No. 16-35956

# 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**

# REPLY BRIEF FOR DEFENDANT-APPELLANT

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## SUMMARY OF THE ARGUMENT

The Commodity Credit Corporation ("CCC"), owned by the United States, asks this Court to help it collect money from a private Yakama Indian corporation. It wants that money not for government coffers, but instead for transfer to private non-Indian businesses.

Words and their meanings are important.[1] So whether money is taken through a "fee" or a "tax" is an important distinction. Whether money to be taken is connected with a property interest is important. Whether the fee used to take the money is assessed on travel – the movement of product out of bond on the Yakama Indian Reservation – is crucial to the legal analysis required in this case. Whether the words our government used to make promises to the Yakama people are to be understood as "learned lawyers" understand those words,[2] or as the Indians understood those words when spoken by white men acting as agents for our

[1] "On behalf of the government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer." *United States v. Merriam*, 263 U.S. 179, 187–88 (1923).

[2] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

government, is pivotal to application of the protections and guarantees we promised to the Yakama in 1855.

CCC's Response ignores words and their meanings, and instead attacks the Opening Brief with sweeping assertions, often unsupported by citation to law or the record, scrambling the order of argument and the issues involved. In doing so the Response attributes words and arguments to the Appellant that are not in the Opening Brief, yet ignores argument that is in the Opening Brief.

The CCC claims that none of this is important because, according to the CCC, the only thing that matters is its assertion that money can NEVER be property protected by the Fifth Amendment. But that is not correct. As this Court, the United States Supreme Court and other courts repeatedly have confirmed, money can be property protected by the United States Constitution. U.S. Const. art. 5, Add. 115. The analysis required to determine whether money is protected property is fact intensive, and must by decided on a case by case basis. But neither the district court below, nor the CCC in its Response, applied this controlling precedent to the facts here. Doing so confirms that the money sought to be taken from King Mountain is protected, and the taking at issue is unconstitutional.

The CCC's Yakama Treaty argument is similarly flawed. The CCC repeatedly declares that this is not a travel case. But the law, regulations, facts and

pleadings demonstrate otherwise. This case parallels the fact pattern this Court addressed in *Smiskin*,[3] a case in which the Court held that the Yakama Treaty prohibits federal enforcement of a travel regulation on the transport of goods to market. Just as in *Smiskin*, the FETRA fee on travel violates the promises made in the Yakama Treaty.

Finally, the Response reverses the order of the issues raised in the Opening Brief in an apparent attempt to marginalize King Mountain's primary arguments that FETRA: 1) involves an unconstitutional taking of property; and 2) violates the guarantees of the Yakama Treaty. This reply addresses the arguments in the order presented in the Opening Brief.

[3] *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007)

# 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 CCC argues that "black letter law" establishes that: (1) *taxes;* and (2) *user fees* are not takings.[4] But this is not a tax case, as the CCC concedes. District Court ECF No. 15 at 16, n.1, ER 339.[5] And this is not a "user fee" case because the assessed fee is not related to any services rendered by the CCC or USDA to King Mountain.[6]

This is at best a fee case.[7] It involves a charge imposed that is not in any way related to services rendered by agencies of the federal government to King

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[4] Resp. Br. 31, *citing*, *Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2600 (2013). [Note: All page cites to court filed documents are to the page number as assigned by the Court's CM/ECF system.]

[5] A tax is "a pecuniary burden laid upon individuals or property for the purpose of supporting the government." *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906).

[6] A user fee is a charge imposed that is reasonably related to services rendered by agencies of the Federal Government to the business being charged the fee. *Massachusetts v. United States*, 435 U.S. 444, 472 (1978) (Rehnquist, J., dissenting).

[7] The choice of a label – whether "tax," "assessment," "user fee" or "fee" – does not control whether an exaction is within Congress's constitutional power to impose without just compensation. *Accord, Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012).

Mountain. The agencies involved here use the money to benefit businesses that do not pay the fee and from which the federal government took certain government created competitive market advantages. The money goes to those who benefited from a controlled market system that was deregulated by the federal government – a system in which King Mountain never participated. When, as here, taxes and user fees are not at issue, the Supreme Court:

> repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. Most recently, in *Brown, supra*, at 232, 123 S.Ct. 1406, we were unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. Our holding in *Brown* followed from *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, (1980), two earlier cases in which we treated confiscations of money as takings despite their functional similarity to a tax. Perhaps most closely analogous to the present case, we have repeatedly held that the government takes property when it seizes liens, and in so ruling we have never considered whether the government could have achieved an economically equivalent result through taxation.
>
> . . .
>
> Two facts emerge from those cases. The first is that the need to distinguish taxes from takings is not a creature of our holding today that monetary exactions are subject to scrutiny under *Nollan* and and *Dolan*. Rather, the problem is inherent in this Court's long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.

> Second, our cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice.

*Koontz*, 133 S. Ct. at 2601.

The FETRA fee as imposed on King Mountain is a taking – it is a taking of money from a private Yakama business for direct transfer to another private business. As such it is prohibited by the Fifth Amendment. *Cf.*, *Kelo v. City of New London, Conn.*, 545 U.S. 469, 497 (2005) (O'Conner, J., dissenting) ("Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security" (emphasis in original)).

Should the Court confirm that the FETRA fee is a taking, that ruling would not mean that "every fee, assessment, or tax imposed by the government would constitute an unconstitutional 'taking' of property." Resp. Br. 31. This is not a tax or assessment case. It is a fee case. And to be clear, King Mountain is not arguing that every fee is an unconstitutional taking, much less every tax or assessment. What King Mountain is arguing, consistent with controlling legal precedent, is that: 1) some fees may be unconstitutional takings depending on the facts; 2) the district court had an obligation to assess the facts; and 3) the facts confirm that the FETRA fee as imposed on King Mountain is an unconstitutional taking.

Because the CCC's only argument is that money can never be property subject to taking, its response leaves unaddressed the two alternative ways in which a government imposed fee 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.

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

As stressed in the Opening Brief, and ignored in the Response, controlling precedent hinges upon specific, identifiable *property interests*, and prohibits fees that take money connected to those *property interests* without just compensation. Opening Br. 44-48. King Mountain spent nearly four pages of its Opening Brief addressing the per se physical takings rule and its application to the FETRA fee at issue, including how the fee is connected to King Mountain's protectable property interests. Yet the Response mentions "per se" only three times: twice quoting the lower court's order,[8] and once in a citation to *Koontz*, 133 S. Ct. at 2600.[9] And the

[8] Resp. Br. 13 and 41.
[9] Resp. Br. 39.

Response mentions "property interests" only twice: once in a quote from *Swisher*,[10] and once when simply stating (without supporting argument) that "FETRA does not abrogate any treaty right involving property interests granted in the Yakama Treaty." Resp. Br. 41.

Because the CCC ignored this argument, it did not cite nor make any attempt to distinguish much of the case law relied upon by King Mountain, including:

- *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (applying Fifth Amendment takings analysis to fungible property (raisins));
- *Armstrong v. United States*, 364 U.S. 40, 48 (1960) ("The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure"); and
- *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (confirming constitutional protection of *property interests*, holding that money paid as interest on trust accounts is "property" entitled to Fifth Amendment protection).

[10] Resp. Br. 39. *Swisher* only involved a "regulatory taking" challenge. Per se taking of property associated with a property interest was not an issue in that case. *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008)

By ignoring *Phillips*, CCC avoided addressing the requirement confirmed in *Phillips* that – when called upon to determine whether money is property in a given case – courts must make the determination "by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips* 524 U.S. at 164 (1998) (citation omitted). That sleight of hand allowed CCC to avoid addressing the multiple "existing rules or understandings that stem from an independent source" cited in the Opening Brief that show the money CCC wants must be treated as King Mountain's property.[11]

So, for example, CCC does not dispute that under Yakama Nation law money is considered to be property. Opening Br. 46. And CCC chose not to respond to the significant jurisprudence confirming that Indian treaty rights are "property interests" entitled to Fifth Amendment protection. *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 686 (9th Cir. 1976) (treaty rights cannot be abrogated "without payment of just compensation").[12] And finally, the Response

[11] Taking money eliminates all of its economic value. *Accord*, *Lucas v. South Carolina. Coastal Council*, 505 U.S. 1003, 1046-47 (1992) (creating "new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle").

[12] CCC also ignored the following cases cited in the Opening Brief: *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.*

fails to address the FETRA fee's impact on the "property interests" in the Indian allotment on which King Mountain operates. *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").

The money sought to be taken here qualifies as property because it is linked to specific, identifiable property interests. Because of that link, the "'per se [takings] approach' is the proper mode of analysis" under Supreme Court precedent. *Koontz*, 133 S. Ct. at 2600 (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2001)).

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

CCC does not respond to the regulatory taking analysis in the Opening Brief.[13] Its only arguable attempt to do so is its claim that the decision in *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) is a "plurality opinion of four Justices." Resp. Br. 39. But it is the regulatory takings analysis, not the application of that analysis to the facts in *Eastern* that confirms the improper regulatory taking in this case. In other words, simply because *Eastern* is a plurality decision does not mean

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*Res.*, 971 F. Supp. 282, 288 (W.D. Mich. 1995) (treaty rights "are property rights protected by the United States Constitution").

[13] A word search confirms that the phrase "regulatory taking" is not to be found in the Response.

that there can never be a regulatory taking defense challenging an uncompensated regulatory taking of money. *See, e.g.*, *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 (N.D. Cal. 2014) (city ordinance held unconstitutional which "requires a monetary exaction—a substantial payment"), *appeal dismissed as moot*, 680 F. App'x 610 (9th Cir. 2017).

The response does not address let alone contest that:

> 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."

*Eastern*, 524 U.S. at 516-17 (internal citations omitted). As discussed in detail in KMT's Opening Brief, an examination of the "justice and fairness" of the FETRA fee imposed on King Mountain confirm that it results in an unconstitutional regulatory taking.

First, FETRA is a retroactive scheme that only benefits businesses that were in the market prior to its enactment, and FETRA's scheme compensates for past

activity through assessments on future business activity. FETRA also has forced a considerable financial burden upon King Mountain.[14]

Second, King Mountain's reasonable investment backed expectations never 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);[15]

(2) pay for quotas in which King Mountain had no interest and from which King Mountain received no benefit;[16] and

(3) bear the costs of paying to move "instantaneously from a government-regulated market to a free-market system."[17]

Third, "the nature of the governmental action in this case is quite unusual." *Eastern*, 524 U.S. at 537:

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[14] The district court awarded $6,425,683.23 against King Mountain. ECF No. 67, ER 1.

[15] The Response does not challenge the accuracy of the Opening Brief's description of the intertwined history of FETRA and the MSA. Indeed, there is not a single reference in the Response to the Master Settlement Agreement or MSA.

[16] As demonstrated in the Opening Brief (and once again ignored in the Response), Big Tobacco's contract with the States had already guaranteed that quota holders would be paid for the loss of their quotas. FETRA did not secure further payment, it simply replaced the contract payments from Big Tobacco with fee assessments spread among a wider range of companies. See Opening Br. 28-29.

[17] Ryan D. Dreveskracht, *Forfeiting Federalism: The Faustian Pact with Big Tobacco*, 18 Rich. J.L. & Pub. Int. 291, 309-10 (2015), available at: http://scholarship.richmond.edu/jolpi/vol18/iss3/4/ (last visited August 16, 2017).

> When [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 underlying the Takings Clause.

*Id.* Because FETRA fees are unrelated to any commitment that King Mountain made, or to any injury it caused, or to any benefit it received, FETRA implicates fundamental principles of fairness underlying the Takings Clause by forcing King Mountain to bear a burden which should have been borne by the public as a whole. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) ("in a general sense concerns for proportionality animate the Takings Clause," *citing Armstrong*, 364 U.S. at 49 for the proposition that "[t]he Fifth Amendment's 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").

### B. FETRA Violates Other Constitutional Protections.

At no point does CCC's Response take issue with the history of the Master Settlement Agreement set out in the Opening Brief, nor does the Response provide any citation to fact or law that would contradict the details that show that it was not "manufacturers" who benefitted from FETRA, nor was it tobacco farmers (who would have received MSA contract payments that were instead replaced by

FETRA). The only group that benefitted from FETRA was Big Tobacco, as set out in detail in the Opening Brief. As a result, FETRA's fee mechanism violates the Constitution's due process and equal protection clauses and the unconstitutional conditions doctrine.

FETRA violates due process because taking non-tax money from a Yakama Indian business that did not benefit from an historic market control system, giving that money to other private business that did benefit from the historic system (and who would have received similar payments from another source), relieving Big Tobacco of a contractual obligation in the process, and doing all of this as part of a financial scheme to change the core operation of a market overnight, is not sufficiently rational to survive due process scrutiny.

As to equal protection, FETRA cannot withstand scrutiny under rational basis review as noted in the Opening Brief because its application results in unequal treatment of King Mountain and infringes on King Mountain's Treaty and constitutional right to transport its reservation made goods.

As to the unconstitutional conditions doctrine, the Supreme Court has confirmed that "'the government may not deny a benefit to a person because he exercises a constitutional right.' . . . [T]he unconstitutional conditions doctrine [] 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.[18] Yet that is the Hobson's choice that King Mountain faced – stay out of the business, or submit to an unconstitutional taking and surrender its Treaty rights as a "condition of doing business."[19]

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

### A. A Ruling Confirming Yakama Treaty Guarantees Obviates the need to Address FETRA's Constitutional Infirmities.

Because the Yakama Treaty precludes assessment of the FETRA fee on King Mountain, King Mountain agrees with CCC that "the remedy would be for this Court to hold that the Treaty exempts King Mountain from FETRA payments" Resp. Br. 34, n.5. A holding confirming that FETRA violates King Mountain's Treaty protections obviates the need for the Court to address whether "FETRA itself is an unconstitutional taking (or an unconstitutional condition.)" *Id.*

[18] 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.

[19] Resp. Br. 35: "FETRA was . . . simply a condition of doing business."

### B. CCC Misrepresents How and Where the FETRA Fee is Assessed.

Whether the Yakama Treaty's guarantees apply in this case hinges in large part on where the fee is assessed, and whether the fee is assessed on travel. Yet recognizing these critical distinctions as it does in its Response, the CCC nevertheless chose repeatedly to misrepresent how the FETRA fee is determined. *E.g.*, Resp. Br. 28 ("this case does not "involve [] a fee on the right to move Yakama products," KM Br. 57; this case involves an assessment on manufactured tobacco products"); and Resp. Br. 29 ("As explained, this case involves an assessment on King Mountain's manufactured products, not any tax on transportation").[20]

It is beyond dispute that the FETRA fee is *not* based upon cigarettes sold in commerce. Instead, it is based *solely* upon the transportation of cigarettes out of bond on the Yakama Reservation:

> under the statute, **the transaction giving rise to liability for FETRA Assessments is the "removal" of tobacco products from customs**

[20] *See also* Resp. Br. 16 ("The imposition of an obligation to pay FETRA assessments based on market share does not deprive the Yakama Tribe of the exclusive use of its land, nor does it infringe the Tribe's right to free access on public highways"); at 37 ("King Mountain is required to pay no more than its own **sale of tobacco in the free market** commands" (emphasis added)); at 35 ("the required payments were not backward-looking, but rather were collected from *current* tobacco manufacturers based on their then-*current* tobacco manufacturing (emphasis in original)).

> **or inventory** and making them available for distribution in the U.S. market. While the precise amount of the Assessments for each Tobacco Manufacturer is not known until CCC issues invoices after the quarter close, **the actual liability for those Assessments arises when tobacco products are "removed"**.

*In re Int'l Tobacco Partners, Ltd.*, 468 B.R. 582, 598–99, 2012 WL 1158734 (Bankr. E.D.N.Y. 2012) (emphasis added). Indeed, Appellee's own regulations confirm that the figure used for the FETRA fee assessments "**shall correspond to the quantity of the tobacco product that is removed into domestic commerce** by each such entity."7 C.F.R. § 1463.7, Supp. Add. 5.

Removal is defined in FETRA in reference to Section 5702(j) of Title 26 of the U.S. Code.[21] Supp. Add. 4. That section reads in its entirety:

> (j) Removal or remove**.**--"Removal" or "remove" means **the removal of tobacco products** or cigarette papers or tubes, or any processed tobacco, **from the factory or from internal revenue bond** under section 5704, as the Secretary shall by regulation prescribe, or release from customs custody, and shall also include the smuggling or other unlawful importation of such articles into the United States.

CCC conceded this issue in the district court. U.S. Statement of Material Facts, ECF No. 15-1, ¶ 2, page 2, ER 344 (confirming fee is "based upon the removals" of product out of bond).

[21] 7 U.S.C. § 518d. Supp. Add. 1-3.

Because the FETRA fee is assessed on the Yakama reservation for transport of reservation made goods, the fee denies Yakama Indians the "exclusive use and benefit" of their Reservation under Article II of their Treaty as addressed in detail in the Opening Brief and below.

And as the fee is assessed for travel out of bond (removal), that assessment on travel is pivotal to resolution of the Article III Treaty issues in this case, again as addressed in detail in the Opening Brief and below. As the Court confirmed in *Smiskin*, at the time of Treaty negotiations:

> the Yakamas exercised free and open access to transport goods as a central part of a trading network running from the Western Coastal tribes to the Eastern Plains tribes. Agents for the United States thus repeatedly emphasized in negotiations that tribal members would retain the 'same liberties ... to go on the roads to market.' Indeed, although the United States 'negotiated with the Northwest tribes many treaties containing parallel provisions,' a 'public highways clause' promising a right to travel is found in only one other treaty.

487 F.3d at 1265 (citations omitted).

### C. 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.

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. Opening Br. 40-41, 60-61. These Indian canons of construction are not limited to state government efforts to regulate or tax Indians. They also apply

to federal monetary exaction cases as confirmed by both this Court[22] and the Supreme Court in *Squire v. Capoeman*, 351 U.S. 1. Although *Capoeman* involved imposition of federal capital gains tax, its treaty analysis is controlling in this action.

The CCC argues that *Capoeman* "has no bearing here . . . [as] the Supreme Court's holding in *Capoeman* was not based on treaty language concerning 'exclusive use of the land."' Resp. Br. 24. But once again, the Response is wrong. As the Supreme Court itself explained:

> The question presented is whether the proceeds of the sale by the United States Government of standing timber on allotted lands on the Quinaielt Indian Reservation may be made subject to capital gains tax, consistently with applicable treaty and statutory provisions and the Government's role as respondents' trustee and guardian.

*Capoeman*, 351 U.S. at 2 (1956) (emphasis added).

At issue in *Capoeman* was the Treaty with the Quinaielts [Add. 13], under which the Quinaielt Indians "were to have **exclusive use** of their reservation" 351

[22] *Squire v. Capoeman*, 220 F.2d 349 (1956) ("Under the provisions of a **Treaty with the Quinaielt Indian Tribe**, 12 Stat. 971, [Add. 13] tribal lands in what is now the State of Washington were transferred to the United States. By the terms of the treaty an area was reserved therefrom and **set apart for the exclusive use of the members of the tribe**. . . . in our view this attempt to tax evidences, at the least, a sorry breach of faith with these Indians" (emphasis added)).

U.S. at 3 (emphasis added.) The term "exclusive use" in the treaty was alone sufficient to apply treaty canons of construction in *Capoeman*. Not only are those same words used in the Yakama Treaty, but the Yakama were promised even more: both "exclusive use" (held sufficient in *Capoeman*) and **exclusive benefit**.[23] And the Yakama were promised the right to travel without restriction. *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)).

It is impossible to rectify this Court's absolute certainty regarding the existence of a Yakama Treaty guaranty to unrestricted travel when striking down state regulation, with the total absence of any court opinion willing to at least consider the possible existence of a similar right implicating federal fees. Neither the Indians nor the United States agents who negotiated the Yakama Treaty made any distinction between federal and state government during treaty negotiations: instead "Agents for the United States thus repeatedly emphasized in negotiations that tribal members would retain the 'same liberties ... to go on the roads to

[23] *See* Resp. Br. 23: "There is no dispute that Yakama land is for the 'exclusive' benefit of the Tribe, as King Mountain emphasizes."

market.'" *Smiskin*, 487 F.3d at 1265. Those words – those promises were important:

> travel was of great importance to the Yakamas, that they enjoyed free access to travel routes for trade and other purposes at Treaty time, and that they understood the Treaty to grant them valuable rights that would permit them to continue in their ways.

*Id.* Given this Court's consistent finding of a treaty right to travel prohibiting state regulation, at a bare minimum the Court should apply the Indian canons of construction in cases involving federal regulation, such as the one now before the Court. The promises made by the federal government in 1855 require application of the Indian canons of construction in this case brought by that very same federal government.[24] The district court erred when it refused to do so. *Accord, Perkins v. United States*, No. 16-CV-495(LJV), 2017 WL 3326818, at *2 (W.D.N.Y. Aug. 4, 2017) (applying Indian canons of construction and holding federal tax could not be imposed under treaty with the Seneca).

[24] *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" (emphasis added)); *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*" (emphasis added); *see also Cook v. United States*, 32 Fed. Cl. 170, 174-75 (1994).

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

Words are important. There is a difference between a "tax" and a "fee." Specifically:

1. 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;

2. Because FETRA imposes 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);

3. A fee may be considered an unconstitutional taking, while a tax almost never is;

4. 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;

5. Because the FETRA fee 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 use and benefit" guaranty to the Yakama people; and

6. Because the FETRA fee is assessed on the travel of Yakama goods out of bond on the Yakama Nation, it offends the Treaty's travel guaranty.

See Opening Brief 60-63. Finally, this is not a "state law" argument, as mischaracterized in the Response, Resp. Br. 16.[25] It is an argument based on the federal law distinction between a tax and a fee, and legal precedent supporting that distinction.

### E. The Yakama Treaty Precludes Imposition of the FETRA Fee, Even Under the More Stringent "Tax" Analysis.

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

The Response does not dispute that language in an Indian Treaty can exempt Indians from federal taxation. Therefore, should this Court decline to differentiate between a fee and a tax for purposes of this case, and instead adopts the district court's amalgamation of the two monetary imposition devices, the Court should

[25] A word search confirms that the phrase "state law" appears only once in the Opening Brief – at page 45 and referring to the requirement that the existence of a property interest be determined by reference to an independent source such as state law.

still hold that the Yakama Treaty [Add. 1-7] exempts King Mountain from the FETRA exaction at issue.

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

As noted above, the Ninth Circuit and the Supreme Court have both held that the term "exclusive use" in an Indian treaty was alone sufficiently express to support a holding that the Quinault Treaty prohibited imposition of the capital gains tax in *Capoeman*. That exact phrase is also used in the Yakama Treaty. Add. 2. But the phrase in the Yakama Treaty is even more express as it includes the guaranty of "exclusive benefit." *Id.* The monetary exaction here, imposed on the transport of product on the Yakama reservation out of bond, denies the Yakama Appellant the exclusive use of reservation lands, and more clearly denies it exclusive benefit of reservation based activity.

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

Because the monetary exaction at issue in this case is assessed by statute and by regulation on the movement of goods, this Court's opinion in *Smiskin* is controlling precedent in this appeal.[26] As noted by the CCC in the Response:

[26] The Ninth Circuit's holding in *McKenna* has no application in this case because that was a "trade standing alone" case and did not involve travel for purposes of

> This Court recognized that the law at issue in *Smiskin* affected the right to transport goods to market. *Smiskin* did not depend on finding a "right to trade" in the Yakama Treaty, but only held that the right to *travel* did not depend on whether that travel was commercial or not.

Resp. Br. 29. Even if the Court declines to make a distinction between a tax and a fee, because the monetary exaction at issue here is imposed on travel, this holding in *Smiskin* is controlling in this case now on appeal.

The Response is similarly correct regarding the recent ruling by the Washington Supreme Court on this same issue in *Cougar Den, Inc. v. Washington State Dep't of Licensing*, 392 P.3d 1014, 1019 (Wash. 2017). The court in *Cougar Den* held that Article III of Yakama Treaty [Add. 2] exempted the Yakama corporation in that case from paying fuel taxes imposed on the transport of goods.

The law in the Ninth Circuit is clear: the Yakama Treaty prohibits the imposition of monetary and regulatory conditions on travel, even when those conditions are imposed by the federal government under federal law. *Smiskin*, 487 F.3d at 1263-64 ("There are three established exceptions, however, that preclude the application of an otherwise generally applicable federal law to Indian tribes. ... As we explained in *Baker*, a 'federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if ... the application

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trade. *See*, Opening Brief 69-71; *see also, Cougar Den*, 392 P.3d at 1018-19 (distinguishing *McKenna* because it did not involve a right to travel).

of the law to the tribe would abrogate rights guaranteed by Indian treaties'") (footnote and citation omitted).

## III. King Mountain's Ability to Support its Defenses and Counterclaims Was Materially Impeded by the District Court's Denial of Essential Discovery.

Despite CCC's *post hoc* claims to the contrary, this case was not filed as an administrative review, but as an action "for noncompliance with the Fair and Equitable Tobacco Reform Act of 2004, 7 U.S.C. §§ 518-519a." ECF No. 1 at 1-2, ER 391-92. The CCC did not even mention prior administrative proceedings or any appeal thereof, nor did it cite or refer to the Administrative Procedures Act in the jurisdiction and venue averments, or in any other section of its complaint. *Id.* at 1-6, ER 391-96.

King Mountain raised these deficiencies with the district court when it originally requested access to discovery and after the district court had confirmed that King Mountain would be entitled to discovery. ECF No. 25 at 4, ER 274; ECF No. 9 at 8, ER 74 (holding that 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."). Only after the district court promised King Mountain discovery did the CCC recast this matter as an "administrative review" under the Administrative Procedures Act, in what

turned out to be a successful attempt to limit King Mountain's access to discovery in support of its legal and factual claims. *See* ECF No. 25 at 4, ER 274 (summarizing the shift in CCC's jurisdictional theory of the case).

To support the district court's complete denial of discovery to King Mountain, the CCC cites *Hallett v. Morgan*, 296 F.3d 732 (9th Cir. 2002). But the parties in *Hallett* had access to discovery. The language cited by the CCC referred not to whether all discovery could be denied, but instead to a court's authority over disputes that arise as discovery is taking place. *Hallett* concerned a specific motion to compel production of documents that the district court concluded were not relevant following an *in camera* review by the court. Similarly, *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), *superseded by statute*, 42 U.S.C. § 2000cc-5(7)(A), as recognized in *Navajo Nation v. United States Forest Service*, 479 F.3d 1024 (9th Cir. 2007), concerned "a last-minute request for additional discovery and an evidentiary hearing on the issue of attorney's fees." *Goehring*, 94 F.3d at 1305.

These cases cannot be construed to justify a complete denial of all discovery – in particular where, as here, the district court also imposed a 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.

Even in proceedings that are actually brought under the Administrative Procedure Act, the Ninth Circuit recognizes that "there may be circumstances to justify expanding the record or permitting discovery." *Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982). For example, the district court may inquire outside the administrative record when necessary to explain the agency's action and to determine whether the agency has considered all relevant factors or has explained its course of conduct or grounds of decision. *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988). This case presented such circumstances.

Notably, the CCC conceded early in this suit that it "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 district court's remedy was to remand "to develop properly the administrative record." *Id.* The district court expressly held that "King Mountain may now obtain this additional information on remand before the agency." *Id.* at 21, n.3, ER 46. Yet on remand the CCC did not allow King Mountain to serve any requests for information. Instead King Mountain was left only to dispute the contents of the few papers produced by the CCC. KM-SAR-000002-03, Add. 111-12 ("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.").

King Mountain was promised discovery by the district court on several occasions including at the outset of the suit and prior to administrative remand. King Mountain relied on those promises, yet never was granted the right to serve a single interrogatory, request for production, or request for admission. Contrary to the CCC's responsive arguments, King Mountain has never sought additional discovery or discovery outside of that which the district court promised it would, at some point, allow. King Mountain has simply sought basic, *ab initio* discovery. The district court's refusal to allow any discovery, particularly in light of its repeated promises that discovery would be had at some point, was error.

Moreover, the briefing below and on appeal demonstrate a variety of factual disputes that warranted discovery, beyond the accuracy of the assessments. The parties' briefs are replete with factual disputes regarding whether, under the facts of his case, the FETRA fee is an unconstitutional taking. King Mountain has cited sources of Yakama Nation law confirming that money is treated as property, cited the impact of the FETRA fee on King Mountain's property interests including its interest in the Indian allotment on which it operates, and cited evidence to refute the CCC's argument that manufacturers benefited from FETRA. Critical to both

King Mountain's constitutional and Treaty-based arguments, CCC disputes that the FETRA fee is assessed on the transportation of cigarettes out of bond on the Yakama Reservation. Although the district court and King Mountain were originally in agreement as to the need for discovery of such issues, *see* ECF No. 9 at 8, ER 74, the district court ultimately yielded to the CCC's subsequent and inaccurate arguments that this was nothing more than an administrative review in which discovery would be inappropriate.

## CONCLUSION

The Court should reverse the district court and hold that the FETRA fee at issue in this case is unconstitutional, and is barred by the Yakama Treaty. In the alternative, the Court should reverse and remand this case so that the district court may enter an order based on complete factual findings entered after full development of a factual record, including by providing King Mountain its right to discovery.

August 17, 2017

Respectfully submitted,

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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 reply brief is proportionately spaced, has a typeface of 14 points or more and contains 6,994 words.

August 17, 2017

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## CERTIFICATE OF SERVICE

**When All Case Participants are Registered for the Appellate CM/ECF System**

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 August 17, 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.

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# ADDENDUM

## SUPPLEMENTAL ADDENDUM INDEX

Except for the following, all applicable statutes, etc.,
are contained in the Brief/Addendum for Defendant-Appellant.

(Pub. L. 108–357, title VI, § 624, Oct. 22, 2004, 118 Stat. 1528.)

REFERENCES IN TEXT

The Department of Agriculture Reorganization Act of 1994, referred to in subsec. (c), is title II of Pub. L. 103–354, Oct. 13, 1994, 108 Stat. 3209, as amended. Subtitle H of the Act is classified principally to subchapter VIII (§ 6991 et seq.) of chapter 98 of this title. For complete classification of this Act to the Code, see Tables.

This title, referred to in subsec. (d), means title VI of Pub. L. 108–357, which enacted this chapter, amended sections 609, 1282, 1301, 1303, 1314h, 1361, 1371, 1373, 1375, 1378, 1379, 1428, 1433c–1, and 1441 of this title and section 714c of Title 15, Commerce and Trade, repealed sections 511r, 515 to 515k, 625, 1311 to 1314, 1314–1, 1314b, 1314b–1, 1314b–2, 1314c to 1314j, 1315, 1316, 1445, 1445–1, and 1445–2 of this title, enacted provisions set out as notes under sections 515 and 518 of this title, and repealed provisions set out as a note under section 1314c of this title. For complete classification of title VI to the Code, see Short Title note set out under section 518 of this title and Tables.

### § 518d. Use of assessments as source of funds for payments

#### (a) Definitions

In this section:

**(1) Base period**

The term ''base period''[1] means the one-year period ending the June 30 before the beginning of a fiscal year.

**(2) Gross domestic volume**

The term ''gross domestic volume'' means the volume of tobacco products—

(A) removed (as defined by section 5702 of title 26); and

(B) not exempt from tax under chapter 52 of title 26 at the time of their removal under that chapter or the Harmonized Tariff Schedule of the United States.

**(3) Market share**

The term ''market share'' means the share of each manufacturer or importer of a class of tobacco product (expressed as a decimal to the fourth place) of the total volume of domestic sales of the class of tobacco product during the base period for a fiscal year for an assessment under this section.

#### (b) Quarterly assessments

**(1) Imposition of assessment**

The Secretary, acting through the Commodity Credit Corporation, shall impose quarterly assessments during each of fiscal years 2005 through 2014, calculated in accordance with this section, on each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during that fiscal year.

**(2) Amounts**

Beginning with the calendar quarter ending on December 31 of each of fiscal years 2005 through 2014, the assessment payments over each four-calendar quarter period shall be sufficient to cover—

(A) the contract payments made under sections 518a and 518b of this title during that period; and

(B) other expenditures from the Tobacco Trust Fund made during the base quarter periods corresponding to the four calendar quarters of that period.

**(3) Deposit**

Assessments collected under this section shall be deposited in the Tobacco Trust Fund.

#### (c) Assessments for classes of tobacco products

**(1) Initial allocation**

The percentage of the total amount required by subsection (b) to be assessed against, and paid by, the manufacturers and importers of each class of tobacco product in fiscal year 2005 shall be as follows:

(A) For cigarette manufacturers and importers, 96.331 percent.

(B) For cigar manufacturers and importers, 2.783 percent.

(C) For snuff manufacturers and importers, 0.539 percent.

(D) For roll-your-own tobacco manufacturers and importers, 0.171 percent.

(E) For chewing tobacco manufacturers and importers, 0.111 percent.

(F) For pipe tobacco manufacturers and importers, 0.066 percent.

**(2) Subsequent allocations**

For subsequent fiscal years, the Secretary shall periodically adjust the percentage of the total amount required under subsection (b) to be assessed against, and paid by, the manufacturers and importers of each class of tobacco product specified in paragraph (1) to reflect changes in the share of gross domestic volume held by that class of tobacco product.

**(3) Effect of insufficient amounts**

If the Secretary determines that the assessment imposed under subsection (b) will result in insufficient amounts to carry out this subchapter during a fiscal year, the Secretary shall assess such additional amounts as the Secretary determines to be necessary to carry out this subchapter during that fiscal year. The additional amount shall be allocated to manufacturers and importers of each class of tobacco product specified in paragraph (1) in the same manner and based on the same percentages applicable under paragraph (1) or (2) for that fiscal year.

#### (d) Notification and timing of assessments

**(1) Notification of assessments**

The Secretary shall provide each manufacturer or importer subject to an assessment under subsection (b) with written notice setting forth the amount to be assessed against the manufacturer or importer for each quarterly payment period. The notice for a quarterly period shall be provided not later than 30 days before the date payment is due under paragraph (3).

**(2) Content**

The notice shall include the following information with respect to the quarterly period used by the Secretary in calculating the amount:

(A) The total combined assessment for all manufacturers and importers of tobacco products.

[1] So in original.

(B) The total assessment with respect to the class of tobacco products manufactured or imported by the manufacturer or importer.

(C) Any adjustments to the percentage allocations among the classes of tobacco products made pursuant to paragraph (2) or (3) of subsection (c).

(D) The volume of gross sales of the applicable class of tobacco product treated as made by the manufacturer or importer for purposes of calculating the manufacturer's or importer's market share under subsection (f).

(E) The total volume of gross sales of the applicable class of tobacco product that the Secretary treated as made by all manufacturers and importers for purposes of calculating the manufacturer's or importer's market share under subsection (f).

(F) The manufacturer's or importer's market share of the applicable class of tobacco product, as determined by the Secretary under subsection (f).

(G) The market share, as determined by the Secretary under subsection (f), of each other manufacturer and importer, for each applicable class of tobacco product.

**(3) Timing of assessment payments**

**(A) Collection date**

Assessments shall be collected at the end of each calendar year quarter, except that the Secretary shall ensure that the final assessment due under this section is collected not later than September 30, 2014.

**(B) Base period quarter**

The assessment for a calendar year quarter shall correspond to the base period quarter that ended at the end of the preceding calendar year quarter.

**(e) Allocation of assessment within each class of tobacco product**

**(1) Pro rata basis**

The assessment for each class of tobacco product specified in subsection (c)(1) shall be allocated on a pro rata basis among manufacturers and importers based on each manufacturer's or importer's share of gross domestic volume.

**(2) Limitation**

No manufacturer or importer shall be required to pay an assessment that is based on a share that is in excess of the manufacturer's or importer's share of domestic volume.

**(f) Allocation of total assessments by market share**

The amount of the assessment for each class of tobacco product specified in subsection (c)(1) to be paid by each manufacturer or importer of that class of tobacco product shall be determined for each quarterly payment period by multiplying—

(1) the market share of the manufacturer or importer, as calculated with respect to that payment period, of the class of tobacco product; by

(2) the total amount of the assessment for that quarterly payment period under subsection (c), for the class of tobacco product.

**(g) Determination of volume of domestic sales**

**(1) In general**

The calculation of the volume of domestic sales of a class of tobacco product by a manufacturer or importer, and by all manufacturers and importers as a group, shall be made by the Secretary based on information provided by the manufacturers and importers pursuant to subsection (h), as well as any other relevant information provided to or obtained by the Secretary.

**(2) Gross domestic volume**

The volume of domestic sales shall be calculated based on gross domestic volume.

**(3) Measurement**

For purposes of the calculations under this subsection and the certifications under subsection (h) by the Secretary, the volumes of domestic sales shall be measured by—

(A) in the case of cigarettes and cigars, the number of cigarettes and cigars; and

(B) in the case of the other classes of tobacco products specified in subsection (c)(1), in terms of number of pounds, or fraction thereof, of those products.

**(h) Measurement of volume of domestic sales**

**(1) Submission of information**

Each manufacturer and importer of tobacco products shall submit to the Secretary a certified copy of each of the returns or forms described by paragraph (2) that are required to be filed with a Federal agency on the same date that those returns or forms are filed, or required to be filed, with the agency.

**(2) Returns and forms**

The returns and forms described by this paragraph are those returns and forms that relate to—

(A) the removal of tobacco products into domestic commerce (as defined by section 5702 of title 26); and

(B) the payment of the taxes imposed under charter[2] 52 of title 26, including AFT Form 5000.24 and United States Customs Form 7501 under currently applicable regulations.

**(3) Effect of failure to provide required information**

Any person that knowingly fails to provide information required under this subsection or that provides false information under this subsection shall be subject to the penalties described in section 1003 of title 18. The Secretary may also assess against the person a civil penalty in an amount not to exceed two percent of the value of the kind of tobacco products manufactured or imported by the person during the fiscal year in which the violation occurred, as determined by the Secretary.

**(i) Challenge to assessment**

**(1) Appeal to Secretary**

A manufacturer or importer subject to this section may contest an assessment imposed on

[2] So in original. Probably should be ''chapter''.

the manufacturer or importer under this section by notifying the Secretary, not later than 30 business days after receiving the assessment notification required by subsection (d), that the manufacturer or importer intends to contest the assessment.

**(2) Information**

Not later than 180 days after October 22, 2004, the Secretary shall establish by regulation a procedure under which a manufacturer or importer contesting an assessment under this subsection may present information to the Secretary to demonstrate that the assessment applicable to the manufacturer or importer is incorrect. In challenging the assessment, the manufacturer or importer may use any information that is available, including third party data on industry or individual company sales volumes.

**(3) Revision**

If a manufacturer or importer establishes that the initial determination of the amount of an assessment is incorrect, the Secretary shall revise the amount of the assessment so that the manufacturer or importer is required to pay only the amount correctly determined.

**(4) Time for review**

Not later than 30 days after receiving notice from a manufacturer or importer under paragraph (1), the Secretary shall—

(A) decide whether the information provided to the Secretary under paragraph (2), and any other information that the Secretary determines is appropriate, is sufficient to establish that the original assessment was incorrect; and

(B) make any revisions necessary to ensure that each manufacturer and importer pays only its correct pro rata share of total gross domestic volume from all sources.

**(5) Immediate payment of undisputed amounts**

The regulations promulgated by the Secretary under paragraph (2) shall provide for the immediate payment by a manufacturer or importer challenging an assessment of that portion of the assessment that is not in dispute. The manufacturer and importer may place into escrow, in accordance with such regulations, only the portion of the assessment being challenged in good faith pending final determination of the claim.

**(j) Judicial review**

**(1) In general**

Any manufacturer or importer aggrieved by a determination of the Secretary with respect to the amount of any assessment may seek review of the determination in the United States District Court for the District of Columbia or for the district in which the manufacturer or importer resides or has its principal place of business at any time following exhaustion of the administrative remedies available under subsection (i).

**(2) Time limits**

Administrative remedies shall be deemed exhausted if no decision by the Secretary is made within the time limits established under subsection (i)(4).

**(3) Excessive assessments**

The court shall restrain collection of the excessive portion of any assessment or order a refund of excessive assessments already paid, along with interest calculated at the rate prescribed in section 3717 of title 31, if it finds that the Secretary's determination is not supported by a preponderance of the information available to the Secretary.

**(k) Termination date**

The authority provided by this section to impose assessments terminates on September 30, 2014.

(Pub. L. 108–357, title VI, § 625, Oct. 22, 2004, 118 Stat. 1529.)

REFERENCES IN TEXT

The Harmonized Tariff Schedule of the United States, referred to in subsec. (a)(2)(B), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

### § 518e. Tobacco Trust Fund

**(a) Establishment**

There is established in the Commodity Credit Corporation a revolving trust fund, to be known as the ''Tobacco Trust Fund'', which shall be used in carrying out this subchapter. The Tobacco Trust Fund shall consist of the following:

(1) Assessments collected under section 518d of this title.

(2) Such amounts as are necessary from the Commodity Credit Corporation.

(3) Any interest earned on investment of amounts in the Tobacco Trust Fund under subsection (c).

**(b) Expenditures**

**(1) Authorized expenditures**

Subject to paragraph (2), and notwithstanding any other provision of law, the Secretary shall use amounts in the Tobacco Trust Fund, in such amounts as the Secretary determines are necessary—

(A) to make payments under sections 518a and 518b of this title;

(B) to provide reimbursement under section 519(c) of this title;

(C) to reimburse the Commodity Credit Corporation for costs incurred by the Commodity Credit Corporation under paragraph (2); and

(D) to make payments to financial institutions to satisfy contractual obligations under section 518a or 518b of this title.

**(2) Expenditures by Commodity Credit Corporation**

Notwithstanding any other provision of law, the Secretary shall use the funds, facilities, and authorities of the Commodity Credit Corporation to make payments described in paragraph (1). Not later than January 1, 2015, the Secretary shall use amounts in the Tobacco Trust Fund to fully reimburse, with interest, the Commodity Credit Corporation for all funds of the Commodity Credit Corporation expended under the authority of this paragraph. Administrative costs incurred by the

**(i) Export warehouse proprietor**

''Export warehouse proprietor'' means any person who operates an export warehouse.

**(j) Removal or remove**

''Removal'' or ''remove'' means the removal of tobacco products or cigarette papers or tubes from the factory or from internal revenue bond under section 5704, as the Secretary shall by regulation prescribe, or release from customs custody, and shall also include the smuggling or other unlawful importation of such articles into the United States.

**(k) Importer**

''Importer'' means any person in the United States to whom nontaxpaid tobacco products or cigarette papers or tubes manufactured in a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States are shipped or consigned; any person who removes cigars or cigarettes for sale or consumption in the United States from a customs bonded manufacturing warehouse; and any person who smuggles or otherwise unlawfully brings tobacco products or cigarette papers or tubes into the United States.

***(l)* Determination of price on cigars**

In determining price for purposes of section 5701(a)(2)—

(1) there shall be included any charge incident to placing the article in condition ready for use,

(2) there shall be excluded—

(A) the amount of the tax imposed by this chapter or section 7652, and

(B) if stated as a separate charge, the amount of any retail sales tax imposed by any State or political subdivision thereof or the District of Columbia, whether the liability for such tax is imposed on the vendor or vendee, and

(3) rules similar to the rules of section 4216(b) shall apply.

**(m) Definitions relating to smokeless tobacco**

**(1) Smokeless tobacco**

The term ''smokeless tobacco'' means any snuff or chewing tobacco.

**(2) Snuff**

The term ''snuff'' means any finely cut, ground, or powdered tobacco that is not intended to be smoked.

**(3) Chewing tobacco**

The term ''chewing tobacco'' means any leaf tobacco that is not intended to be smoked.

**(n) Pipe tobacco**

The term ''pipe tobacco'' means any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco to be smoked in a pipe.

***(o)* Roll-your-own tobacco**

The term ''roll-your-own tobacco'' means any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes.

(Aug. 16, 1954, ch. 736, 68A Stat. 706; Pub. L. 85–859, title II, § 202, Sept. 2, 1958, 72 Stat. 1415; Pub. L. 89–44, title V, § 502(b)(3), title VIII, § 808(a), June 21, 1965, 79 Stat. 151, 164; Pub. L. 94–455, title XIX, § 1906(b)(13)(A), title XXI, § 2128(b), Oct. 4, 1976, 90 Stat. 1834, 1921; Pub. L. 99–272, title XIII, § 13202(b)(2)–(4), Apr. 7, 1986, 100 Stat. 312; Pub. L. 100–647, title V, § 5061(b)–(c)(2), Nov. 10, 1988, 102 Stat. 3679; Pub. L. 101–508, title XI, § 11202(g), Nov. 5, 1990, 104 Stat. 1388–419; Pub. L. 105–33, title IX, § 9302(g)(2)–(3)(B), (h)(4), Aug. 5, 1997, 111 Stat. 672, 674; Pub. L. 106–554, § 1(a)(7) [title III, § 315(a)(2)], Dec. 21, 2000, 114 Stat. 2763, 2763A–644.)

AMENDMENTS

2000—Subsec. (f). Pub. L. 106–554, § 1(a)(7) [title III, § 315(a)(2)(B)], redesignated subsec. (g) as (f) and struck out former subsec. (f), which defined ''cigarette papers''.

Subsec. (g). Pub. L. 106–554, § 1(a)(7) [title III, § 315(a)(2)(B)], redesignated subsec. (h) as (g). Former subsec. (g) redesignated (f).

Subsec. (h). Pub. L. 106–554, § 1(a)(7) [title III, § 315(a)(2)(B)], redesignated subsec. (i) as (h). Former subsec. (h) redesignated (g).

Pub. L. 106–554, § 1(a)(7) [title III, § 315(a)(2)(A)], amended heading and text of subsec. (h) generally. Prior to amendment, text read as follows: '' 'Manufacturer of cigarette papers and tubes' means any person who makes up cigarette paper into books or sets containing more than 25 papers each, or into tubes, except for his own personal use or consumption.''

Subsecs. (i) to (p). Pub. L. 106–554, § 1(a)(7) [title III, § 315(a)(2)(B)], redesignated subsecs. (i) to (p) as (h) to (*o*), respectively.

1997—Subsec. (c). Pub. L. 105–33, § 9302(g)(3)(A), substituted ''pipe tobacco, and roll-your-own tobacco'' for ''and pipe tobacco''.

Subsec. (d). Pub. L. 105–33, § 9302(g)(3)(B)(i), substituted ''pipe tobacco, or roll-your-own tobacco'' for ''or pipe tobacco'' in introductory provisions.

Subsec. (d)(1). Pub. L. 105–33, § 9302(g)(3)(B)(ii), added par. (1) and struck out former par. (1) which read as follows: ''a person who produces cigars, cigarettes, smokeless tobacco, or pipe tobacco solely for his own personal consumption or use; or''.

Subsec. (k). Pub. L. 105–33, § 9302(h)(4), inserted ''under section 5704'' after ''internal revenue bond''.

Subsec. (p). Pub. L. 105–33, § 9302(g)(2), added subsec. (p).

1990—Subsec. (m). Pub. L. 101–508 substituted heading for one which read: ''Wholesale price'' and amended text generally. Prior to amendment, text read as follows: '' 'Wholesale price' means the manufacturer's, or importer's, suggested delivered price at which the cigars are to be sold to retailers, inclusive of the tax imposed by this chapter or section 7652, but exclusive of any State or local taxes imposed on cigars as a commodity, and before any trade, cash, or other discounts, or any promotion, advertising, display, or similar allowances. Where the manufacturer's or importer's suggested delivered price to retailers is not adequately supported by bona fide arm's length sales, or where the manufacturer or importer has no suggested delivered price to retailers, the wholesale price shall be the price for which cigars of comparable retail price are sold to retailers in the ordinary course of trade as determined by the Secretary.''

1988—Subsec. (c). Pub. L. 100–647, § 5061(c)(1), inserted reference to pipe tobacco.

Subsec. (d). Pub. L. 100–647, § 5061(c)(2), inserted reference to pipe tobacco in introductory provisions and in par. (1).

Subsec. (*o*). Pub. L. 100–647, § 5061(b), added subsec. (*o*).

1986—Subsec. (c). Pub. L. 99–272, § 13202(b)(2), inserted reference to smokeless tobacco.

Subsec. (d). Pub. L. 99–272, § 13202(b)(3), inserted references to smokeless tobacco.

Subsec. (n). Pub. L. 99–272, § 13202(b)(4), added subsec. (n).

contact for further information; an e-mail address and postal address at which they wish to receive notifications required by the Act to be made to them by CCC; and

(ii) On a monthly basis for each class of tobacco, the total amount of tobacco products, summarized by employer identification number or such other method as may be prescribed by CCC, that are required to be reported to the United States Department of the Treasury or to the Department of Homeland Security in each month beginning October 1, 2004, and ending September 30, 2014.

(2) The information required to be submitted to CCC under paragraph (b)(1) of this section must be submitted by:

(i) With respect to fiscal year 2005 activities occurring prior to February 10, 2005, by February 25, 2005; and

(ii) With respect to all other activities, on the same date the information was required to be submitted to the United States Department of the Treasury or to the Department of Homeland Security.

### § 1463.7 Division of class assessment to individual entities.

(a) In order to determine the assessment owed by an entity, that portion of the national assessment assigned to each class of tobacco will be further divided at the entity level. The amount of the assessment for each class of tobacco to be paid by each domestic manufacturer and importer of tobacco products will be determined by multiplying:

(1) With respect to each class of tobacco, the adjusted market share of such manufacturer or importer; by

(2) The total amount of the assessment for that class of tobacco for the calendar year quarter.

(b) For purposes of determining the volume of domestic sales of each class of tobacco products and for each entity, such sales shall be based upon the reports filed by domestic manufacturers and importers of tobacco with the Department of Treasury and the Department of Homeland Security and shall correspond to the quantity of the tobacco product that is removed into domestic commerce by each such entity:

(1) For cigarettes and cigars, on the number of cigarettes and cigars reported on such reports;

(2) For all other classes of tobacco, on the number of pounds of those products.

(c) In determining the adjusted market share of each manufacturer or importer of a class of tobacco products, except for cigars, CCC will determine to the fourth decimal place an entity's share of excise taxes paid of that class of tobacco product during the immediately prior calendar year quarter. With respect to cigars, CCC will determine the adjusted market share for each manufacturer or importer of a class of tobacco products based on the number of such products removed into domestic commerce.

(d) The amount of a quarterly assessment owed by a domestic manufacturer or importer of tobacco products that must be remitted to CCC by the end of a calendar year quarter is based upon the application of the manufacturer's or importer's adjusted market share to the amount of the national assessment that has been allocated to one of the six specified tobacco product sectors under § 1463.5. As provided in § 1463.3, this adjusted market share is determined by the actions of such manufacturer or importer in a prior calendar year quarter. Accordingly, this amount must be remitted to CCC whether or not the manufacturer or importer is engaged in the removal of tobacco or tobacco products into commerce in the calendar year quarter in which it receives notification of the amount of assessment owed to CCC.

[70 FR 7011, Feb. 10, 2005, as amended at 70 FR 17158, Apr. 4, 2005]

### § 1463.8 Notification of assessments.

(a) Once CCC has determined a national assessment, CCC will collect that amount on a quarterly basis from all domestic manufacturers and importers of tobacco products subject to § 1463.5.

(b) 30 calendar days prior to the end of each calendar year quarter domestic manufacturers and importers of tobacco products will receive notification of: