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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,	)	Case No. 1:14-cv-03162-RMP
Plaintiff,	)	
v.	)	
KING MOUNTAIN TOBACCO	)	<b>UNITED STATES OF AMERICA'S</b>
COMPANY, INC.,	)	<b>MEMORANDUM IN SUPPORT OF</b>
Defendant.	)	<b>ITS MOTION TO DISMISS</b>
	)	<b>COUNTERCLAIM</b>
	)	<b>5/7/2015</b>
	)	<b>Without Oral Argument</b>

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**UNITED STATES OF AMERICA'S MEMORANDUM**

UNITED STATES' MEMORANDUM

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1 Plaintiff, the United States of America, pursuant to Federal Rule of Civil  
2 Procedure 12(b)(6) and Local Rule 7.1(a), by undersigned counsel, hereby moves  
3 with supporting memorandum to dismiss Defendant King Mountain Tobacco  
4 Company, Inc.'s ("King Mountain") Counterclaim for failing to state a claim upon  
5 which relief can be granted. For the reasons which follow, this Motion should be  
6 granted.  
7

### 8 INTRODUCTION

9  
10 On October 30, 2014, the United States filed its Complaint against King  
11 Mountain, a manufacturer of tobacco products, for its failure to pay the United  
12 States over \$6.3 million in statutory quarterly assessments and late payment interest  
13 pursuant to the Fair and Equitable Tobacco Reform Act of 2004 ("FETRA"), 7  
14 U.S.C. §§ 518-519a. Complaint, ECF No. 1 at ¶¶ 1, 11-12. These assessments and  
15 the late payment interest were administratively imposed on King Mountain by the  
16 United States Department of Agriculture's Commodity Credit Corporation ("CCC").  
17

18  
19 On January 5, 2015, King Mountain answered the Complaint and filed a  
20 Counterclaim seeking a declaratory judgment, refund, and abatements of the  
21 quarterly assessments on the ground it is a Native American corporation operating  
22 under tribal law and located on property held in trust by the United States for the  
23 beneficial use of a Native American. *See* Prayer for Relief, ECF No. 10 at 6-7.  
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1 This Counterclaim must be dismissed, as King Mountain has failed to state a claim  
2 for the relief sought. FETRA is a general applicability statute which by law is  
3 presumed to apply and does in fact apply to Native American tobacco companies  
4 who manufacture or import their tobacco products on tribal land. As FETRA applies  
5 to such Native American tobacco companies, King Mountain's Counterclaim to  
6 avoid its statutory obligation to pay its assessments fails to state a claim upon which  
7 relief can be granted. Accordingly, this Motion should be granted and King  
8 Mountain's Counterclaim dismissed with prejudice.  
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## 12 BACKGROUND

### 13 I. STATUTORY AND REGULATORY FRAMEWORK

14 In the wake of the Great Depression and the devastation it wrought on  
15 American farmers, Congress enacted a number of laws to shore up the profitability  
16 of raising crops. Among these were measures that created marketing quotas on, and  
17 price supports for, tobacco cultivation. *See* Agricultural Adjustment Act of 1938  
18 ("1938 Act"), 7 U.S.C. § 1281 *et seq.* (2000); Agricultural Act of 1949 ("1949  
19 Act"), *id.* § 1421 *et seq.* (2000). The marketing quotas capped the amount of  
20 tobacco that farmers could sell while the price supports – guaranteed purchases by  
21 government-backed cooperatives – assured farmers of a minimum price for the  
22 tobacco they did sell. *See Leaf Tobacco Exporters Association, Inc. v. Block*, 749  
23  
24  
25

1 F.2d 1106, 1108–09 (4th Cir. 1984); H.R. Rep. No. 108-755, at 450–51 (2004)  
2 (FETRA’s Conference Report), *reprinted in* 2004 U.S.C.C.A.N. 1341, 1516–17;  
3 Jasper Womach, Congressional Research Service, 95-129, *Tobacco Price Support:*  
4 *An Overview of the Program* (2005), available at [http://assets.opencrs.com/rpts/95-](http://assets.opencrs.com/rpts/95-129_20051231.pdf)  
5 [129\\_20051231.pdf](http://assets.opencrs.com/rpts/95-129_20051231.pdf).  
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8 FETRA, enacted as Title VI of the American Jobs Creation Act of 2004, Pub.  
9 L. No. 108-357, §§ 601–43, 118 Stat. 1418, 1521–36 (codified at 7 U.S.C. §§ 518–  
10 519a), repealed these marketing quotas and price supports to create a free market for  
11 tobacco. To help tobacco farmers transition to the free market, FETRA directs the  
12 Secretary of Agriculture to offer annual payments for ten years to “tobacco quota  
13 holders” (farmers entitled to grow tobacco, *see* 7 U.S.C. § 518(9)) and to “producers  
14 of quota tobacco” (farmers who actively grow tobacco, *see* § 518(6)). *See* §§ 518a,  
15 518b. *See generally* *Neese v. Johanns*, 518 F.3d 215 (4th Cir. 2008); Jasper  
16 Womach, Congressional Research Service, RS22046, *Tobacco Quota Buyout*  
17 (2005), available at [http://assets.opencrs.com/rpts/RS22046\\_20051231.pdf](http://assets.opencrs.com/rpts/RS22046_20051231.pdf).  
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20  
21 The Act established a “Tobacco Trust Fund” to disburse these transition  
22 payments and to pay ancillary expenses incurred in dismantling the price support  
23 program. § 518e. The CCC administers the Fund, § 518e(a), and is authorized to  
24 spend up to \$10.14 billion over the ten-year life of the program (fiscal years 2005—  
25



1 2014). § 518f. The Fund is financed primarily through assessments imposed on  
2 manufacturers and importers of tobacco products. § 518d. The assessments occur  
3 every quarter for the lifetime of the transition program (fiscal years 2005–2014<sup>1</sup>).  
4  
5 § 518d(b)(1).

6 To compute these quarterly assessments, the CCC first estimates the transition  
7 program costs for a particular year. § 518d(b)(2); 7 C.F.R. § 1463.4. It then  
8 allocates those costs among six classes of tobacco products (cigarettes, cigars, snuff,  
9 roll-your-own tobacco, chewing tobacco, and pipe tobacco) according to percentages  
10 set by the Act and its implementing regulations. 7 U.S.C. § 518d(c); 7 C.F.R.  
11 § 1463.5. Last, the CCC apportions the amount each class owes among the  
12 manufacturers and importers of that class of tobacco products according to their  
13 respective market shares for the quarter of assessment. 7 U.S.C. § 518d(f); 7 C.F.R.  
14 § 1463.7.

15 “Market share” is defined as a company’s “share . . . (expressed as a decimal  
16 to the fourth place) of the total volume of domestic sales of the class of tobacco  
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22 <sup>1</sup> A “fiscal year” for FETRA is October 1 through September 30. 7 C.F.R.  
23 § 1463.3 ¶ 9. So, for example, fiscal year 2011 is October 1, 2010 through  
24 September 30, 2011.  
25

1 product” during the “base period.” 7 U.S.C. § 518d(a)(3). The “volume of domestic  
2 sales” is calculated based on “gross domestic volume,” § 518d(g)(2), which is “the  
3 volume of tobacco products . . . removed (as defined by section 5702 of title 26),”  
4 § 518d(a)(2)(A).<sup>2</sup> Section 5702(j) of Title 26 explains that “remove” refers  
5 primarily to “the removal of tobacco products . . . from the factory . . . or release  
6 from customs custody.” Read together, these provisions dictate that a company’s  
7 “market share” of, for example, cigarettes, is its share of the number of cigarettes  
8 manufactured and taken out of factories plus the number imported and processed  
9 through customs during the base period.  
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13 The CCC calculates a company’s share of gross domestic volume by relying  
14 on records that FETRA requires companies to submit. *See* 7 U.S.C. § 518d(h)(1),  
15 (h)(2). Assessments are due at the end of the quarter in which they are imposed.  
16 § 518d(d)(3)(A). Interest accrues on amounts not paid by that date. 7 C.F.R.  
17 § 1463.9(d). At least thirty days before payment is due, the CCC must notify each  
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20 <sup>2</sup> Also, § 518d(a)(2)(B) excludes from gross domestic volume certain tax-  
21 exempt tobacco products. *See Prime Time International Co. v. Vilsack*, 599 F.3d  
22 678, 680 & n.1 (D.C. Cir. 2010) (describing § 518d(a)(2)(B)). Such exemptions are  
23 irrelevant in this case.  
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1 manufacturer and importer of the amount of its assessment. 7 U.S.C. § 518d(d)(1),  
2 (2).

3  
4 Manufacturers and importers may administratively contest an assessment  
5 within thirty business days of receiving notice of the assessment. § 518d(i). Judicial  
6 review is available only after administrative remedies are exhausted. § 518d(j).

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8 **II. FACTUAL AND PROCEDURAL HISTORY**

9 King Mountain is a corporation organized, existing, and operating under the  
10 laws of the Yakama Nation, and is located on property held in trust by the United  
11 States (“trust property”) for the beneficial use of a member of the Yakama Nation,  
12 Delbert Wheeler, Sr. ECF No. 10 at ¶¶ 17, 38. On this trust property, King  
13 Mountain grows, harvests, and/or manufactures tobacco products. *Id.* at ¶¶ 25, 32.  
14 Because King Mountain has failed since fiscal year 2005 to pay more than \$6.3  
15 million in assessments including late payment interest to the CCC as required by  
16 FETRA, 7 U.S.C. §§ 518-519a, the United States initiated this action. Complaint,  
17 ECF No. 1 ¶¶ 1, 11-12. On November 20, 2014, King Mountain filed its motion for  
18 a more definite claim, ECF No. 4, which the Court on December 22, 2014 denied.  
19 ECF No. 9. On January 5, 2015, King Mountain filed its Answer and Counterclaim.  
20 ECF No. 10 at 6-7, contending the General Allotment Act and the 1855 Yakama  
21 Treaty exempt it from paying FETRA assessments.  
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## **STANDARD OF REVIEW**

Dismissal for failure to state a claim upon which relief may be granted is appropriate under either of two circumstances: when “there is either a ‘lack of a cognizable legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’” *Anderson v. Teck Metals, Ltd.*, No. CV-13-420, 2015 WL 59100, at \*1 (E.D. Wash. Jan. 5, 2015) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990)). As King Mountain has failed to plead a cognizable legal theory exempting it as a Native American corporation from paying its statutory FETRA assessments, and has therefore pleaded no facts under a cognizable legal theory whereby it could receive the relief sought, the Court should dismiss with prejudice King Mountain’s Counterclaim.

## **ARGUMENT**

### **A. FETRA APPLIES TO NATIVE AMERICAN CORPORATIONS; KING MOUNTAIN HAS THEREFORE FAILED TO PLEAD A LEGALLY COGNIZABLE CLAIM FOR RELIEF**

King Mountain alleges that FETRA does not apply to it because King Mountain is a Native American corporation. *See* ECF No. 10 at ¶¶ 13-14. That position is untenable. “Indians and their tribes are equally subject to statutes of general applicability, just as any other United States Citizen.” *Solis v. Matheson*, 563 F.3d 425, 431 (9th Cir. 2009) (holding overtime provisions of the Fair Labor

1 Standards Act apply to Native American owned retail business located on trust land)  
2 (citations omitted). For a general applicability statute not to apply to Native  
3 Americans, the statute must be silent as to its applicability to them, and: “(1) the law  
4 touches exclusive rights of self-governance in purely intramural matters; (2) the  
5 application of the law to the tribe would abrogate rights guaranteed by Indian  
6 treaties; or (3) there is proof by legislative history or some other means that  
7 Congress intended the law not to apply to Indians on their reservations.” *Id.* at 430  
8 (citations omitted). None of these three exceptions applies here.

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12 The Ninth Circuit has concluded that “purely intramural matters” are “matters  
13 such as conditions of tribal membership, inheritance rules, and domestic  
14 relations.” *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir.  
15 1985) (holding Occupational Safety and Health Act, a statute of general  
16 applicability, applied to Native American commercial farm’s activities on tribal land  
17 as the farm’s activities were “neither profoundly intramural . . . nor essential to self-  
18 government”) (internal citation omitted). In the instant matter, King Mountain’s  
19 tobacco manufacturing is not “profoundly intramural” or essential to the Yakama’s  
20 self-governance. Indeed, FETRA regulates commercial activity that has nothing to  
21 do with intramural matters. FETRA, as applied to King Mountain, does not affect  
22 the Yakama’s tribal membership, inheritance, domestic relations, tribal customs,  
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1 social order, or anything of the sort. Nor does FETRA's application to King  
2 Mountain abrogate any "rights guaranteed by Indian treaties." *Solis*, 563 F.3d at  
3 431. Although King Mountain has identified a treaty it claims bar application of  
4 FETRA to it, ECF No. 10 at ¶ 13, King Mountain does not identify any provision of  
5 the treaty that would do so. Finally, the legislative history contains no indication  
6 that Native Americans are exempt from FETRA.  
7

8  
9 Because none of the three recognized Native American exceptions to a statute  
10 of general applicability is appropriate here, FETRA applies to King Mountain in the  
11 same manner that it applies to any other similarly-situated company. *See, e.g.*,  
12 *United States v. Native Wholesale Supply Co.*, 822 F. Supp. 2d 326, 337 (W.D. N.Y.  
13 2011) (finding "FETRA does not violate rights under the Jay Treaty and the Treaty  
14 of Ghent . . . Native American importers or manufacturers of tobacco products are  
15 not exempt from FETRA and its assessment obligations."). King Mountain is  
16 engaged in the business of removing tobacco products into domestic commerce, and  
17 it has done so for every quarter of the transition program to date. *See* ECF No. 10  
18 ¶¶ 6, 16. As such, King Mountain is subject to assessment under the Act. *See* 7  
19 U.S.C. § 518d(e)(1), (a)(2).  
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24 King Mountain simply fails to allege a legally-recognized theory for avoiding  
25 its FETRA assessments. Instead, King Mountain's theory that it should avoid

1 statutory assessments simply because it is organized, existing, and operating on trust  
2 property for Mr. Wheeler's benefit, is without any legal basis, is laden with unsound  
3 legal conclusions, and necessarily fails to survive dismissal. Indeed, mere legal  
4 conclusions that do not state a "plausible claim for relief" must be dismissed. *See*  
5 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). King Mountain alleges not even a  
6 thread of facts supporting its claim to be exempt from paying FETRA assessments.  
7

8  
9 Moreover, King Mountain's previous and similar arguments that the General  
10 Allotment Act and the 1855 Yakama Treaty allow it to avoid paying its federal  
11 obligations because it is a Native American corporation operating on tribal trust land  
12 have been rejected by this Court in unrelated litigation. In *King Mountain Tobacco*  
13 *Company, Inc. v. Alcohol & Tobacco Tax & Trade Bur.*, 996 F. Supp. 2d 1061 (E.D.  
14 Wash. 2014), King Mountain asserted that the General Allotment Act as well as the  
15 Treaty of 1855 between the Yakama Nation and the United States precluded it from  
16 paying excise tax on its tobacco products. Finding the United States was "not  
17 seeking to impose a tax on [King Mountain's] income from unprocessed tobacco  
18 grown on trust land" but rather "on manufactured tobacco products, including  
19 cigarettes and roll-your-own tobacco," *id.* at 1065, the Court rejected King  
20 Mountain's General Allotment Act argument and held:  
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25 Manufacturing tobacco products from unprocessed tobacco grown

on trust land is analogous to ‘income derived from investment of surplus income from the land.’ *See* [*Squire v. Capoeman*, 351 U.S. 1, 9 (1956)]. The excise tax at issue is triggered by the manufacturing process, which is more akin to reinvestment income that is not exempt from taxation. *See Dillon [v. United States*, 792 F.2d 849, 855-56 (9th Cir. 1986).]

*Id.*

In the instant matter, King Mountain attempts to distance itself from the Court’s reasoning concerning King Mountain’s federal excise tax obligation, by pleading that FETRA assessments are not a tax. *See* ECF No. 10 ¶ 34. But while courts have ruled both ways on whether FETRA assessments are a tax,<sup>3</sup> King Mountain’s averment that FETRA assessments are not taxes ignores the Court’s central point regarding the Allotment Act and reinvestment income: the purpose of the allotment system “was to protect the Indians’ interest and to prepare the Indians

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<sup>3</sup> *See, e.g., In re International Tobacco Partners, Ltd.*, 468 B.R. 582, 597 Bankr. (E.D. N.Y. 2012) (holding “[i]n function and effect, FETRA Assessments represent excise taxes on Debtor’s business of importing and distributing tobacco products” and finding them to be “excise taxes” for bankruptcy priority); *but see Swisher International, Inc. v. Johanns*, No. 3:05-cv-871, 2007 WL 4200816, at \*6-7 (M.D. Fla. 2007) (holding because FETRA is primarily concerned with regulation, “revenue raised under the statute will be considered a fee rather than a tax).”



1 to take their place as independent qualified members of the modern body politic.”  
2 *King Mountain Tobacco Company*, 996 F. Supp. 2d at 1065 (citations omitted).  
3  
4 That purpose of the Allotment Act is a far cry from what King Mountain pleads in  
5 alleging the Allotment Act exempts it from FETRA assessments on tobacco  
6 products it manufactures on tribal land. *Id.*<sup>4</sup>  
7

8 As to King Mountain’s theory that the 1855 Yakama Treaty (“the Treaty”)  
9 prevents the United States from collecting assessments it owes, ECF No. 10 at ¶ 39,  
10 the Court’s reasoning in *King Mountain Tobacco Company* illustrates the flaw in  
11 King Mountain’s theory. In that case, the Court ruled that neither Article II nor III  
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13  
14 <sup>4</sup> Even assuming that the trust property produces tobacco used for “religious and  
15 ceremonial purposes,” ECF No. 10 at ¶ 27, such use of the tobacco does not change  
16 the tobacco from being the same source material from which King Mountain  
17 manufactures its tobacco products. *See* King Mountain’s First Amended Complaint,  
18 ECF No. 16 ¶ at 4.70 (Case No. CV-11-3038-RMP) (“Traditional ceremonial and  
19 agricultural processes are incorporated into the production of every King Mountain  
20 Product.”). Thus, whether ceremonial in purpose or for manufacture into tobacco  
21 products, the tobacco is the same material and is subject to FETRA assessments.  
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1 of the Treaty supported King Mountain's claimed exemption from paying federal  
2 excise taxes.<sup>5</sup> As to Article II of the Treaty, the Court concluded based on *Hoptowit*  
3 *v. Commissioner*, 709 F.2d 564 (9th Cir. 1983) that King Mountain's tobacco  
4 products were not tax exempt because the tax applied to the manufacturing and not  
5 the "use and benefit of the land." 996 F. Supp. 2d at 1068 (citation omitted). As the  
6 FETRA assessments, too, apply to the manufacturing of the product and not to the  
7 use and benefit of the land, King Mountain is not exempted by Article II of the  
8 Treaty and must pay its FETRA assessments.

11  
12 With respect to Article III of the Treaty, the Court, relying upon *Ramsey v.*  
13 *United States*, 302 F.3d 1074 (9th Cir. 2002), concluded there was no "express  
14 exemptive language applicable to King Mountain's manufactured tobacco products."  
15 *King Mountain Tobacco Company*, 996 F. Supp. 2d at 1069. In the instant matter,  
16 the Court should similarly rule that there is no such exemptive language in the  
17 Treaty and reject King Mountain's Treaty defense.

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20 In sum, King Mountain's defense that, as a Native American corporation, it is  
21 exempt from statutory FETRA assessments, is without any cognizable legal basis.

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23 \_\_\_\_\_  
24 <sup>5</sup> In the instant action King Mountain does not specify which Article of the 1855  
25 Yakama Treaty upon which it relies.

1 Accordingly, the Court should dismiss with prejudice King Mountain's  
2 Counterclaim.

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4 **B. KING MOUNTAIN FAILS TO STATE A CLAIM UPON WHICH DECLARATORY  
5 RELIEF CAN BE GRANTED**

6 In order to state an actionable claim for declaratory relief, one must "allege  
7 facts that, if true, would violate federal law. *Courtney v. Goltz*, 736 F.3d 1152, 1157  
8 (9th Cir. 2013) (citation omitted.) This, King Mountain has not done. Rather, King  
9 Mountain has made conclusory allegations that do not amount to any violation of  
10 federal law by the CCC. Indeed, there simply can be no violation of federal law  
11 when King Mountain identifies no particular federal law that is being violated, and  
12 buttresses its Counterclaim on the non-cognizable premise that it is exempt from  
13 paying its statutory FETRA assessments. Dismissal for failure to state a claim upon  
14 which relief can be granted is appropriate when "there is either a 'lack of a  
15 cognizable legal theory' or 'the absence of sufficient facts alleged under a  
16 cognizable legal theory.'" *Anderson v. Teck Metals, Ltd.*, No. CV-13-420, 2015 WL  
17 59100, at \*1 (E.D. Wash. Jan. 5, 2015) (quoting *Balistreri v. Pacifica Police Dept.*,  
18 901 F.2d 696, 699 (9th Cir. 1990). King Mountain's Counterclaim lacks a  
19 cognizable legal theory by which relief can be granted, and necessarily lacks facts  
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1 alleged under a cognizable legal theory. Therefore, the Counterclaim should be  
2 dismissed, with prejudice.  
3

4 **CONCLUSION**

5 For the foregoing reasons, the United States respectfully requests that the  
6 Court dismiss with prejudice King Mountain's Counterclaim.  
7

8 Dated: March 6, 2015

9 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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