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10 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
11

12 UNITED STATES OF AMERICA,	}	Case No. 1:14-cv-03162-RMP
13 Plaintiff,		
14 v.		
15 KING MOUNTAIN TOBACCO		
16 COMPANY, INC.,		
17 Defendant.	}	UNITED STATES OF AMERICA’S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT 5/7/2015 With Oral Argument
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1 Plaintiff, the United States of America, pursuant to Local Rules 7.1(c) and
2 56.1(c), by undersigned counsel, hereby replies to Defendant King Mountain
3 Tobacco Company, Inc.'s ("King Mountain") opposition to the United States'
4 Motion for Summary Judgment. For the reasons which follow, as well as those in
5 the United States' Motion for Summary Judgment, summary judgment should be
6 granted.
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8 INTRODUCTION

9
10 The United States established in its Memorandum in Support of its Summary
11 Judgment Motion, ECF No. 15, that King Mountain's defenses for non-payment of
12 its statutory FETRA assessments are meritless and should be summarily rejected, as
13 statutes of general applicability, such as FETRA, are presumed to apply to Native
14 Americans, subject to certain narrow exceptions that are not applicable here. King
15 Mountain attempts to manufacture a genuine factual issue by relying principally on
16 the 1855 Yakama Treaty ("Treaty" or "Yakama Treaty"), which the Ninth Circuit has
17 ruled clearly and unambiguously does not give the Yakamas a right to trade. *See*
18 *King Mountain Tobacco Company v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014).
19 King Mountain's other argument, that it is unaware of the amount it owes the United
20 States, is belied by its statement agreeing in response to the United States' Statement
21 of Material Facts that "the CCC has imposed quarterly FETRA assessments upon
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King Mountain between April 1, 2007 and January 1, 2015, in the amounts reflected in the administrative record in this matter.” ECF No. 27 at ¶ 2(a). King Mountain has not shown there is a genuine factual dispute concerning its obligation to pay FETRA assessments that it admits it has not fully paid. Nor has King Mountain refuted that the amount owing is accurate. Therefore, judgment for \$6,375,100.81, the amount of King Mountain’s unpaid FETRA assessments and late payment interest, *see* United States Statement of Material Facts, No. ECF 15-1 at ¶ 4, should be entered for the United States.

ARGUMENT

I. King Mountain Has Not Refuted That FETRA Applies to Native American Corporations, Including 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, 430 (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

1 to Indians on their reservations.” *Id.* at 430 (citations omitted). King Mountain seeks
2 to create a factual dispute through discovery of whether the Yakamas in 1855 would
3 have understood the Treaty to “prevent imposition of FETRA assessments on King
4 Mountain.” ECF No. 26 at 6-7. Any such discovery would be contrary to Ninth
5 Circuit law. In *King Mountain Tobacco Company v. McKenna*, 768 F.3d at 997, the
6 Ninth Circuit ruled “Article II does not address trade” and “[n]owhere in Article III
7 is the right to trade discussed.” In that case, King Mountain unsuccessfully raised
8 the Yakama Treaty in attempting to avoid paying into the Washington State escrow
9 fund established for cigarette manufacturers who chose not to enter into the Master
10 Settlement Agreement of 1998¹. Rejecting King Mountain’s argument that the trial
11 court, which granted summary judgment to the State on King Mountain’s claim for
12 relief from the regulatory statute, should have considered evidence of the Yakamas’
13 understanding of the Treaty, the Court concluded the Yakama Treaty was not
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21 ¹ The Master Settlement Agreement (“MSA”) governs the settlement of suits brought
22 by 46 states, the District of Columbia, and five United States territories against the
23 four dominant cigarette manufacturers to offset smoking-related healthcare costs.

24 *See King Mountain Tobacco Company v. McKenna*, 768 F.3d at 991.
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1 ambiguous and that “there is no right to trade in the Yakama Treaty.” *Id.* at 998.² In
2 the instant matter, there too is just no right to trade that supports King Mountain’s
3 Treaty argument that the understanding of the Yakamas in 1855 should be
4 discovered. The Court should therefore enter summary judgment for the United
5 States.
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8 King Mountain makes a proverbial mountain out of whether a FETRA
9 assessment is a tax or a regulatory fee, contending FETRA regulates but does not
10 tax. ECF No. 26 at 7-8. In so doing, King Mountain misapprehends the purpose of
11 the United States’ analogizing the Court’s rejection of the King Mountain Treaty
12 defense in *King Mountain Tobacco Company, Inc. v. Alcohol & Tobacco Tax &*
13 *Trade Bur.*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014) to what King Mountain
14 attempts in this action. The United States does not, as King Mountain asserts, cite to
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18 ² The Ninth Circuit affirmed the District Court’s findings that King Mountain’s trade
19 included shipping “its tobacco crop to Tennessee where it is threshed . . . sent to a
20 factory in North Carolina where more tobacco is purchased and blended with
21 reservation tobacco . . . [and] sent back to the reservation, where much of it is made
22 into cigarettes[,]” and sold in Washington State and approximately 16 other states.
23 *McKenna*, 768 F. 3d at 994.
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1 *Alcohol & Tobacco Tax & Trade* as controlling authority, but rather, to illustrate the
2 Court's reasoning in rejecting the General Allotment Act and Yakama Treaty
3 defenses. *See* ECF No. 15 at 16-19.³ Assuming, *arguendo*, FETRA is regulatory
4 and not a tax, FETRA can be likened to the Washington State escrow statute in
5 *McKenna*, 768 F.3d at 991, for which the Yakama Treaty was no defense. In
6 disregarding *McKenna's* ruling that the Yakama Treaty provides no right to trade,
7 King Mountain makes a distinction without a difference in asserting FETRA
8 imposes a fee. ECF No. 26 at 7. Indeed, even assuming that FETRA imposes a fee,
9 the burden on King Mountain's trade would be "less significant" than if FETRA
10 were a tax. *Cf. King Mountain Tobacco Company v. McKenna*, 768 F.3d at 996
11 (holding the State escrow statute is not a tax and it "imposes a less significant
12 burden on trade than the tax approved by the Supreme Court in [*Washington v.*
13 *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)].

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20 ³ In its Response to the United States' Motion for Summary Judgment, King
21 Mountain does not contend, as it did in its Answer and Counterclaim, ECF No. 10,
22 that the General Allotment Act prevents it from paying FETRA assessments. The
23 General Allotment argument has apparently been abandoned.
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1 King Mountain contends also that under Article VI of the Treaty, the
2 Yakamas have a right “to hold their allotted lands ‘exempt from levy, sale, or
3 forfeiture.’” ECF No. 26 at 10. However, in addition to the fact there is no Treaty
4 right to trade, the United States’ suit is not to levy, sell, or forfeit King Mountain’s
5 property, but rather, to recover the unpaid FETRA assessments. Article VI of the
6 Treaty therefore is no defense to defeat summary judgment in this FETRA matter.
7
8 Equally unavailing is the argument the Treaty prevents imposing on a Yakama a fee
9 that benefits non-Yakama tobacco growers. ECF No. 26 at 11-12: the Treaty simply
10 does not address trade. *McKenna*, 768 F.3d at 997. Hence, the Ninth Circuit has
11 allowed the State of Washington to collect escrow funds from King Mountain, funds
12 which presumably will go to the benefit of non-Yakamas.
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16 **II. King Mountain Has Not Disputed That It Has Waived Its Ability**
17 **To Challenge All but Two Assessments by Failing To Comply With**
18 **FETRA’s Administrative Appeal Process**

19 Under FETRA, manufacturers and importers may dispute any assessment
20 imposed by the CCC within thirty business days of receiving the quarterly
21 assessment notices. 7 U.S.C. § 518d(i)(1). Following exhaustion of their
22 administrative remedies, they may also seek judicial review of the agency’s final
23 assessment determination. *Id.* § 518d(j). In its first of two appeals, King Mountain
24 did not identify a quarterly assessment it disputed, let alone that it disputed the
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1 amount or basis thereof, but instead made a blanket denial of payment based on the
2 Yakama Treaty of 1855. *See* KM-AR-000104-107. In response to the first appeal,
3 the CCC informed King Mountain that it had long waived its right to challenge the
4 assessments that underlay the Notice of Acceleration which triggered King
5 Mountain's appeal. *See* KM-AR-000108, third paragraph. In its second appeal,
6 King Mountain identified only two sums that it challenged, both in the March 1,
7 2013 assessment, in the amounts of \$287,952.29 and \$280.61, again making a
8 blanket denial of payment based upon the Yakama Treaty of 1855. *See* KM-AR-
9 000110. Had King Mountain developed a full administrative record concerning each
10 assessment, USDA could have developed a full administrative record on each
11 assessment, applied its expertise, and then reached a reasoned resolution—the very
12 purpose of the exhaustion requirement. *See Cavalier Telephone, LLC v. Va. Elec. &*
13 *Power Co.*, 303 F.3d 316, 322 (4th Cir. 2002) (“[T]he exhaustion requirement serves
14 to allow an agency the opportunity to use its discretion and expertise to resolve a
15 dispute without premature judicial intervention[.]” (internal quotation marks
16 omitted)). Because King Mountain failed to raise all but two of these claims
17 administratively, it deprived USDA of the opportunity to address these issues. Thus,
18 King Mountain is now precluded from raising any challenges to its assessments and
19 late payment interest other than the two it challenged in its September 13, 2012 and
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1 April 10, 2013 correspondence. *See Coit Independence Joint Venture v. Federal*
2 *Savings & Loan Ins. Corp.*, 489 U.S. 561, 579 (1989) (“[E]xhaustion of
3 administrative remedies is required where Congress imposes an exhaustion
4 requirement by statute.”).⁴

6 In addition, even if King Mountain had exhausted administratively all of the
7 assessments, the record evidence shows that the CCC’s assessment determinations
8 are supported by “a preponderance of the information available to the Secretary[,]”
9 7 U.S.C. § 518d(j)(3), and therefore must be upheld. Part 1 of the Administrative
10 Record includes the outstanding Quarterly Assessment Invoices (KM-AR-000001-
11 000061), the latest quarterly statement (KM-AR-000062-000063), and Detail
12 History through February 27, 2015 (KM-AR-000064-67). Each of the invoices
13 provided to King Mountain (KM-AR-000001-000061), indicates the product class
14 and product market share, in Block 5, “Class of Tobacco,” and in Parts A (“National
15 Assessment Information”) and B (“Class and Company Assessment Information”).
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20 _____
21 ⁴ King Mountain’s sundry arguments challenging the competency of the declarant
22 who certified the administrative record, ECF No. 26 at 4, and claiming it was denied
23 administrative appeals that would anyway have been futile, ECF No. 26 at 18-19, are
24 without record support or legal bases and should be rejected.
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1 *See* United States' Reply Statement of Material Facts, at ¶15, accompanying this
 2 Reply. In sum, King Mountain has not refuted the United States' summary
 3 judgment motion arguments. As there is no genuine factual dispute, summary
 4 judgment should be awarded the United States.
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6 **CONCLUSION**

7
 8 For the foregoing reasons, the United States respectfully requests that the
 9 Court enter summary judgment in favor of the United States.

10 Dated: April 10, 2015

11
 12 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 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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