

HONORABLE LONNY R. SUKO

Theresa L. Keyes
J. Michael Keyes
Brian P. McClatchey
K&L GATES LLP
618 West Riverside Avenue, #300
Spokane, WA 99201-0602
Telephone: 509-624-2100
Facsimile: 509-456-0146

Adam Moore
Adam Moore Law Firm
217 N. Second St.
Yakima, WA 98901

Irwin H. Schwartz
710 Cherry Street
Seattle, WA 98104

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KING MOUNTAIN TOBACCO
COMPANY, INC.; CONFEDERATED
TRIBES AND BANDS OF THE
YAKAMA NATION,

Plaintiffs,

v.

ROBERT McKENNA, ATTORNEY
GENERAL OF THE STATE OF
WASHINGTON,

Defendant.

No. CV-11-3018-LRS

**PLAINTIFFS' AMENDED
MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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1 Plaintiffs King Mountain Tobacco Company, Inc. (“King Mountain”)
 2 and the Confederated Tribes and Bands of the Yakama Nation (“Yakama
 3 Nation”) respectfully submit the following Memorandum of Law In Support
 4 of Their Motion For Summary Judgment.

5 INTRODUCTION

6 Plaintiffs are entitled to judgment as a matter of law because there is no
 7 dispute that the State Escrow Statutes¹ impose significant economic
 8 restrictions and burdensome preconditions on King Mountain’s federally-
 9 guaranteed rights under the Treaty of 1855 (the “Treaty”) between the Yakama
 10 Nation and the United States. At the time of the Treaty, the Yakama ceded
 11 over 10 million acres of their land to the federal government. In return they
 12 were promised that they would have the exclusive use and benefit of their
 13 lands, revenues derived from their lands, and be allowed to engage in their
 14 traditional practices of travel and trade without any restrictions or
 15 preconditions.

16 Now, over 150 years later, the State of Washington wants to ignore the
 17 Treaty and is imposing severe economic burdens and onerous preconditions on
 18 King Mountain’s right to engage in the trade of tobacco—a trade that has been
 19 engaged in by the Yakama since long before the State of Washington, the
 20 Treaty, and even the federal government existed. As stated by Judge Alan A.
 21 McDonald regarding the Treaty of 1855:

22 Treaties are a country’s contracts. The solemn
 23 commitment of great nations, like the given word of good

24
 25 ¹ RCW 70.157 *et seq.* and RCW 70.158 *et seq.* are referred to collectively
 26 herein as the “State Escrow Statutes.”

men, should be honored. It should not matter if the erosion of time and the bright glare of hindsight demonstrate that they were extravagant or ill-advised. The promises made at Walla Walla all those years ago were unconditional. They will be so enforced by this Court.

Flores, 955 F. Supp. at 1260 (emphasis supplied).

The Treaty and binding precedent from the Ninth Circuit preclude the State's conduct, and the Plaintiffs respectfully request that this Court enter judgment as a matter of law in favor of the Plaintiffs. Even if this Court finds that the Treaty is not impacted by, or does not preclude application of the State Escrow Statutes to King Mountain, it is still undisputed that these laws do not and cannot apply to King Mountain. The State Escrow payment obligations apply only to products subject to state excise tax, and the Department of Revenue has previously issued a binding ruling finding that King Mountain's products are exempt from the state excise tax laws. The Department of Revenue ruling illustrates the Department's discretion to make rulings regarding excise tax obligations and exemptions, and provides an independent reason why the State Escrow Statutes do not apply.

For the foregoing reasons, Plaintiffs are entitled to judgment as a matter of law and an order from this Court declaring that the State Escrow Statutes do not apply to King Mountain.

BACKGROUND FACTS REGARDING KING MOUNTAIN AND THE STATE ESCROW STATUTES

In order to provide the Court with a proper context for the legal issues presented in this motion, it is necessary to highlight the undisputed facts regarding the following: (i) the history of King Mountain and the importance

1 of tobacco cultivation and trading to the Yakama people; (ii) a brief history
 2 leading up to the enactment of the State Escrow Statutes, as well as the key
 3 statutory provisions contained therein; and (iii) the State of Washington's
 4 flawed rationale as to why these state laws apply to King Mountain Tobacco
 5 Company.

6 **A. King Mountain Is Engaged In The Trade Of Farming, Cultivating,**
 7 **And Trading Tobacco Just As The Yakama Have Been For**
 8 **Centuries.**

9 Since long before the Yakama entered into the Treaty with the federal
 10 government, the Yakama people engaged in cultivating tobacco and trading it
 11 with both Native Americans and non-Native Americans. (SOF² ¶¶ 79-81, 83,
 12 89-93, 95, 96 and 97.) The Yakama people were also involved in extensive
 13 travel throughout North America for purposes of trading a variety of goods,
 14 including tobacco. (SOF ¶¶ 64-68, 70-71, 76.) Trading was the lifeblood of
 15 the Yakama people and essential for survival. (SOF ¶ 66.) The Yakama
 16 traditionally enjoyed free and open access to trade centers and trade networks
 17 in order to maintain their extensive trade and exchange with other Tribes and
 18 white traders. (SOF ¶ 68.)

19 Based upon the Yakama historic trading practices and the numerous
 20 representations made to the Yakama by the federal government when the
 21 Treaty was negotiated, the Yakama always understood that they would be
 22 allowed to harvest the resources of the land and trade those resources in the
 23 same way in which they had traditionally done. (SOF ¶¶ 15-16, 18, 20, 58, 59,

24
 25 ² "SOF" refers to Plaintiffs' Amended LR 56.1 Statement of Material Facts
 26 filed herewith.

60-61, 68-78); *see also Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1247-48 (E.D. Wash. 1997) (“*Flores*”) *aff’d sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (“*Cree I*”); *Cree II*, 157 F.3d at 769 (affirming the district court’s finding that the Yakama “understood the Treaty to grant them valuable rights that would permit them to continue in their ways”); *United States v. Smiskin*, 487 F.3d 1260, 1265 (9th Cir. 2007) (*quoting Cree II*, 157 F.3d at 769). In agreeing to cede large geographic areas to the federal government, the Yakama understood that their “new land” on which they would settle would truly and unequivocally be their own and they would be able to use that land, cultivate crops, engage in their traditional practices of trade and travel, and do all of this for their exclusive use and benefit without any economic restrictions or preconditions being imposed by the state. (SOF ¶¶ 15-18, 55, 59-61, 95.) Many Yakama and tribal corporations are still involved in harvesting the resources of the land and trading them to this very day. (SOF ¶¶ 66, 101-102.) King Mountain Tobacco Company is one such corporation.

King Mountain is organized and existing under the laws of the Yakama Nation. (SOF ¶ 5.) King Mountain is owned and operated by Delbert Wheeler, a life-long enrolled member of the Yakama Nation. (SOF ¶¶ 4, 6.) King Mountain grows tobacco and manufactures tobacco products on trust lands within the boundaries of the Yakama Nation Reservation. (SOF ¶¶ 7-8, 10, 102.) King Mountain has worked diligently to produce King Mountain Products using traditional growing methods, and has incorporated and blended tobacco grown on the Yakama Nation Reservation into its products. (SOF ¶¶ 9, 106-108.) The purpose of blending the King-Mountain-grown tobacco

1 with non-King-Mountain-grown tobacco is to preserve the sacred character of
2 King Mountain's tobacco products. (SOF ¶ 109-110.)

3 **B. In The 1990s, The States' Attorneys General Litigation Against The**
4 **Major Tobacco Companies Resulted In The "Master Settlement**
5 **Agreement."**

6 Beginning in 1994, the State of Washington—along with virtually all of
7 the other states—commenced civil litigation against the major U.S. cigarette
8 manufacturers including Philip Morris Inc., R.J. Reynolds Tobacco Company,
9 Brown & Williamson Tobacco Corp., Lorillard Tobacco Company
10 (hereinafter collectively referred to as the "Original Participating
11 Manufacturers" or "OPMs"). (SOF ¶ 112-113.) Washington State's litigation
12 effort was lead by then-Attorney General Ms. Christine Gregoire. (SOF
13 ¶ 112.) In 1998, after extensive global settlement negotiations, forty-six
14 states, the District of Columbia, and five United States territories ("Settling
15 States") executed the Master Settlement Agreement ("MSA") with the Majors.
16 (SOF ¶ 112-14.) In return for releases from liability, the "Majors" agreed to
17 make billions of dollars in payments to the states for health care expenses
18 incurred by the state in the past and expected to be incurred in the future as a
19 result of their populations' smoking-related ailments. (SOF at ¶ 115.)

20 **C. The "Master Settlement Agreement" Resulted In The Enactment**
21 **Of The State Escrow Statutes Which Placed Economic Restrictions**
22 **And Preconditions On The Ability Of NPMs To Participate In The**
23 **Market.**

24 As part of the MSA, the Majors negotiated a provision that would
25 require the Settling States to enact legislation that would require a tobacco
26 manufacturer who was not a party to the MSA, but who sold tobacco products
into an MSA State, to pay a certain amount of money into a "qualified escrow

1 account.” (SOF ¶ 116-117.) The purpose behind this required legislative
2 enactment was to “neutralize” the price advantage that these “Non-
3 Participating Manufacturers” (hereinafter “NPMs”) would have otherwise
4 received as a result of the Majors paying money directly to the MSA States.
5 (SOF ¶ 118.)

6 Pursuant to the MSA, Washington enacted RCW 70.157 *et seq.*
7 According to that statute, any tobacco product manufacturer selling cigarettes
8 to consumers within the State (whether directly or through a distributor,
9 retailer or similar intermediary or intermediaries) that does not become a
10 “Participating Manufacturer” (hereinafter “PM”) under the MSA is an NPM
11 and must deposit specified funds into a “qualified escrow account” for the sole
12 benefit of the State. RCW 70.157.010(j); 70.157.020. The State may apply
13 these funds to pay a judgment or settlement against the manufacturer. RCW
14 70.157.020(2)(A). Otherwise, the money is held in escrow—for the sole
15 benefit of the State—for twenty-five years before the funds can be released
16 back to the manufacturer, but only if the funds are still available and if there
17 have been no changes to the statute. RCW 70.157.020(2)(A)-(C).
18 Noteworthy is that twenty-five years has yet to lapse since the signing of the
19 MSA agreement and enactment of the statutes. Whether any money would be
20 returned is speculative at best.

21 As an incentive for the Settling States to protect the PMs’ market share,
22 the MSA includes a provision that, if one of the PMs loses market share in a
23 particular year, a nationally recognized firm of economic consultants is to
24 determine whether the restraints imposed on the PMs by the MSA were a
25 significant factor contributing to the market share loss. (SOF ¶ 126.) If so,
26

1 then the PM's MSA settlement payments may be reduced by as much as three
2 times its market share loss. (*Id.* (emphasis added).) This is known as the Non-
3 Participating Manufacturer Adjustment or "NPM Adjustment." (*Id.*)
4 Accordingly, the Settling States have a direct financial interest in protecting
5 the PMs' market share.

6 The NPM Adjustment is passed on to the Settling States in the form of
7 decreased annual "Allocated Payments." (SOF ¶ 127.) However, a Settling
8 State's Allocated Payment is not subject to an NPM Adjustment "if such
9 Settling State continuously had a Qualifying Statute [Escrow Statute] in full
10 force and effect during the entire calendar year immediately preceding the year
11 in which the payment in question is due, and diligently enforced the provisions
12 of such statute during the entire calendar year." (SOF ¶¶ 125, 127 (emphasis
13 added).) As noted above, Washington enacted the Escrow Statute at RCW
14 70.157 *et seq.*

15 In July 2003, the Washington legislature enacted RCW 70.158 *et seq.*,
16 known as the "Complimentary Act," to assist in the enforcement of the
17 payment and reporting requirements of RCW 70.157 *et seq.* One of the
18 primary procedural enforcement "enhancements" of RCW 70.158 was the
19 creation of a directory of approved tobacco manufactures ("approved
20 directory") maintained and published by the Washington State Attorney
21 General. RCW 70.158.030(2). Any brand that is not included on the
22 approved directory ("non-directory brand") may not be sold in the State.
23 RCW 70.158.060(3); 70.158.030(3).

24 In order to be included on the "approved directory," tobacco product
25 manufacturers must annually certify, under penalty of perjury, compliance
26

1 with the State Escrow Statutes. RCW 70.158.030(1)-(2); *see also* RCW
 2 70.157.020(b)(3) (requiring annual certification and reporting by tobacco
 3 product manufacturers); RCW 70.158.050(1) (requiring wholesalers and
 4 distributors to file monthly reports). (SOF ¶¶117, 129, 135-145, 150-151.)

5 Washington law not only prohibits the non-directory brand
 6 manufacturer from selling its products in Washington, it enforces the
 7 prohibition through potential criminal liability.

8 According to RCW 70.158.030(3):

9 It is unlawful for any person (a) to affix a stamp to a
 10 package or other container of cigarettes of a tobacco product
 11 manufacturer or brand family not included in the directory,
 12 or to pay or cause to be paid the tobacco products tax on any
 13 package or container; or (b) to sell, offer, or possess for sale
 14 in this state or import for sale into this state, any cigarettes
 of a tobacco products manufacturer or brand family not
 included in the directory.

15 Violation of RCW 70.158.030(3) subjects a person to potential civil
 16 fines, criminal liability, and liability under the Washington Consumer
 17 Protection Act. RCW 70.158.060; *see also* RCW 70.158.070(6) (allowing for
 18 disgorgement of “any profits, gain, gross receipts or other benefit from
 19 violation of [chapter 70.158]”).

20 **D. The Yakama Nation and National Congress of American Indians**
 21 **Have Affirmed that King Mountain is Not Subject to the**
 22 **Requirements of the State Escrow Statutes.**

23 The conflict between the State Escrow Statutes and the rights secured
 24 by the Treaty 1855 was analyzed and considered by both the Yakama Nation
 25 leadership and later by the National Congress of American Indians. In May
 26 2010, the Yakama Nation Tribal Council resolved “[I]t is our considered

1 determination that King Mountain [is] exempt from having to pay any of those
2 taxes imposed and assessed by the individual states pursuant to the Master
3 Settlement Agreement.” Yakama Nation Tribal Council Resolution T-092-10,
4 May 24, 2010. (SOF ¶ 182.)

5 In particular, Resolution T-092-10 states:

6 As such, no state government can impose its revenue-
7 generating laws, including those laws passed pursuant to the
8 Master Settlement) on King Mountain for it engaging in an
historic right of trade and travel with respect to tobacco
products.

9 King Mountain Products are products of our lands, our natural
10 resources, our people, and our way of life. These products are
11 inextricably intertwined with our realty such that all
commercial exchanges or tradition of the products must be
and are governed by the laws, traditions, and customs of the
Yakama Nation.

12 (*Id.*)

13 This Resolution was passed after consideration was given to the papers,
14 legal foundation and the Yakama history and understanding of their rights
15 under the Treaty of 1855. (SOF ¶ 183.) These documents and Resolution T-
16 092-10 (hereinafter “Obama packet”) were sent directly to President Obama
17 and given to members of the Obama Administration in an attempt to resolve
18 these issues. (*Id.*) Attempts by the Yakama to work directly with the
19 administration is in accord with the Yakama understanding of its Treaty right
20 to take their grievances to the President. (SOF ¶182-184) (see also Court
21 Order (ECF 83 at p. 13) in *King Mountain v. Alcohol and Tobacco Tax and*
22 *Trade Bureau, Inc.* (CV-11-3038-RMP) finding that the Yakama assertion of
23 Treaty right to consult with the President is justiciable.)

24 The Obama packet was further provided and considered in June 2011
25 when the National Congress of American Indians (“NCAI”) adopted
26

1 Resolution #MKE-11-011, affirming T—092-10 and stating:

2
3 BE IT FURTHER RESOLVED, that products from tribal trust
4 resources, such as those produced by the Yakama Business
5 Enterprises [including King Mountain] and other similarly
6 situated Indian-owned business enterprises, are products of
7 our lands, our natural resources, our people, and part of our
8 way of life. These products are inextricably intertwined with
9 our land such that commercial exchanges or trading of these
10 products must be and are governed by our laws, traditions,
11 and customs of the Yakama nation and any other similarly
12 situated Sovereign Indian Nation. As such, no state
13 government may impose its revenue-generating laws –
14 including but not limited to those revenue-generating laws
15 passed under the Master Settlement Agreement – on Yakama
16 Business Enterprises and other similarly situated Indian-
17 owned business enterprises, for engaging in a historic right of
18 trade and travel with respect to tobacco products[.]

11 (SOF ¶ 184.)

12 Both the Yakama Nation and the NCAI have formally concluded that
13 the State Escrow Statutes violate the protections of the Treaty of 1855, based
14 upon the unique characteristic of the King Mountain product when considered
15 in light of the Treaty and established case law.

16 Additionally, and particularly noteworthy, is that independent findings
17 and rulings recognizing the tax exempt status of the unique King Mountain
18 products were also issued in 2007 by the Washington State Department of
19 Revenue. (*See* Section IV, *infra*; SOF ¶ 166, 168-169, 171-173). In other
20 words, in 2007, 2010, and 2011, the Washington Department of Revenue, the
21 Yakama Nation Tribal leadership, and NCAI, respectively, all agreed about
22 the unique status and characteristics of the King Mountain product in light of
23 the Treaty, as well as other established federal case law.

1 **E. The Present Lawsuit Was Commenced When The State Failed To**
 2 **Acknowledge That The Economic Restrictions And Preconditions**
 3 **Imposed By The State Escrow Statutes Violate Established Treaty**
 4 **Rights.**

5 On January 4, 2011, counsel for King Mountain sent a letter to the
 6 Washington State Attorney General explaining that the State Escrow Statutes
 7 violate the rights guaranteed by the Yakama Treaty of 1855—specifically the
 8 guarantee in Article II that the Yakama people would have the “exclusive use
 9 and benefit” of the income derived from their lands and the protections for the
 10 Yakama rights to “trade and travel” explained in Article III. (SOF ¶ 154.)
 11 This letter was in follow-up to an in-person meeting between King Mountain
 12 representatives and representatives of the Washington State Attorney General,
 13 including Senior Counsel David Hankins. (*Id.*)

14 In response, Senior Counsel Mr. David Hankins of the Attorney
 15 General’s Office, one of the attorneys assigned to monitor and enforce the
 16 statutes relating to tobacco product manufacturers under chapters RCW 70.157
 17 and RCW 70.158, responded on behalf of the Attorney General, and also now
 18 serves the dual role of litigation counsel in this matter. (SOF ¶ 155-156; *see*
 19 *also* Keyes Second. Dec., Ex. G (attaching Defendant’s witness disclosure
 20 list).) Statements by Mr. Hankins, self-identified as a witness in this case, are
 21 deemed party admissions.³ *Id.* In rationalizing the on-going violation of King
 22 Mountain’s Treaty rights, the Attorney General’s office made the following

23 ³ Pursuant to ER 801(d)(2), and Mr. Hankins’ role as one of the attorneys
 24 assigned to monitor and enforce the statutes relating to tobacco product
 25 manufacturers under chapters RCW 70.157 and RCW 70.158, the statements
 26 made in Mr. Hankins’ January 14, 2011 letter are admissions by the Attorney
 General of Washington. (SOF ¶¶ 149-50, 152-54.)

1 admissions:

- 2 • The Escrow payments “are intended to compensate for state
3 expenditures for tobacco-related public health measures and to
4 reimburse states for the health care costs they incur as providers
5 of last resort for any of their citizens.” In other words, the
6 Attorney General’s office admits that the State Escrow Statutes
7 require payment of fees from King Mountain for the exercise of
8 its Treaty rights, and that such fees are a mechanism for the
9 generation of revenue for the State. (SOF ¶ 157.)
- 10 • The State Escrow Statutes impose “restrictions” on King
11 Mountain’s tobacco trade and travel: “the statutory requirements
12 attempt to insure that NPMs do not unfairly expand their market
13 and unfairly compete with tobacco companies that have joined
14 the MSA.” (SOF ¶ 158.) Simply put, the State Escrow Statutes
15 condition King Mountain’s exercise of its Treaty rights on
16 payment of fees and charges.
- 17 • The State admits that its Escrow Statutes impose an economic
18 burden on King Mountain through their attempt to ensure that
19 King Mountain, regardless of the existence of the Treaty rights
20 and guarantees it holds, “sits in the same competitive position as
21 any other NPM in the State of Washington or in any other state.”
22 (SOF ¶ 160.)
- 23 • The State admits that the State Escrow Statutes’ “requirement to
24 become certified and escrow for such sales places no greater
25 economic restriction on King Mountain than any other tobacco
26

1 product manufacturer.” (SOF ¶ 161.) Again, the State admits
2 that its Escrow Statutes make no provision for King Mountain’s
3 Treaty rights and guarantees.

4 In other words, the restrictions are present, continuing, admitted, and do
5 not account for Plaintiffs’ Treaty rights. (SOF ¶ 155-158, 160-161.) The
6 Attorney General’s response illustrated a grave misunderstanding of, and
7 refusal to acknowledge, King Mountain’s Treaty rights. (SOF ¶159.)
8 Accordingly, Plaintiffs were forced to seek this Court’s assistance in enforcing
9 the rights guaranteed by the Treaty of 1855.

10 Plaintiffs initiated this suit on February 15, 2011. (ECF No. 1.) On
11 August 17, 2011, Plaintiffs filed the instant First Amended Complaint for
12 Declaratory and Injunctive Relief Against the Attorney General from
13 Continuous Violations of the Treaty of 1855 and Other Federal Laws Relating
14 to the Master Settlement Agreement of 1998 and Resulting State Escrow
15 Statutes. (ECF No. 20.) In their First Amended Complaint, Plaintiffs seek
16 declaratory relief from the Court that: (1) the restrictions and preconditions
17 imposed by the State Escrow Statutes violate the Treaty of 1855 and other
18 Federal Laws; (2) King Mountain is not subject to the restrictions and
19 preconditions imposed by the State Escrow Statutes because these restrictions
20 and preconditions violate the Treaty of 1855 and other Federal Laws; and (3)
21 King Mountain is entitled to a refund of all Escrow payments it paid to date
22 pursuant to the State Escrow Statutes. (ECF No. 20 at 12-14.) Plaintiffs also
23 seek permanent injunctive relief: (1) enjoining the Defendant and its
24 employees from prohibiting King Mountain from selling its products in
25 Washington State; and (2) requiring the Attorney General to list King
26

1 Mountain as an approved manufacturer of tobacco products in the State of
 2 Washington. (ECF No. 20 at 14.) Summary judgment is appropriate because
 3 the undisputed facts illustrate that the State Escrow Statutes unlawfully violate
 4 the Treaty of 1855, King Mountain is entitled to the rights guaranteed to it by
 5 the Treaty of 1855, and Plaintiffs are therefore entitled to the relief requested
 6 in their First Amended Complaint as a matter of law.

7 LAW & ARGUMENT

8 **I. The Requisite Analytical Framework for the Interpretation of** 9 **Indian Treaties.**

10 The Supreme Court and the 9th Circuit Court of Appeals have repeatedly
 11 provided direction for courts which are asked to determine the applicability
 12 and interpretation of Indian treaties. Specifically, the Supreme Court has
 13 enunciated the governing law of Indian treaty construction, in what are often
 14 referred to as the Indian treaty interpretation “canons.” *See* Cohen’s Handbook
 15 of Federal Indian Law, § 2.02[1] at 113 (2012 ed.).

16 First, an Indian treaty “must be construed as the Indians would naturally
 17 have understood it at the time of the treaty, with doubtful or ambiguous
 18 expressions resolved in the Indians’ favor.” *Smiskin*, 487 F.3d at 1264; *Tulee*
 19 *v. Washington*, 315 U.S. 681, 684-685 (1942) (noting that it is the court’s
 20 “responsibility to see that the terms of the treaty are carried out, so far as
 21 possible, in accordance with the meaning they were understood to have by the
 22 tribal representatives at the council, and in a spirit which generously
 23 recognizes the full obligation of this nation to protect the interests of a
 24 dependent people”); *see also Flores*, 955 F. Supp. at 1252 (stating that “the
 25 scope of the Yakamas’ right to travel must be divined according to the
 26

1 Yakamas' understanding of the Treaty language") (emphasis supplied) *aff'd*
 2 *sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) ("*Cree II*"). Second,
 3 treaties must be broadly and liberally interpreted in the Indians' favor. *See*
 4 *Washington v. Washington State Commercial Passenger Fishing Vessel*
 5 *Ass'n.*, 443 U.S. 658 (1979). These are uniquely mandatory standards for
 6 interpretation of Indian treaties: "The standard principles of statutory
 7 interpretation do not have their usual force in cases involving Indian law."
 8 *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Because the Yakama
 9 people understood that the oral promises made to them at the time of the treaty
 10 negotiations were the Treaty, the Court must also examine the treaty council
 11 minutes (the official verbatim transcript recorded by agents of the federal
 12 government) as an indispensable component of the canons of treaty
 13 interpretation. *See, e.g., Flores*, 955 F. Supp. at 1253 (stating, "as the Treaty
 14 minutes reflect, Stevens unconditionally guaranteed that the Yakamas would
 15 have the right to take their horses and cattle and other goods to market.").

16 In light of the canons of treaty interpretation, in addition to the Treaty
 17 itself and the treaty council minutes, courts must consider two sources of
 18 extrinsic evidence: (i) the testimony of tribal elders who have been educated
 19 by their ancestors as to the meaning of the Treaty; and (ii) the testimony of
 20 experts who have studied and analyzed the Yakama people and their history,
 21 language, and culture. *Cree II*, 157 F.3d at 773-774 (noting that "testimony of
 22 this sort by Yakama elders has been sanctioned for over twenty years");
 23 *United States v. Washington*, 384 F. Supp. 312, 350 (W.D. Wash. 1974), *aff'd*,
 24 520 F.2d 676 (9th Cir. 1975) (oral testimony of Yakama tribal members
 25 educated in tribal history and customs is reasonable and credible factual data
 26

1 regarding relevant aspects of Yakama Indian life and of the intentions and
2 understandings of the Indian representatives present at Treaty negotiations at
3 Walla Walla).

4 As well, this Court has consistently emphasized that a fundamental goal
5 of the Treaty, and therefore a fundamental component of the intent of the
6 Indians at the time of the Treaty, was to preserve the Yakama traditional way
7 of living and fortify their resources. *Flores*, 955 F. Supp. at 1244 (noting that
8 “the Treaty was presented as a means to preserve Yakama customs and
9 prevent encroachment by white settlers, while at the same time providing
10 tribes with modern accoutrements to enhance their standards of living and
11 fortify their resources”) (emphasis supplied)). Consequently, this Court
12 should likewise interpret the Treaty with this historical background in mind.
13 *Id.* at 1238.

14 Crucially, for purposes of summary judgment, this is the legal analytical
15 framework for considering the evidence presented—and “the substantive law
16 will identify which facts are material. Only disputes over facts that might
17 affect the outcome of the suit under the governing law will properly preclude
18 the entry of summary judgment.” *Anderson v. Liberty Lobby*, 477 U.S. 242,
19 248 (1986). As well, the non-moving party must go beyond the pleadings, and
20 produce *admissible evidence* in order to avoid summary judgment.
21 Fed.R.Civ.Proc. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).
22 And particularly noteworthy, as set forth below, is Defendant’s silence and
23 complete absence of disputed evidence related to Article II—which alone is
24 dispositive in favor of Plaintiffs.

1 **II. As A Matter of Law, the State Escrow Statutes Violate Yakama**
 2 **Members' Article II Right to the "Exclusive Use and Benefit" of**
 3 **Income from Activities on Their Lands.**

4 The parties to the Treaty of 1855 could not have contemplated a State
 5 mandate that required Yakama people to surrender revenue generated by them
 6 on Yakama land to be held and used for the benefit of the state as a
 7 precondition to exercising their Treaty-protected rights to trade in tobacco. To
 8 that end, the Treaty's recognized broad protections secure King Mountain's
 9 right to produce and sell its products in the State of Washington without the
 10 encroachments imposed by the State Escrow Statutes.

11 *A. The Yakama Understood Article II To Be a Guarantee That They*
 12 *Would Always Have the "Exclusive Use and Benefit" of the*
 13 *Income From Their Lands.*

14 There are five undisputed—and indisputable—facts that demonstrate as
 15 a matter of law that the Yakama reasonably understood at the time of the
 16 Treaty that Article II provided them with the right to continue in their historic
 17 practices of growing, cultivating, and trading tobacco without economic
 18 restrictions being imposed by any state or the federal government.

19 First, it is undisputed that in 1855 the Yakama ceded nearly ten million
 20 acres of their land for the benefit of the United States. *Flores*, 955 F. Supp. at
 21 1240-41. In agreeing to cede this enormous geographic region to the federal
 22 government, the Yakama were guaranteed that their “new land” upon which
 23 they would settle would truly and unequivocally be their own. (SOF ¶¶ 56-
 24 61.) This guarantee was expressly promised to the Yakama in Article II of the
 25 Treaty of 1855, which provides:
 26

1 There is, however, reserved, from the lands above
2 ceded for the use and occupation of the aforesaid
3 confederated tribes and bands of Indians, the tract of
4 land . . .

5 All which tract shall be set apart and, so far as
6 necessary, surveyed and marked out, for the
7 exclusive use and benefit of said confederated tribes
8 and bands of Indians, as an Indian reservation, nor
9 shall any white man, excepting those in the
10 employment of the Indian Department, be permitted
to reside upon the said reservation without
permission of the tribe and the superintendent and
agent.

11 (SOF ¶ 58 (emphasis added).) Not only were the Yakama to be the sole
12 residents of the lands reserved from cession (“use and occupation”), but they
13 were also to be the only ones to derive revenues from their lands (“exclusive
14 use and benefit”). (SOF ¶¶ 56-61.)

15 Second, it is undisputed that before the time of the Treaty the Yakama
16 used their lands for various farming and agricultural endeavors, including
17 growing tobacco. (SOF ¶¶ 79-81, 83, 89-93.)

18 Third, it is undisputed that before the time of the Treaty, the Yakama
19 were “inveterate traders.” *Flores*, 955 F. Supp. at 1238. The Yakama trading
20 practices extended to trading their goods with travelers coming through the
21 Yakama territory. *Id.* The Yakama also traveled extensively for purposes of
22 trading their goods. *Id.* The Yakama trading practices extended to a variety of
23 goods, including tobacco that was grown by the Yakama on their lands. (SOF
24 ¶¶ 79-80, 83-84, 89-94); *see also Smiskin*, 487 F.3d at 1266 n. 10; *Flores*, 955
25 F. Supp. at 1238. The Yakama also received tobacco from non-Yakama in
26

1 commercial exchanges. (SOF ¶ 91.)

2 Fourth, it is undisputed that the Yakama understood that Article II
3 would preserve these traditional practices of using their lands for growing
4 tobacco and being able to trade that product with other Yakama and non-
5 Yakama alike without any economic restrictions being imposed by the State of
6 Washington. (SOF ¶ 59-61, 100.) Likewise, at the time of the Treaty signing,
7 the Yakama believed that “exclusive use and benefit” meant that all income
8 derived from the Yakama land would be exclusively retained by the Yakamas.
9 (SOF ¶¶ 60-61, 100.) In fact, the “State of Washington” would have been a
10 completely foreign concept to the Yakama as the “State” would not exist for
11 another 34 years after the Treaty was signed. 25 Stat. 676 (1889) (Enabling
12 Act).

13 Fifth, it is undisputed that the Yakama understanding of Article II is
14 wholly consistent with the unequivocal representations made by the U.S.
15 negotiators at the time of the Treaty signing. For example, during the
16 negotiations, Governor Stevens emphasized that the Yakama lands would “be
17 your own and your childrens.” (ECF 39-1 (Walker Dec.), Ex. A, p. 105
18 (Treaty Minutes).) The Yakama accepted Governor Stevens’ assurance that
19 the white man would be barred from their land, “Let it be as you propose so
20 the Indians have a place to live, a line as though it was fenced in, where no
21 white man can go. Although you have said the whites are like the wind, you
22 cannot stop them. You make good what you have promised.” (*Id.* at 131.)

23 The U.S. negotiators to the Treaty of 1855 understood that agriculture,
24 especially tobacco growing, was of vital economic and spiritual importance to
25 the Yakama. (SOF ¶¶ 95-100.) As this Court previously found, “Stevens
26

1 began the formal negotiations by expressing the government's desire to better
 2 the lifestyle of tribal members and assure peace: We told the Great Father,
 3 these men have farms. The Great Father said I want them to have more and
 4 larger farms.” *Flores*, 955 F. Supp. at 1243.

5 In sum, based on: (1) the historical significance of tobacco being grown
 6 by the Yakama and then subsequently traded with other Yakama and non-
 7 Yakamas alike; (2) the representations made by the United States
 8 representatives to the Yakama at the time of the Treaty negotiations at the
 9 Walla Walla Council; and (3) the language of the Treaty itself, there is no
 10 dispute—and Defendant has failed to rebut—that as a matter of fact and law,
 11 the Yakama understood Article II of the Treaty to guarantee them the right to
 12 engage in the historic practice of growing and trading tobacco without any
 13 economic impediments, restrictions, or conditions being imposed by any state
 14 or the federal government.

15
 16 *B. The Stated Purpose and Intent of Washington’s Escrow Statutes*
 17 *is to Prohibit Tobacco Manufacturers’ Use of Income Which,*
 18 *Here, Directly Violates King Mountain’s Article II Rights.*

19 Any state law or regulation that “acts upon the Indians as a charge for
 20 exercising the very right their ancestors intended to preserve” in the Treaty of
 21 1855 cannot be enforced against a Yakama Nation member. (*See Tulee*, 315
 22 U.S. at 685; *see also* U.S. Const. Art. VI, cl. 2 (stating that “Treaties made, or
 23 which shall be made, under the Authority of the United States, shall be the
 24 supreme Law of the Land; and the Judges in every State shall be bound
 25 thereby, any Thing in the Constitution or Laws of any State
 26 notwithstanding”).)

1 In order to sell its trust-harvested products in the State of Washington,
2 King Mountain must submit annual payments into the State's Escrow fund, in
3 which the funds are held "for the *benefit* of Releasing Parties [here, the State
4 of Washington] and *prohibits* the Tobacco Product Manufacturer placing the
5 funds into escrow *from using, accessing, or directing the use of*" the funds.
6 See RCW 70.157.020(a)-(b). In other words, the State Escrow payment
7 obligations require King Mountain to surrender the use and benefit of income
8 derived from Yakama land for at least twenty-five years, and possibly forever,
9 if the funds are used for other purposes. During that period of time, it is the
10 State, and not King Mountain, which enjoys the exclusive benefit and
11 entitlement to the use of this income.

12 The State imposes this Escrow payment obligation as a pre-condition
13 for King Mountain selling its products in the State of Washington. The State
14 Escrow Statutes explicitly state that the funds held in the Escrow account are
15 held solely for the **benefit of the State**, and that the NPM may not use the
16 funds, an arrangement which, as shown below, runs directly counter to the
17 language of Article II:
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<u>RCW 70.157.010(f)</u>	<u>Treaty of 1855, Article II</u>
<p>“‘Qualified escrow fund’ means an escrow arrangement [which] requires that such financial institution hold the escrowed funds’ principal <u>for the benefit of the releasing parties and prohibits the tobacco product manufacturer</u> placing the funds into escrow <u>from using,</u> accessing or directing the use of <u>the funds’ principal</u> except as consistent with RCW 70-157.020(b).”</p>	<p>“There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land . . .</p> <p>All which tract shall be set apart and, so far as necessary, surveyed and marked out, <u>for the exclusive use and benefit of said confederated tribes and bands of Indians,</u> as an Indian reservation,</p>

The enforcement tool for the State Escrow Statutes is the NPM’s mandatory execution of an escrow agreement in which the NPM is to deposit funds **“for the benefit of the applicable Beneficiary State or any Releasing Party** located or residing in the applicable Beneficiary State.” (Keyes Second Dec., Ex. B (mandatory Model Escrow Agreement), pp.21-22 (Definitions a-f).) In fact, **“No persons or entities other than the Beneficiary States . . . are intended beneficiaries** of this Escrow Agreement . . .” (*Id.* at p. 31, Sec. 10) (emphasis added).) Simply put, the Escrow payments are held for the sole benefit of the State.

Not only is the State the sole beneficiary, but the funds King Mountain pays into escrow are held for the State’s benefit. RCW 70.157.020(b)(2)(A)-(C). During the twenty-five year escrow period, the Escrow funds may only be released under three highly restricted and restrictive methods, none of

1 which allows the use of funds by the NPM. (Keyes Second Dec., Ex. B
2 (Escrow Agreement), Sec. 3(f) at p. 25-26; RCW 70.157.020(2)(A)-(C).)

3 The NPM may obtain the distribution of its escrow payments twenty-
4 five years after each payment was made into escrow, on a rolling basis, but
5 only if funds remain unexpended for other purposes. (*Id.*) Even if all funds
6 remain, King Mountain would not get a lump-sum distribution: each payment
7 (less escrow agent fees) would revert to King Mountain on the twenty-fifth
8 anniversary of its deposit into escrow. (*Id.*) In any event, whether and how
9 King Mountain would receive the funds from escrow at some point far in the
10 future is a highly uncertain and speculative exercise, at best, which the State
11 admits. (SOF ¶¶ 154-162.)

12 The drafters of the model escrow statute understood that denying a
13 NPM (like King Mountain) the benefit and use of the funds paid into escrow
14 carried significant financial implications. According to the MSA, the Escrow
15 Statutes' true purpose is to "effectively and fully neutralize the cost
16 disadvantages that the [Majors and SPMs] experience *vis-à-vis* [NPMs] within
17 each [MSA state] as a result of the provisions of [the MSA]." (ECF No. 21 at
18 ¶ 3.11; SOF ¶ 117.) In other words, the drafters understood that the Escrow
19 payments effectively imposed an additional cost which was intended to force
20 NPMs, like King Mountain, to increase the purchase price of their products to
21 cover the amounts surrendered to escrow. The Attorney General has admitted
22 that the State Escrow Statutes impose an economic restriction on King
23 Mountain. (SOF ¶¶ 156-158, 160-161); see also ER 801(d) (2). In fact, the
24 express intent of the State Escrow obligation is to prevent King Mountain
25 "from deriving large, short-term profits." (SOF ¶ 158; RCW 70.157.005(f).)
26

1 The financial restrictions placed on King Mountain by the State Escrow
 2 Statutes violate Article II of the Treaty of 1855 because they directly encroach
 3 on King Mountain's Treaty-guaranteed exclusive use and benefit of Yakama
 4 land, specifically targeting income and profits derived from Yakama land. As
 5 noted above, the Yakama understood the "exclusive use and benefit" provision
 6 to include the exclusive use and benefit of income derived from the Yakama
 7 land. All King Mountain products are produced and sold on Yakama land and
 8 incorporate tobacco grown on Yakama land. (SOF ¶¶ 7-9, 11, 102-103, 108-
 9 109.) Therefore, King Mountain's income is derived from the use of trust land
 10 on the Yakama Nation Reservation to produce tobacco products.

11 Accordingly, the State-imposed Escrow payment obligation violates the
 12 exclusive use and benefit guaranteed by Article II of the Treaty of 1855. For
 13 this reason alone, the State Escrow Statutes cannot be enforced against King
 14 Mountain's business endeavors of selling its products located in the State of
 15 Washington. Plaintiffs are entitled to judgment as a matter of law.

16
 17 C. The State of Washington Has Completely Failed to Challenge or
 18 Even Address the Article II Evidence, Requiring Judgment in
 19 Plaintiffs' Favor.

20 The Plaintiffs' claims and evidence showing that the State Escrow
 21 Statutes violate Article II of the Treaty stand unrebutted. In the face of this
 22 silence, Plaintiffs are entitled to judgment as a matter of law on the Article II
 23 claim.

24 On February 15, 2011, Plaintiffs filed their Complaint alleging, *inter*
 25 *alia*, that the State Escrow Statutes violate Article II of the Treaty. (ECF No.
 26 1). Essential components of the proof of that claim, according to the canons of

1 Indian treaty interpretation (explained in Section I, *supra*), are the Treaty text
2 itself and the treaty council minutes (the official verbatim transcript recorded
3 by agents of the federal government). The treaty council minutes are to be
4 considered by the Court because the Yakama people understood that the oral
5 promises made to them at the time of the treaty negotiations were the Treaty.
6 *See, e.g., Flores*, 955 F. Supp. at 1253. The Court must also examine, as
7 indispensable components of the canons of treaty interpretation: (i) the
8 testimony of tribal elders who have been educated by their ancestors as to the
9 meaning of the Treaty; and (ii) the testimony of experts who have studied and
10 analyzed the Yakama people and their history, language, and culture. *Cree II*,
11 157 F.3d at 773-774 (noting that “testimony of this sort by Yakama elders has
12 been sanctioned for over twenty years”); *United States v. Washington*, 384 F.
13 Supp. 312, 350 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975) (oral
14 testimony of Yakama tribal members educated in tribal history and customs is
15 credible information regarding the intentions and understandings of the Indian
16 Treaty signers).

17 Plaintiffs have provided all of this evidence here to enable the Court to
18 engage in the commonly-accepted treaty interpretation analysis—and the
19 Defendant has not addressed, rebutted, nor challenged this evidence at all
20 throughout discovery. (No expert reports regarding Article II (SOF 185-188);
21 no depositions of the Tribal Elders; no questions of deponents regarding
22 Article II and the Yakama understanding; no deposition taken of Plaintiffs’
23 expert Dr. Deward Walker.) The State of Washington has provided no
24 admissible evidence with which to counter the overwhelming testimony of
25 tribal elders, life-long tribal members, and the preeminent expert in this field.
26

1 To support its Complaint, Plaintiffs provided the declarations of tribal
2 elders William Sohapp and Jerry Meninick, who provided the oral history of
3 elders on the Yakama understanding of the Treaty, including Article II. (See
4 ECF No. 33, 35.) As well, Plaintiffs provided the declaration of life-long
5 members of the Yakama Nation, Richard "Kip" Ramsey and Delbert Wheeler,
6 to lend further support for the Yakama understanding of the Treaty's terms,
7 both at the time of signing and contemporaneously. (ECF No. 34.) Delbert
8 Wheeler is a direct descendent of Chief Ka'mi'akin and other Yakama chiefs
9 who made their marks on the Treaty of 1855. (ECF 36, at ¶9.) Defendant has
10 no admissible evidence with which to rebut or challenge any of these elders
11 and tribal members' statements regarding the historic and current Yakama
12 understanding of Article II.

13 Finally, Plaintiffs provided the expert reports of Deward Walker, Ph.D.,
14 far and away the most knowledgeable non-Yakama person regarding the
15 Yakama understanding of the terms of the Treaty of 1855 and the historical
16 context of the Treaty, to assist the Court in knowing the Yakama
17 understanding of Article II. (ECF No. 39) Defendants have not challenged Dr.
18 Walker's conclusions regarding Article II, much less rebutted them. Dr.
19 Walker is extraordinarily knowledgeable regarding Yakama customs, history,
20 culture, and language, and produced an expert report as evidence to support
21 the Plaintiffs' Article II claims. (ECF No. 39-1) Defendant's expert, Emily
22 Greenwald, Ph.D. produced a report that contains no mention of Article II
23 whatsoever, let alone rebutting Dr. Walker's opinions and conclusions. (SOF
24 185-188.)

25 Simply put, the State of Washington has produced no admissible
26

1 evidence concerning Article II at all. The declarations of tribal elders and life-
 2 long tribal members recounting the understanding of Article II as carried
 3 through the Yakama Nation's oral tradition have not been rebutted. Plaintiffs'
 4 expert's conclusions regarding the historic Yakama understanding of Article II
 5 has been completely ignored by Defendant's expert and gone unrebutted.
 6 Therefore, the Court should accept all of Plaintiffs' Article II evidence as
 7 unrebutted, and summary judgment should be entered in Plaintiffs' favor.

8
 9 **III. As A Matter of Law, the State Escrow Statutes Are Preconditions**
 10 **and Economic Restrictions That Violate Yakama Members' Article**
 11 **III Trade and Travel Rights.**

12 Article III of the Treaty of 1855 states, in pertinent part, as follows:

13 And provided, that, if necessary for the public convenience, roads
 14 may be run through the said reservation; and on the other hand,
 15 the right of way, with free access from the same to the nearest
 16 public highway, is secured to them; as also the right, in common
 17 with citizens of the United States, to travel upon all public
 18 highways. (SOF ¶¶ 62-63.)

19 Controlling decisional case law has interpreted the meaning of
 20 Article III, and in this setting, the State's escrowing obligations and
 21 preconditions for King Mountain's trade of tobacco violates Article III
 22 of the Treaty.

23 **A. Binding Ninth Circuit Precedent Unequivocally Establishes That**
 24 **Article III Prohibits A State From Imposing Economic**
 25 **Restrictions or Pre-Conditions On King Mountain's Ability To**
 26 **Engage In The Trade of Tobacco.**

The Ninth Circuit has expressly held that this Treaty provision protects

1 the Yakama right to travel and trade, without restriction, with respect to
2 tobacco products. *Smiskin*, 487 F.3d at 1266-67 (“Thus, whether the goods at
3 issue are timber or tobacco products, the right to travel overlaps with the right
4 to trade under the Yakama Treaty such that excluding commercial exchanges
5 from its purview would effectively abrogate our decision in *Cree II* and render
6 the Right to Travel provision truly impotent.”); *see also Flores*, 955 F. Supp.
7 at 1248 (holding that “the language of the Treaty, when viewed in the
8 historical context as the Yakamas would have understood it, unambiguously
9 reserves to the Yakamas the right to travel the public highways without
10 restriction for purposes of hauling goods to market”) (emphasis supplied);
11 *Cree II*, 157 F.3d at 769 (affirming the *Flores* district court’s finding that
12 Article III “must be interpreted to guarantee the Yakamas the right to transport
13 goods to market over public highways without payment of fees for use”);
14 *Salton Sea Venture, Inc. v. Ramsey*, 2011 WL 4945072 at *7 (S.D. Cal. 2011)
15 (finding California state fuel tax imposed upon entry into the state “constitutes
16 a restriction on the Yakama’s transportation of fuel into California and
17 violates the Yakama’s rights under the Treaty of 1855”).

18 In *Smiskin*, enrolled members of the Yakama Tribe were prosecuted for
19 allegedly violating the Federal Contraband Cigarette Trafficking Act by
20 possessing and transporting unstamped cigarettes into the State of Washington
21 without first giving it “pre-notification” as required under state law. *Smiskin*,
22 487 F.3d at 1262. The Court held that Article III of the Treaty preempted the
23 State of Washington from requiring the Smiskins to give notice before
24 transporting these unstamped cigarettes. *Id.* at 1266. The Court’s rationale
25 and ultimate holding is particularly instructive in this case.

1 In throwing out the convictions, the Ninth Circuit reaffirmed that the
2 “Right to Travel” provision of Article III was of “tremendous importance to
3 the Yakama Nation when the Treaty was signed” because “the Yakamas
4 exercised free and open access to transport goods as a central part of a trading
5 network running from the Western Coastal tribes to the Eastern Plains tribes.”
6 *Smiskin*, 487 F.3d at 1265. At the time of the Treaty, the federal government
7 was aware of the Yakamas being “inveterate traders,” *Flores*, 955 F. Supp. at
8 1238, and “thus repeatedly emphasized in negotiations that tribal members
9 would retain the ‘same liberties to go on the roads to market,’” *Smiskin*, 487
10 F.3d at 1265 (*quoting Flores*, 955 F. Supp. at 1244, 1247). Furthermore,
11 “[t]he United States also promised the Yakamas that they could rely on “all
12 the Treaty's provisions being carried out strictly.” *Smiskin*, 487 F.3d at 1265
13 (*quoting Cree II*, 157 F.3d at 767). Consequently, “both parties to the treaty
14 expressly intended that the Yakamas would retain their right to travel outside
15 reservation boundaries, *with no conditions attached*.” *Smiskin*, 487 F.3d at
16 1266 (*quoting Flores*, 955 F. Supp. at 1251).

17 *Smiskin* also confirmed that trading endeavors engaged in by the
18 Yakama were inextricably connected to the right to travel and that both were
19 beyond the reach of the State. In this regard, the Court observed that the
20 Yakamas understood that the Treaty to “unambiguously reserve to them the
21 right to travel the public highways *without restriction* for purposes of hauling
22 goods to market.” *Smiskin*, 487 F.3d at 1266 (*quoting Flores*, 955 F. Supp. at
23 1248) (emphasis in original). The court further emphasized the inextricably
24 linked nature of travel and trade when it observed that “the Treaty was clearly
25 intended to reserve the Yakamas' right to travel on the public highways to
26

engage in *future* trading endeavors.” *Smiskin*, 487 F.3d at 1266 (*quoting Flores*, 487 F.3d at 1253) (emphasis in original). Finally, the Court underscored the connection between unrestricted travel and trade when it held:

we refuse to draw what would amount to an arbitrary line between travel and trade in this context, holding, as the Government suggests, that the Yakama Treaty does not protect the “commerce” at issue in the *Smiskins'* case. We have already established that the Right to Travel provision “guarantee[s] the Yakamas the right to transport goods to *market*” for “*trade* and other purposes.” **Thus, whether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent.**

Smiskin, 487 F.3d at 1266-67 (emphasis supplied) (internal citations omitted). In sum, *Smiskin* holds that Article III guaranteed the Yakamas the right to travel and the right to trade in the same manner that they did at the time of the Treaty 1855.

B. The State’s Escrow Statutes Violate Article III by Requiring Escrow Payments as a Precondition to Trade King Mountain Products in Washington State.

The State Escrow Statutes violate Article III because they impose significant preconditions and economic impediments on King Mountain’s right to trade its King Mountain products in Washington State. In fact, Defendant’s designated enforcement and compliance official admits that the preconditions are mandatory requirements for King Mountain’s exercise of its Article III rights. (SOF ¶¶ 135-145)

1 There are several preconditions that King Mountain must satisfy before
2 its products can be sold in the State of Washington. Washington State requires
3 King Mountain to be listed on the Attorney General's directory of approved
4 tobacco product manufacturers to sell its products in Washington State. RCW
5 70.158.030(3); RCW 70.158.060(3). In order to be included on the directory
6 of approved tobacco product manufacturers, the State Escrow Statutes require
7 King Mountain to: (1) make annual payments into a "qualified escrow
8 account," based on "units sold" in the State, to be held for the sole benefit of
9 the State for a period of twenty-five years, RCW 70.157.020(b)(1)-(2); and (2)
10 annually certify compliance with the annual escrow payment obligations,
11 RCW 70.157.020(b)(3); 70.158.030(1). Accordingly, King Mountain must
12 comply with the State Escrow Statutes' payment and certification
13 requirements as a precondition to selling its products in Washington State.
14 (SOF 135-153)

15 In addition to the ability to absolutely prohibit sales of King Mountain
16 products in Washington State, the State Escrow Statutes also empower the
17 State to: (1) prohibit sales of King Mountain products in Washington State; (2)
18 assess per day civil penalties up to 15% of the amount improperly withheld;
19 (3) assess civil penalties and (3) and collect attorney fees and costs, for the
20 failure to comply with the State Escrow Statutes. RCW 70.157.020 (b)(3)(A)-
21 (C). A second knowing violation of the State Escrow Statutes can result in up
22 to a two-year prohibition on sales of the tobacco product manufacturer's
23 products in the State of Washington. RCW 70.157.020(b)(3)(C).

24 These preconditions are far more onerous and restrictive than the pre-
25 notification requirement found unenforceable against Yakama tribal members
26

1 in *Smiskin* and, therefore, cannot stand. In *Smiskin*, the violative State law
 2 simply required that individuals “give notice” before transporting unstamped
 3 cigarettes into Washington State. 487 F.3d at 1262. According to the Ninth
 4 Circuit that “notice” requirement alone violated the Yakamas’ Treaty-
 5 protected right to travel and trade without restriction. *Smiskin*, 487 F.3d at
 6 1264, 1266-67. The fact that the notice requirement did not impose a fee was
 7 of no consequence, the “pre-notification requirement is a ‘restriction’ and
 8 ‘condition’ on the right to travel that violates the Yakama Treaty.” *Smiskin*,
 9 487 F.3d at 1266. Article III was further understood by the Yakama as
 10 preserving their traditional rights to travel and trade. (SOF ¶ 14-16, 18, 61.);
 11 *see also Smiskin*, 487 F.3d at 1265 (noting that Yakama “understood the
 12 Treaty to grant them valuable rights that would permit them to *continue in*
 13 *their ways*”) (emphasis supplied).

14 Here, in order to travel and trade its goods in the State of Washington,
 15 King Mountain must comply with the State-imposed reporting and payment
 16 requirements. These requirements indisputably impose restrictions and
 17 conditions on King Mountain’s right to travel that far exceed the pre-
 18 notification requirement in *Smiskin*, and thus violate the Treaty of 1855.
 19 Accordingly, the State Escrow Statutes’ requirements cannot be enforced
 20 against King Mountain as a matter of law.⁴

21 ⁴ It is important to note that the Ninth Circuit did not invalidate Washington’s
 22 pre-notification requirement, rather it held that the otherwise valid requirement
 23 could not be enforced against a Yakama member because it violated the
 24 Treaty-guaranteed right to trade and travel without restriction. *Smiskin*, 487
 25 F.3d at 1264. Likewise, here Plaintiffs seek only recognition that this same
 26 “carve-out” exception would apply in this context, because the State Escrow
 Statutes violate King Mountain’s Treaty-guaranteed rights, and accordingly
 the Escrow Statutes cannot be enforced against King Mountain.

1 **IV. Washington State Has Acknowledged That King Mountain**
 2 **Products are State-Tax Exempt. Therefore, The Sales of King**
 3 **Mountain Products Are Not Subject To State Escrow Obligations.**

4 In addition to the Treaty protections exempting King Mountain from
 5 State Escrow obligations, it is also exempt from State Escrow obligations for
 6 its on-reservation sales based on the State's determination that these sales are
 7 not taxable. According to the State Escrow Statutes, the required Escrow
 8 payment is based on the number of "units sold" as defined by the State Escrow
 9 Statutes. RCW 70.157.020(b)(1). The State Escrow Statutes define "units
 10 sold" as:

11 [T]he number of individual cigarettes sold in the State by
 12 the applicable tobacco manufacturer (whether directly or
 13 through a distributor, retailer or similar intermediary or
 14 intermediaries) during the year in question, **as measured**
 15 **by excise taxes collected by the State** on packs bearing
 16 the excise tax stamp of the State or "roll-your-own"
 17 tobacco containers. The department of revenue shall
 18 promulgate such regulations as necessary to ascertain the
 19 amount of State excise tax paid on cigarettes of such
 20 tobacco product manufacturer for each year.

21 RCW 70.157.010(j) (emphasis added).

22 The statutory "units sold" definition vests significant power in the
 23 Washington Department of Revenue ("Department of Revenue") for
 24 determining an NPM's State Escrow obligation. This power is both direct and
 25 indirect. First, the Department of Revenue is tasked with "promulgat[ing]
 26 such regulations as necessary to ascertain the amount of State excise tax paid
 on cigarettes of such tobacco product manufacturer for each year." See RCW
 70.157.010(j). Second, the Department of Revenue has the authority to
 determine whether a particular party must pay excise taxes, specifically excise

1 taxes related to the sale of cigarettes (“determination authority”). RCW
2 82.01.060(1); WAC 458-20-264.

3 The Department of Revenue’s power is particularly apparent in the
4 context of the sales of tobacco products by Indians and Indian Tribes. The
5 State’s compacting power allows it to expressly exempt subject sales and
6 products from the State Escrow obligation, because sales by Compacting
7 Tribes and retailers are not “escrowing events.” (SOF ¶¶ 163-164, 175-176)
8 Put simply, these sales are not subject to State excise taxes and therefore do
9 not meet the statutory and regulatory definition of “units sold.”

10 A July 21, 2004 document titled “MSA and NPM Issues/Policy Points
11 of View and Facts,” (“State’s MSA Memorandum”) and produced by the
12 Defendant in discovery, demonstrates the State’s acknowledgement of several
13 specific issues related to imposing the State Escrow obligation on Indians and
14 Indian Tribes. (SOF ¶¶ 177-181) Importantly, the State’s MSA Memorandum
15 expressly acknowledges that the “Tribes are not part of the MSA settlement
16 and were not at the table.” In addition, the State’s MSA Memorandum
17 discusses that the State Escrow obligation is based on state excise taxes
18 collected and that the tax imposed by a Tribe “cannot be fairly characterized as
19 a state tax.” (SOF ¶179.) The implication of this acknowledgment is that the
20 cigarettes sold with a Tribe tax stamp are not “units sold” and therefore not
21 subject to the State Escrow obligation. As such, the State understands that
22 through entering into compacts with the Tribes, the State effectively exempts
23 sales from the State Escrow obligation.

24 Just as the sales by compacting Tribes are not subject to excise tax, and
25 therefore not subject to the State Escrow obligation, King Mountain products
26

1 are also not subject to excise tax or the State Escrow obligation. The
 2 compacting authority is not the only power the State has with regard to
 3 exempting payments otherwise required under the State Escrow statute. As
 4 noted above, the Department of Revenue has the authority to determine
 5 whether a particular party must pay excise taxes, specifically excise taxes
 6 related to the sale of cigarettes (“determination authority”). RCW
 7 82.01.060(1); WAC 458-20-264. The Department of Revenue exercises its
 8 determination authority by providing rulings on whether an individual or
 9 entity must pay taxes. WAC 458-20-100. When the Department of Revenue
 10 makes a ruling, the ruling “is binding upon both the taxpayer **and the**
 11 **department** under the facts stated in the ruling.” (WAC 458-20-100(2)(b)
 12 (emphasis added); *see also* SOF ¶ 165.)

13 On August 15, 2007, Leslie Cushman, Deputy Director & Tribal
 14 Liaison for the Department of Revenue, issued a ruling (“DOR Ruling”) as it
 15 relates to the King Mountain product and the inapplicability of state taxes to
 16 that product. (SOF ¶ 166-170 (DOR Ruling).) Specifically, the DOR Ruling
 17 concluded that the manufacture and sale of cigarettes manufactured on trust
 18 land within the boundaries of the Yakama reservation are “**not subject to**
 19 **state manufacturing or business and occupation tax, state and local sales**
 20 **and use tax, or state cigarette tax**.” (SOF ¶ 168 (emphasis added).)
 21 Additionally, the DOR Ruling held that King Mountain is not required to
 22 collect state or local sales taxes or affix state cigarette stamps to its products
 23 that it manufactures and sells within the reservation to non-Indians **and**
 24 nonmembers. (SOF ¶ 168.)

25 Both King Mountain and the Department of Revenue have interpreted
 26

1 the DOR Ruling to hold that King Mountain product is “completely state-tax
2 exempt.” (SOF ¶ 169.) Accordingly, because King Mountain conducts its
3 business on the reservation and sells its products to third parties at that location,
4 the products do not fit the definition of “Units sold,” and are therefore not
5 subject to the State Escrow Statutes.

6 While not expressly decided as it relates to Article II and Article III of
7 the Treaty, the DOR ruling nonetheless acknowledges the limitation on the
8 State’s authority to impose restrictions on King Mountain’s trade of its
9 Yakama-reservation produced product. Furthermore, to the extent that the
10 DOR views the State Escrow payments as a tax,⁵ the DOR Ruling
11 acknowledges that King Mountain products are not subject to the “tax.”

12 Additionally, construing the escrow payments as a tax would make
13 King Mountain exempt from the tax obligation because the legal incidence of
14 such tax can not be imposed directly on King Mountain for activities within
15 the boundaries of the Yakama Reservation. *See Montana v. Blackfeet Tribe*,
16 471 U.S. 759, 764 (1985); *see also Oklahoma Tax Comm’n v. Chickasaw*
17 *Nation*, 515 U.S. 450, 453 (1995); *County of Yakima v. Confederated Tribes &*
18 *Bands of Yakima Nation*, 502 U.S. 251, 258 (1992) (“a State is without power
19 to tax reservation lands and reservation Indians”); *Bryan v. Itasca County*,
20 426 U.S. 373 (1976) (prohibition of tax on Indian-owned personal property
21 situated in Indian country); *McClanahan v. State Tax Comm’n of Arizona*, 411
22 U.S. 164, 165-66 (1973) (prohibition of tax on income earned on reservation

23
24 ⁵ The State regulation promulgated under the State Escrow Statutes is included
25 in Chapter 458-20 under the Department of Revenue “Excise Tax Rules.” *See*
26 WAC 458-20-264. WAC 458-20-264 includes several definitions, including a
definition for “Units sold.” WAC 458-20-264(2)(h).

1 by tribal members residing on reservation). Accordingly, as acknowledged by
2 the DOR Ruling, to the extent the mandated State Escrow payment is a tax,
3 King Mountain is exempt from payment of the tax.

4 5 CONCLUSION

6 Based on the foregoing, Plaintiffs are entitled to judgment as a matter of
7 law, that the State Escrow Statutes, RCW 70.157, and RCW 70.158, violate
8 Article II and Article III of the Treaty of 1855. Accordingly, these statutes
9 may not be enforced against King Mountain in the State of Washington.
10 Furthermore, the State is prohibited from barring the sale of King Mountain
11 products in the State of Washington.

1 DATED this 9th day of November 2012.

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3 K&L GATES LLP

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5
6 By /s/ J. Michael Keyes
J. Michael Keyes
7 Email: mike.keyes@klgates.com
Theresa L. Keyes
8 Email: Theresa.keyes@klgates.com
Brian P. McClatchey
9 Email: brian.mcclatchey@klgates.com
K&L GATES LLP
10 618 West Riverside Avenue, #300
Telephone: 509-575-0372
11 Spokane, WA 99201-0602
Telephone: 509-624-2100
12 Facsimile: 509-456-0146

13
14 By: s/ Irwin H. Schwartz
Irwin H. Schwartz
15 710 Cherry Street
Seattle, WA 98104
16 Telephone: 206-623-5084
Facsimile: 206-623-5951
17 Email: Irwin@ihschwartz.com

By: s/ Adam Moore
Adam Moore
Email: mooreadamlawfirm@qwestoffice.net
Adam Moore Law Firm
217 N. Second St.
Yakima, WA 98901
Facsimile: 509-452-6771

18 Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

David M. Hankins, Email: david.hankins@atg.wa.gov
Rene D. Tomisser, Email: renet@atg.wa.gov
Joshua Weissman, Email: joshuaw@atg.wa.gov
Attorneys for Defendants

By s/ J. Michael Keyes
J. Michael Keyes
mike.keyes@klgates.com
618 West Riverside Avenue, #300
Spokane, WA 99201-0602
Attorneys for Plaintiffs