

No. 16-35956

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**In the United States Court of Appeals  
for the Ninth Circuit**

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

KING MOUNTAIN TOBACCO COMPANY, INC.,  
*Defendant-Appellant.*

**On Appeal from the United States District Court  
for the Eastern District of Washington, Yakima**

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**BRIEF FOR DEFENDANT-APPELLANT**

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**CORPORATE DISCLOSURE STATEMENT**

Defendant-Appellant King Mountain Tobacco Company, Inc. has no parent company, and no public company has any ownership interest in it.

## **REQUEST FOR ORAL ARGUMENT**

King Mountain Tobacco Company, Inc. respectfully requests oral argument. Oral argument will allow the parties to address in greater detail whether the United States Constitution allows the federal government to use a fee to take money from a Yakama Indian Nation business when the money taken is transferred to other private businesses. The Yakama Treaty guarantees that the Yakama people: (1) are to have the “exclusive use and benefit” of their reservation; and (2) cannot be charged fees to travel with their trade goods. Whether those guarantees prohibit the taking at issue in this case is also an issue on which the Court will benefit through oral argument, as is the district court’s failure to apply the appropriate canons of treaty construction

Oral argument will significantly aid the Court’s decisional process on these and other issues in this appeal. Fed. R. App. P. 34(a)(2)(C). Add. 108-10.

**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT ..... i

REQUEST FOR ORAL ARGUMENT ..... ii

TABLE OF AUTHORITIES ..... vii

STATEMENT OF JURISDICTION..... 1

I. Federal District Court Jurisdiction ..... 1

II. Jurisdiction on Appeal ..... 1

ISSUES PRESENTED FOR REVIEW ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 3

STATEMENT OF THE CASE..... 4

I. Procedural History and Rulings Presented for Review ..... 4

A. Initial Proceedings ..... 4

B. Denial of King Mountain’s Requests for Discovery ..... 6

C. Grant of The CCC’s Motion to Dismiss Treaty Counter Claim ..... 8

D. Denial of The CCC’s Motion for Summary Judgment With  
Leave to Renew ..... 8

E. Denial of King Mountain’s Motion for Summary Judgment..... 8

F. King Mountain’s First Appeal..... 10

G. Administrative Remand..... 10

H. The District Court’s Final Judgment and King Mountain’s  
Appeal..... 10

II.	Statement of the Facts.....	12
A.	Introduction .....	12
B.	FETRA - the “Fair and Equitable Tobacco Reform Act of 2004” .....	12
1.	The Federal Tobacco Price Support and Quota System .....	12
2.	The Tobacco Master Settlement Agreement .....	14
i.	Phase I of Big Tobacco’s Settlement.....	14
ii.	Phase II of Big Tobacco’s Settlement - the National Tobacco Grower Settlement Trust.....	14
3.	FETRA’s Fee Relieves Big Tobacco of its Financial Obligation to Fund the Phase II Trust.....	15
4.	The CCC’s FETRA Assessments Against King Mountain .....	16
C.	The 1855 Yakama Treaty .....	17
1.	Negotiation of the Treaty .....	17
2.	The Yakama Treaty Protects the Yakama People’s Historic Cultivation and Trade of Tobacco .....	22
3.	King Mountain’s Tobacco Products .....	22
	SUMMARY OF THE ARGUMENT .....	24
I.	The United States Constitution Prohibits the Taking of King Mountain’s Property Under FETRA .....	24
II.	The Yakama Treaty Prohibits Imposition of the FETRA Fee on King Mountain.....	25
III.	The District Court Erred When it Denied King Mountain Discovery .....	25

STANDARD OF REVIEW AND BURDEN OF PROOF .....	27
ARGUMENT .....	30
I. The United States Constitution Prohibits the Taking of King Mountain’s Property Under FETRA .....	30
A. FETRA Violates the Fifth Amendment Takings Clause .....	30
1. The Takings Clause.....	30
2. The Per Se Physical Takings Rule is the Appropriate Analysis to Employ in this Action.....	31
i. The Money Taken Here is Property Protected by the Takings Clause.....	31
ii. The Court Should Apply the Per Se Physical Takings Rule here .....	35
3. In the Alternative, FETRA Results in a Regulatory Taking .....	36
B. FETRA Violates the Due Process Clause .....	41
C. FETRA Violates Other Constitutional Protections.....	43
II. The Yakama Treaty Prohibits the Imposition of the FETRA Fee on King Mountain.....	44
A. The Yakama Treaty Must Be Construed “Not According to the Technical Meaning of its Words to Learned Lawyers” But in the Sense in which it was Understood by the Yakama People .....	44
B. Federal <i>Tax</i> Analysis of Treaty Guarantees Does Not Apply in This Monetary Fee Case.....	47
C. The Yakama Treaty Precludes Imposition of the FETRA Fee, Even Under the More Stringent “Tax” Analysis .....	50

1.	Treaty Language Can Exempt Indians From Taxation.....	50
2.	Article II of the Yakama Treaty Contains Express Exemptive Language .....	51
3.	Article III of the Yakama Treaty Contains Express Exemptive Language .....	55
III.	The District Court Erred When it Denied King Mountain Discovery .....	59
	CONCLUSION.....	62
	STATEMENT OF RELATED CASES .....	64
	CERTIFICATE OF COMPLIANCE.....	66
	CERTIFICATE OF SERVICE .....	67
	ADDENDUM	

**TABLE OF AUTHORITIES**

**Cases**

*Anderson v. Liberty Lobby*,  
477 U.S. 242 (1986).....61

*Armstrong v. United States*,  
364 U.S. 40 (1960)..... 30, 39, 43

*Bidart Bros. v. California Apple Comm'n*,  
73 F.3d 925 (9th Cir. 1996) .....47

*Boston v. Kitsap Cty.*,  
852 F.3d 1182 (9th Cir. 2017) .....28

*Brown v. Legal Found. of Wash.*,  
538 U.S. 216 (2001)..... 32, 36, 40

*Calder v. Bull*,  
3 U.S. 386 (1798).....30

*Chickasaw Nation v. United States*,  
534 U.S. 84 (2001)..... 48, 49

*Cnty of Oneida v. Oneida Indian Nation*,  
470 U.S. 226 (1985).....27

*Commonwealth Edison Co. v. United States*,  
271 F.3d 1327 (Fed. Cir. 2001) .....39

*Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco  
Tax & Trade Bureau*, 843 F.3d 810 (9th Cir. 2016).....64

*Cook v. United States*,  
32 Fed. Cl. 170 (1994).....49

*Cougar Den, Inc. v. Washington State Dep't of Licensing*,  
No. 92289-6, 2017 WL 1192119 (Wash. Mar. 16, 2017) ..... 57, 58, 59



<i>Cree v. Flores</i> , 157 F.3d 762 (9th Cir. 1998) .....	22, 27, 46
<i>Eastern Enters. v. Apfel</i> , 524 U.S. 498 (1998).....	<i>passim</i>
<i>Grand Traverse Band of Chippewa &amp; Ottawa Indians v. Dir., Michigan Dep't of Nat. Res.</i> , 971 F. Supp. 282 (W.D. Mich. 1995) .....	33
<i>Grand Traverse Band of Ottawa &amp; Chippewa Indians v. Dir., Michigan Dep't of Nat. Res.</i> , 141 F.3d 635 (6th Cir. 1998).....	33, 34
<i>Hexom v. Oregon Dep't of Transp.</i> , 177 F.3d 1134 (9th Cir. 1999) .....	48
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947).....	60
<i>Holt v. Comm'r of Internal Revenue</i> , 364 F.2d 38 (8th Cir. 1966) .....	49
<i>Hoptowit v. CIR</i> , 709 F.2d 564 (9th Cir. 1983) .....	54
<i>Horne v. Dep't of Agric.</i> , 135 S. Ct. 2419 (2015).....	<i>passim</i>
<i>Kimball v. Callahan</i> , 590 F.2d 768 (9th Cir. 1979) .....	35
<i>King Mountain Tobacco Co. v. Alcohol and Tobacco Tax and Trade Bureau</i> , 923 F. Supp. 2d 1280 (E.D. Wa. 2013) .....	7
<i>King Mountain Tobacco Co. v. Alcohol and Tobacco Tax and Trade Bureau</i> , 996 F. Supp. 2d 1061 (E.D. Wa. 2014) .....	7, 64
<i>King Mountain Tobacco Co. v. McKenna</i> , 768 F.3d 989 (9th Cir. 2014) .....	7, 56, 57, 58, 59

<i>Koontz v. St. Johns River Water Management District</i> , 133 S. Ct. 2586 (2013).....	31, 32, 35, 44
<i>Lazore v. Comm'r of Internal Revenue</i> , 11 F.3d 1180 (3d Cir. 1993) .....	49
<i>Lopez v. Smith</i> , 203 F.3d 1122 (9th Cir. 2000) ( <i>en banc</i> ).....	28
<i>Muckleshoot Indian Tribe v. Hall</i> , 698 F. Supp. 1504 (W.D. Wash. 1988) .....	33
<i>Nolan v. Heald College</i> , 551 F.3d 1148 (9th Cir. 2009) .....	28
<i>Oppenheimer Fund, Inc. v. Sanders</i> , 437 U.S. 340 (1978).....	61
<i>Phillips v. Washington Legal Found.</i> , 524 U.S. 156 (1998).....	32, 33, 34, 36
<i>Puri v. Khalsa</i> , 844 F.3d 1152 (9th Cir. 2017) .....	27, 29
<i>Puyallup Tribe v. Dep't of Game</i> , 391 U.S. 392 (1968).....	47
<i>Ramsey v. United States</i> , 302 F.3d 1074 (9th Cir. 2002) .....	<i>passim</i>
<i>Seal v. University of Pittsburg</i> , 135 F.R.D. 113 (W.D. Pa. 1990) .....	60
<i>Seufert Bros. Co. v. United States</i> , 249 U.S. 194 (1919).....	45, 46
<i>Skeem v. United States</i> , 273 F. 93 (9th Cir. 1921) .....	53

*Squire v. Capoeman*,  
351 U.S. 1 (1956)..... 50, 52, 5, 554

*State v. Philip Morris USA Inc.*,  
618 S.E.2d 219 (N.C. 2005)..... 13, 14, 15, 16

*State v. Philip Morris USA Inc.*,  
685 S.E.2d 85 (N.C. 2009)..... 13, 16

*Swim v. Bergland*,  
696 F.2d 712 (9th Cir. 1983) .....52

*Swisher Int'l, Inc. v. Johanns*,  
No. 3:05-cv-871-J16-TEM, 2007 WL 4200816 (M.D. Fla. 2007).....48

*Tulee v. Washington*,  
315 U.S. 681 (1942)..... *passim*

*United States v. Smiskin*,  
487 F.3d 1260 (9th Cir. 2014) ..... *passim*

*United States v. State of Washington*,  
520 F.2d 676 (9th Cir. 1975) .....12

*United States v. Wildcat*,  
244 U.S. 111 (1917).....34

*United States v. Winans*,  
198 U.S. 371 (1905)..... 20, 28, 45, 46

*United States v. Southern Pac. Transp. Co.*,  
543 F.2d 676 (9th Cir. 1976) .....33

*Washington Legal Found. v. Legal Found. of Washington*,  
271 F.3d 835 (9th Cir. 2003) .....32

*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,  
443 U.S. 658 (1979)..... 19, 28, 45

*Yakama Indian Nation v. Flores*,  
 955 F. Supp. 1299 (E.D. Wash. 1997)..... *passim*

**Constitution and Statutes**

U.S. Const. amend. V ..... *passim*

U.S. Const. art. VI, cl. 2 .....44

15 U.S.C. § 714b(c) .....1

28 U.S.C. § 1291 .....1

28 U.S.C. § 1331 .....1

28 U.S.C. § 1345 .....1

Fair and Equitable Tobacco Reform Act of 2004, Pub. L. No. 108–357, 118 Stat.  
 1521 (codified at 7 U.S.C. §§ 518 to 519a (2006)) ..... *passim*

RYC 10.01.91 .....34

RYC 10.01.93 .....34

RYC 22.01.21(4).....34

**Treaties**

Treaty with the Quinaielt, Etc. 1855, 12 Stat. 971 (Jul. 1, 1855).....52

Treaty With the Yakama, 12 Stat. 951 (1855)..... *passim*

**Rules**

Fed. R. App. P. 34(a)(2)(C) ..... ii

Fed. R. Civ. P. 56(a).....28

## Regulations

7 C.F.R. § 1463.11 ..... 10, 60

## Other Authorities

Ryan D. Dreveskracht, *Forfeiting Federalism: The Faustian Pact with Big Tobacco*, 18 Rich. J.L. & Pub. Int. 291 (2015) (available at: <http://scholarship.richmond.edu/jolpi/vol18/iss3/4/>, last visited May 10, 2017) ..... 13, 15, 16

MSA Phase I settlement (available at: <http://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/1msa.pdf>, last visited May 10, 2017)..... 14

MSA Phase II settlement (available at: <http://www.ncbusinesscourt.net/120945/Trust%20Agreement%20less%20Appendix%20B%20C%20D.htm>, last visited May 10, 2017) ..... 15

National Tobacco Growers Settlement Trust Payment - Agriculture Tax Tips, available at: <http://www.irs.gov/Businesses/Small-Businesses-%26-Self-Employed/National-Tobacco-Growers-Settlement-Trust-Payment-Agriculture-Tax-Tips>, last visited May 10, 2017 ..... 15

*Understanding Tribal Treaty Rights In Western Washington* (available at <http://nwifc.org/w/wp-content/uploads/downloads/2014/10/understanding-treaty-rights-final.pdf>, last visited April 11, 2017)..... 19

*Yakama History*, Yakama Nation Museum & Cultural Center (available at: <http://www.yakamamuseum.com/home-history.php>, last visited April 10, 2017) ..... 19

## **STATEMENT OF JURISDICTION**

### **I. Federal District Court Jurisdiction.**

The United States brought this fee collection case on behalf of the Commodity Credit Corporation against King Mountain Tobacco Company, Inc. The district court had jurisdiction over plaintiff's claims because: (1) the claims present a federal question that arises under the laws and a treaty of the United States [28 U.S.C. § 1331, Add. 102-03]; (2) the United States initiated the action [28 U.S.C. § 1345, Add. 104]; and 3) the United States brought the action on behalf of the Commodity Credit Corporation. [15 U.S.C. § 714b(c), Add. 93-96].

### **II. Jurisdiction on Appeal.**

The Ninth Circuit Court of Appeals has appellate jurisdiction pursuant to 28 U.S.C. § 1291, Add. 99-101, because the district court's combined orders constitute a final decision of a district court of the United States. *See* ECF No. 46, ER 26-67; ECF No. 50, ER 8-25; ECF No. 66, ER 2-7; ECF No. 67, ER 1; ECF No. 52, ER 114; ECF No. 69, ER 76-78.

**ISSUES PRESENTED FOR REVIEW**

1. Whether the government's taking of money from a private Yakama Indian business solely for the purpose of transferring that money to other businesses violates the Fifth Amendment's Takings, Due Process and Equal Protection Clauses or the Unconstitutional Conditions Doctrine. Add. 115.
2. Whether the fee at issue, imposed at the point when Yakama trade goods travel out of bond on the Yakama Indian Nation Reservation, is barred by Articles II and III of the Yakama Treaty. Add. 1-7.
3. Whether the district court erred by denying King Mountain its right to discovery.

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

An addendum containing pertinent constitutional provisions, statutes, rules, and legislative history is bound with this brief.



## STATEMENT OF THE CASE

### **I. Procedural History and Rulings Presented for Review**

#### **A. Initial Proceedings**

The United States brought this action as the real party in interest asserting claims alleged by the Commodity Credit Corporation which is a private corporation owned by the United States and operated by the United States Department of Agriculture, ECF No. 1, ER 251. The plaintiff is referred to in this brief as the “CCC.” In its complaint, the CCC sought to force payment of fees it had assessed against King Mountain Tobacco Company, Inc. (“King Mountain”), plus interest, based upon the Fair and Equitable Tobacco Reform Act of 2004 (FETRA).<sup>1</sup> *Id.* at 5, ER 254. The complaint alleged that the fees accrued between 2005 and 2014 (the 10-year period of the FETRA program), and that the fees were due to be paid to eligible tobacco farmers. *Id.* at 3, ER 252.

In response to the complaint, King Mountain moved for a more definite statement. ECF No. 4, ER 384-390. The district court denied that motion, holding “King Mountain does not argue that the United States’ complaint is unintelligible, but only that it lacks detail. The additional details that King Mountain requests may be obtained through the discovery process, and thus do not provide a basis for an order compelling the United States to amend its complaint.” *See* Order Denying

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<sup>1</sup> Pub. L. No. 108–357, 118 Stat. 1521 (codified at 7 U.S.C. §§ 518 to 519a (2006)). Add. 13.

Defendant's Motion for a More Definite Statement, ECF No. 9 at 8, ER 74. King Mountain then filed its answer, and counter claimed seeking a declaratory judgment, refund, and abatement of all amounts of FETRA fee assessments imposed by the CCC on King Mountain. ECF No. 10, ER 376-83. The district court set a telephonic scheduling conference and ordered the parties to confer and submit a proposed discovery plan. ECF No. 11, ER 371-75. The CCC thereafter filed a motion to dismiss King Mountain's counter claim, and a motion for summary judgment. ECF No. 14, ER 349-370; ECF No. 15, ER 319-43.

At the telephonic scheduling conference, the district court noted that the "Parties disagree whether or not discovery should even be allowed." ECF No. 17, ER 318. Following brief argument, the district court ordered King Mountain to "file a motion on what basis discovery is appropriate[.]" *Id.* The court thereafter issued a scheduling order that was limited to the briefing schedule and hearing date for the dispositive and discovery motions. ECF No. 18, ER 316-17.

King Mountain filed a Rule 56(d) motion opposing the CCC's motion for summary judgment [ECF No. 23, ER 302-09], and filed a motion seeking the discovery the district court had promised [ECF No. 25, ER 271-80]. King Mountain also responded to and opposed the CCC's motion to dismiss and motion for summary judgment. ECF No. 24, ER 281-301; ECF No. 26, ER 245-70.

Shortly thereafter, King Mountain moved for summary judgment. ECF No. 41, ER 123-46.

After hearing the parties' arguments, the district court addressed the above matters in a single order, with the exception of King Mountain's motion for summary judgment, which was later denied in a separate order. Each of the appealed rulings is summarized below.

**B. Denial of King Mountain's Requests for Discovery**

The district court devoted nearly nineteen pages to discussing whether King Mountain could obtain discovery. ECF No. 46 at 19-37, ER 44-62. The court separately addressed the following two issues: (1) whether King Mountain was entitled to discovery regarding the accuracy of the FETRA assessments; and (2) whether King Mountain was entitled to discovery regarding its treaty counter claim or defense. *Id.* at 21-22, ER 46-47.

As to discovery regarding the assessments, the district court held that its review was limited to the administrative record and, if the court were to remand the case to the CCC, "no discovery is warranted in this Court on King Mountain's claims regarding the accuracy of the assessment calculations." *Id.* The court further found that "King Mountain may now obtain this additional information on remand before the agency." *Id.* at 21 n.3, ER 46.

In addressing whether King Mountain was entitled to discovery on its Treaty claims and defenses, the district court found that discovery was not necessary because the Yakama Treaty did not contain express exemptive language and without such language, “the Court may not consider extrinsic evidence regarding how Yakama tribe members understood the Treaty at the time that it was ratified.” *Id.* at 36, ER 61. The district court relied on this Court’s opinion in *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014) (“*McKenna*”), as well as the district court’s own decisions in *King Mountain Tobacco Co. v. Alcohol and Tobacco Tax and Trade Bureau*, 923 F. Supp. 2d 1280 (E.D. Wa. 2013) (“*King Mountain I*”), and *King Mountain Tobacco Co. v. Alcohol and Tobacco Tax and Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wa. 2014) (“*King Mountain II*”). Specifically, the district court held that: (1) “the Yakama Treaty must contain express exemptive language before the Court can consider whether that exemptive language applies to FETRA assessments, or consider extrinsic evidence, such as how the Yakama tribe may have understood the Treaty terms” [ECF No. 46 at 28, ER 53]; (2) Articles II and III of the Yakama Treaty do not contain express exemptive language under the holdings of *McKenna*, *King Mountain I*, and *King Mountain II* [*Id.* at 36, ER 61]; (3) due to the absence of express exemptive language, the court could not consider extrinsic evidence regarding the Yakama’s understanding of the Treaty [*Id.*]; and (4) “[t]herefore, no discovery on King

Mountain's Yakama Treaty counterclaim and defense is warranted" [*Id.* at 37, ER 62].

**C. Grant of The CCC's Motion to Dismiss Treaty Counter Claim**

Having rejected King Mountain's request for discovery, the district court only briefly evaluated its dismissal of King Mountain's Treaty-based counter claims, concluding that "[t]here is no set of facts which King Mountain could plead that would change this result, and thus King Mountain has failed to plead a cognizable legal theory with regard to its treaty counterclaim." ECF No. 46 at 38, ER 63.

**D. Denial of The CCC's Motion for Summary Judgment With Leave to Renew**

The district court spent only three sentences addressing the CCC's motion for summary judgment. It denied the motion, but only to remand to the CCC for determination of the accuracy of the CCC's assessment calculations. The remand was proposed as the remedy to the acknowledged violation of due process during CCC's initial agency determination.<sup>2</sup>

**E. Denial of King Mountain's Motion for Summary Judgment**

In a separate order, the district court denied King Mountain's counter claims based on the Takings Clause, Due Process Clause, and Equal Protection Clause of

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<sup>2</sup> "The United States conceded at oral argument that CCC never held a hearing in response to King Mountain's requests and that King Mountain was denied due process." ECF No. 46 at 17, ER 42.

the Fifth Amendment, as well as the Unconstitutional Conditions Doctrine. Add. 115; ECF No. 50, ER 8-25. The district court's eighteen page order was issued one day following oral argument on King Mountain's motion. ECF No. 49, ER 117.

For its Taking Clause holding, the district court found that: (1) the FETRA assessments "were not imposed against any specific, identifiable property, and therefore do not constitute either a classic or regulatory per se taking" [ECF No. 50, ER 16]; and (2) FETRA "merely imposes an obligation to perform an act, the payment of assessments" and did not alter an identified property interest sufficient to amount to an unconstitutional taking [*Id.* at 13, ER 20]. For its Due Process Clause holding, the district court relied on an Eleventh Circuit Court of Appeals case finding a legitimate legislative purpose behind FETRA and that, because in the district court's opinion the FETRA assessments were not retroactive in nature, there was no violation of the Due Process Clause of the Fifth Amendment. *Id.* at 15, ER 22. Similarly, the district court held that because FETRA assessments "are imposed proportionate to a manufacturer's own sales, there is no basis for an Equal Protection claim." *Id.* at 16, ER 23. In denying the remaining legal claim, based on the Unconstitutional Conditions Doctrine, the district court held that "FETRA assessments are a cost of doing business, but their cost is not so prohibitive as to have coerced King Mountain into ceasing to manufacture tobacco." *Id.* at 17, ER

24.

**F. King Mountain's First Appeal**

Because the CCC refused to agree that the district court's remand was not a final judgment, King Mountain appealed the district court's disposition of the matter to this Court. ECF No. 52, ER 114-116. This Court held that the district court's combined rulings and remand to the CCC were not a final judgment, and dismissed the appeal. ECF No. 57, ER 113

**G. Administrative Remand**

King Mountain filed an administrative appeal on remand and included a request for discovery based on the district court's express holding that King Mountain could obtain discovery during remand. *See* KM-SAR-000007-08, Add. 113-14 (requesting dates by which King Mountain could submit discovery requests in the remand). The CCC denied King Mountain any discovery, stating: "neither of the orders of the Court nor the provisions of 7 C.F.R. § 1463.11, Add. 105 contemplate discovery." KM-SAR-000002, Add. 111. The CCC held one perfunctory hearing and then confirmed its earlier determination regarding the amount of fees it claimed King Mountain owes. *See* ECF No. 63, ER 79-89.

**H. The District Court's Final Judgment and King Mountain's Appeal.**

After the CCC closed the administrative appeal process, it moved to reopen the district court case and renewed its motion for summary judgment. ECF No. 60,

ER 90-99. The district court granted that motion. ECF No. 66, ER 2-7.

King Mountain appealed. No. 69, ER 76-78.



## **II. Statement of the Facts**

### **A. Introduction**

Should this Court elect not to analyze the takings here under the Supreme Court’s “clear rule” analysis, it will be required to address King Mountain’s Treaty and regulatory claims. Both of those arguments are fact intensive. *Accord United States v. State of Washington*, 520 F.2d 676 (9th Cir. 1975) (affirming “in all respects, with [one] clarification” a district court decision, 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 that case, including the Yakama Treaty); *Eastern Enters. v. Apfel*, 524 U.S. 498, 522-24 (1998) (“whether ‘justice and fairness’ require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons, is essentially ad hoc and fact intensive”) (citation and some quotations omitted).

### **B. FETRA - the “Fair and Equitable Tobacco Reform Act of 2004”**

#### **1. The Federal Tobacco Price Support and Quota System**

Beginning in 1938 and continuing until the enactment of the Fair and Equitable Tobacco Reform Act of 2004 (FETRA),<sup>3</sup> “the United States government

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<sup>3</sup> Pub. L. No. 108–357, 118 Stat. 1521 (codified at 7 U.S.C. §§ 518 to 519a (2006)). Add. 13

largely regulated the production and supply of domestic tobacco through a system of price supports and quotas.” *State v. Philip Morris USA Inc.*, 685 S.E.2d 85, 86-87 (N.C. 2009) (“*Philip Morris II*”). “This system utilized ‘price supports [to keep] tobacco prices elevated’ and implemented quotas to curtail the amount of tobacco grown.” *Id.* (quoting *State v. Philip Morris USA Inc.*, 618 S.E.2d 219, 220 (N.C. 2005) (“*Philip Morris I*”). “In its final years, the system began collapsing under its own weight.” *Id.* at 87. “The tobacco farmers toiling under this system experienced shrinking quotas due to a lessening demand for artificially high-priced domestic tobacco, a product of the federal price support system.” *Id.* at 87. A law review article summarizing the collapse of this federal scheme explains:

in 1998 — in the midst of utter turmoil for tobacco farmers — came the MSA, which would have sounded the death knell had it not been for “Attorneys General from tobacco-producing states strongly advocating that some MSA payments go toward agricultural funding and rural economic development.”

Ryan D. Dreveskracht, *Forfeiting Federalism: The Faustian Pact with Big Tobacco*, 18 Rich. J.L. & Pub. Int. 291, 307-08 (2015) (internal citations omitted).<sup>4</sup>

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<sup>4</sup> Available at: <http://scholarship.richmond.edu/jolpi/vol18/iss3/4/>, last visited May 10, 2017.

## **2. The Tobacco Master Settlement Agreement**

### **i. Phase I of Big Tobacco's Settlement**

On November 16, 1998, forty-six states and six other jurisdictions entered a settlement called the Master Settlement Agreement (“MSA”).<sup>5</sup> The MSA settled lawsuits against the four largest United States tobacco manufacturing companies, Philip Morris Inc., R. J. Reynolds, Brown & Williamson and Lorillard (collectively “Big Tobacco”). Under the MSA the states agreed to drop their then pending lawsuits against Big Tobacco and to exempt Big Tobacco from private tort liability, and in exchange, Big Tobacco to pay the states a minimum of \$206 billion over the first 25 years of the agreement.

### **ii. Phase II of Big Tobacco's Settlement - the National Tobacco Grower Settlement Trust**

The MSA also required Big Tobacco to address the negative economic consequences that the MSA would have on tobacco farmers. In *Philip Morris I*, the court explained this Phase II agreement

[Big Tobacco] immediately raised prices to cover the future costs of payments due under the MSA. The parties anticipated this rise in prices would curtail tobacco consumption; indeed, reduced consumption was one of the aims of the MSA. They also understood decreased demand for tobacco products could cause tobacco [farmers] significant economic hardship. The MSA therefore required that [Big Tobacco] meet with the political leadership of the fourteen tobacco

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<sup>5</sup> The MSA Phase I settlement is available at: <http://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/1msa.pdf>, last visited May 10, 2017.

growing states . . . to devise a plan for mitigating the MSA’s potentially negative economic consequences.

*Philip Morris I*, 618 S.E. 2d at 221.<sup>6</sup> The plan they developed involved a Trust funded by Big Tobacco.<sup>7</sup> Yet although Big Tobacco “agreed to pay \$5.15 billion to the Trust over a 12-year period,”<sup>8</sup> the “deal was not the boon expected by tobacco farmers.”<sup>9</sup>

### **3. FETRA’s Fee Relieves Big Tobacco of its Financial Obligation to Fund the Phase II Trust**

Big Tobacco had no intent of paying into the Trust created under Phase II:

From 1998 on, Big Tobacco ramped up its lobbying efforts to pass buyout legislation similar to the 1997 bill, in order “to extricate themselves from the Trust obligations.” Their efforts came to fruition in 2004, an election year. Surreptitiously tucked into Title VI of the American Jobs Creation Act of 2004 was the FETRA – the first law to move an American crop “instantaneously from a government-regulated market to a free-market system.” The Senate bill passed on July 15, 2004, and provided that the federal government would buyout all quota, with payments funded by assessments levied on Big Tobacco. After Senate and House conferences, on October 11, 2004, an agreed-upon bill was passed, providing quota holders \$7 per quota pound (\$1 less than the Senate bill), paid in equal installments over 10

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<sup>6</sup> The MSA Phase II settlement is available at: <http://www.ncbusinesscourt.net/120945/Trust%20Agreement%20less%20Appendix%20B%20C%20D.htm>, last visited May 10, 2017.

<sup>7</sup> *Philip Morris I*, 618 S.E.2d at 221-22; *Forfeiting Federalism*, 18 Rich. J.L. & Pub. Int. at 308-09.

<sup>8</sup> National Tobacco Growers Settlement Trust Payment - Agriculture Tax Tips, available at: <http://www.irs.gov/Businesses/Small-Businesses-%26-Self-Employed/National-Tobacco-Growers-Settlement-Trust-Payment-Agriculture-Tax-Tips>, last visited May 10, 2017.

<sup>9</sup> *Forfeiting Federalism*, 18 Rich. J.L. & Pub. Int. at 309 (internal citations omitted).

years, with total payments not to exceed \$10.14 billion (\$1.86 billion less than the Senate bill). In addition, **and most importantly**, the final bill provided that the buyout would be funded by assessments on **all tobacco product manufacturers and importers, not just those of Big Tobacco**, based upon their market share. **Because of the Tax Offset Adjustment, Phase II payments disappeared.**

*Forfeiting Federalism*, 18 Rich. J.L. & Pub. Int. at 310 (internal citations omitted) (emphasis added). By getting FETRA passed, Big Tobacco avoided its contractual obligations to fund the Trust, and it immediately stopped making Trust payments.<sup>10</sup>

Small tobacco growers and small tobacco manufacturers were the losers. Specifically, FETRA forced companies like King Mountain to fund the payment obligations that Big Tobacco had created through its settlements with the states, even though these small companies were not parties to the MSA settlements (and therefore received no benefits, releases or protections from those settlements). This result was predicted by the court in *Philip Morris I* – Big Tobacco “stand[s] to profit handsomely from the abolition of market controls and a concomitant drop in tobacco prices.” *Philip Morris I*, 618 S.E.2d at 223.

#### **4. The CCC’s FETRA Assessments Against King Mountain**

King Mountain had no involvement in and did not benefit from the federal system of price supports and quotas that were in place from 1938 to 2004 as King

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<sup>10</sup> Lawsuits by the Grower States followed: *Philip Morris I*, 618 S.E.2d 219; *Philip Morris II*, 685 S.E.2d 85 (holding the Phase II Trust contract allowed Big Tobacco to offset all payments made under FETRA (from 2005 forward) against all payments due the Trust, without regard to which states are receiving benefits under FETRA).

Mountain did not exist during that time. King Mountain's SOF at ¶ 4, ECF No. 42, ER 119. King Mountain had no involvement in, was not a party to, and did not benefit from the MSA settlements that Big Tobacco entered into with the states in 1998 and 1999. King Mountain's SOF at ¶ 5, ECF. No. 42, ER 119. King Mountain had no involvement in and did not benefit from Big Tobacco's successful efforts to get FETRA enacted. King Mountain's SOF at ¶ 5, ECF No. 42, ER 119. King Mountain does not receive payments under the FETRA program for the tobacco it grows on Yakama Nation trust land. King Mountain's SOF at ¶ 7, ECF. No. 42, ER 119. FETRA adds costs to King Mountain's tobacco products and impedes King Mountain's ability to trade tobacco grown and harvested on the Yakama Nation, and the products King Mountain manufactures on the Yakama Indian Reservation.<sup>11</sup>

### **C. The 1855 Yakama Treaty<sup>12</sup>**

#### **1. Negotiation of the Treaty**

The 1855 Yakama Treaty resulted in the Yakama people's surrender to the United States of nearly ten million acres, or 90% of their land base. *United States v. Smiskin*, 487 F.3d 1260, 1265 (9th Cir. 2014); Yakama Treaty, Add. 1-7. In return, the Yakama people were promised by federal negotiators that "*you can rely*

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<sup>11</sup> King Mountain's SOF at ¶ 8, ECF. No. 42, ER 120.

<sup>12</sup> Although the Treaty is titled "Treaty with the Yakimas," 12 Stat. 951 (1855), Add. 1-7, the official spelling is "Yakama." *See Ramsey v. United States*, 302 F.3d 1074, 1076 n.1 (9th Cir. 2002).

*on all its provisions being carried out strictly.” Yakama Indian Nation v. Flores*, 955 F. Supp. 1299, 1243 (E.D. Wash. 1997) (discussing the representations of federal negotiators at the treaty negotiations) (emphasis in original).

It is impossible to understand this Treaty and its meaning to the Yakama people unless the facts surrounding its negotiation are placed into historical context. The Lewis and Clark Expedition entered what is now the State of Washington on October 10, 1805, a short fifty years before the Treaty was negotiated. Britain ceded all of its claims to the land that is now the State of Washington in 1846. Settlers from the eastern United States began pouring into the Oregon Territory. The growing population of settlers north of the Columbia River persuaded the U.S. government to create the Washington Territory in 1853. This massive influx of settlers also led to a series of wars between the United States military and the Native Indian population who had controlled this area since time immemorial.

Isaac Ingalls Stevens, Governor of the Washington Territory, and General Joel Palmer, Superintendent of Indian Affairs in the Oregon Territory, were tasked with negotiating treaties with these Native people. In 1855 Governor Stevens and General Palmer initiated treaty negotiations near present day Walla Walla Washington with Kamaiakin, Sklom, Owhi, Te-cole-kun, La-hoom, Koo-lat-toose, Sch-noo-a, Me-ni-nock, Shee-ah-cotte, Sla-kish, Elit Palmer, Tuck-quille, Wish-

och-knipits, Ka-loo-as and other leaders of fourteen tribes and bands of Plateau Indians. Those tribes and bands ultimately were confederated into the Yakama Nation.<sup>13</sup> It was critically important to the United States that these negotiations be successful.<sup>14</sup>

As members of an oral culture, the Yakama leaders focused on the federal negotiators' spoken words, not the written text ultimately included in the Treaty, which none of the Yakama signatories could read. SOF at ¶ 16, ECF No. 27, ER 152; Decl. of Fisher, ECF No. 27-3 at ¶ 6, ER 239.<sup>15</sup> The Yakama's understanding of their agreement came from verbal descriptions of the Treaty's articles passed through a chain of interpreters and Indian criers. *Id.* But the translation provided to benefit the Yakama negotiators was limited as the "language" used by the interpreters was a commercial jargon that used only a few hundred words.

*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* ("Fishing Vessel"), 443 U.S. 658, 667 n.10 (1979).

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<sup>13</sup> See *Yakama History*, Yakama Nation Museum & Cultural Center (available at: <http://www.yakamamuseum.com/home-history.php>, last visited April 10, 2017).

<sup>14</sup> See *Understanding Tribal Treaty Rights In Western Washington* (available at <http://nwifc.org/w/wp-content/uploads/downloads/2014/10/understanding-treaty-rights-final.pdf>, last visited April 11, 2017).

<sup>15</sup> King Mountain Tobacco Co., Inc.'s Response to the United States' Statement of Facts and Additional Statement of Facts, ECF No. 27, ER 147, is abbreviated as "SOF" in this opening brief.



The verbal descriptions of the promises made by the United States treaty negotiators were captured in part in minutes taken by the United States. Treaty Minutes, Add. 15-88. These minutes, testimony of Yakama elders and similar sources are part of the Treaty and must be relied upon by federal courts when called upon to determine the meaning of the Treaty's written text. *Tulee v. 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”); *United States v. Winans*, 198 U.S. 371, 381 (1905) (“How the treaty in question was understood may be gathered from the circumstances.”).

The negotiations at Walla Walla culminated in the Yakama Treaty of 1855, which was subsequently ratified by the Senate and signed by the President. Article II of the Yakama Treaty set aside the land the Yakama people retained as a reservation for “the exclusive use and benefit” of the Yakama people. Yakama Treaty; Add. 1-7; Treaty Minutes, Add. 15-88. 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 would accrue to non-Yakama businesses through imposition of fees imposed on reservation activities. SOF ¶ 29, 30, 31, ECF No. 27, ER 155-56; Decl. of Fisher, ECF No. 27-3 at ¶ 7(j), ER 164.

Article III of the Treaty extended and protected Yakama economic activities beyond reservation boundaries. Specifically, it secured to the Indians “free access” to the nearest public highway . . . as also the right, in common with the citizens of the United States, to travel upon all public highways.” Yakama Treaty; Add. 2. The Yakama people understood the Treaty to reserve their “right to travel the public highways without restriction for purposes of hauling goods to market” and to “retain their right to travel outside reservation boundaries, with no conditions attached” even as they “engage in *future* trading endeavors”. *Yakama Indian Nation*, 955 F. Supp. at 1248, 1251, 1253 (emphasis in original). The Yakama people also understood that the right to travel with trade goods included all goods, not just those derived from on-reservation resources. *Smiskin*, 487 F.3d at 1268 (“Here, there is evidence from the time of treaty suggesting that the Yakamas then understood the right to travel to extend beyond tribal goods.”).

The Yakama people’s understanding of these sacred treaty terms is consistent with the unequivocal promises made by the federal treaty negotiators. Federal treaty negotiators explained to the Yakama people that “entering into the Treaty would not infringe upon or hinder their tribal practice” and “was presented as a means to preserve Yakama customs and prevent further encroachments by white settlers, while at the same time providing tribes with modern accoutrements to enhance their standard of living and fortify their resources.” *Yakama Indian*

*Nation*, 955 F. Supp. at 1244; *see Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) (“*Cree II*”) (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”).

## **2. The Yakama Treaty Protects the Yakama People’s Historic Cultivation and Trade of Tobacco**

The Yakama people have long been recognized as “inveterate traders” with extensive trading practices and territory. *Yakama Indian Nation*, 955 F. Supp. at 1238 (“*Cree I*”). Their trading practices included trade with travelers entering Yakama territory, as well as trade that occurred well beyond their lands. *Id.* at 1238. The Yakama people’s “way of life depended on goods that were not available in the immediate area.” *Id.* at 1238; *see Smiskin*, 487 F.3d at 1268 (“it is likely that the Yakamas transported not only their own goods but also goods produced by other tribes in the network”).

## **3. King Mountain’s Tobacco Products.**

Pursuant to their historic practices and treaty rights, the Yakama people and their tribal corporations continue to harvest the resources of the land and trade them and other goods to this very day. King Mountain Tobacco Company is just such a tribal corporation, organized and existing under the laws of the Yakama Nation. SOF at ¶ 5, EFC No. 42, ER 119, 122. King Mountain is owned and operated by members of the Wheeler family, all enrolled member of the Yakama

Nation. King Mountain's SOF at ¶ 2, ECF No. 42, ER 119.<sup>16</sup> King Mountain's manufacturing facilities are located on a Yakama trust allotment belonging to the Wheeler family. SOF at ¶ 2, ECF No. 42, ER 119

All products manufactured by King Mountain contain trust-land grown tobacco although some of that product is blended with other tobacco. ECF No. 10 at ¶ 25, ER 379. Certain products manufactured by King Mountain consist entirely of tobacco grown exclusively on allotted land held in trust by the United States; ECF No. 10 ¶ 26, ER 380.

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<sup>16</sup> Delbert Wheeler passed away in June 2016. His estate is in probate, including his allotted lands, which must pass to enrolled members of the Yakama Nation under federal probate procedures, and all shares of King Mountain, which also will pass to his Yakama enrolled family members.

## SUMMARY OF THE ARGUMENT

### **I. The United States Constitution Prohibits the Taking of King Mountain's Property Under FETRA.**

The CCC fee at issue in this case takes money from a Native American business based upon the business's activities on the Yakama Nation. Non-Yakama businesses are the sole beneficiaries of the money taken from this Yakama Indian business. The money taken is property, protected by the Fifth Amendment to the United States Constitution which guarantees that private property will not be taken for a private use, and only taken for a public use with just compensation. The fee scheme also violates the Fifth Amendment's Due Process Clause because it imposes liability on a company that had not participated in the controlled market that the fee was designed to address, and which could not have anticipated being subject to liability to remedy the shortcomings of that controlled market after the fact. And because of FETRA's unquestioned benefit to Big Tobacco (and its unequal treatment of small companies such as King Mountain who did not receive similar benefits) the fee also violates both the equal protection clause, and the unconstitutional conditions doctrine. FETRA further violates these constitutional provisions by denying King Mountain's access to market if it exercises its Treaty right to travel.

## **II. The Yakama Treaty Prohibits Imposition of the FETRA Fee on King Mountain.**

The Yakama Treaty guarantees that the Yakama people will have the “exclusive use and benefit” of their reservation. But FETRA charges a fee on the Yakama Nation that the CCC collects and then uses to benefit non-Yakama federal tobacco quota holders. The Yakama Treaty also exempts Yakama people from restrictions on travel, such as the fee at issue here which is imposed on travel of product out of bond on the Yakama Nation. The district court erred when it dismissed King Mountain’s counterclaim for failing to state a claim, and when it granted summary judgment against King Mountain on its Treaty defenses. The Treaty’s language is at least sufficiently expressed to have required the district court to consider the Treaty minutes and other evidence showing how the Yakama Indians understood the Treaty and their rights and guarantees under the Treaty. The district court compounded its error when it failed to conduct the Treaty analysis required by controlling Supreme Court and Ninth Circuit Court of Appeals precedent, including the requirement to apply the Indian canons of treaty construction.

## **III. The District Court Erred When it Denied King Mountain Discovery.**

King Mountain repeatedly asked to engage in discovery to identify the evidence it needed to defend this action. Although the district court promised King Mountain that it would be allowed discovery, the court ultimately denied access to

discovery at every stage of the proceedings below. Compounding this error, the district court granted summary judgment in favor of the plaintiff, holding that King Mountain failed to “demonstrate that there is probative evidence that would allow a reasonable jury to find in their favor.” ECF No. 66 at 3-4, ER 4-5. Placing the burden on a party to demonstrate the probative value of evidence when it has been denied access to the evidence is contrary to the Rules of Civil Procedure, and requires remand to the district court to ensure King Mountain its right to due process.

## **STANDARD OF REVIEW AND BURDEN OF PROOF**

This case involves a determination of constitutional protections, and interpretation of a treaty between the United States and an Indian Tribe. This Court reviews *de novo* a district court's constitutional rulings, and its determination on mixed questions of law and fact that implicate constitutional rights. *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017). The Court also reviews *de novo* the interpretation and application of treaty language. *Cree II*, 157 F.3d at 768.

The Supreme Court and this Court repeatedly have held that the interpretation of Indian treaties is subject to canons of construction favorable to the Indian party. *See, e.g., Cnty of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 227 (1985). Under those canons, 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 Indian's favor. *Tulee*, 315 U.S. at 684-85 (“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”). As the Supreme Court has held:

[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.

*Fishing Vessel*, 443 U.S. at 675-76 (citation omitted) (emphasis added). Sources beyond the treaty necessarily aid treaty interpretation. *Winans*, 198 U.S. at 381 (“How the treaty in question was understood may be gathered from the circumstances.”).

The district court’s grant of the CCC’s motion to dismiss the counterclaim is reviewed *de novo*, *Boston v. Kitsap Cty.*, 852 F.3d 1182, 1184-85 (9th Cir. 2017), as is the grant of summary judgment, *Nolan v. Heald College*, 551 F.3d 1148, 1153 (9th Cir. 2009). This Court is guided by the traditional rules of summary judgment and will affirm a grant of summary judgment only if it appears from the record that “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a), Add. 107; *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (*en banc*). The Court must view the evidence in the light most favorable to the non-moving party to determine whether there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ramsey*, 302 F.3d at 1077.

When the district court refused to allow King Mountain access to discovery it violated King Mountain's right to due process. That violation of a constitutional right is reviewed *de novo*. *Puri*, 844 F.3d at 1157.

## ARGUMENT

### **I. The United States Constitution Prohibits the Taking of King Mountain's Property Under FETRA.**

#### **A. FETRA Violates the Fifth Amendment Takings Clause.**

##### **1. The Takings Clause.**

The FETRA fee scheme allows the federal government to take money from a private Yakama Indian business, with the sole purpose of transferring that money to non-Indian private businesses and individuals. But the Fifth Amendment Takings Clause guarantees that private property will not be taken, even for a public use, without just compensation. U.S. Const. amend. V. Add. 115. That guarantee “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The fee here is particularly offensive to this constitutional protection because the money the government takes is handed over to private businesses and individuals. As the Supreme Court has stated, “[i]t is against all reason and justice” to presume that the legislature has been entrusted with the power to enact “a law that takes property from A. and gives it to B.” *Calder v. Bull*, 3 U.S. 386, 388 (1798) (opinion of Chase, J.).

Takings Clause jurisprudence recognizes two separate ways in which the government can trigger Fifth Amendment protections, both of which are dependent on the nature of the government action and not the type of property taken: (1) when the government physically takes property courts apply a *per se* taking rule; and (2) when the government limits property use through regulation courts apply a more complex analysis to determine the “justice and fairness” of the government action. As noted by the Supreme Court in *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2428 (2015): “It is ‘inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.’” *Id.* (citation omitted).

**2. The *Per Se* Physical Takings Rule is the Appropriate Analysis to Employ in this Action.**

**i. The Money Taken Here is Property Protected by the Takings Clause.**

The district court held that money is not property protected by the Fifth Amendment, and then ruled that because the FETRA assessments take money, they:

were not imposed against any specific, identifiable property, and therefore do not constitute either a classic or regulatory *per se* taking.

ECF No. 50 at 9. But controlling precedent hinges upon specific, identifiable *property interests*, and protects money generated from those *property interests* under the Fifth Amendment. For example, in *Koontz v. St. Johns River Water*

*Management District*, the Supreme Court did not say that money qualified as property if linked to other property, but instead said money qualifies as property if it is linked to a “specific, identifiable *property interest*” in which case “a ‘per se [takings] approach’ is the proper mode of analysis under the Court’s precedent.” *Koontz*, 133 S. Ct. at 2600 (alteration omitted, emphasis added) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2001)).

Moreover, in reaching its conclusion that money is not property in this case, the district court relied on cases where courts were not called upon to address Indian law, either tribal or federal, and the district court declined to apply holdings confirming that money can be property subject to Fifth Amendment protections. *E.g.*, *Koontz v. St. Johns River Water Mgm’t Dist.*, 133 S. Ct. 2586 2600-02 (2013) (government “confiscations of money [are] takings despite their functional similarity to a tax”); *cf.* *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 866 (9th Cir. 2003) Kozinski, J., dissenting (it is “peculiar and quite dangerous to say that the government has greater latitude when it takes money than when it takes other kinds of property”).

As the Supreme Court has instructed, “[b]ecause the Constitution protects rather than creates *property interests*, the existence of a *property interest* is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’” *Phillips v. Washington Legal Found.*, 524

U.S. 156, 164 (1998) (emphasis added) (holding that money paid as interest on trust accounts is “property” under Texas law, and entitled to Fifth Amendment protection). Here, the CCC takes money from King Mountain, which the CCC then gives to non-Yakama businesses and individuals. “Existing rules or understandings” confirm that the money in this case – money that this Native American company generates on allotted Yakama lands – is the private property of its owner – King Mountain.

So, for example, the Yakama Treaty guarantees this Yakama business and its owners the “exclusive benefit” of their activities conducted on the Yakama reservation.” That exclusive benefit” is a *property interest*, qualifying the money generated by that *property interest* as property protected by the Fifth Amendment.

*United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 686 (9<sup>th</sup> Cir. 1976)

(“Abrogation of treaty rights is also subject to constitutional limitation such property rights cannot be taken without payment of just compensation”);

*Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988)

(“The Tribes’ right to take fish is a property right, protected under the fifth

amendment”); *Grand Traverse Band of Chippewa & Ottawa Indians v. Dir.*,

*Michigan Dep’t of Nat. Res.*, 971 F. Supp. 282, 288 (W.D. Mich. 1995) (“Treaty-

reserved rights to access traditional fishing areas and catch fish are property rights

protected by the United States Constitution”), *aff’d sub nom. Grand Traverse Band*

*of Ottawa & Chippewa Indians v. Dir., Michigan Dep't of Natural. Res.*, 141 F.3d 635 (6th Cir. 1998); *see Phillips*, 524 U.S. at 170 (discussing “longstanding recognition that property is more than economic value; it also consists of ‘the group of rights which the so-called owner exercises in his dominion of the physical thing,’ such ‘as the right to possess, use and dispose of it.’”) (citations omitted).

Money is also property under Yakama law, as codified in the Revised Yakama Code. *See* RYC 10.01.91, Add. 89 (defining fraud as a criminal offense for a person “who shall by willful misrepresentation or deceit or by false interpreting or by the use of false weights or measures, *obtain any money or other property*”) (emphasis added); RYC 10.01.93, Add. 89-90 (defining gambling as a criminal offense for a person “who operates or participates in any game of chance or lottery to win money or other valuable consideration or operates a place or device where a risk is taken on a chance of winning *money or other valuable property*”) (emphasis added); RYC 22.01.21(4), Add. 91-92 (authorizing domestic relations actions to include “the recovery from either spouse of an amount of *money or other personal property* as may be just and proper for the maintenance of the other”) (emphasis added).

And money generated from Indian allotments is the “property” of the allotment holder. The allotment holder here is the owner of King Mountain Tobacco. *Accord United States v. Wildcat*, 244 U.S. 111, 114 (1917) (addressing

“disposition of the lands, moneys, or other property of the Creek Nation”); *Kimball v. Callahan*, 590 F.2d 768, 773 (9th Cir. 1979) (“an individual Indian enjoys a right of user in tribal property derived from the legal or equitable property right of the Tribe of which he is a member. Because money tied to a specific, identifiable *property interest* is property protected by the Fifth Amendment, money generated on a Yakama Indian allotment is property, and the district court’s ruling that the money at issue here is not property for purposes of the Fifth Amendment’s Taking Clause is wrong.

**ii. The Court Should Apply the *Per Se* Physical Takings Rule here.**

FETRA does not impose any regulatory restrictions on King Mountain, nor on King Mountain’s use of its property. Instead, the CCC simply takes King Mountain’s property at the point that King Mountain’s manufactured products are moved out of bond on an Indian allotment within the Yakama Nation.<sup>17</sup> This “categorical taking” requires application of the *per se*, or “clear rule” takings analysis. *Horne*, 135 S. Ct. at 2427 (“physical *appropriation* of property [gives] rise to a *per se* taking, without regard to other factors” (emphasis in original)). *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2600 (2013) (when the government takes funds linked to a specific, identifiable property

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<sup>17</sup> United States Statement of Material Facts in Support of Its Motion for Summary Judgment, ECF No. 15-1, at ¶ 1, 2, ER 344-45.



interest a per se takings approach is required).<sup>18</sup>

### **3. In the Alternative, FETRA Results in a Regulatory Taking.**

If the Court declines to apply the clear rule analysis, FETRA still results in an unconstitutional regulatory taking. In *Eastern Enters. v. Apfel*, the Supreme Court considered a Takings Clause challenge to the Coal Industry Retiree Health Benefit Act, which established a system for funding health care benefits for coal industry retirees. *Eastern*, 524 U.S. at 503-04. Although *Eastern* was no longer involved in the coal industry, it was assessed premiums for former employees of over \$5 million per year. *Id.* at 516-17. In analyzing whether a regulatory taking had occurred, the Court explained:

the process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental action. That inquiry, by its nature, does not lend itself to any set formula, and the determination whether "'justice and fairness' require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons," is essentially ad hoc and fact intensive. We have identified several factors, however, that have particular significance: "[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."

*Id.* (citations omitted).

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<sup>18</sup> See also *Brown*, 538 U.S. at 235 (in monetary takings case, the court stated: "We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis").

Addressing the first factor – economic impact – FETRA is retroactive as it only benefits businesses that were in the market prior to its enactment. And just as in *Eastern*, FETRA’s scheme compensates for past activity through assessments on future business activity. As the Court confirmed in *Eastern*, it is the nature of the wrong sought to be corrected by Congress, not the timing of the monetary exaction, that makes a scheme retroactive.

In *Eastern* the company could have raised its prices.<sup>19</sup> But the ability, *vel non*, to simply charge more money to customers in a competitive market was not the issue in *Eastern*, and it is not the issue here. Pricing demands in the cigarette market are extremely competitive, especially for small, relatively unknown companies like King Mountain.<sup>20</sup> FETRA is a retroactive scheme (just like the flawed scheme rejected in *Eastern*)<sup>21</sup> which has forced a considerable financial

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<sup>19</sup> *Eastern* “was a signatory to every NBCWA executed between 1947 and 1964.” It was still an operating business “Although it left the coal industry in 1965.” *Eastern*, 524 US. at 499.

<sup>20</sup> See, e.g., Value Line Industry Analysis: Tobacco (“Given the limited opportunities for growth in this highly competitive industry, brand equity support is crucial in developing customer loyalty. A leading market position gives a company greater pricing power, which is important, especially under difficult economic conditions. The leader of a particular product category often determines price points.”) [http://.staging.valueline.com/Stocks/Industries\\_Analysis\\_Tobacco.aspx#.WRSUe2fru](http://.staging.valueline.com/Stocks/Industries_Analysis_Tobacco.aspx#.WRSUe2fru), last visited May 11, 2017.

<sup>21</sup> The program in *Eastern* that could not pass muster was a compassionate health insurance funding system for retired coal miners. In contrast, there is no rationale for the Government to force King Mountain to make payments to the very tobacco growers who benefitted from the government’s price support system for

burden upon King Mountain.<sup>22</sup>

As to the second factor, the Court must consider whether King Mountain's reasonable investment backed expectations included expectations that it would have to: (1) bear the costs of paying for Big Tobacco's MSA contracts (to which King Mountain was not a party and from which it did not benefit); (2) pay quota holders for quotas in which King Mountain had no interest and from which King Mountain received no benefit; and (3) bear the costs of paying for the first law to move an American crop "instantaneously from a government-regulated market to a free-market system." As a new company formed in September 2004, King Mountain could not expect and did not anticipate that it would be burdened with the substantial costs associated with dismantling a regulated market system in which it had never participated and from which it had already benefited.

As to the third factor, just as in *Eastern*, "the nature of the governmental action in this case is quite unusual." *Eastern*, 524 U.S. at 537. As the *Eastern* court explained, "[w]hen [legislation] singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness

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decades.

<sup>22</sup> The district court awarded \$6,425,683.23 — against King Mountain, including interest. ECF No. 67, ER 1.

underlying the Takings Clause.” Again, the FETRA assessments are unrelated to any commitment that King Mountain made, or to any injury it caused, or to any benefit it received.<sup>23</sup> Instead, FETRA forced King Mountain to bear a burden which should have been borne by the public as a whole. *Armstrong*, 364 U.S. at 49. The \$9.6 billion in FETRA payments to growers is little more than a naked wealth transfer, as FETRA does not even purport to: (1) compensate growers for any burden they endured under the price support system, or (2) recoup from manufacturers some economic benefit that they derived from the program. 7 U.S.C. §§ 518-519a. Add. 13-14.

And finally, FETRA did not promote the public interest. Instead, the history of FETRA confirms that the primary purpose of the legislation was to promote the interests of Big Tobacco. Under FETRA, Big Tobacco escaped billions of dollars in payment obligations under the MSA Phase II Trust, and now that a “free market” is in place, almost all tobacco is sold by direct contract with Big Tobacco,

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<sup>23</sup> *Accord Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1342 (Fed. Cir. 2001) (distinguishing Supreme Court cases that held *tax* legislation unconstitutional, stating: “those decisions were limited to situations involving a ‘wholly new tax.’ EPACT, unlike the statutes at issue in those two cases, is not a mere revenue-raising measure. Rather, it represents an assessment on particular existing domestic utilities, which Congress concluded **benefited from** the government’s operation of the uranium enrichment facilities, and which Congress also concluded were **themselves partially responsible for the problem** the statute seeks to remedy” (emphasis added, citation omitted)).

allowing Big Tobacco to completely “dictate the market.”<sup>24</sup> Any benefit that was conferred on tobacco growers and quota holders certainly cannot be construed as a public benefit because they would have received the same benefit without FETRA, through payments made by Big Tobacco into the Phase II Trust Fund. FETRA allowed Big Tobacco to avoid making those payments, and did so by taking property from one group of businesses (tobacco manufacturers and importers) for the purported benefit of another group of businesses (tobacco growers and quota holders) but for the actual benefit of Big Tobacco. This taking of private property for the benefit of another private party cannot constitute public use. *Eastern*, 524 U.S. at 523 (“‘It is against all reason and justice’ to presume that the legislature has been entrusted with the power to enact ‘a law that takes *property* from A. and gives it to B’”) (internal citation omitted).

FETRA’s wealth transfer mechanism is unconstitutional because it does not constitute public benefit. *Horne*, 135 S. Ct. at 2433, Thomas, J. concurring (“The Takings Clause imposes a meaningful constraint on the power of the state — the government may take property only if it actually uses or gives the public a legal right to use the property” (internal quotations and citation omitted)); *Brown*, 538 U.S. at 231 (“While it confirms the State’s authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such

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<sup>24</sup> *Forfeiting Federalism*, 18 Rich. J.L. & Pub. Int. at 310-311.

authority: the taking must be for a “public use” and “just compensation” must be paid”. Add. 115.

**B. FETRA Violates the Due Process Clause.**

FETRA violates due process because paying yet more money to the beneficiaries of an historic price control scheme is not a rational way to “instantaneously” move a billion dollar industry to a free-market system. Justice Kennedy was the fifth vote for holding the Coal Act unconstitutional in *Eastern*, but not based on the Takings Clause which he found “unnecessary” to invoke. *Eastern* 524 U.S. at 539. Instead, Justice Kennedy found that the Act violated the Due Process Clause because it imposed liability on a company that had not participated in the conduct that harmed the miners, and which could not have anticipated being subject to liability after the fact. *Id.* at 547-50. Here, FETRA imposes liability after the fact on King Mountain even though King Mountain had no involvement in the old price support program that enriched tobacco growers. In a model of twisted logic, because growers will no longer benefit from a price support system that enriched them for decades, Congress decided to enrich them for an additional ten years through a wealth transfer scheme funded not by taxes but from monetary exactions taken from companies like King Mountain.

FETRA imposes liability in an arbitrary and irrational manner because its effect is very different on King Mountain (which was not a party to and did not

benefit from the old federal price support and quota system or the MSA contracts) as compared to Big Tobacco. Big Tobacco participated in and benefited from the old system, participated in and benefitted from its MSA contracts, and now controls the price of tobacco under the current “free market” system. In contrast, King Mountain was not a member of the past market and therefore cannot be held liable for its correction. And although FETRA relieved Big Tobacco from making contractual payments it had promised to make, FETRA did not provide the same type of benefits to King Mountain.

A tax might be rational, and a less seismic transition might have been rational. But taking non-tax money from a Yakama Indian Nation business that did not benefit from the old system, giving it to other private business that did benefit from the old system, and doing so as part of a financial scheme to change the core operation of a market overnight, is not sufficiently rational to survive due process scrutiny.

**C. FETRA Violates Other Constitutional Protections.**

Because of FETRA's unquestioned benefit to private companies that profited for decades from government price fixing, FETRA's unquestioned benefit to Big Tobacco, and FETRA's unequal treatment of small companies that received no benefit such as King Mountain, FETRA violates both the equal protection clause, and the unconstitutional conditions doctrine. As to equal protection, FETRA cannot withstand scrutiny under rational basis review as noted above because its application results in unequal treatment of King Mountain and infringes on King Mountain's Treaty and constitutional right to move its reservation goods to market. As the Supreme Court held in *Horne*, engaging in interstate commerce: "although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." *Horne*, 135 S. Ct. at 2430.

Past involvement in the old tobacco support system plays no role in calculating FETRA assessments. If the government deems it appropriate to pay businesses that benefitted for decades from government fixed pricing, those costs should be borne by the public as a whole. *Armstrong*, 364 U.S. at 49. At the very least, it is inappropriate for the vast majority of the public to escape any costs, while multi-million dollar assessments are imposed on companies like King Mountain that were not involved in the old price support system.



As to the unconstitutional conditions doctrine, the Supreme Court has confirmed:

We have said in a variety of contexts that “the government may not deny a benefit to a person because he exercises a constitutional right.” . . . for example . . . we concluded that a county impermissibly burdened the right to travel by extending healthcare benefits only to those indigent sick who had been residents of the county for at least one year. Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.

*Koontz*, 133 S. Ct. at 2594. This same analysis applies to King Mountain’s Treaty rights to exclusive benefit of Yakama land and the right to travel, which King Mountain must surrender to avoid paying FETRA assessments, and which therefore also implicate the unconstitutional conditions doctrine.<sup>25</sup>

## **II. The Yakama Treaty Prohibits the Imposition of the FETRA Fee on King Mountain.**

### **A. The Yakama Treaty Must Be Construed “Not According to the Technical Meaning of its Words to Learned Lawyers” But in the Sense in which it was Understood by the Yakama People.**

Our government negotiated the Yakama Treaty to end a war and secure millions of acres of land for American settlers.<sup>26</sup> We promised to preserve and protect Yakama economic rights including the right to the exclusive benefit of their

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<sup>25</sup> The “Constitution, and the Laws of the United States . . . *and all Treaties* made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .” U.S. Const. art. VI, cl. 2 (emphasis added). Add. 116.

<sup>26</sup> Treaty with the Yakama, 12 Stat. 951 (1855), Add. 1-7.

land and the right to continue their long tradition of travel to bring goods to market. We assured the Yakama people that “*you can rely on all its provisions being carried out strictly.*” *Yakama Indian Nation*, 955 F. Supp. at 1243 (emphasis in original). Notwithstanding these promises, the Yakama negotiators remained troubled:

Although Chief Kamiakin expressed some reluctance to the Treaty, he ultimately agreed based on Stevens’ and Palmer’s representations, declaring: “I have been afraid of the white man. Their doings are different from ours. Your chiefs are good. Perhaps you have spoken straight, that your children will do what is right. Let them do as they have promised.”

*Id.* at 1244–45.

Chief Owhi expressed anguish over the decision, evidencing the seriousness with which the Yakamas considered the treaty negotiations: “What shall I do? Shall I give the lands that are a part of my body and leave myself poor and destitute? Shall I say I will give you my lands? I cannot say.”

*Id.* at 1245 n.9.

The United States Supreme Court has been called upon on four separate occasions to interpret the Yakama Treaty. *Fishing Vessel*, 443 U.S. 658; *Tulee*, 315 U.S. 681; *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *Winans*, 198 U.S. at 381. In each of these opinions, the Supreme Court evaluated the evidence offered by the Yakama party showing the Yakama people’s understanding of the text of the Treaty. *See, e.g., Fishing Vessel*, 443 U.S. at 675-76 (“[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.”) (internal citations omitted); *Tulee*, 315 U.S. at 684-85; *Seufert Bros. Co.*, 249 U.S. at 194 (same); *Winans*, 198 U.S. at 381 (same).

Lower courts that followed this controlling Supreme Court precedent have entered numerous binding findings of fact regarding the Yakama’s understanding of the Treaty. For example, trial court findings of fact confirm that the federal negotiators emphasized that “entering into the Treaty would not infringe upon or hinder their tribal practice” and “was presented as a means to preserve Yakama customs and prevent further encroachment by white settlers.” *Yakama Indian Nation*, 955 F. Supp. at 1244. The Yakama people “understood the Treaty to grant them valuable rights that would permit them to continue in their ways.” *Cree II*, 157 F.3d at 769. This Court has accepted and applied these factual findings. *E.g. Smiskin*, 487 F.3d at 1266 (The Yakama Nation “assigned a special significance to each part of the Treaty at the time of signing and continues to view the Treaty as a sacred document today.”).

The Yakama Treaty affirmed certain rights for the Yakama people beyond those rights they would have had without the Treaty and beyond rights that other citizens may have. *Tulee*, 315 U.S. at 684 (holding that “despite the phrase ‘in

common with citizens of the Territory,’ Article III conferred upon the Yakamas continuing rights, *beyond those which other citizens may enjoy*, to fish at their ‘usual and accustomed places’”) (emphasis added); *accord Puyallup Tribe v. Dep’t of Game*, 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). Among the rights confirmed by the Treaty are: (1) the exclusive benefit of their reservation land, explicitly reserved in Treaty Article II; and (2) the right to travel to engage in trade free from economic restrictions, explicitly reserved in Treaty Article III.

**B. Federal Tax Analysis of Treaty Guarantees Does Not Apply in This Monetary Fee Case.**

Distinguishing between a tax and a fee in this action is very important because taxes are entitled to greater judicial protection than are fees. That is so because judicial interference with taxes “threaten[s] the flow of general revenue to or the budgets of . . . governments.” *Bidart Bros. v. California Apple Comm’n*, 73 F.3d 925, 930 (9th Cir. 1996). A government imposition of taxes is entitled to greater judicial deference than are fees because judicial review of fees can only have a limited impact on government operations, but judicial interference with tax collection could “damage . . . the [government’s] budget, and perhaps . . . shift to

the [government] . . . the risk of taxpayer insolvency.” *Id.* As a result, this Court has “appropriately distinguished between assessments that if enjoined would threaten the flow of central revenues of [] governments and assessments that are not so critical to general [government] functions.” *Hexom v. Oregon Dep’t of Transp.*, 177 F.3d 1134, 1135–36 (9th Cir. 1999) (citation omitted).

Because FETRA involves imposition of a fee, FETRA assessments are not entitled to the same protections extended to federal tax collection.<sup>27</sup> FETRA fees do not generate revenue for the United States Government. Instead, they provide direct financial support to non-Yakama businesses in connection with termination of a former federal subsidy program benefitting non-Yakama tobacco farmers.<sup>28</sup>

The fact that the assessments are fees, rather than revenue generating taxes, is critical in this case for at least the following reasons:

1. Because this is a fee, not a tax, the Indian canons of construction are not subject to the offsetting canon of construction 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);
2. A fee may be considered an unconstitutional taking, while a tax almost never is;

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<sup>27</sup> The CCC concedes that assessments imposed under FETRA have been found to be “considered a fee rather than a tax.” ECF No. 15 at 16, n.1, ER 339.

<sup>28</sup> “FETRA is primarily concerned with regulation-albeit through the seemingly incongruous aim of aiding in 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. v. Johanns*, No. 3:05-cv-871-J16-TEM, 2007 WL 4200816, \*7 (M.D. Fla. 2007).

3. The fee here involves government taking from citizen A to give to citizen B, whereas a tax is placed into a larger pool of funds that may ultimately benefit citizen A;
4. Because the fee here only benefits non-Yakama Indian businesses (as opposed to a tax that benefits Yakama and non-Yakama alike), assessing the fee on activities conducted on the Yakama Nation by Yakama Indians offends the Treaty's "exclusive benefit" guaranty to the Yakama people; and
5. Because imposing the fee on the travel of Yakama goods out of bond on the Yakama Nation offends the Treaty's travel guaranty.

As to the first of these reasons, the required application of the Indian canons of construction, the Supreme Court 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*, 534 U.S. at 95. In instances of a claimed federal tax exemption by a tribe, the two canons can "offset" each other. *Id.*<sup>29</sup> But because this is a fee case, the canons of construction that

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<sup>29</sup> The Third and Eighth Circuit Courts of Appeal have appropriately harmonized the Indian canon and federal tax canons in the context of Indian treaties. See *Holt v. Comm'r of Internal Revenue*, 364 F.2d 38, 40 (8th Cir. 1966) (holding that courts must look to the Indian canons if there is a basis in a treaty's text "which can reasonably be construed to confer income exemptions"); *Lazore v. Comm'r of Internal Revenue*, 11 F.3d 1180, 1184-85 (3d Cir. 1993) ("This formulation gives appropriate weight to the notion that a treaty-based tax exemption must have a textual basis and accounts for the interpretive rules applicable to Indian treaties"); see also *Cook v. United States*, 32 Fed. Cl. 170, 174-75 (1994).

favor taxes are not applicable, and the Court must determine King Mountain's Treaty rights by applying the Indian canon of construction:

the text of the Yakama Treaty must be construed as the Yakama people would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians tribe's favor.

*Smiskin*, 487 F.3d. at 1264; *Tulee*, 315 U.S. at 681-85 (“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”).

**C. The Yakama Treaty Precludes Imposition of the FETRA Fee, Even Under the More Stringent “Tax” Analysis.**

**1. Treaty Language Can Exempt Indians From Taxation.**

Even if this Court declines to differentiate between a fee and a tax for purposes of this case, and instead adopts the district court's amalgamation of the two revenue generating devices, this Court should still confirm that the district court erred when it summarily dismissed King Mountain's Treaty based claims and defenses.

Native Americans, in ordinary affairs of life not governed by treaties or remedial legislation, are subject to federal taxes. However, statutes and treaties may exempt Native Americans from federal taxation. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). When a federal tax is involved, the existence of a statutory or

treaty exemption “depends on whether express exemptive language exists within the text of the statute or treaty.” *Ramsey*, 302 F.3d at 1078. This exemptive 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.” *Id.* “Treaty language such as ‘free from incumbrance,’ ‘free from taxation,’ and ‘free from fees,’ are but some examples of express exemptive language required to find Indians exempt from federal tax.” *Id.* at 1078-79. The Yakama Treaty contains such language.

In dismissing King Mountain’s Treaty claims and defenses, the district court simply adopted its earlier rulings in a different set of cases involving different parties and different issues. The district court then predictably rejected King Mountain’s Treaty defenses out of hand. But in doing so, the district court ignored this Court’s guidance that the Treaty “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.

**2. Article II of the Yakama Treaty Contains Express Exemptive Language.**

Article II of the Yakama Treaty provides:

There is, however, reserved [a tract of land which] shall be set apart and, so far as necessary, surveyed and marked out, *for the exclusive*



*use and benefit* of said confederated tribes and bands of Indians, as an Indian reservation . . . .

Treaty, Add. 2 (emphasis added). Article II confirms that the Yakama people were to be the *exclusive* beneficiaries of their activities on their reserved lands.

The term “exclusive use” alone was used in the Quinaielt Treaty. Treaty with the Quinaielt, Etc. 1855, 12 Stat. 971 (Jul. 1, 1855), Add. 8-12. And the term “exclusive use” as used in the Quinaielt Treaty was alone sufficiently “express” to require application of the Indian canons of construction by the district court, this Court and the Supreme Court in *Capoeman*, 351 U.S. at 6. The Yakama Treaty guarantees are even greater than those promised the Quinaielt. The Yakama in Article II of their Treaty reserved the right to both exclusive use *and exclusive benefit* – a much broader confirmation of the intent of the parties to protect the Yakama from federal monetary exactions than the language in the Quinaielt Treaty.

“Exclusive” is not an ambiguous term, and is sufficiently express to confirm that the Yakama reserved their right to be free from federal monetary exactions through fees. At the time of the Treaty negotiations, the Yakama were fighting to keep others from exploiting Yakama land. In negotiating peace, they secured the right to be the only people who would benefit from the fraction of land they were able to keep. *See Swim v. Bergland*, 696 F.2d 712, 716 (9th Cir. 1983) (“Land cession agreements between the United States and Indian tribes are to be

interpreted as grants *by* the Indians *to* the United States. The Indians reserve any rights not explicitly granted.”) (emphasis in original); *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921) (“The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted were reserved to the Indians.”). The “exclusive benefit” language is at least sufficiently express to confirm a genuine issue of material fact that must be resolved at trial, and sufficiently express to require application of the Indian canons of construction.

That the phrase “exclusive use and benefit” is an express exemption is further confirmed by viewing 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 the promise of “exclusive benefit” was and is sufficiently express, and requires the Court to look beyond the face of the Treaty when it is tasked with determining whether the Treaty bars the fee at issue here.

To deny the exemptive intention of the term “exclusive use and benefit” in Article II of the Treaty, the district court relied on *Hoptowit v. CIR*, 709 F.2d 564, 566 (9th Cir. 1983). ECF No. 46 at 38, ER 63. *Hoptowit*, however, does not weaken King Mountain’s claims in this case. First, unlike the case now before this Court, *Hoptowit* did not involve a federal fee. Second, *Hoptowit* only addressed federal income tax on per diem payments received by a Tribal Council member that were not related to manufacture of a product on the Yakama reservation. *Hoptowit*, 709 F.2d at 565-566. *Hoptowit*, therefore, has no precedential value to a court called upon to preserve Article II’s guarantee of exclusive benefit of reservation lands in the face of a federal fee placed on the travel of products manufactured on the Yakama Nation. At a minimum, *Hoptowit* does not foreclose application of the Indian treaty canons of construction to the analysis required to determine the impropriety of the CCC fee under Article II’s guarantee of exclusive benefit.

The Yakama negotiators could not see into the future and demand more than the “exclusive benefit” of their reserved lands – exempting themselves and all Yakama people who came after them from unimaginable charges and assessments that might be imposed at some future date by the very government that was promising the Yakama people they would be the exclusive beneficiaries of that fraction of their lands they were allowed to retain. *Capoeman*, 351 U.S. at 8 (“the

allotment shall be free from all taxes, both those in being *and those which might in the future be enacted*” (emphasis added)).<sup>30</sup>

**3. Article III of the Yakama Treaty Contains Express Exemptive Language.**

Although Article II’s promise of “exclusive use and benefit” is sufficient to prohibit imposition of the fee at issue here, the district court also erred in its rulings on the guarantees in Article III, and its refusal once again to apply the Indian canons of construction. Article III 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.

Treaty With the Yakama, 12 Stat. 951 (1855), Add. 2. This Court has interpreted Article III as unequivocally prohibiting imposition of economic restrictions or pre-conditions on the Yakama people’s treaty right to engage in the trade of tobacco products:

Thus, whether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview

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<sup>30</sup> It is inconceivable that in 1855 the Yakama negotiators had any idea that the government with which they were negotiating was reserving the right to take money from Yakama people for their on reservation activities solely to pay non-Yakama businesses located thousands of miles away. *See Yakama Indian Nation*, 955 F. Supp. at 1244; *accord Capoeman*, 351 U.S. at 8 (“it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian”) (citation omitted).

would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent.

*Smiskin*, 487 F.3d at 1266-67; *see also Yakama Indian Nation*, 955 F. Supp. at 1248 (holding that “the language of the Treaty, when viewed in the historical context as the Yakamas would have understood it, unambiguously reserves to the Yakamas the right to travel the public highways without restriction for purposes of hauling goods to market”).

Instead of applying this controlling precedent, the district court relied on a decision of this Court that declined to apply Article III’s provisions to exempt an individual tribal member from federal heavy vehicle and diesel fuel taxes [*Ramsey*],<sup>31</sup> and a decision that did not even address government imposition of a tax or fee [*McKenna*].<sup>32</sup> But neither of these cases impacts the Article III issues in this case.

*Ramsey* involved federal taxes, not a fee. And the heavy vehicle and diesel fuel taxes at issue in *Ramsey* had nothing to do with fees charged in connection with on reservation activity. Instead *Ramsey* dealt with off reservation taxes imposed exclusively on the instruments used to transport the goods, rather than the goods themselves. *Ramsey* does not stand for the proposition that Article III can never be read to contain exemptive language sufficient to require application of the

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<sup>31</sup> *Ramsey*, 302 F.3d 1074.

<sup>32</sup> *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014).

Indian canons of treaty construction.<sup>33</sup> In contrast to the facts in *Ramsey*, this case involves a fee on the right to move Yakama products out of bond on the Yakama Nation. The money from the fee is transferred to non-Yakama businesses in the eastern United States.

In deciding a Yakama Treaty case just this year, the Washington Supreme Court did not even cite to *Ramsey*, and instead felt bound to follow this Court's decision in *Smiskin* when called upon to interpret Article III of the Yakama Treaty, stating:

*Smiskin* is nearly identical to this case. In both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction.

*Cougar Den, Inc. v. Washington State Dep't of Licensing*, No. 92289-6, 2017 WL 1192119, at \*5 (Wash. Mar. 16, 2017). The Washington Supreme Court also correctly distinguished *McKenna*, as follows:

The [McKenna] court analyzed the treaty again and held that the plain text reserved to the Yakamas the right “ ‘to travel upon all public highways,’ “ not the “right to trade.”

...

The difference between *Smiskin* and *King Mountain* is that in *King Mountain*, travel was not at issue. In *King Mountain*, the court held under the facts that “there is no right to trade in the Yakama Treaty.” *King Mountain*, 768 F.3d at 998. Where trade does not involve travel

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<sup>33</sup> *Ramsey*'s precedential value is limited to the finding that Article III's guarantee to the Yakama's of their right to travel “does not provide express language from which we can discern an intent to exempt the Yakama from federal heavy vehicle and diesel fuel taxation.” *Ramsey*, 302 F.3d at 1080.

on public highways, the right to travel provision in the treaty is not implicated.

*Id.* at \*4 and \*5. Moreover, in *McKenna* the government's power to impose a tax or fee was not at issue. Instead, that case only involved a state requirement that certain cigarette manufacturers keep their own money in an escrow account to pay possible future judgments:

The Washington escrow statute is not a tax. King Mountain earns interest on the money held in escrow and may receive a refund after 25 years.

*McKenna* at 996. Just as in *Cougar Den*, it is this Court's decision in *Smiskin* that controls in this case.

In *Smiskin*, the Court held that Article III prohibited federal prosecution of a Yakama tribal member for his transport of tobacco products. *Smiskin*, 487 F.3d at 1266. (“the Yakamas understood the Treaty at the time of signing to “unambiguously reserve [ ] to [them] the right to travel the public highways *without restriction* for purposes of hauling goods to market”) (emphasis in original) (citations omitted). The Article III travel guarantee confirmed by this Court in *Smiskin* exempts the Yakama people from a fee imposed when goods travel out of bond. *Accord Cougar Den*, 2017 WL 1192119 (applying Indian canons of construction to hold that Article III prohibits taxation when the incidence of the tax is on movement of the article of trade).

It is uncontested that the fee in this case is imposed when the goods travel out of bond on the Yakama Nation. Unlike *McKenna*, and just like in *Smiskin*, *Cree* and *Cougar Den*, this is a fee imposed on travel. Just as it did in *Smiskin* and both *Cree* decisions, this Court must analyze the language in Article III by applying the Indian canons of construction and by viewing the Article III guaranty of travel as the Yakama understood it. And just as it did in *Smiskin* and *Cree*, the Court should confirm that Article III's right to travel precludes imposition of the CCC fee in this case.

### **III. The District Court Erred When it Denied King Mountain Discovery.**

Because the CCC's complaint is vague at best, King Mountain moved for an order requiring the CCC to submit a more detailed complaint. ECF No. 4, ER 384-390. In denying King Mountain's motion, the district court stated "King Mountain's request for additional details regarding the claims against it is more appropriately addressed through the discovery process." *Id.* See also ECF No. 46 at 21, n.3, ER 21 ("King Mountain may now obtain this additional information on remand before the agency.").

King Mountain repeatedly requested access to the discovery it needed to defend itself in this action. See ECF No. 23, ER 302-309; ECF No. 25, ER 271-280; ECF No. 63 at pp. 3-6, ER 84-82; *see also* KM-SAR-000007-08, Add. 111-12 (requesting discovery during the administrative remand). Yet despite



acknowledging the validity of King Mountain's request for discovery, the district court denied King Mountain access to the discovery process. *See* ECF No. 17, ER 318 (ordering King Mountain to "file a motion on what basis discovery is appropriate"); ECF No. 46 at 19-37, ER 44-62; KM-SAR-000002-03, Add. 111-12.

King Mountain filed an administrative appeal on remand and included a request for discovery during the appeal. *See* KM-SAR-000007-08, Add. 113-14 (requesting dates by which King Mountain could submit discovery requests in the remand). But the CCC also denied King Mountain discovery: "Your letter makes further requests with respect to briefing and discovery. . . . neither of the orders of the Court nor the provisions of 7 C.F.R. § 1463.11 contemplate discovery." KM-SAR-000002-03, Add. 111-12.

The deposition-discovery process performs a "vital role in the preparation for trial." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947), superseded by rule on other grounds as recognized in *Seal v. Univ. of Pittsburg*, 135 F.R.D. 113 (W.D. Pa. 1990). It helps to "narrow and clarify the basic issues between the parties," and serves as a tool for "ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues," to ensure that the parties "obtain the fullest possible knowledge of the issues and facts before trial." *Id.* "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper

litigation.” *Id.*; *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (defining relevancy for discovery to “encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in a case.”).

The district court compounded its error when it applied the summary judgment burden of proof on King Mountain to “demonstrate that there is probative evidence that would allow a reasonable jury to find in their favor.” ECF No. 66 at 3-4, ER 4-5 (*citing Anderson v. Liberty Lobby*, 477 U.S. 242, 251 (1986)). The district court faulted King Mountain during the remand and during dispositive motion briefing for lacking such probative evidence, despite never allowing King Mountain to access such information. Placing the burden on a party to *demonstrate* the probative value of evidence when it has not been allowed any process to discover such evidence is contrary to the Rules of Civil Procedure.

Because discovery has not been allowed at any stage of this proceeding, King Mountain was forced to identify only glaring deficiencies in the administrative record. In response, the CCC took the opportunity to correct its statements regarding the FETRA assessments on King Mountain. King Mountain was never allowed to discover evidence, it was only allowed to correct or dispute the evidence being unilaterally produced by the CCC and endorsed by the district court. This is not a substitute for discovery and it was error for the district court to

grant summary judgment without allowing discovery.

### **CONCLUSION**

The Court should reverse the district court and hold that the United States Constitution prohibits FETRA's unconstitutional taking of King Mountain's property. In the alternative, the Court should reverse the district court's dismissal for failure to state a claim of King Mountain's Treaty and federal Indian law based counterclaim, and hold that the Yakama Treaty prohibits imposition of FETRA's monetary fee on this Yakama Nation defendant. At a minimum the Court should reverse and remand for further proceedings in the district court because the Yakama Treaty contains language sufficiently express to require application of Indian canons of treaty construction, and because of the district court's failure to honor King Mountain's right to engage in discovery, the denial of which violates King Mountain's right to due process.

May 15, 2017

Respectfully submitted,

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### **STATEMENT OF RELATED CASES**

The district court in this case denied all of King Mountain's Yakama Treaty based defenses and claims, relying on two decisions of that same district court in other actions involving a different agency of the United States and the Yakama Nation.

The Ninth Circuit Court of Appeals vacated and remanded the first of the cases relied on by the district court in this action: *King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014), *vacated and remanded sub nom. Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau*, 843 F.3d 810 (9th Cir. 2016). Because it vacated the district court's decision, this Court did not reach the Yakama Nation Treaty issues.

However, this Court has those Treaty issues before it in the pending appeal of the second case relied on below by the district court: *United States v. King Mountain Tobacco Co.*, Nos. 14-36055, 16-35607.

Neither of these cases involves a fee, let alone the CCC fee at issue here. Instead, both involve different federal parties and a federal excise tax that is not at issue in this case.

May 15, 2017

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE  
REQUIREMENTS**

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 13,954 words.

May 15, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 15, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

May 15, 2017

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# **ADDENDUM**

## INDEX

1.	Treaty with the Yakama, 12 Stat. 951 (1855) .....	Add. 1
2.	Treaty with the Quinaielt, Etc. 1855, 12 Stat. 971 (Jul. 1, 1855).....	Add. 8
3.	Fair and Equitable Tobacco Reform Act of 2014, Pub. L. No. 108– 357, 118 Stat. 1521 (codified at 7 U.S.C. §§ 518 to 519a (2006)).....	Add. 13
4.	Treaty with the Yakama 1855 – Treaty Minutes.....	Add. 15
5.	Revised Yakama Code, 10.01.91.....	Add. 89
6.	Revised Yakama Code, 10.01.93.....	Add. 89
7.	Revised Yakama Code, 22.01.21 (4).....	Add. 91
8.	15 U.S.C. § 714b(c) .....	Add. 93
9.	28 U.S.C. § 1291.....	Add. 99
10.	28 U.S.C. § 1331.....	Add. 102
11.	28 U.S.C. § 1345.....	Add. 104
12.	7 C.F.R. § 1463.11.....	Add. 105
13.	Fed. R. Civ. P. 56.....	Add. 107
14.	Fed. R. App. P. 34(a)(2)(C).....	Add. 108
15.	KM-SAR-000002-03 .....	Add.111
16.	KM-SAR-000007-08.....	Add. 113
17.	U.S. Const. art. V.....	Add. 115
18.	U.S. Const. art. VI .....	Add. 116

The Office of the President of the United States

(TREATY)

TREATY WITH THE YAKIMA, 1855.

June 9, 1855.

Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisuouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them. [FNA][FNB]

#### ARTICLE 1

The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit: [FNC]

Commencing at Mount Ranier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119 degrees 10',) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47 degrees) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "LaLac;" thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries[FND] separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

#### ARTICLE 2

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 included within the following boundaries, to wit: Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning. [FNE][FNF]

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant. [FNG] [FNH]

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid. [FNI]

#### ARTICLE 3

And provided, That, 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. [FNJ]

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. [FNK]

#### ARTICLE 4

In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in provid-

ing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year. [FNL]

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto. [FNM]

#### ARTICLE 5

The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmith's shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years. [FNN][FNO][FNP][FNQ]

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office. [FNR]

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized[FNS] head chief of the confederated tribes and bands aforesaid, styled the Yakama Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and band of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

#### ARTICLE 6

The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. [FNT]

#### ARTICLE 7

The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.[FNU]

#### ARTICLE 8

The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.[FNV]

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities. [FNW]

Nor will they make war upon any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial. [FNX][FNY]

#### ARTICLE 9

The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine. [FNZ]

#### ARTICLE 10

And provided, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations. [FNAA]

#### ARTICLE 11

This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. [FNBB]

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent. (L.S.)

Kamaiakun, his x mark. (L.S.)

Skloom, his x mark. (L.S.)

Owhi, his x mark. (L.S.)

Te-cole-kun, his x mark. (L.S.)

La-hoom, his x mark. (L.S.)

Me-ni-nock, his x mark. (L.S.)

Elit Palmer, his x mark. (L.S.)

Wish-och-kmpits, his x mark. (L.S.)

Koo-lat-toose, his x mark. (L.S.)

Shee-ah-cotte, his x mark. (L.S.)

Tuck-quille, his x mark. (L.S.)

Ka-loo-as, his x mark. (L.S.)

Scha-noo-a, his x mark. (L.S.)

Sla-kish, his x mark. (L.S.)

Signed and sealed in the presence of - -

James Doty, secretary of treaties,

Mie. Cles. Pandosy, O. M. T.,

Wm. C. McKay,

W. H. Tappan, sub Indian agent, W. T.,

C. Chirouse, O. M. T.,

Patrick McKenzie, interpreter,

A. D. Pamburn, interpreter,

Joel Palmer, superintendent Indian affairs, O. T.,

W. D. Biglow,

A. D. Pamburn, interpreter.

FNA Ratified Mar. 8, 1859.

FNB Proclaimed Apr. 18, 1859.

FNC Cession of lands to the United States.

FND Boundaries.

FNE Reservation.

FNF Boundaries.

FNG Reservations to be set apart, etc., and Indians to settle thereon.

FNH Whites not to reside thereon.

FNI Improvements on ceded lands.

FNJ Roads may be made.

FNK Privileges secured to Indians.

FNL Payments by the United States.

FNM How to be applied.

FNN United States to establish schools.

FNO Mechanics' shops.

FNP Sawmill and flouring mill.

FNQ Hospital.

FNR Salary to head chief; house, etc.

FNS Kamaiakun is the head chief.

FNT Reservation may be surveyed into lots and assigned to individuals or families.

FNU Annuities not to pay for debts of individuals.



FNV Tribes to preserve friendly relations.

FNW To pay for depredations.

FNX Not to make war but in self-defense.

FNY Tosurrender offenders.

FNZ Annuities may be withheld from those who drink ardent spirits.

FNAA Wenatshapam fishery reserved.

FNBB When treaty to take effect.

1855 WL 10420 (Trty.)  
END OF DOCUMENT

1855 WL 10417(Trty.)  
(TREATY)

TREATY WITH THE QUINAIELT, ETC., 1855.

July 1, 1855.

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian affairs of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them. [FNA][FNB][FNC]

**ARTICLE 1**

The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the chehalis and Quinaiatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning. [FND][FNE]

**ARTICLE 2**

There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby. [FNF][FNG][FNH][FNI]

**ARTICLE 3**

The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, however, That they shall not take[FNJ] shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine the stallions themselves.

**ARTICLE 4**

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one thousand six hundred dollars each year; for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums

of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States, who may from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto. [FNK][FNL]

#### **ARTICLE 5**

To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. [FNM]

#### **ARTICLE 6**

The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on renumerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor. [FNN][FNO]

#### **ARTICLE 7**

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals. [FNP]

#### **ARTICLE 8**

The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in case of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offenders against the laws of the United States, but to deliver them to the authorities for trial. [FNQ][FNR][FNS][FNT]

#### **ARTICLE 9**

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine. [FNU]

**ARTICLE 10**

The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for a term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities. [FNV][FNW]

**ARTICLE 11**

The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter. [FNX]

**ARTICLE 12**

The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent. [FNY][FNZ]

**ARTICLE 13**

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. [FNAA]

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Qui-nai-elt River, July 1, 1855.

Isaac I. Stevens, Governor and Sup't of Indian Affairs.

Tah-ho-lah, Head Chief Qui-nite-l tribe, his x mark. (L.S.)

How-yat'l, Head Chief Quil-ley-yute tribe, his x mark. (L.S.)

Kal-lape, Sub-chief Quil-ley-hutes, his x mark. (L.S.)

Tah-ah-ha-wht'l, Sub-chief Quil-ley-hutes, his x mark. (L.S.)

Lay-le-whash-er, his x mark. (L.S.)

E-mah-lah-cup, his x mark. (L.S.)

Ash-chak-a-wick, his x mark. (L.S.)

Ay-a-quan, his x mark. (L.S.)

Yats-see-o-kop, his x mark. (L.S.)

Karts-so-pe-ah, his x mark. (L.S.)

Quat-a-de-tot'l, his x mark. (L.S.)

Now-ah-ism, his x mark. (L.S.)

Cla-kish-ka, his x mark. (L.S.)

Kler-way-sr-hun, his x mark. (L.S.)

Quar-ter-heit'l, his x mark. (L.S.)

Hay-nee-si-oos, his x mark. (L.S.)

Hoo-e-yas'lsee, his x mark. (L.S.)

Quilt-le-se-mah, his x mark. (L.S.)

Qua-lats-kaim, his x mark. (L.S.)

Yah-le-hum, his x mark. (L.S.)

Je-tah-let-shin, his x mark. (L.S.)

Ma-ta-a-ha, his x mark. (L.S.)

Wah-kee-nah, Sub-chief Qui-nite'l tribe, his x mark. (L.S.)

Yer-ay-let'l, Sub-chief, his x mark. (L.S.)

Silley-mark'l, his x mark. (L.S.)

Cher-lark-tin, his x mark. (L.S.)

How-yat-'l, his x mark. (L.S.)

Kne-she-guartsh, Sub-chief, his x mark. (L.S.)

Klay-sumetz, his x mark. (L.S.)

Kape, his x mark. (L.S.)

Hay-et-lite-'l, or John, his x mark. (L.S.)

Executed in the presence of us; the words "or tracts," in the II. article, and "next," in the IV. article, being interlined prior to execution.

M. T. Simmons, special Indian agent.

H. A. Goldsborough, commissary, &c.

B. F. Shaw, interpreter.

James Tilton, surveyor-general Washington Territory.

F. Kennedy.

J. Y. Miller.

H. D. Cock.

- A
- Jan. 25, 1856.
  - FNB Ratified Mar. 8, 1859.
  - FNC Proclaimed, Apr. 11, 1859.
  - FND Surrender of lands to the United States.
  - FNE Boundaries.
  - FNF Reservation within the Territory of Washington.
  - FNG Whites not to reside thereon, unless, etc.
  - FNH Indians agree to move and settle there.
  - FNI Roads may be made.
  - FNJ Rights and privileges secured to the Indians.
  - FNK Payment by the United States.
  - FNL How to be applied.
  - FNM Appropriation for removal, for clearing and fencing lands, etc.
  - FNN Indians may be removed from the reservation, etc.
  - FNO Tribe annuities may be consolidated.
  - FNP Annuities of tribes not to pay debts of individuals.
  - FNQ Tribes to preserve friendly relations, etc.
  - FNR To pay for depredations.
  - FNS Not to make war, except, etc.
  - FNT To surrender offenders.
  - FNU Annuities to be withheld from those drinking, etc., ardent spirits.
  - FNV United States to establish agricultural schools, etc.
  - FNW To employ mechanics, etc., a physician, etc.
  - FNX The tribes are to free all slaves and not to acquire others.
  - FNY Not to trade out of the United States.
  - FNZ Foreign Indians not to reside on reservation.
  - FNAA When treaty to take effect.

TITLE VI—FAIR AND EQUITABLE TOBACCO REFORM

SEC. 601. SHORT TITLE.

<< 7 USCA § 518 NOTE >>

This title may be cited as the “Fair and Equitable Tobacco Reform Act of 2004”.

Subtitle A—Termination of Federal Tobacco Quota and Price Support Programs

SEC. 611. TERMINATION OF TOBACCO QUOTA PROGRAM AND RELATED PROVISIONS.

<< 7 USCA §§ 1311, 1312, 1313, 1314, 1314-1, 1314b, 1314b-1, 1314b-2, 1314c, 1314d, 1314e, 1314f, 1314g, 1314h, 1314i, 1314j >>

(a) **MARKETING QUOTAS.**—Part I of subtitle B of title III of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1311 et seq.) is repealed.

<< 7 USCA § 511r >>

(b) **TOBACCO INSPECTIONS.**—Section 213 of the Tobacco Adjustment Act of 1983 (7 U.S.C. 511r) is repealed.

<< 7 USCA §§ 515, 515a, 515b, 515c, 515d, 515e, 515f, 515g, 515h, 515i, 515j, 515k >>

(c) **TOBACCO CONTROL.**—The Act of April 25, 1936 (commonly known as the Tobacco Control Act; 7 U.S.C. 515 et seq.), is repealed.

(d) **PROCESSING TAX.**—Section 9(b) of the Agricultural Adjustment Act (7 U.S.C. 609(b)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, is amended—

<< 7 USCA § 609 >>

(1) in paragraph (2), by striking “tobacco,”; and

<< 7 USCA § 609 >>

(2) in paragraph (6)(B)(i), by striking “, or, in the case of tobacco, is less than the fair exchange value by not more than 10 per centum,”.

<< 7 USCA § 1282 >>

(e) DECLARATION OF POLICY.—Section 2 of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1282) is amended by striking “tobacco,”.

(f) DEFINITIONS.—Section 301(b) of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1301(b)) is amended—  
(1) in paragraph (3)—

<< 7 USCA § 1301 >>

(A) by striking subparagraph (C); and

<< 7 USCA § 1301 >>

(B) by redesignating subparagraph (D) as subparagraph (C);

<< 7 USCA § 1301 >>

(2) in paragraph (6)(A), by striking “tobacco,”;

(3) in paragraph (10)—

<< 7 USCA § 1301 >>

(A) by striking subparagraph (B); and

<< 7 USCA § 1301 >>

(B) by redesignating subparagraph (C) as subparagraph (B);

<< 7 USCA § 1301 >>

(4) in paragraph (11)(B), by striking “and tobacco”;

<< 7 USCA § 1301 >>

(5) in paragraph (12), by striking “tobacco,”;

(6) in paragraph (14)—

<< 7 USCA § 1301 >>

(A) in subparagraph (A), by striking “(A)”; and

<< 7 USCA § 1301 >>

(B) by striking subparagraphs (B), (C), and (D);

<< 7 USCA § 1301 >>

(7) by striking paragraph (15);

(8) in paragraph (16)—

<< 7 USCA § 1301 >>

(A) by striking subparagraph (B); and



# TREATY WITH THE YAKAMA

1855

Isaac Stevens, Governor and Superintendent,  
Treaty Ground Camp Stevens, Walla-Walla Valley - June 9, 1855



# INDEX

<u>ITEM</u>	<u>TAB</u>
Pre-Treaty Official Proceedings Minutes James Doty, Secretary Council Ground, Walla Walla Valley - May 28, 1855	1
Treaty With The Yakama – 1855 Isaac Stevens, Governor and Superintendent Treaty-Ground, Camp Stevens, Walla-Walla Valley - June 9, 1855	2
Official Treaty Proceeding Minutes Isaac Stevens, Governor and Superintendent Joel Palmer, Superintendent, Indian Affairs Walla Walla Valley, June 9 & 11, 1855	3
Indian Affairs Commissioner Letter Isaac Stevens, Governor and Superintendent Joel Palmer, Superintendent, Indian Affairs June 13, 1855	4
Official Proceeding Minutes BY Isaac Stevens. 1855	5

**TAB 1**


Official Proceedings at the Council, held at the Council Ground in the Walla Walla Valley with the Yakima Nation of Indians, and which resulted in the conclusion of a Treaty on the 9th day of June 1855.

May 28, 1855.

At 11 a.m. Kamaiakun, Owhi & Skloom, Yakima Chiefs came to the Council Ground; they had been greatly delayed on the road by continued heavy rains and consequent high water in the streams. But few of their people accompanied them as it is the season for digging roots and catching salmon. The Yakimas were also accompanied by Delegates from the Pahwanwappam, Pisquouse, Wenatshappam and Palouse Indians, all Tribes or Bands acknowledging Kamaiakun as their Head Chief, and there were present Representatives from the Bands living on the Columbia River down to the White Salmon River.

Gov. Stevens addressed them briefly, welcoming them; offering them provisions as his friends and guests; and inviting them to meet tomorrow in Council at this place and hear what the Commissioners wished to say to all the Indians in this Country.

The next day the 29th the Yakima Chiefs attended at the Council, and listened to an explanation of the objects had in view by the Government in proposing to treat with them. They continued to attend from day to day and Gov. Stevens stated to them fully the terms of the Treaty he proposed to conclude with them; the amount to be paid for their lands and the manner of payment; the extent of the Reservation to be set apart for them and that upon the Reservation he wished to place the Yakimas, the Colvilles, the Pisquouse & Oakinakanes and the Bands on the Columbia River below the mouth of the Umatilla as low down as the mouth of the Cowlitz River; the Yakima Chiefs made no reply to these propositions until the 8th day of June when upon the request of Gov. Stevens that he would speak his mind, Kamaiakun spoke briefly saying, in effect, that many of his people had left their country, some gone to the Caloopooyer Country some to Nisqually and some to the Taih. He wished the Americans to settle in his country on the Waggon Road. He spoke for his people not for himself alone. He wished no Goods for himself. He was tired talking and waiting here and wished to get back to his Garden.



Skloom and Owhi spoke but only in a general manner, and the Council adjourned, it being understood that the Yakima Chiefs had determined to return home the next day.

In the evening Gov. Stevens had a lengthy interview with Skloom which did not result in anything conclusive; but in the morning, June 9th, at an early hour Kamaikun visited Gov. Stevens and announced his determination to return home that day: Gov. Stevens endeavored to convince him that it was better to reflect well upon the course he, the Head Chief of his Nation, was about to pursue; whether it would result in good or Evil to his people and advised him to remain until the conclusion of the Council with the Nes Forces and others, and try to make up his mind to a Treaty which would certainly be beneficial to his people.

Kamaikun said he was tired of hearing so much talking; he himself did not wish to talk: Why did not Owhi and Skloom speak? He Kamaikun did not wish to be Head Chief, but, since they all said he must talk; must be the Chief; will, let it be so. He would not speak: He would make the Treaty proposed; he liked the Reservation and wished to collect there all his people; they were much scattered, as he had before said, and he desired to have them sent home. He then gave a statement of the Indian Tribes and Bands who considered him their head Chief, viz: the Yakimas proper, the Palouse, Pisuouse Okinakanes and Methows, the Pshawwappam and all the Bands on the Columbia below the Umatilla as far as the White Salmon River and these he would undertake to govern; He was satisfied with the Reservation in his country, but desired a small piece of land at the place called Wenatshapam - where the Indians take many fish for the Pisuouse & Methows. He wished the papers written so that he might sign them today and go home. This was all. During the interview several Head men of the Palouse, Pisuouse & Methows were present and unanimously assented to Kamaikun's decision.

Kamaikun was present at the General Council during the day but did not speak; and in the evening immediately after the adjournment of the Council he called upon Gov. Stevens for the Treaty and signed it: Owhi and Skloom did the same, as also the Palouse Chief Kahlatoose, and all the Chiefs present, named by Kamaikun as being under his jurisdiction. Several Chiefs of the Bands at Dalles and above, who were in attendance during the first days of the Council, had returned home to catch their usual supply of salmon, these Kamaikun said, as also all that he had named would sign the Treaty whenever it was presented to them if Gov. Stevens thought it necessary.

The Treaty was then duly witnessed and the Council with the Yakimas declared adjourned sine die.

On Monday the 11th. The goods, presents for the Yakimas were portioned out and Kamaikun although he would not take any goods for himself superintended the division among his people.

Kamaikun said he had never taken goods from the whites as presents; he did not wish them now but when the Treaty was pronounced good by the President then he would live on the Yakima Reservation and accept his share of the annuities and other payments.

The Chiefs were entertained at Gov. Stevens Table and throughout their stay here appeared to have the most friendly feelings towards the whites.

Towards evening, Kamaikun, Owhi, and Skloom and their people started on their return to the Yakima Valley.

I hereby certify the above to be a true record of the proceedings at the Yakima Council.

(Sgd.) James Doty  
Secty. Treaties W.T.

Approved,

and for further detail, see  
record of the Joint Treaty  
Official Proceedings

(SGD.) Isaac I. Stevens  
Gov. & Supt. Ind. Affairs Washington Terr.

**TAB 2**

TREATY WITH THE YAKIMA. 1855

Signed in the presence of --

James Doty, secretary treaties  
Wm. C. McKay, secretary treaties.  
C. Chirouse, O.M.I.  
A. D. Pamburn, interpreter  
John Witford, his x mark, interpreter  
Mathew Dofa, his x mark, interpreter.  
William Craig, interpreter.  
James Coxey, his x mark, interpreter  
Patrick McKenzie, interpreter.  
Arch. Grazie, jr. brevet second lieutenant,  
Fourth Infantry.  
R.R. Thompson, Indian agent.  
R.B. Metcalfe, Indian sub-agent.

---

TREATY WITH THE YAKIMA. 1855

*Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisuouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham Shyiks, Ochechotes, Kah-milt-pah, Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered one nation, under the name of "Yakama", with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.*

ARTICLE I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described, as follows, to wit:

Commencing at Mount Rainier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence, southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes (119° 10',) which two latter lines separate the above



confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47<sup>o</sup>) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "LaLac;" thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island", between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE 2. 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 included within the following boundaries, to wit: Commencing on the Yakama River, at the mouth of Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said sput to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River; from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning. All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the Tribe and the superintendent and agent. And the said

confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

*And provided,* That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements afore said, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE 3. *And provided,* That, 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.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and suitable outfit, and for such other objects as he may deem necessary; and the remainder in annuities, as follows:

For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop: One carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools: to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in them in the same; to

\* erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures: to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

\* [ and in view of the fact that the head chief of the said confederated tribes and bands of Indians as expected, and will be called upon to perform many services ~~of a public character~~, occupying much of his time, ~~the United States~~ further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakama Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail

themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE 7. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid confederated Tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States and to deliver them up to the authorities for trial.

ARTICLE 9. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. *And provided.* That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisuouse or Wenatshapam River, and known as the "Wenatshapam Fishery", which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

ARTICLE 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony hereof, the said Isaac I. Stevens, governor and uperintendent of Indian Affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent. (L.S.)

Kamaiakun, his x mark. (L.S.)	Wish-och-kmpits, his x mark. (L.S.)
Skloom, his x mark. (L.S.)	Koo-lat-toose, his x mark (L.S.)
Owhi, his x mark. (L.S.)	Shee-ah-cotte, his x mark (L.S.)
Te-cole-kun, his x mark (L.S.)	Tuck-quille, his x mark (L.S.)
La-hoom, his x mark. (L.S.)	Ka-loo-as, his x mark. (.L.S.)
Meni-nock, his x mark. (L.S.)	Scha-noo-a, his x mark. (L.S.)
Elit Palmer, his x mark. (L.S.)	Sla-kish, his x mark. (L.S.)

Signed and sealed in the presence of--

James Doty, secretary of treaties  
 Mie. Cles. Pandosy, O.M.T.,  
 Wm. C. McKay,  
 W.H. Tappan, sub agent, W.T.  
 C. Chirouse, O.M.T.,  
 Patrick McKenzie, interpreter,  
 A.D. Pamburn, interpreter,  
 Joel Palmer, superintendent Indian affairs, O.T.,  
 W.D. Biglow,  
 A.D. Pamburn, interpreter.

**TAB 3**

A true copy of the Record of  
the official proceedings at the Council  
in the Walla Walla Valley, held jointly by  
Isaac I. Stevens Gov. & Supt. W. T.  
and  
Joel Palmer Supt. Indian Affairs O.T.  
On the part of the United States  
with the  
Tribes of Indians named in the Treaties  
made at that Council

June 9th and 11th

1855



PROCEEDINGS AT INDIAN TREATIES IN WASHINGTON  
TERRITORY EAST OF THE CASCADE MOUNTAINS

Programme of operations at the Walla Walla Council decided upon by the Commissioners Gov. Isaac I. Stevens and Superintendent Joel Palmer, May 22nd A. D. 1855

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Present: - Indians common to both Territories, Oregon and Washington, viz. Nes Perses, Cayuse and Walla Tribes in Oregon from the western boundary of the Snake Tribe to the Cascades of the Columbia, Tribes in Washington from the Bitter Root to the Cascades, except the Spokanes, Coeur d'Alones, Colvilles and Pond D'Orcilles.

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Governor Stevens and Gen'l. Palmer Superintendents of Washington and Oregon to act jointly for the Nes Perses, Walla Wallas and Cayuse common to the two Territories. To agree upon the terms of treaty. To sign jointly. Each acting for the Indians the above tribes in his own jurisdiction.

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Gen'l. Palmer sole commissioner for the Oregon Indians proper present at the council.

Gov. Stevens, sole commissioner for the Washington Territory Indians proper present at the council.

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Gov. Stevens to preside at the council

The proceedings to be carefully recorded for the Tribes common to the two territories separately by the Secty. of Gov. Stevens and the Secty. of Gen'l. Palmer.

The two records to be carefully compared and certified jointly by the commissioners.

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Each commissioner to appoint an agent and commissary.

Gov. Stevens for the Washington Nes Perses, Cayuses and Walla Wallas, Gen'l. Palmer for the Oregon Nes Perses, Cayuses and Walla Wallas. Goods and provisions to be distributed to the Nes Perses, Cayuses and Walla Wallas, by the Superintendents in proportion to the Indians under the jurisdiction of each.

OFFICERS OF THE JOINT TREATY

Gov. Stevens  
 Gen'l. Palmer Commissioners  
 James Doty Sectly for Washington Territory  
 Wm. McCoy " " Oregon " "  
 H. A. Crosbie Commissary for Washington Territory  
 C. Olney " " Oregon " "  
 Agent R. R. Thompson, in charge of Oregon Nes Perses, Cayuses and Walla Wallas.  
 Wm. Craig Interpreter, Washington Territory  
 N. Raymond " " " "  
 Leaufoher " Oregon " "  
 John Flette " " " "

Census of the Nes Perses, Cayuses and Walla Wallas.

	Washington Terr.	Oregon Terr.	Total
Nes Perses	1400	400	1800
Cayuses	150	350	500
Walla Walla including Utilias	600	200	800
	2150	950	3100

This census to be revised on the Indians reaching the ground.

A public table for the prominent chiefs under charge of agents Landsdale, Thompson and Bolon.

Gov. Stevens details Palmer and F. Gcnitto  
 Supt. Palmer also details one or two men.

Coll. Crosbie to take personal charge of issues for public table of issues, of provisions to Indian tribes, and goods distributed. Provisions and goods to be turned over to the agents, and issued under their direction.

May 28th, Monday

Agent Bolon with an interpreter went to meet the Yakamas who are supposed to be near at hand, and returned at 10 a.m. having seen Cam-i-ah-kum and also the Chief Pee-o-pee-mox-a-mox.

The latter had said to Mr. Bolon, "that someone had informed him that the chiefs and others in the Commissioners camp had said that he was unfriendly to the whites. That his heart was with the Cayuses whose hearts were bad. He was very sorry to hear this. He had always been friendly to the whites and was so now. He should go today to see the Commissioners, and ask why such things had been said of him."

The Commissioners and Sect'y. Doty visited the Lawyer at his lodge, as he was unable to walk without great difficulty. An old gunshot wound received at the battle of Pierres Hole, having broken open again causing much pain.

The Lawyer explained a map of the Nes Perses country which he had drawn for Gov. Stevens. Several chiefs came in and suddenly U-u-sune-mel-e-can, one of the chiefs, said:

"The Cayuses wish us to go to their camp and hold a council with them and Pee-o-pee-mox-a-mox.

What have we to say to the Cayuses or Pee-pee-mox-a-mox? What are their hearts to us? Did we propose to hold a council with them or ask them for advice? Our hearts are Nes Perses hearts and we know them. We came here to hold a great council with the Great Chief of the Americans, and we know the straightforward truth to pursue and are alone responsible for our actions. Three Cayuses came last night and spoke to Jim and two other head men urging them to come to a council at the Cayuse camp, to meet Pee-o-pee-mox-a-mox and Cam-i-ah-kum. He did not wish to go; they insisted; then I said to them; You had best say no more. His mind is made up.

What do you come here for and ask these chiefs to come to a council when to the Head Chief and the rest you say nothing? Have we not told your messenger, yesterday, that our hearts are not Cayuse hearts? Go home!

Our chiefs will not go. We have our own people to take care of, they give us enough trouble, and we will not have the Cayuse troubles on our hands. This is my heart."

Lawyer opened a book containing in their own language the advice left to them by their Great Chief Ellis, and read as follows: Ellis said,

"Whenever the Great Chief of the Americans shall come into your country to give you laws, accept them! The Walla Walla heart is a Walla Walla; a Cayuse heart is a Cayuse; so is a Yakamas heart a Yakamas; a Nes Perses heart is a Nes Perses heart; but they have all received the white law. They are all going straight, yes! While the Nes Perses are going straight, why should they turn aside to follow others who are going straight? Ellis, advise is to accept the white law. I have read it to you to show my heart."

The Commissioners were glad to hear what had been spoken. They knew the Nes Perses were always friendly to the whites. Lewis & Clark had said this and all white men. The Commissioners were friendly to all Indians, and when they come together would tell them so, and show it by what they propose to do. They had no more to say now because when they spoke they wanted all the Indians to hear. The Commissioners then returned to camp.

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At 11 a.m. Pee-o-pee-mox-a-mox, Cam-i-ah-kum, Owhi, Skloom and a number of Walla Walla and Yakamas rode into camp, and having shaken hands in the most friendly manner, with the Commissioners and agents, seated themselves under the arbor in front of the Commissioners tent and indulged in a smoke; using their own tobacco exclusively although other was offered them.

Gov. Stevens then said to them: "My friends, we are glad to see you. We are glad to see all the Indians around here, and what we say to one is the same to all. You will see that <sup>what</sup> we say to one tribe is spoken to all the tribes. When you are ready to come into council, when the council is opened, we will speak to you of the important business for which you have been called together. We have near to our hearts the prosperity of the Indians and the propositions to be made to you will prove this.

We shall endeavor to clearly explain the wishes of the Government, in order that you may fully understand them; as it is our desire you should.

If it is convenient to you we will suggest tomorrow at noon as the time for opening the council. We look upon you as friends, shall so speak to you; as one friend speaks to another, and wish you to reply as such.

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Gen'l. Palmer said: I am equally pleased with Gov. Stevens to see you. Many years ago I met you and considered you friends, and I look upon you as the same now, and hope our meeting will prove this to be true.

We come here to promote peace and happiness among you, leaving behind all that was bad, bringing only that which was good; thus we have but one heart. When you understand this then there will be no difficulty, but we will all work together for the best.

As all the chiefs are not here we will not speak of important business, but wait till all are present.

I want to know if the time fixed by Gov. Stevens for opening the council is good, and if you will meet.

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Pee-o-pee-mox-a-mox said; I want more than one interpreter at the Council, that we may know they translate truly.

Gen'l. Palmer said: You may have any one who can comprehend what he is told to interpret, and who will suit you. We wish you to understand clearly what is said. Will you designate a interpreter whom you have confidence in?

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The Chief said: I do not wish my boys running around the camps of the whites as these young men do. (alluding to some young Men Perses who were lounging about our camp feeling quite at home as they knew themselves to be among friends.)

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Pee-o-pee-mox-a-mox said: We have rode over today merely to see the Commissioners.

Gov. Stevens said: Come and see us as our friends and guests. Can-i-ah-kum knows that our people have been in his country, and eaten of his food. So of Poo-o-pee-mox-a-mox and the Nes Perses. We always give food to our friends when they visit us, you have been invited to come and you are welcome to whatever we have.

We have a public table at which we are glad to have all our friends sit, and share that which hospitality induces us to offer.

We have provided plenty of food, and have already given beef, corn and potatoes to those on the ground. They were invited and we wish them to have plenty to eat.

I was glad to hear that my friend Sklooh had been so kind to Mr. Tinkham one of my party who crossed the mountains. He was in want and Sklooh gave him provisions and clothing.

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The Chiefs then took their leave.

PROCEEDINGS AT THE COUNCIL HELD AT CAMP STEVENS

WALLA WALLA VALLEY, ON THE 29TH DAY OF MAY 1855

Gov. Stevens, Superintendent of Indian Affairs in Washington Territory, and Gen'l. Joel Palmer, Superintendent of Indian Affairs in Oregon Territory, with the following named chiefs, delegates and head men present at the Council, and representing their respective tribes and bands of Indians as below stated.

For the Nos Perses: Lawyer, Joseph, U-u-sune-mal-o-can, James, Tin othy, Red Wolfe, Spotted Eagle, Three Feathers, Jason, Jacobs, Cow-pook, Is-coh-tim, Ka-kay-map, Tu-per-lar-its-a-kun, Billy, Toh-ton-mol-e-wot, the Snake, Bold Eagle, and others.

For the Cayuses: The Young Chief, Steachus, Canaspilo, and others.

For the Walla Wallas: Pee-o-pee-mox-a-mox.

For the Yakimas: Can-i-sh-lan, Ow-hi, Skloom, Kow-was-say-ic, Si-ry-was, Skin-pah.

For the Palouses: Kah-lat-toose

For the Spokanes: Gerry.

For the Piquose and Metows.

For the Oak-kin-a-kanes.

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On May 29th, at 2:02 p.m. the Council opened. Present; the commissioners, officers of Treaties, the Indian agents, and some fifty citizens.

Besides the Indian chiefs already mentioned and some others, about 1800 Indians, Nos Perses, Cayuses, Walla Wallas, Yakimas, Dalles Indians and others on the Columbia above were assembled.

After the pipe had been smoked sometimes, Gov. Stevens said:

"My children: Before entering upon the council we

must have good and faithful interpreters. We want men who will state truly and exactly all that is said; we want men that you know to be good men; men that you can trust; we want no others.

We propose as interpreters for the Nes Perses, William Craig, this man, (pointing to Mr. Craig) who has long lived with you, also McDauphin and Delaware Jim.

For the Cayuses Mr. Pembrom and Mr. Olney.

For the Wallas and Yakamas, John Whitford.

Thus for each language we propose to have two and three interpreters. Now I ask you, do you want others added to the number? Are you satisfied with these men? If you have any others you wish to propose, speak out, for we wish you to be satisfied.

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Stachus, a Cayuse said: We know of no others whom we would wish. There may be some words hard for them to make us understand, but we think the arrangement good as it is.

Gov. Stevens said: When you cannot understand what we say to you, stop us and we will repeat it.

Each interpreter will now be sworn to be a faithful interpreter.

Gov. Stevens then administered to the interpreters the following oath.

You solemnly swear in the presence of Almighty God, that you will well and truly interpret to the best of your ability what may be said by the Commissioners for the United States holding this council on the one part; and the chiefs and head men of the tribes and bands of Indians here present on the other part. So help you God.

Gov. Stevens then said: My children, the interpreters have each taken a solemn oath in the presence of Almighty God, to be true and faithful interpreters. I will now read the form of the oath. (and it was read as above).

Gov. Stevens continued: My children; I have much to say to you; my brother here Gen'l. Palmer will have much to say to you. We want you to listen and be con-



comfortable at the same time. We want clear skies, we want the ground to be dry. We will meet tomorrow with a clear sun and the day before us. Then we will open the whole subject, and will see if our hearts and your hearts will not come together.

We have met as friends today, tomorrow we will meet as friends and then enter upon our business. I therefore adjourn the council till 10 o'clock a.m. tomorrow. The weather is rainy and bad, tomorrow we hope the skies will be clear and you will all be able to be present. Should it rain tomorrow we will meet when it clears up.

One word on another point, you have come here by our invitation and are our guests. I have entered, and so has my friend here Gen'l. Palmer, many an Indian lodge, and they always gave us to eat and drink. We therefore have brought provisions which we offer to you as a friend to a guest; and we therefore trust you will all feel free to receive the provisions we have brought to furnish you with as our guests.

I propose to the Walla Wallas, Cayuses and Yakamas that you take two oxen, drive to your camp and slaughter for yourselves.

Young Chief replied: We have plenty of cattle, they are close to our camp. We have already killed three and have plenty of provisions.

Gov. Stevens said: We are much pleased to hear you are so well provided for, but we have plenty of provisions and you are welcome to them.

Young Chief replied: We have plenty at present. We do not throw away your offer. If we want any we will come to you.

Gen'l. Palmer (to the interpreter): Say to the Yakamas: You have come a long ways. You may not have provisions. If you want any we have them and you are welcome.

Young Chief said: Cam-i-ah-kun is supplied at our camp.

Gov. Stevens said: There will be no more said today unless you wish to say something.

Young Chief said: We have nothing to say today; the weather is bad, rainy. We do not throw away your offer; when we are done talking you will know our hearts; we will talk slow not all in one day. No snow falls at this season of the year. There will be time for you to go anywhere you wish.

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The council then broke up and nearly all the Indians returned to their camps.

Pe-e-o-pee-rox-a-rox and Cam-i-ah-kim dined with the Commissioners and remained in their tent sometime smoking in a friendly manner.

Timothy, a Nus Perses chief acted as orier for his nation and he will also record in their language the full proceedings each day of the council and this will be preserved among the archives of the nation and handed down to future generations.

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May 30th Wednesday.

At 1 o'clock P.M. the Indians began to assemble and at 1 3/4 P.M. the Council opened. Present same as yesterday.

Gen'l. Palmer said, My friends, I am glad to see so many of you here today: Yesterday the council was organized and Interpreters sworn to repeat to you what we say. Today my brother in Council will speak to you the great desire that our Chief has to promote your good.

I know that our Great Chief has a good heart. I know that my brother Gov. Stevens has a good heart, that they both desire to do and act for your good. I hope then you have come here with good hearts to listen to what he has to say. We both come here to talk to you as men and not as boys; we throw behind us everything that is bad, and come to you with one heart: we hope you have done the same: You are men able to judge between good and bad; and when my brother speaks to you, you can judge whether it be good or bad.

For the present I am done, and my brother will speak to you.

Gov. Stevens said: My children: The sky is clear, the ground is dry, my heart is glad today. Our hearts are glad. You are men! You have families: You have the means to live.

You have all of you been friends to me and mine; Two years since I came among you: Two years only have I known you; I came from the great waters beyond the mountains, across the mountains, and you have all been friends to me.

The Nes Perses. Lawyer fed my men driven out of the mountains by snow; the Cayuses and Walla Wallas received my men kindly; Pee-o-pee-mox-a-mox saw us in his country and gave us guides: the young chief and his people had nothing but smiles and kindness for us; and yesterday Can-i-ah-kun showed me a paper from Capt. McClelland saying that he furnished guides and welcomes them on their way.

So to the north and east; there sits a Flat Head and there a Cocur D'Alone on the route across the Bitter Root; there are Poulouses and Colvilles and Spokanes away to the North; there are also men from both sides the river, from far down; all were kind, and I brought a message to all, from a tribe beyond the mountains: I have been among the Blackfeet and have brought word that they would meet you in Council, and that war should cease.

I met you in the trail, I saw your people in the Buffalo country; I met your people on the road to the Buffalo country: My heart said peace in the Buffalo country, peace here; peace is here now: peace between yourselves, peace between us. So for your kindness to me I am your friend, and I came from the Great Father to be your friend.

The interpreters yesterday took a solemn oath to speak truly. I took a solemn oath and my brother took a solemn oath to be your friends.

The Great Father has learned much of you. He first learned of you from Lewis & Clarke; Pee-o-pee-mox-a-mox remembers Lewis & Clarke, the Lawyer does: they came through your country finding friends and meeting no enemies.

I went back to the Great Father last year to say that you had been good, you had been kind, he must do something for you. My brother wrote to the Great Father in like manner.

He told the Great Father, these men have farms; the Great Father said I want them to have more and larger farms; I told him you had cattle and horses; he answered that he wanted your horses and cattle to increase: I told him some of your grown people could read and write; He answered, I want all the grown people and all the children to learn to read and write; I told him that some of you were handy at trades; he answered, that he desired to give all who choose the means to learn these trades;

Why did the Great Father answer in this way? Why did he send my brother and myself here this day, to say this to you? Because you are his children; his red children are as dear to him as his white children; his red children are men, they have hearts, they have sense; they resent injury: we want kindness on the one side and kindness on the other; we want no injuries to resent.

The Great Father has been for many years caring for his red children across the mountains; there/pointing East/many treaties have been made. Many councils have been held; and there it had been found that with farms and with schools and with shops and with laws the red man could be protected.

Why do I say laws? What has made trouble between the white man and the red man? Did Lewis and Clark make trouble? They came from the Great Father; did I and mine make trouble? No! but the trouble had been made generally by bad white men and the Great Father knows it, hence laws.

The Great Father therefore desires to make arrangements so you can be protected from these bad white men, and so they can be punished for their misdeeds; and the Great Father expects you will treat his white children as he will make a law they shall treat you. We are now in council to see if we can arrange the terms which will carry this into effect.

Let us go back to old times across the mountains and see what was there done: the red men received the white men gladly; but after awhile difficulties arose; the blood of the red man was spilled and the blood of the white man; there was cold; there was hunger; there was death. But a man came; William Penn, and said I will see if my white children and my red children cannot be friends, and they were friends: Wm. Penn and the Indians came together as

we now come together; they made a Treaty: there was peace: and no white mans blood and no red mans blood had been shed, and there has been peace to this day; this was in olden times.

Oh! these people said we too will make treaties; we too will live in peace. They tried various plans, a plan that worked well when there were but few whites, did not work well when there were many. It was found that when the white man and the red man lived together on the same ground; the white man got the advantages and the red man passed away.

The Great Fathers name at that time was Andrew Jackson: he said I will take the red man across a great river into a fine country where I can take care of them; they have been there twenty years; they have their government; they have their schools, they have their own laws; their Chief John Ross knows as much as my brother or myself and a great deal more; he is what you call a Lawyer: he is an Indian, A Cherokee. When he goes to see the Great Father, the President, he sits with him at table as you sit with us at table.

Before you met my brother and myself in council, you have your own council: and the Great Father when he acts has his council also, he has his chiefs.

When I saw the Great Father he called his chiefs together, and had a council about you. He has two chiefs who have the care of the red men, their names are Gen'l. Orr and Robert Johnson, I want you to remember them. Robert Johnson lives near John Ross; they both told me that what had been done for John Ross should be done for you, and more, as I will tell you.

As we grow older we learn more and grow wiser; so of the Great Father and his chiefs; they did much for John Ross and his people twenty years ago; they have learned much since and know better what to do; they find one thing however the same now as then.

They gave John Ross and his people a tract of land into which no white man could go without their consent; they sent them an agent, they had schools, they had mills, they had shops, they had teachers, they had farmers, they had doctors. I repeat again no white man could go there unless the red man consented to it.

North of that tract of land the whites are going in but they cannot enter it: South of that tract of land the whites are going in but they cannot enter it; that tract of land is the Indians home; his home and the home of his children.

There are other tracts of land East of the mountains set apart for the red mans home: for there are many tribes. These tracts the white man cannot enter without the consent of the red man. On all these tracts the red man has schools and farms and mills: they have teachers and physicians and an agent.

Now listen carefully: On these tracts the land was all in common: there were one or more larger fields for the tribes but no man had his special field; the Great Father and his chiefs now think that is not good; the Great Father said, the white men has his farm, his cattle and his horses: the Great Father says that when on that tract of land an Indian has his field, that field should be his.

This brings us now to the question. What shall we do at this council? We want you and ourselves to agree upon tracts of land where you will live; in those tracts of land we want each man who will work to have his own land, his own horses, his own cattle, and his own home for himself and his children.

On each tract we want an agent to live who shall be your brother, and who shall protect you from bad white men. I shall speak more of this subject by and by.

On each tract we wish to have one or more schools: we want on each tract one or more blacksmiths; one or more carpenters; one or more farmers; we want you and your children to learn to make ploughs, to learn to make waggons, and everything which you need in your house. We want your women and your daughters to spin, and to weave and to make clothes. We want to do this for a certain number of years.

Then you the men will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and your daughters will then teach their children, those who come after them to spin, to weave, to knit, to sew, and all the work of the house and lodges, you will have your own teachers, your own farmers, blacksmiths, wheelwrights and mechanics; besides this we want on each tract a saw mill and a grist mill.

Now we want you to agree with us to such a state of things; You to have your tract with all these things; the rest to be the Great Father's for his white children.

Besides all these things, these shops, these mills, and these schools which I have mentioned; we must pay you for the land which you give to the Great Father; these schools and mills and shops, are only a portion of payment. We want besides to agree with you for a fair sum to be given for your lands, to be paid through a term of years as are your schools and your shops.

Now these payments are something you will have to think much about. Whatever is done is done with your free consent; I have more to say about these payments, about the agent, and about your doing better, as I think you will if we can agree.

I am tired of speaking; you are tired of listening, I will speak tomorrow. My brother will now say a few words to you.

Genl. Palmer said, I shall say but little to you today; It is not expected we can come together with one day's talk; nor do we expect you can understand with what has been said all that we want. You will not make up their mind until you hear all we have to say.

Tomorrow my brother will say something more to you; when he is through then I will speak to you. Sometimes when people have a matter to settle they commence way off; but as they understand each other they come together. With us, if we commenced way off, I hope we are a little nearer now, and by and by I hope we shall come quite together.

As we expect you are tired sitting, and as we do not wish to say too much at once, we will speak no more.

We will meet tomorrow if you like, at an earlier hour say 10 a.m. and you can come without our sending for you. If any present wish to say anything, we are ready to listen to it.

No reply was made by the Indians and the Council then adjourned at 4 1/2 P.M.

May 31st Thursday.

The Indians assembled at 11 1/2 A.M. and at 12M. the council commenced.

Gov. Stevens said, My children. I said to you yesterday we want you to agree to live on tracts of land which shall be your own and your childrens; we want you to sell the land you do not need to your Great Father; we want you to agree with us upon the payments for these lands; we want you to have schools and mills and shops and farms; we want you to have teachers and millwrights and farmers and artisans; we want your people to learn to read and write; your men and boys to be farmers or millwrights or mechanics, or to be of some profession as a lawyer or a doctor. We want your wives and daughters to learn to spin and to weave and to make clothes and all the labor of the house; this for a number of years as we may agree.

I said yesterday this would only be a part of the payment. We want also for a certain number of years to furnish you with some clothing, clothing for your men, your women and your children.

I will mention only some of the principal articles; there will be blankets and cloth for leggings, clothes made, shirts and other articles for the men and boys; there will also be blankets and shawls and calicos and shirting and other articles for the women and girls. The particular articles however will be agreed upon between yourselves each year; you may want certain articles one year, and different articles the next.

Besides clothing we would wish to furnish you with tools and implements for the shops; for the blacksmith; for the wheelwright; for the tinsmith and such other tools as you might need: we also want to provide you with tools for your farms, with ploughs and hoes and shovels and when you get further advanced with reapers and all the implements white man has; we want in your houses plates and cups and brass and tin kettles; frying pans to cook your meat and bake ovens to bake your bread, like white people.

I have told you about the mill to grind wheat and corn, and about the mill to saw boards and lumber, and that we should employ carpenters in your service.



We want you by and by to live in houses and we shall furnish you with a mill to saw lumber, and with carpenters, and your own people by and by will become carpenters and then you will have houses; all this for a term of years. Then we hope that you people - every family will have its farm, its cattle, its horses, and I trust, its sheep; then I said you will have your own teachers and your own schools; you will have your own smiths, your own wheelwrights, your own carpenters, your own physicians and lawyers and other learned men.

I told you of John Ross. As your fathers and your friends we think this will be good for you.

In thinking over the matter we want you to bear in mind what you have seen and what you know. That venerable old man Jim recollects when he first saw a house in this country; you all of you recollect when you first saw cattle, now you count your horses and your cattle by thousands.

The horse carries you wether you wish to go, yourself, your wife, your children; and your packs, and he works in your fields; your cattle now furnish you with a portion of your food; your cows furnish you with milk and you already know how to make butter; we trust you will make butter and cheese, and that your women will all have churns. Formerly you raised no wheat, no potatoes. Now you have both grain and vegetables. Is not this a great change? A change which you all have seen? Has it not been for your good?

Let us look at it now in a different way. My brother said yesterday he would have much to say today.

We do not want you to agree not to get roots and berries, and not to go off to the Buffalo; we want you to have your roots and to get your berries, and to kill your game; we want you if you wish to mount your horses and go to the Buffalo plains, and we want more; we want you to have peace there. What has disturbed you on these plains? The Blackfeet tribe of Indians who stole your horses and murdered your grown people and your children; we want that to cease forever.

The Blackfeet are not all bad people; they have some good chiefs among them and some good men; a part of them promised me two years ago not to make war upon you; and these have kept their promise; I could not see all, and

those I could not see have since given trouble. But I left with them a man who spent a whole year with them; a man whom you have seen here; a man who writes at that table. He traveled all through their country, sometimes alone sometimes with two or three men; he saw them all, he talked to them about you, and he promised to meet you in council this year and make a peace with you, to murder no longer your people, to steal no longer your horses.

The Blackfeet have now began to think, if we stop stealing horses from the Indians this side of the mountains, what will become of our bands of horses? They will pass away. Raise your own horses says Mr. Doty as do the Flat Heads, the Nes Perses, the Cayuses, the Walla Wallas, the Coeur d'Alanes, the Spokanes, the Yakamas and so back to the Flat Heads again. The Blackfeet then said, the Buffalo are not as plenty as formerly, we have to cut too many old bulls.

Doty then talked about you, said you had your fields, horses and cattle, and raised your own milk, meat and vegetables; the Blackfeet then said we too would like to have farms; we would like to have cattle and milk and bread.

The Blackfeet and other tribes who live in the Buffalo country, see that the Buffalo cannot subsist there forever; they feel that unless they change their mode of life, they will soon pass away.

They desire to change their mode of life. We shall help them provided they agree not to molest you.

When you see the Blackfeet at the Council they will ask you many questions, they will want you to tell them when you first had horses and cattle, and when you first had crops. If we agree at this council they will ask you all about that; and you will tell them you have not as much game as you once had, and the time is coming when you will not have dressed skins for your clothing; you will tell them the Buffalo is passing away, and the time will come when we will not have robes for our tents and lodges; we have already changed and found it for our good, and we are determined to make another change in good season; we have made a bargain with the Great Father; we will have instead of tents of lodge skin when there are no Buffalo, houses of boards and of lumber; when the elk and the deer and the buffalo pass away, then we will have clothing, every man and woman and child like the white man; we have enough now to do to get roots and game and berries for our children; but we intend then to raise enough for our women and berries and game are no longer to be found.

If we can agree here, this you will be able to say to the Blackfeet, and the Blackfeet will say, we will cut off bulls no longer, we will not starve, we will not die of cold, we will do as you have done, we will be friends, we will chase the Buffalo together on the plains, we will be friends forever.

I have spoken of an agent, I will speak more. If we agree at the Council we have many things to do for you; the agent will live with you and see that it is done; if you think we have not done our part go to the agent and tell him so, and he will see that we do do it. If we think you have not done your part the agent will go to the chiefs and say so frankly and arrange it with them; he will be your elder brother, and will see that you are not wronged, and that the bargain is carried out.

I have much more to say in my heart but not now, there will be time enough by and by; my brother Gen'l. Palmer has to speak, he is your friend as I am but he has known you longer, and he can speak to you better than myself; he feels for you, and you will find that every word which he says comes from a desire to serve you.

If you wish to hear him now he is ready to speak.

Gen'l. Palmer said, My friends, I do not wish to tire your patience too long, I have something to say to you, if you will listen a little longer I will speak.

My brother here speaks truly, when he says I desire to speak and act for your good.

In order to explain more fully the course pursued by the government towards the Indians on the other side of the mountains I will tell you of it; my brother here has reference to that subject and I may perhaps have to repeat his words.

He has told you something about our first settlements among the Indians over the mountains; those settlements were made over Three hundred and sixty years ago. First came a chief with several of his brethren in three ships across the ocean, they found many Indians in that country who received them kindly, they gave to them food and received in return beads and various trinkets; that chief after traveling over a great extent of country and visiting many villages left a part of his people and returned home.

After having been absent some time he returned and many

others, upon arriving at the point where he had left his children none could be found. After the Chief left, these people began to quarrel among themselves and with the Indians.

There were many causes for this; a portion of the Indians whose hearts were not good, stole the property belonging to these people; the whites retaliated by whipping and ill treating them. That was the first offense on the part of the Indians; the whites had long been without women and they often took forcibly the women of the Indians; this induced them on their part to retaliate; these difficulties continued from bad to worse until finally there was war; our people were but few, the Indians many; our people were all killed; there were also many Indians killed. Upon seeing our Chief return with his vessel and other vessels and so many people they fled; they knew they had done wrong as well as the whites, and they expected they would be punished for it; this time our Chiefs brot with them their women and children and cattle and horses, and tools to work with.

The Indians seeing they were not interfering with them returned and for awhile they lived together in peace; but they lived indiscriminately together, a white man here and an Indian there; but they could not long live this; their customs and mode of life was different, they did not understand each other; they continued a number of years with little difficulties occurring, occasionally killing one another until it finally broke out with another war; peace would sometimes be made and last for a little time, but finally they would get foolish and their hearts would get bad; as it is said in this country sometimes; in this part of the country by the young men they are few we are many let us wipe them out.

They finally made war, a council was held, speeches and harangues were made and they declared war, a few white men were killed and many Indians were killed; there were more Indians killed than white men because we had better arms and knew how to make them. This war continued some time but finally they had peace; the whites brought with them and made after they arrived here whiskey; this the Indians were very fond of and like all other persons after drinking it were foolish; they quarreled among themselves and killed each other and some whites in their drunken frolics; our chief saw this condition and desired to do them good; he saw that the Indians and the white man could not live peaceably together; he

called the Indians together in council; he proposed as we propose in this council, to purchase their country and select a place for them to live; he proposed to have a district of country set aside for the Indians to live in and that no white man should live there; but the Indians said No! why should we leave the bones of our fathers and go to a strange land; we have plenty of elk, deer, bear, berries and roots; we like you let us live together, we don't want to cultivate the soil you are welcome to occupy it; they were told that the wild game, the roots and the berries would not last always; they said they were a great and numerous people, they knew what was best for them and did not want our counsel; they quit talking, the whites went to their houses and Indians to their lodges; our people continued coming; every year vessels came until our people got as numerous as the leaves on the trees.

It was but a few years before their game was all killed off; for the white man killed the game as well as the Indians; the Indians had no food in his lodges, the women and children were hungry; at last they commenced stealing our peoples property and plundering their houses; our people were forced to retaliate by whipping and shooting some of them. The Indians again sent messengers to the surrounding tribes to call them to make war; they resolved in council to exterminate the whites, kill them off; they commenced by burning houses, murdering women and children, and killed a good many of our people; finally our warriors were collected and they had war; they did not understand our mode of warfare and thousands of Indians were killed and but few of our people were killed in the battles. This continued for a long time and the tribes finally concluded they had been acting foolish, and that they would receive the talk of our chief.

Those that were left finally agreed to meet our chief in council; they did so and there was peace. In that council it was agreed by the Indians that they would reside on a certain district, set aside for them certain limits, certain bounds; they agreed in that council to live in peace with the whites, and to commit no depredations on them, and to live at peace with other tribes; our chief agreed that we would build them mills, blacksmith shops, carpenter shops and supply them with all necessary fixtures.

Our chief directed his agents to build those mills and school houses and shops, and he employed teachers and

smiths and millers and sent them among them. They supplied them with cattle and horses and oxen and ploughs and wagons and every variety of farming tools.

These Indians then began to see that they had acted very foolish, and that when they supposed they knew enough for them and did not want any of our counsel, they knew nothing, they were as blind men; they have since been learning and continued to learn and prosper, and are now a great happy and good people; there were a few tribes who refused to go into that council, who refused to treat. What was the condition of that people? Those who thought themselves very wise and refused to take the advice of the white people those who continued to make war upon our people? Their game was all killed, they had nothing to eat, they fled to the mountains then they continued to live but a few years of miserable existence, until they were finally overtaken by more powerful tribes and all killed. There were other tribes in other districts of country, who heeded the advice of the chief and were set aside in districts of country belonging to themselves.

In all cases where they have entered into a treaty and agreed to reside upon tracts set apart for them our chief has aided them. All who have settled upon these tracts have not done well, for they are lazy and have foolishly thrown away what has been paid them.

But you as a people know how to appreciate these advantages and would not throw them away; all experience we have had with Indians these Three hundred and sixty years shows us that the white man and the red man cannot live happily together; although we may live near together there should be a line of distinction drawn so that the Indians may know where his land is and the white man where his land is; you are all able to judge for yourselves by the constant difficulties that are occurring here among you, between the whites and the Indians.

We have some people whose hearts are bad, who violate our laws; we have men who are afraid to live in the settlements, they seek opportunities to go among people at a distance, among the Indians; as an evidence of that I need only refer to matters that have transpired within the past four weeks in your own country; a few men had formed a plot by which they were to get your horses: their plan was this: part of those men went over into your bands and if they found any horse branded took a description of it, wrote it down in a book; when they had visited all your bands and got the description they would go away.

Sometimes after they would take their book and give one of their party a description of these horses and an order to get them; when they gather up all these horses they will drive them off to the Grand Ronde or some place in the Blue Mountains; they contemplate when they had got the stray horses coming back and driving all your horses to Salt Lake; but a short time ago Mr. Thompson came up and learned the trick; he went below and took out a warrant for them and these soldiers came up to try to arrest them.

It is these men I am told who would rob you of your property, who are giving you advice not to treat with us; whose counsels do you prefer to take? These men who would rob you, or ours who come to befriend you? These men who came here are strangers to you with smooth tongues, they care nothing about the truth. I don't mean to say that all who come among you are bad men; I am afraid there are a few of these young men who come to live among you and wish to get your women, not because they desire your women but because they want your horses; they will come and remain among you a few years, get a woman and raise children, but when they get a band of horses around them, they will be off and leave the women and children without anything; I have been told that one of these men has been in your camp since we have been holding this council, advising you to have nothing to do with us; these men you cannot tell always who they are, but all such men need watching; you will now be able to judge who are your friends, such men, or myself and my brother who have come here to act for your good.

We have been talking a good while and you have been listening. You are tired sitting. I have more to say to you but I will leave it until tomorrow and say no more at present.

The Council then adjourned at 3 1/2 P.M.

In the evening the Young Chief sent a message to the Commissioners to the effect that he should be pleased if no council should be held tomorrow, as his people desired to make a great Feast and have a general holiday. To which request the Commissioners acceded.

Lawyer, Poo-a-poo-mox-a-mox, Young Chief and Cam-i-ah-kun dined at Gov. Stevens table with Gen'l. Palmer and the gentlemen of the party.

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June 1st. Friday.

All about the Treaty Ground was very quiet, all the principal Chiefs dined at Gov. Stevens table.

The day was extremely warm and to have held a council would have been most uncomfortable.

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June 2nd. Saturday.

The Indians began to collect at 11 1/2 A.M. Some delay was occasioned by the non-appearance of Cam-i-ah-kun and Ow-hi. But at 12 M. all the Chiefs being present the council opened.

Gen'l. Palmer Said. My friends, we have met here today to continue the talk; I shall try and speak so that you may understand me.

I have said that the white man and the Indians could not long live together in peace, a few may do so, but where there are many we cannot do it. If your Chiefs are unable to restrain your people where there are but few, how can our Chief prevent his people from doing wrong when they are so many and scattered over so large an extent of country.

It is but fifty years since the first white man came among you, those were Lewis and Clark who came down the Big River - the Columbia. Next came Mr. Hunt and his party, then came the Hudson Bay Co. who were traders. Next came missionaries; these were followed by emigrants with wagons across the plains; and now we have a good many settlers in the country below you.

If there were no other whites coming into the country we might get along in peace: You may ask, why do they come? Can you stop the waters of the Columbia River from flowing on its course? Can you prevent the wind from blowing? Can you prevent the rain from falling? Can you prevent the



whites from coming? You are answered No! Like the grass-hoppers on the plains; some years there will be more come than others, you cannot stop them. Our chief cannot stop them, we cannot stop them; they say this land was not made for you alone; the air that we breathe, the water that we drink, was made for all. The fish that come up the rivers, and the beasts that roam through the forests and the plains, and the fowls of the air, were alike made for the white man and the red man.

Who can say that this is mine and that is yours? The white man will come to enjoy these blessings with you; what shall we do to protect you and preserve peace? There are but few whites here now, there will be many, let us like white men, act so as to prevent trouble.

And now while there is room to select for you a home where there are no white men living let us do so. I have made treaties with all the Indian tribes in the Willamette Valley, with all in the Unqua Valley, with all in the Rogue River and Shasta country; they have agreed to remove to such tracts as shall be selected for them; they have agreed to be friendly with the whites and all other Indians; they have sold us all their country except the reservations; we have agreed to build them mills, blacksmith shops, waggon makers shop, to erect a tin shop and gun smith shop, to build a school house and hospital, to employ millers, mechanics, school teachers, doctors and farmers, all these expenses to be paid by the government for twenty years.

Do you want these things? Do you want a sawmill to saw the timber to build your houses? You have a few lodges now, how long will they last? By and where will you get your hides to make lodges? Gov. Stevens told you that the Blackfeet said the Buffalo were not as plenty as they were once; it is but a few years since there were a plenty of Buffalo at Fort Hall. Mr. Craig here has seen many of them there and probably others of you have; where are they now? all gone;

Do you want mills to grind your wheat and your corn? Do you want blacksmiths to make your ploughs and harrows? to make your axes, hatchets, hoes, knives, and to shoe your horses? Do you want a gun-smith to mend your guns when broken? Do you want a tinner to mend your kettles, your pans and cubs? Do you want a carpenter to build your houses and a waggon maker to make your waggons? Do you want a shoe maker to make your boots and shoes? Do you want a doctor to

attend to the sick and give them proper medicines? Do you want farmers to assist you and show you how to raise wheat, corn and potatoes? Do you want school teachers to teach your children how to read and write? Is it not good that these men can write down what is said here and understand what it is? It would make my heart glad if you could all do so. It would make my brother's heart glad if you could all do so; would it not be good if you wanted to talk with my brother; or if you wanted to talk with our Great Chief? If you knew how to write and wanted to talk you could send it to him on paper and he would know your heart; would it not be good then to have schools among you?--

Do you want to have plenty of provisions for your women and children? Do you want to have plenty of blankets and clothing? The deer skin and the elk skin cannot always be had to make your clothing; do you always want to live at peace with all persons? If you want all these things we are ready to give them to you; when we know your hearts then we shall know whether you want these things or not.

You have been told that by and by our Great Chief would send some person to buy your country. I suppose you have been looking for that person a long time; Dr. White came here. What did he do? He may have talked very well to you but what use? Mr. Mampool came, what did he do for you? My brother and myself have come, we have not only come to talk but to do something. Will you receive it or will you throw it behind you? We did not come here to scare you or to drive you away, but we came here to talk to you like men, and to make such arrangements as to preserve peace and protect you. Our agents have tried to protect you in all your rights; but I am fearful they will not always be able to do so if you continue to live in this scattered condition.

I see here a good many old people. I expect you have left a good many of your old people at home; we want to do them some good while they yet live, and if you enter into a treaty with us we can then do them some good and do you all good; if we enter into a treaty now we can select a good country for you; but if we wait till the country is filled up with whites, where will we find such a place? My heart is that it is better for you to enter into a treaty now with us. I know that my brother has a good heart and wants to do you good, but we do not know how long we can act for you. Perhaps it may not be

long before other agents will come; the next that come may not have such good hearts and do as much for you as we will.

If we make a treaty with you and our Great Chief and his council approves it, you can rely on all its provisions being carried out strictly. My heart is that it is wise for you to do so. I will not speak any longer.

Gov. Stevens Said. My Children, my brother and myself have opened our hearts to you, we want you to open your hearts to us.

Five Crows said, we are tired.

Gen'l. Palmer Said. We are not expecting to say any more today.

Five Crows Said. I have a little to say. Do you speak true that you call me brother? We have but one Father in Heaven; it is He /pointing above/ who has made all the earth; He made us of earth on this earth: He made our Fathers; when he gave us this earth. He gave no gardens.

He created our Fathers when he created Adam; we were divided into different countries; It was He, the Almighty that passed the law; He is the same God that made the Ten Commandments; He said My Children you must do no evil, you must not steal, you shall not take anything without payment; the Great Father says he will send the thief into fire - into hell -

The Commissioners said will you speak now or on Monday?

Pee-c-deo-mox-a-mox Said. Why not speak tomorrow as well as today? We have listened to all you have to say, and we desire you should listen when any Indian speaks. It appears that Craig knows the hearts of his people, that the whole has been prearranged in the hearts of the Indians; that he wants an answer immediately without giving them time to think; that the Indians have had nothing to say so far it would appear that we have no chief.

I know the value of your speech from having experienced the same in California, having seen treaties there. We have not seen in a true light the object of your speeches; as if there was a post set between us, as if my heart cried from what you have said; as if the Almighty came down upon us here this day; as if He would say, What are you saying? Look at yourselves, your flesh is white, mine is different; mine

looks poor, our languages are different. If you would speak straight then I would think you spoke well; we have come together to speak about the earth and not of God; you were not afraid of the Devil!

You see this earth that we are sitting on; this country is small in all directions. Why should you fear to speak on Sunday? Should I speak to you of things that have been long ago as you have done? The whites made me do what they pleased, they told me to do this and that and I did it; they used to make our women to smoke; I suppose then they did what was right; when they told me to dance with all these motions that are here then I danced. From that time all the Indians became proud, and called themselves chiefs.

On another subject I have something else to say. Now how are we here as a post? From what you have said I think you intend to win our country, or how is it to be? In one day the Americans become as numerous as the grass; this I learned in California; I know that is not right. You have spoken in a round about way; speak straight. I have ears to hear you and here is my heart. Suppose you show me goods shall I run up and take them? That is the way we are, we Indians, as you know us. Goods and the Earth are not equal; goods are for using on the Earth. I do not know where they have given lands for goods.

We require time to think, quietly, slowly. I see Americans in all countries, it is not the country to think about, we may think about another; there is the Mission /Catholic Mission/ it is right there and it is right it should be there. You have spoken in a manner partly tending to Evil. Speak plain to us, I am a poor Indian, show me charity; if there was a chief among the Nes Perses or Cayuses, if they saw evil done they would put a stop to it and all would be quiet; such chiefs I hope Gov. Stevens and Gen'l Palmer are. I should feel very much ashamed if the Americans should do anything wrong. I had but little to say, that is all. I do not wish you to reply today, think over what I have said.

Com-os-pi-lo Said in substance as follows; it was addressed to his people and rendered by the Interpreters after the conclusion of his speech.

He reproved the young men for laughing and talking; said they considered him of no account any longer; they had knocked off his horns and his teeth were worn out; once he had horns and he could hook; teeth and they were sharp

and he could bite; you young men think yourselves very smart by and by you will learn; now I am tired of your conduct; I am not speaking to Gov. Stevens or Genl. Palmer, I am speaking to you young men, as my children, to listen and behave yourselves.

Gov. Stevens said. We are ready to hear, my friends anything you have to say today. If you desire not to speak today the council will adjourn till Monday. We do not wish to speak on Sunday because our Great Chief does not want us to do business on that day, unless it is a matter of necessity. We think that most of our red brethren do not wish to do business on Sunday. The Council is adjourned till Monday at 10 A.M.

And the Indians then dispersed at 3P.M.

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June 4th at 12 1/2 P.M. the Indians began to collect and 1 1/2 P.M. the council opened.

Gov. Stevens Said. Poo-o-pee-mox-a-mox said on Saturday, he had listened patiently to all we had said, and hoped we would listen patiently when any Indian spoke. We listened patiently on Saturday, we shall listen patiently today; we want you to open your hearts and speak freely.

After a long pause the Lawyer said. If you will designate some one to speak first he will speak. If you do not they will sit here all day without speaking.

Gov. Stevens Said. We expect the Head Chiefs know the hearts of their people. We will be glad to hear the Lawyer speak.

The Lawyer Said. My Chiefs and people, I will now speak, listen (to Commissioners) I ask good for these poor people; I think my Chief about what you have been speaking; It is from the man that made us, My Chief, or is it from your own people? that is the reason of my asking, where is it from you have spoken My Chief? Although I think it is from the white people; from where the white people is they have been dying and dying, and are yet dying, and also the whites are living all from the same people. The same thing of our people our red people that are younger and from the same root; and here you see these many of us yet, and still living, old men and children.

The Supreme Being our maker listens to the white people who are dead and also to those who are living; the same thing with the red people, they listen to the dead and also the living.

And this is what the President has made up his mind for us poor people; he has thought we were a poor people and says go and see them and learn them straight; and that is the reason you have told them you would learn them to read and write and all those other things you have spoken of; and that is the reason I have understood what you have spoken from the President; for that reason you have been asking us questions, and now we are asking questions from you.

It was not for nothing I have been listening to you. My country is poor it is a trifling country. You see the map the marks of our country, one stream runs one way another runs another way, it is all rock. My Chief, but the Big Chief from the light (the East) said to you go and talk to these people and you have done it, he says go there to take care of your white people and your red people and you have done it. As long as the Earth stands take care of the people; he said to the white people and the red people all as one let us listen to the law, when the earth is done away with there is the end of the law, and that is the reason you see us good and we see you good.

My Chief that is all I have to say at the present, there are a good many men here who wish to speak. Let them speak.

The Commissioners requested Pe-at-tan-at-tee-miner to speak who replies. You have heard what I have to say. My mind is the same as the Lawyer has spoken. What I had to say he has said, he has spoken my mind, I have nothing to say, he has said all, for my land it is for you and for me. I shall do you no wrong and you do me none both our rights shall be protected forever; it is not for ourselves here that we are talking, it is for those that come that we are speaking. This is all I have to say at this present time.

Cam-i-ah-kun was invited to speak and said. I have something different to say than the others have said. It is young men who have spoken; I have been afraid of the white man, their doings are different from ours. Your chiefs are good, perhaps you have spoken straight, that your children will do what is right, let them do as they have promised. This is all I have to say.

Poo-o-pee-nox-a-nox was next invited and said I do not wish to speak. I leave it to the old men.

Gen'l. Palmer Said. We do not know who of them desire to speak; let their old men speak if they desire to do so.

Gov. Stevens said, If u-u-Sin-mull-e-cun would like to speak we would be glad to hear him. He replied, I do not wish to speak now let those who have already spoken speak. What the Lawyer has said is my heart, it is not necessary for me to speak.

The Commissioners called upon Statches to speak who said, how is a chiefs language? How is the Big Chief talk? Where has their talk sprung from? That they have spoken straight on the part of the Indians; the Lawyer although young has spoken well for me. Who is it that is going to speak straight for all of us. Now I want the whites and the Indians to show all their hearts; you know and we all know life while we are living, and I ask you my friends to speak straight and plain to us, as if I spoke to the President I say Yes. I would wish that the President was here so that we might all listen to him; he would enlighten us, he would give us life, he would make us to live as we ought to live, we would give each other our hands to hold always.

Lawyer spoke first and he will have more to say about this we are now speaking of. Lawyer has asked you to speak plain. I make the same request. I have nothing more to say.

Poo-o-pee-nox-a-nox Said. I do not know what they (the interpreters) have said. My heart was heavy; my heart has to separate so, that was my heart. I do not know for what lands they (the Interpreters) have spoken. If they had mentioned the lands that had spoken of then I should have understood them. Let it be as you propose so the Indians have a place to live, a line as though it was fenced in, where no white man can go.

If you say it shall be so then all these Indians will say yes. Although that you have said the whites are like the wind; you cannot stop them, you make good what you have promised.

You have spoken for lands generally. You have not spoken of any particular ones, your words are here (at this place). If you spoke as the watch goes, then we would say yes; the manner in which you have addressed the whole of

us has made my heart heavy. I had nothing to say: I like you Americans: and I like the Hudson Bay Co. people by which means I am led this way and that way; I do not know as yet what lands these Indians have spoken for but when they mention the lands then I shall know.

Fah-hah-tsil-pilp or the Red Bear said: I am not ashamed of any of my friends, for why should I be ashamed? if there was something above that I should be ashamed of, then I should be ashamed; I am not ashamed of any people that are sitting around, we have spoken here with our brothers. This is the first time I have ever seen my brothers here.

I like your talk very much as I have heard it, and that is the reason I have listened to you well. And here where we see each other face to face we will talk straight. We shall know if you shall like my talk that I am now talking as I have like yours. I wonder if we both tell the truth to each other.

This is what I think my Brothers, that one time none we will talk, we will not say yes from what has yet been said.

Now my younger brother there will speak. Being thus called upon.

Tip-pee-il-lan-ah-cow-pook, or the Eagle from the Light arose and said: Yes my friends you see where the Sun is. He hears me. It is from beyond where the Sun is that sent you here to talk.

The red people are put on this earth. A white man was sent on this earth from the Light (meaning the East). The red man was sent from the West, and now the big Chief from the Light has sent his talk here to the red people.

The President has spoken to me through you and I hear it. He likes us. He has fixed places for us to sit on and love one another. And I also like the white people as the President likes us.

On a road ready finished, he has sent you here. Look at the face of the earth, there is a road to travel on. Roads up the valleys and roads on to the end of the earth. From the time you started, you found a road till this time.

You are now come to join together the white man and the red man.



And why should I hide anything? I am going now to tell you a tale. I like the President's talk; I am glad of it when I hear it here and for that reason I am going to tell you a tale.

The time the first white men ever passed through this country, although the people of this country were blind, it was their heart to be friendly to them. Although they did not know what the white people said to them they answered yes, as if they were blind. They traveled about with the white people as if the people that said that had been lost, and these lost people said to them, yes.

I have been talked to by the French and by the Americans, and one says to me, go this way, and the other says go another way; and that is the reason I am lost between them.

A long time ago they hung my brother for no offence, and this I say to my brother here that he may think of it.

Afterwards came Spalding and Whitman. They advised us well and taught us well, very well. It was from the same source, the Light (the east). They had pity on us and we were pitied. And Spalding sent my Father to the East--the states--and he went. His body was never returned. He was sent to learn good counsel and friendship and many things. That is another thing to think of.

At the time in this place here, when there was blood spilled on the ground, then there was blood upon the earth we were friendly to the whites and they to us. At that time they found it out that we were friends to them. My chief, my own chief said, I will try to settle all the bad matters with the whites and he started to look for counsel to straighten up matters; and there his body lies, beyond here. He has never returned.

At the time the Indians held a grand Council at Fort Laramie. I was with the Flatheads and I heard there would be a council this side, next year. We were asked to go and find counsel, friendship and good advice. Many of my people started and died in the country. Died hunting what was right. There was a good many started there on Green River, the smallpox killed all but one. They were going to find good counsel in the East; and here I am looking still for counsel, and to be taught what is best to be done.

And now look at my peoples' bodies scattered everywhere hunting for knowledge, hunting for someone to teach them to go straight.

And now I shew it to you, and I want you to think of it. I am of a poor people.

A preacher came to us, Mr. Spalding. He talked to us to learn, and from that he turned to be a trader, as though there was two in one, one a preacher and the other a trader. He made a farm and raised grain and bought our stock, as though there was two in one; one a preacher the other a trader.

And now from the East has spoken and I have heard it. And I do not wish another preacher to come and be both a trader and preacher in one. A piece of ground for a preacher big enough for his own use, is all that is necessary for him,

Look at that, it is the tale I had to tell you, and now I am going to hunt friendship and good advice.

We will come straight here -- slowly perhaps -- but we will come straight.

Gov. Stevens said: My brother, if any of you wish to speak today, I will still be silent. Is there anyone who wishes to speak now? If not, I will go on. We have listened to you carefully. We think we know your hearts.

You are willing to make a bargain. You want to know exactly the terms: We have promised mills, shops, schools, teachers, farmers; and all the other things for a term of years. You want to know how many years. We have promised you as the other part of the payment clothing for yourselves, your wives, and your children; tools and implements for your farms and shops and articles for your house.

You want to know how much clothing. How many implements and tools and articles for your farms, your shops, and your houses; and how many years will you have them?

Before I answer that, I will answer another question which you have asked me. You want to know where your Reservations are to be. What is the ground we have in view for you. I will explain this matter freely.

Here are Nes Perces, Cayuses, Walla Walla, Yakamas and Umatillas and bands on both sides the Great River to below The Dalles.

Tribes northwards: Colvilles, Okin-a-kunc, Paluse.

and one in the Yakama country. The Reservation in the Nes Perces country to extend from the Blue Mountains to the spurs of the Bitter Root, and from the Palouse River to part-way up the Grand Ronde and Salmon River.

On this Reservation we wish to place the Spokanes, the Cayuses, the Walla Wallas, as well as the Nes Perces, and also the Umatillas. That will be something for them to think about to see whether they can agree to it.

The Yakama Reservation to extend from the Attanum river--to include the valley of the Pisco River--and from the Yakama River to the Cascade Mountains. On this Reservation we wish to place the Colvilles, O-kin-a-kunos, Palouse, Pesgouse, Klit-a-tats, and the bands on the north side of the river below the Walla Wallas as far as the Kuth la poedle river, near the Cowlitz. All these as well as the Yakamas on that Reservation.

There is a third Reservation East of Mt. Jeffersons which will be explained to you by Gen'l. Palmer; there it is proposed to place the bands Below the Umatillas.

We want you to think about this and see if you like it. You may think the Reservations are not good. If not you will say so. The Cayuses, the Walla Wallas, the Umatillas, may prefer the Yakama to the Nes Perces Reservation; and they may not like either.

I will give briefly the reason for selecting these two Reservations. We think they are large enough to furnish each man and each family with a farm, and grazing for all your animals. There is especially in winter grazing on each Reservation. There is plenty of Salmon on these Reservations, there are roots and berries. There is also some game. You will be near the Great Road and can take your horses and your cattle down the river and to the Sound to market.

Though near to the great roads, you are a little off from them, and you will not be liable to be troubled by travellers passing through.

We can better protect you from bad white men there. We can better prevent the trader and the preacher all in one man going there. We can better prevent bad men telling you to dance, and cheating you with lies. We can better stop the thief who comes to steal your horses. Your horses will be saved to you and there will be no thieves to throw into hell-fire.

You may ask, why so many tribes on one Reservation, and how is it proper to place them on the Reservation?

We want as many tribes together as can be taken care of by one agent. We can do more with the same means; this is a matter I wish to explain fully, and also about the payment in clothing, etc., which I mentioned in the first part of what I said. I will speak no more today, but speak tomorrow. Think over what I have said and hear the rest tomorrow.

Gen'l. Palmer said: I shall say nothing to you tonight. You have been sitting a long time and you are tired. We want you to come tomorrow morning early. We want you all to come. You have heard but part, we want you to hear the whole, and when you hear all I think you will say it is good. I have nothing more to say to night.

The Council then adjourned at 6 P.M.

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June 5th, Tuesday.

The Indians began to collect at 11 1/2 A.M. and at 12 M. the Council opened.

Gov. Stevens said: My Children, I stated yesterday that we wished to place you on two Reservations and that as regards the tribes below the Umatillas. There was a third Reservation which would be explained by my brother, Gen'l. Palmer. I stated we wanted as many tribes as could be taken care of by one agent.

I will now explain this matter more freely. We wish to put the Spokanos, the Nos Perses, the Walla Wallas, the Cayuses, the Umatillas on one Reservation in the Nos Perses country.

Here (showing a draft on a large scale) is a map of the Reservation. There is the Snake River. There is the Clear Water River. Here is the Salmon River. Here is the Grand Ronde River. There is the Palouse River. There is the El-pow-wow-wee.

We commence where this river, the Palouse, comes from the mountains, and down the river to the mouth of the Tinot-pan-up, then to the Snake River 10 miles below the mouth of the El-pow-wow-wee, then to the source of the El-pow-wow-wee, thence along the crest of the Blue Mountains to the Grande River below the Grande Ronde, thence along the ridge between the Wall-low-low river crossing the Snake

River 15 miles below the mouth of Powder River, thence to the Salmon River a little above the crossing, thence by the spurs of the mountains to the source of the Palouse River at the place of beginning.

This is a large Reservation. The best fisheries on the Snake River are on it; there are the fisheries on the Grande Ronde River. There are fisheries on the Os-kor-we-wee and other streams. There are cumash grounds here at this place (pointing to the large cumash grounds of the Nes Perses.) We feel if we put you on this Reservation our agent can visit you all and take care of you all.

Each tribe will have its own place on the Reservation. The Spokanes will have their place and their home. The Nes Perses their place and their home. The Walla Wallas their place and their home. The Cayuse and the Umatillas their place and their home.

The Spokanes will have a blacksmith, a school, and a farmer. The Walla Wallas will have a blacksmith, a school, and a farmer. The Cayuse and Umatillas will have a blacksmith, a school, and a farmer. The Nes Perses are more numerous, they will have two blacksmiths, two schools, and two farmers.

These schools are the first schools where your children will learn to read and write. The agent will live in some central place where there will be an agricultural and industrial school common to all the tribes. To this school all the tribes will send such of their children as wish to study more than in the first schools, and to learn trades. Here where the agent lives will be the tinner and the tin shop. There will be one for all the tribes. There will be the wagon maker and wheel right; there will be one for all the tribes.

For the four tribes there will be two saw-mills and two flouring mills in proper localities. Thus all the tribes will be on an even footing, and each will have the same provision made for them.

You will see that you will be better taken care of all on one reservation; each tribe having its own place, than if the Spokanes were on one reservation with the whites all around them, the Nes Perses on one reservation with the whites all around them, the Cayuses and Umatillas on one reservation with the whites all around them.

Here (showing the map) you will be on one Reservation with equal rights under one Agent, and the same provisions for your welfare. But each tribe has its head chief. A chief takes care of his people. His people listen to him. He devotes his time, his very life to their good. We want your chiefs to be such men, we expect them to know about you and to see that we do our part. They will not work for themselves, they will work for you. We shall therefore give the Head Chief of each tribe Five Hundred Dollars a year for 20 years to be paid in cash.

We shall build for each Head Chief a good house to live in. The agent will have his house and he will be paid. The Head chiefs shall have their houses and be paid. They will all labor for the good of the Indians.

You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. You will be allowed to go on the roads, to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation.

My friends, I have held four councils on Puget Sound, I have made treaties with all the Indians on that sound. They number more than all the tribes here present. They have agreed, should the President decide, to go on one Reservation. That Reservation is only about one fiftieth part as large as this; they have, however, few horses and cattle. They have not three hundred head. They take salmon and catch whale and make oil. They ask for no more land. They think they have land enough. You will be farmers and stock raisers and wool growers and you need more.

Now I will tell you the payments that will be made provided you are placed on one Reservation. If you go on different Reservations different provisions will be made. Well, you all go on one Reservation, Spokanes, Nez Perces, Walla Walla, Cayuses and Umatillas; we shall spend a certain amount in moving you onto the Reservation, in breaking up and fencing your farms, in building houses for your chiefs, your sub-chiefs and your people, in cooking utensils for your houses, in milk pans and churns, in a good supply of blankets and clothing. In all these things we will expend for you, One Hundred Thousand Dollars. This will be done the first year you go on the Reservation.

Now if any man gives up a tract of land in going onto the Reservation, he will have the same thing done for him that is done for all the rest and he will have, in addition, his improvements made good to him on the Reservation or the value of them paid to him in cash, as he may desire.

The other payments extend through twenty years. Two Hundred and Fifty Thousand Dollars. We do not want to spend this amount or much of it in cash, and I want my friend Poo-o-poo-max-a-max and the other chiefs to listen while I give the reason. I ask all the chiefs to hear my reasons and think of them.

We can furnish you with nearly twice as many goods with the same amount of money as you can get from the Traders. We shall buy the things you want in New York and San Francisco at cheap rates and good articles. The expense of getting them to you will not come out of your money; it will cost you nothing. You now pay eight or nine dollars for a blanket at Fort Wulla Wulla, we shall furnish you two such blankets for less than that sum, say from six to seven dollars. At Fort Wulla Wulla a flannel shirt costs three dollars, we will give you three shirts for three dollars. You pay for a calico shirt at Wulla Wulla one and a half and two dollars. We can furnish calico shirts for fifty cents a piece. If we furnish the goods therefore, you will get three blankets, three flannel shirts and three calico shirts for the same money you now pay for one blanket, one flannel shirt, one calico shirt and have to make a long journey for them besides. We can furnish four hoes for a dollar and a half. You know what you have to pay for a single hoe at Fort Wulla Wulla and The Dalles. We want the payments to be as much for your good as possible. We don't want half of it to go into the pockets of Traders.

I ask the chiefs to listen to me again.

There will be a certain sum each year for their people. We want them each year to consult their people and tell us what things they want. We want them to make out a list how many blankets they want and what kind of blankets; the number of flannel and calico shirts they want, and so for every article of clothing for their men, women and children. Also the tools they want for their farms, their houses and their shops. In

short we want the chiefs to tell us how they want the money spent. The list to be made out every summer for the pay of the next year. If you want part of the pay made in money, we want you to give the reasons and state the sum each year. We will send your reasons to the President and let him decide. There are many of you we would be willing to give a part of the payment in money, but not to the men who drink whiskey, and not to the men who do not take care of their wives and children. Let, therefore, your chiefs each year make out a list of how much money and we will send it to the President.

I have now a few words to say in regard to the Yakama Reservation; the same provisions as regards schools, farms and shops will be made as in the case of the Nez Percés Reservation.

Here is the Yakama Reservation, commencing with the mouth of the Attanum river, along the Attanum river to the Cascade mountains, thence down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass river from the rivers flowing into the Columbia, thence to the crossing of the Yakama below the main fisheries, then up the main Yakama to the Attanum where we began.

We propose to place there the Colvilles, the O-kin-a-kunes and Pisqueuse Indians (they now send their cattle and horses there in winter), also the Bands on the Columbia River below the Walla Wallas down to the mouth of the Kuth la poodle river, also the Klicatats around Mount Adams and Mount St. Helens. These Klicatats and these bands on the Columbia originally came from here or further north.

We will give one blacksmith, one farmer and one school for the Colvilles, one of each for the Pisqueuse and O-kin-a-kunes, one of each for the Yakamas, one of each for the Yakamas including the Palouses, one of each for the remaining bands. They shall have the agricultural and industrial schools as in the other Reservation. They shall have the same mechanics, gunsmith, plough and wagon makers. Their children shall be taught and they shall learn trades like the children on the other Reservation. They shall have the same liberties outside this Reservation to pasture animals



on land not occupied by whites, to kill game, to cut  
berries and to sell the furs to market. Payments to  
be made in the same way as in the Nez Percés Reserva-  
tion. One Hundred Thousand Dollars to be expended the  
first year. Two Hundred and Fifty Thousand Dollars, the  
next twenty years.

I need say nothing more. It is designed to make  
the same provision for all the tribes and for each  
Indian of every tribe. The people of one tribe are as  
much the people of the Great Father as the people of  
another tribe; the red men are as much his children  
as the white men.

We think this plan will be for your good. We want  
you to think of it. I have tried to talk plain and to  
speak straight out. My Brother will now speak.

Gen'l. Palmer said. My Brothers, my brother here  
has said as much perhaps as could be said. He has told  
you what we desire to do for you; it is for you to say  
whether you will receive it or throw it away; we have  
but one heart; he has been speaking of something which  
interests you; it is the duty of your chiefs and your  
men to think well of it. It was said by this man (Young  
Chief) the other day that we were not acting wholly for  
these that are here now, but for those who come after  
us; it is the duty of a parent to provide for his  
children. You may not understand all the advantages  
of the propositions that have been made to you; but  
they are for your benefit and those who come after you;  
as a chief desiring to promote your interest, I say it is  
good; that I would not deceive you; the Great Spirit  
who knows the heart of all men knows that I desire to  
promote your good.

We expect it will take at least two years to prepare  
these reservations for you to go onto. If we make a  
bargain and sign the papers, my Brother and myself and  
all the Head Chiefs and Head men, that paper must go to  
Washington. Our Chief and his council will examine it;  
if they approve it they say yes, and give us the money  
to expend in accordance with its provisions.

My brother has stated that you will be permitted to  
travel the roads outside the Reservation. We have some  
kind of roads which perhaps you have never seen; we may

wish to make one of the roads from the settlements east of the mountains to our settlements here; they may desire to run that road through your Reservation; if we desire to do so we wish that privilege; that kind of road we call a railroad. I will try and explain to you the way in which we make such roads. We first lay on the ground sticks of timber, we then lay other sticks across in that way, unite them together and put a strip of iron on the top of them, we then place a waggon on these tracks and instead of having horses or oxen hitched to the wagon we build a fire; some of you have seen a steamboat; they have on this wagon a boiler filled with water, the fire heats the water and produces steam, which propels the machine. I am unable to explain all the machinery or the way in which it works but they will travel faster than your swiftest horses can run, all the time. If we start from here at sunrise we can be at Wascopen by the middle of the day. We sometimes attach twenty of these waggons together and one of those Engines draws the whole, they will take waggons enough to draw more people than are here. We call the wagon in which they have the fire and water a locomotive; I have rode on these waggons many a time so have our people here all or nearly all of them. Now if our chief desires to construct such a road through your country we want you to agree that he shall have the privilege. You would have the benefit of it as well as other people.

We have another improvement that I wish to speak to you about, it is called a Telegraph. We may possibly desire to make such an improvement through your country. We set posts into the ground 15 or 20 feet high, and as far from here as that house; when the posts are set we place a wire on the top about as big as that; this wire extends as far as we wish to make the road if it is 100 or 1000 miles.

If my brother is at Oregon City and desires to speak to the Great Chief he speaks to him if the wires extend that far; the man at the other end of the land will know what he says as quick as I who stand beside him; if the instrument which is attached to this wire should be in your country and a man should steal your horse, and you desired to send word to the Willamette Valley, you would tell this man and he would work the machine, and the man in the Willamette would understand you had lost a horse, and before the thief could reach

there they would know it, arrest him before he came. You may not understand them now, but when you know as much as the white man you will.

Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for your injury.

I told you yesterday I would explain to you another Reservation, but that Reservation is for the people who live below here; there are but few of them here; and as I expect to hold a council with them when I return, and as that Reservation does not particularly interest you, I need not explain it now.

Now I want you all to talk among yourselves and think about what has been said to you, and I want you to think of it like men. When you think of it if you say that what we have said is good and that you receive it, you can express it to us and we can soon write out the Treaty.

You are now tired, you have been long sitting, you know our hearts, and if there is anything you do not fully understand before you make up your minds come and inquire and we will explain. If any of you wish to speak now we will listen to you. Or if you can make up your minds so as to give us an answer this evening and do so and we will be ready to receive it.

Staches Said. My friends I wish to show you my mind, interpret right for me. How is it I have been troubled in mind? If your mothers were here in this country who gave you birth, and suckled you, and while you were sucking some person came and took away your mother and left you alone and sold your mother, how would you feel then? This is our mother this country, as if we drew our living from her.

My friends, all of this you have taken. Had I two rivers I would be content to leave the one and live on the other.

I name three places for myself, the Grand Rondo, the Touchet towards the mountains and the Tucannon.

That is all I have to say.

After a long pause —

Gov. Stevens Said. My brothers, if you do not feel inclined to speak today, we will come together again tomorrow.

We want the chiefs and the people to speak freely as Stachus has done. We will think of what Stachus has said. We could give our reasons now but we are all tired. We will tomorrow after you have spoken, state what we think. Come early in the morning and let us see if we cannot agree before night.

The Council is adjourned till 9 o'clock tomorrow.

Five Crows Said. I am as it were without thinking yet. I require time to think and then I will answer.

Council then adjourned at 4 1/2 P.M.

Thursday, June 7th

Council met pursuant to adjournment — at 12 o'clock — Present as before.

Gov. Stevens Said. My brothers we expect to have your hearts today, let us have your heart straight out.

Lawyer Said. My friends you have been speaking to me a poor people. This Earth is known as far as it extends. This earth has red people on it and it has had as far as it extends. The people are lost, they don't think whose talk has come to us poor people. On the other side of the big water there is a large country. We also know that towards the east there are a great many different kinds of people; there are red people and yellow people, and black people, and a long time ago the people that travelled this country passed on the waters. And there is that country on that other side of the big water, and here is this on this side. On the other side of the big waters they have their laws. Yes, they have their laws there. We now hear the laws they have there, and we now know they have those laws there. We also know the white people pass about on the waters as they wish to. I do not know what they find in travelling about on these waters or

what they are hunting, whether it is timber, leaves, grass, or what. It was the Spaniards in that direction that just traveled about in their ships, they were the ones who first discovered this country and it was in that way they travelled to look for things, in that way they travelled when they found this country; the red people that along the shores to the big waters, these were the people, and at this place they landed to see these poor people. At that place the red man started to run off, or a part of them did because they did not know the people who came to see them, and the rest came and met them, there is where the white people first placed their children when they first came into the land. From this country they took back samples of rich earth, of flowers, and all such things: they also reported they had found a country. And it was known that there was a new country found. And one of the head men said. I know there was a country there before. Columbus the discoverer said Can you make an egg stand on end. Although he tried he could not do it, he did not understand how, it fell over: then Columbus showed them all that he could make it stand, and he did it, he made the egg stand. After they saw it done they could all do it.

Those children that he had placed in this country among the red people, from then the blood ran on both sides: that is when the laws come into this country to these poor people: there were a great many white people come back to that place: that is the reason the red people traveled off further and from that they kept still travelling on further as the white people came up to them and this man's (Delaware Jim) people are from the same people; they have come till they are here to us now, and from that country some central part came Lewis and Clark, and that is the way the white people travelled and came in here to my forefathers. Where they came into our country they named that stream Kouskaoski: it was then they knew us poor people. They passed through our country and knew all our country and all our streams and on their return my forefathers used them well: as well as they could.

From the time of Columbus and from the time of Lewis & Clark we have known our friends; we poor people have known you as brothers although we were a poor people, a people knowing nothing when we first saw the white chiefs, Lewis & Clark. From these poor people there were

some of them that started in that direction (East) and of these there is only one now living (Spokane Gerry) they want to be taught, they returned after they could see a little and told us about the Great Spirit; they told us the laws for the poor people; they had seen and heard them. My Chief said our old laws are poor, the new laws we are getting are good laws, are straight. We said there were these laws, the laws of the Commandments; our old laws the laws of our forefathers and the new laws we are getting shown to us and when the French and American traders first came to us they told us there were laws and these laws should be sent to us.

Ellis our Chief spoke strait for the white people, the President has sent you here to us poor people. Yes! the President has studied this and sent you here for our good. This is the reason I said on Monday use us well my Chief we are a poor people.

The Governor has said the President has sent him to take care of his children; it was you that had spoken thus my brothers (Gov. Stevens and Gen. Palmer) I want the President to see what I a poor man has said. I have got your talk here (pointing to his note book) and although a poor man I can look at it from time to time. I can take care of that; my brother, we have been talking a long time and are all tired.

I think on the stream just below where Mr. Craig lives will be a good place for the mechanic or one of the ranches you have shown me. I also think perhaps in the country where I live may be good place for some more of them, in case they were crowded below it would be a good place where I live.

Now my friends I have spoken; these things that have been talked of, you know, I have shown you my heart. You have said to them all you had to say. I have also given you all I had to say.

Then my friends I have spoken; these things that have been talked of you know. I have shown you my heart. You have said to them you have said all you have to say. I also have said also all I have to say.

You spoke of a road through my country (the Reserve) it is a bad country, to make roads in, but perhaps it may go through, that is the reason I think we have both

talked. 'Tis all our talk. Our Father Chief has said take care of one another. There is no reason that I should speak long although I have more to say. That is the reason I say take care of us well: That is all I have to say at this time, my brethren. I will have one word more to say when we are about to part.

Gov. Stevens: We have the heart of the Nez Percés through their Chief, their hearts and our hearts are one. We want the hearts of the other people through their Chiefs.

Young Chief. Us Indians are blind the reason we do not see the earth well, the Lawyer see clear. The reason that I do not know anything about this ground is I do not see the offer you have made us yet. If I had the money in my hand then I would see: the country is very large is the reason this land is afraid. I wonder if this ground has anything to say: I wonder if the ground is listening to what is said. I wonder if the ground would come to life and what is on it: though I hear what this earth says, the earth says, God has placed me here. The Earth says, that God tells me to take care of the Indians on this earth; the Earth says to the Indians that stop on the Earth feed them right. God named the roots that he should feed the Indians on; the water speaks the same way; God says feed the Indians upon the earth; the grass says the same thing; feed the horses and cattle. The Earth and water and grass says God has given our names and we are told those names; neither the Indians or the Whites have a right to change those names; the Earth says. God has placed me here to produce all that grows upon me, the trees, fruit, etc. The same way the Earth says, it was from her man was made. God on placing them on the Earth during then to take good care of the earth and do each other no harm. God said. You Indians who take care of a certain portion of the country should not trade it off unless you get a fair price.

I am as it were, blind. I am blind and ignorant. I have a heart but cannot say much, that is the reason the Chiefs do not understand each other right. They stand apart. Although I see your offer before me I do not understand it and I do not yet take it. I walk as if were in the dark and cannot therefore take hold of what I do not see. Lawyer sees and he takes hold.

When I come to understand your proposition then I shall take hold. I do not know when. 'Tis all I have to say.

Five Crows Said. I will speak a few words. My heart is just the same as the Young Chief.

Gen. Palmer. We know no chief among the Walla Wallas but Po-po-nux-nux; if he has anything to say we should be glad to hear it.

Po-po-nux-nux. I thought these Indians were all the same as one, all alike (backing the Indians he said). Why do you speak to me another? Listen to me. That is the way with your Chiefs, you white people. When you show us something then we think it good, treating us as children, giving us food. I do not know what is straight. I do not see the offer you have made to the Indians. I never saw these things with my father. My heart cried very hard when you first spoke to me, the same as if I was a feather. I flew, then I thought the same as if you were talking to a feather. I thought what will I do? I have seen everything on both sides of the river. You are all talking together, we are all talking together. If you were to separate as we are now and appoint some other time we shall have no bad minds. Stop the whites from coming up here till after this talk, not to bring their axes with them, the same as if I saw my heart above.

I hope the President will not think I say or mean anything bad, there is no difficulty in sending letters about; this that I have said to you I do not know in what light you have taken it, whether I have spoken straight or wrong. The whites may travel in all directions through my country we shall have nothing to say to them providing they do not build houses on our land. Now I will speak about Lawyer.

I think my friend has given his lands, that is what I think from his words. You hear both of you what I say, it is why that I request another meeting, whenever it shall be. It is not only by one meeting that we can come to a decision. I have listened to you in a friendly way. If you come again with a friendly message from the President I shall see them at this place, tomorrow I shall come to see you, and towards



evening, I shall go home. You have spoken to us in a friendly way and I speak to you in the same way, slowly. Gov. Stevens and Gen. Palmer I cannot give you a direct answer, perhaps you will not think of my words. I beg you will leave me in this way for today. Tomorrow I will give you an answer. I do not know; that is all I have to say.

Gen. Palmer. I wish to say a few words to those people; but before I do so if Kan-i-ah-kan wishes to speak he can do so.

Kan-i-ah-kan Said, I have nothing to say.

Gen. Palmer. I would inquire whether Po-po-mox-mox or the Young Chief speaks for the Umatillas. I wish to know if they are of the same heart.

Owhi. I have nothing to say about this land today. God gave us day and night, the night to rest in, and the day to see, and that as long as the earth shall last, he gave us the naming with our breath; and so he takes care of us on this earth; and here we have met under his care. Is the earth before the day or the day before the earth. God was before the earth, the heavens were clear and good and all things in the heavens were good. God looked one way then the other and named our lands for us to take care of. God made the other. We did not make the other, we did not make it, he made it to last forever. It is the earth that is our parent or it is God is our older brother. This leads the Indian to ask where does this talk come from that you have been giving us. God made this earth and it listens to him to know what he would decide. The Almighty made us and gave us breath; we are talking together and God hears all that we say today. God looks down upon his children today as if we were all in one body. He is going to make one body of us: we Indians present have listened to your talk as if it came from God.

God named this land to us that is the reason I am afraid to say anything about this land. I am afraid of the laws of the Almighty, this is the reason I am afraid to speak of the land. I am afraid of the Almighty that is the reason of my hearts being sad: this is the reason I cannot give you an answer. I am afraid of the Almighty. Shall I steal this land and sell it? or what shall I do? this is the reason that my heart is sad.

My friends, God made our bodies from the earth as if they were different from the whites. What shall I do? Shall I give the lands that are a part of my body and leave myself poor and destitute? Shall I say I will give you my lands? I cannot say. I am afraid of the Almighty.

I love my life is the reason why I do not give my lands away. I am afraid I would be sent to Hell. I love my friends. I love my life, this is the reason why I do not give away my lands. I have one word more to say.

My people are far away they do not know your words, this is the reason why I cannot give you an answer now; I show you my heart, that is all I have to say.

Gov. Stevens. Now will Kan-a-a-kan and Skloom speak.

Kan-a-ah-kan. What have I to be talking about?

Gen. Palmer. We have listened and heard your Chief's speak. The heart of the Nez Percés and ours are one. The Cayuses, the Walla Wallas and these other people say they do not understand us. We were in hopes we would have but one heart. Why should we have more than one heart? The Young Chief says he does not see what we propose to give them. Po-pe-mox-mox says the same. Can we bring these saw mills and these grist mills here on our backs to show these people? Can we bring these blacksmith shops, the wagons & tools on our backs to show them at this time? Can we cause farms of wheat and of corn to spring up in a day that they may see it? Can we build these school houses and these dwellings in a day? Can we bring all the money that these things will cost that you may see it. It would be more than all the horses of any one of these men could carry. It takes time to do these things. We come first to see you and make a bargain. We brought but a few goods with us to give you but whatever we agree to give you you will get.

How long will these people remain blind. We came to try to open their eyes they refuse the light. I have a wife and children, my brother has also a wife and children. I have a good home, fields of wheat, potatoes,

coats, moccasins, and beans. Why should I leave them and come so far to see you? It was to try and do you good but you throw it away. Why is it that you do so? We all sometimes do wrong. Sometimes because our hearts are bad, and sometimes because we have bad council. Your people have sometimes done wrong. Our hearts have evil. Our hearts will cry, but if you will try and do right we will forget it. How long will you listen to this bad council and refuse to receive the light?

I too love the earth where I was born. I left it because it was for my good, I have come a long way. We ask you to go but a very short distance. We don't come to steal your lands, we pay you more than it is worth. Here in this little valley and the Umattilla valley that affords a little good land, between these two streams and all around it is a parched up plain. What is it worth to you or to us? Not one-half of what we have offered for it. Why do we offer you so much? It is because our Chief has told us to take care of his red people. We come to you with his messages to try and do you good. You throw his words behind you. Why do you do it? because you have listened to bad council.

I told you the difficulties that existed between the whites and the Indians beyond the mountains. If the whites and the Indians live together here as they did there, it would be the same. Our Chief knows this and he sent us here to see you and to talk with you, this we do before there are many whites here.

Pé-pe-mox-mox says "let us part and appoint another day". Before that day would arrive we might have a great deal of trouble. Gold has been found in the country above yours. Our people are very fond of it. When our people hear this they will come here by hundreds, among these who come there will be some bad people; these bad people will steal your horses and cattle. There are but few of you, you cannot prevent it when you are scattered over a great extent of country, you cannot prevent it; but if you are living in these reservations we can protect you and your property. Then why should you refuse to receive our talk and refuse to allow us to protect you? Your refusal to receive it is not such talk as should come from Chiefs desirous of promoting the interest of their people. I want you

to think more of this tonight and; if you act like wise men I think you will arrive at a different conclusion.

We expect to perfect the arrangements with the Nez Perces perhaps tomorrow. We have but one heart, we expect it will always remain so. We want the Walla Walla, the Cayuses and the Umatillas to unite with us and have but one heart: we want you to stop your ears against bad council and receive that which is good. We do not come among you as traders we come bearing the words of our great chief. If you refuse to receive it our hearts will be sad. Our hearts will be sorry for these chiefs for we like them. Our hearts will be sorry and bleed for all these old men. Our hearts will be sorry and bleed for these young men. Our hearts will be sorry and bleed for these women and children.

We want you to help put food into your lodges and homes. We want to help you to get clothes and blankets to cover you from the storm; we want to help you to get arms and ammunition to kill game; we want to open your eyes and give you light that you may see. We want to make you a good people.

Will you receive our talk or will you throw it behind you. My heart will be glad tomorrow if you come and say we are all of one heart.

What I have said is for your good; think of it. I have nothing more to say.

Cam am pello It is true you have mercy on us. I think it is true what you have been saying: if you were to send me into a mountainous country still I would say you have mercy on us. What would I be glad for? I was glad to hear the first talk by the Governor, that was the reason I was glad to hear what they said. I would be very glad if he had said to me stop over on one side, then I would be glad.

What would I be glad about if I were to take a thing and throw it away? That is the reason my heart cries. If you would show me fine lands and I were to see them then I would be glad and go to them. How do you show your pity by sending me and my children to a land where there is nothing to eat but wood? That is the kind of land up there, that is the reason I cry.

Look at my hands! An old man. I have but them by hard work: then I ask myself have I labored in vain? What have I to be glad for?

The white man first showed me and aided me in making my garden and every mile I have been laboring. Will God think nothing of the labor I have bestowed on my garden? Do you do this to me in pity? I am really pitiable and therefore I pray night and day till I am tired. I have no books. The missionaries told me if I had no books I had a book in my heart which enabled me to pray to God. They told me in taking water to drink I should think of God, this I have not learned of myself, it is what they have taught me and I keep it. The laws of God are not alone for you, they are for me as well.

Woa-lish-wam-pum I have got only two things to say. I have listened to your speech without any impression. I did not understand it. I know this. We are the same. You have life and breath you white people; we red people have life and breath. I think the old laws are straight, that they should still exist.

The Nez Percés have already given you their land. You want us to go there. What can we think of that? What is the reason I cannot think of leaving this land to go there. Your words since you came here have been crooked. That is all I have to say.

Gen. Palmer. I desire to say a few words in reply to Cam an pello, he says he "is an old man, he has worked hard in his garden." We have said that any man who has a garden or a field and who left it to go to this reservation should have as much improvement made there for him, or be paid for it in money as he chooses. We will go farther and say he shall have a better improvement; it shall have a better fence, be ploughed well. We will not take them there to starve, they shall live better than where they are and if there is not good land enough in the reservation to make them farms we will make it larger.

Gov. Stevens said. Although you are all tired, my friends, I must say a few words. My Brother and myself have talked straight? Have all of you talked straight? Lawyer has and his people have. And their business will be done tomorrow.

The Young Chief says he "is blind and does not understand". What is it that he wants?

Stickuss says his "heart is in one of the three places, the Grand Ronde, the Touchet and the Tu-kan-on".

Where is the heart of the Young Chief?

Pe-po-mox-mox "Cannot be wafted off like a feather." Does he prefer the Yakama reservation to that of the Nez Perces? We have asked him before, we ask him now-- where is his heart?

And Kam-a-ah-kan the great Chief of the Yakimas has not spoken at all. His people have had no voice here today. He is not ashamed to speak--he is not afraid to speak--then speak out.

But Owhi is "afraid lest God be angry at his selling his land". Owhi, my brother I do not think God will be angry if you do your best for yourself and your children. Ask yourself this question tonight. Will not God be angry with me if I neglect this opportunity to do them good? Owhi says his people are not here. Why did he promise to come here to hear our talk. I do not want to be ashamed of Owhi. Owhi has the heart of his brother Toayass and his people; we expect him to speak straight; out.

We expect to hear from Kam-a-ah-kan from Skloom. The papers we will have drawn up tonight. You can see them tomorrow. The Nez Perces must not be put off any longer, their business must be dispatched.

I hope the hearts of all the others and our hearts will agree. They have asked us to speak straight, we have spoken straight. We have asked you to speak straight, but we have yet to hear from you.

Gen. Palmer. This man (How-lish-wam-pum) says the reason he does not want to go to the Nez Perces' country is that they have given it to us. If he and his people go on that Reservation it will belong to them as much as to the Nez Perces. They will all be served alike, every man will have his farm, it will be his!

Pe-po-mox-mox says we have met as friends let us say nothing that is bad, let us part friends. We have been friends a long time." I hope we shall always remain friends and as brothers. When we part we will part as friends. Then let us act as friends and as wise men.

Five Crows listen to me you Chiefs. We have been as one people with the Nez Percés heretofore; this day we are divided. We the Cayússas, Walla Wallas, and Kam-a-ab-kané people and others will I think over the matter tonight and give you an answer tomorrow.

Owhi Kam-a-ab-kan is the man who is to speak about these lands. I have nothing to say about them. We will settle the matter among ourselves.

Gen. Palmer. We have heard what Five Crows has said. We want all this people to have one heart, they ought not to have two hearts. Our Great Chief looks upon them all as his children and I hope you will think on what is here said to you.

Gov. Stevens. My Friends, we will meet in the morning again, we have to get through the business of the Nez Percés so that they may get home, they have a long journey before them. We shall meet as friends I hope. Your hearts and ours will be united I trust. We want every person to come early. If any person wishes to speak, speak now or otherwise we shall meet in the morning.

Council met at

Gov. Stevens said. My friends, judging from your faces, I think you see your way clear. The paper of the Nez Percés is nearly ready and soon will be read to them. We expect that the Young Chief, that See-Pee-mox-mox and Yamliakan will speak now, and we hope that with them the business may be concluded today. Let us know what they want, we are here for that purpose.

The Young Chief Said. We have been tiring one another for a long time. We did not know our hearts, we did not understand each other on both sides, about this country. We have so many horses and cattle in this country is the reason we were troubled. Your marking out the country is the reason it troubles me so and has made me sit here without saying anything. You Americans, your forefathers are dying in your own country, as many of your people are wealthy in stock it requires a large tract to keep them. Those that have large bands of cattle mark each one a tract for himself. The reason why we could not understand you was that you selected this country for us to live in without our having any voice in the matter. We will think slowly over the different streams that run through the country, we will expose the country and think over it slowly. I cannot take the whole country and throw it to you. If we can agree this country will furnish food for the whites and for us. The whites and ourselves will be compelled to have equal privileges in getting timber from the mountains to build our houses and fences; then we shall love one another. The good of you white people is foremost, the bad is behind, it is the same with us Indians; we keep the bad with us behind us. You embraced all my country, when I to go, was I to be a wanderer like a wolf. Without a home, without a house I would be compelled to steal, consequently I would die. I will show you lands that I will give you, we will then take good care of each other. The reason for my uneasiness is for my stock which is running all over the country. Perhaps we will be compelled to divide with our stock, one taking one way the other another way, perhaps out there (pointing South) it would be well to draw a line to divide us. This is the reason why I think we should stop awhile that we may come to an agreement. We will see when you make another offer whether we can agree to it. Wait, we may come to an agreement when we see your offer, if any people come send good people; those of the settlers



who are here now it is well they should stay. I think the land where my forefathers are buried should be mine; that is the place that I am speaking for. We will talk about it, we shall then know, my brothers, that is what I have to show to you, that is what I love the place we get our roots to live upon (meaning the Grand Ronde). The Salmon comes up the stream--that is all.

Gen. Palmer said. My brothers when we quit talking yesterday your minds were very much troubled, you were unwilling to go to the Nez Percés reservation. We have thought of your words. The Nez Percés have a great many horses and cattle, you too have a great many horses and cattle, perhaps you might not agree together quite so well; your people appear to be much divided where to go. We asked you to give us your hearts and tell us where it was, the Young Chief (He\*\*\*\*) has given us his heart, the Grand Ronde Valley. We have thought of the Umatillas. Many of your people died there. It is a good country for your horses and cattle. We desired first to have you go all to one place, but to show you that we wish to do you good I will make you another proposition. I propose to designate for the Cayuses, the Walla Walla & the Umatillas -- to commence on the Columbia River (this is the Columbia River pointing to the map) this is the Umatilla River; this is the Agency, this is McKay's place, this is Wild Horse Creek. Now I propose to select a reservation commencing at the mouth of Wild Horse Creek and running up this creek to the mountains to the head waters of Hou-to-nic Creek, now down that creek till you strike Mr. McKay's claim, now across from his claim to the Umatilla River, then up to the mouth of the Wild Horse Creek, leaving Mr. McKay's claim out of the reservation. This will include all your farms, your houses and gardens within the reservation. You will have sufficient grazing for your stock and land to make farms but your stock will have the privilege of grazing on any lands not claimed by the whites. If the whites should settle near to the reservation their stock might sometimes go onto the reservation while yours might go off it: if they should do so we would not want you to quarrel about it. We would build at suitable points on the reservation a saw-mill and a flouring mill; we would employ millers to attend them for you for twenty years, and by that time you would be able to attend them yourselves. We will have a blacksmith shop and employ a blacksmith for 20 years;

we will have a plow and wagon-makers shop and employ mechanics for that for twenty years; we will have a carpenter and cabinet makers shop and employ mechanics for that for 20 years -- we will have at least two school houses and employ teachers for at least 20 years; we will build a hospital and furnish a doctor and medicines for twenty years; we will build a good house for Pee-Pee-Mox-Mox, and a good house for the Chief of the Cayuso; we will build a house for Pee-Pee-Mox-Mox's son, we will plow and fence ten acres of land for Pee-Pee-Mox-Mox; we will plow and fence the same for the chief of the Cayuses; we will plow and fence five acres for Pee-Pee-Mox-Mox's son; we promise to do this for him and for his son because he leaves his country and goes to another place. We will give him as soon as he goes down to The Dalles for it \$500, in money -- we will give him 3 yoke of oxen, wagon and two plows -- we also give him some other things which it is not necessary to mention. We give him a salary and also the chief of the Cayuses of \$500 a year in money, this to continue for twenty years -- the same as is to be given to the Lawyer, the head chief of the Nez Perces. We give these salaries because they are the head chiefs, and are expected to labor for the good of their people, and in the event of the death of the head chief their successors get the salaries. Now in addition to these things we will expend fifty thousand dollars in the first and second years after the treaty is ratified. This money is to be expended in building houses, opening farms, buying teams and wagons and paying persons working for them, and in any way that the President may deem best calculated to promote their interests. In addition to this there will be expended for you eight thousand every year for five years, for the next five years six thousand dollars a year, the next five years four thousand dollars a year, for the next five years two thousand dollars a year -- this makes twenty years, and the amount to be expended one hundred thousand dollars (\$100,000). This amount will be expended as the President may direct; we should consult you every year as to how you wanted it paid -- part in money -- part in goods. You will not be required to go onto this reservation till our chief the President and his council sees this paper and says it is good; and we build the houses, the mills, and the blacksmith shop. But we want you to allow the white people to come and settle in the country anywhere outside of the reservation. The President will have this

**10.01.87: FLIGHT TO AVOID PROSECUTION.**

Any person who willfully and knowingly shall flee from the Yakama Indian Reservation or the jurisdiction of the Tribal Court to avoid prosecution or to avoid giving testimony in any case pending before the Tribal Court shall be deemed guilty of an offense. Upon conviction thereof, shall be sentenced to imprisonment for a period not to exceed thirty (30) days or to pay a fine not to exceed \$60 or both, with costs.

[Annotation: Enacted by T-53-77; Amended by T-053-94; Amended by T-172-99]

**10.01.89: FORGERY AND COUNTERFEITING.**

Any person who shall, with intent to defraud, falsely sign, utter, execute, alter or counterfeit any written instrument, check or currency shall be guilty of forgery. Upon conviction thereof, shall be sentenced to confinement at labor for a period of six (6) months or to pay a fine of not more than \$500 or both, with costs, and may be required to make restitution.

[Annotation: Enacted by T-53-77]

**10.01.91: FRAUD.**

Any person who shall by willful misrepresentation or deceit or by false interpreting or by the use of false weights or measures, obtain any money or other property shall be guilty of fraud and, upon conviction thereof, shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than \$500 or both, with costs, and may be required by order of the Court to make proper restitution.

[Annotation: Enacted by T-53-77]

**10.01.93: GAMBLING.**

Any person who operates or participates in any game of chance or lottery to win money or other valuable consideration or operates a place or device where a risk is taken on a change of winning money or other valuable property shall be guilty of an offense. Upon conviction thereof, shall be sentenced to confinement for a period of not more than fifteen (15) days or to pay a fine of not more than \$50 or both, with costs, and all gambling equipment, materials, supplies, and winnings or wagers, may be confiscated. This Section shall not apply to those games of chance or lottery authorized by the Tribal Council, except for those persons under the age of sixteen (16) years;



nor shall this Section apply to traditional games of chance operated by Tribal members in their own right.

[Annotation: Enacted by T-53-77]

[Division of Code Revision Note: Clerical error corrected, “change” to “chance”]

#### **10.01.95: INDECENT EXPOSURE.**

Any person who publicly exposes their sexual organs under circumstances in which that conduct is likely to cause affront or fear shall be guilty of an offense. Upon conviction thereof, shall be sentenced to imprisonment for a maximum term of not more than one (1) year, or by a fine in the amount of no more than five thousand dollars (\$5000.00), or both. In addition, upon a second conviction under Section 10.01.95, the Court shall enter an order excluding the violator from all locations within the jurisdiction of the Yakama Nation for life. This exclusion order may be rescinded only by resolution of the Yakama Nation General Council or Tribal Council. The Court may order that the violator pay restitution, court costs, and attorney fees and costs. The Court may order a forfeiture of any bail, bond and any other type of surety, as well as any seized property or evidence used in the commission of any violation or resulting therefrom. The Court may order the violator to serve a period of probation and during that probation the violator shall comply with any other conditions the Court deems just. The violator shall be subject to the requirements of the Sex Offender Registration and Notification Code codified as Title XI (11) of the Revised Law and Order Codes of the Yakama Nation.

[Annotation: Enacted by T-53-77; Amended by T-135-07; Amended by T-035-09]

#### **10.01.99: LIBEL AND SLANDER.**

Any person who shall with intent to harm the reputation of another willfully write a falsehood about another, knowing the same to be untrue shall be guilty of the offense of libel. Any person who shall, with intent to harm the reputation of another person, willfully speak a falsehood about another, knowing the same to be untrue, shall be guilty of an offense of slander and, upon conviction thereof, shall be sentenced to confinement for a period of not more than ninety (90) days or to pay a fine of not more than \$300 and may be required to make public retraction of the written or spoken falsehood.

[Annotation: Enacted by T-53-77]



trial will be conducted by the Court only. The Court may require a waiting period of sixty (60) days before making any divorce final.

[Annotation: Enacted by T-53-77; Amended by T-053-94; Amended by T-172-99]

**22.01.19: ACTIONS OF THE COURT PENDING DIVORCE OR ANNULMENT.**

The Yakama Tribal Court may order:

- (1) The husband and wife to provide for the separate maintenance of his or her spouse and children as the Court may deem just upon application therefore or in the disposition of a divorce proceeding.
- (2) The care, custody and maintenance of the minor children of the marriage during the pendency of the proceedings.
- (3) The restraint of either spouse from, in any manner, molesting or interfering with the other or the minor children.
- (4) The restraining and enjoining of either spouse or both from disposing of their individually or jointly owned property during the pendency of the action except as approved by the Court.
- (5) Enter and docket as a judgment any order issued by the Court to pay any moneys falling due pending action if payment is in default and order enforcement as provided in the Civil Code of the Yakama Nation.

[Annotation: Enacted by T-53-77; Amended by T-053-94; Amended by T-172-99]

**22.01.21: PROVISIONS FOR JUDGMENT.**

All proceedings under this Section of the Code shall be in accordance with the Rules of Civil Procedure of this Code and the Rules of the Court. In addition to voiding or dissolving the marriage, the Court shall have the power to impose judgment as follows:

- (1) For the future custody and care of the minor children of the marriage as may be in the best interest of the children.
- (2) Approve any agreement between the parties as to the custody and care of minor children if deemed by the Court to be in the best interests of the children.



- (3) For the recovery from either spouse and to allow for the care and custody of the minor children an amount of money as may be just and proper for the party to contribute toward their education and support.
- (4) For the recovery from either spouse of an amount of money or other personal property as may be just and proper for the maintenance of the other.
- (5) For the approval of any property settlement between the parties or recovery and delivery to each of the parties any of their personal property in the possession or control of the other at the time of the giving of the judgment.
- (6) To restore the maiden name of the wife.

[Annotation: Enacted by T-53-77]

## **CHAPTER 22.02 – FAMILY DESERTION**

### **22.02.01: DESERTION OR NONSUPPORT – PENALTY.**

SEE SECTION 10.01.69

[Annotation: Enacted by T-53-77]

### **22.02.03: ALTERNATE REMEDIES TO ENFORCE SUPPORT – PROCEDURE ON FAILURE TO COMPLY WITH ORDER.**

In any case enumerated in Section 10.01.69, the court may render one of the following orders:

- (1) Should a fine be imposed, it may be directed by the Court to be paid in whole or in part to the wife, or to the guardian, or to the custodian of the child or children, or to an individual appointed by the Court as guardian.
- (2) The Court in its discretion having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have the power, either before or after trial, conviction, or sentence, to make an order, with the consent of the defendant, which shall be subject to change by it from time to time as circumstances may require, directing the defendant to pay a certain sum weekly during such time as the Court may direct, to the wife or to the guardian, or custodian of the minor child or children, or to an individual appointed by the Court, and to release the defendant from custody or probation during such time as the Court may direct, upon his or her entering into a recognizance, with or



U.S. Code › Title 15 › Chapter 15 › Subchapter II › § 714b

## 15 U.S. Code § 714b - General powers of Corporation

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

The Corporation—

**(a)** Shall have succession in its corporate name.

**(b)** May adopt, alter, and use a corporate seal, which shall be judicially noticed.

**(c)** May sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property. The district courts of the United States, including the district courts of any Territory or possession, shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation: *Provided*, That the Corporation may intervene in any court in any suit, action, or proceeding in which it has an interest. Any suit against the Corporation shall be brought in the District of Columbia, or in the district wherein the plaintiff resides or is engaged in business. No suit by or against the Corporation shall be allowed unless (1) it shall have been brought within six years after the right accrued on which suit is brought, or (2) in the event that the person bringing such suit shall have been under legal disability or beyond the seas at the time the right accrued, the suit shall have been brought within three years after the disability shall have ceased or within six years after the right accrued on which suit is brought, whichever period is longer. The defendant in any suit by or against the Corporation may plead, by way of set-off or counterclaim, any cause of action, whether arising out of the same transaction or not, which would otherwise be barred by such limitation if the claim upon which the defendant's cause of action is based had not been barred prior to the date that the plaintiff's cause of action arose: *Provided*, That the defendant shall not be awarded a judgment on any such set-off or counterclaim for any amount in excess of the amount of the plaintiff's claim established in the suit. All suits against the Corporation shall be tried by the court without a jury. Notwithstanding any other provision of this subchapter, the Federal Tort Claims Act (Public Law 601, Seventy-ninth Congress<sup>[1]</sup>) shall be applicable to the Corporation. Any suit by or against the United States as the real party in interest based upon any claim by or against the Corporation shall be subject to the provisions of subsection (c) to the same extent as though such suit were by or against the Corporation, except that (1) any such suit against the United States based upon

any claim of the type enumerated in section 1491 of title 28, may be brought in the United States Court of Federal Claims, and (2) no such suit against the United States may be brought in a district court unless such suit might, without regard to the provisions of this subchapter, be brought in such court.

**(d)** May adopt, amend, and repeal bylaws, rules, and regulations governing the manner in which its business may be conducted and the powers vested in it may be exercised.

**(e)** Shall have all the rights, privileges, and immunities of the United States with respect to the right to priority of payment with respect to debts due from insolvent, deceased, or bankrupt debtors. The Corporation may assert such rights, privileges, and immunities in any suit, action, or proceeding.

**(f)** Shall be entitled to the use of the United States mails in the same manner and upon the same conditions as the executive departments of the Federal Government.

**(g)** May enter into and carry out such contracts or agreements as are necessary in the conduct of its business, except that obligations under all such contracts or agreements (other than reimbursable agreements under section 714i of this title) for equipment or services relating to automated data processing, information technologies, or related items (including telecommunications equipment and computer hardware and software) may not exceed \$170,000,000 in fiscal year 1996 and not more than \$188,000,000 in the 6-fiscal year period beginning on October 1, 1996, unless additional amounts for such contracts and agreements are provided in advance in appropriation Acts. State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements.

**(h)** May contract for the use, in accordance with the usual customs of trade and commerce, of plants and facilities for the physical handling, storage, processing, servicing, and transportation of the agricultural commodities subject to its control. The Corporation shall not have power to acquire real property or any interest therein except that it may (a) rent or lease office space necessary for the conduct of its business and (b) acquire real property or any interest therein for the purpose of providing storage adequate to carry out effectively and efficiently any of the Corporation's programs, or of securing or discharging obligations owing to the Corporation, or of otherwise protecting the financial interests of the Corporation: *Provided*, That the authority contained in this subsection shall not be utilized by the Corporation for the purpose of acquiring real property, or any interest therein, in order to provide storage facilities for any commodity unless the Corporation determines that existing privately owned storage facilities for such commodity in the area concerned are not adequate: *Provided further*, That no refrigerated cold storage facilities shall be constructed or purchased except with funds specifically provided by Congress for that purpose: *And provided further*, That any contract entered into by the Corporation for the use of a storage



facility shall provide at least that (1) the rental rate charged for an extended term in excess of one year shall be at an annual rate less than that which is charged for a one-year contract, (2) any obligation of the Corporation to pay for the use of any space in a facility shall be relieved to the extent that the Corporation does not use the space and payment is made by another person for the use of such space, and (3) if the Corporation determines that it no longer needs the space reserved in the facility, the Corporation may be relieved, for the remaining term of the contract, of its obligations to an extent and in a manner that will provide significant savings to the Corporation while permitting the owner of the facility reasonable time to lease such space to another person: *And provided further*, That nothing contained in this subsection shall limit the duty of the Corporation, to the maximum extent practicable consistent with the fulfillment of the Corporation's purposes and the effective and efficient conduct of its business, to utilize the usual and customary channels, facilities, and arrangements of trade and commerce in the warehousing of commodities: *And provided further*, That to encourage the storage of grain on farms, where it can be stored at the lowest cost, the Corporation may make loans to grain growers needing storage facilities when such growers shall apply to the Corporation for financing the construction or purchase of suitable storage, and these loans shall be deducted from the proceeds of price support loans or purchase agreements made between the Corporation and the growers, except that the Secretary shall make such loans in areas in which the Secretary determines that there is a deficiency of such storage. To encourage the alleviation of natural resource conservation problems that reduce the productive capacity of the Nation's land and water resources or that cause degradation of environmental quality, the Corporation may, beginning December 22, 1981, make loans to any agricultural producer for those natural resource conservation and environmental enhancement measures that are recommended by the applicable county and State committees established under section 590h(b) of title 16 and are included in the producer's conservation plan approved by the local soil and water conservation district; such loans shall be for a period not to exceed ten years at a rate of interest based upon the rate of interest charged the Corporation by the United States Treasury; the Corporation may make loans to any one producer in any fiscal year in an amount not to exceed \$25,000; loans up to \$10,000 in amount may be unsecured and loans in excess of \$10,000 shall be secured; and the total of such unsecured and secured loans made in each fiscal year shall not exceed \$200,000,000: *Provided*, That the authority provided by this sentence to make loans shall be effective only to the extent and in such amounts as may be provided for in prior appropriation Acts. Notwithstanding any other provision of law, the Commodity Credit Corporation shall, to the maximum extent practicable, in consultation with the Secretary of State, and upon terms and conditions prescribed or approved by the Secretary of Agriculture, accept strategic and critical materials produced abroad in exchange for agricultural commodities acquired by the Corporation. Insofar as practicable, in effecting such exchange of goods, the Secretary shall: (1) use normal commercial trade channels; (2) take action to avoid displacing usual marketings of United States agricultural commodities and the products thereof; (3) take reasonable precautions to prevent the resale or transshipment to other countries, or use for other than domestic use in the importing country, of agricultural commodities used for such

exchange; and (4) give priority to commodities easily storable and those which serve as prime incentive goods to stimulate production of critical and strategic materials. The Corporation may solicit bids from, and utilize, private trading firms to effect such exchange of goods. The determination of the quantities and qualities of such materials which are desirable for stock piling and the determination of which materials are strategic and critical shall be made in the manner prescribed by section 3 of the Strategic and Critical Materials Stock Piling Act [50 U.S.C. 98b]. Strategic and critical materials acquired by Commodity Credit Corporation in exchange for agricultural commodities shall, to the extent approved by the President, be transferred to the stock pile provided for by the Strategic and Critical Materials Stock Piling Act [50 U.S.C. 98 et seq.]; and in the same fiscal year such materials are transferred to the stock pile the Commodity Credit Corporation shall be reimbursed for the strategic and critical materials so transferred to the stock pile from the funds made available for the purpose of the Strategic and Critical Materials Stock Piling Act, in an amount equal to the fair market value, as determined by the Secretary of the Treasury, of the material transferred to the stock pile. If the volume of petroleum products (including crude oil) stored in the Strategic Petroleum Reserve is less than the level prescribed under section 6234 of title 42, the Corporation shall, to the maximum extent practicable and with the approval of the Secretary of Agriculture, make available annually to the Secretary of Energy, upon the request of the Secretary of Energy, a quantity of agricultural products owned by the Corporation with a market value at the time of such request of at least \$300,000,000 for use by the Secretary of Energy in acquiring petroleum products (including crude oil) produced abroad for placement in the Strategic Petroleum Reserve through an exchange of such agricultural products. The terms and conditions of each such exchange, including provisions for full reimbursement to the Commodity Credit Corporation, shall be determined by the Secretary of Energy and the Secretary of Agriculture. Nothing contained herein shall limit the authority of the Commodity Credit Corporation to acquire, hold, or dispose of such quantity of strategic and critical materials as it deems advisable in carrying out its functions and protecting its assets: *Provided*, That, notwithstanding any other provision of law, where a grain storage facility owned by the Corporation is not needed by the Corporation and, upon being offered for sale no person offers to pay the minimum price set by the Corporation for such facility for use in connection with storage or handling of agricultural commodities, then the Corporation may, without declaring such facility to be excess property, sell it by bids at not less than such minimum price to any public or private nonprofit agency or organization for use for the purposes of such agency or organization. This provision shall apply also to facilities which on the effective date of this Act have been declared excess to the needs of the Commodity Credit Corporation but have not been claimed by any other Government agency, or surplus to the needs of the Government but not disposed of pursuant to the provisions of chapters 1 to 11 of title 40 and division C (except sections 3302, 3307(e), 3501(b), 3509, 3906, 4710, and 4711) of subtitle I of title 41.

(i) May borrow money subject to any provision of law applicable to the Corporation:  
*Provided*, That the total of all money borrowed by the Corporation, other than trust deposits

and advances received on sales, shall not at any time exceed in the aggregate \$30,000,000,000. The Corporation shall at all times reserve a sufficient amount of its authorized borrowing power which, together with other funds available to the Corporation, will enable it to purchase, in accordance with its contracts with lending agencies, notes, or other obligations evidencing loans made by such agencies under the Corporation's programs.

**(j)** Shall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid.

**(k)** Shall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers.

**(l)** May make such loans and advances of its funds as are necessary in the conduct of its business.

**(m)** Shall have such powers as may be necessary or appropriate for the exercise of the powers specifically vested in the Corporation, and all such incidental powers as are customary in corporations generally; but any research financed by the Corporation shall relate to the conservation or disposal of commodities owned or controlled by the Corporation and shall be conducted in collaboration with research agencies of the Department of Agriculture. Notwithstanding any other provision of this subchapter, the Corporation may, in the exercise of its power to remove and dispose of surplus agricultural commodities, export, or cause to be exported, not to exceed such amounts of commodities owned by the Corporation as will enable the Corporation to finance research and development of external combustion engines using fuel other than that derived from petroleum and petroleum products. The total value of commodities exported annually for the purposes of the research authorized by the preceding sentence may not exceed \$30,000,000.

(June 29, 1948, ch. 704, § 4, 62 Stat. 1070; June 7, 1949, ch. 175, §§ 2, 5, 63 Stat. 154, 156; Aug. 10, 1949, ch. 412, § 12(a), 63 Stat. 591; June 28, 1950, ch. 381, § 2, 64 Stat. 261; Mar. 20, 1954, ch. 102, § 2, 68 Stat. 30; Aug. 31, 1954, ch. 1172, § 2, 68 Stat. 1047; Aug. 11, 1955, ch. 782, § 2, 69 Stat. 634; Aug. 1, 1956, ch. 815, § 1(a), 70 Stat. 783; Pub. L. 89-758, Nov. 5, 1966, 80 Stat. 1307; Pub. L. 95-113, title XI, § 1104, Sept. 29, 1977, 91 Stat. 954; Pub. L. 95-279, title III, § 301(a), May 15, 1978, 92 Stat. 242; Pub. L. 96-41, § 3(b), July 30, 1979, 93 Stat. 325; Pub. L. 96-234, § 3, Apr. 11, 1980, 94 Stat. 333; Pub. L. 97-35, title I, § 151, Aug. 13, 1981, 95 Stat. 370; Pub. L. 97-98, title XV, § 1520(a), title XVI, § 1606, Dec. 22, 1981, 95 Stat. 1335, 1347; Pub. L. 97-164, title I, § 161(1), Apr. 2, 1982, 96 Stat. 49; Pub. L. 99-198, title XI, § 1167(b), title XVII, § 1761, Dec. 23, 1985, 99 Stat. 1503, 1651; Pub. L. 99-260, § 11, Mar. 20, 1986, 100 Stat. 52; Pub. L. 100-202, § 101(k) [title I, § 101], Dec. 22, 1987, 101 Stat. 1329-322, 1329-336; Pub. L. 102-572, title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub. L. 104-127, title I, § 161(b)(1), Apr. 4, 1996, 110 Stat. 934; Pub. L. 105-185, title V, § 521(a), June 23, 1998, 112 Stat. 580; Pub. L. 105-277, div. A, § 101(a) [title VII, § 756], Oct. 21, 1998, 112 Stat. 2681, 2681-34.)

[1] So in original. Should be "Congress)".

## EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-352 effective ninety days after June 27, 1988, except that such amendment not to apply to cases pending in Supreme Court on such effective date or affect right to review or manner of reviewing judgment or decree of court which was entered before such effective date, see section 7 of Pub. L. 100-352, set out as a note under section 1254 of this title.

## EFFECTIVE DATE OF 1970 AMENDMENT

Section 199(a) of title I of Pub. L. 91-358 provided that: "The effective date of this title (and the amendments made by this title) [enacting sections 1363, 1451, and 2113 of this title and amending this section, sections 292 and 1869 of this title, section 5102 of Title 5, Government Organization and Employees, and section 260a of Title 42, The Public Health and Welfare] shall be the first day of the seventh calendar month which begins after the date of the enactment of this Act [July 29, 1970]."

## § 1258. Supreme Court of Puerto Rico; certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(Added Pub. L. 87-189, §1, Aug. 30, 1961, 75 Stat. 417; amended Pub. L. 100-352, §4, June 27, 1988, 102 Stat. 662.)

## AMENDMENTS

1988—Pub. L. 100-352 struck out "appeal;" before "certiorari" in section catchline and amended text generally. Prior to amendment, text read as follows: "Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

## EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-352 effective ninety days after June 27, 1988, except that such amendment not to apply to cases pending in Supreme Court on such effective date or affect right to review or manner of reviewing judgment or decree of court which was entered before such effective date, see section 7 of Pub. L. 100-352, set out as a note under section 1254 of this title.

## § 1259. Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

(Added Pub. L. 98-209, §10(a)(1), Dec. 6, 1983, 97 Stat. 1405; amended Pub. L. 101-189, div. A, title XIII, §1304(b)(3), Nov. 29, 1989, 103 Stat. 1577; Pub. L. 103-337, div. A, title IX, §924(d)(1)(C), (2)(A), Oct. 5, 1994, 108 Stat. 2832.)

## AMENDMENTS

1994—Pub. L. 103-337 substituted "Court of Appeals for the Armed Forces" for "Court of Military Appeals" in section catchline and wherever appearing in text.

1989—Pub. L. 101-189 substituted "section 867(a)(1)" for "section 867(b)(1)" in par. (1), "section 867(a)(2)" for "section 867(b)(2)" in par. (2), and "section 867(a)(3)" for "section 867(b)(3)" in par. (3).

## EFFECTIVE DATE

Section effective on the first day of the eighth calendar month beginning after Dec. 6, 1983, see section 12(a)(1) of Pub. L. 98-209, set out as an Effective Date of 1983 Amendment note under section 801 of Title 10, Armed Forces.

## CHAPTER 83—COURTS OF APPEALS

Sec.	
1291.	Final decisions of district courts.
1292.	Interlocutory decisions.
[1293.	Repealed.]
1294.	Circuits in which decisions reviewable.
1295.	Jurisdiction of the United States Court of Appeals for the Federal Circuit.
1296.	Review of certain agency actions.

## AMENDMENTS

1996—Pub. L. 104-331, §3(a)(2), Oct. 26, 1996, 110 Stat. 4069, added item 1296.

1984—Pub. L. 98-620, title IV, §402(29)(C), Nov. 8, 1984, 98 Stat. 3359, struck out item 1296 "Precedence of cases in the United States Court of Appeals for the Federal Circuit".

1982—Pub. L. 97-164, title I, §127(b), Apr. 2, 1982, 96 Stat. 39, added items 1295 and 1296.

1978—Pub. L. 95-598, title II, §236(b), Nov. 6, 1978, 92 Stat. 2667, directed the addition of item 1293, "Bankruptcy appeals", which amendment did not become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1961—Pub. L. 87-189, §4, Aug. 30, 1961, 75 Stat. 417, struck out item 1293 "Final decisions of Puerto Rico and Hawaii Supreme Courts".

## § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit)

shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 48, 65 Stat. 726; Pub. L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97-164, title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 225(a), 933(a)(1), and section 1356 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and sections 61 and 62 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, § 9, 37 Stat. 566; Jan. 28, 1915, ch. 22, § 2, 38 Stat. 804; Feb. 7, 1925, ch. 150, 43 Stat. 813; Sept. 21, 1922, ch. 370, § 3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, § 3, 47 Stat. 817; May 31, 1935, ch. 160, 49 Stat. 313; June 20, 1938, ch. 526, 52 Stat. 779; Aug. 2, 1946, ch. 753, § 412(a)(1), 60 Stat. 844).

This section rephrases and simplifies paragraphs "First", "Second", and "Third" of section 225(a) of title 28, U.S.C., 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of section 1356 of title 48, U.S.C., 1940 ed., relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See definitive section 451 of this title.)

Paragraph "Fourth" of section 225(a) of title 28, U.S.C., 1940 ed., is incorporated in section 1293 of this title.

Words "Fifth. In the United States Court for China, in all cases" in said section 225(a) were omitted. (See reviser's note under section 411 of this title.)

Venue provisions of section 1356 of title 48, U.S.C., 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President's approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371(e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties.

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

#### AMENDMENTS

1982—Pub. L. 97-164, § 124, inserted "(other than the United States Court of Appeals for the Federal Circuit)" after "The court of appeals" and inserted provision that the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

1958—Pub. L. 85-508 struck out provisions which gave courts of appeals jurisdiction of appeals from District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted reference to District Court of Guam.

#### EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982. See section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

#### EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c.16 as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

#### TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct.

1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96-70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

#### § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of

opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, §49, 65 Stat. 726; Pub. L. 85-508, §12(e), July 7, 1958, 72 Stat. 348; Pub. L. 85-919, Sept. 2, 1958, 72 Stat. 1770; Pub. L. 97-164, §125, Apr. 2, 1982, 96 Stat. 36; Pub. L. 98-620, title IV, §412, Nov. 8, 1984, 98 Stat. 3362; Pub. L. 100-702, title V, §501, Nov. 19, 1988, 102 Stat. 4652; Pub. L. 102-572, title I, §101, title IX, §§902(b), 906(c), Oct. 29, 1992, 106 Stat. 4506, 4516, 4518.)

Sec.	
1345.	United States as plaintiff.
1346.	United States as defendant.
1347.	Partition action where United States is joint tenant.
1348.	Banking association as party.
1349.	Corporation organized under federal law as party.
1350.	Alien's action for tort.
1351.	Consuls, vice consuls, and members of a diplomatic mission as defendant.
1352.	Bonds executed under federal law.
1353.	Indian allotments.
1354.	Land grants from different states.
1355.	Fine, penalty or forfeiture.
1356.	Seizures not within admiralty and maritime jurisdiction.
1357.	Injuries under Federal laws.
1358.	Eminent domain.
1359.	Parties collusively joined or made.
1360.	State civil jurisdiction in actions to which Indians are parties.
1361.	Action to compel an officer of the United States to perform his duty.
1362.	Indian tribes.
1363.	Jurors' employment rights.
1364.	Direct actions against insurers of members of diplomatic missions and their families.
1365.	Senate actions.
1366.	Construction of references to laws of the United States or Acts of Congress.
1367.	Supplemental jurisdiction.
1368.	Counterclaims in unfair practices in international trade.
1369.	Multiparty, multiforum jurisdiction.

## AMENDMENTS

2002—Pub. L. 107-273, div. C, title I, §11020(b)(1)(B), Nov. 2, 2002, 116 Stat. 1827, added item 1369.

1999—Pub. L. 106-113, div. B, §1000(a)(9) [title III, §3009(2)], Nov. 29, 1999, 113 Stat. 1536, 1501A-552, substituted "trademarks" for "trade-marks" in item 1338.

1998—Pub. L. 105-304, title V, §503(b)(2)(B), Oct. 28, 1998, 112 Stat. 2917, inserted "designs," after "mask works," in item 1338.

1995—Pub. L. 104-88, title III, §305(a)(4), Dec. 29, 1995, 109 Stat. 944, substituted "Surface Transportation Board's" for "Interstate Commerce Commission's" in item 1336.

1994—Pub. L. 103-465, title III, §321(b)(3)(B), Dec. 8, 1994, 108 Stat. 4947, added item 1368.

1990—Pub. L. 101-650, title III, §310(b), Dec. 1, 1990, 104 Stat. 5114, added item 1367.

1988—Pub. L. 100-702, title X, §1020(a)(7), Nov. 19, 1988, 102 Stat. 4672, substituted "Actions" for "Action" in item 1330, inserted a period after "question" in item 1331, substituted "plant variety protection, copyrights, mask works, trade-marks," for "copyrights, and trade-marks" in item 1338, and inserted "and elective franchise" in item 1343.

1986—Pub. L. 99-336, §6(a)(1)(A), June 19, 1986, 100 Stat. 638, renumbered item 1364 "Senate actions" and item 1364 "Construction of references to laws of the United States or Acts of Congress" as items 1365 and 1366, respectively.

1984—Pub. L. 98-353, title I, §101(b), July 10, 1984, 98 Stat. 333, substituted "cases" for "matters" in item 1334.

1980—Pub. L. 96-486, §2(b), Dec. 1, 1980, 94 Stat. 2369, struck out "; amount in controversy; costs." after "question" in item 1331.

1978—Pub. L. 95-598, title II, §238(b), Nov. 6, 1978, 92 Stat. 2668, directed the substitution of "Bankruptcy appeals" for "Bankruptcy matters and proceedings" in item 1334, which amendment did not become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

Pub. L. 95-572, §6(b)(2), Nov. 2, 1978, 92 Stat. 2457, added item 1363 and redesignated former item 1363

"Construction of references to laws of the United States or Acts of Congress", as 1364.

Pub. L. 95-521, title VII, §705(f)(2), Oct. 26, 1978, 92 Stat. 1880, added item 1364 "Senate actions".

Pub. L. 95-486, §9(c), Oct. 20, 1978, 92 Stat. 1634, substituted "Commerce and antitrust regulations: amount in controversy, costs" for "Commerce and antitrust regulations" in item 1337.

Pub. L. 95-393, §§7(b), 8(a)(2), Sept. 30, 1978, 92 Stat. 810, substituted "Consuls, vice consuls, and members of a diplomatic mission as defendant" for "Consuls and vice consuls as defendants" in item 1351 and added item 1364 "Direct actions against insurers of members of diplomatic missions and their families".

1976—Pub. L. 94-583, §2(b), Oct. 21, 1976, 90 Stat. 2891, added item 1330.

1970—Pub. L. 91-358, title I, §172(c)(2), July 29, 1970, 84 Stat. 591, added item 1363.

1966—Pub. L. 89-635, §2, Oct. 10, 1966, 80 Stat. 880, added item 1362.

1962—Pub. L. 87-748, §1(b), Oct. 5, 1962, 76 Stat. 744, added item 1361.

1958—Pub. L. 85-554, §4, July 25, 1958, 72 Stat. 415, inserted "costs" in items 1331 and 1332.

1953—Act Aug. 15, 1953, ch. 505, §3, 67 Stat. 589, added item 1360.

## § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

(Added Pub. L. 94-583, §2(a), Oct. 21, 1976, 90 Stat. 2891.)

## EFFECTIVE DATE

Section effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94-583, set out as a note under section 1602 of this title.

## § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85-554, §1, July 25, 1958, 72 Stat. 415; Pub. L. 94-574, §2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96-486, §2(a), Dec. 1, 1980, 94 Stat. 2369.)

## HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §41(1) (Mar. 3, 1911, ch. 231, §24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, §1, 48 Stat. 775; Aug. 21, 1937, ch. 726, §1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq., §§30-43. See, also, reviser's note under section 1332 of this title.)



Words "wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in *United States v. Sayward*, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; *Fishback v. Western Union Tel. Co.*, 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630; and *Halt v. Indiana Manufacturing Co.*, 1900, 20 S.Ct. 272, 176 U.S. 68, 44 L.Ed. 374.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority," for purposes of brevity.

The remaining provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

#### AMENDMENTS

1980—Pub. L. 96-486 struck out "the amount in controversy; costs" in section catchline, struck out minimum amount in controversy requirement of \$10,000 for original jurisdiction in federal question cases which necessitated striking the exception to such required minimum amount that authorized original jurisdiction in actions brought against the United States, any agency thereof, or any officer or employee thereof in an official capacity, struck out provision authorizing the district court except where express provision therefore was made in a federal statute to deny costs to a plaintiff and in fact impose such costs upon such plaintiff where plaintiff was adjudged to be entitled to recover less than the required amount in controversy, computed without regard to set-off or counterclaim and exclusive of interests and costs, and struck out existing subsection designations.

1976—Subsec. (a), Pub. L. 94-574 struck out \$10,000 jurisdictional amount where action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

1958—Pub. L. 85-554 included costs in section catchline, designated existing provisions as subsec. (a), substituted "\$10,000" for "\$3,000", and added subsec. (b).

#### EFFECTIVE DATE OF 1980 AMENDMENT; APPLICABILITY

Section 4 of Pub. L. 96-486 provided: "This Act [amending this section and section 2072 of Title 15, Commerce and Trade, and enacting provisions set out as a note under section 1 of this title] shall apply to any civil action pending on the date of enactment of this Act [Dec. 1, 1980]."

#### EFFECTIVE DATE OF 1958 AMENDMENT

Section 3 of Pub. L. 85-554 provided that: "This Act [amending this section and sections 1332 and 1345 of this title] shall apply only in the case of actions commenced after the date of the enactment of this Act [July 25, 1958]."

### § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully ad-

mitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a for-

**§ 1344. Election disputes**

The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, where in it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

(June 25, 1948, ch. 646, 62 Stat. 932.)

**HISTORICAL AND REVISION NOTES**

Based on title 28, U.S.C., 1940 ed., §41(15) (Mar. 3, 1911, ch. 231, §24, par. 1, 36 Stat. 1092).

Words "civil action" were substituted for "suits," in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "United States Senator" were added, as no reason appears for including Representatives and excluding Senators. Moreover, the Seventeenth amendment, providing for the popular election of Senators, was adopted after the passage of the 1911 law on which this section is based.

Changes were made in phraseology.

**§ 1345. United States as plaintiff**

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 933.)

**HISTORICAL AND REVISION NOTES**

Based on title 28, U.S.C., 1940 ed., §41(1) (Mar. 3, 1911, ch. 231, §24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, §1, 48 Stat. 775; Aug. 21, 1937, ch. 726, §1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1354, and 1359 of this title.

Words "civil actions, suits or proceedings" were substituted for "suits of a civil nature, at common law or in equity" in view of Rules 2 and 81(a)(7) of the Federal Rules of Civil Procedure.

Word "agency" was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (See definitive section 451 of this title.)

The phrase "Except as otherwise provided by Act of Congress," at the beginning of the section was inserted to make clear that jurisdiction exists generally in district courts in the absence of special provisions conferring it elsewhere.

Changes were made in phraseology.

**§ 1346. United States as defendant**

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-reve-

nue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws:

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall

CFR › Title 7 › Subtitle B › Chapter XIV › Subchapter B › Part 1463 › Subpart A ›  
Section 1463.11

## 7 CFR 1463.11 - Appeals and judicial review.

### § 1463.11 Appeals and judicial review.

(a) An entity may appeal any adverse determination made under this subpart, including with respect to the amount of the assessment, by submitting a written statement that sets forth the basis of the dispute to Darlene Soto, Tobacco Transition Assessment Program Manager, U.S. Department of Agriculture, 1400 Independence Avenue SW., Room 3722, Mail Stop 0515, Washington DC 20250-0514, within 30 business days of the date of receipt of the notification by CCC of its determination.

(b) The Executive Vice President shall assign a person to act as the hearing officer on behalf of CCC. The duty of the hearing officer will be to develop an administrative record that will provide the Executive Vice President, or a designee, with sufficient information to render a final determination on the matter in dispute. The hearing to be conducted by the hearing officer will be an informal hearing at which the appellant may present oral and written evidence in support of the appellant's position. A copy of the rules of conduct that will be applicable to the proceeding will be provided to the appellant upon receipt of the appeal by CCC.

(c) For any appeals filed after October 1, 2014, appellants must submit all supporting documentation within 30 calendar days following the date of the initial written appeal to CCC. Any documents received after that time will not be considered by the hearing officer.

(1) The final date that entities may file an appeal is January 14, 2016.

(2) If 30 calendar days elapse following receipt by CCC of the final submission of supporting documentation by an appellant with respect to any appeal filed under this section regarding an assessment imposed on a

domestic manufacturer or importer of tobacco products, without a final administrative decision by CCC, then all administrative remedies available to the appellant will be deemed to be exhausted; except, if the 30th calendar day would fall on a weekend day or federal holiday, then the 30th calendar day will be deemed the next business day following such weekend day or federal holiday.

**(d)** Any domestic manufacturer or importer of tobacco products aggrieved by a determination made by CCC under this subpart may seek review of the determination upon the exhaustion of the administrative remedies provided by this part in the United States District Court for the District of Columbia, or for the district in which such importer or manufacturer has its principal place of business.

[ 70 FR 7011, Feb. 10, 2005, as amended at 79 FR 19464, Apr. 9, 2014]

C

United States Code Annotated [Currentness](#)

Federal Rules of Civil Procedure for the United States District Courts ([Refs & Annos](#))

▾ [Title VII. Judgment](#)

→→ **Rule 56. Summary Judgment**

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 56 are displayed in three separate documents. Notes of Decisions for subdivisions I to VI are contained in this document. For Notes of Decisions for subdivisions VII through XXV, see the second document for 28 USCA Federal Rules of Civil Procedure Rule 56. For Notes of Decisions for subdivisions XXVI to end, see the third document for 28 USCA Federal Rules of Civil Procedure Rule 56.>

**(a) Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. 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. The court should state on the record the reasons for granting or denying the motion.

**(b) Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

**(c) Procedures.**

**(1) Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

**(A)** citing 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; or

**(B)** showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

**(2) Objection That a Fact Is Not Supported by Admissible Evidence.** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

**(3) Materials Not Cited.** The court need consider only the cited materials, but it may consider other materials

Federal Rules of Appellate Procedure › TITLE VII. GENERAL PROVISIONS

## Rule 34. Oral Argument

### (a) IN GENERAL.

(1) *Party's Statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) NOTICE OF ARGUMENT; POSTPONEMENT. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) ORDER AND CONTENTS OF ARGUMENT. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) CROSS-APPEALS AND SEPARATE APPEALS. If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) NONAPPEARANCE OF A PARTY. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) **SUBMISSION ON BRIEFS.** The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) **USE OF PHYSICAL EXHIBITS AT ARGUMENT; REMOVAL.** Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

### **NOTES**

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005.)

#### **NOTES OF ADVISORY COMMITTEE ON RULES—1967**

A majority of circuits now limit oral argument to thirty minutes for each side, with the provision that additional time may be made available upon request. The Committee is of the view that thirty minutes to each side is sufficient in most cases, but that where additional time is necessary it should be freely granted on a proper showing of cause therefor. It further feels that the matter of time should be left ultimately to each court of appeals, subject to the spirit of the rule that a reasonable time should be allowed for argument. The term “side” is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it. In other particulars this rule follows the usual practice among the circuits. See 3d Cir. Rule 31; 6th Cir. Rule 20; 10th Cir. Rule 23.

#### **NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT**

The proposed amendment, patterned after the recommendations in the Report of the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 1975, created by Public Law 489 of the 92nd Cong. 2nd Sess., 86 Stat. 807, sets forth general principles and minimum standards to be observed in formulating any local rule.

#### **NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT**

The amendments to Rules 34(a) and (e) are technical. No substantive change is intended.

#### **NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT**

*Subdivision (d).* The amendment of subdivision (d) conforms this rule with the amendment of Rule 28(h).

#### **NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT**

*Subdivision (c).* The amendment deletes the requirement that the opening argument must include a fair statement of the case. The Committee proposed the change because in some circuits the court does not want appellants to give such statements. In those circuits, the rule is not followed and is misleading. Nevertheless, the Committee does not want the deletion of the requirement to indicate disapproval of the practice. Those circuits that desire a statement of the case may continue the practice.

#### **COMMITTEE NOTES ON RULES—1998 AMENDMENT**

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. Substantive changes are made in subdivision (a).

*Subdivision (a).* Currently subdivision (a) says that oral argument must be permitted unless, applying a local rule, a panel of three judges unanimously agrees that oral argument is not necessary. Rule 34 then outlines the criteria to be used to determine whether oral argument is needed and requires any local rule to “conform substantially” to the “minimum standard[s]” established in the national rule. The amendments omit the local rule requirement and make the criteria applicable by force of the national rule. The local rule is an unnecessary instrument.

Paragraph (a)(2) states that one reason for deciding that oral argument is unnecessary is that the dispositive issue has been authoritatively decided. The amended language no longer states that the issue must have been “recently” decided. The Advisory Committee does not intend any substantive change, but thinks that the use of “recently” may be misleading.

*Subdivision (d).* A cross-reference to Rule 28(h) has been substituted for a reiteration of the provisions of Rule 28(h).

#### **COMMITTEE NOTES ON RULES—2005 AMENDMENT**

*Subdivision (d).* A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).





my copy

November 2, 2015

United States Department of Agriculture

Domestic and Foreign Agricultural Services

Commodity Credit Corporation

P.O. Box 2415 Washington, D.C. 20525



Justin Solimon  
Johnson Barnhouse & Keegan LLP  
7424 4<sup>th</sup> Street NW  
Los Ranchos de Albuquerque, NM 87107

Mr. Solimon,

This is to acknowledge receipt of your letter dated October 23, 2015, requesting an in-person hearing of your appeal of an adverse determination, pursuant to 7 CFR Section 1463.11 and the two orders of the United States District Court for the Eastern District of Washington, dated respectively July 27, 2015 and September 17, 2015, in the matter captioned *United States of America v. King Mountain Tobacco Company, Inc.* (1:14-cv-03162-RMP).

As indicated in the letter of September 25, 2015, from Michael Gurwitz of the U.S. Department of Agriculture Office of the General Counsel, such hearing will occur pursuant to the remand of the Court to address the discrete issue of determining the accuracy of the Fair and Equitable Tobacco Reform Act of 2004 (FETRA) assessments imposed on King Mountain Tobacco Company, Inc., in or after February, 2012.

In your letter you have requested "a complete and current copy of the administrative record." Accordingly, enclosed please find the administrative record to date, together with a Table of Contents. Although most all of these documents have previously been provided to you, they are provided again for your convenience of reference.

Your letter makes further requests with respect to briefing and discovery. You will note that neither of the orders of the Court nor the provisions of 7 CFR Section 1463.11 contemplate discovery.

The hearing is informal, unlike a judicial proceeding. It is not transcribed and may be in person or conducted over the telephone. With respect to the hearing, 7 CFR Section 1463.11(b) provides: "The hearing to be conducted by the hearing officer will be an informal hearing at which the appellant may present oral and written evidence in support of the appellant's position." You will be contacted directly by the hearing officer regarding the anticipated schedule of available dates. Also in accordance with that provision, a copy of the rules of conduct applicable to the proceeding are enclosed for your review.

Also pursuant to 7 CFR Section 1463.11(b), a "duty of the hearing officer will be to develop an administrative record that will provide to the Executive Vice President [of the Commodity Credit Corporation], or a designee, with sufficient information to render a final determination on the matter in dispute." Up to 10-days prior to the hearing date, King Mountain Tobacco Company may submit directly to my office any further documents (electronic requested) they wish to have included in the hearing

record. Please submit electronically directly to [darlene.soto@wdc.usda.gov](mailto:darlene.soto@wdc.usda.gov) to facilitate the timeliness of the submission for proper consideration as part of the record for the scheduled hearing.

Sincerely,



Darlene A. Soto  
Tobacco Transition Assessment Program Manager  
U.S. Department of Agriculture  
Farm Service Agency  
1400 Independence Avenue, SW  
Room 3722, Mail Stop 0515  
Washington, D.C. 20250-0515  
office 202.720.0542  
fax 202.720-8120

Atch: Table of Contents  
Administrative Hearing Rules of Conduct  
7 C.F.R. 1463.11 (b) and (c)

2

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October 23, 2015

Darlene Soto  
Tobacco Transition Assessment Program Manager  
United States Department of Agriculture  
1400 Independence Avenue SW, Room 3722, Mail Stop 0515  
Washington, D.C. 20250-0514

*Re: Request for In Person Hearing for King Mountain Tobacco Co., Inc.*

Dear Ms. Soto:

Pursuant to the attached letter of September 25, 2015, and the orders of the United States District Court for the Eastern District of Washington, and 7 C.F.R. § 1463.11, King Mountain Tobacco Co., Inc. requests an in person administrative evidentiary hearing addressing FETRA and the FETRA assessments that have been levied against King Mountain.

King Mountain previously requested, and was denied, an administrative appeal and hearing as early as February of 2012. King Mountain incorporates its prior requests and correspondence with the USDA, which have been accepted by the United States District Court for the Eastern District of Washington as a valid request for appeal to which the USDA failed to respond. See Order of July 27, 2015 at 18 (citing *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) ("[A]n administrative remedy may be inadequate where the administrative body . . . has otherwise predetermined the issue before it.")). King Mountain continues to object to the denial of its due process rights by the USDA, including denial of due process inherent in the lapse in time between its original requests for hearing to the present.

As part of this appeal hearing request, King Mountain further requests the following:

- (1) That USDA provide a complete and current copy of the administrative record;
- (2) That you set a briefing schedule setting reasonable dates by which King Mountain may:
  - a) submit discovery requests to USDA;
  - b) submit briefs and legal memorandum supporting its arguments prior to any scheduled hearing; and

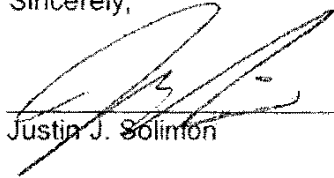
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Darlene Soto  
October 23, 2015  
Page 2 of 2

- c) submit supporting documentation under 7 C.F.R. § 1463.11(c);
- (3) That USDA accept and timely respond to service of discovery requests from King Mountain.

Thank you for your prompt attention to this matter.

Sincerely,



Justin J. Solimon

Enclosures

## **U.S. CONSTITUTION**

### **Article V**

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

## **Article VI**

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.