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

UNITED STATES OF AMERICA, Plaintiff, v. KING MOUNTAIN TOBACCO COMPANY, INC., Defendant.	Case No. 1:14-cv-03162-RMP **UNITED STATES OF AMERICA'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** **5/7/2015** **Without Oral Argument**

UNITED STATES OF AMERICA'S MEMORANDUM

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Plaintiff, the United States of America, pursuant to Federal Rule of Civil Procedure 56(a) and Local Rules 7.1(a) and 56.1, by undersigned counsel, hereby moves with supporting memorandum for summary judgment in its favor against Defendant King Mountain Tobacco Company, Inc. ("King Mountain") with respect to the United States' claim for outstanding and delinquent assessments and interest that King Mountain has failed to pay. For the reasons which follow, this Motion should be granted.

I. INTRODUCTION

King Mountain, a manufacturer of tobacco products, has failed to pay the United States over $6.3 million in quarterly assessments and late payment interest. These assessments and this interest were administratively imposed on King Mountain by the United States Department of Agriculture's Commodity Credit Corporation ("CCC"), as required by the Fair and Equitable Tobacco Reform Act of 2004 ("FETRA"), 7 U.S.C. §§ 518-519a. Complaint, ECF No. 1 at ¶¶ 1, 11-12. King Mountain has twice disputed FETRA quarterly assessments, contending it is exempt from paying because it is a Native American corporation operating under tribal law and located on property held in trust by the United States for the beneficial use of a Native American. Pursuant to established law, however, King Mountain's defenses to avoid paying its statutory FETRA debts are meritless and should be

summarily rejected, as statutes of general applicability, like FETRA, are presumed to apply to Native Americans, subject to certain narrow exceptions that are not applicable here. Hence, the Court should enter summary judgment for the United States on its affirmative claim.

II. BACKGROUND

A. THE OLD TOBACCO QUOTA AND PRICE SUPPORT PROGRAMS

Until FETRA, the supply of domestic tobacco for sale in the United States had been controlled through quota programs established by the Agricultural Adjustment Act of 1938 ("1938 Act"), 7 U.S.C. § 1281 *et seq.* (2000), and the price of domestic tobacco had been controlled through price support systems established by the Agricultural Act of 1949 ("1949 Act"), *id.* § 1421 *et seq.* (2000). These programs were administered by the U.S. Department of Agriculture ("USDA").

Under the 1938 Act, certain tobacco producers were permitted to market only as much acreage or poundage of tobacco for which they held an acreage allotment or marketing quota. *See id.* §§ 1311-16 (2000). Under the 1949 Act, if eligible tobacco producers could not sell their tobacco on the open market at a rate exceeding a support price established by the CCC, they could sell instead to one of several producer-owned cooperative associations established pursuant to that Act. *See id.* § 1421 *et seq.* (2000); *see also* H.R. Rep. No. 97-613, at 4-7 (1982), *reprinted in* 1982

U.S.C.C.A.N. 484, 487-90 (describing old tobacco price support system). The CCC would loan the associations the value of the tobacco the associations had purchased, and the tobacco would serve as collateral for the loans. H.R. Rep. No. 97-613, at 5. The associations would eventually sell the tobacco at a CCC-approved price, and the proceeds of those sales would serve as payment of the associated loans. *Id.*

B. TRANSITION TO THE FREE MARKET

Congress passed FETRA as Title VI of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, §§ 601-43, 118 Stat. 1418, 1521-36 (2004) (codified at 7 U.S.C. §§ 518 to 519a). FETRA transformed the tobacco production system into a free market system at the end of 2004 by terminating the tobacco marketing quota programs established under the 1938 Act and by terminating the tobacco price support programs established under the 1949 Act. *Id.* §§ 611-12.

To ease the tobacco producers' transition from the highly regulated market to the free market, FETRA directed the Secretary of Agriculture to make annual payments, over a ten-year period, to owners of farms that held an established tobacco marketing quota under the 1938 Act, 7 U.S.C. § 518a, and to other persons who had been engaged in the production of tobacco, *id.* § 518b. These payments were intended to "constitute full and fair consideration for the termination of [the] tobacco marketing quotas and related price support." *Id.* §§ 518a(a), 518b(a).

C. FUNDING THE TRANSITION

To fund ten years of transitional payments to tobacco quota holders and producers, the projected costs to the CCC that would result from the tobacco disposal and loan liquidation, and certain other program expenses, FETRA established the Tobacco Trust Fund. 7 U.S.C. § 518e. Congress capped the total amount the Secretary was authorized to charge to the Tobacco Trust Fund at $10.14 billion over the ten years of the transition program. *Id.* § 518f. The CCC administers the Tobacco Trust Fund on behalf of the Secretary. *Id.* § 518e(a).

Under the Act, the Tobacco Trust Fund is funded primarily through quarterly assessments on domestic manufacturers and importers of tobacco products over the ten years of the program. *Id.* §§ 518e(a), 518d. The CCC calculates quarterly assessments by first projecting program costs for a particular program year. To that end, the CCC must impose assessments on manufacturers and importers in an amount sufficient to cover all payments to quota holders and producers that occur in that year, and to cover all "other expenditures" for that year. *Id.* § 518d(b)(2). The CCC then divides that estimated annual cost into the four quarters of the year and allocates the quarterly cost among the manufacturers and importers of each of six classes of tobacco products – cigarette, cigar, snuff, roll-your-own tobacco, chewing tobacco, and pipe tobacco. *Id.* § 518d(b)-(c).

Within each product class, the CCC further allocates the quarterly cost based on each manufacturer's or importer's share of "gross domestic volume." *Id.* § 518d(e)(1). The term "gross domestic volume" means "the volume of tobacco products . . . removed." *Id.* § 518d(a)(2). The term "removed" refers to "the removal of tobacco products or cigarette papers or tubes from the factory or from internal revenue bond . . . or release from customs custody." 26 U.S.C. § 5702(j). Manufacturers and importers of tobacco products must submit to the CCC the information necessary for the CCC to calculate their respective shares of gross domestic volume. 7 U.S.C. § 518d(h). This information consists, *inter alia*, of copies of various Alcohol and Tobacco Tax and Trade Bureau ("TTB") and U.S. Customs and Border Protection ("CBP") forms. *Id.*

At least thirty days prior to the date payment is due, the CCC must provide manufacturers and importers subject to assessment with written notice setting forth the amount of their assessments. *Id.* § 518d(d)(1). Assessments are due from manufacturers and importers at the end of each calendar year quarter. *Id.* § 518d(d)(3)(A). Manufacturers and importers may dispute any assessment imposed by the CCC within thirty business days of receiving their assessment notices. *Id.* § 518d(i)(1). Following exhaustion of their administrative remedies, they may also seek judicial review of the agency's final assessment determination. *Id.* § 518d(j).

FETRA authorized the Secretary of Agriculture to promulgate regulations to implement the Act. *Id.* § 519a. Those regulations are codified at 7 C.F.R. §§ 1463.1 to .201.

III. FACTUAL AND PROCEDURAL HISTORY

King Mountain is a tobacco manufacturer located in White Swan, Washington, *see* Answer [ECF No. 10] at ¶ 2, and is subject to FETRA. 7 U.S.C. § 518d(b)(1). Beginning in 2007, USDA imposed quarterly FETRA assessments on King Mountain. *See* Administrative Record (hereinafter "KM-AR") at KM-AR-000001-67. Between June 2007 and September 2010, King Mountain made fourteen payments on these assessments. (KM-AR- at 000064-67) ("Collection" column.) Since September 2012, however, King Mountain has not made any payments, *see id.*, notwithstanding repeated notice from USDA informing King Mountain of its delinquent balance and obligation to pay. (KM-AR-000068-97.) On September 13, 2012, King Mountain appealed one assessment, and on April 10, 2013, King Mountain appealed another assessment, challenging its obligation to pay and demanding a return of assessments previously paid because it is a Native American corporation operating under tribal law on trust property. (KM-AR- 000104; 110.) As of February 27, 2015, King Mountain's unpaid FETRA assessments and late payment interest totaled over $6.3 Million. (KM-AR- 000064-67.) That amount is

comprised of roughly $6.3 Million in unpaid assessments, and over $75,000 in interest. *See* United States' Local Rule 56.1 Statement of Material Facts supporting this Motion ("Stmt. of Material Facts"), at ¶4. King Mountain's unpaid balance will continue to increase as USDA continues to impose assessments and late payment interest on it.

King Mountain has filed an answer and counterclaim, ECF No. 10, denying responsibility to pay the assessments and demanding a refund of what is has paid, contending FETRA assessments against it are unconstitutional, violate the General Allotment Act and the 1855 Yakama Treaty. *See Id.* at ¶ 14. Because there is no genuine dispute that King Mountain is delinquent in paying its FETRA assessments and has no cognizable defense to avoid paying the debt, the Court should grant summary judgment for the United States against King Mountain.

IV. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once that burden is met, the nonmoving party must set out specific facts that raise a genuine dispute. *Matsushita Electric Industrial Co. v.*

Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); s*ee also Littlefield v. Forney Independent School Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (nonmovant must go beyond pleadings and designate specific facts showing that there is a genuine issue for trial). The nonmovant cannot meet this burden "with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted).

A. AGENCY DETERMINATIONS OF FACT

FETRA requires courts to uphold a final assessment determination of the Secretary if it is supported by "a preponderance of the information available to the Secretary." 7 U.S.C. § 518d(j)(3). Accordingly, judicial review of the Secretary's final assessment determination, like its review of agency finding of facts in general, is narrow. Reviewing courts do not engage in independent fact-finding but instead determine only whether the evidence in the administrative record supports the agency's decision. *Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1051 (2d Cir. 1985) ("Congress has excluded the courts from the fact-finding process and any attempt to turn the clock back and renew the contest by reinsinuating the judiciary into the area now reserved to executive expertise should be sharply rejected."); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)

("The factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking."). "*[D]e novo* review" of the facts ordinarily is "an error requiring reversal." *Sierra Club*, 772 F.2d at 1052.

As such, summary judgment in cases challenging agency fact-finding is different than in other cases. In challenges to final agency action, the court does not employ the standard analysis for determining whether a genuine issue of material fact exists because, in a review of agency action, the court is not generally called upon to resolve facts. *Fla. Power & Light Co.*, 470 U.S. at 744. While there may have been issues of disputed fact before the agency, the court's function is only to determine whether as a matter of law, the evidence in the administrative record permitted the agency to make the decision that it did. *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985) ("The appellant confuses the use of summary judgment in an original district court proceeding with the use of summary judgment where, as here, the district court is reviewing a decision of an administrative agency which is itself the finder of fact.").

V. ARGUMENT

The United States is entitled to judgment against King Mountain for the unpaid FETRA assessments and late payment interest, as a matter of law. FETRA is consistent with the Constitution, and Native American corporations that manufacture

or import tobacco products on tribal land are not exempt from FETRA. King Mountain has failed to pay over $6.3 million of FETRA assessments and interest, with no legal justification for not paying its FETRA obligations.

A. KING MOUNTAIN HAS WAIVED ITS ABILITY TO CHALLENGE ALL BUT TWO ASSESSMENTS BY FAILING TO COMPLY WITH FETRA'S ADMINISTRATIVE APPEAL PROCESS

In its Answer, King Mountain denies that it was responsible to pay any FETRA assessment. ECF No. 10 at ¶ 6. However, King Mountain is precluded from challenging any but two assessments, one it appealed on September 13, 2012 and the other on April 10, 2013, *see* KM-AR-000104-107 and KM-AR-000109-188, respectively, because King Mountain failed to comply with FETRA's mandatory administrative-appeal process.

Pursuant to traditional principles of administrative law, litigants must properly exhaust all administrative remedies, which "means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotation marks omitted); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."). The

rationale for this exhaustion requirement is simple: "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946).

Here, Congress created a mandatory administrative-appeal process for companies to challenge their FETRA assessments. *See* 7 U.S.C. § 518(d)(i)(1) (providing that companies may challenge an assessment within 30 days of receiving written notice of the assessment). FETRA's regulations implement this provision by requiring companies to provide a "written statement that sets forth the basis of the dispute," and then providing for "an informal hearing at which the [company] may present oral and written evidence in support of the [company's] position." 7 C.F.R. § 1463.11(a),(b). A company aggrieved by the outcome of its appeal may thereafter obtain judicial review of its challenge—but *only* after complying with the administrative-appeal process. *See* 7 U.S.C. § 518d(j)(1) (providing for judicial review "at any time *following exhaustion of the administrative remedies* available under subsection (i)" (emphasis added)).

King Mountain failed but on two occasions to comply with the administrative-appeal process. *See* Designation and Certification of Administrative Record at ¶ 3.

Had King Mountain developed a full administrative record concerning each assessment, USDA could have developed a full administrative record on each assessment, applied its expertise, and then reached a reasoned resolution—the very purpose of the exhaustion requirement. *See Cavalier Telephone, LLC v. Va. Elec. & Power Co.*, 303 F.3d 316, 322 (4th Cir. 2002) ("[T]he exhaustion requirement serves to allow an agency the opportunity to use its discretion and expertise to resolve a dispute without premature judicial intervention[.]" (internal quotation marks omitted)). Because King Mountain failed to raise all but two of these claims administratively, it deprived USDA of the opportunity to address these issues. Thus, King Mountain is now precluded from raising any challenges to its assessments and late payment interest other than the two it challenged in its September 13, 2012 and April 10, 2013 correspondence. *See Coit Independence Joint Venture v. Federal Savings & Loan Ins. Corp.*, 489 U.S. 561, 579 (1989) ("[E]xhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute.").

In addition, even if King Mountain had exhausted administratively all of the assessments, the record evidence shows that the CCC's assessment determinations are supported by "a preponderance of the information available to the Secretary[,]" 7 U.S.C. § 518d(j)(3), and therefore must be upheld. *See, e.g.*, KM-AR-000001-67.

The assessments are factually supported, and King Mountain argues only that it is exempt from paying the assessments because it is a Native American corporation operating under tribal law and located on trust property. ECF No. 10 at ¶¶ 13-14. For the following reasons, that defense is meritless and summary judgment should be awarded the United States.

B. FETRA APPLIES TO NATIVE AMERICAN CORPORATIONS AND THERE THEREFORE IS NO GENUINE DISPUTE THAT FETRA APPLIES TO KING MOUNTAIN

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

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

Because none of the three recognized Native American exceptions to a general applicability statute is appropriate here, FETRA applies to King Mountain in

the same manner that it applies to any other similarly-situated company. *See, e.g.*, *United States v. Native Wholesale Supply Co.*, 822 F. Supp. 2d 326, 337 (W.D. N.Y. 2011) (finding "FETRA does not violate rights under the Jay Treaty and the Treaty of Ghent . . . Native American importers or manufacturers of tobacco products are not exempt from FETRA and its assessment obligations."). King Mountain is engaged in the business of removing tobacco products into domestic commerce, and it has done so for every quarter of the transition program to date. *See* ECF No. 10 ¶¶ 6, 16. As such, King Mountain is subject to assessment under the Act. *See* 7 U.S.C. § 518d(e)(1), (a)(2).

Moreover, previous and similar King Mountain arguments that the General Allotment Act and the 1855 Yakama Treaty allow it to avoid paying its federal obligations because it is a Native American corporation on tribal trust land have already been rejected by this Court in unrelated litigation. In *King Mountain Tobacco Company, Inc. v. Alcohol & Tobacco Tax & Trade Bur.*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014), King Mountain asserted that the General Allotment Act as well as the Treaty of 1855 between the Yakama Nation and the United States precluded it from paying excise tax on its tobacco products. Finding the United States was "not seeking to impose a tax on [King Mountain's] income from unprocessed tobacco grown on trust land" but rather "on manufactured tobacco

products, including cigarettes and roll-your-own tobacco," *id.* at 1065, the Court rejected King Mountain's General Allotment Act argument and held:

> 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,[1] King

[1] *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)."

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 to take their place as independent qualified members of the modern body politic." *King Mountain Tobacco Company*, 996 F. Supp. 2d at 1065 (citations omitted). That purpose of the Allotment Act is a far cry from what King Mountain pleads in alleging the Allotment Act exempts it from FETRA assessments on tobacco products it manufactures on tribal land. *Id.*[2]

[2] Even assuming that the trust property produces tobacco used for "religious and ceremonial purposes," ECF No. 10 at ¶ 27, such use of the tobacco does not change the tobacco from being the same source material from which King Mountain manufactures its tobacco products. *See* King Mountain's First Amended Complaint, ECF No. 16 ¶ at 4.70 (Case No. CV-11-3038-RMP) ("Traditional ceremonial and agricultural processes are incorporated into the production of every King Mountain Product."). Thus, whether ceremonial in purpose or for manufacture into tobacco products, the tobacco is the same and is subject to FETRA assessments.

As to King Mountain's theory that the 1855 Yakama Treaty ("the Treaty") prevents the United States from collecting assessments it owes, ECF No. 10 at ¶ 39, the Court's reasoning in *King Mountain Tobacco* illustrates the flaw in King Mountain's theory. In that case, the Court ruled that neither Article II nor III of the Treaty supported King Mountain's claimed exemption from paying federal excise taxes.[3] As to Article II of the Treaty, the Court concluded based on *Hoptowit v. Commissioner*, 709 F.2d 564 (9th Cir. 1983) that King Mountain's tobacco products were not tax exempt because the tax applied to the manufacturing and not the "use and benefit of the land." 996 F. Supp. 2d at 1068 (citation omitted). As the FETRA assessments too apply to the manufacturing of the product and not the use and benefit of the land, King Mountain is not exempted by Article II of the Treaty and must pay its FETRA assessments.

With respect to Article III of the Treaty, the Court, relying upon *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), concluded there was no "express exemptive language applicable to King Mountain's manufactured tobacco products." *King Mountain Tobacco Company*, 996 F. Supp. 2d. at 1069. In the instant matter,

[3] In the instant action King Mountain does not specify which Article of the 1855 Yakama Treaty upon which it relies.

the Court should similarly rule that there is no such exemptive language in the Treaty and reject King Mountain's Treaty defense.

In sum, there is no genuine dispute as to any material fact in this matter. As a matter of law, the Court should enter judgment in favor of the United States.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court enter summary judgment in favor of the United States.

Dated: March 6, 2015

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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