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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff / Counter-Defendant, v. KING MOUNTAIN TOBACCO CO., INC., Defendant / Counter-Plaintiff.	Case No.: 1:14-CV-03162-RMP **DEFENDANT/COUNTER-PLAINTIFF KING MOUNTAIN TOBACCO CO., INC.'S RESPONSE IN OPPOSITION TO UNITED STATES OF AMERICA'S MOTION FOR SUMMARY JUDGMENT** **DATE: May 7, 2015** **TIME: 1:00 p.m.** **With Oral Argument**

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INTRODUCTION

History is written by the victors. Treaties, in contrast, are negotiated at arms' length between sovereigns.[1] And while Congress can abrogate a treaty, the executive and judicial branches cannot. Congress has never chosen to abrogate the Yakama Treaty. Yet here, the executive branch asks leave of the Court to do just that, through its after-the-fact "interpretation" of words that agents of the United States penned 160-years ago. It asks this Court to acquiesce without even hearing from the Yakama people, whose forefathers bled and died to protect the Yakama way of life, and who sat at arms' length with the United States to negotiate the Yakama Treaty[2]. The Yakama know what the Treaty means, and if history is to be honored and not rewritten, this Court must hear from the Yakama people.

Our government negotiated the Yakama Treaty to end a war and secure millions of acres of land for American settlers. We promised to preserve and protect Yakama economic rights including the right to the exclusive benefit of their land and the right to continue their long tradition of trade and sale of goods. We assured the Yakama people that "*you can rely on all its provisions being carried out strictly*." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1243 (E.D. Wash. 1997) *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998)(emphasis in original). FETRA has less noble origins and purposes. As USDA concedes, FETRA does nothing more than collect fees (not taxes) to fund subsidies paid to non-Yakama tobacco farmers. The calculation of these resource shifting fees is ambiguous, at best, as federal courts have recognized. Inherent statutory ambiguities and a lack of evidence regarding the specifics of this case, both require

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[1] "Although the United States dealt from a clearly superior position, the treaties . . . were not dictated to a defeated nation." *United States v. State of Wash.*, 520 F.2d, 684.

[2] 12 Stat. 951 (1855) Treaty with the Yakama

discovery to determine whether and, if so, how USDA has addressed this recognized flaw when it determined how much to ask for in its complaint. Moreover, and contrary to USDA's argument in its motion, no court in any jurisdiction has ever determined whether the Yakama Treaty prohibits these fees to be imposed on a Yakama member-owned business in the first instance.

For these reasons, as discussed in detail below, the Court should deny or, at a minimum allow discovery before addressing, the summary judgment motion.[3]

FACTUAL BACKGROUND

For nearly 70 years, USDA administered a system of price supports and subsidies to keep certain tobacco farmers in business. *See* United States' Motion, ECF No. 15, at pp. 2-3. Congress enacted FETRA to phase out that old regime of subsidies. *Id.* at p. 3.[4] To ease the transition to a free market system, FETRA created a Tobacco Trust Fund to make annual payments to holders of tobacco quotas and tobacco farmers using money collected from cigarette manufacturers and importers based on federal calculation of their share of the tobacco market. 7 U.S.C. § 518e.[5] The money to pay these subsidies was collected through imposition of a fee on "each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during [a] fiscal year." 7 U.S.C. § 518d(b)(1). Over the 10-year life of the

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[3] Concurrent with and in the alternative to this Motion, King Mountain will also submit on this date its Fed. R. Civ. P. 56(d) Motion in Opposition to the United States of America's Motion for Summary Judgment, providing both legal and factual reasons why judgment cannot be entered at this time.

[4] 7 U.S.C. § 518 et seq.

[5] FETRA designated USDA to administer the program in conjunction with the Commodities Credit Corporation ("CCC") and the Farm Services Agency ("FSA"), two entities within USDA. 7 U.S.C. § 518-7 U.S.C. § 519a.

program, USDA collected more than $10 billion in fees which it distributed to tobacco quota holders and tobacco grower competitors of King Mountain. *See* USDA, *Tobacco Transition Payment Program; Cigar & Cigarette Per Unit Assessments*, 76 FR 15,859 (Mar. 22, 2011). Neither King Mountain nor any other Yakama Nation business received any benefit from this resource shifting scheme.[6]

ARGUMENT

I. Genuine Issues of Material Fact Preclude Entry of Summary Judgment.

Summary judgment is appropriate only "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 movant must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." *Id.* 56(c)(1)(A). As the movant, USDA bears both the burden of showing the absence of a genuine issue of material fact, and the burden of demonstrating there is an absence of evidence to support King Mountain's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986). At summary judgment, the Court draws all reasonable inferences in favor of the nonmoving party. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).[7]

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[6] King Mountain incorporates into this Response its Response to United States of America's Statement of Material Facts and Additional Statement of Facts ("SOF").

[7] In response to USDA's request that King Mountain be denied discovery, the Court required King Mountain to separately move for leave to be allowed to take discovery. While the summary judgment standard calls for the Court's consideration of depositions, answers to interrogatories, and admissions [Fed. R. Civ. P. (56)(c)(1)(A)], these sources are unavailable to King Mountain at this time.

USDA has erroneously argued that the Court cannot engage in any fact-finding in reviewing its request for summary judgment. ECF No. 15 at p. 8-9. Yet as set out in detail in King Mountain's related motion for discovery, that is not correct. Because this is not an "administrative appeal," because the documents claimed to be the "administrative record" were submitted with an affidavit from an agent in charge of collections (as opposed to the person making the assessment determination), and due to the nature of the legal challenges brought by King Mountain, this Court is not limited to the administrative record in this matter. Indeed, as an administrative body, USDA is neither qualified nor authorized to make determinations of King Mountain's Treaty defenses. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-54 (2006) (determining the meaning of treaties "as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution.") (citations omitted). Treaty issues, and other issues that are beyond the province of an administrative agency, are properly litigated for the first time before the federal district courts, even when (unlike here) a full administrative record has been developed below. *Id.* ; *see Gilbert v. Nat'l Transp. Safety Bd.*, 80 F.3d 364, 367 (9th Cir. 1996) (constitutional challenges are beyond agency authority and thus can be adjudicated for the first time in federal district court); *Howard v. F.A.A.*, 17 F.3d 1213, 1218 (9th Cir. 1994)(constitutional challenges are outside of agency cognizance and need not be exhausted).

Drawing all reasonable factual inferences in favor of King Mountain confirms that USDA has not demonstrated an absence of evidence to support King Mountain's case. Specifically, USDA has failed to address: (1) the Yakama people's understanding of the rights reserved to them in Articles II and III of their Treaty, *see* SOF ¶¶9-31; and (2) disputes regarding USDA's calculations regarding market share and product type upon which the alleged assessments are based, the amount of payments King Mountain has made in connection with USDA's

assessments, how USDA has applied those payments to the various categories of recovery USDA seeks in this action, the amount of outstanding assessments USDA claims are due, the relevant quarters for which USDA claims King Mountain has not paid assessments, and the calculation of late payment interest, *see* SOF ¶¶ 1-8, ¶¶ 32-38. Because USDA has failed to meet its burden of demonstrating that there is an absence of evidence to support King Mountain's case, the Court must deny its motion for summary judgment.

II. Before Entering Judgment, the Court Must Make Findings of Fact Regarding the Yakama People's Understanding of Their Treaty.

The United States Supreme Court has repeatedly mandated that the interpretation of all Indian treaties is subject to canons of construction favorable to the Indian party. *See, e.g., Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985). Under those canons, the text of a specific treaty must be construed as the Indian tribe would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians tribe's favor. *Tulee v. State of Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"); *see* SOF ¶ 16. The Supreme Court has explained the application of these canons to the Yakama Treaty, as follows:

> [I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very [Yakama] treaties in the Indians' favor.

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 *modified sub nom. Washington v. United States*, 444 U.S. 816

(1979) (internal citation omitted). Moreover, sources beyond the treaty necessarily aid treaty interpretation. *United States v. Winans*, 198 U.S. 371, 381 (1905)("How the treaty in question was understood may be gathered from the circumstances.").

The Yakama Treaty has never been abrogated by Congress, and has been interpreted by the United States Supreme Court on four separate occasions. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658; *Tulee*, 315 U.S. 681; *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *Winans*, 198 U.S. 371. In every instance, the Supreme Court has confirmed that judicial determination of protections secured by the Treaty requires that courts consider evidence beyond the Treaty language itself:

> [The district court] decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more. And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.' How the treaty in question was understood may be gathered from the circumstances.

Winans, 198 U.S. at 380-81 (internal citations omitted); *accord Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 397 (1968)("[T]o construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' would be 'an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more.'") (internal citation omitted).

This controlling precedent requires the Court to apply the canons of construction and enter findings of fact construing the Treaty, "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Fishing Vessel*, 443 U.S. at 76. Without considering evidence on the Yakama people's understanding of the terms

of their Treaty and whether the Treaty terms as understood by the Yakama prevent the imposition of FETRA assessments on King Mountain, entry of summary judgment would be improper. *See* SOF ¶ 16.[8]

III. The "Express Exemptive" Tax Canon Does Not Apply to This Case.

As conceded by USDA, the money it collects under FETRA has been found to be "considered a fee rather than a tax." ECF No. 15, at p. 16 n.1 (citing *Swisher Int'l, Inc. v. Johanns*, 3:05-CV-871-J16-TEM, 2007 WL 4200816, , *6-7 (M.D. Fla. Nov. 27, 2007) *aff'd sub nom. Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008); *see also Philip Morris USA, Inc. v. Vilsack*, 736 F.3d 284, 292 (4th Cir. 2013)("There is no evidence in the text of FETRA or elsewhere to indicate that Congress intended to use FETRA as a vehicle to further tax policy writ large. The record equally supports the conclusion that Congress used the 2003 excise tax rates only because they were a useful mathematical expedient.").[9] So, for example, one court evaluated FETRA assessments as follows:

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[8] *Accord N.L.R.B. v. Local No. 106, Glass Bottle Blowers Ass'n, AFL-CIO*, 520 F.2d 693 (6th Cir. 1975) (affirming "in all respects, with [one] clarification" a decision by the United States District Court for the Western District of Washington, that included 253 separate findings of fact with regard to the historical backdrop, the parties' understanding, and the conduct of parties following various Indian treaties at issue in the case including the Yakama Treaty); *see also United States v. State of Wash.*, 384 F. Supp. 312, 348-99 (W.D. Wash. 1974) *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

[9] *See also State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) ("if regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax.") (citing *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943)). Moreover, an "assessment placed in a special fund and used only for

> Essentially, the FETRA fee provides funds to help dismantle a regulatory system, that is, the former federal price support system. Although the hybrid FETRA fee appears to this Court to provide the Federal Government with a financial framework that allows it to avoid directly paying for this free market transition. It is clear the FETRA fee is more about deregulation than revenue. . . .
> The Court finds that FETRA is primarily concerned with regulation-albeit through the seemingly incongruous aim of aiding the transition of formerly heavily regulated industry to a free market system. If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax.

Swisher Int'l, Inc., 2007 WL 4200816, *7.[10]

This distinction is critical because USDA argues that this Court's prior rulings in a federal excise *tax* case are controlling on King Mountain's claims and defenses in this *fee* collection matter. ECF No. 15 at pp. 18-19 (discussing this Court's opinion in *King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014)). Yet as the Court is aware, in that prior action King Mountain claimed *exemption* from federal tobacco excise *taxes*. Tax exemption claims are governed by a canon of construction that "requires a definite expression of exemption stated plainly in a statute or treaty before any further inquiry is made or any canon of interpretation employed." *Ramsey v. United States*, 302 F.3d 1074, 1076 (9th Cir. 2002). But in this case King Mountain does not seek exemption from a federal tax, so the "express exemption" requirement does not apply and the Court must directly apply the

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special purposes is less likely to be a tax." *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 932 (9th Cir. 1996). Here, USDA concedes that this assessment is placed in the Tobacco Trust Fund and distributed in annual payments to specific tobacco quota holders and producers of quota tobacco. ECF No. 15 at pp. 3-4.

[10] At the very least, any dispute with regard to whether FETRA assessments are a tax or a fee creates a genuine issue of material fact preventing entry of summary judgment.

canon of construction that requires the Court to look at the Yakama people's understanding of the Treaty terms.

The United States Supreme Court itself has clarified the distinction between "the canon that assumes Congress intends its statutes to benefit the tribes" and "the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001). In particular, the Supreme Court noted that in instances of a claimed federal *tax* exemption by a tribe, the two canons can "offset" each other. *Id.* But no such "offset" is available when a fee is challenged. *Cf. Hoptowit v. C.I.R.*, 709 F.2d 564, 565 (9th Cir. 1983) ("The intent to exempt from taxation must be clearly expressed"). The federal tax "express exemptive" requirement was addressed in *Ramsey*, as follows:

> The applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the statute or treaty. The language need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation.

Ramsey, 302 F.3d at 1078-7902 F.3d at 1078-79.

This Court adopted the "express exemptive" requirement when examining King Mountain's claims of exemption from a federal excise tax. *King Mountain Tobacco Co.*, 996 F. Supp. 2d at 1068. But FETRA fees are not a federal tax. Therefore, the "express exemptive" requirement does not apply and the Court must use the canons of construction employed in other treaty-based challenges to federal law.

This result is confirmed in a case decided after *Hoptowit* and *Ramsey*, and in which the Ninth Circuit evaluated the application of a federal law of general applicability to a Yakama tribal business. *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). There, because the case did not concern a federal tax, the Ninth Circuit correctly stated the canon as follows: "The text of a treaty must be construed as the Indians would naturally have understood it at the time of the

treaty, with doubtful or ambiguous expressions resolved in the Indians' favor." *Id.* at 1264 (citations omitted). Because the case did not involve a federal tax, the *Smiskin* Court did not apply the two-step "express exemptive" standard.

IV. The Yakama Treaty Prevents Imposition of a Fee that Directly Benefits Non-Yakama Tobacco Growers.

Among the rights confirmed on the face of the Yakama Treaty are: (1) the "exclusive use and benefit" of their lands, explicitly reserved in Article II of the Treaty; (2) the right to travel and trade outside the boundaries of the reservation free from economic restrictions, explicitly reserved in Article III of the Treaty; and (3) the right to hold their allotted lands "exempt from levy, sale, or forfeiture" guaranteed in Article VI of the Treaty. In this suit, the Court must construe whether those provisions, based on an evaluation of the Yakama people's understanding of those terms, would be violated if USDA were allowed to impose on and collect from a Yakama-member owned tobacco grower and manufacturer a fee that is then transferred to support another non-Yakama tobacco grower.

A. Article II's Right to "Exclusive" Benefit Would Be Violated by USDA Assessments.

Article II of the Yakama Treaty provides:

> There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land . . . for the *exclusive use and benefit* of said confederated tribes and bands of Indians, as an Indian reservation . . . .

SOF 22, Ex. A (emphasis added). Article II confirms that the Yakama people were to be the sole residents of the reserved lands ("use and occupation") and were to be the sole beneficiaries of the resources cultivated on their reserved lands ("exclusive use and benefit"). *Id.* By imposing fees that fund subsidies to other tobacco growers, FETRA violates King Mountain's rights under Article II of the Treaty of retaining the "exclusive use and benefit" of Yakama lands.

Article II of the Yakama Treaty set aside the reservation for "the exclusive

use and benefit" of the confederated tribes and bands, which was explained by federal negotiators as affirming the Yakama's right to be free from encroachment, interference, and from preventing non-Yakama from taking advantage of the Yakama on the reservation. *See Yakama Indian Nation*, 955 F. Supp. at 1243; SOF 23-25. Article II reflects statements made during the negotiations by federal negotiators who "declared a resolution to protect the Indians from 'bad white men' if the tribes agreed to live within the designated reservations, explaining that 'when the white man and the red man lived together in the same ground the white man got the advantage and the red man passed away.'" *Yakama Indian Nation*, 955 F. Supp. at 1243 (citations omitted); SOF 24, 25. During the negotiations, federal negotiators further "communicated to the tribes that whites and Indians should not occupy the same territory and that the tribes would be protected from unlawful white men by living on the reservations." *Yakama Indian Nation*, 955 F. Supp. at 1243. There is no evidence in either the Treaty or the council proceedings to suggest that tribal leaders anticipated benefits from the use of reservation land to accrue to any non-Indian party or government. SOF 26, Ex. C. There is no evidence in either the Treaty or the council proceedings to suggest that tribal leaders anticipated benefits from the use of reservation land to accrue to any non-Indian party or government. SOF 26, Ex. C.

"Exclusive" is not an ambiguous term, and unequivocally confirms a Treaty right to be free from paying money for using Yakama land to fund another non-Yakama tobacco growers business. The word "exclusive" is at least sufficiently ambiguous to create a genuine issue of material fact that must be resolved at trial, through testimony of Yakama elders. *Cree v. Flores*, 157 F.3d 762, 773-74 (9th Cir. 1998) ("[t]estimony of this sort by Yakama elders has been sanctioned for over twenty years"). That the word "exclusive" prevents Government-imposed resource-shifting fees is further confirmed by the Treaty as a whole. "Exclusive" is used in the Treaty only in Article II (guaranteeing the "exclusive use and benefit

of" the reservation to the Yakama) and Article III (providing for the "exclusive right of taking fish"). The phrase "use and benefit" alone (without inclusion of the word "exclusive") is used in the Treaty in Articles IV and X. The addition of "exclusive" in Article II is critical, especially given its omission in other provisions in the Treaty. Reading Article II as part of the larger Treaty confirms that there is a genuine issue of material fact as to whether the "exclusive" promise includes a right to be free from Government collection of money from Yakama use of reservation land so that it can subsidize non-Yakama farmers.

Because the Yakama reserved the right to the exclusive use and benefit of their land, the only way that exclusivity could be denied is for Congress to express a clear intent to do so. *Smiskin*, 487 F.3d at 1264 ("'federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if . . . the application of the law to the tribe would abrogate rights guaranteed by Indian treaties.'") (citations omitted). There is no evidence that in passing FETRA, Congress expressly abrogated the Yakama's Treaty right to be the exclusive (only) people who benefit from the "exclusive" use of their Yakama land. At the absolute minimum, the Court must take evidence from Yakama elders and experts as to whether the Yakama understood "exclusive use and benefit" in Article II to prevent the Government from collecting money from Yakama businesses to pay a subsidy to non-Yakama businesses. *Id.*

B. Article III's Right to Travel and Trade Would Be Violated by USDA's Assessments.

> Article III of the Yakama Treaty states, in pertinent part:
> if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

SOF 27, Ex. A. Article III is discussed at length by the Ninth Circuit in *Smiskin*.

The court there began by recognizing the general rule that "[f]ederal laws of general applicability are presumed to apply with equal force to *Smiskin*, 487 F.3d at 1263 (discussing the federal Contraband Cigarette Trafficking Act) (citations omitted). Because the Yakama party's claim involved Article III of the Yakama Treaty, the court further acknowledged that "[t]he text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indian's favor." *Id.* at 1265 (citations omitted). Relying on detailed findings on the Yakama people's understanding of their Treaty entered in a prior case, the court held that:

> We agree with the district court that there is no basis in either the language of the Treaty or our cases interpreting it for distinguishing restrictions that impose a fee from those, as here, that impose some other requirement. Applying either type of requirement to the Yakamas imposes a condition on travel that violates their treaty right to transport goods to market without restriction.

Id. at 1266. Consistent with Ninth Circuit precedent, King Mountain has presented evidence that the Yakama people understood that Articles II and III of the Yakama Treaty would preserve traditional practices of using their lands for growing tobacco and trading that product with other Yakama and non-Yakama alike, without economic restrictions, such as fees. SOF 29-31; *see Cree*, 157 F.3d, 769 (affirming the district court's finding that the Yakama people "understood the Treaty to grant them valuable rights that would permit them to continue in their ways"). Although this Court must conduct an examination of the Yakama's understanding of "exclusive use and benefit," the evidence now before the Court confirms that the Yakama people understood that their Treaty rights could not be abrogated by imposition of fees used to pay subsidies to non-Yakama tobacco growers.

Based on the above material facts, King Mountain can show that the Yakama could not have conceived that many decades after 1855 fees or other

conditions or economic restrictions would be imposed on their sovereign trade or other economic activities by the States or federal government. Articles II and III of the Treaty of 1855 were understood to signify the firm commitment and agreement by the U.S. to allow the tribe to use their land for developing farms and crops for the purposes of engaging in their traditional practices of trade both on and off their reserved lands without interference or hindrance by the United States and without the imposition of a fee, toll, permit, license, encumbrance, or other permission of any kind. The evidence shows that the Yakama people's understanding of Articles II and III of the Treaty is wholly consistent with the unequivocal representations made by the federal negotiators at the time they negotiated and signed the Treaty.

Accordingly, a genuine disputes remain and USDA has not met its burden in its summary judgment motion.

V. No Court Has Ever Determined Whether FETRA Assessments Violate the Yakama Treaty.

USDA argues that determination of Yakama Treaty protections is precluded by an unrelated decision entered by the United States District Court for the Western District of New York in *United States v. Native Wholesale Supply Co.*, 822 F. Supp. 2d 326, 337 (W.D.N.Y. 2011). That is incorrect.

Native Wholesale Supply concerned a defendant's claim that FETRA assessments would violate two treaties between the United States and the United Kingdom of Great Britain and Ireland. It did not concern the Yakama Treaty, nor any other treaty between the United States and an Indian tribe. Nor did it involve any treaty language analogous to the "exclusive use and benefit" and right to travel and trade provisions of the Yakama Treaty that protect King Mountain in this action. USDA's complete reliance on a single, inapposite decision in another case further demonstrates why its motion for summary judgment must be denied.

Substantial controlling decisions of the Ninth Circuit and the Supreme Court of the United States require the Court to interpret the text of the Yakama Treaty

itself, not some other treaty between some other parties, and to do so as the Yakama people would have understood the terms. Only then can the Court determine whether application of FETRA assessments violates the Yakama Treaty. This required analysis cannot be done on the face of the USDA's complaint and in total reliance on an irrelevant case involving different parties, different treaties, and entered by a district court from another district and another Circuit. The required analysis confirms that the Yakama Treaty prohibits the fee that the USDA seeks to impose on King Mountain here.

As USDA concedes, a statute of general applicability that is silent as to its application to Native Americans will apply unless "the application of the law to the tribe would abrogate rights guaranteed by Indian treaties." ECF No. 15 at p. 13. Both during its administrative appeal and through the instant suit, King Mountain has made it clear that USDA's application of FETRA to King Mountain violates the Yakama Treaty, among other sources of federal law. *See* SOF 5, 7-8. Yet USDA has consistently refused to even consider these arguments. SOF 6. In this lawsuit, USDA continues to refuse to consider King Mountain's Treaty arguments and, instead, seeks to have this Court adopt a flawed legal premise that – regardless of the Yakama Treaty – "FETRA applies to King Mountain in the same manner that it applies to any other similarly-situated company." ECF No. 14 at pp. 14-15. But King Mountain is not "similarly situated" to any other company because of the Yakama Treaty. *See United States v. State of Wash.*, 520 F.2d 676, 688 (9th Cir. 1975) ("The treaties must be viewed as agreements between independent and sovereign nations.").

Native Wholesale Supply Co., 822 F. Supp. 2d at 336. Both Treaties were between the United States and Great Britain. *Id.* The sole provision of the Treaty relied upon by the defendant in *Native Wholesale Supply Co.*, reads:

> No Duty of Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, or shall the Indians passing or repassing with their own proper Goods and

> Effects of whatever nature, pay for the same any Impost or Duty whatever, But Goods in Bales, or other large packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

Id. at 336-337. The Western District of New York court relied on numerous cases that determined that the "duty exemption" had been abrogated as a matter of law by Acts of Congress and the War of 1812. *Id.* at 337. Neither the Jay Treaty nor the Treaty of Ghent involved tribal signatories, neither was the result of negotiations with an Indian tribe, and neither involved any concession or transfer by a tribe of property or other rights. *Cf. State of Wash.*, 520 F.2d at 688 ("The treaties must be viewed as agreements between independent and sovereign nations."); *Id.* at 684 ("The treaties were 'not a grant of rights to the Indians, but a grant of rights from them a reservation of those not granted.' . . . The extent of that grant will be construed as understood by the Indians at that time, taking into consideration their lack of literacy and legal sophistication, and the limited nature of the jargon in which negotiations were conducted.") (citations omitted).

Here, King Mountain does not claim that its defenses in this case fall under the inapplicable "duty exemption" of the treaties discussed in *Native Wholesale Supply*. *See Smiskin*, 487 F.3d at 1267 (rejecting the United States' comparisons of the Yakama Treaty to case that "addressed a different tribe, a different treaty, and a different right). Rather, King Mountain raises, *inter alia*, its rights in the Yakama Treaty. As discussed above, this Court must evaluate the express terms of the Yakama Treaty, including an evaluation of how the Treaty's terms were understood by the Yakama people at the time the Treaty was negotiated. *Native Wholesale Supply* offers no support for USDA's argument to the contrary.

VI. King Mountain's Defenses and Counterclaim Must be Determined by This Court.

A. King Mountain Was Denied the Right to Administratively Appeal USDA's FETRA Assessments.

The Administrative Record makes it clear that USDA completely faltered and miscommunicated with King Mountain during the administrative appeal process. *See* SOF 8. Now, USDA seeks to use its ambiguous and non-responsive communications to King Mountain about the administrative appeal process in its own favor and have this Court find that King Mountain has waived its rights or is precluded from asserting defenses. But this claim is not supported in law, or by the "Administrative Record" provided by USDA. Instead, USDA's proffered "Administrative Record" reveals substantial efforts by King Mountain to administratively appeal all FETRA assessments, and further efforts to comply with the muddy appeal process while receiving misdirection from USDA throughout those efforts. *See* SOF 4-8.

King Mountain disputed USDA's assessments and demand letters pursuant to the instructions provided by USDA. KM-AR-000106 (discussing King Mountain's efforts to request administrative review and stating that "neither FSA nor RMO provided any clear or consistent direction to King Mountain regarding the appeal process"). King Mountain additionally requested clarification from USDA on whether it needed to submit different appeal documents. *Id.* Rather than complying with its regulations that require notice of the right to request administrative review and of the proper procedure for making such a request, USDA informed King Mountain that it would provide guidance at a later date; a promise USDA never kept. KM-AR-000189 (representatives of the USDA explaining to King Mountain that "I believe at some point some guidance will come back to me").

Accordingly, USDA's claims that King Mountain has failed to comply with any mandatory administrative appeal process are without merit.

B. King Mountain Is Not Required to Exhaust Administrative Remedies Where No Administrative Remedy Was Available.

USDA has claimed that King Mountain's Treaty-based claims are somehow limited by or foreclosed by what USDA describes as its "administrative appeal process." But this issue was never adjudicated in prior administrative proceedings, nor could it be. Administrative bodies are neither qualified nor authorized to make such determinations of essential federal Indian law. As explained by the U.S. Supreme Court:

> Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such infereior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. That "judicial Power . . . extends[s] to . . . Treaties." Id., § 2. And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803) L.Edc. 60 (1803). If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court' established by the Constitution. *Id.* ; *see also Williams v. Taylor*, 529 U.S. 362, 378-379 (2000) (opinion of STEVENS, J.) ("At the core of [the judicial] power is the federal court's independent responsibility – independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States – to interpret federal law").

Sanchez-Llamas, 548 U.S., 353-54.

Treaty issues, and other issues that are beyond the province of an administrative agency, are properly litigated for the first time before the federal district courts, even when (unlike here) a full administrative record has been developed below. *Gilbert*, 80 F.3d, 367 (constitutional challenges are beyond agency authority and thus can be adjudicated for the first time in federal district court); *Howard*, 17 F.3d, 1218 (constitutional challenges like outside of agency cognizance and need not be exhausted). Moreover, the exhaustion doctrine does not apply here, because it "would not merely be futile for the applicant, but would

also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975); *Walsh v. United States*, 151 Ct. Cl. 507, 511 (1960), *cert. den.*, 365 U.S. 880 (1961) (holding that exhaustion of administrative remedies does not mean that parties are "required to go through obviously useless motions in order to preserve their rights").

Accordingly, King Mountain is not bound by any prior administrative decisions in this matter, nor is it limited to the documents or arguments presented by USDA as its "Administrative Record."

VII. King Mountain Is Entitled to Discovery Before Entry of Judgment.

USDA has requested that King Mountain be denied discovery in this matter. The Court has required King Mountain to separately brief the issue of its right to conduct discovery. In considering summary judgment, the Rules of Civil Procedure require that a party asserting that a fact is genuinely disputed "must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purpose of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). Because it has not yet had access to discovery, most of these sources are unavailable at this time to King Mountain. Along with this Response, King Mountain will file two motions directed at the lack of discovery to date: (1) King Mountain's Fed. R. Civ. P. 56(d) Motion in Opposition to Motion for Summary Judgment; and (2) Defendant King Mountain Tobacco Co., Inc.'s Motion and Memorandum in Support of Defendant's Essential Right to Conduct Discovery.

Both of the concurrently filed motions state that discovery is needed to address USDA's failure to account for unreported cigarette production in determining gross domestic volume in its calculation of assessments under FETRA. ECF No. 10 at ¶ 31. Several United States District Courts have agreed

that, "[o]bviously, this statute is not a model of clarity." *Native Wholesale Supply Co.*, 822 F. Supp. 2d at 333 (discussing the application of definitions used in the formulation of FETRA assessments as "murky"); *see Philip Morris USA Inc. v. Vilsack*, 896 F. Supp. 2d 512, 514 (E.D. Va. 2012) *aff'd*, 736 F.3d 284 (4th Cir. 2013)("Although the reasoning underlying the algorithm currently employed by USDA to calculate the assessment is clear, the underlying logic is a little more murky."). Because FETRA unequivocally forbids USDA from imposing an assessment on any manufacturer or importer that is disproportionate to its market share, 7 U.S.C. § 518d(e)(2), disputed issues remain as to validity of USDA's request that the Court enter judgment for a single specific dollar amount of FETRA fees and interest. *See* SOF 32-38.

CONCLUSION

The United States' Motion for Summary Judgment should be denied.

March 27, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 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:

Kenneth E. Sealls, Email: Kenneth.Sealls@usdoj.gov

/s/ Randolph Barnhouse
Randolph H. Barnhouse