No. 02 1547 APR 22 2003

In The

Supreme Court of the United States

KIP R. RAMSEY, d/b/a TIIN-MA LOGGING CO.;
TIIN-MA LOGGING CO.,

Petitioner,

vs.

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 A WRIT OF CERTIORARI

TIMOTHY R. WEAVER
Counsel of Record

LAW OFFICES OF TIM WEAVER
402 E. Yakima Avenue,
Suite 190
Yakima, WA 98901
(509) 575-1500
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether previous opinions of this Court,[1] applying the canons of Treaty construction to construe the language "the right of taking . . . *in common with citizens of the territory*" in Article III, Paragraph 2, of the Treaty with the Yakamas of 1855 (12 Stat. 951), and finding that the "right . . . in common with" language reserved to the Yakama specific and special rights to take fish are in direct conflict with the opinions of the Court of Appeals for the Ninth Circuit in this case finding that identical language in the same Treaty article provided Yakamas with no special and specific rights as to travel on the public highways.

2. Whether the opinion below finding that the terms "in common with" and "right to travel . . . " in Article III provide Yakamas no rights is in direct conflict with this Court's opinion in *Washington v. Washington State Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), construing the same language to grant specific rights to Yakama Indians.

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[1] *United States v. Winans*, 198 U.S. 371 (1905); *Suefert Bros v. United States*, 294 U.S. 194 (1918); *Tulee v. State of Washington*, 315 U.S. 682 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

QUESTIONS PRESENTED – Continued

3. Whether the reasoning of the opinion of this Court in *Tulee v. Washington*, 315 U.S. 682 (1942), construing the "in common with" language of Article III, Paragraph 2, of the Treaty with the Yakama of 1855 (12 Stat. 951) as reserving to Yakama tribal members the right to take fish without payment for fees for that right, conflicts with the Court of Appeals' ruling that the identical language of Article III, Paragraph 1, of the Treaty regarding the right of Yakama Indians to haul tribally produced goods to market on the public highways free of the Federal diesel and heavy vehicle use tax, provided no similar exemption.

4. Whether the Court of Appeals' opinion requiring that an Indian Treaty must contain "express exemptive language" on its face before it may qualify an Indian for a Federal tax exemption is in direct conflict with prior rulings of this Court in *Choate v. Trapp*, 224 U.S. 665 (1912), *Squire v. Capoeman*, 351 U.S. 1 (1956), and *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), holding that such language need only be "clearly expressed" with all doubtful terms and expressions construed in favor of the Indians.

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PETITION FOR A WRIT OF CERTIORARI

Kip R. Ramsey, d/b/a Tiin-Ma Logging Co., and Tiin-Ma Logging Co. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A *infra* 1a to 11a) is reported at 302 F.3d 1074. The opinion of the District Court (App. B *infra* 12a to 26a) is unreported. There are two other opinions that bear directly on the Treaty interpretation issue before the Court. The Court of Appeals' opinion, *Cree v. Flores* (App. *infra* 59a to 87a) is reported at 157 F.3d 762 (9th Cir. 1998). The District Court opinion, *Cree v. Flores* (App. *infra* 88a to 182a) is reported at 955 F.Supp. 1229 (E.D. Wash. 1997).

JURISDICTION

The Court of Appeals entered its judgment on September 11, 2002. A Petition for Rehearing was denied by the Court of Appeals on December 23, 2002 (App. E *infra* 28a). On March 17, 2003, Justice O'Connor granted an extension of time for filing of this Petition to and including April 22, 2003 (App. D *infra* 27a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction in the original action in the District Court was invoked pursuant to 28 U.S.C. 1346(a)(1), as this was an action for the refund of Federal excise taxes.

TREATY PROVISIONS INVOLVED

This case involves the Treaty with the Yakama of June 9, 1855 (12 Stat. 951). The Treaty is set forth in full in Appendix G at Pages 35a to 43a. The specific provision of the Treaty, with the applicable language in bold, here in question is Article III, Paragraph 1:

ARTICLE III.

> ***And provided,*** That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest highway, **is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways**.

TREATY RECORDS INVOLVED

Also involved are what are generally referred to as the "Treaty Minutes" comprising the record of the Treaty proceedings at Walla Walla, Washington in May and June of 1855. Those "Minutes" are formally titled:

> "A true copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley held jointly by Isaac I. Stevens Gov. & Supt. W.T. and Joel Palmer Supt. Ind. Affairs O.T. on the part of the United States with the Tribes of Indians named in the Treaties made at that Council June 9th and 11th 1855."

These records are voluminous, but pertinent portions are set forth below:

"I will give briefly the reason for selection [of] these two Reservations . . . **You will be near the great road** and can take your horses and your cattle down the river and to the Sound to market." Record of proceedings, Statement of Governor Stevens to Yakamas (Records Page 64, App. G *infra* 45a).

"You will be allowed to pasture you [sic] animals on land not claimed or occupied by settlers, white men. **You will be allowed to go on the roads to take your things to market, your horses and cattle.** You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites. **All that outside the Reservation.**" Record of proceedings, Statement of Governor Stevens to Yakamas (Records Page 67, App. G *infra* 48a to 49a).

"They shall have the same liberties outside the Reservation to pasture animals on land not occupied by whites, to kill game, to get berries and **to go on the roads to market.**" Record of proceedings, Statement of Governor Stevens to Yakamas (Records Page 69, App. G *infra* App. 52a).

"Gov. Stevens: I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this Reservation settlers cannot go, that he can graze his cattle outside of the Reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, **that he can kill game and can go to buffalo when he pleases**, that he can get roots and berries on any of the lands not occupied by settlers." Record of proceedings, Statement of Governor Stevens to Nez Perce and Yakamas (Records Page 102, App. G *infra* 57a).

"My brother has stated that you will be **permitted to travel the roads** outside the Reservation." Record of proceedings, Statement of General Palmer to Yakamas (Records Page 70, App. G *infra* 53a).

"Now as we give you the privilege of **traveling over the roads**, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for injury." Record of proceedings, Statement of General Palmer to Yakamas (Records Page 71, App. *infra* 55a).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes which are set out in full in Appendix F at Pages 29a to 34a:

26 U.S.C. 4041; 26 U.S.C. 4081; 26 U.S.C. 4083; 26 U.S.C. 4091; 26 U.S.C. 4092; and 26 U.S.C. 4481.

STATEMENT OF THE CASE

This is a case for refund of Federal heavy vehicle use taxes paid pursuant to 26 U.S.C. 4481 (App. F *infra* 34a) and Federal diesel fuel taxes paid pursuant to 26 U.S.C. 4041, 26 U.S.C. 4081, 26 U.S.C. 4083, 26 U.S.C. 4091 and 26 U.S.C. 4092 (App. F *infra* 29a to 33a). The basis for the refund claim is Petitioner's assertion that as an enrolled member of the Yakama Nation, he is entitled to an exemption from these taxes pursuant to the provisions of the Treaty with the Yakamas of June 9, 1855 (12 Stat. 951) (hereafter Treaty) (App. G *infra* 35a to 43a), particularly

the provisions of Article III, Paragraph 1, of that Treaty which reads as follows:

> ***And provided,*** That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, **is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways**. [Emphasis added]

Ramsey's position is that the bolded language of Article III, Paragraph 1, above was understood by the Yakamas at the time of the Treaty to provide them the *unfettered* right to travel on the public highways of the United States, without having to pay taxes for that right. Ramsey asserts that the language of Article III, Paragraph 1, when interpreted under the canons of construction applied to doubtful terms in Treaties, provides an express exemption from Federal highway taxes. Ramsey brought this refund action following the decisions of the District Court for the Eastern District of Washington in *Cree v. Flores*, 955 F.Supp. 1229 (E.D. Wash. 1997; App. *infra* 88a to 182a), and the Ninth Circuit upholding that decision in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998; App. *infra* 59a to 87a), with the Ninth Circuit there holding with regard to Article III, Paragraph 1, of the Treaty:

> We agree with the district court that, in light of those and its other findings, **the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use**. *Cree v. Flores*, *supra* at 769, App. *infra* 72a). [Emphasis added]

In the opinion here in question, the Ninth Circuit rejected the reasoning of the panel in *Cree*, *supra*. It held that *Cree* dealt only with the issue of State taxation, and in the context of Federal taxes, the Treaty clause construed by the Court in *Cree* to provide free use of the public highways did not contain "express exemptive language," was not subject to interpretation under the canons of Indian Treaty construction, and, accordingly, did not qualify Ramsey for a Treaty based tax exemption. *Kip R. Ramsey, et al. v. United States*, 302 F.3d 1074, 1080, (9th Cir. 2002, App. A *infra* 1a to 11a).

A. Position of Ramsey

Petitioner Kip R. Ramsey, d/b/a Tiin-Ma Logging Co., and Tiin-Ma Logging Co. (hereafter Ramsey) is a sole proprietorship[2] owned and operated by Ramsey on land held in trust for him by the United States within the Yakama Indian Reservation in the State of Washington. Ramsey is an enrolled member of the Federally recognized Confederated Tribes and Bands of the Yakama Nation. He operates a logging business which harvests trees from the Yakama Nation's forest on lands held in trust for that Nation and its individual members. Ramsey then hauls those logs to sawmills both on and off the Reservation, using heavy logging trucks and traveling on private County, State and Federal highways. In order to operate his trucks on the public highways, he has been required to

[2] In spite of the "Co." designation of the business name, Ramsey's business is not incorporated and is solely owned by him as an individual Yakama Indian.

pay the Federal heavy vehicle use tax and Federal diesel fuel taxes.

Ramsey, as a Yakama tribal member, has long asserted that the unique language of Article III, Paragraph 1, of the Yakama Treaty reserved to the Tribe and its members the right to travel the public highways without the payment of fees or taxes for that use.[3] He has litigated this issue for nearly ten years against the State of Washington. His efforts against the State concluded with the decision in his favor by the Ninth Circuit in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (App. H *infra* 59a to 87a). These claims for refund followed.

It is important for the Court to note that the tax free use of the public highways asserted here is one limited in its scope. Ramsey asserts only his right, as a Yakama tribal member, to haul what the prior Court rulings have held to be "tribal goods over the public highways." District Court ruling, *Ramsey v. U.S.A.*, unreported (App. B *infra* 13a), *Cree v. Flores*, 955 F.Supp. 1229, 1252, 1253, (App. I *infra* 88a to 182a). There is no effort to assert this right to uses other than those tied directly to tribal members and to the hauling of "tribal goods" – in this instance, logs harvested on the Reservation. There is no contention that the Treaty exempts Ramsey from following all of the rules

[3] The language of Yakama Treaty Article III, Paragraph 1, here in question is contained in only two other Treaties in the United States. See *Cree v. Flores*, 157 F.3d 762, 772 (9th Cir. 1998), one of which was negotiated at the same proceeding as the Yakama Treaty, and the other, the Flathead Treaty, a few weeks later. The Yakama Treaty and its Minutes, as discussed *infra*, reflects the basis for the inclusion of this unique "right to travel" in its Treaty.

of the road, including weight restrictions, speed, safety, etc.

B. Proceedings Below

Following the denial of Ramsey's refund claims by the IRS, Ramsey filed suit in the Federal District Court for the Eastern District of Washington. In that action, Ramsey asserted that Article III, Paragraph 1, of the Treaty, reserved to him the right "to travel the public highways" "in common with citizens of the United States" free of taxes and fees. Ramsey asserts that Article III, Paragraph 1, is language that can be construed, under the Treaty canons of construction, to constitute language which clearly expresses a tax exemption. This position was based upon both the language of the Treaty cited, *supra*, the decision in *Cree*, *supra*, and the many decisions of this Court, discussed *infra*, which applied the canons of Treaty construction to virtually identical language in Treaty Article III, Paragraph 2. It is further based on the Indian tax decisions discussed *infra* requiring application of those same canons of construction.

Both parties moved for summary judgment in the District Court. In support of his motion, Ramsey filed the identical exhibits used by him in the *Cree*, *supra*, proceeding, together with affidavits from the same experts he used in that proceeding.[4] The United States presented no

[4] The decision and findings of the District Court in *Cree v. Flores*, 955 F.Supp. 1229 (E.D. Wash. 1997, App. I *infra* 88a to 92a), provide an excellent factual background on this case and the Yakama Treaty negotiations, and discuss the exhibits presented there and in this case. Ramsey's Local Rule 56(b) Statement of Material Facts (App. J *infra* 183a

(Continued on following page)

controverting exhibits or declarations and did not contest Ramsey's factual assertions, choosing instead to rely solely on the legal argument that the Yakama Treaty contained no "express exemptive language."

Both parties presented an Eastern District of Washington Local Rule 56(b) "Statement of Material Fact Re Motion for Summary Judgment." (Ramsey's Statement, App. J *infra* 183a to 190a). Under local court rules, the facts presented there are deemed admitted unless specifically rebutted.

The following uncontested facts regarding the parties' understanding of the "right to travel . . . public highways" language were before the District Court and Court of Appeals below:

> 9. That the Yakama Chiefs would not have signed the Treaty had they believed it would condition their ability to travel on the public highways upon the payment of a fee or tax. Yallup Declaration, Page 5, lines 1-4.
>
> 12. That continued free access to travel was a primary concern of the Yakama in 1855, and that concern was well known to the Chief U.S. Treaty negotiators, Governor Isaac Stevens and General Joel Palmer. Walker Declaration, Page 4, lines 16-22; Page 7, lines 1-13.

to 190a), which as noted above was uncontested by the United States, is based upon the exhibits, declarations and testimony in *Cree*, *supra*, and these same exhibits and declarations filed in support of Ramsey's Motion for Summary Judgment in this case.

> **13. That the Yakamas and the United States, in the Treaty of 1855, specifically understood and agreed that the Yakamas would retain the right of off-Reservation travel on the highways, without the payment of fees or taxes of any nature.** Walker Declaration, Page 7, lines 15-19. [Emphasis added]
>
> 14. That the Yakamas, in the Treaty negotiations, bargained for and understood that the Treaty provided unrestricted free of any fees or taxes, travel upon public highways that would in the future be constructed by non-Indians. Walker Declaration, Page 8. (All included in Plaintiff's Statement of Material Facts, App. J *infra* 183a to 190a.)

The District Court (App. B *infra* 12a to 26a), relying upon Ramsey's unrebutted exhibits, declarations and Statement of Material Facts, held that the reasoning in the *Cree* cases, *supra*, regarding Article III, Paragraph 1, was correct, and that application of the canons of Treaty construction to Article III, Paragraph 1, resulted in a finding that a Federal tax exemption was present in the Yakama Treaty. (*Ramsey v. U.S.*, unreported, App. B *infra* 21a, 22a).

On appeal, the Ninth Circuit reversed, determining that it need not apply the canons of Treaty interpretation to Article III, Paragraph 1:

> *Cree II*'s interpretation, however, is not binding on the question of *federal* taxation because the initial inquiry when exempting Indians from *federal* taxes is whether the federal law in question contains express exemptive language at all. **The canon of construction favoring the Indian when ambiguities are present in a statute or treaty does not come into play absent such language.** *Ramsey v. U.S.*, 302 F.3d 1074, 1079 (App. A *infra* 10a).
>
> Indeed, the clause granting the Yakama the "right, in common with citizens of the United States, to travel upon all public highways" contains no exemptive language. **"In common with" does not express an intent to exempt the Yakama from taxes.** Thus, there is no express exemptive language in the Treaty to exempt the Yakama from the generally applicable, federal heavy vehicle and diesel fuel taxes. *Id.* at 1080 (App. A *infra* 11a).

In making its determination not to apply the canons of construction to Article III, Paragraph 1, the Ninth Circuit further determined that Treaty language must first "provide evidence of *the Federal government's intent* to exempt Indians from taxation," *Ramsey*, *supra* at 1078 (App. A *infra* 8a). It then went on to determine a "bright line" nature of Treaty language that was necessary to constitute "express exemptive language" for purposes of Federal tax exemptions, *which must be present* on the face of the Treaty before the canons of construction will be applied:

> Treaty language such as "free from incumbrance," "free from taxation," and "free from fees," are but some examples of express exemptive language required to find Indians exempt from federal tax. *Id.* at 1078. (App. A *infra* 8a)

The Court of Appeals denied Ramsey's Petition and Petition for Rehearing and En Banc.

REASONS FOR GRANTING THE PETITION

This Court has, in four previous decisions,[5] construed the language of Article III of the Yakama Treaty, the same Treaty Article here at issue. By application of the canons of Treaty construction to Article III, this Court has consistently held that its language reserved specific and important rights to the Yakamas. In each of those opinions, this Court has emphasized the importance of applying the canons of construction to Article III in order to interpret it as the Yakamas understood it at the Treaty grounds in Walla Walla in 1855. The opinion of the Court of Appeals here, in refusing to apply the canons of construction to the language of Article III, is in direct conflict with the reasoning and holding of those cases.

The opinion of the Court of Appeals, in failing to give meaning to the term "in common with" and "right to travel . . . public highways" in Article III of the Yakama Treaty is in direct conflict with this Court's opinion in *Washington v. Washington State Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), construing Article III of the Yakama Treaty, and giving these terms specific meaning "in the manner in which the Indians understood them."

The opinion of the Court of Appeals, in finding that the provision of Article III, Paragraph 1, contained no language that would exempt Petitioner from paying fees for the exercise of his Treaty rights, is in direct conflict

[5] *United States v. Winans*, 198 U.S. 371 (1905); *Suefert Bros. v. United States*, 294 U.S. 194 (1918); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

with this Court's holding in *Tulee v. State of Washington*, 315 U.S. 682 (1942), that identical language in Paragraph 2 prohibited the collection of fees or taxes for the exercise of Yakama's reserved Treaty rights.

The opinion of the Court of Appeals is in direct conflict with the opinions of this Court in *Choate v. Trapp*, 224 U.S. 665 (1912), *Squire v. Capoeman*, 351 U.S. 1 (1956), and *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), requiring the application of the Treaty canons of construction to Treaty terms in order to determine whether an exemption from Federal taxation is expressly stated. It is further in conflict with the decisions in these cases as it establishes a requirement that a Treaty contain "express exemptive language" before it may be treated as creating a Federal tax exemption, in contravention of those holdings that such language need be only "clearly expressed."

This case also provides the Court with its first clear opportunity to explore and establish an Indian *Treaty based exemption* from Federal excise taxes, as opposed to its previous cases which involved only the interpretation of statutory provisions.

I. PRIOR RULINGS OF THIS COURT REQUIRING APPLICATION OF THE TREATY CANONS OF CONSTRUCTION TO INTERPRET THE TERMS OF ARTICLE III, PARAGRAPH 2, OF THE YAKAMA TREATY, MANDATE THAT THE COURT OF APPEALS APPLY THE CANONS TO THE VIRTUALLY IDENTICAL LANGUAGE OF ARTICLE III, PARAGRAPH 1, TO DETERMINE ITS MEANING RELATIVE TO WHETHER THE YAKAMAS UNDERSTOOD IT TO EXEMPT THEM FROM THE PAYMENT OF TAXES WHEN EXERCISING THEIR "RIGHT TO TRAVEL . . . PUBLIC HIGHWAYS."

The determination of the meaning of a "right . . . " reserved "in common with citizens of the United States" (or Territory in some Stevens' Treaties) has a long history before this Court. Persons and States who opposed the reservation of special rights to Yakama and its members under Article III have long argued that the term "in common with" meant simply that the Treaty reserved nothing more to the Tribe than it did to any other citizen. This Court, on no fewer than four previous occasions, rejected that argument, finding that the provisions of Article III regarding such rights were "doubtful expressions," or expressions "fairly capable of two interpretations," and, accordingly, applied the canons of construction to determine their meaning as the Indians understood them.

Beginning in 1905, in *United States v. Winans*, 198 U.S. 371 (1905), this Court found that the "right of taking fish in common with citizens . . . ," as understood by the Indians encompassed larger rights than just those held by ordinary citizens:

> The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. *Indeed, acquired no rights but such as they would have without the treaty.* **This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more.** And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality . . .

In *Winans*, the Court found the language "right to take fish in common with citizens . . . " included perpetual easements over private lands even though the Treaty was silent on that issue.

Fourteen years later, in *Suefert Brothers Co. v. United States*, 249 U.S. 194 (1919), this Court held that the language "right to take fish . . . " discussed in *Winans*, *supra*, imposed the same easement on lands in the State of Oregon, even though Oregon was outside the boundaries of the lands ceded by the Yakamas:

> This recital of the facts and circumstances of the case renders it unnecessary to add much to what was said by this court in *United States v. Winans*, 198 U.S. 371, in which this same provision of this treaty was considered and construed. . . .
>
> To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of

> the treaty, . . . *and would substitute for the natural meaning of the expression used, . . . the artificial meaning which might be given to it by the law and by lawyers. Suefert, supra,* at 198, 199 [Emphasis added]

On its third visit to Article III, this Court determined that the "right of taking fish in common with citizens . . . " specifically included the right to do so without *the payment of fees* for its exercise:

> Viewing the treaty in this light *we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. . . .*
>
> Even though this method may be both convenient and, in its general impact fair, *it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such 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. Tulee v. State of Washington,* 315 U.S. 862, 864, 865 (1942). [Emphasis added]

In 1979, this Court made its last interpretation of Article III of the Yakama Treaty, in the case of *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 677, 678 (1979):

> *It is true that the words "in common with" may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians or as securing an interest in the fish runs themselves. . . .* But we think greater importance should be given to the Indians' likely understanding of the other words in the treaty and especially *the reference to the "right of* ***taking*** *fish" – a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise. . . .*
>
> This interpretation is confirmed by additional language in the treaties. The fishing clause speaks of "securing" certain fishing rights, *a term the Court has previously interpreted as synonymous with "reserving" rights previously exercised.* [Emphasis added]

Recitation of this Court's many experiences with the fishing right provisions of the Yakama Treaty is not intended to assert that those specific interpretations were binding on the Court of Appeals' determination regarding whether a Federal tax exemption exists under the "right to travel" provision. Instead, they are set forth to illustrate that virtually identical language, included in the same Treaty article, has been given broad and important meaning by this Court:

> *The Court has interpreted the fishing clause in these treaties on six prior occasions. In all of these cases the Court placed a relatively broad gloss on the Indians' fishing rights. . . .* [Emphasis added] *Washington State Commercial Passenger Fishing Vessel Ass'n., supra,* at 679.

In contrast to the Court of Appeals' opinion which ignores the meaning of Paragraph 2's reserved "right to travel . . . public highways . . . " and specifically holds that "in common with" secured no rights. *Ramsey, supra,* at 1080 (App. A *infra* 11a).

By failing to ascribe any meaning to this Treaty provision, the Court of Appeals ignored this Court's numerous

clear holdings that "rights" secured under Article III *do have specific meaning* and must be interpreted through use of the canons, *Winans*, *Suefert*, *Tulee*, *Passenger Fishing Vessel Ass'n*, all *supra*, and failed to give meaning to the Treaty as a whole. *Chickasaw Nation v. U.S.*, 84, 94 (2001). The language of Article III clearly and specifically secures a "right to travel," just as it "secured" a "right to take fish." This Court, as noted in *Passenger Fishing Vessel Ass'n*, *supra*, interprets the term "secured" to mean "reserving rights previously exercised." Here, the right asserted by Petitioner is to travel as the Yakamas did in 1855 – free and without taxes – and in the manner agreed to by the United States in the Treaty *"upon all public highways."* That right is clear when Article III, Paragraph 1, is construed as the Yakamas understood it.

Under the holdings cited above, the Court of Appeals erroneously ignored the obvious mandate that Article III, Paragraph 1, is subject to construction and interpretation under the canons of Treaty construction, just as was Paragraph 2 of the same Article. As is set forth in Argument IV, *infra*, such interpretation under the canons of construction is just as appropriate in Federal tax cases as it is in the fishing context. To hold otherwise is in direct conflict with the four previously discussed opinions of this Court.

II. THE OPINION OF THE COURT OF APPEALS' REFUSING TO CONSTRUE THE TERM "IN COMMON WITH," AND FAILING TO IN ANY MANNER CONSIDER THE TERM "RIGHT TO TRAVEL ... PUBLIC HIGHWAYS" IS IN DIRECT CONFLICT WITH THE OPINION OF THIS COURT IN *WASHINGTON V. WASHINGTON STATE PASSENGER FISHING VESSEL ASS'N*, 443 U.S. 658 (1979), WHICH HAS ALREADY APPLIED THE CANONS OF CONSTRUCTION TO THE SAME LANGUAGE IN THE YAKAMA TREATY.

In Argument I, Petitioner asserts that the action of the Court of Appeals was in conflict with the opinions of this Court requiring applications of the canons of construction. Here, Petitioner asserts that the Court of Appeals' opinion is in direct conflict with the actual holding of a case cited in Argument I.

In *Passenger Fishing Vessel*, *supra*, at 677, 678, this Court specifically determined that the words "in common with" were subject to differing interpretations and were not understood by the Yakamas to limit their Treaty fishing rights, and in fact secured to them a 50% share of the fishery resource. It also determined that the term "right to take fish" was also subject to interpretation under the canons of construction, and was understood by the Yakamas to encompass Treaty fishing rights as they were exercised at the time of the Treaty.

Conversely, the Court of Appeals here, in direct conflict with the holding that "in common with" is ambiguous and subject to interpretation, specifically held that the term "in common with" was subject to only one interpretation – that Article III, Paragraph 1, secured no greater

rights than those held by non-Indian citizens – and, accordingly, could not be subject to the canons of construction: " . . . in common with does not express an intent to exempt the Yakamas from taxes." *Ramsey, supra*, at 1080 (App. A *infra* 11a).

The Court of Appeals, again in direct conflict with this Court's *Passenger Fishing Vessel Ass'n, supra*, ruling, failed to even discuss the "right to travel . . . public highways" language of Paragraph 1, thereby giving no meaning to that critical portion of the Treaty language.

The Court of Appeals' action in failing to construe the language of Article III, Paragraph 1, is in stark contrast to and in direct conflict with the holding in *Passenger Fishing Vessel Ass'n, supra*, requiring this Court to grant the Petition.

III. THE OPINION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S RULING IN *TULEE V. WASHINGTON*, 315 U.S. 682 (1942), CONSTRUING ARTICLE III OF THE YAKAMA TREATY AS PROVIDING AN EXEMPTION FOR TAXES IN THE EXERCISE OF RIGHTS SECURED BY THAT ARTICLE.

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. . . .
>
> Viewing the treaty in this light *we are of the opinion that the state is without power to charge the Yakimas a fee for fishing . . . it acts upon the*

> *Indians as a charge for exercising the very right their ancestors intended to reserve. Tulee, supra,* at 684, 685 (citations omitted) [Emphasis added]

In Argument I, Petitioner asserts that the action of the Court of Appeals was in conflict with the opinions of this Court requiring applications of the canons of construction. Here, Petitioner asserts that the Court of Appeals' opinion is in direct conflict with the actual holding of a case cited in Argument I.

Here, the issue is the *"right to travel . . . public highways"* contained in the same paragraph and couched in the same terms as the language construed in *Tulee, supra*. There is nothing on the face of the Treaty, or in the records of the Treaty proceedings, that reflect that the parties intended it to be given less import than the fishing clause, nor is there anything to reflect that the parties intended it to secure any less important rights.

The reasoning of this Court in *Tulee, supra*, its determination that the language of Article III of the Yakama Treaty regarding the "rights" secured therein was capable of two interpretations, and, accordingly, its application of the canons to determine the Indian understanding, compels the same result with Paragraph 1 of Article III. As the uncontested facts in this case reflect (Plaintiff's Local Rule 56(b) Statement of Material Fact re: Motion for Summary Judgment, App. J *infra* 187a, No's 12-15), both parties to the Treaty understood and intended that it secured tax free travel to the Yakamas. Had the Court of Appeals followed the law as set forth by *Tulee, supra*, and *Passenger Fishing Vessel Ass'n, supra*, (and as analyzed by the District Court in this case, App. B *infra* 12a to 26a, and the Courts in *Cree v. Flores*, App. H, I *infra* 59a to 87a, and 88a to 182a), it would have found that the language of

In *Choate v. Trapp*, 224 U.S. 665 (1912), this Court established the bedrock rule for interpretation of Treaties regarding Indian exemptions from tax, requiring that the Courts employ a liberal construction of Indian statutes and Treaties:

> Such exemption was a mere bounty, valuable as long as the state chose to concede it, but **as tax exemptions are strictly construed, it could be withdrawn at any time the state saw fit.**
>
> **But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal;** doubtful expressions, ***instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.*** **This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.** *Choate v. Trapp*, 224 U.S. 665, 675, 56 L.Ed. 941 (1912). [Emphasis added]

While *Choate* dealt with State tax exemptions, its principles requiring broad and liberal construction are cited with favor and adopted by this Court in *Squire v. Capoeman*, 351 U.S. 1 (1956), the seminal case on Treaty or statutory exemptions from Federal taxes. The *Squire*

highways" are words which "can reasonably be so construed" so as to provide an exemption. Had the Ninth Circuit adopted a "bright line" there as it asserts here, the term "reasonably be so construed" would have been superfluous in those opinions.

Court held that while a tax exemption must be "clearly expressed" in a Treaty or statute, such a "clear expression" must be determined after examination of the language of the statute or the Treaty, and it need not be "expressly couched in terms of nontaxability":

> We also agree that, to be valid, exemptions to tax laws should be clearly expressed. **But we cannot agree that taxability of respondents** in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act. . . .
>
> Although this statutory provision **is not expressly couched in terms of nontaxability**, this Court has said that **doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.** Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. **If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."** *Squire*, *supra*, at 6, 7.

As Petitioner sets forth in Argument I, *supra*, the terms "in common with" and a "right . . . " secured "in common with" in Article III of the Yakama Treaty have previously been determined by this Court to be "words susceptible of a more extended meaning . . . " as that term is used in the above quote from *Squire*. The Court of Appeals ignored that long established law concerning the Yakama Treaty when it failed to construe the language of Article III under the canons of construction.

The most recent ruling on this issue, *Chickasaw Nation v. U.S.*, 534 U.S. 84 (2001), makes clear that no "bright line" of "exemptive" words governs when and if the canons of construction should be applied in the context of Federal tax exemption, instead reiterating the holdings of this Court in *Choate*, *supra*, and *Squire*, *supra*:

> In this instance, to accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote. Cf. . . . (same);. . . . **In light of the considerations discussed earlier, we cannot say that the statute is "fairly capable of two interpretations"**, cf. *Montana v. Blackfeet Tribe*, *supra*, at 766, nor that the Tribes' interpretation is fairly "possible." . . .
>
> Moreover, the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions **unless those exemptions are clearly expressed**. . . . **Nor can one say that the pro-Indian canon is inevitably stronger – particularly where the interpretation of a congressional statute rather than an Indian Treaty is at issue.** Cf. *post*, at 7 (O'Connor, J., dissenting). This Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength. *Chickasaw*, *supra*, at 94-96. [Citations omitted, emphasis added]

Again, this Court requires a "clear expression" of a tax exemption, but recognizes that such a "clear expression" may arise under specific language or as a result of the

application of the canons in appropriate circumstances. As has been argued above and in Argument Nos. I, II and III, construction of the language of Article III of the Yakama Treaty under the canons has always been employed by this Court.

Since at least 1912 with the ruling in *Choate*, *supra*, this Court has consistently held that Treaty language providing a tax exemption need only be "clearly expressed" and the determination of such a "clear expression" must occur under application of the canons of Treaty construction when a Treaty or statutory provision was "doubtful" or "capable of two interpretations" as to exemption from the tax at issue. None of those rulings discussed or imposed a bright line requirement for "express exemptive language." *Squire*, *supra*, in fact was very specific that language allowing an exemption need not be "couched in terms of nontaxability." The recent ruling in *Chickasaw*, *supra*, at 96, again makes clear that there is no bright line test for "clearly expressing" tax exemptions, and that they must be determined through use of the canons of construction:

> This Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength.

Obviously, the Courts of Appeals must look at Federal tax matters on a case-by-case basis, and apply the canons of construction to doubtful provisions to ascertain whether the Treaty contains language which "clearly expresses" an exemption.

Requiring that a Treaty negotiated in 1855 guaranteeing a "right to travel . . . the public highways" contain

"express" words exempting that travel from heavy vehicle and diesel fuel taxes when neither existed in 1855 obviously violates this Court's stricture against giving Treaty language "the artificial meaning which might be given to it by the law and lawyers." Instead, the Treaty parties simply made it clear that the "right to travel . . . public highways" was reserved to the Yakamas regardless of how it might be exercised in the future, and exempt from later enacted fees or taxes for its exercise. This Court, in *Squire*, *supra*, at 8, wisely recognized this concept:

> **The fact that this amendment antedated the federal income tax by 10 years also seems irrelevant.** The literal language of the proviso evinces a congressional intent . . . [Emphasis added]

Accordingly, Article III, Paragraph 1, of the Yakama Treaty establishes a "clearly expressed" exemption from travel taxes enacted following the execution of the Treaty. The Court of Appeals here devised a Treaty Federal tax exemption test far more narrow and stringent than is required or allowed by this Court. The opinion of the Court of Appeals conflicts directly with the opinions cited herein and therefore must be reviewed and reversed by this Court.

CONCLUSION

The Court of Appeals' opinion is in direct conflict with four opinions of this Court which have consistently applied the canons of construction to Article III of the Yakama Treaty in order to determine its meaning as the Yakamas understood it. The decision of the Court Appeals' failing to

construe the language of Article III, Paragraph 1, of the Yakama Treaty conflicts directly with the rulings of this Court in *Tulee*, *supra*, and *Passenger Fishing Vessel Ass'n*, *supra*, requiring such construction of Article III and determining that it reserved specific and meaningful rights to the Yakamas. Its determination that "express exemptive language" be present in a Treaty before the application of the canons can be applied to such language is both an oxymoron because the canons do not apply to construe "express" language, and in direct conflict with the tax decision of this Court requiring application of the canons to doubtful Treaty expressions, and then requiring only that the exemption be "clearly expressed."

Finally, the opinion below creates a test for Indian Federal tax exemptions that engenders an absurd result. It has been the law for 200 years that "doubtful" or "ambiguous" Treaty language shall be subject to interpretation favorable to Indians. Those canons are *not* applicable when Treaty language is express or obvious as to its meaning. *Worchester v. The State of Georgia*, 6 Pet. 515, 582. Here, the Court of Appeals started with the end point of the construction test – express language – and made it the beginning. A holding that a Court must first find "express" language before applying the canons provides no test for their application, as no "doubtful" expression can exist in "express" language. Such a determination has no place in our law, and the decision does significant harm to the decisions of this Court and those of the Court of Appeals for the Ninth Circuit.

Based upon the foregoing, this Court should grant the Petition for Certiorari.

Respectfully submitted,

TIMOTHY R. WEAVER
Counsel for Petitioner
LAW OFFICES OF TIM WEAVER
402 E. Yakima Avenue, Suite 190
Yakima, WA 98901

April 22, 2003

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KIP R. RAMSEY, dba Tiin-Ma Logging Co.; TIIN-MA LOGGING CO., *Plaintiffs-Appellees*, v. UNITED STATES OF AMERICA, *Defendant-Appellant.*	No. 01-35014 D.C. No. CV-99-03070-WFN OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Chief Judge, Presiding

Argued and Submitted
June 5, 2002 – Seattle, Washington

Filed September 11, 2002

Before: Melvin Brunetti, Stephen S. Trott, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Trott

COUNSEL

David English Carmack, Department of Justice, Washington, D.C., for the defendant-appellant.

A. Wray Muoio, Department of Justice, Washington, D.C., for the defendant-appellant.

Kent L. Jones, Department of Justice, Washington, D.C., for the defendant-appellant.