Indian Law Newsletter

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U.S. Supreme Court Upholds Yakama Treaty Rights in *Washington State Department of Licensing v. Cougar Den, Inc.*

*By Leonard Powell, Adam Unikowsky, Mat Harrington, and Jaime ("Jr.") Cuevas**

Recently in *Washington State Department of Licensing v. Cougar Den, Inc.*, the United States Supreme Court held that the Yakama Nation's Treaty of 1855 with the United States preempts Washington state fuel taxes as applied to Yakama transportation of fuel from the southern Washington state line to the Yakama Indian Reservation. As the first Roberts Court decision to interpret an Indian treaty, *Cougar Den* is both a vindication of the Yakama Nation's Treaty rights and a promising beginning to the Roberts Court's Indian treaty jurisprudence.

At the time of European contact, the predecessors of the Yakamas occupied a vast territory. Yakama lands stretched across most of what is now central Washington, extending from the Columbia River up to near the modern border with Canada. But even greater in scope was the Yakama trading network. At the very least, it reached from the Puget Sound and Willamette Valley in the west to the Plains and buffalo country in the east.

In 1855, things changed. Under the Treaty of 1855, the Yakama Nation relinquished the vast majority of its land—a total of more than 10 million acres. But in exchange, the Nation reserved for itself and its members, among other things: the Yakama Reservation, Art. II; the right to fish "at all usual and accustomed places, in common with citizens of the Territory," Art. III, ¶ 2; and the right "in common with citizens of the United States, to travel upon all public highways," Art. III, ¶ 1.

Today, the third of these rights conflicts with modern Washington state fuel taxes. Washington taxes the wholesale supply of fuel, but exactly who must pay the tax on a given fuel shipment depends on how the fuel is transported into the state. At the time the tax at issue was assessed, fuel imported via motor vehicle was taxed at the moment of importation, but fuel imported via pipeline or vessel was taxed only when an in-state sale or transfer occurred.

The current case arose when Washington tried to impose these taxes on Cougar Den, Inc., a tribally incorporated, tribal-member-owned Yakama business that imports fuel to the Yakama Reservation for sale and delivery to Yakama members. Since 2013, Cougar Den has imported fuel to the Yakama Reservation from Oregon. In doing so, Cougar Den trucks travel along a 27-mile section of Highway 97 that is located within the Nation's ceded lands and that stretches from the

AT THE TIME OF EUROPEAN CONTACT, THE PREDECESSORS OF THE YAKAMAS OCCUPIED A VAST TERRITORY. YAKAMA LANDS STRETCHED ACROSS MOST OF WHAT IS NOW CENTRAL WASHINGTON, EXTENDING FROM THE COLUMBIA RIVER UP TO NEAR THE MODERN BORDER WITH CANADA…

Continued on page 2…

In This Issue

U.S. Supreme Court Upholds Yakima Treaty Rights

…from page 1

Washington-Oregon border to the southern boundary of the Yakama Reservation. Attempting to exploit this gap between the Oregon and Yakama borders, in December 2013 the Washington State Department of Licensing assessed Cougar Den over $3.5 million in fuel taxes and penalties.

Cougar Den appealed the assessment to a state administrative law judge, arguing that the Treaty of 1855 preempted the tax. To resolve the issue, the ALJ looked to the findings of fact made in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998)—a case that had conducted an extensive investigation into the Treaty's history. Relying on those findings, the ALJ held that the assessment was indeed an impermissible restriction on travel. The Department's director reversed the ALJ's order. But on appeal, the Yakima County Superior Court overturned the director's decision and concluded that the Treaty preempted the tax.

The Washington Supreme Court affirmed the decision of the Yakima County Superior Court by a 7-2 vote. Writing for the court, Justice Johnson agreed that the Treaty was meant to preempt taxes like the one at issue. He observed that "[d]uring negotiations, the Yakamas' right to travel off reservation had been repeatedly broached, and assurances were made that entering into the treaty would not infringe on or hinder their tribal practices." *Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 392 P.3d 1014, 1017 (Wash. 2017). Thus, "the treaty was clearly intended to reserve to the Yakamas' right to travel on the public highways to engage in *future* trading endeavors." *Id.* (emphasis in original) (quoting *Yakama Indian Nation*, 955 F. Supp. at 1253). Here, Washington "taxe[d] the importation of fuel, which is the transportation of fuel," and "it was impossible for Cougar Den to import fuel without using the highway." *Id.* at 1019-20. Accordingly, the tax violated the Treaty.

The Department successfully petitioned the United States Supreme Court for review and sought reversal of the Washington Supreme Court decision. This tax, the Department said, was one on "first possession," not travel—even the Washington Supreme Court had acknowledged that the tax "is assessed regardless of whether Cougar Den uses the highway." *Id.* at 1019. And this distinction, the Department claimed, rendered the Treaty irrelevant. After all, outside Indian country, exemptions from state taxation must be "clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001). Here, the Department contended, no language in the Treaty could plausibly be interpreted to bar it from requiring Indians to pay generally applicable, off-reservation *possession* taxes.

In response, Cougar Den contested the Department's selective invocation of precedent. The Department had not even acknowledged *Tulee v. Washington*, 315 U.S. 681 (1942), which held that the Treaty's similarly worded right-to-fish provision prevents the imposition of nondiscriminatory fishing-license fees on Yakamas because such fees are "a charge for exercising the very right [the Yakamas'] ancestors intended to

Continued on page 3…

U.S. Supreme Court Upholds Yakima Treaty Rights

…from page 2

reserve." *Id.* at 685. So too in this case, Cougar Den explained, the record of the Treaty negotiations left no doubt that the Yakamas intended to reserve the right to travel with goods to trade—and that was the exact activity that triggered the tax. Cougar Den also pointed out that the Department could no longer plausibly maintain that this tax was on "possession": The Washington Supreme Court had already rejected that argument, and the Washington Supreme Court is the final arbiter of Washington state law.

The U.S. Supreme Court, by a vote of 5-4, affirmed the decision of the Washington Supreme Court. Writing for a plurality, Justice Breyer (joined by Justices Sotomayor and Kagan) held that the Washington statute was preempted because it "taxes the importation of fuel by public highway." Slip op. at 4 (plurality opinion). That was, after all, what the Washington Supreme Court had concluded. And if there were any doubt, Justice Breyer's own examination of the statute revealed that "the element of travel by ground transportation" was "a necessary prerequisite to the imposition of the tax,"—*i.e.*, the Department was required to "prove that Cougar Den *traveled by highway* in order to apply its tax." *Id.* at 7 (emphasis in original). Nor, ultimately, was the question about what the tax is "on" dispositive, as "it is the practical effect of the state law that … makes the difference." *Id.* at 9. "Here, the Yakamas' lone off-reservation act within the State [wa]s traveling along a public highway with fuel," making it "irrelevant whether the State's tax might apply to other activities beyond transportation." *Id.*

Concurring in the judgment, Justice Gorsuch (joined by Justice Ginsburg) emphasized the importance of "'giv[ing] effect to the terms [of the Treaty] as the Indians themselves would have understood them.'" *Id.* at 2 (Gorsuch, J., concurring in judgment) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)). Although "[t]o 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," *id.*, to the Yakamas "the term 'in common with'" indicated merely "that they would share the *use* of the road with whites," *id.* at 3 (emphasis added) (internal quotation mark omitted) (quoting *Yakama Indian Nation*, 955 F. Supp. at 1265). The latter, thus, was the bargain the Yakamas actually struck, and "the Court holds the parties to the terms of their deal." *Id.* at 11.

The Supreme Court's decision is a promising beginning to the Roberts Court's Indian treaty jurisprudence. Some commentators had speculated that the Indian treaty canons would hold little sway over this Court, given its firm commitment to textualism. Indeed, in this very case, Justice Kavanaugh (joined in dissent by Justice Thomas) would have "st[u]ck with the text," which on his reading unambiguously required a win for Washington. *Id.* at 3 (Kavanaugh, J., dissenting). But the plurality proceeded in the footsteps of the Yakama fishing cases, which had "stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855." *Id.* at 10 (plurality opinion). And the concurrence underscored that the Court's job was "to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact." *Id.* at 7 (Gorsuch, J., concurring in judgment). If this first step is any guide, the Roberts Court may find its Indian treaty footing after all.

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ADAM UNIKOWSKY is a partner at Jenner & Block. Since 2016, he has won eight Supreme Court cases as lead counsel, including Cougar Den, while losing none. He also handles high-stakes appellate and district court litigation in numerous areas of law, including patent law, telecommunications law, securities law, and Indian law. In 2017, he was recognized as a Law360 "MVP of the Year." He can be reached at *aunikowsky@jenner.com*.

MAT HARRINGTON is a Shareholder with Stokes Lawrence. He has extensive experience representing tribes, tribal corporations, and individuals in his litigation practice. He has successfully argued treaty rights before the Washington Supreme Court, and has recently tried a case to verdict regarding preemption of state and local taxes for on-reservation commerce. He graduated from the University of Chicago Law School. He can be reached at *Mathew.Harrington@stokeslaw.com*.

JAIME ("JR.") CUEVAS is an attorney in the litigation practice at Stokes Lawrence. He works with clients on a variety of matters, such as business disputes and general litigation surrounding labor and employment law, agriculture law, and contract law. He is a graduate of the Gonzaga University School of Law, where he served as Associate Editor for the *Gonzaga Law Review*. He can be reached at *Jaime.Cuevas@stokeslaw.com*.

*The authors were counsel to respondent *Cougar Den, Inc.* in this case. Any opinions herein belong solely to the authors.

Missing and Murdered Indigenous Women and Girls

by Margo Hill — Spokane Tribal Citizen, Director of EWU Tribal Planning Programs

On Saturday, November 17, 2018, native women gathered at the Shadle Park Library in Spokane to recognize Native American Heritage month and raise awareness of all the native women yet missing and murdered at epidemic rates throughout the United States and Canada.

Given their frequency, these cases and the women they represent often go unsolved and thus unanswered. According to the Indian Law Resource Center, more than four in five American Indian and Alaska Native women have experienced violence and half have been sexually assaulted.

On November 14, 2018, the Urban Indian Health Institute (UIHI), a division of the Seattle Indian Health Board, released a report on sexual and domestic violence against Native women and the lack of data on native women missing from 71 urban cities throughout the United States. 128 — or 25 percent — of the 506 uniquely identified UIHI cases collected were missing person cases, 280 (56 percent) were murder cases, and 98 (19 percent) had unknown status.

According to the report, within the United States, Seattle has the highest number of sexual assaults of Native women and Tacoma the sixth.

These numbers give a sense of scale but do not convey the devastating impact violence has on the individual survivors, the families, and Native communities. Idella King, a Northern Arapaho tribal member, shared her story with the crowd of community members as part of Native American Heritage month at Spokane Public Library South Hill Branch. Her family had relocated from the Northern Arapaho reservation first to Los Angeles and eventually to Seattle. Idella recounted how when her grandparents lived in West Seattle, tribal people knew their home as a safe shelter.

Idella's family has lost several women. As a young girl, her auntie's body was discovered in her grandparent's locked house while they were away at a Yakama pow-wow. They returned home when her grandma got a bad feeling but never received an explanation and no investigation was conducted.

ACCORDING TO THE INDIAN LAW RESOURCE CENTER, MORE THAN FOUR IN FIVE AMERICAN INDIAN AND ALASKA NATIVE WOMEN HAVE EXPERIENCED VIOLENCE AND HALF HAVE BEEN SEXUALLY ASSAULTED.

Idella went on to study at the University of Montana in Missoula, where she once again got a call about the death of a female relative. Her sister had died on the Wind River reservation. She and her family drove to Wind River to go tend to her sister's affairs. Upon arriving, Idella and her family found out that her sister's body was left to freeze outside the hospital door. However, no police officers came and there was no yellow tape like Idella had seen on "Law and Order." She could not believe it. No investigation; no answers.

A few years later, Idella found herself in an abusive and violent

Continued on page 5…

Seeking Attorneys for Pro-Bono Advocacy on Behalf of Families of MMIW

Dear Colleagues,

I'm reaching out in order to find attorneys who are interested in representing or advocating for Native American families who have lost a loved one who has been identified as murdered or missing.

I have been contacted by a community advocate and leader who relays there is a high need for legal advocacy in areas of working with law enforcement, and other needs. Many of you out there have already asked how you can help. As you may already know, high rates of Native or Indigenous women (and men) have gone missing or have been murdered throughout the nation, and especially locally in the Pacific Northwest. While this has been an unfortunate phenomenon for decades, there is fortunately a recent heightened attention around the issue.

For more information or if you are interested or willing to help out, please email **Brooke Pinkham** at: **brooke_ann_22@yahoo.com**.

Thank you!

Missing and Murdered Indigineous Women and Girls

…from page 4

dating relationship. The police told her that the laws of the state would not adequately protect her and she should move to some jurisdiction more able to do so.

The suffering Idella's family has faced is the product of law and policy.

Currently 71 percent of American Indians and Alaskan Natives live in urban areas due to past federal Indian programs and policies, like relocation and termination.

On reservations throughout the United States, jurisdictional complexities make it difficult to protect women from violence. Tribal law enforcement departments must often cover large areas without enough officers. Without criminal jurisdiction over non-Indian offenders, tribal police must rely on local law enforcement agencies such as county sheriffs and the state patrol to enforce state law or enter cross-deputization agreements, which these agencies may refuse to do. Even after the Tribal Law and Order Act (TLOA) United States Attorney's offices, including in both Washington districts, lack resources and the will to prosecute cases in Indian Country and decline 67 percent of sexual abuse referrals in Indian country.

Solutions do exist and families like Idella can finally receive answers, if necessary change happens. Idella herself currently works with native youth at the Healing Lodge of Seven Nations in Spokane supporting them in the fight against drug addiction and teaching healthy life choices in the hopes that doing so will break cycles of violence.

SOLUTIONS DO EXIST AND FAMILIES LIKE IDELLA'S CAN FINALLY RECEIVE ANSWERS, IF NECESSARY CHANGE HAPPENS.

The Red Skirt Society formed to bring awareness to the Missing and Murdered Indigenous Women (MMIW).

Tribal communities need to work to ensure that the Violence Against Women Act (VAWA) is reauthorized.

For more information, contact the Spokane Tribe's Domestic Violence Program | **509-258-7502**

MARGO HILL is a Spokane Tribal citizen and was raised on the Spokane Indian reservation. She earned a Juris Doctorate from Gonzaga University School of Law and a Master of Urban and Regional Planning from Eastern Washington University. As the Spokane Tribal Attorney and Coeur d'Alene Tribal Court Judge she has worked in the legal field to protect tribal sovereignty, water rights and the land base of her tribe and other tribes. Margo is faculty at Eastern Washington University where she teaches Planning Law and Legislation, Administrative Law, Community Development, Tribal Planning classes and American Indian Law.

Urban Indian Legal Clinic Looking for Volunteers

Urban Indian Legal Clinic at Chief Seattle Club is looking for attorneys to join our volunteer roster.

Chief Seattle Club is a nonprofit in Seattle serving Native American and Alaska Native peoples experiencing homelessness. We hold a legal clinic for our members and the indigenous community of King County to receive free legal aid. The lawyers do not represent who they see, but they can provide legal advice and support during 30-minute sessions.

If you're interested in volunteering, please contact Chief Seattle Club's program manager, Colleen Chalmers, at **colleen.chalmers@chiefseattleclub.org**.

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Generations: Alan Stay and the Future of Tribal In-House Counsel

by Danielle L. Bargala

New waves are being made in the field of Tribal in-house counsel — Alan Stay has officially retired. After decades of serving the Muckleshoot Indian Tribe and tribes throughout the Puget Sound, seeing the Culverts case through, Alan is making room for young Native lawyers to take his place. Alan's retirement further marks the beginning of a new generation of tribal lawyers.

In-house counsel for Tribal Nations is a very special and unique place to work. The work done behind the doors of a tribal government includes everything from insuring the employees of the tribe, to drafting compacts and contracts, to finding the best ways to utilize the complex tax structures in the United States, to litigating, and everything in between. This list doesn't account for the background truth that any person practicing Indian Law knows — Indian Law in and of itself is beyond complicated and it changes and expands every time a case is brought to the Supreme Court. In our field, there will always be vast amounts of work to do and countless areas of law to learn.

I will never forget what Alan said to me at the Indian Law Section's annual CLE: "I won't retire until you come back." Holding true to his word, Alan retired shortly after my return to the Muckleshoot Tribe as a practicing attorney. In my short time practicing with Alan Stay, I was able to work on one of the most important cases to reach the Supreme Court – the Culverts case. As a Muckleshoot tribal member, this case was of utmost importance to me and it tied into my identity. As someone who has worked on the fisheries cases for decades, this case was Alan Stay's passion and many, many hours were spent strategizing the win. Together, along with many other attorneys, both Alan and I were able to take a role and see that the salmon had better protection so that tribal fisherman all over Washington had their treaty right protected. Alan and I also were able to find shared ground in our passion for educating Native youth at the Muckleshoot Tribal School and beyond, both of us hoping that the words we share with high school students will prompt them to find passion in Indian law, and make their way to where we are.

BEHIND EVERY SINGLE PIECE OF WORK PRODUCT THAT COMES THROUGH THESE DOORS, THERE IS A TRIBAL ELDER OR CHILD WHO IS AFFECTED BY THE WORK DONE.

As new lawyers make their way into this field, there is a shared hope that indigenous and Native peoples will continue to join. As a young Native woman working in-house counsel for my own tribe, I spend my days weaving my experiences and the experiences of my community into the work that I do. Behind every single piece of work product that comes through these doors, there is a tribal elder or child who is affected by the work done. Having once been that child, and knowing I will someday be that elder, brings a different kind of love for the work.

Although working in-house for your own tribe can be complex, the perspective that Native Americans have cannot be left out of this area of law. Those that have been raised on the reservation, in the powwow circle, and/or as Treaty hunters and fishers have a unique and special perspective with the laws that govern them — both inside and outside of the Tribe.

To Alan and all those who helped pave the way for successful, young Native lawyers - thank you.

DANIELLE L. BARGALA is a member of the Muckleshoot Indian Tribe, descending from James Daniels and Eliza Snohomish. She is an alumna of Seattle University School of Law, and obtained her Bachelors of Arts at Johns Hopkins University. Danielle currently works as in-house counsel at her enrolled tribe with a focus on Land Use and Planning, Education, Health, and code-work.

TO ALAN AND ALL THOSE WHO HELPED PAVE THE WAY FOR SUCCESSFUL, YOUNG NATIVE LAWYERS — THANK YOU.

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- Reservation Diminishment after *Carpenter v. Murphy* and in *Yakama Nation v. Klickitat County*
- Current Tribal Tax Issues
- Tribal Court Perspectives from the Bench
- In-House Perspectives on Ethics in Representation of Tribal Governments

What: 31st Annual Indian Law Section Seminar

When: 8:15 am-5:00 pm, Friday, May 10, 2019

Where: Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101

Registration: To register for either in-person or webcast, click here.

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