No. 16-35956

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KING MOUNTAIN TOBACCO CO., INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the United States' suit under 28 U.S.C. §§ 1331, 1345 and 15 U.S.C. § 714b(c). ER 392 The district court entered judgment in favor of the United States on November 7, 2016. ER 1. Defendant timely filed a notice of appeal on November 16, 2016. ER 76. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The Fair and Equitable Tobacco Reform Act of 2004 (FETRA) imposed quarterly assessments on manufacturers and domestic importers of tobacco for a ten-year period. Defendant King Mountain Tobacco Company failed to pay many of those assessments, forcing the United States to bring suit to recover the amounts owed. The issues presented are the following:

1. Whether substantial evidence supports the amount of FETRA assessments King Mountain was required to pay.

2. Whether the Yakama Treaty of 1855 exempts King Mountain from paying FETRA assessments.

3. Whether imposing FETRA assessments on King Mountain violates the Fifth Amendment.

STATEMENT OF THE CASE

A. Statutory Background

1. Prior to 2004, tobacco producers were subject to a comprehensive system of quotas and price controls. Under the Agricultural Adjustment Act of 1938, the U.S. Department of Agriculture (USDA) assigned quotas and allotments limiting the amount of tobacco producers could produce and market. *See generally* 7 U.S.C. §§ 1311 *et seq.* (repealed 2004). Under the Agricultural Act of 1949, the government provided, by tobacco type, for the support of regulated tobacco at a set average minimum price when producers were unable to sell their product at the same or higher rates. *See* 7 U.S.C. §§ 1445, 1445-1, 1445-2 (repealed 2004). The price support system was administered by the USDA Farm Service Agency on behalf of the Commodity Credit Corporation, a wholly owned government corporation.

2. In 2004, Congress repealed the program of tobacco quotas and price supports. *See* Fair and Equitable Tobacco Reform Act of 2004 (FETRA), Pub. L. No. 108-357 §§ 611-612, 118 Stat. 1521, 1522-24 (2004), 7 U.S.C. §§ 518-519. It did so to ensure the long-term viability of the U.S. tobacco industry and to protect the economic stability of American tobacco farmers and their rural communities. *See, e.g.,* 150 Cong. Rec. H8717 (daily ed. Oct. 7, 2004). As a result, tobacco producers now operate in a largely deregulated environment.

To ease the tobacco producers' transition from a highly regulated market to the free market, FETRA directed the Secretary of Agriculture to make annual payments, over a ten-year period, to owners of farms that held an established tobacco marketing quota under the 1938 Act, 7 U.S.C. § 518a, and to other persons who had been engaged in the production of tobacco, *id.* § 518b. These payments were intended to "constitute full and fair consideration for the termination of [the] tobacco marketing quotas and related price support." *Id.* §§ 518a(a), 518b(a). The Corporation was reimbursed for these payments by the Tobacco Trust Fund, which was financed by quarterly assessments (known as FETRA assessments) on domestic manufacturers and importers of tobacco products that sold tobacco in the United States during fiscal years 2005 to 2014. 7 U.S.C. § 518d(b).

To compute these quarterly assessments, the Commodity Credit Corporation first estimated the transition program costs for a particular year. 7 U.S.C. § 518d(b)(2); 7 C.F.R. § 1463.4. It then allocated those costs among six classes of tobacco products (cigarettes, cigars, snuff, roll-your-own tobacco, chewing tobacco, and pipe tobacco) according to percentages set by FETRA and its implementing regulations. 7 U.S.C. § 518d(c); 7 C.F.R. § 1463.5. The Commodity Credit Corporation then apportioned the amount each class owed among the manufacturers and importers of that class of tobacco products according to their respective market shares (as demonstrated by

reports submitted by the manufacturer or importer) for the quarter. 7 U.S.C. § 518d(f); 7 C.F.R. § 1463.7.

At least thirty days before payment was due, the Commodity Credit Corporation was required to notify each manufacturer and importer of the amount of its quarterly assessment. 7 U.S.C. § 518d(d)(1), (2); 7 C.F.R. § 1463.8. Any amounts not timely paid were assessed interest. 7 C.F.R. § 1463.9(d). Manufacturers and importers could administratively contest an assessment within thirty business days of receiving notice of the assessment. 7 U.S.C. § 518d(i). To contest an assessment, a manufacturer or importer was required to submit a written statement setting forth the basis of the dispute to the Executive Vice President of the Commodity Credit Corporation. 7 C.F.R. § 1463.11. The Executive Vice President would then assign a person to act as the hearing officer on behalf of the Corporation and develop an administrative record. *Id.* § 1463.11(b). The agency could revise an assessment if the manufacturer or importer successfully established that the "initial determination of the amount of an assessment [was] incorrect." 7 U.S.C. § 518d(i)(3). FETRA provided for judicial review following the exhaustion of these administrative remedies. *Id.* § 518d(j).

B. Facts and Prior Proceedings

1. King Mountain is a corporation organized under the laws of the Yakama Nation and operates its business and manufactures tobacco products on trust land held by a member of the Yakama Nation. ER 379-80.

As a manufacturer of tobacco products, King Mountain was subject to FETRA assessments, and the Commodity Credit Corporation sent King Mountain quarterly notices regarding the amount of its FETRA assessments. ER 29. On numerous occasions, King Mountain failed to pay the amount due in full or in part, and King Mountain made no payments after September 2010. ER 30. The government sent King Mountain thirty demand letters, and King Mountain's balance due rose to approximately $6.3 million. *Id.*

2. The United States filed suit to collect the balance due on King Mountain's FETRA assessments. ER 391. King Mountain counterclaimed, seeking a refund of the partial FETRA payments it had made and a declaration that imposing FETRA assessments on King Mountain violated the 1855 Yakama Treaty. ER 376, ER 378. King Mountain also filed a motion for summary judgment, arguing that FETRA assessments were unconstitutional. ER 123.

On July 27, 2015, the district court granted the government's motion to dismiss with respect to King Mountain's counterclaim based on the 1855 treaty between the

Yakama Tribe and the federal government, which grants the Yakama Tribe the exclusive use and benefit of its trust land. The court explained that under this Court's decision in *Ramsey v. United States*, 302 F.3d 1074, 1079 (9th Cir. 2002), "a statute or treaty must contain express exemptive language in order to exempt a Native American organization from paying a tax or a fee," ER 63, and that the Yakama Treaty contains no such express language.

The court indicated that it would address King Mountain's constitutional claims in a later order. *See* ER 64. With respect to King Mountain's challenge to the amount owed, the district court concluded, and the United States agreed, that the suit should be remanded back to the agency with respect to quarterly assessment amounts for which King Mountain had exhausted its administrative remedies. ER 42-43.

On September 17, 2015, the district court held that the FETRA assessments imposed on King Mountain were constitutional, and denied King Mountain's motion for summary judgment. ER 24-ER 25. Emphasizing that "[i]t is beyond dispute that taxes and user fees . . . are not takings," ER 15 (quoting *Koontz v. St. Johns River Water Mgt. Dist.,* 133 S. Ct. 2586 , 2600-01 (2013)), the court explained that the "FETRA assessments were not imposed against any specific, identifiable property, and therefore do not constitute either a classic or regulatory per se taking." ER 16.

The district court likewise rejected King Mountain's contention that the FETRA transition program violated principles of due process. The court explained that "[l]aws that adjust 'the burdens and benefits of economic life' are presumed to be constitutional." ER 20 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). Relying on the Eleventh Circuit's analysis of FETRA in *Swisher International, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008), the district court concluded that FETRA was a rational response to economic problems in the tobacco industry and the need to transition gradually to a free market. ER 21. The district court also rejected King Mountain's equal-protection challenge to the FETRA transition program. As the court explained, King Mountain was not subject to unequal treatment: FETRA assessments were based on market share, and King Mountain was assessed an amount proportional to its share. ER 23.

3. On remand from the district court, the agency held a hearing on the FETRA assessments as to which King Mountain had exhausted its administrative remedies. King Mountain made no specific objections to the amount of the assessments and did not otherwise challenge the accuracy of the agency's accounting of the FETRA assessments in question, and the agency affirmed the amount due. ER 5-ER 6.

4. Following the agency's decision, the case returned to the district court. The court granted the government's motion for summary judgment, concluding that the

administrative record supported the determinations concerning King Mountain's unpaid FETRA assessments. ER 5. The district court therefore entered judgment in favor of the United States in the amount of $6,425,683.23. ER 6.

SUMMARY OF ARGUMENT

In 2004, Congress enacted the Fair and Equitable Tobacco Reform Act (FETRA), which moved the tobacco industry from a decades-long system of price supports and quotas to the free market. To ease producers' transition from a highly regulated market to a free market, Congress put in place a ten-year transition program funded by quarterly assessments imposed on then-current domestic manufacturers and importers of tobacco products based on quarterly market share.

King Mountain was a manufacturer of tobacco products during the fiscal years in which the transition program was operating, and was therefore subject to FETRA assessments. King Mountain paid only a fraction of the amount due, forcing the United States to bring this suit to recover the unpaid amounts, which at the time of the district court's judgment totaled approximately $6.4 million.

As the district court recognized, the administrative record submitted in this case fully supports the monetary judgment entered by the district court. King Mountain does not argue to the contrary, but rather claims that it was wrongfully denied discovery. But this is an administrative record case, and discovery is therefore not

appropriate. In any event, King Mountain has failed to articulate a basis on which this Court could conclude that the district court abused its discretion in denying discovery.

King Mountain's argument that it is exempt from FETRA assessments under the Yakama Treaty of 1855 similarly fails. As the district court correctly concluded, the Yakama Treaty contains no express language evidencing an intent to exempt the Yakama Tribe from paying assessments on products it manufactures. 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.

King Mountain's attack on the constitutionality of the ten-year transition program FETRA set in place is without legal basis. As the district court explained, the congressional purpose underlying the statute is wholly legitimate, as are the means used to achieve its goals. Manufacturers of tobacco products were particularly likely to benefit from the abolition of market controls and the expected drop in tobacco prices. It was rational for Congress to fund the transition program through assessments on then-current manufacturers of tobacco products. King Mountain similarly errs in urging that FETRA was retroactive: payments were based on current market sales, not on past conduct. FETRA plainly does not violate either principles of due process or equal protection.

Nor does it assist King Mountain to recast its claim as one proceeding under the Takings Clause. As the Supreme Court and courts of appeals have repeatedly stated, mere obligation to pay money does not give rise to a claim under the Takings Clause, a principle applied by the Eleventh Circuit in *Swisher* in holding that FETRA was not subject to a takings analysis.

STANDARD OF REVIEW

The grant of a motion to dismiss is reviewed de novo. *Brewster v. Sun Trust Mortg., Inc.*, 742 F.3d 876, 877 (9th Cir. 2014). This court also reviews de novo the grant of summary judgment. *Jesinger v. Nevada Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir. 1994). A ruling denying discovery is reviewed for abuse of discretion. *Hallett v. Morgan,* 296 F.3d 732, 751 (9th Cir. 2002). "Broad discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Goehring v. Brophy,* 94 F.3d 1294, 1305 (9th Cir. 1996).

ARGUMENT

I. THE ADMINISTRATIVE RECORD DEMONSTRATES THE ACCURACY OF THE FETRA ASSESSMENTS IMPOSED.

The district court correctly held that the administrative record submitted by the agency demonstrates the accuracy of the agency's determinations regarding King

Mountain's obligations under FETRA. ER 5. The record contains the quarterly assessment invoices sent by the Commodity Credit Corporation to King Mountain, along with the payment history for those assessments. *See, e.g.,* SER 1-4. The quarterly assessment invoices provide information regarding the market share of each type of tobacco product and King Mountain's market share for both its cigarettes and its "roll your own" products. *Id.* The record also contains all thirty demand letters sent to King Mountain by the Commodity Credit Corporation. Those letters demonstrate a balance of increasing debt, up to the $6.3 million due as of November 2014. *See, e.g.,* SER 5.

When the district court remanded this case back to the agency, the agency provided King Mountain with all of the documents in the administrative record. The agency then conducted a hearing, as the district court had directed. At that telephonic hearing, King Mountain's counsel represented that "he was satisfied with the accounting of assessments provided by [the USDA] and was not further challenging the accuracy of the FETRA assessments." SER 7.

Throughout this litigation, King Mountain's argument has not been that the FETRA assessments were inaccurate, but rather that King Mountain should not be required to pay *any* FETRA assessments. Further, in its appeal brief, King Mountain does not argue that the amounts USDA assessed under FETRA are incorrect, or even

suggest an avenue by which those amounts might be found to be incorrect. Instead, King Mountain argues that it was wrongfully denied discovery. KM Br. 59-61.

Although King Mountain's brief speaks in general terms about the benefits of discovery, it never explains how discovery could have assisted it in this case or why the district court's decision to deny discovery was an abuse of discretion. *See Hallett v. Morgan,* 296 F.3d 732, 751 (9th Cir. 2002). As this Court has explained, "[b]road discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Goehring v. Brophy,* 94 F.3d 1294, 1305 (9th Cir. 1996). King Mountain has demonstrated no prejudice resulting from the district court's discovery ruling, which is unsurprising given the clear documentation contained in the administrative record demonstrating the accuracy of the FETRA assessments.

More fundamentally, as the government explained in district court, discovery is not appropriate in a case of this kind, in which review is limited to the administrative record. *See Friends of the Earth v. Hintz,* 800 F.2d 822, 828 (9th Cir. 1986) ("With a few exceptions . . . judicial review of agency action is limited to a review of the administrative record."); *see also* Gov't Reply, Dkt No. 40, at 4-5 n.1 (explaining

consistent government position that review is limited to the administrative record).[1] Although the case appeared before the district court in the somewhat unusual posture of a suit brought by the United States to collect administrative assessments (because of King Mountain's failure to pay most of the assessments), the lawfulness of the amount assessed is measured against the evidence in the administrative record, just as it would have been if the case had arisen from King Mountain's administrative objections to the quarterly FETRA assessments. The administrative record in this case contains all the information necessary to calculate the assessment amounts. If it did not, the appropriate course would have been to remand to the agency, not to allow discovery. *See Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."). The district court properly followed that course in remanding to the agency in its order of July 27, 2015. ER 26. King Mountain was free to make objections to the agency's calculations at that time. It chose not do so, *see* SER 7**,** and it cannot now complain that it is entitled to discovery.

[1] For the reasons explained *infra* pp. 18-20, the district court was equally correct that no discovery was necessary regarding King Mountain's claim that it was exempt from FETRA assessments under the Yakama Treaty. The claim is resolved by considering the language of the treaty, not by examining extrinsic evidence of the parties' intent.

II. THE 1855 YAKAMA TREATY DOES NOT EXEMPT KING MOUNTAIN FROM FETRA ASSESSMENTS.

The district court correctly rejected King Mountain's contention that the Yakama Treaty of 1855 exempts the company from paying its FETRA obligations. Neither Article of the Treaty relied upon by King Mountain contains the "express exemptive language" necessary to demonstrate an intent to exempt the Yakama Tribe from paying federal assessments on manufactured products. *Ramsey v. United States*, 302 F.3d 1074, 1078 (9th Cir. 2002).

A. "Indians and their tribes are equally subject to statutes of general applicability, just as any other United States citizen." *Solis v. Matheson,* 563 F.3d 425, 430 (9th Cir. 2009) (holding overtime provisions of the Fair Labor Standards Act apply to Native American-owned retail business located on trust land). As this Court explained in its decision in *Ramsey v. United States*, also involving the Yakama Treaty, when the question is whether a federal law applies to an Indian tribe, the answer "depends on whether express exemptive language exists within the text of the statute or treaty." 302 F.3d at 1078.

Although ambiguous language is interpreted in favor of an Indian tribe, that canon of construction is only applicable where relevant express exemptive language "is first found in the text of the statute or treaty." *Ramsey*, 302 F.3d at 1079. Only where such express language is found, does the court "consider whether it could be

'reasonably construed' to support the claimed exemption." *Id.* (quoting *Hoptowit v. Comm'r of Internal Revenue*, 709 F.2d 564, 566 (9th Cir. 1983)). The treaty need contain no particular set of words to exempt an Indian tribe from federal law, but must "provide evidence of the federal government's intent to exempt Indians" from the challenged law, *Ramsey*, 302 F.3d at 1078, and the intent to exempt "must be clearly expressed." *Id.* at 565.

B. As the district court correctly held, there is no express language in the Yakama Treaty of 1855 exempting the Yakama Tribe from federal assessments on manufactured products. ER 61. Although King Mountain invokes language from both Article II and Article III of the Treaty, neither provides any basis on which to conclude that the Treaty exempts King Mountain from paying the FETRA assessments at issue here.

1. King Mountain first relies on Article II of the Yakama Treaty, which provides that Yakama land shall be "for the exclusive use and benefit" of the Tribe. KM Br. 51-52 (emphasis omitted); Treaty with the Yakamas, art. II, 12 Stat. 951, 952 (1855). As this Court has observed, "Article II defines the geographic boundaries of the Yakama reservation, and reserves it for Yakama use and benefit, while prohibiting non-Indians from living on the reserved land." *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 996 (9th Cir. 2014).

King Mountain's reliance on Article II of the Treaty is misplaced. The imposition of taxes and fees on products manufactured by a company operating on trust land does not implicate the Yakama Tribe's exclusive use of its land or its ability to exclude outsiders. There is no dispute that Yakama land is for the "exclusive" benefit of the Tribe, as King Mountain emphasizes. KM Br. 52-53. But this says nothing about whether a company operating on trust land is exempt from taxes and fees. The assessments imposed under FETRA had no effect on the Yakama Tribe's ability to use the land, nor did they require the Yakama Tribe to admit others to the land. Imposing FETRA assessments on King Mountain as a manufacturer of cigarettes therefore does not conflict with the right granted in Article II of the Yakama Treaty.

King Mountain's reliance on *Squire v. Capoeman*, 351 U.S. 1, 6 (1956), a case concerning the General Allotment Act, fails to advance its claim. KM Br. 52. In holding that the federal government could not directly tax the sale of lumber on trust land, the Supreme Court relied on language in the General Allotment Act promising that Trust land would be "free of all charge or incumbrance whatsoever," *Capoeman*, 351 U.S. at 6, and that once transferred in fee simple "all restrictions as to sale, incumbrance, or taxation of said land" would be lifted. *Id.* at 7. The Supreme Court held that direct federal taxation of lumber grown exclusively on reservation land amounted to an incumbrance on the land.

That holding has no bearing here. As an initial matter, the Supreme Court's holding in *Capoeman* was not based on treaty language concerning "exclusive use of the land," but rather on the language of the General Allotment Act. King Mountain has not made an argument in this case relying on the General Allotment Act (and King Mountain is a company, not an allottee).

In any event, as this Court has recognized, *Capoeman* applies "where the allottee has exploited or reduced the value of the land by mining, logging, agricultural or similar activity," *Dillon v. United States,* 792 F.2d 849, 855 (9th Cir. 1986); that is, where taxation is directed at "the trust and income derived directly therefrom." *Capoeman*, 351 U.S. at 9. The Supreme Court expressly stated in *Capoeman* that income not derived directly from trust land (for example, reinvestment income) was not exempt from taxation. *Id.* Following the distinction set forth in *Capoeman*, this Court has recognized that income derived from stores located on trust land is not exempt from taxation, because the income was not "generated principally from the use of reservation land and resources." *Dillon,* 792 F.2d at 856.

Thus, as the government has previously explained, if Article II of the Yakama Treaty gives rise to any exemption from tax or fees, such an exemption is "limited to income produced directly by reservation land." *See Hoptowit*, 709 F.2d at 664-66 (agreeing with federal government that Article II of the Yakama Treaty did not exempt

Tribal Council Members from paying income tax). Thus, even if Article II imposed a limit on taxes or fees, it would do so only with respect to income derived directly from the land.[2] But King Mountain does not complain about an assessment imposed directly on reservation land. Instead, King Mountain generates income from manufacturing, packaging, and selling tobacco products, including cigarettes and roll-your-own products; it does not generate income directly from the land. *See* ER 55 ("FETRA assessments were calculated based on the quantity of manufactured cigarettes and roll your own tobacco [products] that King Mountain placed in the market . . . the assessments were not imposed on a product derived directly from the land, but on a manufactured product twice or thrice removed from the land."). Indeed, King Mountain has never contended that the tobacco products it manufactured from 2004 to 2014 used tobacco grown exclusively on trust land. *See generally* ER 379-ER 381 (answer to compl.).

[2] The issue of whether King Mountain must pay excise taxes on the cigarettes it manufactures is currently pending before this Court in a suit involving the United States' attempts to collect unpaid federal excise taxes. *See* Nos. 14-36055, 16-35607; *see also King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d. 1061, 1062-63 (E.D. Wash. 2014), vacated on ground that district court lacked jurisdiction, *Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau*, 843 F.3d 810 (9th Cir. 2016).

Similarly unpersuasive is King Mountain's contention that the district court applied the wrong standard in evaluating whether the Treaty exempted King Mountain from FETRA assessments. KM Br. 54. King Mountain urges that the proper standard is the standard this Court has applied in the context of state laws: resolving ambiguous language in favor of the Tribe before determining whether "express exemptive language" is present in the Treaty. *McKenna*, 768 F.3d at 995. As the district court explained, a more searching standard for state laws is appropriate because "the federal government has greater power than the states to deal with Indian tribes." ER 49.

But even assuming King Mountain were correct, the distinction between the two standards does not matter in this case. As this Court explained in *McKenna*, even when this Court applies the more lenient state standard, "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *McKenna*, 768 F.3d at 995 (alterations in original) (quoting *South Carolina v. Catawba Indian Tribe, Inc.,* 476 U.S. 498, 506 (1986)). As explained, there is no ambiguity in the language of the Yakama Treaty; it therefore does not matter whether the Court applies the standard of review governing federal laws (which by its terms applies here), as articulated in *Ramsey*, 302 F.3d at 1078, or the more generous standard governing state laws applied in *McKenna*, 768 F.3d at 997. Under either standard, it is

plain that Article II does not provide the Yakama Tribe a right to trade free of taxes and fees. *See id.* at 996. And because there is no ambiguity in the Yakama Treaty, King Mountain's discussion of the intent of the parties to that Treaty is equally irrelevant. *See* KM Br. 44-47, 54-55 & n.30.

Nor is there any substance to King Mountain's contention that the more lenient standard of review should apply in this case because this case involves "fees" and not taxes. This Court's precedent does not support a distinction between a "tax" and a "fee," and indeed, as the district court observed, in *Ramsey* this Court used the terms "tax" and "fee" interchangeably. ER 49-ER 50. As was the case in district court, "King Mountain fails to cite any case law distinguishing a federal tax from a federal fee for purposes of determining [the] standard to apply to an alleged exemption." ER 51.[3]

2. Article III of the Yakama Treaty secured to the Tribe "free access . . . to the nearest public highway" and "also the right in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. 951. King Mountain claims that this provision means that there can be no "economic

[3] The government does not dispute that the difference between a tax and a fee is relevant for some purposes. For example, King Mountain relies upon a case involving the Tax Injunction Act, for which status as a tax is central. *See* KM Br. 48 (quoting *Hexom v. Oregon Dep't of Transp.*, 177 F.3d 1134, 1135-36 (9th Cir. 1999) (case involving Tax Injunction Act under Oregon state law)).

restrictions" on the "Yakama people's treaty right to engage in the trade of tobacco products." KM Br. 55.

This Court in *McKenna* rejected the same argument. As this Court explained, "[n]owhere in Article III is the right to trade discussed," and "there is no right to trade in the Yakama treaty." *McKenna*, 768 F.3d at 997, 998. "King Mountain is not being taxed for using on-reservation roads," but for manufacturing tobacco products, a right not protected by Article III of the Treaty. ER 56. Because "FETRA assessments do not constitute a 'restriction' or 'condition' on the use of the public highways," they do not violate Article III of the Yakama Treaty. ER 60.

King Mountain relies on *United States v. Smiskin*, 487 F.3d 1260, 1266-67 (9th Cir. 2007), to argue that language in the Yakama Treaty providing free access to travel means that all Tribe businesses must be free from taxes, fees, and other assessments. *Smiskin* concerned, however, not an assessment on manufactured products, but rather a law requiring individuals transporting certain cigarettes to give notice to the Washington State Liquor Control Board. *Id.* at 1263; ER 57. 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. *See McKenna*, 768 F.3d at 997-98 (discussing *Smiskin*, 487 F.3d at 1262-63, 1266-67, 1272).

Contrary to King Mountain's contention, 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.

For similar reasons, King Mountain errs in relying on a recent Washington Supreme Court decision concerning state taxes and licensing of the *transportation* of fuel. *See Cougar Den, Inc. v. Washington State Dep't of Licensing*, 392 P.3d 1014, 1019 (Wash. 2017) (holding that Article III of Yakama Treaty exempted Tribe from paying state fuel taxes), *petition for cert. filed* June 14, 2017 (No. 16-1498). That case involved a state law that arguably implicated "travel on public highways" "because the tax was an importation tax." *Id.* As explained, this case involves an assessment on King Mountain's manufactured products, not any tax on transportation.

III. THE FETRA SCHEME DOES NOT VIOLATE THE CONSTITUTION.

FETRA ended a system of tobacco quotas and price supports that had been in place for decades and created a ten-year transition program to ease the transition of tobacco producers from a highly regulated market to the free market. To finance this program, Congress imposed assessments on current tobacco manufacturers and importers based on their share of the market. King Mountain's effort to discover a constitutional defect in this regime is unavailing.

A. FETRA does not violate principles of due process or equal protection.

1. As explained, the tobacco-growing industry has historically been subject to a system of quotas and price controls. This system benefitted tobacco farmers, at the expense of manufacturers, by artificially inflating the price of tobacco.

In the 1980s, however, it became apparent that the quota and price support system was no longer working. As one court observed, "[i]n recent years, tobacco quotas and price supports often worked at cross-purposes. Artificially high prices dampened demand for domestic tobacco and led to reduced quotas. Along with many other factors, this contributed to a worsening financial situation among the members of the tobacco farming community." *North Carolina v. Philip Morris USA Inc.*, 618 S.E.2d 219, 220 (N.C. 2005).

In response to this problem, Congress repealed the program of tobacco quotas and price supports in 2004 through FETRA. Pub. L. No. 108-357, §§ 611-612, 118 Stat. at 1522-24. Because tobacco farmers had operated in the regulated environment for decades, however, Congress established a ten-year transition period to help stabilize the tobacco industry and ensure the long-term viability of tobacco farmers and their local economies.

Congress quite reasonably decided to finance this program by imposing assessments on current manufacturers and importers of tobacco products based on

their domestic sales within the given year. 7 U.S.C. § 518d(b). Cigarette manufacturers stood "to profit handsomely from the abolition of market controls and a concomitant drop in tobacco prices." *Philip Morris*, 618 S.E.2d at 223. It was therefore rational for Congress to finance the ten-year transition program through assessments on manufacturers and importers.

2. As the district court correctly concluded, the FETRA program plainly does not violate principles of due process. ER 20.

a. "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). In reviewing legislative determinations under the Due Process Clause, "the federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1342 (Fed. Cir. 2001). Courts "are charged simply with determining whether the congressional action was rational." *Id.*

The FETRA transition program was a rational means of accomplishing a legitimate end. The quota and price support system had for decades insulated tobacco farmers from the vagaries of the free market, though not always to their benefit.

Congress legitimately concluded that it was sound policy to help farmers move from the tobacco quota and price support systems and prepare to operate in an environment where prices were market based. *See* 7 U.S.C. § 518 *et seq.*; 150 Cong. Rec. H8704-03, H8718-19 (daily ed. Oct. 7, 2004). Congress also reasonably determined that such payments to tobacco farmers would serve the public interest in avoiding widespread tobacco farm failures and the resulting disruption to local economies. *See* 7 U.S.C. §§ 518a, 518b; 150 Cong. Rec. S10959 (daily ed. Oct. 9, 2004) (statement of Sen. Hatch) ("It will not be an easy transition for many tobacco growers . . . [but] [t]his proposal . . . mak[es] temporary assistance available to farmers as they adjust to the free market."); 150 Cong. Rec. H8717 (daily ed. Oct. 7, 2004) (statement of Rep. Burr) ("It is offering tobacco farmers a way out, and the assistance they need to transition to new crops."); 150 Cong. Rec. S8172 (daily ed. July 15, 2004) (statement of Sen. Daschle) ("The tobacco buyout included in this amendment provides tobacco farmers and quota holders important economic assistance as they transition from the current tobacco quota program to the free market.").

Similarly, Congress's determination that current tobacco manufacturers and importers would shoulder the costs of this transition, as a condition of doing business in the tobacco market, was entirely reasonable. It was manufacturers of tobacco products who "st[ood] to profit handsomely from the abolition of market controls and

a concomitant drop in tobacco prices." *Philip Morris*, 618 S.E.2d at 223; *see also* 150 Cong. Rec. S8173 (daily ed. July 15, 2004) (statement of Sen. Harkin) ("Clearly, ending the quota and price support system will lower the cost to the tobacco companies of acquiring tobacco for manufacturing."); 150 Cong. Rec. H4406 (daily ed. June 17, 2004) (statement of Rep. Holt) ("If the current quota system is eliminated . . . the price of tobacco will collapse. . . . [T]he end of the quota is worth $15 billion to the tobacco industry over 14 years.").

As the Eleventh Circuit explained in *Swisher International, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008), in enacting FETRA, "Congress obviously perceived problems in the industry, perceived a need to eliminate the old subsidy system, and decided to move to a free market system." *Id.* at 1058. Such a transition would have been abrupt, however, and "Congress exercised its legitimate legislative powers to address" the difficulties farmers would experience in an immediate transition to the free market." *Id.* at 1058-59. As the Eleventh Circuit further observed, "the means Congress chose to address these industry problems were rational. Congress recognized that such a transition to a free market system would benefit all current and future tobacco manufacturers and importers, and thus devised a system of assessments to fund the transition to the free market system," which relied on assessments from current manufacturers. *Id.*

b. In urging that FETRA violates principles of due process, King Mountain primarily relies on its assertion that FETRA is "retroactive," like the statute in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality op.), and is therefore unconstitutional. *See* KM Br. 41-42. But King Mountain's reliance on Justice Kennedy's concurrence in *Eastern Enterprises*, which did not garner the support of any other Justice on the Court, is altogether misplaced. Justice Kennedy's analysis rested on the plainly retroactive features of the Coal Industry Retiree Health and Benefit Act of 1992, Pub. L. No. 102-486, tit. XIX, subtit. C, 106 Stat. 3036 (Coal Act). As a result of the statute, Eastern, which had left the coal industry in 1965, was made newly responsible for the health care of miners who had been Eastern employees prior to its departure from the industry. *Id.* at 516-17 (plurality op.). In concluding that the Coal Act was unconstitutional, Justice Kennedy explained that "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." *Eastern Enterprises*, 524 U.S. at 549 (Kennedy, J., concurring in the judgment and dissenting in part). By imposing liability "for events which occurred 35 years ago, the Coal Act has a retroactive effect of unprecedented scope." *Id.*

By contrast, the challenged assessments, like the federal excise taxes to which King Mountain is also subject, were based on King Mountain's current quarterly manufacture of tobacco products, including cigarettes and "roll your own" products.

King Mountain was not subject to new liability based on its past conduct. FETRA was therefore not retroactive, but simply a condition of doing business, and suffered from none of the flaws identified by Justice Kennedy's reasoning. *See Swisher*, 550 F.3d at 1058 ("Contrary to Swisher's argument, the plain language of the statute clearly indicates that the assessments are not based upon the past conduct of tobacco manufacturers or importers.").

King Mountain urges that FETRA "only benefits businesses that were in the market prior to its enactment" and is therefore constitutionally infirm. KM Br. 37. But King Mountain's complaint is not about whom the program benefits, but rather who must pay for the costs of transition to a free market system. As explained, the required payments were not backward-looking, but rather were collected from *current* tobacco manufacturers based on their then-*current* tobacco manufacturing. As the district court put it: "No aspect of the assessment calculations was based on past conduct." ER 22.

King Mountain also challenges its FETRA assessments on the ground that King Mountain was not in the market prior to FETRA, and therefore did not benefit from the old tobacco and price support system that FETRA repealed. KM Br. 38. But King Mountain was in the class of entities—current manufacturers and importers of tobacco products—that stood to benefit from FETRA. As explained, FETRA deregulated the tobacco market, which was expected to cause the price of tobacco to fall and, as such,

to benefit current and future tobacco product manufacturers. As the district court recognized, "[i]t is evident that the transition from a quota system to a free market system would lower the price of tobacco, to the detriment of tobacco farmers, but to the benefit of tobacco manufacturers such as King Mountain." ER 22.

Nor could the magnitude of King Mountain's assessments plausibly be thought to raise concerns of constitutional dimensions. At the time of the district court's judgment, King Mountain owed approximately $6.4 million in unpaid FETRA assessments and interest. KM Br. 38 n. 22. Although that is a significant amount, it is the result of dozens of quarterly assessments, over a period of seven years, which King Mountain simply failed to pay. There is nothing extraordinary about the increase in the cost of doing business imposed by FETRA. Such costs were borne by other manufacturers of tobacco products and were costs that King Mountain could have passed on to its customers.

King Mountain's argument that it could not have anticipated a liability of the nature and scope imposed by FETRA when it entered the market in 2004 is similarly unpersuasive. *See* KM Br. 38. FETRA was not different in kind to other costs imposed on participants in the tobacco industry when King Mountain entered the market. In 2000, the federal excise tax rate alone was nearly two cents per cigarette, an amount that could have been increased at any time to serve any number of purposes (and was,

in fact, more than doubled in 2009). *See* Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111–3, § 701(b)(1), 123 Stat. 8, 106. And although FETRA was not enacted until 2004, it was preceded by tobacco quota buyout proposals and was the latest chapter in an historically highly regulated industry.

At bottom, King Mountain believes that "Big Tobacco" should have borne a greater share of the burden under FETRA. *See* KM Br. 39-40. But a litigant's opinion about who should bear an economic burden does not demonstrate that economic legislation is irrational and unconstitutional. *Usery*, 428 U.S. at 15. A property owner may believe that only parents with children in public schools should pay property taxes, for example; or a driver may believe that only owners of non-hybrid cars should pay fees relating to car emissions. That does not make such laws irrational. *Id.*

3. King Mountain's cursory attempt to raise an equal-protection challenge also fails. *See* KM Br. 43. The FETRA program required each manufacturer to pay a proportional amount of the costs of the program. As the district court concluded, "there is no evidence of unequal treatment," and King Mountain's argument to the contrary is "perplex[ing]" given that "King Mountain is required to pay no more than its own sale of tobacco in the free market commands." ER 23.

B. The district court properly rejected King Mountain's attempt to frame its challenge under the rubric of the Takings Clause.

1. It is black letter law "that taxes and user fees . . . are not takings," *Koontz v. St. Johns River Water Mgt. Dist.,* 133 S. Ct. 2586, 2600 (2013), and "[t]he mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison*, 271 F.3d at 1340; *see also Eastern Enterprises*, 524 U.S. at 554 (Breyer, J., dissenting) ("an ordinary liability to pay money" does not give rise to a "taking"); *id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part) ("an obligation to perform an act, the payment of benefits" is not a "taking"); *Sperry Corp. v. United States*, 493 U.S. 52, 62 n.9 (1989) (considering and rejecting view that money is private property that can be physically occupied by the government). Because the FETRA assessments at issue in this case simply require King Mountain to pay an amount in proportion to its market share of manufactured tobacco products, those assessments cannot give rise to a claim under the Takings Clause, as the district court correctly recognized. *See* ER 13-14. To hold otherwise would mean that every fee, assessment, or tax imposed by the government would constitute an unconstitutional "taking" of property. *See Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) ("Under appellants' theory, however, compensation would be required for every fee; therefore, every fee would be unconstitutional. We see no valid basis for such a rule.").

The district court's analysis was consistent with the Eleventh Circuit's decision in *Swisher*, which recognized that a plaintiff's challenge to the FETRA scheme does not implicate the Takings Clause. *See Swisher*, 550 F.3d at 1054-56. In *Swisher*, the Eleventh Circuit explained that "the takings analysis is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest." *Id.* at 1056. Objecting to the constitutionality of FETRA assessments "challenges the very power of Congress to impose the obligation at issue." *Id.* at 1055. Because "the Takings Clause, by its plain language, does not operate as a substantive or absolute limit on the government's power," challenges to FETRA do not implicate the Takings Clause. *Id.*

2. *Koontz*, on which King Mountain attempts to rely, provides no support for its position. In *Koontz*, a local government refused to provide a land use permit unless a portion of the land was given to the government or the land owner paid to make improvements on government land. 133 S. Ct. at 2593. In holding that such conduct effected a taking, the Supreme Court emphasized that, although a taking existed based on the facts of that case, "[i]t is beyond dispute that taxes and user fees . . . are not takings." *Id.* at 2600-01. *Koontz* plainly does not support King Mountain's contention that obligations to pay money may be per se takings. *See* KM Br. 31-32.

King Mountain's reliance on *Eastern Enterprises* similarly fails to advance its claim. KM Br. 36-40. King Mountain relies on the plurality opinion of four Justices

who concluded that requiring a former coal mine operator to fund health benefits for retired miners constituted a taking. *Eastern Enterprises,* 524 U.S. at 538; *see also* ER 17. The five remaining Justices in *Eastern Enterprises* all explicitly concluded that the requirement to pay money at issue in that case could *not* give rise to a taking. *Id.* at 540 (Kennedy, J., concurring in judgment and dissenting in part) ("Our cases do not support the plurality's conclusion that the Coal Act takes property."); *id.* at 554 (Breyer, J., dissenting) (explaining that case involved "not an interest in physical or intellectual property, but an ordinary liability to pay money").[4]

Like the Coal Act in *Eastern Enterprises*, FETRA "simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so." 524 U.S. at 540 (Kennedy, J., concurring in judgment and dissenting in part). Such an obligation to pay money does not constitute a taking. *Id.*; *id.* at 554 (Breyer, J., dissenting).

King Mountain's argument that FETRA is unconstitutional as applied to the Yakama Tribe likewise fails. *See* KM Br. 33-35. King Mountain urges that its FETRA assessments differ from those imposed on non-Tribe cigarette manufacturers because FETRA abrogated a purported treaty right to sell tobacco products without paying any taxes or fees. But that argument hinges on an interpretation of the Yakama Treaty

[4] The courts of appeals have recognized that there is no controlling opinion supporting a taking in *Eastern Enterprises*. *See, e.g., Unity Real Estate Co. v. Hudson*, 178

that is incorrect. As explained above, FETRA does not abrogate any treaty right involving property interests granted in the Yakama Treaty because the Treaty does not give King Mountain the right to manufacture tobacco products without paying excise taxes or FETRA assessments.[5] *See supra* pp. 14-22. The district court was therefore correct to conclude that the "FETRA assessments were not imposed against any specific, identifiable property, and therefore do not constitute either a classic or regulatory per se taking." ER 16.

Because the gravamen of plaintiff's claim is one for violation of due process and not a taking, it is unnecessary to determine whether the district court would have had authority to adjudicate that claim on the merits, or whether such a claim must be brought in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1).

F.3d 649, 659 (3d Cir. 1999); *Adams v. United States*, 391 F.3d 1212, 1223 n.7 (Fed. Cir. 2004); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999).

[5] If the Treaty meant what King Mountain urges, the remedy would be for this Court to hold that the Treaty exempts King Mountain from FETRA payments; it would not be to hold that FETRA itself is an unconstitutional taking (or an unconstitutional condition, *see* KM Br. 44). This Court "avoid[s] deciding constitutional issues needlessly." *Stevenson v. Lewis*, 384 F.3d 1069, 1072 (9th Cir. 2004).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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STATEMENT OF RELATED CASES

The question of the interpretation of the Yakama Treaty is currently pending before this Court in a case involving the related issue of whether the Yakama Treaty exempts King Mountain from paying excise taxes on its tobacco products. *United States v. King Mountain Tobacco Co.,* Nos. 14-36055, 16-35607.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,802 words, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2017, 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.

The plaintiffs in this case are registered CM/ECF users and service will be effected using the CM/ECF system.

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