

Justices Say Tribal Co. Doesn't Owe Wash. State Fuel Tax

By **Andrew Westney**

Law360 (March 19, 2019, 11:15 AM EDT) -- The U.S. Supreme Court on Tuesday upheld a Washington state court ruling that a Yakama Nation company does not have to pay a state fuel tax, saying the tribe's right to travel on public highways under its treaty makes the company exempt from the tax.

In a plurality opinion by Justice Stephen Breyer, the high court denied the state's bid to overturn a March 2017 Washington Supreme Court ruling that wholesale fuel distributor Cougar Den — formed under the laws of the Confederated Tribes and Bands of the Yakama Nation and owned by a tribe member — doesn't have to cover the state's \$3.6 million tax bill because the motor fuel tax is barred by the tribe's right to travel on public highways under its 1855 federal treaty.

Justice Breyer said the tax constituted a tax on the transportation of fuel and therefore fell within the tribe's treaty right.

While Chief Justice John Roberts agreed with Washington in his dissent that the tax is actually a tax on the possession of fuel and doesn't implicate the tribe's treaty rights, "we cannot accept that characterization of the tax ... for the Washington Supreme Court has authoritatively held that the statute is a tax on travel," Justice Breyer said.

The tribe's treaty "protects the Yakamas' right to travel on the public highway with goods for sale," and the state's statute "taxes the Yakamas for traveling with fuel by public highway," according to the opinion.

"Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here," Justice Breyer said. "Treaties with federally recognized Indian tribes — like the treaty at issue here — constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians."

In a concurrence, Justice Neil Gorsuch gave even stronger backing to the tribe's treaty right, saying the court was required to interpret the treaty as the Yakamas themselves understood it, and that the tribe deserves the benefits it negotiated for in "a bargain-basement deal" with the federal government.



The U.S. Supreme Court on Tuesday upheld a ruling by a Washington state court that a Yakima Nation company does not have to pay a state fuel tax. (AP)

"Really, this case just tells an old and familiar story," Justice Gorsuch said. "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. It is a new day, and now it wants more. But today and to its credit, the court holds the parties to the terms of their deal. It is the least we can do."

Referring to another dissent by Justice Brett Kavanaugh, Justice Gorsuch said that "to some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else."

"But that is not how the Yakamas understood the treaty's terms," Justice Gorsuch wrote, saying the tribe instead understood that their treaty right to travel included the right not to have to pay any fees for transporting tribal goods.

The Washington Supreme Court had voted 7-1 in favor of Cougar Den, ruling that the Washington State Department of Licensing couldn't assert fuel import licensing and taxation requirements against the company because that importation falls under the unfettered right to travel "upon all public highways" in the Yakamas' treaty.

In its petition to the U.S. Supreme Court, the Washington agency said the Yakama tribe didn't apply for a license from Washington to distribute wholesale fuel but secured a fuel dealer license from Oregon, which has no sales tax, and began buying fuel there, transporting it back to the Yakama Indian Reservation and selling it to gas stations on tribal land.

The department assessed \$3.6 million in unpaid taxes, interest and penalties against Cougar Den in December 2013 after learning it had hauled "millions of gallons" of fuel over the state's borders sans tax over a seven-month period that year, according to the petition.

The Supreme Court granted the petition in June, after the solicitor general recommended in a May amicus brief requested by the court that the case be heard.

The state had contended at oral arguments in the case that its fuel tax is a generally applicable tax on fuel possession and not on highway travel, and that a ruling against the state could impact tens of millions of dollars in taxes asserted against Cougar Den since the initial charge, as well as taxes from other Yakama businesses.

The federal government had backed Washington, saying the state high court's ruling was inconsistent with Ninth Circuit precedent and that there might not be a way to structure the tax so that it would cover imported fuel headed for the tribe's reservation.

In the court's opinion, Justice Breyer said that the Washington tax targets "travel by ground transportation with fuel," distinguishing it from a typical possession tax. Such a tax would normally apply to anyone who possesses a particular good, but with the fuel tax, "the state must prove that Cougar Den traveled by highway in order to apply its tax," Breyer said.

And "the incidence of a tax is a question of state law," Justice Breyer said, adding, "We decline the Department's invitation to overstep the bounds of our authority and construe the tax to mean what the Washington Supreme Court has said it does not."

If the tax were considered a possession tax, it "would still have the practical effect of burdening the Yakamas' travel," and "it is the practical effect of the state law that we have said makes the difference," according to the opinion.

Justice Gorsuch said in his concurrence that the Washington court properly recognized that the Yakama treaty allows regulations on both Yakama members and non-Indians to make sure they travel safely, but doesn't allow "encumbrances on the ability of tribal members to bring their goods to and from market."

"And by everyone's admission, the state tax at issue here isn't about facilitating peaceful coexistence of tribal members and non-Indians on the public highways. It is about taxing a good as it passes to and from market — exactly what the treaty forbids," Justice Gorsuch said.

Washington's interpretation of the treaty "promises tribal members only the right to venture out of their reservation and use the public highways like everyone else," but "the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation," Justice Gorsuch said.

In a dissent joined by Justices Clarence Thomas and Samuel Alito as well as Justice Kavanaugh, Justice Roberts said that "the mere fact that a state law has an effect on the Yakamas while they are exercising a treaty right does not establish that the law impermissibly burdens the right itself."

And while the tribe's right to travel "ensures 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," Justice Roberts said.

Comparing the current case to previous high court cases dealing with the Yakamas' fishing rights, Justice Roberts said the relevant state regulations there were found to have violated the treaty because they stopped tribe members from fishing, while the fuel tax, by contrast, doesn't prevent them from traveling.

The historical record around the treaty negotiations "shows only that the Yakamas wanted to ensure they could continue to travel to the places where they traded," and "they did not, and did not intend to, insulate the goods they carried from all regulation and taxation," Justice Roberts said.

In addition, the court's opinion puts forward a "health and safety" exception for states to impinge upon tribal treaty rights that "follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence," Justice Roberts added.

"Today's decision digs such a deep hole that the future promises a lot of backing and filling," he said.

The ruling may not be a good one for members of other tribes, Justice Roberts said, as "by creating the need for this untested exception, the unwarranted expansion of the Yakamas' right to travel may undermine rights that the Yakamas and other tribes really did reserve."

Justice Kavanaugh, joined by Justice Thomas, agreed in his dissent with Roberts' conclusion that the Washington fuel tax isn't a highway regulation, but said that even if it were, it is nondiscriminatory and therefore doesn't violate the Yakamas' travel right.

The court's opinion "fashions a new right for Yakama tribal members to disregard even nondiscriminatory highway regulations, such as the Washington fuel tax and perhaps also Washington's

similarly structured cigarette tax," and "will allow Yakama businesses not to pay state taxes that must be paid by other competing businesses, including by businesses run by members of the many other tribes in the state of Washington," Justice Kavanaugh added.

Mathew L. Harrington of Stokes Lawrence PS, which represents Cougar Den, said that with the decision, "the U.S. Supreme Court honored the solemn promises made by the U.S. government — promises that were made before Washington became a state."

A representative for the Washington State Department of Licensing said in a statement Tuesday that the department "respects and honors today's SCOTUS decision," adding that "we will be studying the ruling closely."

Representatives for the federal government and the Yakama Nation were not immediately available for comment Tuesday.

The Washington State Department of Licensing is represented by Robert W. Ferguson, Noah G. Purcell, Jay D. Geck and Anne E. Egeler of the Washington State Office of the Attorney General.

Cougar Den is represented by Brendan V. Monahan, Mathew L. Harrington and Lance A. Pelletier of Stokes Lawrence PS, and Ian H. Gershengorn, Sam Hirsch, Adam G. Unikowsky and Leonard R. Powell of Jenner & Block LLP.

The federal government is represented as an amicus by Noel J. Francisco, Jeffrey H. Wood, Edwin S. Kneedler, Ann O'Connell, Elizabeth Ann Peterson and Rachel Heron of the U.S. Department of Justice.

The Yakama Nation is represented as an amicus by Ethan Jones and Marcus Shirzad of the Yakama Nation Office of Legal Counsel.

The case is Washington State Department of Licensing v. Cougar Den Inc., case number 16-1498, in the Supreme Court of the United States.

--Additional reporting by Derek Major, Joshua Rosenberg and Michael Phillis. Editing by Breda Lund.