.010 *et seq.*
5. *See* Wash. Rev. Code § 82.36.022.
6. *Cougar Den, Inc.*, 139 S. Ct. at 1007-08 (2019) (Breyer, J., plurality opinion).
7. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 455-56 (1995).
8. *Id.* at 459; *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1255 (W.D. Wash. 2005).
9. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 115 (2005).
10. *Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("[While] tax exemptions are strictly construed, "in the government's dealings with the Indians the rule is exactly the contrary."); *see also Wagnon*, 546 U.S. at 115 (describing the Court's "unique Indian tax immunity jurisprudence, which relies 'heavily on the doctrine of tribal sovereignty'").
11. Treaty with the Yakamas, 12 Stat. 951, 1855 WL 10420 (1855).
12. *Cougar Den, Inc. v. Washington State Department of Licensing*, 188 Wash. 2d 55, 61 (2017).
13. *Cougar Den, Inc.*, 188 Wash. 2d at 60.
14. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970).
15. The Ninth Circuit has previously addressed the right-to-travel provision of the treaty, but those decisions are not binding on the Court. *See, e.g., Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (concluding a truck-licensing fee burdened travel rights under the treaty).
16. Treaty with the Yakamas, 12 Stat. 951, 1855 WL 10420 (1855).
17. *United States v. Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919).
18. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).
19. *Cree*, 157 F.3d at 774.
20. *Cougar Den, Inc.*, 139 S. Ct. at 1016 (Gorsuch, J., concurring opinion);
21. *Id.* at 1007 (Breyer, J., plurality opinion); Treaty with the Yakamas, 12 Stat. 951, 1855 WL 10420 (1855).
22. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1238-39 (E.D. Wash. 1997) ("The record as a whole unquestionably depicts a tribal culture whose manner of existence was ultimately dependent on the Yakamas' ability to travel.").
23. *Cougar Den, Inc.*, 139 S. Ct. at 1013 (Gorsuch, J., concurring opinion).
24. *Id.* at 1009 (Breyer, J., plurality opinion) (emphasis added).
25. *Id.* at 1010 (Breyer, J., plurality opinion).
26. *Id.*
27. *Id.*
28. *Id.* at 1012.
29. *Id.* at 1019 (Gorsuch, J., plurality opinion).
30. *Id.*
31. *Id.* ("These findings bind us under the doctrine of collateral estoppel, and no one has proposed any lawful basis for ignoring them.").
32. *Id.* (emphasis in original).
33. *Id.* at 1012 (Breyer, J., plurality opinion).
34. *Id.*
35. *Id.* at 1023 (2019) (Roberts, C.J., dissenting opinion) ("[T]he tax on 10,000 gallons of fuel is the same whether the tanker carrying it travels three miles in Washington or three hundred.").
36. *Id.* at 1024 (Roberts, C.J., dissenting opinion).
37. *Id.*
38. *Id.*
39. *Id.* at 1024 (Kavanaugh, J., dissenting opinion).