



## ALERTS

### U.S. Supreme Court Rules That A Tribal Company Does Not Have To Pay Fuel-Importation Tax In Washington State

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On March 19, 2019, the U.S. Supreme Court held, in [Washington State Department of Licensing v. Cougar Den, Inc.](#), that a tax on the importation of motor fuel by ground transportation could not be applied to the Yakama Nation. While the 5-4 decision confirmed that a 1855 treaty preempted a Washington state tax, it did not yield a clear rule of law.

The five votes in favor of the Yakama Nation were split between a plurality opinion by Justice Breyer (joined by Justices Sotomayor and Kagan) and an opinion concurring in the judgment by Justice Gorsuch (joined by Justice Ginsburg). Justice Gorsuch's opinion included the caveat that it does not apply to other tribes and other treaties, as "each must be taken on its own terms." A plurality opinion is an opinion lacking enough votes to constitute a majority, but receiving more votes than any other opinion.

In the 1855 treaty, the Yakama Nation gave the United States 10 million acres of what is now the state of Washington in exchange for \$200,000, for improvements on remaining Yakama land (such as building a hospital and schools), and for the reservation of certain rights. The right at issue here was, in the words of the treaty, "the right, in common with citizens of the United States, to travel upon all public highways."

A member of the Yakama Nation, who owned a fuel-importing company called Cougar Den, Inc., argued that this reserved right to travel prevented Washington state from taxing goods he transported (namely, the fuel) when he traveled from Oregon back to the reservation with the

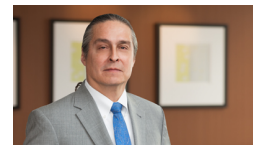
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fuel. The Washington Supreme Court agreed with him, and last week the U.S. Supreme Court did too.

The three-justice plurality concluded that the fuel tax violated the treaty's right-to-travel provision by imposing a burden on that travel. They reasoned that the tax, which had been construed by the state supreme court as covering importing fuel, not just possessing fuel, operated like a tax on travel because it applied to the member of the Yakama Nation only because he happened to transport the goods on a highway while en route to the reservation. The plurality, though, provided a few caveats to its principle that Washington state could not impose burdens on the Yakamas' right to travel. They stated that the treaty did not grant protection to "any and all goods" (perhaps thinking of items that would be illegal to transport), did not prevent the state from imposing regulations either for conservation purposes or for health and safety purposes (such as speed limits), and did not prevent sales and use taxes that did not apply only to items moved by ground transportation.

Concurring in the judgment, Justices Gorsuch and Ginsburg reasoned that the phrase "in common with citizens of the United States" meant that no fees could be imposed for traveling, including for traveling while transporting goods. In the view of the justices who concurred in the judgment, the right to travel included the right to travel with goods, and so the treaty preempted the tax. Justice Gorsuch's separate opinion noted that this case would not necessarily apply to other tribes and other treaties, which might have used different language.

Both the plurality and the opinion concurring in the judgment also took into account the language barriers associated with interpreting the treaty language. The 1855 treaty was negotiated in Chinook (not the Yakama language) and then written in English, and based on these facts, the plurality and Justices Gorsuch and Ginsburg concluded that the treaty should be construed to protect how the Yakama Tribe would have understood it at the time (and thus against the drafter, the United States).

In dissent, Chief Justice Roberts (joined by Justices Thomas, Alito, and Kavanaugh) argued that the tax was for possessing fuel, not for traveling on the highways, and so the reserved right to travel did not prevent this tax. In the view of the primary dissent, the treaty protected integral features of travel, and the transportation of fuel is not an integral feature of travel. In a separate dissenting opinion, Justice Kavanaugh (joined by Justice Thomas) concluded that the "in common with" language of the treaty created a non-discrimination rule and so prohibited only regulations that did not apply equally to Yakama members and other U.S. citizens. It is up to Congress, he concluded, to provide additional benefits to the Yakamas.

It is possible that this decision may show a difference in interpretive approach between the two newest justices, at least as to tribal treaties: while Justice Gorsuch focused on the treaty's original meaning, Justice Kavanaugh focused more on the plain meaning of the treaty's text.

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