

Takeaways From Justices' Divergent Tribal Tax Treaty Opinion

By **Catherine Munson and Rachel Saimons** (March 26, 2019, 6:21 PM EDT)

In *Washington State Department of Licensing v. Cougar Den Inc.*,^[1] the United States Supreme Court delivered its first Indian law decision of this term and since Justice Brett Kavanaugh joined the court in a highly fractured ruling involving the question of whether a state tax infringes on a tribal treaty right. The court concluded that the Yakama Nation's 1855 treaty provision reserving for the nation "the right, in common with citizens of the United States, to travel upon all public highways," preempts the application of a Washington state fuel tax on Cougar Den, a wholesale fuel importer owned by a Yakama Nation tribal member.^[2]



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Justice Stephen Breyer authored a plurality opinion joined by Justices Elena Kagan and Sonia Sotomayor, and Justice Neil Gorsuch penned a persuasive concurrence, with slightly differing reasoning, joined by Justice Ruth Bader Ginsburg in what has been widely noted to be an unusual pairing. Justices John Roberts and Brett Kavanaugh each wrote dissenting opinions, with the former joined by Justices Clarence Thomas, Samuel Alito and Kavanaugh, and the latter joined by Justice Thomas.



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The justices' disagreement in the case involves not just the incidence of the tax, which is at issue in most tax cases, but also the meaning and scope of the Yakama Nation's treaty right to travel. The plurality opinion interprets the tax as one on the importation of fuel and thus on transportation, rejecting the dissent's characterization of the tax as one only on possession of fuel. In so holding, the plurality held that it is bound by the Washington State Supreme Court's interpretation of the statute as one on transportation and declined the state'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."^[3]

Even so, in rejecting the dissent's interpretation of the tax as one on possession, the court explains that "it is the practical effect of the state law we have said makes the difference."^[4] The court likened the analysis to the court's prior holding that fishing rights reserved in the nation's treaty preempted the state's enforcement of a trespass law against the Yakama fisherman crossing private land to access the river.^[5]

The court explained that when the Yakamas bargained for this provision, "they could only have cared about preventing the State from burdening their exercise of that right."^[6] Therefore, the "[t]he only

relevant question is whether the tax ‘act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve.’ And the State’s tax here acted upon Cougar Den in exactly that way.”[7] Thus, the court held that although a state is “generally is free to amend its law to shift the tax’s legal incidence,” it could not burden a treaty-protected right in the process.[8]

The justices also diverge as to how to interpret the treaty’s “in common with” language in the context of the treaty right to travel. The plurality and concurrence decline to interpret the “in common with” language in the treaty as permitting statutes of general applicability, such as the fuel importation tax, to apply to the nation, because such a meaning is not what the Yakamas would have understood the words to mean in 1855, when the treaty was written. This is particularly so, both the plurality and concurrence acknowledge, given that the negotiations were conducted in “Chinook jargon,” which no tribe used as a primary language.[9]

The plurality also notes that it has previously held that the words “in common with” did not limit the reservation’s scope to a right against discrimination, but instead conferred “continuing rights, beyond those which other citizens may enjoy ...”[10]

Justice Gorsuch’s concurrence similarly finds that there was no evidence that the Yakamas would have understood the term “in common with” to place Indians in the same category as non-Indians with respect to taxes or fees for public roads.[11] Both the plurality and the concurrence find that such an interpretation would result in an “an impotent” construction of the treaty.”[12]

Justice Kavanaugh, by contrast, reads the “in common with” language to mean that the treaty entitled tribal members to travel on public highways “on equal terms with” other U.S. citizens.[13] Acknowledging that the treaty “may not have turned out to be a particularly good deal for the Yakamas,” Justice Kavanaugh nonetheless opines that “[i]t is for Congress and the President, not the courts, to update a law and provide additional compensation or benefits to tribes beyond those provided by an old law.”[14] His conclusion that the treaty subjects tribal members to nondiscriminatory state highway regulations is somewhat surprising given his acknowledgment during oral argument that “in common with” had been previously interpreted in the fishing cases to mean more than simply nondiscrimination.[15]

Both the plurality and concurrence also conclude that the treaty preempts the tax in part because the Yakamas were led to believe during treaty negotiations that their right to travel on public highways included the right to travel with goods for the purposes of trade. Justice Breyer recounts that United States representatives had “repeatedly assured” the Yakamas that under the treaty they would be able to travel outside their reservation on the roads that the United States built, as well as assuring them that they could travel along the roads for trading purposes.[16]

Justice Gorsuch also places great weight on the historic importance of travel for the Yakamas, calling it an “an intrinsic ingredient in virtually every aspect of Yakama culture” and emphasizing that travel for purposes of trade was so important that the tribe could not have performed and functioned as a distinct culture without it.[17] The Roberts’ dissent disputes this interpretation, finding that “Yakamas wanted to ensure they could continue to travel to the places where they traded. They did not, and did not intend to, insulate the goods they carried from all regulation and taxation.”[18]

The plurality also held that imposing a tax upon travel with certain goods would impermissibly burden the right to travel, and “the right to travel on the public highways without such burdens is, as we have said, just what the treaty protects.”[19] Comparing the case to *Tulee v. Washington*,[20] where the

court held that fishing rights reserved in the treaty preempted the state's application of a fishing license for the Yakama fishermen, the court restated its holding that "'such exaction of fees as a prerequisite to the enjoyment of' a right reserved in the treaty 'cannot be reconciled with a fair construction of the treaty.'" [21] The dissent disagrees, writing 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." [22] Thus, Roberts concludes, the state's method of administering its fuel tax is consistent with the treaty.

The justices also disagree about the implication of the court's decision on the power of the state to regulate activity of the nation when traveling on the public highway with goods. The plurality explains that it is not holding "that the treaty deprives the state of the power to regulate, say, when necessary for conservation" or that the treaty deprives the state of the "power to regulate to prevent danger to health or safety occasioned by a tribe's member's exercise of treaty rights." [23]

In their respective dissents, Justices Roberts and Kavanaugh both focus on this "health and safety exception" they claim to be carved out by the plurality and concurrence as a limitation to their "overly expansive interpretation of the treaty right." [24] Justice Roberts cautions that the exception is both novel and dangerous because it could limit, for example, the ability of a state police officer to "burden a Yakama's travel by pulling him over on suspicion of carrying such contraband on the highway." [25] Thus, Justice Roberts concludes, the decision should not be assumed to be good news for tribal members, because "the unwarranted expansion of the Yakamas' right to travel may undermine rights that the Yakamas and other tribes really did deserve." [26] Kavanaugh similarly objects to the exception but on the basis that it does not come from the text of the treaty. [27]

Gorsuch pointedly dismisses this criticism in his concurrence, noting that the "in common with" language indicates that tribal members knew that they would have to share the road with whites and accept regulations allowing for the two groups' safe coexistence. [28] With respect to the state's concern about regulating activity, Justice Gorsuch responds that the state has failed to identify a single challenge by the Yakamas to any critical highway regulation and that "the State's hypothetical parade of horrors has yet to take its first step in the real world." [29]

Although the decision relies on the interpretation of specific treaty language, it offers insights into the approach of the court's two newest members, Justices Gorsuch and Kavanaugh to Indian law matters. Justice Kavanaugh seems to disregard well-established precedent, including fishing cases and the well-established rules of treaty interpretation, in favor of a textual reading, construing the terms of the treaty strictly and narrowly. In contrast, Justice Gorsuch, the only justice with a professional history of serving on western courts, wrote separately, signaling his apparent willingness to depart from his conservative colleagues on Indian law matters. Unlike the plurality opinion, Justice Gorsuch's concurrence seemed most comfortable with the issues before the court through a straightforward application of the long-standing principals of treaty interpretation based on the original intent and the Yakama's understanding of the treaty terms.

In siding with the tribe, Justice Gorsuch also emphasizes the importance of holding the United States to its bargain, noting the immense benefit from the treaty — namely, "millions of acres desperately wanted by the United States to settle the Washington Territory," which he writes were "worth far more than an abject promise they would not be made prisoners on their reservation." [30]

"By any fair measure," he reasons, "it was a bargain-basement deal." [31] Perhaps most notably, he concludes the concurrence by opining that although the state is now dissatisfied with the promises

made within the treaty, “to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.”[32] Whether the last sentence means more than just what is written is anyone’s guess, but for tribes it is an encouraging sign of what may be to come in future Indian law cases with Justice Gorsuch on the bench as perhaps the deciding vote.

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[1] Washington State Department of Licensing v. Cougar Den Inc., 586 U. S. ____, 16-1498, 2019 WL 1245535 (U.S. Mar. 19, 2019).

[2] Id. at *9.

[3] Id. at *5.

[4] Id.

[5] See United States v. Winans, 198 U.S. 371, 381 (1905).

[6] 586 U. S. ____, at *5.

[7] Id. (quoting Tulee v. State of Washington, 315 U.S. 681, 685, 62 S. Ct. 862, 865, 86 L. Ed. 1115 (1942)).

[8] Id. at *6.

[9] Id. at *7.

[10] Id. (emphasis in original).

[11] Id. at *10.

[12] Id. at *7, *12 (quoting Winans, 198 U.S. at 380).

[13] Id. at *18.

[14] Id. at *19.

[15] See oral argument transcript at 19:23–25.

[16] Id. at *7.

[17] *Id.* at *11.

[18] *Id.* at *16.

[19] *Id.* at *8.

[20] *Tulee v. Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115 (1942)).

[21] *Id.*

[22] *Id.* at *14.

[23] *Id.* at *9.

[24] *Id.* at *17, *20.

[25] *Id.* at *17.

[26] *Id.* at *18.

[27] *Id.* at *20.

[28] *Id.* at *10.

[30] *Id.* at *11.

[31] *Id.*

[32] *Id.* at *14.v