David Hankins
Senior Counsel
Joshua Weissman
Assistant Attorney General
Rene D. Tomisser
Senior Counsel
P.O. Box 40123
Olympia, WA 98504-0123
(360) 664-9426

The Honorable Lonny R. Suko

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 AMENDED MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Washington law unequivocally requires tobacco product manufacturer King Mountain Tobacco to either (1) join the 1998 Master Settlement Agreement between 46 states and tobacco product manufacturers or (2) deposit

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

funds into escrow that the State would obtain access to in the event of a future settlement or judgment against King Mountain. After certifying its escrow obligation and generally complying with the escrow requirement for several years, King Mountain, a corporation owned by a member of the Yakama Nation Tribe, now denies its obligations under State law. It asserts that the Yakama Nation's 1855 Treaty prohibits Washington State from enforcing non-discriminatory state law over the company's vast operations that reach throughout Washington and into numerous other states. But King Mountain's claim contradicts long-established United States Supreme Court law: "Absent *express* federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (emphasis added). Treaty rights allowing the Yakamas to travel and use their land are not express exemptions from non-discriminatory Washington regulation of tobacco products. We ask the Court to grant the Attorney General summary judgment on all of Plaintiffs' Claims.

II. THE TOBACCO SETTLEMENT AND RELATED LAWS

The landscape of cigarette regulation changed in the late 1990s, and it is helpful to review that regulatory scheme before addressing the claims in this case.

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

A. The Master Settlement Agreement

In the mid-1990s, Washington and several other states sued cigarette manufacturers, seeking to protect public health and recover costs and other damages incurred by the states due to smoking-related disease. Master Settlement Agreement (Doc. # 1-6 at 210). In November 1998, 46 states, the District of Columbia, and five United States territories settled with the four dominant cigarette manufacturers (Original Participating Manufacturers), creating a Master Settlement Agreement (MSA).

The Supreme Court described the MSA as a "landmark" public health agreement. *Lorillard Tobacco Corp. v. Reilly,* 533 U.S. 525, 533 (2001). The court has also described cigarette smoking as "one of the most troubling public health problems facing the Nation today: the thousands of premature deaths that occur each year because of tobacco use." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 125 (2000).

Pursuant to the MSA, the Original Participating Manufacturers obtained release of specified past and future tobacco-related claims against them in exchange for an agreement to make substantial annual cash payments to the states in perpetuity to offset the burden that their cigarettes impose on the public health system. MSA (Doc. # 1-6 at 210, 238). The payments compensate the states for expenses they incur as the payers of last resort for health care costs of citizens who suffer smoking-related illnesses. *See Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169-70 (2d. Cir. 2005).

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

The MSA contemplates three different groups of manufacturers: the Original Participating Manufacturers, Subsequent Participating Manufacturers, and Non-Participating Manufacturers. MSA (Doc. # 1-6 at 214, 217, 218). Original Participating Manufacturers (OPMs) are the four dominant manufacturers who initially executed the MSA. MSA (Doc. # 1-6 at 214). Subsequent Participating Manufacturers (SPMs) include manufacturers who joined the MSA after its original execution. (Doc. # 1-6 at 217-18); *see also Freedom Holdings, Inc. v. Cuomo,* 624 F.3d 38, 42 (2d. Cir. 2010) (discussing the MSA and its history). Non-Participating Manufacturers (NPMs) are those who have not joined the MSA, though they may choose to do so at any time. *Id.*

NPMs have no obligations under the MSA and are not subject to the financial obligations imposed therein. *See* Wash. Rev. Code § 70.157.005. Although the settling states preserved their past and future claims against the NPMs, the states were concerned that the NPMs could escape future liability for smoking-related claims through financial management that rendered these manufacturers judgment proof. *See Omaha Tribe of Nebraska v. Miller,* 311 F. Supp. 2d 816, 818 (S.D. Iowa 2004). The states were also concerned that NPMs would benefit from declining to sign the MSA because they would experience lower costs and increased market share. *Id.* As a result, the MSA encouraged participating states to enact a Qualifying Statute (also called a

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Model Escrow Statute) to address these concerns. *S&M Brands v. Caldwell,* 614 F.3d 172, 174 (5th Cir. 2010). The Qualifying Statute recognizes that NPMs have a cost advantage over participating manufacturers due to the participating manufacturers' obligations under the MSA. The Qualifying Statute therefore requires NPMs to either join the MSA or pay into a qualified escrow fund based on the amount of their cigarette sales. All 46 states have enacted a Qualifying Statute. States also enacted complementary statutes to assist in the enforcement of the qualifying statutes.

These qualifying and complementary statutes have faced legal challenges under numerous theories, but courts have consistently held such statutes to be constitutional. *Grand Rivers Enterprises Six Nations Ltd. v. Beebe*, 574 F.3d 929 (8th Cir. 2009) (Arkansas escrow requirement does not violate Sherman Act, commerce clause, equal protection clause, procedural due process, or free speech rights); *KT&G Corp. v. Atty. General of the State of Oklahoma*, 535 F.3d 1114 (8th Cir. 2008) (changes to Kansas and Oklahoma escrow requirements do not violate Sherman Act, free speech, equal protection, procedural due process, or commerce clause); *Oregon v. Maybee*, 232 P.3d 970 (Or. App. 2010) (Oregon's complementary statute does not violate dormant commerce clause); *Oklahoma v. Native Wholesale Supply*, 237 P.3d 199 (Okla. 2010) (enforcement of Oklahoma complementary statute against cigarette importer and distributor owned by Indian member did not violate Indian

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Commerce Clause); *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002) (Virginia escrow requirement did not violate due process, equal protection, or commerce clauses, nor did the master settlement agreement encroach upon federal supremacy in violation of the Compact Clause).

B. Washington's Qualifying Statute – Reserve Fund And Escrow Requirements.

The Washington Legislature, like the legislatures of the other settling states, adopted a Qualifying Statute. *See* Wash. Rev. Code § 70.157.005. In its findings, the Legislature expressly recognized the need to establish a reserve fund to cover the potential liability of NPMs:

> It would be contrary to the policy of the State if tobacco product manufacturers who determine not to enter into [the MSA] could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise *without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably*. It is thus in the interest of the State to require that such manufacturers *establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise*.

Wash. Rev. Code § 70.157.005(f) (emphasis added).

Washington's Qualifying Statute requires all NPMs to make payments into qualified escrow accounts or join the MSA. The amount to be deposited is calculated based on "units sold," which is "the number of individual cigarettes sold *in the State* by the applicable tobacco product manufacturer [whether directly or through a distributor, retailer or similar intermediary or

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

intermediaries] during the year in question, as measured by excise taxes collected by the State on packs bearing the excise tax stamp of the State or 'roll-your-own' tobacco containers." Wash. Rev. Code § 70.157.010(j) -.020(b) (emphasis added). Thus, NPMs are required to make escrow payments for only those cigarettes or roll-your-own containers that are subject to Washington's cigarette tax. Because state cigarette taxes are generally required for sales made to non-members (as further explained below), regardless whether the sales are made off-reservation or on-reservation, Washington requires that escrow payments be made on those "units sold" according to the Qualifying Statute.

The escrow requirement works differently than the State's cigarette taxes. The State obtains access to escrow funds only under certain conditions; otherwise, the funds revert to the tobacco product manufacturer. The financial institution holding the escrow funds may release the funds only (1) to pay a judgment or settlement of a qualifying claim (i.e., state or consumer sues manufacturer for damages due to smoking), (2) to reimburse the manufacturer for amounts above what the NPM would have had to pay had it been a Participating Manufacturer, or (3) to return the escrow funds to the manufacturer 25 years after they were placed into the escrow fund. Wash. Rev. Code § 70.157.020(2). In addition, the manufacturer receives any interest earned on the account on an ongoing basis. *Id.*

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

The Washington Attorney General enforces the Qualifying Statute and must bring a civil action against any NPM that fails to certify compliance with the statute. Wash. Rev. Code § 70.157.020(3). Upon a finding of a second knowing violation of the Qualifying Statute, a court may prohibit the manufacturer from selling cigarettes in Washington (either directly or through a distributor) for a period of two years. *Id.*

C. Washington's Cigarette Tax

Washington cigarette taxes are not at issue in this case, but a short explanation provides the context for the escrow requirement. Washington levies a general excise tax on "the sale, use, consumption, handling, possession, or distribution of all cigarettes." Wash. Rev. Code § 82.24.020. In order to enforce collection of the cigarette tax, "stamps must be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed . . ." Wash. Rev. Code § 82.24.030. Generally, only a wholesaler may affix the stamps. Wash. Rev. Code § 82.24.030(2). Washington also imposes a business and occupation tax on wholesale and retail sales for the privilege of doing business in Washington, and a tax on manufacturers. Wash. Rev. Code § 82.04.220 (business and occupation tax on businesses engaging in sales); Wash. Rev. Code § 82.04.240 (business and occupation tax on manufacturers).

The cigarette tax statutes provide several exemptions for certain entities and persons. For example, Wash. Rev. Code § 82.24.020(4) allows enrolled

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

members of federally recognized Indian tribes to "purchase cigarettes from an Indian tribal jurisdiction of the member's tribe for the member's own use exempt from the applicable taxes imposed by this chapter." Wash. Rev. Code § 82.24.250 allows Indian tribal organizations to possess unstamped cigarettes under certain conditions. Washington law also exempts certain notice, stamping, and cigarette tax requirements for Indian tribes that have compacts with the State under Wash. Rev. Code § 43.06.455. Wash. Rev. Code § 82.24.295.

D. Washington's Complementary Statute – Certification and Directory.

In 2003, the Legislature enacted Wash. Rev. Code § 70.158 (the Complementary Statute) to aid the enforcement of Wash. Rev. Code § 70.157.020 (including the escrow requirement). Wash. Rev. Code § 70.158.010. The Complementary Statute requires a manufacturer whose cigarettes are sold in this state, whether directly or through a subsequent seller, to certify to the Washington Attorney General that it is either a participating manufacturer under the MSA or that it is in full compliance with the escrow requirements set forth in Wash. Rev. Code § 70.157. Wash. Rev. Code § 70.158.030. The State's Attorney General is directed to publish on its website a list of manufacturers and cigarette brand families that meet the Complementary Statute enforcement requirements. Wash. Rev. Code § 70.158.030(2). In addition, Wash. Rev. Code § 70.158.030(3) makes it unlawful for any person to

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

stamp, sell, offer, or possess cigarettes of a manufacturer or brand family that has not been certified. Finally, the statute imposes civil penalties on manufacturers that fail to comply. Wash. Rev. Code § 70.158.060 and .070.

III. KING MOUNTAIN BACKGROUND

The Yakama Nation is a federally recognized Indian tribe located in Washington.[1] Complaint at ¶ 2.2. King Mountain is a tobacco product manufacturer, owned by Delbert Wheeler, a Yakama Nation member. Complaint at ¶ 3.5; Hankins Dec. Ex. 1-2 (Williams Dep. Ex. 15). Mountain Tobacco Distributing, Inc. is King Mountain's sister company, and distributes King Mountain cigarettes to distributors outside the Yakama reservation but within Washington. Hankins Dec. Ex. 3 (Goudy Dep. at 22-23). Many of the same individuals operate both entities. Hankins Dec. Ex. 4.

King Mountain, which was conceived by Wheeler, engages in an expansive, multistate business growing tobacco and manufacturing cigarettes and roll-your-own tobacco. Hankins Dec. Ex. 5 (Wheeler Dep. at 25, 27-30, 47); Williams Dec. Ex. 1; Hankins Dec. Ex. 6 (Aburto Dep. at 33-36, 62, 64).

King Mountain was incorporated in 2005. Hankins Dec. Ex. 2. King Mountain obtained a federal permit from the Alcohol and Tobacco Tax and

---

[1] The Yakama Nation is a plaintiff in this lawsuit but is not a tobacco product manufacturer subject to the regulatory scheme at issue in this case. It apparently joined the suit due to its interest in the Treaty.

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Trade Bureau in 2006 to manufacture cigarettes. Williams Dec. Ex. 2. In its early years, [redacted] Hankins Dec. Ex. 5 (Wheeler Dep. at 25); Hankins Dec. Ex. 6 (Aburto Dep. at 64). [redacted] Hankins Dec. Exs. 6-7 (Aburto Dep. at 45; Ex. 40). Although wild tobacco has been growing in the Americas for thousands of years, King Mountain's farming consultant and blending expert, [redacted] Hankins Dec. Ex. 6 (Aburto Dep. at 44-46). [redacted] Hankins Dec. Ex. 6 (Aburto Dep. at 44). [redacted] Hankins Dec. Ex. 6 (Aburto Dep. at 49); Hankins Dec. Exs. 5 and 8 (Wheeler Dep. at 23, Ex. 2).

[redacted] Hankins Dec. Ex. 6 (Aburto Dep. at 33-34). [redacted] Hankins Dec. Exs. 6 and 9 (Aburto Dep. at 41, 43, 47, 48; Ex. 39 Declaration of Jaime Aburto Garcia at ¶ 21-23). [redacted] Hankins Dec. Ex. 6 (Aburto Dep. at

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

62). [redacted] Hankins Dec. Ex. 5 (Wheeler Dep. at 47); Hankins Dec. Ex. 6 (Aburto Dep. at 62).

[redacted] Hankins Dec. Ex. 5 (Wheeler Dep. at 27, 34-35); Hankins Dec. Ex. 6 (Aburto Dep. at 49, 54, 64). [redacted] Hankins Dec. Ex. 6 (Aburto Depo. at 62, 34-37). With the exception of a subsequent Native American ceremony, also referred to as "blending," [redacted] *See* Hankins Dec. Ex. 6 (Aburto Dep. at 36, 61; 67); Hankins Dec. Ex. 5 (Wheeler Dep. at 68). [redacted] Hankins Dec. Exs.6-7 (Aburto Dep. Ex. 40); Hankins Dec. Ex. 5 (Wheeler Dep. at 27). [redacted] *Id.* [redacted] Hankins Dec. Ex. 5 (Wheeler Dep. at 70). [redacted] *See* Hankins Dec. Ex. 5 (Wheeler Dep. at 57).

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

King Mountain and its distributor, Mountain Tobacco, sell the cigarettes to distributors throughout Washington and in approximately 16 other states. Complaint, Att. F at 2; Williams Dec. Ex. 1 (2011 Certification of Enrollment). [redacted] Hankins Dec. Ex. 3 (Goudy Dep. at 22-23; 32). [redacted] Hankins Dec. Ex. 3 (Goudy Dep. at 32). King Mountain advertises its products at trade shows in multiple states, as well as through the Internet. Hankins Dec. Exs. 3 and 10 (Goudy Dep. at 66, 68-70, Ex. 38).

In 2007, King Mountain applied for certification that it met the requirements of a tobacco product manufacturer under Washington's Qualifying and Complementary Statutes. Hankins Dec. Exs. 1 and 12 (Williams Dep. Ex. 6). Washington provided King Mountain certification instructions and a quarterly escrow payment form for King Mountain to report details relating to deposits into the escrow account. Hankins Dec. Exs. 1, 12, and 13 (Williams Dep. Exs. 7 and 8). Owner and sole shareholder Delbert Wheeler certified under oath that:

> King Mountain is a corporation formed pursuant to the laws of the Yakama Nation Revised Law and Order Code as of September 29, 2004. King Mountain is located on the Yakama Reservation and within the geographic boundaries of the State of Washington. King Mountain operates as a Non-Participating Manufacturer, as defined in the Master Settlement Agreement dated November 23, 1998 ("MSA").

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Hankins Dec. Ex. 14 (Williams Dep. Ex. 13). Pursuant to the requirements of the Complementary Statute, the Attorney General certified King Mountain to sell cigarettes in Washington, and notified King Mountain that "King Mountain will be required to escrow for all sales off the reservation, including sales to non-compact tribes." Hankins Dec. Ex. 15 (Williams Dep. Ex. 17).

King Mountain has generally acknowledged its escrow requirement in other states as well. For example, King Mountain informed New Mexico that

> Sales to non-native consumers outside of Indian country are escrow events and King Mountain fully intends to comply with all applicable laws and regulations related to any such sales.

Hankins Dec. Ex. 16 (Wheeler Dep. Ex. 17). King Mountain has even advertised its MSA compliance in certain states, for example, by placing the statement "MSA compliant" on bags of its roll-your-own tobacco. Williams Dec. Ex. 3 (Letter dated September 17, 2008).[2]

Each year, King Mountain certifies under the penalty of perjury it is a tobacco product manufacturer in full compliance with Wash. Rev. Code § 70.157. Williams Dec. Ex. 1. These certifications include King Mountain's "units sold" from the preceding year and current year. *Id.* [redacted] *Id.* King Mountain deposits funds into

---

[2] Despite a Treaty claim in New York, King Mountain has agreed to cease selling unstamped cigarettes in that State. Hankins Dec. Ex. 17 (Stipulated Consent Order *City of New York v. King Mountain, et al.*).

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

its escrow account and reports these deposits to Washington on a quarterly and annual basis. Williams Dec. Ex. 4 (Quarterly and Annual Escrow Payment forms 2007-2011). These escrow reports include units sold on a quarterly basis. *Id*. To report the number of units sold to Washington, King Mountain assembles information from its own records and from its various distributors. Hankins Dec. Ex. 18 (King Mountain Sales Summaries 2007-2011).

Recently, King Mountain has taken a new position in Washington that it has no obligation to comply with Washington law. King Mountain filed a Complaint against Attorney General Rob McKenna seeking a declaration from this Court (1) that King Mountain need not comply with Washington's Escrow Statute, (2) that previously deposited escrow funds must be returned to King Mountain, and (3) that King Mountain must be listed as an approved manufacturer and permitted to sell cigarettes and roll-your-own tobacco in Washington without complying with the Escrow Statute. First Amended Complaint at 13-14. King Mountain's First Claim asserts its 1855 Treaty and other (unspecified) federal law conflicts with Washington law. First Amended Complaint at ¶ 4.1-4.5. Similarly, in its Second Claim, King Mountain asserts that the Treaty and (unspecified) federal law preempts state law. First Amended Complaint at ¶ 4.6-4.8. The Yakama Nation is a plaintiff but appears to have no separate claims.

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

IV. ARGUMENT

King Mountain meets the definition of a tobacco product manufacturer under Washington law and therefore must comply with the requirements of Washington law when selling tobacco into the state. No express federal law conflicts with Washington's regulatory authority. And even if the 1855 Treaty conflicted with Washington law, the state law in question is purely regulatory and validly applies outside reservation boundaries.

A. King Mountain Is A Tobacco Product Manufacturer Selling Cigarettes To Consumers Within This State And Is Therefore Subject To Washington's Qualifying Statute.

The Qualifying Statute requires all tobacco product manufacturers selling cigarettes to consumers within this State, "whether directly or through a distributor" to either (1) "become a participating manufacturer" and perform their obligations under the Master Settlement Agreement or (2) place specified amounts into a qualified escrow fund. Wash. Rev. Code § 70.157.020. King Mountain acknowledges it is a tobacco product manufacturer. Williams Depo. Ex. 13. It is also undisputed that it sells cigarettes, through intermediaries, to consumers within Washington's geographical boundaries. Williams Dec. Ex. 1 and 4. King Mountain applied for and was certified as a tobacco product manufacturer. Williams Depo Ex.13, 17. Accordingly, Washington law unequivocally requires King Mountain to either join the Master Settlement Agreement or deposit into an escrow fund with a qualified financial institution.

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

King Mountain has generally complied with this escrow requirement, but now alleges this non-discriminatory law is invalid as applied to King Mountain and the Yakamas. King Mountain's sole argument rests on a novel and expansive interpretation of the "travel" and "exclusive use and benefit" provisions of the 1855 Treaty. These claims fail as a matter of law for the reasons below.

B. The Right to Travel Does Not Invalidate The Escrow Requirement In The Qualifying Statute.

The first Treaty clause at issue assures the Yakamas "the right, in common with citizens of the United States, to *travel upon all public highways*." Treaty with the Yakamas, Art. III, 12 Stat. 951, 953 (1855) (emphasis added). Relying on this provision, King Mountain makes the sweeping claim that any "economic restriction," which apparently includes non-discriminatory state regulation of commercial activity largely taking place off-reservation, is invalid under its treaty. No authority supports this position. Because no genuine issue exists as to any material fact and the Attorney General is entitled to judgment as a matter of law, the Court should grant summary judgment to the Attorney General. FRCP 56(c).

"Absent *express* federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (emphasis added). *Mescalero*

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

involved application of New Mexico's state gross receipts tax on the Mescalero Apache Tribe's ski resort operations occurring off-reservation on land leased from the federal government. *Mescalero*, 411 U.S. at 146. The Court rejected the tribe's argument that federal law prohibited the state's efforts to tax:

> This Court has repeatedly said that tax exemptions are not granted by implication . . . It has applied that rule to taxing acts affecting Indians as to all others . . . If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences.

Mescalero, 411 U.S. at 156 (*quoting Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606-07 (1943)).

The principle in *Mescalero* applies equally to King Mountain. King Mountain's operations plainly involve extensive off-reservation activity. [redacted] As a result, King Mountain has the burden to show express federal law exempting its business from state regulation. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160 (1980) (holding that the Tribes,

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

rather than the State, have the burden to show state recordkeeping requirements are invalid).

Relying on *Mescalero*, the Eastern District of Oklahoma rejected similar claims to those raised in this case. The court upheld imposition of the MSA escrow requirement and certain state cigarette taxes on a tribal manufacturer, reasoning that "pursuant to *Mescalero*, even if a cigarette manufacturer is a tribal nation, it is subject to State regulation and taxation when the cigarettes leave the manufacturing Nation's Indian country." *Muscogee Creek Nation v. Henry*, No. CIV-10-019-JHP, 2010 WL 8917011 at *9 (E.D. Okla. Dec. 30, 2010) (to be reported in __ F. Supp. 2d __). The court also reasoned that *Mescalero* controlled the challenge to the escrow requirement: "*Precedent also makes it clear* that Indian tribes going beyond their Indian Country boundaries are subject to non-discriminatory state laws, *such as the challenged escrow statutes*." *Id.* at *10 (emphasis added). The court also confronted and rejected treaty claims: "[N]otwithstanding the broad language in Article 4 of the Muscogee (Creek)'s 1856 treaty and the continued status of certain tribal lands as 'Indian country,' tribal cigarette sales to nonmembers are subject to the same rules of state taxation and regulation that apply to other tribes." *Id.* at 10 (quoting *Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 985-87 (10th Cir. 1987)).

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

The sole law relied on by King Mountain to prove an exemption from state law is its 1855 Treaty. Even though King Mountain may assert a trading right in addition to its travel right, the Treaty clause at issue assures the Yakamas "the right, in common with citizens of the United States, to *travel upon all public highways*." Treaty with the Yakamas, Art. III, 12 Stat. 951, 953 (1855) (emphasis added).

The interpretation of treaty provisions is a matter of law within the domain of the court. *See Sioux Tribe v. United States,* 500 F.2d 458, 462 (1974); *United States ex rel. Chunie v. Ringrose,* 788 F.2d 638, 643 n. 2 (9th Cir. 1986). The Supreme Court has cautioned that "even though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language [in the treaty] that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe,* 473 U.S. 753, 774 (1985). Similarly, "[t]he canon of construction regarding the resolution of ambiguities ... does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe,* 476 U.S. 498, 506 (1986). Courts cannot, "under the guise of [liberal] interpretation ... rewrite congressional acts [*e.g.,* treaties] so as to mean something they obviously were not intended to mean." *Confederated Bands of Ute Indians v. United States,* 330 U.S. 169, 179 (1947) (citations omitted).

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

"[E]ven Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 432 (1943) (citations omitted).

The liberal canons of construction concerning Indian treaties also do not necessarily apply to conduct reaching outside the reservation where the State's regulatory or taxing power is concerned. In *Chickasaw Nation v. United States*, 534 U.S. 84, 94-95 (2001), a gambling tax case, the Supreme Court discussed the interplay between the liberal construction of Indian treaties and the presumption against tax exemptions. In rejecting the tribe's liberal construction argument, the Court reasoned that neither canon was determinative, but rather that the court's aim was to discern legislative intent. *Id.* This discussion cited not only federal tax cases, but also *Mescalero*, a state tax case. *Id.* at 95. Under *Chickasaw Nation*, where a state's regulatory authority conflicts with an asserted treaty right, liberal canons of construction do not necessarily apply.

The Ninth Circuit precedent King Mountain relies on is inapposite. Past cases invalidating application of state laws based on the 1855 Treaty concern fees or notice requirements related to *travel*, not regulation of an expansive interstate commercial enterprise like King Mountain. The limited body of case law that has restricted the application of Washington law in the face of the 1855

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Treaty travel right is directly related to travel, such as vehicle licensing fees and travel notice requirements. And contrary authority that has upheld laws related to travel demonstrates that even taxes or fees directly imposed on travel are valid in some instances. But none of these prior travel cases deal with regulation similar to the Qualifying Statute that regulates *the product itself*, rather than how such a product is brought to market.

The Ninth Circuit has in several cases limited application of laws directly related to the Yakamas' right to travel upon all public highways, based on the express right to travel in the Treaty. *E.g. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (state license fees for trucks traveling on public highways conflict with Treaty); *United States v. Smiskin*, 487 F.3d 1260, 1266 (9th Cir. 2007) (the federal government cannot impose criminal sanctions on tribal members for not providing notice to the State before transporting cigarettes). Other cases have held that laws did not conflict with the travel right in the Treaty. *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002) (federal heavy vehicle and fuel tax did not conflict with treaty); *United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008) (right to travel did not prohibit conviction for racketeering conspiracy to transport contraband cigarettes). But all of these cases dealt with fees, taxes, or notice requirements directly related to travel: a notice requirement for transporting cigarettes in *Smiskin* and *Fiander*, and vehicle and fuel taxes or

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

fees in *Ramsey* and *Cree*. None of the cases dealt with regulation of products that were the subject of commerce.[3]

To read *Cree* and *Smiskin* consistently with *Mescalero*, the distinction between travel and trade must have meaning. Although the 1855 Treaty includes an express right to travel, nothing in the Treaty mentions or even hints at a right to trade free from regulation when distributing cigarettes to non-members. King Mountain's reading of the Treaty is not consistent with *Mescalero*'s requirement of an "express federal law to the contrary" to create an exemption from regulation or taxation of conduct that extends beyond the reservation.

Although one of the purposes of the travel right is to take goods to market, this fundamentally differs from regulation of the product itself. Here,

---

[3] This Court should reject any suggestion by King Mountain that a passage in *Smiskin* recognizes a right to trade without any tax, fee or regulation. *See Smiskin*, 487 F.3d at 1266-68. This argument reads *Smiskin* completely out of context. The *Smiskin* court merely rejected the State's argument that because a travel notice requirement was related to commerce, it was outside the "travel" right. *See Smiskin*, 487 F.3d at 1266. The case certainly does not stand for the expansive proposition that the State cannot regulate commercial transactions outside the reservation. It merely recognized that part of the travel right exists to allow the Yakamas to bring their goods to market.

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

the State through its Qualifying and Complementary Statutes regulates tobacco and its health effects; it in no way restricts King Mountain from transporting its tobacco to market. That the trading right asserted by King Mountain is related to the actual subject of commerce rather than to travel makes the right King Mountain claims in this litigation much broader than the travel-related rights previously litigated. In essence, King Mountain asserts that, even when entering commerce outside the reservation, it should be free from regulation of commerce in any activity similar to activities it was engaged in before 1855. This claim is without support in the case law or the language of the Treaty.

King Mountain fails to meet its burden under *Mescalero* to show that *express* federal law exempts its tobacco sales from regulation under non-discriminatory state law. This Court should rule as a matter of law that the regulation of commercial conduct that extends beyond the reservation is not preempted by the treaty right to travel.

C. The Right To Exclusive Use And Benefit Of Reservation Land Does Not Invalidate The Escrow Requirement.

No authority supports King Mountain's separate contention that Article II of the 1855 Treaty prevents application of the Qualifying Statute's escrow requirement. See First Amended Complaint at ¶ 3.2-3.3; 4.1-4.5. The same principle from *Mescalero* applies to this claim. King Mountain must demonstrate that an express federal law exempts it from state law. It cannot do so.

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Article II of the Treaty states in relevant part:

> All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation: nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the Tribe and the superintendent and agent.

Nothing in this language suggests the Yakamas could set the terms of commercial transactions when they took their goods to market. *See Rice v. Rehner*, 463 U.S. 713, 733 (1983) ("Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations."). Rather, this treaty provision preserved the physical land for the Indian reservation.

King Mountain's claim is somewhat baffling. Nothing in Washington's Qualifying Statute conflicts with the Yakamas' right to use their land. The State does not seek to tax or regulate the growth or use of tobacco by Yakama people for their cultural or other personal uses. Rather, the State seeks merely to enforce its escrow requirement for retail sales to non-members, as part of a broad regulatory scheme seeking potential reimbursement for health-related illnesses. Just as a state (if not preempted) or the federal government may prohibit sales of products harmful to health within their borders, no law or treaty prevents Washington from the considerably less onerous requirement of seeking to protect itself from expenses resulting from tobacco-related illness. The Supreme Court has recognized the State's general police power to regulate

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

affairs outside the reservation, as discussed in section D below. King Mountain and the Yakamas retain the exclusive use and benefit of their land, with no infringement of their Article II treaty rights.

Because there is no case authority on this particular treaty provision, an analogy to cases concerning taxation in relation to Indian sovereignty and the Indian Commerce Clause is useful. Courts have repeatedly held that the mere fact that a regulation or tax decreases revenue for an Indian tribe does not mean the regulation or tax interferes with sovereignty rights or the Indian Commerce Clause. *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980 ("Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them,' merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving") (internal citations omitted); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 720 (9th Cir. 1986) ("a state tax or regulation is not invalid merely because it erodes a tribe's revenues, even if the tax substantially impairs the tribal government's ability to sustain itself and its programs").

King Mountain's assertion that a reduction in tribal revenues infringes its Treaty rights similarly fails. King Mountain cannot demonstrate that an express federal law exempts it from off-reservation state law. Accordingly, the Court

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

should grant the Attorney General's Motion for Summary Judgment on this claim.

D. Washington Law Validly Applies To King Mountain And The Yakamas Because The Statute Is Of A "Purely Regulatory Nature" Under *Tulee*.

Even if the Court finds that the escrow requirement in the Qualifying Statute is in conflict with the 1855 Treaty, the Court should grant summary judgment to the Attorney General. Treaties do not impair the police power of the state. *Ward v. Race Horse*, 163 U.S. 504 (1896); *People of State of New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942). Where two sovereigns are concerned, as here, the State may assert its authority under non-discriminatory state laws concerning off-reservation conduct if those laws are of a "purely regulatory nature." *See Tulee*, 315 U.S. 681, 684 (1942).

Courts have often applied this "purely regulatory" rule in the environmental field where Indians assert treaty fishing rights in areas outside the reservation. *Tulee* involved the Yakamas' right under Article III of their Treaty to fish "at all usual and accustomed places, in common with citizens of the Territory . . . ." Washington asserted a general right to regulate fishing in an area within the territory originally ceded by the Yakamas but outside the reservation. *Tulee*, 315 U.S. at 683-84. The Yakamas asserted "an unrestricted right to fish in the 'usual and accustomed places,' free from state regulation of

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

any kind." *Id*. at 684. The Court rejected both positions, holding that the State's treaty construction was too narrow, but the Yakamas' construction was too broad. *Id.* While rejecting the particular licensing fee at issue in the case because it was unnecessary to accomplish the State's regulatory purpose, the Court explained that the State had a general power to regulate fishing outside the reservation:

> [T]he treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish . . .

Tulee, 315 U.S. at 684. Subsequent cases have upheld the State's general power to regulate outside reservation borders in a non-discriminatory manner if necessary to accomplish the State's regulatory purpose. *E.g.*, *Confederated Tribes of the Colville Reservation v. Anderson*, 2011 WL 8948779 (E.D. Wa. 2011) (upholding hunting safety regulations if they meet certain requirements); *State v. Moses*, 79 Wn.2d 104 (1971) (upholding net fishing prohibition against Treaty Indians).

The same principles permitting state regulatory authority apply to King Mountain's expansive interstate business that extends far beyond the boundaries of the Yakama reservation. The broad scope of this commercial enterprise takes this conduct out of the realm of mere reservation activity.

King Mountain is likely to note that the Ninth Circuit discussed the "purely regulatory" exception in *Smiskin.* The court rejected the State's

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

argument that the state cigarette tax fell within this exception because "revenue generation is at least a significant purpose of the State's cigarette tax scheme." *See Smiskin*, 487 F.3d at 1269-1270. The court distinguished between the "regulation" in *Tulee*, and the "tax" at issue in *Smiskin*. But differences between the escrow requirement and state cigarette taxes allow the escrow requirement to fit within the "purely regulatory" rule, even if state cigarette taxes do not. Rather than being a tax, the escrow requirement is a necessary component of a broad regulatory scheme. *Oklahoma v. Native Wholesale Supply*, 237 P.3d 199, 216 (Okla. 2010) ("the underlying MSA-imposed escrow obligation of the tobacco manufacturer [is not] a tax . . ." [rather it is] "a method adopted by the State to regulate the distribution and sale of tobacco products."). The Qualifying Statute was created due to "serious public health concerns" over smoking related illness and disease, and to require that the financial burden imposed on the State from these medical conditions "be borne by tobacco product manufacturers rather than by the State to the extent that such manufacturers either determine to enter into a settlement with the State or are found culpable by the courts." Wash. Rev. Code § 70.157.005. Tobacco products threaten public health and are squarely within a State's police power to promote public health, safety, welfare and morals. *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 361 (8th Cir. 2002).

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Unlike taxpayers, who retain no rights to tax revenue collected for governmental operations, tobacco product manufacturers retain rights in the monies they escrow. The Qualifying Statute provides that tobacco product manufacturers "shall receive the interest or other appreciation" on these funds and that the escrow funds will revert back to the tobacco product manufacturers after 25 years if not necessary to satisfy a judgment or settlement due to the State. Wash. Rev. Code § 70.157.020. A financial institution, rather than the State, controls the escrow account. Wash. Rev. Code § 70.157.020; 70.157.010(f) (tobacco product manufacturer shall place money into a qualified escrow fund, defined as "an escrow arrangement with a federally or State chartered financial institution . . ."). The State is not entitled to the money unless it proves liability on the part of the tobacco product manufacturer or the manufacturer enters into a voluntary settlement. Because the tobacco product manufacturer retains rights in its deposits and the money is not transferred to the State except in the event of settlement or judgment, the escrow requirement differs from a typical tax.

The escrow requirement is also part of a broader regulatory scheme implementing the Master Settlement Agreement. For example, Washington enacted legislation to prevent the sale and advertising of cigarettes to minors. Wash Rev. Code § 70.155. An escrow requirement seeking to hold tobacco product manufacturers liable for wrongful conduct that causes illness is a

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

necessary part of that regulatory scheme. Because the Qualifying Statute is of a "purely regulatory nature," it validly applies to King Mountain and the Yakama Nation.

E. No Federal Law Preempts Washington's Qualifying Statute.

King Mountain's Second Claim is that the Treaty or "other federal law" preempts application of Washington law. The Court should grant summary judgment to the Attorney General on this claim also. The Treaty does not preempt Washington law.

General preemption standards apply to off-reservation conduct. *See In re Blue Lake Forest Prods., Inc.,* 30 F.3d 1138, 1141 & n. 6 (9th Cir.1994) (explaining that general preemption standards apply to off-reservation activities). State law is preempted if Congress' intent to preempt is (1) explicit in the federal statute's language or (2) implicit in its structure and purpose; (3) if state law actually conflicts with federal law; or (4) if federal law so thoroughly occupies the legislative field that Congress left no room for state regulation. *Quicken Loans, Inc. v. Wood*, 449 F.3d 944, 949 (9th Cir. 2006).

There is no express or implicit preemption because the Treaty does not address whether Washington law applies to Yakama sales of products entering Washington commerce. There is no field preemption because the Treaty says nothing about tobacco, and certainly does not seek to occupy the field of

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

tobacco regulation. There is no conflict between the Treaty and Washington law for the reasons described in previous sections.

King Mountain fails to reveal what "other" federal law it claims preempts Washington law. The most frequent preemption challenge to state statutes implementing the MSA appears to be under the Sherman Act. But numerous courts, including the Ninth Circuit, have held that the Sherman Act does not preempt state statutes implementing the MSA. *E.g.*, *Sanders v. Brown*, 504 F.3d 903, 910-11 (9th Cir. 2007) (California law implementing MSA not preempted by Sherman Act).

King Mountain may be alluding to the *Bracker*[4] balancing test, which applies a preemption analysis to certain on-reservation transactions involving non-members. That issue is addressed below.

F. Whether King Mountain Cigarettes Are Ultimately Delivered To Consumers On Or Off The Yakama Reservation Makes No Difference.

King Mountain may argue that different legal principles apply to that portion of cigarettes that are ultimately sold by tribal retailers on the Yakama reservation to non-member consumers.[5] This is incorrect. *Mescalero* applies

---

[4] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

[5] The Attorney General recognizes that sales made on the Yakama reservation toYakama members or members of compact tribes are not subject to

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

regardless whether sales to non-members are made on or off reservation because of the interstate nature of King Mountain's business.

The Oklahoma Supreme Court has rejected similar arguments by a tribal business. Native Wholesale Supply argued that its transactions with another tribal wholesaler occurred on the reservation. Applying *Mescalero*, the court described the transactions as follows:

> The cigarettes at issue are manufactured in Canada, shipped into the United States, and stored in a Free Trade Zone in Nevada. Muscogee Creek Nation Wholesale places orders for cigarettes from its "reservation" located within the territorial boundaries of this State to Native Wholesale Supply at the latter's principal place of business on another "reservation" in another State. Delivery of the cigarettes to Muscogee Creek Nation Wholesale requires shipment of the cigarettes from Nevada to the purchaser's tribal land in Oklahoma. The entire process comprising these sales thus takes place in multiple locations both on and off different tribal lands. *This is not on-reservation conduct for purposes of Indian Commerce Clause jurisprudence, but rather off-reservation conduct by members of different tribes. Therefore, Oklahoma's enforcement of the Complementary Act against Native Wholesale Supply passes muster without even evaluating it under the Bracker interest balancing test.*

Oklahoma v. Native Wholesale Supply, 237 P.3d 199, 216 (Okla. 2010) (emphasis added). Similarly, King Mountain's conduct extends well beyond Yakama reservation boundaries. King Mountain's multi-jurisdictional operation of manufacturing cigarettes is not transformed into purely reservation

---

the State's escrow requirements because the "units sold" definition includes only sales subject to the state excise tax.

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

conduct because a tribal retailer ultimately consummates a cigarette sale on reservation land.

If the court disagrees and finds that a portion of King Mountain's sales include only on-reservation conduct, the court might address the preemption issue by applying the commonly-known *Bracker* balancing approach. This requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

Washington's interests in enforcing the MSA are unquestionably strong. Cigarette smoking presents serious public health concerns to the State. Wash Rev. Code § 70.157.005. Cigarette smoking also presents serious financial concerns to the State, which must in some circumstances provide medical assistance to those suffering from tobacco-related illness. *Id.* The State has a strong interest in enforcing its policy "that financial burdens imposed on the State by tobacco product manufacturers rather than the State to extent that such manufacturers either determine to enter into a settlement with the State or are found culpable by the courts." Wash Rev. Code § 70.157.005(d). In an age of limited resources, this policy will likely allow the State to provide more health services to patients with smoking-related illness. This state interest is the same

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

whether a consumer drives onto the reservation to purchase cigarettes or purchases from a non-reservation retailer.

Importantly for the preemption analysis, federal interests are consistent with Washington's interest in regulating the health effects caused by smoking. The federal government, like the states, sued tobacco manufacturers for their conduct relating to the sale and marketing of cigarettes. *United States v. Philip Morris U.S.A., Inc.*, 686 F.3d 832 (D.C. Cir. 2012).

Federal legislation also demonstrates the alignment of federal and state interests in regulating tobacco products. In 2009, the Family Smoking Prevention and Tobacco Control Act (the 2009 Act) became law. 21 U.S.C. § 387. Consistent with the MSA, the Act enacts strict prohibitions on cigarette advertising, including advertising to children. *Id.* The 2009 Act also permitted the Food and Drug Administration (FDA) to regulate tobacco products. 21 U.S.C. § 387a. With specified exceptions not at issue here, the 2009 Act specifically states that nothing in the law is to be construed to limit the authority of a State to enforce laws related to tobacco or collect taxes with respect to tobacco products. 21 USC § 387p.

The federal government also has an interest in preventing trafficking in contraband cigarettes. The Contraband Cigarette Trafficking Act supports state regulation and taxation of cigarettes because it ties its definition of contraband cigarettes directly to state cigarette taxes. The CCTA makes it "unlawful for

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 2342; *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995). It defines contraband cigarettes as those cigarettes that "bear no evidence of payment of applicable State cigarette taxes." 18 U.S.C. § 2341.

Other courts have examined federal laws regulating tobacco products and federal law governing Indian tribes and found such federal law consistent with the MSA. In *Omaha Tribe of Nebraska v. Miller*, 311 F. Supp. 2d 816 (S.D. Iowa 2004), the court rejected a tribal tobacco product manufacturer's various preemption challenges to Iowa's qualifying statute implementing the MSA. The court examined six federal statutes that "address the problem of tobacco use and human health," and concluded that "these federal statutes do not indicate a congressional intention to preempt the entire field of cigarette regulation." *Id.* at 823. This analysis is consistent with the later 2009 Act that expressly states it is not intended to preempt state regulation.

State and federal law works together to regulate tobacco products. States and the federal government have interests in controlling tobacco advertising, certifying and tracking manufacturers, prohibiting contraband cigarette trafficking, and recovering health costs.

The tribal interest in maximizing revenues from King Mountain's business is insufficient alone to tip the preemption balance. First, King

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Mountain is not owned by the tribe, but rather by a particular Yakama member. The State's regulation cannot be said to infringe on the tribe's ability to govern itself. The business is apparently thriving despite State regulation. Further, although the business provides economic benefits to the tribe in terms of revenues and employment, it also places a burden on the tribe in terms of the health of its members.

Applying the *Bracker* balancing test here, "the State's interest in enforcing the MSA through the Complementary Act would outweigh any interest the tribe or federal government might have in prohibiting its enforcement against [the tribal business]." *Native Wholesale Supply,* 237 P.3d at 216 (Okla. 2010) (holding that *Bracker* balancing is unnecessary, but even applying *Bracker*, the State's interest outweighs the tribe's interest). The *Native Wholesale Supply* court correctly reasoned that the State had an "exceedingly strong interest in enforcing compliance with the MSA." *Id.* at 216-17. The state and federal interests in regulating tobacco products and their health effects exceed the tribal interests in maximizing profits.

In summary, *Bracker* does not apply to reservation sales to non-members because the acquisition and manufacturing of those products involves substantial conduct occurring outside reservation boundaries. But even if the court applies *Bracker*, the State's exceedingly strong interest in regulating

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

tobacco and enforcing the MSA exceeds a tribal retailer's interests in maximizing revenues.

V. CONCLUSION

Because no express federal law prevents application of non-discriminatory state law to conduct extending beyond reservation boundaries, Washington's Qualifying and Complementary Statutes apply to King Mountain and the Yakamas. These statutes also apply because they are of a "purely regulatory nature." Accordingly, this court should grant summary judgment to the Attorney General on all of Plaintiff's claims.

DATED this 14th day of November, 2012.

ROBERT M. MCKENNA
Attorney General

s/ David M. Hankins
DAVID M. HANKINS, WSBA # 19194
Senior Counsel
JOSHUA WEISSMAN, WSBA # 42648
Assistant Attorney General
RENE D. TOMISSER, WSBA #17509
Senior Counsel
Counsel for Defendant

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2012, I electronically filed Amended Memorandum In Support Of Defendant's Motion For Summary Judgment with the Clerk of the court using the CM/ECF system which electronically notified the following: Theresa L. Keyes, theresa.keyes@klgates.com, J. Michael Keyes, mike.keyes@klgates.com, Brian P. McClatchey, brian.mcclatchey@klgates.com, Adam Moore, mooreadamlawfirm@qwestoffice.net, and Irwin H. Schwartz, Irwin@ihschwartz.com.

Julie Johnson, Legal Assistant

Attorney General of Washington
Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528