UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FREDRICK PERKINS and ALICE J. PERKINS,

Plaintiffs,

-vs-

UNITED STATES OF AMERICA,

Defendant.

Civ. No. 1:16-cv-00495-LJV

Hon. Hugh B. Scott,
Magistrate Judge

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT UNITED STATES' MOTION TO DISMISS

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PRELIMINARY STATEMENT

On September 6, 2016, Plaintiffs Fredrick Perkins (the "Husband") and Alice J. Perkins (the "Wife") (collectively the "Perkins") filed an amended complaint against Defendant United States of America (the "Government") seeking a refund of income tax, interest, and penalties illegally and erroneously collected by the Government. (Doc. 7). In their amended complaint, the Perkins allege income earned by the Wife from the sale of gravel extracted from the Seneca Nation of Indian Allegany Territory is explicitly exempt from federal income tax due to language contained in federal treaties. On September 14, 2016, the Government filed a notice of motion to dismiss pursuant to FRCP Rule 12(b)(6). (Doc. 9). Pursuant to Local Rule 7 (a) (2), (3), the Perkins submit this Memorandum of Law in opposition to the Government's 12(b)(6) motion.

STATEMENT OF THE CASE

The Seneca Nation of Indians ("Seneca Nation") is one of the Six Nations known as the Haudenosaunee or Iroquois Confederacy and is a successor party to federal treaties. (Doc. 7 ¶11). *Lazore v. C.I.R*, 11 F.3d 1180 (3d. Cir. 1993). In these treaties, the Government and the Six Nations agreed to jurisdictional boundaries and promised noninterference in each other's sovereign affairs. (*Id.* ¶12).

In 1794, the Government entered into its third treaty with the Seneca Nation to reaffirm "all the land within" the treaty-defined territory:

> to be the property of the Seneca Nation; and the United States will never claim the same, ***nor disturb*** the Seneca Nation, nor any of the Six Nations, or of ***their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof***; but it shall remain theirs, until they choose to sell the same, to the people of the United States, who have the right to purchase. (Emphasis added).

(*Id.* ¶13 *citing* Canandaigua Treaty of 1794 ["the Canandaigua Treaty"], November 11, 1794, 7 Stat. 44, 45, art. III). After the Seneca Nation claimed its treaties had been breached and its sovereign rights violated when the State of New York sought to tax and foreclose upon its land, the Government and the Seneca Nation mutually agreed:

> to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession ***from all taxes,*** and assessment for roads, highways *or* ***any other purpose***, until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them. (Emphasis added).

Treaty with the Seneca, May 20, 1842 ["1842 Treaty"], 7 Stat. 586, 590, art. 9. (Doc. 7 ¶15).

Under the terms of these treaties, the Seneca Nation retains all rights to lands within its territories "until such lands shall be sold and conveyed" and possession has been relinquished by the Seneca Nation to the Government. *Id.;* Canandaigua Treaty, 7 Stat. at 45 ("until they choose to sell the same, to the people of the United States, who have the right to purchase"). Federal statute further restricts the alienation of lands within the Seneca Nation territories. *See* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or

claim thereto, from any Indian nation or tribe of Indians, shall be of any validity . . . unless the same be made by treaty or convention entered into pursuant to the Constitution."). Because Congress has not authorized the alienation of any land within the Seneca Nation territories, no individual has the authority to alienate or encumber Seneca Nation land in a manner which would remove these treaty-protected lands from the Seneca Nation's jurisdiction and control. Consequently, enrolled Senecas may not encumber these lands with mortgages or other liens to secure their debts.

Due to these federally imposed restrictions on alienation and encumbrance, no individual holds a fee simple title to land within the territories of the Seneca Nation. (Doc. 7 ¶18). Instead, the Seneca Nation has allotted land by restricted conveyances to enrolled members who may only pass or transfer possession of such lands to other enrolled Senecas by quitclaim deeds or by leases. (*Id.*). The Seneca Nation continues to hold the legal title to these lands, ensuring these lands do not pass to non-enrolled members and out of its control, and are preserved for future generations of enrolled members. (*Id.*). *See The New York Indians*, 72 U.S. 761, 770-71(1866) (finding the Seneca Nation remains in their ancient possession of aboriginal lands entitling them to the undisturbed enjoyment of such lands and creating "indefeasible title" to such lands "that may extend from generation to generation" until the Seneca Nation surrenders such lands). These restrictions on alienation and encumbrance run with the land. (Doc. 7 ¶18).

The Wife is an enrolled member of the Seneca Nation and resides with her

Husband on the Seneca Nation Allegany Territory. (Doc. 7 ¶1). As an enrolled member, she has been given a beneficial, possessory interest to land on the Allegany Territory. (*Id.* ¶ 21). These lands for which the Wife has a possessory interest are subject to the restrictions set forth in federal treaties, federal law and Seneca law.

Under Seneca law, an enrolled Seneca possessing a deed or a lease has a beneficial, possessory interest in the land's surface (described as being "plow deep"). The Seneca Nation, however, retains all subterranean land rights. Moreover, no Seneca may extract minerals or gravel from the lands within the Seneca Nation territories without seeking permission from the Seneca Nation Tribal Council. (*Id.* ¶20).

In 2008 and 2009, the Wife had the Seneca Nation's permission to extract gravel on certain lands located on the Allegany Territory for which she holds a deed for a portion and a lease for the remainder. (*Id.* ¶22). On or about June 22, 2009, the Wife stopped mining operations, but continued to sell stockpiled gravel until 2010. (*Id.* ¶24). The income earned by the Wife from gravel sales (minus the royalties paid to the Seneca Nation) are the proceeds that the Perkins claim are exempt from federal income tax, as being derived directly from restricted lands protected by federal treaties. (*Id.* ¶24). The Government does not recognize such income as exempt from federal income tax. (*Id.* ¶¶26-28).

In 2010, the Perkins reported, as exempt income, sales of gravel mined on the Allegany Territory. (*Id.*, Exhibit A). On August 26, 2014, the Government mailed the Perkins a Notice of Deficiency, claiming they owed income tax in the amount of

$6,113.00 and penalties totaling $2,741.70 for the 2010 tax year. (*Id.* ¶¶5-6). The Government later sent the Perkins a tax notice demanding payment of $9,863.68 by June 8, 2015. (*Id.* ¶7). The Perkins paid the adjustment amount in full on May 29, 2015, and then timely filed for a refund claim on October 9, 2015. (*Id.* ¶¶7-8). The Perkins filed this action after the Government failed to respond to its refund claim within six months. (*Id.* ¶9).

ARGUMENT

I

INDIAN TREATIES, LIKE FOREIGN TREATIES, RATIFIED BY THE SENATE ARE THE SUPREME LAW OF THE LAND

Although the Supremacy Clause of the United States Constitution is not a source of any federal rights, it does secure federal rights created by a federal statute or treaty. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979). The Clause provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI cl. 2. The Supremacy Clause imposes restrictions not only on States, but also restricts federal courts, including the Tax Court, and the federal agencies, including the Internal Revenue Service, from taking any action inconsistent with an act of Congress or a treaty ratified by the United States

Senate. *See, e.g., Samann v. C.I.R.*, 313 F.2d 461, 463 (4th Cir. 1963)(finding the Supremacy Clause restricts the U.S. Treasury from enforcing regulations that contract or expand rights under an international treaty) *citing American Trust Co. v. Smyth,* 247 F.2d 149, 153 (9th Cir. 1957); *Fellows v. Blacksmith*, 60 U.S. 366, 372 (1856) (a "treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operations, than they can behind an act of Congress.") *citing United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)(reviewing a decision of an inferior court of admiralty and a treaty with France), *United States v. Brooks*, 51 U.S. (10 How.) 442, 459 (1850), *Foster v. Neilson,* 27 U.S. (2 Pet.) 253 (1829).

From its inception, the United States continued the English and colonial strategy of dealing with the Seneca and other Haudenosaunee nations on a government-to-government basis through treaty-making. Felix S. Cohen, *Handbook of Federal Indian Law* 418-19 (1942 ed.) ("The United States entered into the treaties of 1789 and 1794 with the Iroquois (Six Nations) Indians, recognizing the Indians as distinct and separate political communities capable of managing their internal affairs as they had always done."). Under these federal treaties, the Seneca Nation and other Haudenosaunee nations were not ***given*** rights or lands by the United States; instead, Haudenosaunee relinquished claims to, and protection over, non-Haudenosaunee lands in exchange for peace and friendship and the assurance their lands and sovereignty would never be disturbed by the United

States. *Accord United States v. Winans,* 198 U.S. 371, 381 (1905) (finding a treaty is "not a grant of rights to the Indians, but a grant of right from them, [and] a reservation of those [rights] not granted."). Even though Congress ended treaty-making with Indian nations or tribes, preexisting treaties with the Seneca Nations are still in effect and contain promises, enforceable by federal court and binding federal agencies today. 25 U.S.C. § 71.[1]

As alleged in the amended complaint, treaties with the Seneca Nation contain "language which can reasonably be construed to confer [an] income [tax] exemption." *Holt v. C.I.R.*, 364 F.2d 38, 40 (8th Cir. 1966)(before panel including Justice Blackmun) *cert. denied,* 386 U.S. 931 (1967). The Government promised in these treaties not to disturb the Seneca Nation or "their Indian friends residing" on its territory and "united with them, in the free use and enjoyment" of lands within the Seneca Nation territories and to protect such lands from all taxes for whatever purpose. Canandaigua Treaty, 7 Stat. at 45, art. III; 1842 Treaty, 7 Stat. at 590, art. 9. Congress has taken no action to abrogate these treaties. *See, e.g.,* IRC § 894(a)(1)("The provisions of [IRC] shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer."); IRC § 7852(d)(1)("For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law."). Undisputedly, the promises in these treaties are the supreme law of the land and

[1] See footnote 5.

entitle the Perkins to obtain a refund of income tax, interest, and penalties illegally and erroneously collected by the Government on income derived from land by an enrolled Seneca and which is exempt from federal income tax.

II

INCOME DERIVED DIRECTLY FROM RESTRICTED LAND ON THE SENECA NATION ALLEGANY TERRITORY IS EXEMPT FROM FEDERAL INCOME TAX BASED ON SPECIFIC LANGUAGE CONTAINED WITHIN FEDERAL TREATIES

A. Court Must Liberally Construe Federal Statutes and Treaties to Determine Whether Income Derived from Tribal Land is Exempt from Federal Income Tax.

Unlike issues relating to state revenue statutes where the focus is on whether a State has the *authority* to tax Indians, issues relating to federal taxation focus on whether Congress has the *intention* to tax Indians. Felix S. Cohen, *Handbook of Federal Indian Law* 265 (1942 ed.). *Compare Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) *citing McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 181 (holding a state lacked the authority to tax reservation land or income from activities carried within the boundaries of a reservation absent congressional consent) *with Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956) (holding a 1887 federal statute evinces a congressional intent to create a federal income tax exemption for income earned in 1943).

"[I]n ordinary affairs of life, *not governed by treaties* or remedial legislation, [Indians] are subject to the payment of [federal] income taxes as are other citizens." *Squire*, 351 U.S. at 6; *see, also, Hoptowit v. Commissioner of Internal Revenue*, 709

F.2d 564, 565 (9th Cir. 1983). With regard to federal income tax, however, "Congress has passed neither a statute specifically abrogating the provisions of Indian treaties nor a statute of general application that has the effect of abrogating Indian treaties." *Lazore*, 11 F.3d at 1183. Even though the Internal Revenue Code ("IRC") is a general statute subjecting every individual to taxation based on "all income from whatever source derived," its provisions are to be applied to a taxpayer "with due regard to any treaty obligation of the United States which applied to such taxpayer." IRC §§ 61(a), 894(a)(1). Clearly, a Native American taxpayer is entitled to an exemption if it can be shown that specific language within a statute or a treaty ratified by Congress evinces a congressional intent to exempt certain income from federal income tax. *See, e.g., Squire,* 351 U.S. at 6 (finding income exempt from federal income tax based on a federal statute, the General Allotment Act of 1887); *Hoptowit*, 709 F.2d at 566 (finding the "exclusive use and benefit" provision within a treaty provided a limited tax exemption for "income derived directly from the land," but not for income earned while working on the reservation). *See, also,* Rev. Rul. 67-284, 1967-2 C.B. 55 ("exemption of Indians from the payment of tax must derive plainly from treaties or agreement with the Indian tribes concerned, or some act of Congress dealing with their affairs").

Indians have often been the object of special treatment and legislation. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). This special treatment has been justified when rationally related "to the fulfillment of Congress' unique obligation toward the Indians," particularly when "the preference is reasonable and rationally

designed to further Indian self-government." *Id.* at 555. A cardinal rule in the interpretation of federal statutes or treaties dealing with Indians is that ambiguities are to be resolved in favor of the Indians. *See, e.g., County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.") *quoting Montana v. Blackfeet Tribe,* 471 U.S.759, 766 (1985); *McClanahan*, 411 U.S. at 174 ("[I]n interpreting Indian treaties, . . . the general rule [is] '[d]oubtful 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.'") *quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

The rule that ambiguous statutes and treaties are to be construed in favor of Indians applies to tax exemptions. *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *see, e.g., Squire*, 351 U.S. at 6-7 (construing the General Allotment Act of 1887 to create exemption for not-yet-created federal income tax); *Hoptowit*, 709 F.2d at 566 (construing the 1855 Treaty with the Yakima as creating a limited tax exemption for income derived directly from the land). This rule, however, "comes into play only if such statute or treaty contains language which can reasonably be construed to confer income [tax] exemption." *Holt*, 364 F.2d at 40.

Tax exemptions are matters of legislative grace to be construed with restraint in light of the policy to tax income comprehensively. *Id.* For this reason, tax exemptions are generally strictly construed based on clear and unambiguous language approved by Congress. The Government argues the Seneca treaties do not

set forth clear and unambiguous language exempting "income derived from the land" from federal income tax. (Doc. 9-1 at 6-7).

If the Government's argument were to be taken to its logical conclusion, no Native American could ever claim a federal income tax exemption based on language in a treaty or statute. Until the ratification of the Sixteenth Amendment to the United States Constitution in 1913, Congress had no "power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. XVI amend. *See Pollock v. Farmers' Loan & Trust Co.,* 158 U.S. 601 (1895).[2] All federal treaties with Indian nations and all remedial federal legislation containing language supporting a federal income tax exemption for certain income earned by Native Americans were ratified or enacted prior to 1913. Hence, no treaty or legislation would have contained "clear and unambiguous" language creating an exemption from a yet-to-be created federal tax on personal income.

But contrary to the Government's argument, no strict construction rule has been or should be applied to special legislation or treaties dealing with Indians. (Doc. 5-1 at 4). Deviating from the general rule that congressional intent must be shown by clear and unambiguous language to exempt income from taxation, the Supreme Court in *Trapp* stated:

[2] In 1895, the United States Supreme Court in *Pollock* struck down portions of the income tax provisions of the 1894 Tariff Act because the United States Constitution, at that time, specified Congress could impose a "direct" tax only if the law apportioned that tax among the states according to each State's census population.

> 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.

224 U.S. at 674-675. These liberal rules of construction make it possible for a court to find language within a treaty or special statute to create a federal income tax exemption even though the ratification of the treaty or the enactment of special statute took place long before the enactment of any federal statute imposing a federal income tax. *See, e.g., Squire*, 351 U.S. at 6-7; *Hoptowit*, 709 F.2d at 566.

B. The Supreme Court Has Liberally Construed Language within Federal Statutes to Exempt Income Derived from Restricted Land.

In *Squire,* the Supreme Court examined the language of the General Allotment Act of 1887 to determine whether Congress intended to tax income earned in 1943 from the sale of timber harvested from restricted land, allotted to Indians, but held in trust by the Government. 315 U.S. at 6-7. Although this 1887 statute has no applicability to the Seneca Nation, its enrolled members or its territory,[3] *Squire* does illustrate the liberal rules of construction favoring Indians in federal income tax cases.

[3] As the Government has noted (Doc. 9-1 at 10), the General Allotment of 1887 "specifically excludes the Seneca Nation of New York from its provisions." *See* General Allotment Act of 1887, ch. 119, 24 Stat. 391 § 8 (1887) (codified as amended at 25 U.S.C. § 339 (2016)).

In 1887, Congress enacted the General Allotment Act to allow "any Indian not residing upon a reservation or for whose tribes no reservation has been provided" to secure an allotment of public land from the Government. General Allotment Act of 1887, ch. 119, 24 Stat. 389 § 4 (1887) (codified as amended at 25 U.S.C. §334 (2016)). The Act further provided title in trust to such allotment would be held by the Government for 25 years, or longer if the President deems an extension desirable. 24 Stat. 389 § 5 (1887); Felix S. Cohen, *Handbook of Federal Indian Law* 78 (1942 ed.). During this trust period, encumbrances or conveyances were deemed void. *Id.*

Pursuant to an amendment to the Act, the Secretary of the Interior had the authority to transfer these allotted lands in fee "free of all charge or incumbrance whatsoever" if the Indian allottees could show they were "competent and capable of managing" their affairs. *Squire,* 315 U.S. at 6-7. The Court acknowledged these statutory provisions "were not couched in terms of nontaxability," but found "the general words 'charge or incumbrance' might well be sufficient to include taxation." *Id.*

In *Squire*, the Government argued, as it does in this case, such words could have only conveyed a congressional intent to preclude State and local property taxation, particularly when this piece of federal legislation was enacted prior to the adoption of any federal tax on personal income. *Id.* at 7. The Supreme Court found otherwise and specifically held the enactment of a federal income tax statute after the enactment of this remedial legislation was "irrelevant." *Id.*

The Court further noted that once these lands were transferred in fee the statute directed "all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such [fee] patent . . . " *Id.* at 7. The Court found this statutory language "evinces a congressional intent to subject an Indian allotment to all taxes *only after a patent in fee is issued to the allottee***.**" *Id*. at 8 (emphasis added). The Supreme Court, therefore, held income from the sale of timber from restricted lands was exempt from federal income tax because to impose such a tax under such a circumstance would be "at the least, a sorry breach of faith with these Indians." *Id.* at 10 (internal quotation removed).

"In the wake of the Supreme Court's decision in [*Squire v.*] *Capoeman*, the Internal Revenue Service [has] set forth clear guidance as to what income is exempted from taxation." (Doc. 5-1 at 4 *citing* Rev. Rul. 67-284, 1967 C.B. 55). In a 1967 revenue ruling, the IRS indicates "[t]wo basic categories of income are not subject to Federal income tax, to wit, [1] where a treaty, agreement or act of Congress expressly provides that income is not subject to tax, and [2] where income is derived directly from restricted allotted land held under circumstances discussed" in *Squire.* Rev. Rul. 67-284, 1967 C.B. 55, 1967 WL 14945 at 1.

Although the Perkins refund claim falls within the first category of income not subject to federal income tax, the Government set forth the five-point test used to determine whether income is exempt under the second category (i.e. income derived directly from restricted land allotted pursuant to the General Allotment Act

of 1887 or some other similar worded statute). (Doc. 9-1 at 8-9 *citing* Rev. Rul. 67-284, 1967 C.B. 55, 1967 WL 14945 at *1-2). "If one or more of these five tests is not met, and if the income is not otherwise exempt by law, it is subject to Federal income taxation." (Doc. 9-1 at 9).

The Seneca Nation, its enrolled members and its territory are not subject to any provisions of the General Allotment Act. *See* General Allotment Act of 1887, ch. 119, 24 Stat. 391 § 8 (1887) (codified as amended at 25 U.S.C. § 339 (2016)). Nevertheless, the Government continues to insist the five-point test is applicable and fatal to the Perkins refund claim. (Doc. 9-1 at 10-11). In the Government's view, the Perkins may only assert an "income derived from the land" exemption if there is an applicable statute or treaty "containing an exception provision similar to the General Allotment Act." (*Id.* at 10). The Government's argument is without merit.

The General Allotment Act has no application to the exemption sought in this case, but it is not the only legal source or authority for seeking a federal income exemption for income derived from tribal land. Federal treaties with the Seneca Nation have given the Seneca Nation and its enrolled member broader protection than those given to Indians who were allotted federal land because their tribes had surrendered both their lands and sovereignty. Congress, therefore, specifically excluded the Seneca Nation, its people and land from the provision of the General Allotment Act. For this reason, neither the Court nor the Government may reject the Perkins refund claim based on a federal statute from which the Wife claims no

exemption and which has no applicability to the income she derived from the gravel mined from the Allegany Territory. The Court must consider whether any of the treaties on which the Wife relies contain a textual basis for an exemption from federal income tax.

C. Language within Federal Treaties with the Seneca Nation Clearly Exempts Income Derived from Tribal Land.

Prior to the adoption of the United States Constitution, the United States entered into its first treaty with the Senecas and the Haudenosaunee in 1784. *See* Fort Stanwix Treaty with the Six Nations, October 22, 1784, 7 Stat. 15. The Haudenosaunee agreed to concede to the United States claims to these western territories including lands within the Ohio territory and a vast area in Western Pennsylvania. *Id.*, 7 Stat. 15-16, art. III. The United States and the Haudenosaunee formed a treaty alliance, exchanging mutual promises of non-inference in the other's sovereign affairs and establishing jurisdictional boundaries between these sovereign nations. *Lazore*, 11 F.3d at 1186. These mutual promises of non-inference were re-confirmed in subsequent federal treaties, after the ratification of the United States Constitution in 1789. [4] *See* Fort Harmar Treaty, January 9, 1789, 7. Stat. 33, Canandaigua Treaty, November 11, 1794, 7 Stat. 44).

[4] During the negotiation of these treaties, representatives of the United States and the Haudenosaunee had to rely upon interpreters, many of whom were inefficient. Nonetheless, the Haudenosaunee had its own method of recording the treaties. The Haudenosaunee's understanding of the treaty was embodied in the Two-Row Wampum, a belt consisting of two parallel rows of dark colored beads on a background of lighter colored beads. *Lazore*, 11 F.3d at 1186. The two rows signify the two peoples-Indian and European-coexisting peacefully, neither imposing their laws or religion on the other. *Id.*

Before ascertaining what treaty rights the Seneca Nation and its enrolled members possess today, the Court must first examine what rights they possessed at the time they entered into these federal treaties. From there, your Honor must examine whether Congress has subsequently abrogated these treaty rights by statute.[5]

Under these treaties, the Haudenosaunee were recognized as "distinct and separate political communities capable of managing their internal affairs as they had always done." Felix S. Cohen, *Handbook of Federal Indian Law* 419 (1942 ed.). Due to the mutual promises of non-interference, the Haudenosaunee and its people claimed or possessed no rights to United States citizenship or representation within the government of the United States or its several States. *Accord Elk v. Wilkins,* 112 U.S. 94, 100 (1884). Further evidence of this historic fact can be found in the Indian Citizenship Act of 1924, 43 Stat. 253.[6]

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[5] In 1877, Congress declared, by statute, "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; ***but no obligation of any treaty lawfully made and ratified with such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired***." 25 U.S.C. § 71 (Emphasis added).

[6] In 1924, Representative Homer Snyder of New York introduced a bill, signed into law by President Calvin Coolidge, declaring "all non-citizen Indians born within the territorial limits of the United States . . . citizens of the United States . . ." The Fourteenth Amendment already defined citizens any person born in the United States, but only if "subject to the jurisdiction thereof." This latter provision was thought to exclude Haudenosaunee citizens as "citizens of the United States and of the State wherein they reside." *See Elk v. Wilkins,* 112 U.S. 94, 100 (1884).

As the United States Supreme Court has repeatedly held, treaties must "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 676 (1979); *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970) ("treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor"). In determining "the sense in which treaties would naturally be understood" by Native Americans, the Supreme Court has looked "beyond the written words to the larger context that frames the treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties'". *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation v. United States,* 318 U.S. 423, 432 (1943).

In the Canandaigua Treaty, the Government expressly acknowledged "all the land within" the Seneca Nation territories, including the land from which the Wife operated her gravel business "to be the property of the Seneca Nation." Canandaigua Treaty, 7 Stat. 45, art. III. *See, also, The New York Indians,* 72 U.S. 761, 767. It further promised not to:

> ***disturb*** the Seneca Nation, nor any of the Six Nations, or of ***their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof***; but it shall remain theirs, until they choose to sell the same, to the people of the United States, who have the right to purchase. (Emphasis added).

Id. At the time these promises were made, neither the United States nor the Senecas would have contemplated the Government's ability to tax these tribal lands or income derived from these tribal lands for three reasons.

First, the United States did not set aside or reserve land from its own public domain, but allowed the Senecas to remain in "ancient possession and occupancy" of their aboriginal territory existing prior to the existence of the United States. *The New York Indians*, 72 U.S. 761, 770 (1866). As the Supreme Court held in *The New York Indians* case, the Senecas' right of occupancy created "an indefeasible title" to these tribal lands "that may extend from generation to generation and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption." *Id.* at 771.

Second, the Seneca Nation territories were considered to be outside the political boundaries of the United States, as evidenced by Government map makers at the time. Although these territories are viewed today as being within the boundaries of the United States, rights under these treaties are examined from the time such treaties were negotiated, executed and ratified.

Third, the United States won its independence to overcome the tyranny of being British subjects who were taxed without any representative within the British Parliament. Based on these historic facts, neither the United States nor the Senecas would have contemplated the imposition of taxes on tribal land outside the political boundaries of the United States or on individuals who were not citizens.

In *Hoptowit*, an Indian taxpayer sought an exemption based on the Treaty with the Yakimas of 1855. 709 F.2d at 565. The treaty set aside certain tracts of land "for the exclusive use and benefit of said confederated tribes and bands of Indians." *Id.* at 566. The Commissioner conceded the treaty gave a limited exemption for "income produced directly [from] reservation land." *Id.* The United States Court of Appeals for the Ninth Circuit agreed and held the "exclusive use and benefit" language did not create a blanket exemption for all income earned on the reservation, but did create a limited exemption from "income derived directly from the land." *Id.*

In *Lazore,* the United States Court of Appeals for the Third Circuit examined the "free use and enjoyment" provision of the Canandaigua Treaty. 11 F.3d at 1187. In that case, enrolled members of the St. Regis Mohawk Tribe assert their income was exempt from federal taxation. *Id.* Citing to the Ninth Circuit's decision in *Hoptowit*, the Third Circuit held the "free use and enjoyment" provision "might be sufficient to support an exemption from a tax on income derived directly from the land," but was insufficient to create blanket exemption for all income earned on and off the reservation. *Id. See, also, Sylvester v. Commissioner of Internal Revenue*, Docket No. 10777-97, T.C. Memo 1999-35 at *6-7 (finding petitioner not exempt based on his status as a member of the Seneca Nation, but suggesting "income derived directly or indirectly from the use of Indian land" might be exempt); 35 Ops. Att'y Gen 107,108-09, 1926 WL 2180 at *1 (1925).

In *Cook v. United States*, 86 F.3d 1095 (Fed. Cir. 1996), owners of a diesel fuel truck stop within the Onondaga[7] Indian Territory sought a refund on federal excise tax on the sale of diesel fuel. The Circuit found the Canandaigua Treaty granting the Onondaga Indians the "free use and enjoyment" of their land and securing their "peaceful possession" of those lands. *Id.* at 1097. However, it held these provisions "appl[y] to the use of land," and not to "the sale of a commodity." The Court further found that an excise tax on fuel is not a tax on income derived directly from the land. *Id.* at 1098. Citing to *Squire,* the court defined "income derived from the land" as "income from activities that exploit the land, such as the sale of timber from the Indian land." *Id.* Gravel mined from tribal land would fall within this definition. *Accord* Rev. Rul. 70-116, 1970-1 C.B. 11, 1970 WL 20654 (exempting income from mineral rights); Rev. Rul. 67-284, 1967-2 C.B., 1967 WL 14945 at *2 (providing list of income derived directly from the land, including "proceeds from the sale of the natural resources of the land.").

Even if the Court were to conclude the "free use and enjoyment" and "peaceful possession" provisions were not explicit enough to warrant an exemption, the Court still must examine the provisions of the 1842 Treaty with the Seneca. In that treaty, the United States promised:

> to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession ***from all taxes,*** and assessment for roads, highways, or ***any other purpose***, until such lands shall be sold and conveyed by the said Indians and the

[7] The Onondaga Indian Nation is a Haudenosaunee (Six Nations) member and a party to the Canandaigua Treaty.

> possession thereof shall have been relinquished by them. (Emphasis added).

Treaty with the Seneca, May 20, 1842, 7 Stat. 586, 590, art. 9. The words are explicit. The Government promised to protect these lands "from all taxes" including taxes for roads or highways or "any other purpose." No other treaty with any Indian nation sets forth a clearer or less ambiguous tax exemption for income derived from the use of tribal land.

In the words of former Attorney General John G. Sargent, "Indians have always been the subject of special legislation, and that general legislation, and especially revenue laws, which burden and restrict the use and enjoyment of property, should not be applied to Indian wards unless Congress clearly so directs." 35 Ops. Att'y Gen 107,108-09, 1926 WL 2180 at *1 (1925). In enacting the IRC, not only did Congress never express any intent to abrogate any federal treaties with the Senecas, but it explicitly recognized IRC provisions should be applied to a taxpayer "with due regard to any treaty obligation of the United States which applied to such taxpayer." IRC §§ 1, 61(a), 894(a)(1).

If the words of a treaty are susceptible to differing interpretations, then any doubts should be resolved in favor of the Indians who have been called the Government's ward. Through federal treaties and statutes, Congress intended to secure and guarantee to the Seneca Nation the right of possession and enjoyment of their lands, now and in the future, by making these tribal lands inalienable. Taxing the income derived from these restricted lands would infringe upon the Seneca Nation's sovereignty and rights guaranteed and secured by federal treaties. If its

enrolled members are to be taxed on income derived from the land, then enrolled members may well abandon the Seneca Nation territory to pursue higher income work off its territory. Enrolled Senecas would be removing their families not only their aboriginal land of their ancestors, but also the community from which their history, customs, laws and traditions are preserved and handed to the next generations.

The Perkins do not claim all income earned on the Seneca Nation territory should be exempt from federal income tax. They only claim income derived from restricted land to which the Wife has a right of possession superior to all others, except the Seneca Nation, be exempt from federal income tax. By excluding members of the Seneca Nation from the provisions of the General Allotment Act, Congress intended the broader protection given by federal treaties with the Seneca Nation not be abrogated by an act giving lesser protection to Indians whose tribal nations surrendered both their lands and their sovereignty. The liberal rules of construction given to the General Allotment Act should be equally applicable to the federal treaties protecting the Seneca Nation, its people and its sovereign lands. The Perkins has set forth sufficient facts in its amended complaint to support a refund claim for income tax, interest, and penalties wrongfully collected by the Government in violation of these federal treaties.

CONCLUSIONS

For the reasons set forth above, the Court should find the Perkins have set forth sufficient facts within its amended verified complaint and deny the Government's motion to dismiss.

Dated: Orchard Park, New York
October 12, 2016

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CERTIFICATION OF SERVICE

I hereby certify that on October 12, 2016, I electronically filed Plaintiffs' Memorandum of Law in Opposition to Defendant United States' Motion to Dismiss with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant on this case:

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