

2 Possible High Court Approaches To Tribe Tax Dispute

By **Catherine Munson and Rachel Saimons** (November 6, 2018, 5:13 PM EST)

On Tuesday, Oct. 30, the United States Supreme Court heard oral argument in *Washington State Department of Licensing v. Cougar Den Inc.*, a case involving the question of whether the Yakama Nation's 1855 treaty provision securing for the tribe the right to travel "upon all public highways," preempts the application of Washington state's fuel tax on the nation.[1] Based on the oral argument, the outcome of the case will likely turn on whether the court views the state fuel tax as one on the possession of fuel, as the state advocates, or as a tax on the nation's importation of fuel, which would be preempted by the nation's treaty right to travel.



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The dispute in *Cougar Den* involves efforts by the state of Washington to impose a fuel tax on *Cougar Den*, a wholesale fuel distributor owned by the Yakama Nation. *Cougar Den* buys fuel in Oregon and transports it to the Yakama Reservation in Washington state before selling it to Yakama-owned fuel stations. Washington imposes a tax on wholesale suppliers of fuel, based on how the fuel is transported into the state. Fuel that is brought into the state via trucks or railcars is taxed when it "enters into" (i.e., is imported into), the state. Because the transportation of the fuel to the Yakama Nation requires travel over a 27-mile stretch of highway between the Oregon/Washington state line and the Reservation entrance, the state contends that it is entitled to impose a tax on *Cougar Den*.



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In 2013, the state assessed *Cougar Den* \$3,630,954.61 in unpaid fuel taxes and penalties for importing fuel from Oregon into Washington without paying the state's fuel tax or possessing a state import license. *Cougar Den* appealed the assessment to an administrative law judge, who found that the assessment was an impermissible restriction on travel under the tribe's 1855 treaty, which secured certain rights to the tribe, including "the right, in common with the citizens of the United States, to travel upon all public highways," in exchange for the Yakama Nation having surrendered 10 million acres, and over 90 percent of its territory, to the United States.[2] The matter reached the Washington Supreme Court which relied upon prior Ninth Circuit precedent interpreting the nation's right as the right to travel "for the purpose of transporting goods to market." [3] The state Supreme Court rejected the state's argument that the fuel tax burdens the possession of fuel, not transport, holding instead that the statute taxes "the importation of fuel, which is the transportation of fuel." [4] The state Supreme Court concluded that because travel on the public highways is at issue, the nation's treaty preempted the tax.[5]

The state asserted two positions at oral argument before the Supreme Court: first, that the tax is permissibly imposed on fuel as goods, and not on the treaty-protected right of travel; and second, that under the “best reading” of the treaty, the tax is a nondiscriminatory, off-reservation state tax and is therefore not preempted, even if it were a tax on travel.[6] The United States, as *amicus curiae*, similarly argued that the tax is “an economic burden on the goods that are being carried in the truck” and not a “restriction on [the Nation’s] ability to use the highway in common with others,” as protected by the treaty.[7] In response, Justice Elena Kagan noted that the state’s tax was in effect a restriction, because it “tax[es] exactly the activity that’s protected under the treaty, [] which is the transportation of goods to and from market.”[8] The United States disagreed, asserting a distinction between directly taxing the tribe for using public highways versus taxing the goods that are in a truck while they are transported on public highways.[9]

Early in the state’s oral argument, Justice Sonia Sotomayor and Justice Kagan appeared skeptical of the state’s position that it was taxing possession and not travel. Justice Sotomayor pointed to the fact that the tax was not uniformly applied because certain fuel wholesalers could import and possess fuel without paying a tax at that time.[10] The state clarified in response to that question that only licensed entities avoided the importation tax, whereas unlicensed entities owe the tax when they bring fuel into the state regardless of how they do so.[11] The state asserted that licensed entities that buy fuel in the state pay the tax immediately within the state, but that the tax is paid when the fuel is picked up at a terminal or refinery.[12] Justice Kagan also questioned the state’s focus on the tax as applied outside of the facts of this case: “from the Yakama’s point of view, they’re transporting goods on the road, exactly as the treaty says they can, and why do they care if you apply your tax in other circumstances as well? Why should they care? Why does it matter what the full scope of the tax is if, from the Yakama’s point of view, the tax burdens exactly what they got as a result of its treaty?”[13]

In response to the state and United States, Cougar Den first argued that the treaty preempts application of the fuel tax to Cougar Den because it is exercising its treaty-protected right to travel by transporting fuel and has the right to do so without incurring a tax obligation, regardless of whether tax is generally styled as one on possession or transportation. Second, Cougar Den argued that even if the court were to look at the type of tax being assessed, the tax is properly characterized as a tax on transportation both because of the statutory language and the state Supreme Court’s construction of the tax as an “importation tax” as a matter of state law.[14]

During Cougar Den’s argument, Chief Justice John Roberts intimated that he agreed with the state’s position, focusing on the fact that the tax is equally applied to Native Americans and non-Native Americans alike and analogizing the tax to an inspection or fee for bringing other goods into the state. He also offered that the fact that the tax is assessed per gallon instead of per mile, suggesting that the tax was based on possession and “has nothing to do with” travel, but is “purely on the good itself.”[15]

Justice Samuel Alito disagreed with Cougar Den’s assertion that under *Wagnon v. Prairie Band Potawatomi Nation*,[16] preemption turns on the taxpayer’s activity that formally triggers the tax. Cougar Den argued that to avoid a tax, a tribal member must only show that he is exercising a treaty right, regardless of how a statute is written. Dismissing that analysis as “very artificial,” Justice Alito asserted that by asking whether the tribal member is exercising a treaty right, “you get into this metaphysical question of what they’re doing. They’re doing many things. When they’re — you know, when the farmer is bringing his pigs to market, he’s doing many things. He’s traveling with the pigs. He’s possessing the pigs. He’s breathing. He may be doing all kinds of other things.”[17] Cougar Den responded that activities such as breathing are inherent in and “would be sort of wrapped up in

transportation” but that the facts of the case involve “an Indian distributor transporting fuel to an Indian reservation to be sold to an Indian retailer on the reservation and potentially to Indian customers.” Accordingly, “the only connection that Cougar Den has off-reservation is that it’s hauling this fuel.”[18]

Several members of the court also focused on treaty interpretation and what the nation would have understood the benefit of its bargain to be at the time it signed the treaty. For example, Justice Sotomayor asserted to the state that what the tribe had bargained for — was “to carry goods back and forth from the market without a burden. That was their bargain. Just as, under the fishing rights treaty, they can go and collect fish without paying a tax or getting a license for that fish.”[19] Justice Brett Kavanaugh similarly asserted during the state’s argument that the tribe was told at treaty time that “you could go on the roads to take your things to market, as if you would be treated off-reservation, as if you were still on the reservation,” in exchange for “a huge area of land the size of the state of Maryland.”[20] As Cougar Den’s argument came to a close, Justice Kavanaugh once again highlighted the benefit the United States had received and the tribe had relinquished in executing the treaty by seeking confirmation that the value of the land the tribe gave up was “enormous, right?”[21]

Although both the state and the United States attempted to distinguish the concept of treaty-protected travel from treaty-protected fishing rights, several justices raised parallels between the two rights. For example, the court honed in on the phrase “in common with” which appears in the tribe’s treaty both with respect to the right to travel and the right to fish. In response to the state’s attempt to distinguish the phrase as meaning something different in the fishing context than the transportation context, Justice Gorsuch reminded the state that the court had previously interpreted the phrase “in common with” as meaning more for Native Americans than the mere right not to be discriminated against,[22] and that the court normally reads a phrase “to bear the same meaning in all of its applications.”[23] Later, when the United States again tried to differentiate the meaning of the “in common with” language in the two treaty provisions, Sotomayor remarked that “[the Tribe] didn’t sign a treaty and give away that much real estate to get nothing in return, to be treated exactly like every other citizen in traveling the highway.”[24]

Ultimately, the outcome of the case is likely to turn on whether the court views the tax from the tribe’s or the state’s perspective. As summarized by Justice Kagan, the case can be looked at in two ways: first, from the angle of what the taxpayer is doing, and whether that activity is within the scope of the right protected by the treaty. Under that lens, Justice Kagan predicted that Cougar Den would prevail, because “what the taxpayer is doing is transporting goods to and from market.”[25] Alternatively, if the case is viewed from the perspective of the state’s purpose in imposing the tax, which is to collect a tax on every taxpayer in the state who possesses fuel, then the state is more likely to succeed.[26] Cougar Den concurred with Justice Kagan’s characterization, and contended that there were a number of reasons why the former is correct and the second view is not, including that the treaty right focuses on the Indian’s rights and not “the holistic intent of the state why it’s enacting a particular tax.”[27] Additionally, Cougar Den emphasized that under *Wagnon*, the court noted that it did not look at broad assessments of purpose, but instead analyzed what was being taxed, just as Cougar Den was asking the court to do here.

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[1] 188 Wn.2d 55, 392 P.3d 1014 (2017), cert. granted, 138 S. Ct. 2671 (2018).

[2] Art. I, III, ¶ 1, Treaty with the Yakamas, June 6, 1855, Stat. 951; Cougar Den, Inc. v. Washington state Dep't of Licensing, 188 Wn.2d 55, 63, 392 P.3d 1014, 1017 (2017).

[3] Cougar Den, 188 Wn.2d at 66.

[4] Id. at 69.

[5] Id.

[6] 19:14–22.

[7] 24:1–4.

[8] 34:18–22.

[9] 27:18–28:3.

[10] 5:2–5.

[11] 5:6–13.

[12] 5:23–6:4.

[13] 9:21–10:8.

[14] 35:16–36:4.

[15] 40:16–23.

[16] 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005).

[17] 43:10–18.

[18] 43:19–44:7.

[19] 11:4–12.

[20] 15:14–17.

[21] 73:14–16.

[22] See *Tulee v. State of Washington*, 315 U.S. 681, 684, 62 S. Ct. 862, 864, 86 L. Ed. 1115 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 677,

99 S. Ct. 3055, 3070, 61 L. Ed. 2d 823 (1979).

[23] 20: 18–20.

[24] 29:15–20.

[25] 61:22–24.

[26] 61:15–62:16.

[27] 63:1–6.