No. _____

In the Supreme Court of the United States

KING MOUNTAIN TOBACCO COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER G. BROWNING, JR.
Counsel of Record
Troutman Sanders LLP
305 Church at North Hills Street
Raleigh, NC 27609
(919) 835-4127
chris.browning@troutmansanders.com

BRYAN M. HAYNES
Troutman Sanders LLP
1001 Haxall Point
Richmond, VA 23219

January 2019

QUESTIONS PRESENTED

Although exemptions to tax laws should be express, that tax canon is not dispositive if the words of an Indian treaty or statute "are susceptible of a more extended meaning than their plain import." *Squire v. Capoeman*, 351 U.S. 1, 7 (1956) (quotations omitted). Despite *Capoeman*, the circuit courts are split as to the standard for determining whether a treaty creates a federal tax exemption.

In the Ninth Circuit, an Indian treaty must include "express exemptive language" (also referred to as "a definitely expressed exemption") to exempt Indians from a federal tax or fee. Pet. App. 27a, 86a. In the Third, Eighth and Tenth Circuits, however, an exemption will be found – even if not "definitely expressed" – if the treaty can reasonably be construed to confer an exemption.

The issues presented are:

1. Whether the Ninth Circuit erred in holding that the Yakama Treaty must include "express exemptive language" to create an exemption from a federal tax or fee.

2. Whether the Ninth Circuit erred in holding that the federal tobacco excise tax, 26 U.S.C. § 5701-5703, and the Fair and Equitable Tobacco Reform Act ("FETRA"), 7 U.S.C. § 518-519, apply to the Yakama Indians even though (1) the Yakama Treaty creates a right to travel in order to protect the Yakama Indians' ability to trade and (2) these taxes and fees are triggered by the transport of goods – rather than by sale or manufacture.

LIST OF PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE

The caption of the case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

Pursuant to S. Ct. R. 29.6, Petitioner King Mountain Tobacco Company, Inc. makes the following disclosure:

King Mountain Tobacco Company, Inc. does not have a parent company nor does any public company own 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE..... ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW..... 1

JURISDICTION..... 2

TREATY AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT..... 3

REASONS FOR GRANTING THE PETITION 11

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT REGARDING THE TEST FOR DETERMINING WHETHER AN INDIAN TREATY CREATES A TAX EXEMPTION..... 12

II. THIS COURT SHOULD HOLD THE PETITION PENDING ITS DECISION IN *WASHINGTON STATE DEP'T OF LICENSING v. COUGAR DEN, INC.*..... 21

III. THE PETITION RAISES IMPORTANT ISSUES OF FEDERAL LAW THAT MERIT RESOLUTION BY THIS COURT 22

IV. THE NINTH CIRCUIT ERRED IN THE TEST IT APPLIED IN CONSTRUING THE YAKAMA TREATY AND IN ITS FAILURE TO RECOGNIZE THE RIGHTS OF THE YAKAMA PEOPLE UNDER THAT TREATY 26

CONCLUSION 31

APPENDIX:

Nos. 14-36055 & 16-35607 (Federal Excise Tax Action)

United States v. King Mountain Tobacco Co., Nos. 14-36055 & 16-35607, 899 F.3d 954, Ninth Circuit Opinion, (Federal Excise Tax Opinion), Aug. 13, 2018 ..... 1a

United States v. King Mountain Tobacco Co., No. 2:12-cv-3089-RMP, E.D. Wash. Order, (Federal Excise Tax Action), Jan. 24, 2014 ..... 35a

United States v. King Mountain Tobacco Co., No. 2:12-cv-3089-RMP, E.D. Wash. Order, (Federal Excise Tax Action), Aug. 28, 2014 ..... 38a

No. 16-35956 (FETRA Action)

United States v. King Mountain Tobacco Co.,
No. 16-35956, Ninth Circuit Opinion,
(FETRA Opinion) (Unpublished)
Aug. 13, 2018 ..... 56a

United States v. King Mountain Tobacco Co.,
No. 1:14-cv-3162-RMP, E.D. Wash. Order,
(FETRA Action), July 27, 2015 ..... 62a

United States v. King Mountain Tobacco Co.,
No. 1:14-cv-3162-RMP, 131 F. Supp. 3d
1088, (FETRA Action), Sept. 17, 2015 ..... 103a

United States v. King Mountain Tobacco Co.,
No. 1:14-cv-3162-RMP, E.D. Wash. Order,
(FETRA Action), Nov. 7, 2016 ..... 122a

Order in Companion Case to Federal Excise Tax Action

King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau,
No. 2:11-cv-3038-RMP, 996 F. Supp. 2d
1061, E.D. Wash. Order, Jan. 24, 2014
(Companion to Federal Excise Tax Action
and incorporated by reference in
E.D. Wash. Order of Jan. 24, 2014
in the Federal Excise Tax Action) 128a

Ninth Circuit's Denials of Rehearing

United States v. King Mountain Tobacco Co., Nos. 14-36055 & 16-35607, Denial of Rehearing En Banc (Federal Excise Tax Action), Oct. 22, 2018..... 148a

United States v. King Mountain Tobacco Co., No. 16-35956, Ninth Circuit Denial of Rehearing En Banc (FETRA Action), Oct. 22, 2018 ..... 149a

Treaties and Statutes

Treaty Between the United States and the Yakama Nation of Indians, Concluded at Camp Stevens, Walla-Walla Valley, 12 Stat. 951, June 9, 1855 ..... 151a

Treaty with the Omahas, Art. VI, 10 Stat. 1043, Mar. 16, 1854 ..... 163a

Internal Revenue Code, Ch. 52, Sub Ch. A
26 U.S.C. § 5701..... 167a
26 U.S.C. § 5702..... 171a
26 U.S.C. § 5703..... 178a

Fair and Equitable Tobacco Reform Act (FETRA), 7 U.S.C. § 518d 186a

TABLE OF AUTHORITIES

CASES

Board of County Comm'rs v. Seber,
318 U.S. 705 (1943) 22

Chickasaw Nation v. United States,
208 F.3d 871 (10th Cir. 2000), *aff'd*,
534 U.S. 84 (2001) 17

Chickasaw Nation v. United States,
534 U.S. 84 (2001) 14, 17, 27

Choctaw Nation v. Oklahoma,
397 U.S. 620 (1970) 22

Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau, 843 F.3d 810 (9th Cir. 2016) 8

Confederated Tribes of Warm Springs Reservation v. Kurtz,
691 F.2d 878 (9th Cir. 1982) 13

Cook v. United States,
32 Fed. Cl. 170 (Fed. Cl. 1994),
aff'd, 86 F.3d 1095 (Fed. Cir. 1996) 18

Cook v. United States,
86 F.3d 1095 (Fed. Cir. 1996) 18

Cougar Den, Inc. v. Dep't of Licensing,
392 P.3d 1014 (Wash. 2017), *cert. granted*,
138 S. Ct. 2671 (Jun. 25, 2018) 21, 22

County of Oneida v. Oneida Indian Nation,
470 U.S. 226 (1985) 23, 26

Holt v. Comm'r,
364 F.2d 38 (8th Cir. 1966) 15, 16

King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau,
996 F. Supp. 2d 1061 (E.D. Wash. 2014),
vacated and remanded sub nom. Confederated Tribes & Bands of the Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau,
843 F.3d 810 (9th Cir. 2016) 7, 18-19

Lazore v. Comm'r,
11 F.3d 1180 (3d Cir. 1993) 16, 18, 19, 20

McCulloch v. Maryland,
17 U.S. 316 (1819) 31

Means v. Navajo Nation,
432 F.3d 924 (9th Cir. 2005) 24

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973) 13, 16

Minnesota v. Mille Lacs Band of Chippewa Indians,
526 U.S. 172 (1999) 10, 14, 26, 29

Montana v. Blackfeet Tribe,
471 U.S. 759 (1985) 23

Perkins v. United States, No. 16-cv-495 (LJV), 2017 U.S. Dist. LEXIS 123543 (W.D.N.Y. Aug. 4, 2017) (unpublished) 18

Ramsey v. United States, 302 F.3d 1074 (9th Cir. 2002) 13, 14, 22

Red Lake Band of Chippewa Indians v. United States, No. 94-3591, 1995 U.S. App. LEXIS 21470 (8th Cir. Aug. 10, 1995) (unpublished) 16

Squire v. Capoeman, 351 U.S. 1 (1956)..... i, 12

Tulee v. Washington, 315 U.S. 681 (1942)..... 5, 23, 28

United States v. Kagama, 118 U.S. 375 (1886) 23

Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658 (1979)..... 3

Washington State Dep't of Licensing v. Cougar Den, Inc., No. 16-1498, 138 S. Ct. 2671 (cert. granted Jun. 25, 2018).....*passim*

Winters v. United States, 207 U.S. 564 (1908) 26

Worcester v. Georgia, 31 U.S. 515 (1832) 13

Yakama Indian Nation v. Flores,
955 F. Supp. 2d 1229 (E.D. Wash 1997) 4, 5

TREATIES, STATUTES, REGULATIONS AND RULES

Treaty Between the United States and the Yakama Nation of Indians, 12 Stat. 951 (June 9, 1855).....*passim*

Treaty with the Omahas, 10 Stat. 1043, (Mar. 16, 1854) 23, 24

Fair and Equitable Tobacco Reform Act ("FETRA"), 7 U.S.C. § 518-519..... i, 9

7 U.S.C. § 518d..... 3

7 U.S.C. § 518d(f) 6

7 U.S.C. § 518d(g)..... 6

7 U.S.C. § 518d(h) 6

7 U.S.C. § 518d(h)(1) 9

7 U.S.C. § 518d(h)(2) 9

Indian Regulatory Gaming Act, 25 U.S.C. §§ 2701-2721..... 17

26 U.S.C. § 5701 ..... i, 3

26 U.S.C. § 5702 ..... i, 3

26 U.S.C. § 5702(c) 6

26 U.S.C. § 5702(j) 6, 8, 10, 29, 30

26 U.S.C. § 5703 ..... i, 3

26 U.S.C. § 5703(a)..... 29

26 U.S.C. § 5703(a)(1) 29

26 U.S.C. § 5703(b).....6, 8, 10, 29, 30

26 U.S.C. § 5763..... 24

26 U.S.C. § 7302..... 24

28 U.S.C. § 1254(1)..... 2

27 C.F.R. § 40.252 ..... 29, 30

27 C.F.R. § 40.253 30

27 C.F.R. § 40.284 29

S. Ct. R. 12.4..... 1

S. Ct. R. 29.6..... ii

MISCELLANEOUS

Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* (Nell Jessup Newton et. al. eds. 2017) 19, 23, 27

Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 Me. L. Rev. 1 (2008) 14, 26

Official Proceedings at the Council in Walla Walla Valley (1855) 4

U.S. Dep't of Interior, Bureau of Indian Affairs, *Indian Lands of Federally Recognized Tribes of the United States* (June 2016) 20, 25

U.S. Mem. in Opp. to Yakama Nation's Motion for Partial Summary Judgment, *King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 2:11-cv-3038-RMP, (E.D. Wash) (ECF 94) (filed Oct. 30, 2012) 19

Washington State Dep't of Licensing v. Cougar Den, Inc., No. 16-1498, Pet. for Writ of Certiorari (filed Jun. 14, 2017) 22

PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. R. 12.4, Petitioner King Mountain Tobacco Company, Inc. ("King Mountain") respectfully petitions for a writ of certiorari to the Ninth Circuit of two judgments rendered the same day involving the same parties and closely related questions. Both judgments present an issue on which the circuit courts are deeply divided – the application of Indian canons of construction to a federal tax or fee.

Petitioner requests that the Court hold the petition pending this Court's decision in *Washington State Department of Licensing v. Cougar Den, Inc.*, No. 16-1498, 138 S. Ct. 2671 (cert. granted Jun. 25, 2018). Both *Cougar Den* and the present petition raise the issue of the proper construction of the Right to Travel of the Yakama people under Article III of the Treaty Between the United States and the Yakama Nation of Indians, 12 Stat. 951 (June 9, 1855). This Court's decision in *Cougar Den* will likely impact the analysis of the Questions Presented.

OPINIONS BELOW

The opinion of the Ninth Circuit in *United States v. King Mountain Tobacco Co.*, Nos. 14-36055 & 16-35607 ("Federal Excise Tax Opinion"), Pet. App. 1a-34a, is reported at 899 F.3d 954. The Ninth Circuit's denial of rehearing is not reported. Pet. App. 148a. The district court order in that action ("the Federal Excise Tax Action") granting partial summary

judgment on liability is not reported. Pet. App. 35a-37a. The district court's order granting summary judgment on the amount of taxes owed is not reported. Pet. App. 38a-55a.

The opinion of the Ninth Circuit in *United States v. King Mountain Tobacco Co.*, No. 16-35956 ("FETRA Opinion"), Pet. 56a-61a, is unreported. The Ninth Circuit's denial of rehearing is not reported. Pet. App. 149a. The orders of the district court in that action ("the FETRA Action") granting the United States partial summary judgment, Pet. App. 62a-102a, and granting the United States summary judgment on the amount of fees owed, Pet. App. 122a-127a, are not reported. The district court order denying Petitioner's motion for summary judgment, Pet. App. 103a-121a, is reported at 131 F. Supp. 3d 1088.

JURISDICTION

The judgment of the court of appeals in both the Ninth Circuit's Federal Excise Tax Opinion (Nos. 14-36055 & 16-35607) and FETRA Opinion (No. 16-35956) were entered on August 13, 2018. Pet. App. 1a, 56a. Timely petitions for rehearing were filed in both appeals on September 27, 2018. These petitions were denied on October 22, 2018. Pet. App. 148a, 149a. This Court possesses jurisdiction under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

The Treaty Between the United States and the Yakama Nation of Indians, 12 Stat. 951 (June 9, 1855) is set out in the Appendix. Pet. App 151a-62a. The relevant provisions of the Internal Revenue Code regarding the federal tobacco excise tax, 26 U.S.C. §§ 5701-5703, are at Pet. App. 167a-85a. The relevant section of FETRA, 7 U.S.C. § 518d, is at Pet. App. 186a-99a.

STATEMENT

1. In 1855, Isaac Stevens, Governor of the Washington Territory and acting as a representative of the United States, negotiated a treaty with fourteen tribes that were ultimately confederated into the Yakama Nation. Pet. App. 151a. The language of these tribes had no written form. Without an ability to understand written words, the tribes relied exclusively on the oral translations of the Treaty's provisions. These translations, however, were problematic at best. The Government's translators "used a 'Chinook jargon' to explain treaty terms, and that jargon not only was imperfectly (and often not) understood by many of the Indians but also was composed of a simple 300-word commercial vocabulary that did not include words corresponding to many of the treaty terms." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 667 n.10 (1979).

What resonated with the Yakama people, however, was that the Treaty would protect them

and their way of life. Governor Stevens explained to the Yakamas:

> You will be allowed to go on the roads, to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and kill game on land not occupied by the whites; all this outside the reservation.

Pet. App. 26a (quoting Official Proceedings at the Council in Walla Walla Valley (1855)). Stevens further promised to prevent "further encroachment by white settlers." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1244 (E.D. Wash. 1997).

Article II of the Treaty provides that the Yakama Reservation shall be for "the exclusive use and benefit" of the Yakama people. Pet. App. 154a. Consistent with Article II, Article VI of the Treaty incorporates by reference Article VI of the Omaha Treaty which, in turn, protects reservation lands from levy, sale or forfeiture. *Id.* at 27a, 32a, 159a, 164a-65a.

Article III of the Treaty assured the Yakamas that they would have "free access . . . to the nearest public highway." *Id.* at 155a. Additionally, the Yakamas were told that they would "also [have] the right, in common with citizens of the United States, to travel upon all public highways." *Id.* Article III further preserves the "right of taking fish at all usual and accustomed places, in common with citizens of

the Territory."[1] *Id.* at 155a-56a. The Yakama people understood the words of the Treaty and those of Governor Stevens during the negotiations to preserve the Yakamas' "right to travel the public highways without restriction for purposes of hauling goods to market." *Flores*, 955 F. Supp. at 1248. Extrinsic evidence shows that, at the time of the Treaty negotiations, the Yakama understood the Treaty to protect their right "to travel outside reservation boundaries, with no conditions attached." *Id.* at 1251.

In exchange for the rights they believed they were receiving under the Treaty, the Yakama people ceded to the United States 10.8 million acres (16,920 square miles) – 93% of their lands. *See Tulee v. Washington,* 315 U.S. 681, 682 (1942).

2. King Mountain is a corporation existing under the laws of the Yakama Nation. Pet. App. 129a. King Mountain produces tobacco products (including traditional use tobacco intended for Native American ceremonies) on the Yakama Reservation using tobacco grown, in large part, on the Reservation. *Id.* at 4a, 130a.

---

[1] Although this Court has not construed the Treaty's Right to Travel in Article III, it has construed parallel language in that same Article that protects the Yakamas' right to fish. In *Tulee v. Washington,* 315 U.S. 681 (1942), this Court held that the Treaty precludes charging the Yakamas a fee for fishing outside of their reservation. *Id.* at 685 ("exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty").

Despite the provisions of the Yakama Treaty, including the Yakamas' right of "free access" to the public highways, the United States assessed King Mountain with tobacco excise taxes and FETRA assessments. Under the Internal Revenue Code, a manufacturer owes a tax when a tobacco product is moved from the factory – that is, when the tobacco product is transported to its place of sale by way of the public highways.[2] 26 U.S.C. §§ 5702(j), 5703(b). FETRA assessments are based on this federal excise tax. 7 U.S.C. § 518d(f), (g), (h). In the absence of a Treaty provision assuring the Yakama people free access to the public highways, the federal excise tax would be triggered when King Mountain's trucks leave the gate of the factory (located on Reservation lands) and onto public roads for purposes of delivering the tobacco products to the marketplace. Similarly, the transportation of tobacco prepared for Indian ceremonial usage would trigger the excise tax at the instant King Mountain's trucks roll out the factory gate destined for one of the Yakamas' historic trading partners (such as the Nez Perce with whom the Yakamas have traded for centuries).

3. On April 5, 2011, King Mountain, Delbert Wheeler (a Yakama enrolled Indian and the owner/operator of King Mountain), and the Yakama Nation filed an action in federal district court against the United States Alcohol and Tobacco Tax and Trade Bureau, seeking a declaration that King Mountain is not subject to the tobacco excise tax as a

---

[2] "Tobacco product" is defined as "cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco." 26 U.S.C. § 5702(c).

result of the Yakama Treaty (the "Declaratory Judgment Action"). The district court dismissed King Mountain and its owner for lack of jurisdiction. *See* Pet. App. at 6a, 131a; *King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061, 1063 (E.D. Wash. 2014), *vacated and remanded sub nom. Confederated Tribes & Bands of the Yakama Indian Nation v. Alcohol & Tobacco Tax and Trade Bureau*, 843 F.3d 810 (9th Cir. 2016).

Thereafter, the district court granted summary judgment in favor of the United States and against the Yakama Nation. In its order, the district court refused to consider extensive evidence presented by the Yakama Nation regarding how the words of the Treaty were understood by the Yakama people at the time. Pet. App. 142a. The district court noted that in considering whether an Indian treaty gives rise to a federal tax exemption, the Ninth Circuit employs a test that is not as favorable to Native Americans as that used by other circuits. *Id.* at 142a n.4. Under the Ninth Circuit's test, the general rule that Indian treaties should be construed in favor of Native Americans does not apply in matters of federal taxation unless the treaty contains "express exemptive language." *Id.* at 145a. Despite Article III's assurance that the Yakamas will have "free access" to the public highways, the district court concluded that this language does not constitute "express exemptive language." *Id.* at 144a-45a. The district court reasoned: "King Mountain is not being taxed for using on-reservation roads. It is being taxed for manufacturing tobacco products." *Id.* at 145a. The district court, however, failed to address

the fact that the excise tax is not triggered by manufacture, but rather is triggered by the transportation of the tobacco products using on-reservation roads. 26 U.S.C. §§ 5702(j), 5703(b).

Concluding that the Anti-Injunction Act bars the claims of the Yakama Nation, the Ninth Circuit vacated the district court's judgment for lack of subject matter jurisdiction. *Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau,* 843 F.3d 810 (9th Cir. 2016).

4. On July 6, 2012, the United States brought the Federal Excise Tax Action against Petitioner as a result of its failure to pay the tobacco excise tax. In light of the Ninth Circuit's requirement that an Indian treaty should only be viewed as granting a federal tax exemption if it contains "express exemptive language," the district court granted summary judgment in favor of the United States. In doing so, the district court noted that the issues presented in the United States' motion for summary judgment "are essentially identical" to the issues presented in the Declaratory Judgment Action. Pet. App. 36a. The district court proceeded to "incorporate[] by reference" its summary judgment order in the Declaratory Judgment Action. *Id.* Thus, the district court expressly incorporated its statement in the Declaratory Judgment Action that Ninth Circuit precedent precludes it from considering how the Yakama people would have understood the words of the Treaty.

5. On October 30, 2014, the United States brought the FETRA action against Petitioner for the assessment of fees that the United States asserted were owed under FETRA, 7 U.S.C. § 518-519. FETRA imposed quarterly assessments on tobacco manufacturers and importers during 2005 to 2014 to fund the Government's buy-out of tobacco allotments from tobacco farmers. FETRA assessments are directly tied to the federal excise tax and are calculated based on the amount of tobacco a manufacturer removes from its factory. *See* 7 U.S.C. § 518d(h)(1), (2). Reasoning that "any distinction between fees and taxes is irrelevant," the district court concluded that the Ninth Circuit's "express exemptive language" test applies to all federal statutes – not just tax statutes. Pet. App. 88a. Because the district court did not believe that the Treaty's language expressly exempts the Yakama people from the fees at issue, it refused to apply Indian canons of construction or consider extrinsic evidence in determining whether the Treaty bars the FETRA assessment. *Id.* at 85a; *see also id.* at 91a ("[N]o amount of discovery regarding the Yakama people's understanding of the treaty can change the result in this case.").

6. In both the Federal Excise Tax Action and the FETRA Action, the Ninth Circuit affirmed the district court's decision to exclude all extrinsic evidence as to how the Yakama people understood the Treaty. Pet. App. 1a-34a, 56a-61a.

In the Federal Excise Tax Opinion, the Ninth Circuit concluded that the Yakama Treaty does not contain "express exemptive language," and King

Mountain is therefore subject to the tobacco excise tax. Because it found no "express exemptive language," the Ninth Circuit "decline[d] to apply the Indian canons of construction when analyzing the Treaty's provisions."[3] *Id.* at 28a. The Ninth Circuit noted that "express exemptive language" will only be found in an Indian treaty when the federal Government intends to exempt Indians from taxation. *Id.* at 27a. The Ninth Circuit rejected Petitioner's argument that the tobacco excise tax is imposed on the transportation of goods, i.e., the right to travel. Pet. App. 31a n.11. Rather than focusing on the specific language of 26 U.S.C. §§ 5702(j), 5703(b) which provide that the tax is triggered by the transportation of goods out of the factory, the Ninth Circuit relied on Black's Law Dictionary to support its conclusion (contrary to the statute) that a tobacco excise tax is either a tax on the manufacture or sale of tobacco products. Pet. App. 17a.

In the FETRA Opinion, the Ninth Circuit also affirmed. In doing so, it held that "[t]he 'express exemptive language' test applies to federal laws generally, not just to federal taxes." Pet. App. 58a. The Ninth Circuit noted that, as it explained in the Federal Excise Tax Opinion, the Yakama Treaty does not contain "express exemptive language" that would exempt Petitioner from the tobacco excise tax. *Id.* Therefore, the Treaty does not contain language

---

[3] Under the Indian canons of construction, Indian treaties should be liberally construed in favor of Native Americans – with all ambiguities resolved in their favor. Treaties should be construed as the Indian tribe understood the treaty. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

that would exempt Petitioner from the FETRA assessment. *Id.*

Petitioner urged the Ninth Circuit to reconsider its "express exemptive language" test and adopt the test of other circuits that permits consideration of extrinsic evidence when a treaty can reasonably be construed as creating a tax exemption. The Ninth Circuit, however, denied rehearing en banc in both appeals. Pet. App. 148a, 149a.

REASONS FOR GRANTING THE PETITION

Both Questions Presented raise important issues of federal law in which the lower courts are split. The first issue involves a well-entrenched split between four circuits with respect to the appropriate test for determining whether an Indian treaty gives rise to a tax exemption. The second issue (on which the Ninth Circuit and Washington Supreme Court have divided) involves the construction of specific language of the Yakama Treaty – an issue which is pending before this Court in *Washington State Department of Licensing v. Cougar Den, Inc.*, No. 16-1498. Because this Court's ruling in *Cougar Den* may bear upon the resolution of the second question presented, this Court should hold the present petition pending the Court's decision in that matter.

Regardless of the outcome in *Cougar Den*, the first question presented should be resolved by this Court. Awaiting this Court's decision in *Cougar Den,* however, will allow the Court a fuller context

for understanding the practical effect of the Ninth Circuit's test versus the test used by other circuits.

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT REGARDING THE TEST FOR DETERMINING WHETHER AN INDIAN TREATY CREATES A TAX EXEMPTION.

The Ninth Circuit has adopted a test for construing an Indian treaty that is at odds with the approach of all other circuits. The Ninth Circuit's test has been expressly rejected by the Third, Eighth and Tenth Circuits. Moreover, the Federal Circuit appears to have embraced the majority view. The circuit split is well-entrenched and has been expressly recognized by courts and legal scholars.

The Ninth Circuit has held in numerous decisions that for an Indian treaty to give rise to a federal tax exemption, the treaty's text must contain express exemptive language (which it also refers to as a "definitely expressed exemption"). Consistent with this Court's long-standing precedent, other circuits apply a more generous test that focuses on how the Indian people would have read the treaty. That test focuses on whether the language of the treaty can reasonably be construed to confer tax exemptions. The decision below continues the long line of Ninth Circuit opinions that misinterpret this Court's directives in construing Indian treaties. *See Squire v. Capoeman*, 351 U.S. 1, 7 (1956) (if words of an Indian treaty "'are susceptible of a more extended meaning than their plain import,'" they must be construed in favor of the Native Americans)

(quoting *Worcester v. Georgia*, 31 U.S. 515, 582 (1832)).

The Ninth Circuit first articulated its "definitely expressed exemption" test in *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982). In *Warm Springs*, the Confederated Tribes challenged the imposition of various federal excise taxes (e.g., fuel taxes) arising from a sawmill owned and operated by the tribes on reservation land. The tribes argued that even though their treaty did not contain any provision bearing on taxation, such an exemption should be presumed from the treaty's silence. The Ninth Circuit rejected this argument: "Absent a 'definitely expressed exemption,' Indian tribes and their members are subject to federal taxation." *Id.* at 882 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973)).

In *Ramsey v. United States*, 302 F.3d 1074, 1078 (9th Cir. 2002), the Ninth Circuit concluded that its "definitely expressed" exemption test focuses not on how the Indians understood the terms of a treaty, but whether the treaty contains express language establishing "the federal government's intent to exempt Indians from taxation."[4] According to the

---

[4] Below and in *Ramsey*, the Ninth Circuit uses the phrases "definitely expressed," "definitively expressed" and "express exemptive language" to refer to its test. Pet. App. 28a; 302 F.3d at 1078-80. Regardless of the label, the Ninth Circuit's test compels that unless words can be found in an Indian treaty that establish that the federal government intended to create an exemption from taxation, the court should not consider how Indians would have understood the words of the treaty.

Ninth Circuit, "[o]nly if express exemptive language is found in the text of the . . . treaty should the court determine if the exemption applies to the tax at issue." *Id.* at 1079. The Ninth Circuit reiterated that express exemptive language must be found in the treaty "*before* employing the canon of construction favoring Indians." *Id.* (emphasis in original). Thus, under the Ninth Circuit's rule, the intent of the Indians is irrelevant – even when the treaty could reasonably be construed as creating an exemption from federal taxation – unless the treaty contains express language reflecting the Government's intent to create a tax exemption.[5]

Citing *Ramsey*, the Ninth Circuit below held that the door is closed to showing how the Indians understood the treaty language, unless the treaty contains "definitively expressed exemptive language." Pet. App. 28a, *see* Pet. App. at 58a. The Ninth Circuit views the treaty from the lens of "the federal government's intent" – not that of the

---

[5] As one commentator has observed, the Ninth Circuit's approach in *Ramsey* of construing an Indian treaty in favor of the Government "basically turned the traditional understanding of the [the Indian] canons [of construction] on its head." Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 Me. L. Rev. 1, 39 (2008). If an Indian treaty protects an activity from taxation, Congress must clearly state its intent to abrogate that treaty right. *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."). Moreover, in *Chickasaw Nation v. United States,* 534 U.S. 84, 95 (2001), this Court signaled that the Indian canons of construction may have greater force in the context of construing a treaty, rather than a statute.

Indians.[6] *Id.* at 27a. In fact, the Federal Excise Tax Opinion makes this point five separate times. Pet. App. 27a, 30a-31a. As a result of the Ninth Circuit's requirement of definitive language showing the United States' intent to create a tax exemption, the Ninth Circuit "decline[d] to apply the Indian canons of construction to King Mountain's treaty claims." Pet. App. 28a. Although Petitioner urged the Ninth Circuit to come in line with other circuits and apply Indian canons of construction because the Yakama Treaty could be reasonably construed as creating a tax exemption, the Ninth Circuit failed to reconsider its prior precedent. The panel refused to consider whether the Treaty could reasonably be construed as granting a tax exemption, and rehearing en banc was denied.

In direct conflict with the Ninth Circuit, three other circuits (the Third, Eighth and Tenth Circuit) would apply Indian canons of construction to King Mountain's treaty claims. Moreover, the Federal Circuit has signaled its approval of the test used in the Third, Eighth and Tenth Circuits.

The Eighth Circuit, in *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966), held that the starting point for determining whether an Indian treaty bars federal taxation is whether the "treaty contains language which can reasonably be construed to confer" an exemption. If such language exists, the

---

[6] Although Congress' intent is relevant in issues of statutory construction, this Court has never held that Government's understanding of a treaty supplants that of the Indians' understanding of the treaty's words.

treaty "should be liberally construed in favor of Indians." *Id.* More recently, the Eighth Circuit has reiterated that if a treaty can be reasonably construed to confer an exemption from federal taxation, "the principle of liberal treaty construction in favor of Indians" must be applied to determine how the Indians would have understood this language. *Red Lake Band of Chippewa Indians v. United States*, No. 94-3591, 1995 U.S. App. LEXIS 21470, *5 (8th Cir. Aug. 10, 1995) (unpublished).

The Third Circuit, in *Lazore v. Commissioner*, 11 F.3d 1180 (3d Cir. 1993), adopted the *Holt* rationale and expressly held: "We specifically reject the Ninth Circuit's requirement that a treaty contain a definitely expressed exemption." *Id.* at 1185. The Third Circuit concluded that the treaty must merely contain "'language which can reasonably be construed'" to confer a tax exemption. *Id.* (quoting *Holt,* 364 F.2d at 40). Although the phrase "definitely expressed exemption" is a quote from this Court's decision in *Mescalero Apache Tribe*, the Third Circuit concluded the quote is not applicable to an analysis of an Indian treaty. *Mescalero Apache Tribe* only addressed whether the Internal Revenue Code gives rise to an exemption – not how an Indian treaty should be read. *Id.* at 1185 n.2. Evaluating whether a treaty should be read as creating a federal tax exemption is "of an entirely different nature," and a requirement that treaty language must be "'definitely expressed' . . . gives too little regard to the doctrine that Indian treaties be liberally construed to favor the Indians." *Id.*

The Tenth Circuit has similarly rejected the Ninth Circuit's test and has adopted the test used in the Third and Eighth Circuits:

> The Ninth Circuit has indicated that a treaty must contain a *definitely expressed exemption*. In contrast, the Third and Eighth Circuits, recognizing that treaties between the United States and Indian tribes were typically entered into long before passage of a federal income tax (or other types of federal taxes), have held that the proper test is whether a treaty contains language which *can reasonably be construed to confer tax exemptions*.

Chickasaw Nation v. United States, 208 F.3d 871, 884 (10th Cir. 2000) (citations and quotations omitted) (emphasis added), *aff'd*, 534 U.S. 84 (2001). The Tenth Circuit concluded that because treaty language should be liberally construed in favor of the Indians, the test applied by the Third and Eighth Circuits "is the more reasonable one." *Id.* Because the Tenth Circuit rejected the Ninth Circuit's test, the Chickasaw Nation did not cite to this split in its petition for certiorari to this Court. Rather, in its petition, the Chickasaw Nation relied on a separate split concerning the construction of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. Accordingly, the circuit split created by the Ninth Circuit's "definitely expressed exemption" test was not addressed by the parties or decided in *Chickasaw Nation v. United States,* 534 U.S. 84 (2001).

In addition to the Third, Eighth and Tenth Circuits, the Federal Circuit has expressed its approval of the *Lazore* test. In *Cook v. United States,* 32 Fed. Cl. 170 (Fed. Cl. 1994), *aff'd,* 86 F.3d 1095 (Fed. Cir. 1996), the Federal Court of Claims – at the urging of the United States – applied the *Lazore* test (i.e., whether the treaty was "'capable of being reasonably construed as supporting an exemption"') in evaluating the Canandaigua Treaty. *Id.* at 174 (quoting *Lazore*, 11 F.3d at 1187). On appeal, the Federal Circuit evaluated whether the Treaty could "reasonably be interpreted as exempting [the plaintiffs] from the payment of excise tax." *Cook v. United States,* 86 F.3d 1095, 1097 (Fed. Cir. 1996). Although the Federal Circuit did not expressly cite to *Lazore* in its opinion, the *Lazore* test was unquestionably applied by the Federal Circuit in that appeal.

The present circuit split is well-recognized by other courts, as well as legal scholars. Citing *Lazore* and the Ninth Circuit line of cases, one district court has recently observed, "the circuits appear divided on the point at which the favorable standard of [the Indian canons of] construction should be applied to treaties in tax-exemption cases." *Perkins v. United States,* No. 16-cv-495 (LJV), 2017 U.S. Dist. LEXIS 123543, *5 (W.D.N.Y. Aug. 4, 2017) (unpublished).

The district court below expressly recognized the existence of the circuit split. Pet. App. 36a. The district court noted that Petitioner "takes issue with the 'express exemptive language' test and notes that the Third and Eighth Circuits apply a more permissive standard in examining exemptions from

federal taxes flowing from Indian treaties." Pet. App. 142a n.4 (incorporated by reference at Pet. App. 36a). The district court rejected the *Lazore* test, because it was "bound to follow Ninth Circuit precedent on this matter." *Id.* Most notably, the United States conceded that "[t]he Ninth Circuit's standard is more restrictive than that of the Third Circuit and the Eighth Circuit." U.S. Mem. in Opp. to Yakama Nation's Motion for Partial Summary Judgment, *King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 2:11-cv-3038-RMP, Dkt. No. 94 at 9 n.7 (E.D. Wash.) (filed Oct. 30, 2012).[7]

Referring to the present circuit split, a noted Indian law treatise recognizes that "[l]ower courts differ concerning the extent to which . . . treaty language must refer expressly to tax exemption." 1-8 Felix S. Chohen, *Cohen's Handbook of Federal Indian Law* § 8.02 (Nell Jessup Newton et al., eds., 2017) ("Cohen"). The authors conclude that the *Lazore* test, rather than the Ninth Circuit's line of cases, is the more "sensible approach" – particularly given that the Indian treaties pre-date many forms of taxation. *Id.*

This split is well-entrenched. The Ninth Circuit has steadfastly held to its test for over three decades. The Ninth Circuit is well aware of its divide with

---

[7] The United States' brief then asserts that it would prevail even under the Third Circuit's test. Here, however, the Ninth Circuit failed to consider whether the language of the Yakama Treaty could reasonably be construed to confer a tax exemption and therefore declined to construe the Treaty's language as it would have been understood by the Yakamas.

other circuits. Although Petitioner urged the Ninth Circuit to adopt the *Lazore* test, the panel failed to do so, and the Ninth Circuit denied rehearing en banc. Thus, the Ninth Circuit will continue using its test unless this Court resolves the split. Conversely, the Third Circuit's *Lazore* test has been in place for 25 years. Despite numerous opportunities for all four circuits to reconsider their decisions, none have done so. Moreover, it is unlikely that other circuits will weigh in on this circuit split. The vast majority of federal Indian lands are in the Third, Eighth, Ninth and Tenth Circuits. *See* U.S. Dep't of Interior, Bureau of Indian Affairs, *Indian Lands of Federally Recognized Tribes of the United States* (June 2016). Only three other circuits contain federal Indian reservations, and those reservations are among the smallest in the United States. *Id.* Thus, the remaining circuits are not likely to consider this issue for years to come – if ever. The relevant circuits have spoken and have been divided for years.

The United States, the lower courts and commentators recognize that a substantial circuit split exists. That split is well-entrenched and will continue in the absence of intervention by this Court. This circuit split dramatically impacts the treaty rights of Native Americans. Those rights should not hinge on the circuit in which the reservation lands are located.

II. THIS COURT SHOULD HOLD THE PETITION PENDING ITS DECISION IN WASHINGTON *STATE DEP'T OF LICENSING v. COUGAR DEN, INC.*

The second Question Presented concerns the proper construction of the Yakama Treaty, including the Right to Travel set out in Article III of the Treaty. In *Washington State Department of Licensing v. Cougar Den, Inc.,* No. 16-1498, this Court granted certiorari to resolve the conflict between the Washington Supreme Court and the Ninth Circuit with respect to the construction of Article III. Because the present petition is based in part upon the same language of Article III, this Court should hold the Petition pending the decision in *Cougar Den*.

In *Cougar Den, Inc. v. Dep't of Licensing*, 392 P.3d 1014, 1017 (Wash. 2017), *cert. granted*, 138 S. Ct. 2671 (Jun. 25, 2018), the Washington Supreme Court recognized that travel was "woven into the fabric of Yakama life" and that trade and other aspects of the Yakamas tribal culture were "dependent on the Yakamas' ability to travel." Given the assurances by the United States that the Treaty would not infringe on the Yakamas' tribal practices, both sides understood that the Yakamas would have "free and open access to transport goods." *Id.* Thus, the Washington Supreme Court, construing Article III, concluded that when "travel on public highways is directly at issue," the Yakama Treaty precludes the imposition of a tax in connection with that travel. *Id.* at 1019. The Washington Supreme Court expressly held that "the right to travel provision in

the treaty protects the Tribe's historical practice of using the roads to engage in trade and commerce." *Id.* In *Ramsey* and its decision below, the Ninth Circuit held that the language of Article III does not "provide sufficient evidence of the Government's intent to exempt the Yakama from federal taxation." Pet. App. 31a; *see Ramsey*, 302 F.3d at 1080.

In its petition for a writ of certiorari in *Cougar Den*, the State of Washington urged this Court to grant certiorari because "the Washington Supreme Court and the Ninth Circuit are split on whether [the Yakama] Treaty" should be read as precluding taxation when travel on the public highways is directly at issue. Wash. Pet. at 13 (No. 16-1498) (filed Jun. 14, 2017). Because this Court's decision in *Cougar Den* will likely clarify the restrictions that may be placed on the Yakama people's rights set out in Article III of the Treaty, this Court should hold the petition pending its decision in *Cougar Den*.

III. THE PETITION RAISES IMPORTANT ISSUES OF FEDERAL LAW THAT MERIT RESOLUTION BY THIS COURT.

One fact permeates every aspect of the United States' relationship with Indian tribes: "[T]he United States overcame the Indians and took possession of their lands . . . ." *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943); *accord Choctaw Nation v. Oklahoma,* 397 U.S. 620, 630-31 (1970) ("The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent."). As a

result, the Government has an obligation to protect the interests of Native Americans – particularly rights acquired by treaty. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *see United States v. Kagama*, 118 U.S. 375, 384 (1886). The Indian canons of construction are founded on the protection of these rights, the preservation of traditional notations of tribal sovereignty, and the practical reality that the treaties were written in a language and set out concepts that were largely foreign to Native Americans. *See* 1-2 Cohen § 2.02. These canons "mediate the problems presented by the nonconsensual inclusion of Indian nations into the United States." *Id.*

The Indian canons of construction "are rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Accordingly, standard principles of construction are inapplicable to an Indian treaty. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

The inconsistent application of the Indian canons of construction undercuts the relationship of trust that the Government has undertaken. Construing a treaty differently based solely on a reservation's geographical location cannot be reconciled with the United States' duty and obligation to protect the rights of all tribes.

The Yakama Treaty illustrates the importance of consistency among the circuits in this area of the law. Article VI of the Yakama Treaty incorporates by reference "the sixth article of the treaty with the

Omahas." Pet. App. 27a, 32a, 159a. Article VI of the Omaha Treaty, in turn, provides that the President may allot reservation lands to members of the tribe and that the property (until a land patent is issued) "shall be exempt from a levy, sale or forfeiture." Pet. App. 164a. The Omaha Reservation is located in the Eighth Circuit, while the Yakama Reservation is located in the Ninth Circuit. Because of the Ninth Circuit's requirement of "express exemptive language," it refused to consider how Indians would have reasonably construed the language of Article VI.[8] In contrast, a member of the Omaha Tribe – relying on the exact same language – would be permitted, under the Eighth Circuit's more generous test, to show how the treaty's words were understood by the Indians. The Yakama Treaty is not unique in this regard. The United States frequently drafted Indian treaties to incorporate or repeat verbatim provisions of earlier treaties. *See, e.g., Means v. Navajo Nation,* 432 F.3d 924, 935 (9th Cir. 2005).

The consistent application of Indian canons of construction is also vitally important because many

---

[8] Before the Ninth Circuit, Petitioner relied on Article VI in arguing that it was not subject to the federal tobacco excise tax. King Mountain 9th Cir. Br., Nos. 14-36055 & 16-35607 (Federal Excise Tax Action) at 38-39, 51-52 (ECF 16) (filed Apr. 14, 2017). Specifically, the Internal Revenue Code provides that property used to manufacture tobacco products shall automatically be forfeited if the tobacco excise tax is not paid. 26 U.S.C. §§ 5763, 7302. King Mountain is located on reservation lands that have been allocated to the company's owner/operator, an enrolled Yakama Indian. Accordingly, Article VI's prohibition against forfeiture (an incident of the federal excise tax at issue) provides further support for reading the Treaty as prohibiting the tax at issue.

reservations are in two circuits. The Navajo Reservation, for example, includes over 17 million acres in Arizona, New Mexico and Utah. U.S. Dep't of Interior, Bureau of Indian Affairs, *Indian Lands of Federally Recognized Tribes of the United States* (June 2016). Portions of the reservation are in the Ninth Circuit (Arizona) while the remainder is in the Tenth Circuit (New Mexico and Utah). *Id.* Thus, a challenge by the Navajo Tribe to a federal tax will be adjudicated based on different standards depending on whether the proceeding is brought in federal district court in Arizona versus a district court in Utah or New Mexico.[9]

The treaty rights of Native Americans – which the United States has an obligation to protect – are too important to be determined based on the happenstance of where Congress divided the circuit courts. Given our Nation's promises and duty to protect tribal sovereignty, the United States' drafting of treaties so that one treaty incorporates language of another, and the fact that Indian reservations cut across circuits, a circuit split involving the Indian canons of construction carries great practical and equitable importance. The Questions Presented raise important issues of federal law that merit resolution by this Court.

---

[9] The Goshute Reservation, located in both Nevada and Utah, stands as a further example of a tribe whose lands lie in both the Ninth and Tenth Circuits.

IV. THE NINTH CIRCUIT ERRED IN THE TEST IT APPLIED IN CONSTRUING THE YAKAMA TREATY AND IN ITS FAILURE TO RECOGNIZE THE RIGHTS OF THE YAKAMA PEOPLE UNDER THAT TREATY.

The Ninth Circuit erred in two fundamental ways. First, by requiring that the Yakama Treaty contain "definitely expressed" language providing an exemption from federal taxation or fees, the Ninth Circuit has turned the Indian canons of constructions on their head. Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 Me. L. Rev. 1, 39 (2008). By focusing on the intent of the Government rather than the Yakamas, the Ninth Circuit was unable to correctly determine the purpose and intent of the Treaty's words. Second, the Treaty's language, when read in context, provides that the Government will not restrict the movement of goods from the Yakama Reservation to the marketplace over the public highways. Both the federal tobacco excise tax and FETRA impose such restrictions.

This Court has long recognized the importance of the Indian canons of construction in construing a treaty. Indian treaties should be liberally construed in favor of the Native Americans. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). All ambiguities in a treaty are to be resolved in favor of the tribe. *Winters v. United States*, 207 U.S. 564, 576 (1908). Treaties must be construed as the Indian tribe would have understood the agreement that was reached. *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 196 (1999).

Accordingly, this Court has consistently read treaty language in favor of the Indian tribes and against the Government.[10]

The test employed by the Ninth Circuit cannot be reconciled with the Indian canons of construction. The Indian canons recognize that the United States had every possible advantage in negotiating Indian treaties. To construe Indian treaties from the lens of the Government, rather than Native Americans, ignores the historical context which resulted in Native Americans ceding their lands. Doing so is inconsistent with the unique relationship of trust that the United States owes to Native Americans.

In determining whether an Indian treaty creates a tax exemption, courts should "look for a textual basis from which an exemption can be inferred," but should not require express words of exemption. 1-8 Cohen § 8.02. In short, the Ninth Circuit's test simply goes too far in emphasizing the intent of the United States to the exclusion of the intent of the Indian tribe. That is why all circuit courts that have

---

[10] In *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), this Court discussed the relationship of the Indian canons of construction to tax canons in the context of a federal statute. The Court ultimately concluded that because the statute at issue was unambiguous, neither canon was necessary to decide the case. This Court's decision in *Chickasaw Nation* "does not undermine the weight of precedent holding that the Indian law canon predominates [over tax canons.]" 1-2 Cohen § 2.02. Moreover, in *Chickasaw Nation*, this Court expressly left open whether the Indian canons of construction should carry greater force when construing a treaty rather than a statute. 534 U.S. at 95.

addressed this issue have rejected the Ninth Circuit's approach.

When the Yakama Treaty is considered in light of its historical context and how the Yakama people would have understood the words of the Treaty, the Treaty precludes a tax or fee being placed on the transportation of goods over the public highways. Article III of the Yakama Treaty grants the Yakama people "free access" from their lands to the public highways. Those words can reasonably be construed to restrict the Government's ability to extract payment from the Yakamas for the act of transporting their goods from Yakama lands over the public highways for sale. In fact, this Court has construed Article III of the Yakama Treaty (ensuring the Yakamas may fish outside of reservation lands) as precluding the imposition of a fee upon the exercise of the Yakamas' right to fish. *Tulee v. Washington,* 315 U.S. 681, 684 (1942). The Yakamas' Right to Travel – set out in the same Article – should be construed similarly.

Both the FETRA fee and the federal excise tax are inconsistent with the Treaty's plain language – "free." And both are inconsistent with how the Yakama people would have understood their Treaty rights – particularly given that the concept of taxation would have been foreign to Native Americans living in the Pacific Northwest in 1855. Having promised the Yakama people the right of free access to the public highways, that right cannot be taken away unless Congress expressly manifests its intent to abrogate that treaty right – which Congress

has not done. *See Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 202 (1999).

The tobacco tax at issue, though referred to as an excise tax, is in fact a tax on the movement of tobacco products. Under the Internal Revenue Code, a tobacco manufacturer or importer is liable for the federal excise tax on tobacco products. 26 U.S.C. § 5703(a). The tax, however, is not determined until the tobacco product is removed from the factory. 26 U.S.C. §§ 5702(j), 5703(b); *see* Pet. App. 5a. As such, the federal tobacco excise tax is a tax on the transportation of tobacco products from the factory to the marketplace. Similarly, the FETRA assessment – which is calculated based on the federal excise tax removals – is also a cost imposed on the transportation of goods.

The federal excise tax is not on the manufacture of tobacco products. If a tobacco product is manufactured, remains in the factory and then destroyed (whether by accident or by an intentional act because the manufacturer no longer intends to transport the product into the marketplace), no tax liability arises.[11] *See* 27 C.F.R. § 40.284 (no tax liability arises when "tobacco products in bond are lost (otherwise than by theft) or destroyed, by fire, casualty, or act of God" and loss is sufficiently reported and documented); 27 C.F.R. § 40.252 (authorizing manufacturer to reclaim and reuse

[11] That this tax is tied to the movement of goods, rather than manufacturing, is also demonstrated by imposition of the tax on "importers" who did not manufacture the tobacco products but merely transported those products into the United States. *See* 26 U.S.C. § 5703(a)(1).

tobacco by disassembling the finished tobacco product); 27 C.F.R. § 40.253 (manufacturer may intentionally destroy tobacco products and, upon authorization, make appropriate entry in factory records). In fact, the Internal Revenue Code expressly states that the tax will not be "determined" until the tobacco product is removed from the factory. 26 U.S.C. §§ 5702(j), 5703(b).

In the case of King Mountain, this tax is triggered on reservation lands when trucks pass through the gates of the factory en route to deliver the tobacco product over the highways of the United States to the marketplace. The United States, however, guaranteed the Yakama people free access to the public highways so that they could continue their way of life as a trading people. The Yakama Treaty, when read in its historical context and as the Yakamas would have understood its words, was intended to guarantee to the Yakamas their ability to travel without restrictions for purposes of trade. Imposing a tax or a fee on the act of moving goods to the public highways is inconsistent with the rights that the Yakama people believed that the Government agreed by treaty to preserve.

The Ninth Circuit erred by failing to apply the proper framework in analyzing the Yakama Treaty. That error compounded the Ninth Circuit's second mistake – concluding that the Yakama Treaty does not preserve the right of the Yakamas to travel without being taxed. *See* Pet. App. 142a (because of the Ninth Circuit's test, district court refused to "consider evidence extrinsic to the Treaty itself"). As Chief Justice Marshall admonished, 36 years before

the Yakama Treaty, "the power to tax [is] the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). As a result, the Ninth Circuit's reading of the Treaty renders the Yakama people's Right to Travel under Article III illusory. The Indian people deserve more from our Nation.

The erroneous decision of the Ninth Circuit should not stand.

CONCLUSION

The Petition for Writ of Certiorari should be held pending this Court's decision in *Washington State Department of Licensing v. Cougar Den, Inc.,* No. 16-1498, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

Christopher G. Browning, Jr.
Counsel of Record
Bryan M. Haynes
Counsel for Petitioner