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*The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy and environmental protection, and housing development.*

## What the Supreme Court's Cougar Den Decision Means

In *Washington State Department of Licensing v. Cougar Den, Inc.*, 2019 WL 1245535 (U.S. 2019), Article III of the treaty of 1855 between the United States and the Yakama Nation provided: "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; as also the right, in common with citizens of the United States, to travel upon all public highways." Cougar Den, a corporation owned by Ramsey, a member of the Confederated Tribes and Bands of the Yakama Nation, contracted with KAG West, a trucking company, to transport fuel from Oregon to the Yakama Indian Reservation, where Cougar Den sold it to Yakama-owned gas stations on the reservation. The Washington Department of Licensing (Department) sought to assess Cougar Den \$3.6 million in unpaid taxes, penalties and licensing fees under a state statute taxing persons who import motor fuel into the State using ground transportation. The Washington Supreme Court struck down the statute, as applied to Cougar Den, on the ground that it "taxes the importation of fuel, which is the transportation of fuel" and that "travel on public highways is directly at issue because the tax is an importation tax."

On March 19, the US Supreme Court affirmed the Washington Supreme Court's decision. Justices Breyer, Sotomayor and Kagan held that the treaty preempted the tax because (1) the treaty must be understood in historical context and as the Indians understood it, (2) the Yakamas understood their right to travel "in common with the citizens of the United States" to include rights not shared with U.S. citizens (3) the historical record indicated that the parties to the treaty understood it to include the right to travel with goods for sale or distribution and (4) taxing travel with goods burdens travel. According to Justice Breyer: "[O]ur holding rests upon three propositions: "First, a state law that burdens a treaty-protected right is preempted by the treaty. ... Second, the treaty protects the Yakamas' right to travel on the public highway with goods for sale. ... Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway."

Justices Gorsuch and Ginsburg concurred in the judgment on grounds very similar to those cited by the plurality opinion but with greater emphasis on the trial court's uncontested findings of fact, more attention to the canon of construction requiring courts to interpret treaties as Indians would have understood them and a more detailed refutation of the dissenters' arguments. All five justices joining in the judgment agreed that the State retained the authority to enforce health and safety regulations against tribal members exercising their travel-related treaty rights.

Dissenting, Justice Roberts, joined by Justices Alito, Kavanaugh and Thomas, would have upheld the Washington tax, concluding that the State sought merely to

tax possession of fuel, not travel on the highways or transportation of fuel: “The tax before us does not resemble a blockade or toll. It is a tax on a product imported into the State, not a tax on highway travel.”

Justice Thomas, joined by Justice Kavanaugh, dissented separately, insisting that the treaty right to travel “in common with the citizens of the United States” merely gave the Tribe the right to travel on the same terms as whites, subject to the same motor fuel and other taxes. The three-justice plurality dismissed this argument, observing: that “Construing the treaty as giving the Yakamas only antidiscrimination rights, rights that any inhabitants of the territory would have, would amount to an impotent outcome to negotiations ...” (internal quotations and citation omitted.) Justice Gorsuch’s concurrence makes the same point: “As the State reads the treaty, it promises tribal members only the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation. In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. ... The Yakamas knew all this and could see the writing on the wall: One way or another, their land would be taken. If they managed to extract from the negotiations the simple right to take their goods freely to and from market on the public highways, it was a price the United States was more than willing to pay. By any fair measure, it was a bargain-basement deal.”

Lessons from the Cougar Den decision include: (1) a majority of the court is still willing to apply the canon of construction that requires treaty terms to be construed as tribes understood them, (2) State authority to regulate off-treaty rights to protect health and safety, previously acknowledged by various lower courts, is assumed by the Supreme Court, (3) Justice Gorsuch’s hoped-for understanding of tribal perspectives proved to be real in this case and (4) Justice Kavanaugh, initially at least, has staked out a position with Justice Thomas that is hostile to the tribal perspective.

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