

Supreme Court Takes Indian Treaty Right-to-Travel Case

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On October 30, 2018, the Supreme Court is to hear oral arguments in *Washington State Department of Licensing v. Cougar Den, Inc.*, a challenge to a 2017 Washington Supreme Court [decision](#) interpreting the intersection of Washington State’s taxing authority with a right-to-travel provision in an 1855 treaty (1855 Yakama Treaty) between the United States and the Yakama Indian Nation (Tribe). The treaty provision guarantees the Tribe a “right, in common with citizens of the United States, to travel upon all public highways.” In the [decision](#) under review, the Washington Supreme Court held that this provision insulates Cougar Den, Inc., (Cougar Den)—a business owned by a tribal member—from having to pay a Washington State motor fuels tax on gasoline Cougar Den trucks into the state and resells to on-reservation retailers. Without the treaty language, as conceded by both parties in the litigation, the state could impose the motor fuels tax on Cougar Den. A decision by the Court in *Cougar Den*, therefore, is likely to delineate the reach of the right-to-travel provision in the Yakama treaty and, by implication, in identically worded provisions in [treaties](#) with two other tribes. The decision may also have implications for state taxation of Indian activities on- and off-reservation generally.

This sidebar provides a preview of *Cougar Den*. First, the sidebar provides general background on state taxing authority over the activities of Indian tribes. Next, the sidebar discusses Washington’s motor fuels tax, the 1855 Yakama Treaty, and principles governing courts’ interpretation of treaties. The sidebar then analyzes the lower court’s decision and the arguments before the Court. Finally, the sidebar addresses potential implications of *Cougar Den* and considerations for Congress.

State Taxing Authority over Tribal Activity

In general, states may tax off-reservation activities of Indian tribes unless an explicit federal law exempts those activities. In 1973, the Court decided *Mescalero Apache Tribe v. Jones*, a seminal case in which the Court held that New Mexico could impose a gross receipts tax on a tribal ski resort operating off-reservation on land leased from the federal government. According to the Court in *Mescalero*, “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.”

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Although *Cougar Den* involves a state tax imposed on off-reservation activity like the tax the Court upheld in *Mescalero*, the case arises as states have had difficulty collecting judicially upheld taxes on tribal retailers selling goods to non-Indians on Indian reservations. In a series of cases, the Supreme Court has upheld a state's authority to impose non-discriminatory taxes on tribal retailers' sales to non-Indians on an Indian tribe's reservation. Nevertheless, states have been unable to collect these taxes without tribal cooperation because [tribal](#) sovereign immunity bars suits against a tribe absent tribal waiver or congressional consent. For example, in 1976, in *Moe v. Confederated Salish & Kootenai Tribes*, the Court held that state taxing authority over on-reservation activity generally requires that the legal incidence of the tax falls on persons other than the tribe or its members. Thereafter, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, the Court held that a state could impose recordkeeping requirements on tribal retailers to facilitate collecting state taxes on on-reservation cigarette sales to non-Indians. However, in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, decided in 1991, the Court held that tribal sovereign immunity barred a state's enforcement action to compel a tribe to remit taxes collected by tribal retailers on sales to non-Indians. While Oklahoma argued that "decisions such as *Moe* and *Colville* give . . . [states] a right [to levy a tax] without a remedy [to collect the tax]," the Court responded by suggesting that states could tax wholesalers, enter into agreements with tribes for collecting the taxes, or secure congressional legislation to require tribes to remit the taxes.

In 2005, in *Wagon v. Prairie Band Potawatomi Nation*—a case that did not involve a right-to-travel treaty provision similar to the 1855 Yakama Treaty provision—the Court upheld a non-discriminatory Kansas motor fuels tax applied to off-reservation distributors who would later resell the fuel to Indian tribal retailers for on-reservation sales. Important to the Court's reasoning were: (1) the fact that state law specified that the legal incidence of and the liability for paying the tax fell on the distributor; (2) that the transaction being taxed—the receipt of the motor fuels in Kansas by the distributor—took place off-reservation; and (3) that the state taxes were being passed on to beneficiaries of state services—the non-Indian patrons of the tribal gasoline operation and its gaming casino.

Background

Washington's Motor Fuels Tax

The Washington motor fuels tax is similar to the Kansas tax the Court upheld in *Wagon*. Washington enacted the tax after a 2007 federal district court [decision](#) held that Washington could not assess an earlier version of the tax against tribal wholesalers because the tax's legal incidence fell on tribal retailers. Washington enacted the *Cougar Den* version of the motor fuels tax as a means of ensuring that the legal incidence of the tax fell on the wholesalers' activities off-reservation. Unlike the earlier version of the motor fuels tax, the *Cougar Den* tax does not require distributors to pay the tax and pass it on to retailers, and it is imposed off-reservation on wholesalers. It is non-discriminatory and levied on the first possession of motor vehicle fuel within the state. The tax applies to wholesalers off-loading fuel from terminals within the state as well as to those, like *Cougar Den*, that bring the fuel into the state from another state. Currently, all 24 Indian tribes in Washington, other than the Yakama Tribe, have negotiated [fuel tax agreements](#) to remit the motor fuels tax to the state.

In 2013, the Washington State's taxing authority, the Department of Licensing (the Department), issued an assessment against *Cougar Den* for nonpayment of the motor fuels tax. *Cougar Den* appealed the assessment, and the dispute ultimately reached the Washington State Supreme Court and is now before the United States Supreme Court. The question at issue in *Cougar Den* is whether the 1855 Yakama Treaty prevents Washington from imposing the motor fuels tax on gasoline *Cougar Den*—which, as noted above, is owned by a tribal member—trucks into the state and resells to on-reservation retailers.

The 1855 Yakama Treaty and General Principles Governing Treaty Interpretation

Article III of the 1855 Yakama Treaty contains two clauses. The first states that “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.” The second states “as also [is secured to them] the right, in common with citizens of the United States, to travel upon all public highways.” 12 Stat 952-953. It is the second clause that is at issue in *Cougar Den*, although it might be noted that there is a distinction between the two clauses. The first provides for “free access . . . to the nearest public highway;” while the second provides a right to travel “in common with citizens of the United States.”

Before considering the lower court’s decision interpreting the 1855 Yakama Treaty, it may be helpful to review the special canons of construction courts apply when interpreting Indian treaties. According to the Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, courts must “give effect to the terms [of a treaty] as the Indians themselves would have understood them,” considering “the larger context that frames the [t]reaty, including ‘the history of the treaty, the negotiations, and the practical construction adopted by the parties.’” In construing Indian treaties, the Court has repeatedly stated that “any doubtful expressions in [treaties] should be resolved in the Indians’ favor.” Nonetheless, decisions of the Court have counseled that courts must take care not to extend treaty language beyond what it is intended to cover. In *Oklahoma Tax Comm’n v. Chickasaw Nation*, for example, the Court held that treaty language guaranteeing freedom from state law to the Chickasaw Nation and its members “within their limits” could not be stretched by “liberal construction” beyond its stated geographic limit. The Court thus held that Oklahoma could tax tribal members living outside of the Chickasaw Nation’s borders.

The Washington Supreme Court’s Decision

In *Cougar Den*, a majority of seven justices of the Washington Supreme Court held that, because the 1855 Yakama Treaty ensured the Tribe the right to travel on the highways, Washington could not apply the motor fuels tax to the tribal distributor. Specifically, the majority held that, “in this case, it was impossible for Cougar Den to import fuel without using the highway.” Two justices dissented, seeing a sharp dividing line between the right to travel guaranteed in the treaty and a right to trade. According to the dissenters, the right-to-travel provision in the 1855 Yakama Treaty is not a right to trade; rather, it covers “trade *only* when it cannot be meaningfully separated from travel,” not when “travel is merely necessary for trade.”

Both opinions relied on rulings of the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) (the circuit in which Washington sits) interpreting the 1855 Yakama treaty in other contexts, but interpreted these rulings differently. The majority read Ninth Circuit precedent, particularly *United States v. Smiskin*, as construing the Yakama treaty provision to apply to “any trade, traveling, and importation that requires the use of public roads.” In *Smiskin*, the Ninth Circuit held that a Washington State law requiring pre-notification of cigarette shipments violated the 1855 Yakama Treaty right to travel. The majority in *Cougar Den* considered the motor fuels tax to be an impermissible condition on use of the highways analogous to the requirement that *Smiskin* held violated the treaty—requiring tribal companies transporting unstamped cigarettes into the state to provide the state with notice prior to transport.

The dissenting opinion, however, focused on the Ninth Circuit’s ruling in *King Mountain Tobacco Co., Inc., v. McKenna*, which the majority opinion viewed as involving only a trade and not a travel issue and, thus, unrelated to the dispute in *Cougar Den*. In *King Mountain*, the Ninth Circuit held that requiring a tribal tobacco manufacturer to contribute to a state escrow fund for tobacco-related health care costs did not offend the treaty right to travel because that right is distinguishable from a right to trade. Moreover,

the dissent, unlike the majority, did not read *Smiskin* as construing the treaty to provide “a de facto right to trade simply because travel is necessary for trade.” Instead, the dissent read *Smiskin* very narrowly as standing for the proposition that even if trade is necessary for travel, the treaty provision does not preempt state law unless “travel and trade cannot be meaningfully separated.” The dissent drew an analogy between the motor fuels tax and the escrow requirement Ninth Circuit upheld in *King Mountain*: neither is a direct burden on travel, and both impose burdens on products being brought to market by means that incidentally involve travel. Like the escrow requirement in *King Mountain*, according to the dissent, the fuel tax is directed against trade in a product, not travel to bring that product to market.

Arguments before the Supreme Court

The Department appealed the court’s decision to the Supreme Court. (Because the case is a decision of the highest court of a state questioning the validity of a treaty, the Supreme Court has jurisdiction under 28 U.S.C. §1257.)

In their arguments before the Court, the [Department](#) and the [Tribe](#) disagree on how the Court should interpret the 1855 Yakama Treaty. Specifically, the parties dispute how the Tribe originally understood the treaty provision at issue. The Tribe points to a broad interpretation of the treaty provision as explicated in a 1997 district court case, *Yakama Nation v. Flores*. A year later, the Ninth Circuit in *Cree v. Flores* held that the district court’s broad interpretation was “certainly plausible” and “not clearly erroneous.” The Washington State taxing authority argues for a more literal and narrow interpretation of the treaty language and emphasizes that it contains no mention of taxes.

The United States’ amicus brief in support of Washington State [argues](#) for a narrow interpretation of the right-to-travel provision. The government argues that “‘free access’ to highways is guaranteed only between the Reservation and the nearest public highways. . . . [and the] phrase does not . . . modify the right to travel upon public highways, which is granted only ‘in common with citizens of the United States.’” The government asserts that the treaty “language does not on its face confer any right greater than what other citizens share or suggest that the Yakamas are exempt from generally applicable regulations or financial assessments related to use of the highways in Washington (much less elsewhere), such as tolls or regulation or taxation of trucks based on size.”

Implications and Considerations for Congress

Depending on the outcome, the Court’s decision in *Cougar Den* may offer Congress an opportunity to evaluate the standards for state taxation of Indians on- and off-reservation and the ability of states to enforce and collect valid state taxes from Indian tribes. At stake in *Cougar Den* is a considerable amount of tax revenue. According to the [Department’s Brief](#), for the eight-month period from March to October 2013, the state assessed \$3.6 million in taxes, penalties, and interest against Cougar Den, and has stayed “tens of millions of dollars in later assessments . . . pending the outcome of the case.” Any decision of the Court is also likely to have implications for interpreting identically worded provisions in [treaties](#) with the Nez Percé Indians of Idaho and the Flathead, Kootenay, and Upper Pend d’Oreilles Indians of Montana.

Cougar Den also gives the Court an opportunity to consider whether courts should apply the same standard to interpreting treaty language concerning exemptions from state taxes as has been used for exemptions from federal taxes. Relying on Supreme Court precedent upholding a tax exemption based on explicit language in the General Allotment Act, the Ninth Circuit has [consistently held](#) that a federal tax exemption must be explicit. Accordingly, the Ninth Circuit has held that the Yakama tribe is not exempt from federal heavy vehicle and diesel fuel taxes (in a 2002 [case](#)), or from the federal excise tax on manufactured tobacco products (in a 2018 [case](#)), because the right-to-travel provision in the Yakama treaty is not sufficiently explicit to exempt the Tribe from federal taxes. On the other hand, some lower

federal courts—as well as the Washington Supreme Court in *Cougar Den*—have used a lesser standard to hold that Article III of the Treaty exempts the Tribe from state taxes.

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