No. ____

In the
Supreme Court of the United States

ALICE PERKINS, FREDRICK PERKINS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

On Petition for A Writ of Certiorari To the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court is presented with a question of first impression, as to the taxability of income derived from the sale of sand and gravel, mined from treaty-protected land by an enrolled member of the Seneca Nation of Indians ("Seneca Nation"). Upon the granting of certiorari, the Court will examine the language in two federal treaties, promising not to disturb the "free use and enjoyment" of lands by the Seneca Nation and "their Indian friends residing thereon and united with them," and protecting these lands "from all taxes" for any purpose. Treaty with the Six Nations ("Canandaigua Treaty"), art. III, Nov. 11, 1794, 7 Stat. 45; Treaty with the Senecas ("1842 Treaty"), art. 9th, May 20, 1842, 7 Stat. 590. Congress has explicitly stated the Internal Revenue Code "shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer." 26 U.S.C.A. § 894 (a)(1)(West).

The question presented is whether the United States Court of Appeals and the United States Tax Court have given "due regards" to the treaty obligations of the United States by finding these treaties had no textual support for an exemption from federal income tax applicable to an enrolled Seneca member whose income is derived from the lands of the Seneca Nation. *Perkins v. Comm'r,* 970 F.3d 148, 162-67 (2d. Cir. 2020).

CORPORATE DISCLOSURE STATEMENT

No corporation is a party to this case and no corporate disclosure statement is required.

Petitioner Alice Perkins is a sole proprietor doing business under the assumed name, A&F Trucking. Her husband Fredrick Perkins works for, but has no ownership in, his wife's business.

PROCEEDINGS BELOW

United States Tax Court, Docket No. 28215-14, *Perkins v. Comm'r of Internal Revenue*

- Plurality Opinion, filed Mar. 1, 2018, reported at 150 T.C. 119, granting Commissioner's summary judgment motion
- Decision, entered on May 30, 2018, based on stipulated facts submitted by the parties, and setting forth the deficiencies and penalties due on joint tax returns for calendar years 2009 and 2010

United States Courts of Appeal for the Second Circuit, Docket No. 19-2418, *Perkins v. Comm'r of Internal Revenue*

- Opinion, decided and electronically filed on Aug. 12, 2020, (Document 61-1) and reported at 970 F.3d 148, affirming the judgment of the United States Tax Court

- Order, electronically filed on Nov. 16, 2020 (Document 88), denying petition for rehearing or, in the alternative for rehearing *en banc*

- Mandate, electronically filed on Nov. 23, 2020 (Document 89-1), affirming, and remanding for further proceedings.

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The opinion of the United States Court of Appeals for the Second Circuit ("Second Circuit") is reported at 970 F.3d 148 (2020) and is reprinted in the Appendix, App. 1a. The order of the Second Circuit, denying the petition for rehearing is unreported, but is reprinted in the Appendix, App. 70a.

The opinion of the United States Tax Court ("Tax Court") is reported at 150 T.C. 119 (2018) and is reprinted in the Appendix, App. 42a.

JURISDICTION

On August 12, 2020, the Second Circuit filed its opinion, affirming the plurality opinion entered by the Tax Court on March 1, 2018. On November 16, 2020, the Second Circuit denied a petition for rehearing. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

The Petition for a Writ of Certiorari is timely based on this Court's order, issued on March 19, 2020, extending the filing deadline to 150 days from the date of the order denying rehearing.

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2

The Supremacy Clause of the United States Constitution provides that:

> 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.

Canandaigua Treaty, Nov. 11, 1794, 7 Stat. 44-46

The treaty opens with the "President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint and establishing a firm and permanent friendship with them . . . . 7 Stat. at 44.

After defining the Seneca Nation's boundaries, Article III further provides:

> Now, the United States acknowledge all lands within the aforementioned boundaries, to be the property of the Seneka nation; and the United States

> will never claim the same, nor disturb the Seneka 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.

7 Stat. at 45.

In exchange for the promises made by the United States to the Six Nations, Article IV provides:

> Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

Id.

The treaty concludes with Article VII, which provides:

> Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that the injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party

> injured, to the other . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or the great council) of the United States shall make other equitable provisions for the purpose.

7 Stat. at 46.

1842 Treaty, May 20, 1842, 7 Stat. 586 – 591

In the first article of the treaty, the parties to this compact agreed the Senecas:

> shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden, and Joseph Fellows the right of pre-emption, and all other the right and title which they then had or held in or to the said tracts of land.

7 Stat. at 587. In the ninth article of the treaty, the parties:

> mutually agree to solicit the influence of the Government of the United States 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.

7 Stat. at 590.

26 U.S.C.A. § 894 (a) (1) (West 2021)

"(a) Treaty provisions.--

(1) In general.--The provisions of this title shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer."

26 U.S.C.A. § 7852 (d) (West 2021)

"(d) Treaty obligations.--

(1) In general.--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.

(2) Savings clause for 1954 treaties.--No provision of this title (as in effect without regard to any amendment thereto enacted after August 16, 1954) shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on August 16, 1954."

STATEMENT OF THE CASE

Petitioner Alice Perkins ("Alice") is an enrolled Seneca, *Perkins*, 970 F.3d at 150, whose childhood home and school was torn down by the United States for the construction of the Kinzua Dam.[1] She continues to live on the Allegany Territory with her husband, adhering to the customs, laws and traditions of the Seneca Nation. *Id.*

As a sole proprietor, Alice operates A&F Trucking.[2] The Seneca Nation had given "Alice Perkins d/b/a A&F Trucking" permission and exclusive rights to mine and sell sand and gravel from a gravel pit located within a flood zone[3] on the

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[1]Alice J. Perkins Aff. at 8 ¶37, *Perkins v. U.S.*, No. 16-cv-00495 (W.D.N.Y. May 18, 2018), ECF No. 61-2. The Second Circuit took judicial notice of the parties' filings in a tax refund case filed in the United States District Court for the Western District of New York, involving the same parties and subject matter. *Perkins*, 970 F.2d at 152 n.2.

[2] *Id.* at 5 ¶20; Fredrick Perkins Aff. at 2 ¶7, *Perkins v. U.S.*, No. 16-cv-00495 (W.D.N.Y. May 18, 2018), ECF No. 61-2.

[3] Alice J. Perkins Aff. at 8 ¶¶ 36-41. The land has been designated as a flood zone after the construction of the Kinzua Dam. Maria Diaz-Gonzalez, *The Complicated History of the*

Allegany Territory. *Id.* at 152. On June 13, 2009, the Seneca Nation imposed a moratorium on all mining. *Id.* Alice immediately stopped her mining operations but was later given permission by the Seneca Nation to sell the stockpiles of sand and gravel mined prior to June 13, 2009. *Id.*

Alice claims the revenue generated from the sale of sand and gravel extracted from this gravel pit is exempt from federal taxation. *Id.* Alice and her husband (collectively the "Perkinses") were late in filing their joint income tax returns but reported the income from the sale of sand and gravel from the Allegany Territory as exempt income. *Id.* at 150. The Internal Revenue Service audited the 2008 and 2009 joint returns, adjusting the business income to include revenue generated from the sale of sand and gravel from the lands of the Seneca Nation. *Id.*

Based on these audits, the IRS sent a notice of deficiency, assessing taxes, penalties, and interest due for each tax year. *Id.* at 152. The Perkinses then challenged the 2008 and 2009 assessments before the Tax Court, *id.* at 150, having subject matter jurisdiction pursuant to 26 U.S.C.A. §§ 6213(a), 6214(a), and 7742.

On March 1, 2018, the Tax Court issued a plurality opinion, granting the Commissioner's summary judgment motion. *Id.* at 153. The Tax

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Kinzua Dam and How It Changed Life for the Seneca People, Feb. 12, 2020, https://www.alleghenyfront.org/the-complicated-history-of-the-kinzua-dam-and-how-it-changed-life-for-the-seneca-people/.

Court then issued a decision judgment on May 30, 2019.

After the Perkinses filed a timely notice of appeal, *Perkins,* 970 F.3d at 153*,* the Second Circuit heard the appeal pursuant to 26 U.S.C.A. § 7482(a)(1) (West 2021), based on venue pursuant to 26 U.S.C.A. § 7482(b)(1)(A) (West 2021).

REASONS FOR GRANTING THE PETITION

In the last two years, this Court has examined and affirmed doctrines for ascertaining and following the original meaning of Indian treaties and statutes, and for applying liberal rules of construction for such treaties and statutes. *See McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020); *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019); *Washington State Dep't of Licensing v. Cougar Den, Inc.,* 139 S. Ct. 1000 (2019). Consistent with these precedents, the Perkinses argue that Congress never intended income derived from working the land on the Seneca Nation aboriginal territory to be taxed. In their rehearing petition, The Perkinses offered these precedents to shed light on the errors made in the Second Circuit's opinion. The circuit court rejected the petition, even though its opinion never cited, or applied the doctrines re-affirmed in, *McGirt, Herrera,* and *Cougar Den.*

I

THE SECOND CIRCUIT FAILED TO EXAMINE WHETHER CONGRESS INTENDED TO TAX THE SENECAS

In 1913, Congress was given the constitutional authority to impose a federal tax on income, with the ratification of the Sixteenth Amendment. U.S. Const. amend XVI. The Second Circuit erred by finding the historical contexts of the Canandaigua Treaty and the 1842 Treaty make it "nearly impossible for parties to treaties concluded prior to 1913 to have contemplated an exemption to a tax on income." *Perkins*, 970 F.3d at 155. The Second Circuit erred by focusing on the issue of an exemption, instead of focusing on whether Congress intended to tax.

In 1942, Felix S. Cohen, one of the foremost experts in the field of Indian jurisprudence wrote the following regarding federal income taxes:

> In considering federal taxation of Indian income, one finds the courts concerned not, in the case of the state, with the question of whether the state may tax, but with the question of whether the Federal Government has intended to tax.

Felix S. Cohen, Handbook of Federal Indian Law ("1942 Handbook") 265 (1942 ed.)

This Court has found a federal statute enacted in 1887 showed Congress never intended to impose such a tax on income derived from the land

by Indians who were allottees of federal lands. *Squire v. Capoeman*, 351 U.S. 1, 7-8 (1956). The Court's focus in *Squire* was ascertaining congressional intent in enacting the General Allotment Act of 1887.[4]

A. The Court Must Ascertain and Follow the Original Meaning of the Treaty or Law Before it.

In *Squire*, the Court found the General Allotment Act of 1887 evinced *congressional intent* not to tax income derived from the land allotted to, and held in trust by, the federal government for "non-competent" Indians. 351 U.S. at 6-7. The Court acknowledged the Act was "not couched in terms of nontaxability," but found "the general words 'charge or incumbrance' might well be sufficient to include taxation." *Id.* More importantly, the Court found income earned in 1942 from harvesting timber was exempt for federal income tax, *id.* at 3-5, even though the statute "was antedated the federal income tax by 10 years," a fact this Court found "irrelevant." *Id.* at 7.

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[4] The Perkinses' joint tax return filed in 2008 and 2009 reported income from the sale of sand and gravel as being exempt due to the provisions of the General Allotment Act of 1887. An accountant included this information in the returns.

After obtaining counsel to challenge the illegal assessments, the Perkinses claimed the income was exempt due to federal Indian treaties. Contrary to the record on appeal, the Second Circuit repeatedly stated the Perkinses abandoned a claim based on the General Allotment Act, which was never asserted in the Tax Court. *Perkins*, 970 F.3d at 150, 153, 154.

Although the 1887 Act has no applicability to the Seneca Nation, its enrolled members, or its territory,[5] *Squire* does illustrate the liberal rules of construction favoring Indians in federal income tax cases. More importantly, Congress excluded the Senecas from this Act, because it never intended to narrow the protection already given to the Seneca people in federal treaties. Therefore, contrary to the Second Circuit's opinion, *Perkins,* 970 at 155, "parties to treaties concluded prior to 1913" could promise to co-exist "peacefully, neither imposing their laws or religion on the other." *Lazore v. Comm'r,* 11 F.3d 1180, 1186 (3d. Cir. 1993).

1. The Canandaigua Treaty preserved the autonomy of the United States and the Senecas over land and people within their respective jurisdictional boundaries.

"[P]owers that are lawfully vested an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty that has never been extinguished . . . . and persists unless diminished by treaty or statue. . . ." *Cohen's Handbook of Federal Indian Law* 2 (Lexis Nexis 2012). Today, Indian nations are "regarded as dependent nations," because Congress, not the courts, have the power to unilaterally abrogate treaty rights and strip Indian

[5] The General Allotment Act 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.A, § 339 [West 2021]).

nations of their sovereignty. *Perkins*, 970 F.3d at 154. *See Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903). As the Second Circuit acknowledged, Congress has passed neither a tax statute specifically abrogating the provisions of Indian treaties nor a tax statute of general application that has the effect of abrogating Indian treaties with the Six Nations. *Perkins*, 970 F.3d at 154, *quoting Lazore,* 11 F.3d at 1183.

Before ascertaining treaty rights possessed by the Senecas today, the Court must examine what rights they possessed at the time of these treaties, and from there, whether Congress has subsequently abrogated these treaty rights by statute. *McGirt,* 140 S. Ct. at 2468. Understanding the meaning of the words "nor disturb . . . the free use and enjoyment" requires a broader examination of the history of the Canandaigua Treaty than offered by the Second Circuit in its opinion. *Perkins*, 970 F.3d at 156-158.

The history between, and the relationship of, the United States and the Six Nations, show each regarded the other as independent sovereign nations, bargaining for peace without sacrificing their independence or their inherent sovereignty, and respecting not only the boundaries between their nations but also the exclusive authority each would continue to have over its lands and its people.

In 1942, Felix Cohen, concluded:

> The United States entered … 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.

1942 Handbook, *supra,* at 419. The Six Nations "are anomalies" and "are the only ones of like character in the United States." Thomas Donaldson, *Extra Census Bulletin. Indians. The Six Nations of New York* 3 (U.S. Census Printing Office, Cornell University Press 1995) (1892). They successfully defended their ancestral lands and homes against Indian and European invaders. *Id.* at 19. At the beginning of the American republic, they were viewed as "too strong to be ruthlessly forced out of their surroundings." *Id.* Like the British, the United States recognized each Haudenosaunee Nation, "as an independent body politic" with inherent sovereignty over its aboriginal territories and its people. *Id.* "Their history perpetuated their independence while nearly all their contemporary tribes diminished or disappeared." *Id.* at 20.

The Canandaigua Treaty was the third, federal treaty with the Haudenosaunee.[6] It is undoubtedly the most significant historical treaty in U.S. history. It is not only a treaty between independent sovereign nations but also the turning point for a cash-strapped, struggling new nation to

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[6] The Six Nations have been called the Iroquois Confederacy, or the Haudenosaunee Confederacy, the name preferred by member nations. Felix S. Cohen, Handbook of Federal Indian Law 416-417 n.6 (1942 ed.) The term "Haudenosaunee" means, collectively and individually, the nations or citizens, aligned and united with the Confederacy.

expand its territory and to pay its public debts by selling land to white settlers in the ever-expanding western frontier. Jack Campisi & William A. Starna, *On the Road to Canandaigua: The Treaty of 1794*, 19 Am. Indian Q. 467 (1995). By diminishing its history and its importance, the Second Circuit failed to understand its meaning.

In 1821, the Attorney General of the United States officially pronounced, with regards to the Six Nations, that:

> We treat them as separate sovereignties; and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territory, without their consent, than we have to enter upon the territory of a foreign prince. . . . We have acknowledged by treaty that these lands are theirs; and by the same treaty have bound ourselves not to disturb them *in the free use and enjoyment of these lands*."

The Seneca Lands, 1 U.S. Op. Atty. Gen. 465, 466-67 (Apr. 26, 1821).

This history of the Canandaigua Treaty begins with President Washington commissioning Colonel Timothy Pickering to meet with the Six Nations to remove "from their minds all causes of complaint" and to secure "a firm and permanent friendship with them." Canandaigua Treaty, *supra,* 7 Stat. at 44; 19 Am. Indian Q. at 479.

In the two prior treaties, the United States claimed the Haudenosaunee ceded most of the Seneca's aboriginal territory. 19 Am. Indian Q. at 469-70. *See* Treaty with the Six Nations ("Fort Stanwix Treaty"), Oct. 22, 1784, 7 Stat. 15; Treaty with the Six Nations ("Fort Harmar Treaty"), Jan. 9, 1789, 7 Stat. 33. These prior treaties did little to foster trust or to form any alliances between the people of the United States and the Haudenosaunee. *Id.* at 477-78.

Pickering faced the undaunted task of gaining the trust and respect of the Haudenosaunee in general, and the Senecas in particular. He wrote, "Indians have been so often deceived by white people that the White Man is, among many of them, but another name for Liar." *Id.* at 474. Pickering admitted to the chiefs in council at Canandaigua his disapproval of the conduct displayed by the commissioners at Fort Stanwix.[7] *Id.* at 481.

Pickering knew the Senecas were a threat by virtue of being among the most powerful of the Six Nations, the most aggrieved by previous treaties, and therefore the most likely to be a military impediment to any war with the Indian nations in the Ohio Valley. *Perkins*, 970 F.3d at 157, *citing* 19 Am. Indian Q. at 486. He offered jurisdictional boundaries between the United States and the Six Nations, restoring the land taken from the Senecas, in exchange for a promise of neutrality. 19 Am.

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[7] Pickering later expressed in writing his remorse for the manner he negotiated the relinquishment of aboriginal Indian lands over which United States had absolutely no claim. 19 A. Indian Q. at 485.

Indian Q. at 481. Pickering "had no intention of pressing" for more concessions. *Id.*

During the five years of negotiations, the Six Nations refused to accept any language promising neutrality that would limit their sovereign rights to form alliances with other Indian or foreign nations. *Id.* at 474-75, 478. They also refused to make any acknowledgement that they ceded the lands under the jurisdiction of the Senecas to the United States in the Fort Stanwix Treaty. *Id.* at 478, 483. Instead, the Haudenosaunee only agreed "they [would] never claim any other lands within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment" of such lands. Canandaigua Treaty, *supra,* art. IV, 7 Stat. 45. Pickering and the United States were satisfied these concessions were an acceptable bargain to accomplish the "great object" of the treaty. 19 Am. Indian Q. at 473, 479, 484. In the end, the Canandaigua Treaty "was, without a doubt, a treaty between sovereigns." *Id.* at 487.

2. Any ambiguities with the language used in the Canandaigua Treaty must be resolved in favor of the Senecas.

The Second Circuit had the "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." *Cougar Den,* 139 S. Ct. at 1012 *citing Tulee v. Washington,* 315 U.S. 681, 684 (1942). Instead, it turned a blind eye on the mutual promises

made by the United States and the Haudenosaunee. *McGirt*, 140 S. Ct. at 2482.

Contrary to the Second Circuit's one-sided view, 970 F.3d at 158, the "great object" was not only to address the complaints involving the jurisdiction over certain aboriginal lands of the Senecas but also to secure a promise from the Senecas and the Haudenosaunee not to disturb the white settlers claiming land in the Ohio Valley. 19 Am. Indian Q. at 479, 484.[8] The treaty made clear these settlers and these lands were under the sovereign protection of the United States. Canandaigua Treaty, *supra,* art. IV, 7 Stat. 45. In the same vein, the United States agreed not to disturb the "Indian friends residing . . . and united with" the Haudenosaunee. *Id.,* art. III, 7 Stat. 45. Articles III and IV set forth parallel promises of non-interference.

From the Haudenosaunee perspective, the "firm and permanent friendship" established under the Canandaigua Treaty existed because the parties agreed to recognize their separate sovereignties while "coexisting peacefully, neither imposing their laws or religion on the other." *Perkins,* 970 F.3d at 158, *citing Lazore,* 11 F.3d at 1186. By establishing

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[8] At the conclusion of treaty negotiations, Pickering wrote to Secretary of War Henry Knox, "You will see the great object is obtained; an express renunciation which takes in all the lands in Pennsylvania, including the Triangle which comprehends Presque Isle; and a pointed declaration that they will never disturb the people of the U. States in the free use and enjoyment of them or any other lands not contained within the present described boundaries of the lands of the Six Nations." 19 Am. Indian Q. at 484.

these jurisdictional boundaries, the parties agreed not to interfere with the others' exclusive authority over its lands and its people. Canandaigua Treaty, *supra,* art. III & IV, 7 Stat. 45. The United States and the Haudenosaunee further agreed to pursue "prudent measures" to preserve their peace and friendship until Congress makes "other equitable provisions for the purpose." *Id.,* 7 Stat. 46. Even the Second Circuit had to acknowledge Congress has made no laws abrogating any treaty with the Senecas. *Perkins*, 970 F.3d at 154.

In this case, Alice Perkins does not claim an exemption due to her status as an enrolled Seneca. She claims the income for which she earned as a sole proprietor is not subject to federal income tax for four reasons. First, Seneca law gives her the right to extract sand and gravel on the Seneca's sovereign territory. Second, as an enrolled Seneca living on the Allegany Territory, she would be considered an "Indian friend" residing and united with the Seneca Nation. Third, under Seneca law, she had a superior possessory right to freely use the property-at-issue. Finally, taxing income earned from mining sand and gravel places an impermissible burden on her "free use and enjoyment" of such lands. *See Cougar Den*, 139 S. Ct. at 1011, 1013 (The relevant question is whether the tax "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve.") *citing Tulee*, 315 U.S. at 685.

The Second Circuit, however, ruled the treaty promise does not extend to Alice as an enrolled member. *Perkins*, 970 F.3d at 162. The circuit court opined the "better understanding" of the phrase

"Indian friends" were "the affiliated nations making up the Six Nations …" and not enrolled members owing allegiance to, or united with, the Senecas. *Id.* Such an interpretation is inconsistent with the text and the liberal rules of construction applicable to ambiguous provisions within a treaty.

The text reads, "nor disturb the Seneka 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 …" Canandaigua Treaty, *supra*, art. III, 7 Stat. 45. The circuit court's narrow interpretation ignores the placement of the phrase "any of the Six Nations," before the phrase "their Indian friends residing," and thereby rendering the meaning of "Indian friends" obscure under this narrow construction.

The Second Circuit next attempted to differentiate the words used in Articles III (relating to the Senecas) and Article IV (relating to the people of the United States) with the words in Article VII. Article VII speaks to "individuals on either side," whose "misconduct" disrupts the "firm and permanent friendship," while Articles III and IV speak to the "Indian friends" and the white settlers who benefit from the "free use and enjoyment" of the respective lands of each sovereign. The free use and enjoyment of aboriginal lands benefit only those "Indian friends," owing allegiance to the Haudenosaunee, and who reside on the territory.[9]

[9] In 1890, the U.S. Census acknowledged enrolled Senecas had to renounce their allegiance to the Seneca Nation to be

Article VII targets a larger class of individuals by using the phrase, "Lest the firm and permanent friendship now established should be interrupted by the misconduct of individuals …" Since the misconduct of such individuals would be committed on another sovereign's land, it would be contrary to the meaning of the phrase "Indian friends ***residing thereon*** and united with" the Haudenosaunee.

Finally, a promise not to disturb a sovereign nation in the free use and enjoyment its sovereign lands is empty promise unless the promise includes the society of people forming the social compact with such a nation. By giving a narrow meaning to the phrase "Indian friends," the Second Circuit breaches the cardinal rule that ambiguous terms must be construed in favor of the Indians. *See McGirt*, 140 S. Ct. at 2470 ("treaty rights are to be construed in favor, not against, tribal rights"). From the Senecas perspective, the Haudenosaunee and the United States, while "coexisting peacefully, neither imposing their laws or religion on the other" would form "a firm and permanent friendship" if each honored their treaty promises. *Perkins,* 970 F.3d at 158, *citing Lazore,* 11 F.3d at 1186. Now, this Court should "hold the government to its word." *McGirt*, 140 S. Ct. at 2459.

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considered a U.S. citizen. For this reason, they were considered "Indians not taxed." *Census Bulletin* at 3.

3. The original meaning of the 1842 Treaty is clear from its text and extratextual sources should not be used to cloud the meaning of its text.

It has been well documented in history, individuals working for, or authorized by, state and federal governments have encroached and disturbed the free use and enjoyment of the treaty-protected lands since the ratification of the Canandaigua Treaty. Nonetheless, Congress has taken action to remedy such treaty violations in accordance with Article VII of the Canandaigua Treaty.

When the State of New York sought to assess, tax, and foreclose upon Seneca lands in 1841, the United States did not allow the mutual promises of non-interference contained in the Canandaigua Treaty to be breached without a remedy. Instead, the United States entered a separate treaty with the Senecas, promising:

> The parties to this compact mutually agree to solicit the influence of the Government of the United States[10] 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

[10] "The parties to the compact mutually agree to solicit the influence of the Government of the United States" means the parties will endure to have the compact (i.e. treaty) ratified by Congress.

> be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them. (Emphasis added).

1842 Treaty, *supra,* art. 9th, 7 Stat. at 590.

In *McGirt,* Justice Gorsuch, joined by Justices Breyer, Sotomayer, Kagan and the late Justice Ginsburg, reaffirmed a point of law, which had been overlooked by many federal circuit courts, including the Second Circuit:

> There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up ... not create" ambiguity about a statute's original meaning.

140 S. Ct. at 2469. In his concurring opinion in *Cougar Den*, Justice Gorsuch applied this point of law to treaties.

> Our job here is a modest one. We are charged with adopting the interpretation most consistent with the treaty's original meaning. (Citation omitted). When we're dealing with a tribal treaty, too, we must "give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). After all, the

> United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen.

139 S. Ct. at 1016.

While acknowledging "an explicit textual exemption from taxation" within the text of the 1842 Treaty, the Second Circuit held, "the best approach is to first examine each treaty at issue within its historical context." 970 F.3d at 156. Its "best approach" contradicts the holdings in *McGirt,* 140 S. Ct. at 2469 (There is no need to consult extratextual sources when the meaning of a … term is clear."). The Perkinses argued the Canandaigua Treaty and the 1842 Treaty must be read *in pari materia. Perkins,* 970 F.3d at 162. The Second Circuit disagreed, despite language within the 1842 Treaty restoring the Senecas living on the Cattaraugus and Allegany territories to the same title and rights they had prior to 1838. *Id.* Consequently, the circuit court examined only the history *after* 1838, leading to the 1842 Treaty, instead of examining the treaty's plain text. *Id.* at 164-67.

Prior to the 1842 Treaty, the removal of the Senecas from their aboriginal lands had been contemplated by Congress.[11] The first article of the 1842 Treaty confirms the Seneca Nation, and its people would "continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the

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[11] As this Court found in *McGirt*, 140 S. Ct. at 2465, "just as wishes are not laws, future plans aren't either."

Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before" the 1838 conveyance. 1842 Treaty, *supra,* 7 Stat. 587; *see, also, The New York Indians,* 72 U.S. (5 Wall.) 716, 767 (1866). In *The New York Indians* case, this Court held:

> Until the Indians have sold their lands and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possession, and … under their original rights, … entitled to the undisturbed enjoyment of them. This was the effect of the decision in the case of *Fellows* v. *Blacksmith*.

Id. The Second Circuit, therefore, erred by refusing to read the Canandaigua Treaty and the 1842 Treaty *in pari materia.*

In a footnote, the Second Circuit stated it had no need to address whether the 1842 Treaty tax exemption was "limited to state – as opposed to federal – taxation." 970 F.3d at 166 n.18. The court passed on this question, after finding the income earned by Alice Perkins did not derive from the land, but from a permit given to her by the Seneca Nation. *Id.* at 166. It also held the 1842 Treaty bestowed no rights on enrolled members. *Id.* at 164. This Court should reject these findings because the Canandaigua Treaty and 1842 Treaty intended the Senecas to peacefully co-exist with the people of the United States without either being subject to the other's laws.

B. Congress Has Not Enacted Any Law Allowing Respondent Commissioner to Assess or Collect Income Tax from Enrolled Senecas, Living and Working on the Seneca Nation Territory.

Prior to these treaties, Congress had not been given authority under the Constitution to impose a federal tax on land or income. *Pollock v. Farmers' Loan & Trust Co.,* 158 U.S. 601 (1895). Congress only had the constitutional power to impose and collect a "direct Tax . . . apportioned among the several States." Members of the Seneca Nation were classified as "Indians not taxed" and not counted for purposes of this apportionment. U.S. Const. art. I, §2, cl. 3. Petitioner Alice Perkins recognizes Article I, §2, cl. 3 does not provide her with a constitutional claim for federal income tax exemption. However, it does provide a historical perspective from which the Court may conclude the United States never intended to tax Indians living on treaty-protected lands.

The Second Circuit and the Commissioner cannot cite a single case that has held an enrolled Seneca is subject to a tax for income derived from farming, harvesting, mining, or otherwise working these treaty-protected lands. Although at least two circuit courts have suggested in dicta that income derived directly from the land might be exempt from taxation under these treaties, the Second Circuit rejects such dicta and cites cases where an exemption was sought for income earned in ways that do not relate to the land itself. *Perkins,* 970 F.3d at 158-60 (examining *Lazore*, 11 F.3d 1180; *Hoptowit*

v. Comm'r, 709 F.2d 564 [9th Cir. 1983]). Yet even the State of New York has never attempted to assess or collect an income tax from an enrolled Seneca who lives and earns a living on the Seneca Nation territory based on this Court's holding in *McClanahan v. State Tax Commn. of Arizona*, 411 U.S. 164, 181 (1973).

The Canandaigua Treaty was ratified by Congress more than 236 years ago. Now, for the first time in 236 years, the Commissioner of the Internal Revenue claims the authority to assess and collect an income tax from an enrolled Seneca whose income is derived from the treaty-protected lands of the Seneca Nation.

"[E]nough time and patience [cannot] nullify the promises made in the name of the United States. That would be at odds with the Constitution, which . . . directs that federal treaties and statutes are the 'supreme Law of the Land.'" *McGirt,* 140 S. Ct. at 2462, citing U.S. Const, art. VI, cl. 2. In these federal treaties, the United States promised the Haudenosaunee the right to continue to govern themselves. For this reason, this Court has required "a clear expression of the intention of Congress" before the state or federal government may [regulate] Indians for conduct on their lands." *Id.* at 2477; *Herrera*, 139 S. Ct. at 1698 (quoting *United States v. Dion*, 476 U.S. 734, 739–40 (1986) and citing *Mille Lacs Band,* 526 U.S. at 202-203. (The Court will require " 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on

the other, and chose to resolve that conflict by abrogating the treaty.' ")

In 1877, Congress abolished the powers of the President and the Senate to form treaties with Indian nations. 25 U.S.C.A. § 71 (West 2021). Nevertheless, Congress affirmed, "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." *Id.* Ten years later, Congress enacted the General Allotment Act and explicitly excluded the lands of the Seneca Nations, preserving and not disturbing the protections already given the Senecas in federal treaties.

In 1913, the Sixteenth Amendment gave Congress the "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. Congress used this authority to tax individuals who were considered citizens of the United States. Members of the Seneca Nation were not even considered citizens of the United States or subject to its jurisdiction until 1924.[12] Consequently,

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[12] 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 . . . to be citizens of the United States . . ." Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253. 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 as "citizens of the United

neither the Senecas nor the United States contemplated a federal tax on land, or income derived from land, on the Seneca Nation territories.

In 1925 and 1926, the Attorney General of the United States issued two opinions that found:

- "Because revenue laws impose burdens upon the public and restrict the use and enjoyment of property, they are not to be extended beyond the clear import of the words used. Congress is bound to express its intention to tax in clear and unambiguous language." *Income Tax-Restricted Lands of Quapaw Indians.*, 34 U.S. Op. Atty. Gen. 439, 444 (1925)

- "To tax them is so inconsistent with the purpose and object of the Government in its dealing with these Indians, and the relation that it maintains toward them and their property, that is cannot be assumed from the general provisions of the internal revenue laws, although broad in compass, that such was the intention of Congress." *Income Tax-Tom Pavatea, Hopi Indian*, 35 U.S. Op. Atty. Gen. 107, 109 (1926)

Starting with the Internal Revenue Code of 1954, Congress made clear treaties with tax exemption provisions should prevail over the general provisions of the Code. David Sachs *Is the 19th Century*

States and of the State wherein they reside." *See Elk v. Wilkins,* 112 U.S. 94, 100 (1884).

Doctrine of Treaty Override Good Law for Modern Day Tax Treaties?, 47 Tax Law. 867, 870 (1994), Thus, Congress has directed the Commissioner to give "due regard" to treaty obligations of the United States. 26 U.S.C.A. § 894(a)(1). The Internal Revenue Code further provides, "No provision of this title (as in effect without regard to any amendment thereto enacted after August 16, 1954) shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on August 16, 1954." 28 U.S.C.A. § 7852(d)(2)(West 2021). Since the treaties at issue in this case were in effect on August 16, 1954, these treaties continue to protect the land within the treaty-defined boundaries and any income derived from such land. The Commissioner's relief does not rest within the courts, but with Congress.

II

BY GRANTING CERTIORARI, THE COURT WILL ENSURE THESE TREATIES ARE HONORED AND THAT THE RULE OF LAW PREVAILS, NOT THE RULE OF THE STRONG

Contrary to the Second Circuit's view, this case does not turn on whether Petitioner Alice Perkins "owns" or has a "possessory ownership interest in land." At the time of these treaties, the Senecas and Haudenosaunee did not recognize the Anglo-European concept of "ownership." *In Defense of* Property, 118 Yale L. J. 1022, 1066 (April 2009). Instead of ownership, the Haudenosaunee and the Senecas embraced the notion of stewardship. *Id.*

Therefore, it would be antithetical to interpret any rights under these treaties based on ownership.

Under the Canandaigua Treaty and the 1842 Treaty, the Senecas remain 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 Senecas surrender such lands. *The New York Indians*, 72 U.S. (5 Wall.) at 771. Although enrolled Senecas do not "own" land within the territory, they do have the right to possess land, either by a quitclaim deed allotting land or by a lease assigning land. More importantly, based on these treaties, the Seneca Nation has the exclusive sovereign right to make laws governing its lands and the use of such lands. Congress has never abrogated the self-governance rights of the Seneca Nation.

Petitioner Alice Perkins, Alton Jimerson and his family were allotted lands based on the customs, laws, and traditions of the Seneca Nation. When Petitioner Alice Perkins ask her elderly neighbor and countryman, Alton Jimerson, permission to use his land, he willingly and freely gave his permission.

From Mr. Jimerson's perspective, his land had little beneficial value to him or his family since the land is in a flood zone. After the construction of the Kinzua Dam, he and his family could not build homes, farm, or otherwise work the land. But Petitioner Alice Perkins could.

With Mr. Jimerson's permission, Petitioner Alice Perkins sought and received from the Seneca

Nation the exclusive rights to mine this land. She later acquired the adjacent property so she could access Mr. Jimerson's allotted land and was given permission by the Seneca Nation to add her land to her permit.

Alton Jimerson did not have the financial means to start a mining business but reaped the benefit through royalties paid in exchange for giving exclusive rights to Petitioner Alice Perkins to use his allotted land. In turn, the Seneca Nation who granted Petitioner Alice Perkins exclusive rights to extract the sand and gravel from this land, received royalties in accordance with its now suspended, law.

The Seneca Nation, the Jimerson and Perkins families have been subject to the will of the strong. The construction of the Kinzua Dam demonstrates that fact.[13] Congress sanctioned the breach of these treaties, by enacting laws and approving funds for the Kinzua Dam. Yet, since the construction of the Kinzua Dam, Congress has done nothing to further abrogate these treaties, promising the free use and enjoyment of these lands, or the promise not to tax such lands for any purpose.

Now, once again, Petitioner Alice Perkins and other Senecas who earn income from farming, timbering, harvesting, or otherwise working the

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[13] For a history relating to the construction of the Kinzua Dam, please read Maria Diaz-Gonzalez, *The Complicated History of the Kinzua Dam and How It Changed Life for the Seneca People*, Feb. 12, 2020, https://www.alleghenyfront.org/the-complicated-history-of-the-kinzua-dam-and-how-it-changed-life-for-the-seneca-people/.

treaty-protected land of the Seneca Nation, must stand toe-to-toe with one of the most powerful federal agencies, the Internal Revenue Service. While the Second Circuit concluded these lands would never be subject to federal tax liens, it completely ignored the criminal consequences associated with the failure to pay taxes. No Seneca should be forced to pay an unlawful tax or otherwise be threaten with imprisonment.

In *McGirt,* this Court held:

> If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

140 S. Ct. 2482; *see also Herrera*, 139 S. Ct. at 1698 ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so,'" *citing Mille Lacs,* 526 U.S. at 202). Generally, these "brazen and longstanding injustices over the law" are not subject to review by this Court simply because individuals like Alice Perkins or Alton Jimerson lack the means or the courage to speak truth to power. Petitioner Alice Perkins is now on the steps of this mighty Court asking to "hold the government to its words," *McGirt,* 140 S. Ct. at 2459, and not to "cast a blind eye," *id.* at 2482, allowing the "rule of the strong, not the rule of law" to prevail. *Id.* at 2474.

CONCLUSION

The Second Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, in a way that is consistent with the Court's precedents. This Court must honor the promises made in treaties to the Seneca Nation and its people, as Congress has directed. For these reasons, the Court should grant certiorari and hear the merits of this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, DATED AUGUST 12, 2020

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

ALICE PERKINS, FREDRICK PERKINS,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Docket No. 19-2481

August Term 2019

Argued: May 21, 2020

Decided: August 12, 2020

Opinion

Wesley, Circuit Judge:

Alice Perkins is an enrolled member of the Seneca Nation of Indians (the "Seneca Nation" or the "Nation") who resides on the Seneca Nation's Allegany Territories with her husband, Fredrick.[1] Together they operate A & F

1. As the tax court noted below, "[n]omenclature is fraught in this field." J.A. 143 n.1. The official name of the Seneca Nation in

Trucking, which was involved in the mining and sale of gravel from land located within the Allegany Territories. The Perkinses filed their income taxes for the 2008 and 2009 years well after the filing due dates, claiming that the income earned from the sale of gravel mined on Seneca land was exempt from federal income tax by operation of a statute and two treaties between the United States and the Seneca Nation. After an audit, the Internal Revenue Service ("IRS") disagreed that the revenue generated from A & F Trucking's gravel sales was exempt from federal taxes and issued a notice of deficiency to the Perkinses assessing penalties for their late filings.

In November of 2014, the Perkinses filed this action in tax court seeking redetermination of their tax liabilities. They initially argued that a federal statute, the General Allotment Act of 1887, 24 Stat. 388 (codified at 25 U.S.C. § 334 *et seq.*), created an exemption for income derived

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English is the "Seneca Nation of Indians." *See* The Seneca Nation of Indians, *Culture*, https://sni.org/culture/ (last visited August 11, 2020) (hereinafter "*Culture*"). Much of the law and historical sources involving this area of the law refer to the indigenous peoples who reside within the United States as "American Indians." The United States Department of the Interior's Bureau of Indian Affairs likewise uses the term "American Indians" to refer to members of federally recognized tribes, villages, or nations. In an effort to avoid confusion, and to ensure continuity with prior caselaw, we will use this term to refer generally to the indigenous peoples of the United States, or to refer to a body of law generally. Where possible, we will refer to the specific nation at issue in a prior case or in the historical record by its name. We will refer to the Seneca Nation of Indians, when referring to the governmental entity, as "the Seneca Nation" or the "Nation," as appropriate.

from Seneca land. After abandoning that argument, they then claimed that the 1794 Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), and the 1842 Treaty with the Seneca, 7 Stat. 586 (May 20, 1842), created an exemption from income taxes for income derived from land within the Seneca Nation. The tax court disagreed, finding that neither treaty supported an exemption from federal income taxation.

On appeal, the Perkinses argue that the tax court failed to liberally construe the treaties and that doing so would have shown the treaties supported an exemption to federal income taxes. *See, e.g.*, Pet'rs' Br. 13–25, 29–36. They also urge us to endorse language in several cases from other Courts of Appeals suggesting that income derived from Seneca land may be exempt under the Treaty of Canandaigua and the Treaty with the Seneca—which the Perkinses argue must be read together. *See id.* at 18–29.

We agree with the tax court. To the extent the language of either treaty could be construed to offer an exemption from taxes, those exemptions are constrained by the historical contexts under which they were drafted and therefore neither exemption extends to the Perkinses' gravel mining revenue. The text and context of the Treaty of Canandaigua demonstrates that it creates no tax exemption applicable to the Perkinses. Dicta in other cases suggesting the opposite are incorrect; they would require the erroneous extension of a Supreme Court case that is inapposite where the land from which the income is derived is not held in trust by the United States for an

American Indian taxpayer. While the 1842 Treaty with the Seneca contains an explicit exemption for taxes on Seneca land, we reject that a tax exemption applying to Seneca land must necessarily extend to income derived by individual members from Seneca land.

Because neither treaty exempts the Perkinses' gravel-mining income from federal income taxation, we affirm the tax court's decision and remand for further proceedings consistent with this opinion.

BACKGROUND

I. Factual Background

The Seneca Nation was the largest of the Six Nations comprising the Iroquois Confederacy, otherwise known as the Haudenosaunee. *See generally Lazore v. Comm'r*, 11 F.3d 1180, 1182 (3d Cir. 1993) (discussing uncontradicted trial evidence); *see also Culture*, *supra* n.1. Historically, the Seneca Nation occupied territory throughout Central and Western New York. *See Culture*, *supra* n.1. The Seneca Nation continues to own and occupy land in Western New York, including an area known as the Allegany Indian Territories (the "Allegany Territories") near the border of Pennsylvania. *See, e.g.*, Seneca Nation of Indians, *Territories*, https://sni.org/government/territories/ (last visited August 11, 2020).

Appendix A

A. The Seneca Nation's Sand & Gravel Permitting Laws

The Seneca Nation retains ownership of land on its territories, and "allots" to individual members possessory interests in the use of a plot of the Nation's land. J.A. 98 § 102(C). Any land that is unallotted to individual members is retained by the Nation. J.A. 99 § 102(F). The Nation defines any "Nation Land" to mean "any lands" owned in fee simple by the Nation and subject to federal restrictions upon alienation, including the Allegany Territories. J.A. 100 § 102(R).

The Seneca Nation has specific laws governing the extraction and mining of natural resources on its land. "[A]ll minerals, including ... gravel located within any Nation lands shall be and remain the sole and exclusive property of the Nation." J.A. 102 § 301. To lawfully extract gravel from land belonging to the Seneca Nation, the Nation must issue a permit. J.A. 102 § 302(A). A permit requires approval by the Nation's government and the consent of the "owner of record," who is the "Nation member holding an allotment pursuant to Nation law, custom, tradition or usage." *See* J.A. 100 § 102(T), J.A. 102 § 302.

Individual members of the Seneca Nation do not own land on its territories in fee simple. Instead, the Nation provides to individual members lifetime possessory interests in land. *See* Statement of Undisputed Facts, *Perkins v. United States*, No. 16-cv-00495, Dkt. 72-1 at

¶ 8 (W.D.N.Y).[2] The Nation retains ownership over the subsurface rights to all land in its territories. *See id.* at ¶ 9.

B. The Perkinses & A & F Trucking

Petitioner Alice Perkins is an enrolled member of the Seneca Nation and, with her husband Fredrick, operates A & F Trucking ("A & F"). Alice and Fredrick (together, the "Perkinses") live on the Allegany Territories. In 2008, the Seneca Nation issued Alice and A & F a permit to mine gravel from certain land located in the Allegany Territories. In exchange for the right to mine gravel from land belonging to the Seneca Nation, A & F paid the Nation royalties on the proceeds earned from selling that gravel. A & F's permit was valid through June of 2009, when the Nation imposed a moratorium on mining and withdrew A & F's permit. A & F continued selling gravel that had already been mined through 2011.

Alton Jimerson, a member of the Seneca Nation, had a lifetime possessory interest over the 116-Acre plot of

2. As we note below, the Perkinses filed an action in the Western District of New York concerning their tax liabilities for the 2010 tax year. *See Perkins v. United States*, No. 16-cv-00495 (W.D.N.Y. June 16, 2016). We take judicial notice of certain of the parties' filings in that action because those filings concern the same parties and subject matter before this Court, and neither party disputes the contents of those filings. Thus, we may consider those documents for the truth of the matters asserted therein. *See Young v. Selsky*, 41 F.3d 47, 50–51 (2d Cir. 1994) (taking judicial notice of documents and testimony filed in another action for the truth of the matters asserted therein where no party contested the accuracy of the statements and both parties relied on the information).

land from which A & F mined gravel. *See* Statement of Undisputed Facts, *Perkins v. United States*, No. 16-cv-00495, Dkt. 72-1 at ¶¶ 8–9 (W.D.N.Y June 15, 2018). Alice Perkins and A & F obtained permission from Jimerson, pending approval by the Seneca Nation, to mine gravel from the 116-Acre plot. The Perkinses mined gravel from Jimerson's land until A & F's permit was withdrawn by the Seneca Nation in 2009.

C. The Perkinses' Tax Returns

The Perkinses filed their joint individual income tax returns for the 2008 and 2009 years in October of 2011, well after the filing due dates. The Perkinses attached a "detail sheet" to their returns and claimed that the income generated from A & F's sale of gravel during 2008 and 2009 was exempt from federal income tax under the General Allotment Act of 1887, 24 Stat. 388 (Feb. 8, 1887) (codified at 25 U.S.C. § 334 *et seq.*); *see also* 25 U.S.C. § 348. The Commissioner of Internal Revenue (the "Commissioner") issued a notice of deficiency to the Perkinses for the 2008–2010 tax years, and adjusted A & F's business income to include revenue generated from the sale of gravel mined from the Allegany Territories. The Commissioner also sought to impose penalties upon the Perkinses for their late and inaccurate filings under I.R.C. §§ 6651(a)(1) and 6662(a).

The Perkinses claimed the same exemption in their 2010 tax return. They paid the tax, interest, and penalties demanded by the IRS; and then, in 2016, filed a claim in the United States District Court for the Western District

of New York seeking a refund. The district court in that action denied the Commissioner's motion to dismiss and the parties' cross-motions for summary judgment, and the case is currently proceeding towards trial.[3]

II. Procedural History

In response to the Commissioner's notice of deficiency, the Perkinses filed a tax court petition seeking redetermination of their tax liabilities for the 2008 and 2009 tax years. Initially, they argued that the revenues from A & F's sale of gravel were not subject to federal income taxation because that income was "earned from the depletion" of American Indian land held in trust by the United States under the Indian General Allotment Act of 1887. *See* J.A. 84–85 (citing *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956)). The Perkinses later abandoned this argument for the reasons discussed below, and instead claimed that two treaties between the United States and the Seneca Nation created an exemption from federal income taxation for income derived from Seneca land. They argued that the 1794 Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), and the 1842 Treaty with the Seneca, 7 Stat. 586 (May 20, 1842), exempted "income derived directly from" land belonging to the Seneca Nation from federal income taxation, which would include their gravel sales. J.A. 116–17; *see* J.A. 104.

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3. The district court's decisions on the Commissioner's motion to dismiss, and on the parties' cross-motions for summary judgment, are not before this Court; we express no opinion on their reasoning or result.

The Commissioner moved for summary judgment.[4] The tax court found that the Treaty of Canandaigua did not exempt from taxation the income of individual members of the Seneca Nation, and that the tax exemption that appears on the face of the Treaty with the Seneca was directed at taxes on real property and not income derived from the sale of gravel. The tax court also determined that the Perkinses were liable for late filing penalties under I.R.C. § 6651(a)(1), but rejected the Commissioner's request for inaccurate filing penalties under I.R.C. § 6662.[5] The tax court then entered a decision and order assessing penalties against the Perkinses for their late filings. The Perkinses timely appealed.

DISCUSSION

I. Jurisdiction & Standard of Review

This Court has jurisdiction to review decisions of the tax court and does so "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." I.R.C. § 7482(a)(1). Venue is proper in the Second Circuit because the Perkinses reside in the Allegany Territories, located in the Western District of New York. *See id.* § 7482(b)(1)(A).

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4. The Perkinses did not assert that any material issues of fact precluded summary judgment.

5. After the tax court's ruling, the Perkinses and the Commissioner stipulated that the Perkinses were not liable for accuracy-related penalties under I.R.C. § 6662(a).

We review the tax court's grant of the Commissioner's motion for summary judgment *de novo*. *See Williams v. Comm'r*, 718 F.3d 89, 91 (2d Cir. 2013) (per curiam). Because neither party raised as an issue before this Court penalties or the amount of any applicable penalties, we need only consider whether the Perkinses' gravel-mining income is subject to federal income taxation. The dispute is a legal one: whether either of two treaties operates to exempt the Perkinses' gravel-mining income from federal income taxation.

II. General Principles of The Internal Revenue Code and the Interpretation of American Indian Treaties

American Indian nations are "regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States." *Choate v. Trapp*, 224 U.S. 665, 671, 32 S.Ct. 565, 56 L.Ed. 941 (1912). Congress's "power to unilaterally abrogate provisions of treaties with [American] Indians is firmly established." *Lazore v. Comm'r*, 11 F.3d 1180, 1183 (3d Cir. 1993). Furthermore, it is "well settled by many decisions of [the Supreme] Court that a general statute in terms applying to all persons includes [American] Indians and their property interests." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960). The Internal Revenue Code applies to every individual and taxes "all income from whatever source derived." *See* I.R.C. §§ 1, 61(a). Thus, absent a specific exemption, American Indians are not, by virtue of their status, exempt from paying federal income taxes. *See Squire v. Capoeman*, 351 U.S.

1, 6, 76 S.Ct. 611, 100 L.Ed. 883 (1956); *Choteau v. Burnet*, 283 U.S. 691, 694–95, 51 S.Ct. 598, 75 L.Ed. 1353 (1931).

While the Tax Code generally applies to American Indian citizens, "[i]n the area of taxation, 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. Instead, the Internal Revenue Code must be applied "with due regard to any treaty obligation of the United States which applies to [the] taxpayer." I.R.C. § 894(a)(1). The question is therefore whether another act of Congress or a specific treaty creates an exemption applicable to the Perkinses' gravel-mining income. *See, e.g.*, *Squire*, 351 U.S. at 6, 76 S.Ct. 611.

Initially the Perkinses argued that the General Allotment Act of 1887, and a Supreme Court case interpreting that act, *Squire v. Capoeman*, 351 U.S. 1, 6–8, 76 S.Ct. 611, 100 L.Ed. 883 (1956), exempted their gravel-mining income from federal income taxation. For the reasons we discuss below, the Perkinses wisely abandoned that argument. Because they point to no other act of Congress that could create an exemption covering their gravel-mining income, the only question is whether a treaty between the United States and the Seneca Nation creates such an exemption.

A. Interpreting Treaties with American Indian Nations

To determine whether an American Indian treaty creates an exemption from federal income taxes we "look

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, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L.Ed. 877 (1943)); *see also Seneca Nation of Indians v. New York*, 382 F.3d 245, 259 (2d Cir. 2004).

"[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196, 119 S.Ct. 1187 (citations omitted). In doing so, this Court is bound to interpret treaties with American Indians liberally, construing treaties in favor of the American Indians. *See Choctaw Nation of Indians*, 318 U.S. at 431–32, 63 S.Ct. 672. Thus, ambiguous provisions are interpreted to the benefit of the American Indians, and, absent explicit statutory language, courts should refuse to find that Congress abrogated Indian treaty rights. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). Even so, "treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians*, 318 U.S. at 432, 63 S.Ct. 672 (citations omitted).

Furthermore, "to be valid, exemptions to tax laws should be clearly expressed." *Squire*, 351 U.S. at 6, 76 S.Ct. 611. Therefore, a tax exemption must "derive plainly" from the treaty itself, and "[t]he intent to exclude must

be definitely expressed, where, ... the general language of the act laying the tax is broad enough to include the subject-matter." *Superintendent of Five Civilized Tribes v. Comm'r*, 295 U.S. 418, 420, 55 S.Ct. 820, 79 L.Ed. 1517 (1935) (citations omitted). The Supreme Court has "repeatedly said that tax exemptions are not granted by implication" and "can not rest on dubious inferences." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (citations omitted) (interpreting the application of the Indian Reorganization Act, 25 U.S.C. § 465, to state gross receipt taxes on a ski resort operated by the Mescalero Apache Tribe off reservation land).

The problem is more difficult when tasked with determining if an American Indian treaty, as opposed to a statute, gives rise to a tax exemption. The federal income tax did not exist in its present form until 1913, when the Sixteenth Amendment took effect. *See* U.S. Const. amend. XVI. As a result, it is nearly impossible for parties to treaties concluded prior to 1913 to have contemplated an exemption to a tax on income. Despite that, "doubts concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe." *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985) (citations omitted). Therefore, "the fact that the parties to a treaty did not negotiate with the federal income tax in mind is immaterial." *Lazore*, 11 F.3d at 1184. Nevertheless, complete "silence as to matters of taxation will never be sufficient to establish an exemption." *Id.*

Thus, we are presented with contradictory doctrines: we interpret Indian treaties liberally in favor of the American Indians, but tax code exemptions cannot be implied. Our sister circuits have ably dealt with the same question. *See, e.g.*, *Lazore*, 11 F.3d at 1184; *Ramsey v. United States*, 302 F.3d 1074, 1078–79 (9th Cir. 2002). Although they appear to disagree as to *how* they solve this riddle, *see, e.g.*, *Lazore*, 11 F.3d at 1184–85 & n.2, we think this disagreement is without real difference.[6]

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6. For example, the Third and the Eighth Circuits have applied a liberal interpretation to American Indian treaties "only if such ... treaty contains language which can reasonably be construed to confer income [tax] exemptions." *Lazore*, 11 F.3d at 1185 (first alteration in original) (quoting *Holt v. Comm'r*, 364 F.2d 38, 40 (8th Cir. 1966)). The Ninth Circuit, on the other hand, has reasoned that "notwithstanding the canon of interpretation that resolves ambiguities in statutes and treaties in favor of Indians, [courts] have recognized that the intent to exempt income of Indians from taxation must be *clearly expressed*." *Ramsey v. United States*, 302 F.3d at 1079 (alterations and citations omitted and emphasis added). And "unless express exemptive language is first found in the text of the statute or treaty," the Ninth Circuit does "not engage the canon of construction favoring the [American] Indians." *Id.* While "[t]he language need not explicitly state that [American] Indians are exempt from the specific tax at issue[,] it must only provide evidence of the federal government's intent to exempt Indians from taxation." *Id.* at 1078. Each circuit's mode of interpretation requires textual support within a treaty for a tax exemption before the canon of liberal construction applies. *Compare Ramsey*, 302 F.3d at 1078 ("The applicability of a federal tax to Indians depends on whether express exemptive language exists" but "[t]he language need not explicitly state that Indians are exempt from the specific tax," and need only "provide evidence of the federal government's intent to exempt Indians from taxation.") *with Lazore*, 11 F.3d at 1186–87

We think the best approach is to first examine each treaty at issue within its historical context. *See Seneca Nation of Indians*, 382 F.3d at 259. If any exemptive language is found within the treaty, we will interpret that language liberally in favor of the American Indian; but in doing so we will remain mindful that our interpretation cannot re-write the treaty beyond the bounds of its historical grounding and context. *See Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196, 119 S.Ct. 1187; *Choctaw Nation of Indians*, 318 U.S. at 431–32, 63 S.Ct. 672. A liberal reading of a document does not authorize unmooring it from its purpose or place in history.

III. The 1794 Treaty of Canandaigua

A. Historical Background

During the American Revolutionary War, the Seneca Nation, along with the Cayuga, Onondaga, and Mohawk nations aligned themselves with Great Britain. *See, e.g.*, *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1077 (2d Cir. 1982). While the 1783 Treaty of Paris, 8 Stat.

(finding that the Treaty of Canandaigua created no exemption to the federal income tax despite language guaranteeing "free use and enjoyment," because there was no language "capable of being construed more broadly"). Furthermore, the examples of exemptive language given by the Ninth Circuit in *Ramsey*, including "[t]reaty language such as 'free from incumbrance,' 'free from taxation,' and 'free from fees,' " *see Ramsey*, 302 F.3d at 1078–79, demonstrate that the Ninth Circuit requires little more than "language which can reasonably be construed to confer [tax] exemptions," *Holt*, 364 F.2d at 40.

80 (Sept. 3, 1783), effectively ended the war by concluding hostilities between the United States and Great Britain, it was silent with respect to those members of the Six Nations that supported the British. The 1784 Treaty of Fort Stanwix, 7 Stat. 15 (October 22, 1784),[7] between the United States and all members of the Six Nations—including the Oneida and Tuscarora nations, who supported the United States in the war—ended hostilities between the United States and the Haudenosaunee.

The Treaty of Fort Stanwix treated the loyalist Haudenosaunee nations harshly compared to the Oneida and Tuscarora: it required significant land cessions from the Seneca, including the cession of the Six Nations' claims to land in the Ohio Valley. *See id.* at Art. I–III. "The net effect of this cession was to force the Senecas to give up most of their land in New York to the national government." Jack Campisi & William A. Starna, *On The Road to Canandaigua: The Treaty of 1794*, 19 Am. Indian Q. 467, 469 (1995). The Treaty of Fort Stanwix, along with the later treaties of Fort McIntosh and Fort Harmar, caused considerable friction between the United States and the Six Nations. *See id.* at 468–70. While one of the United States' primary concerns was securing land in the Ohio Valley,[8] these treaties, in particular the Treaty

7. While there were several treaties concluded at Fort Stanwix, hereinafter "the Treaty of Fort Stanwix" refers only to the treaty concluded in 1784 between the United States and the Six Nations.

8. While the Treaty of Paris ceded control over the Ohio Valley from Great Britain to the United States, *see* 8 Stat. at 81–82, it did nothing to secure American settlement and claims in the region from the American Indian nations residing therein.

of Fort McIntosh, instead led to hostilities and violence between the American Indian nations residing in the Ohio Valley and the United States. *See id.* at 469–70.

Thus, the negotiations leading to the Treaty of Canandaigua that took place from 1789 to 1794 were motivated by the United States' desire to secure the neutrality of the Haudenosaunee nations as the United States engaged in likely—and then open—warfare with American Indian nations in the Ohio Valley. *See generally id.* at 471–81. The primary issue resolved by the Treaty of Canandaigua was disputed land cessions stemming from both the Treaty of Fort Stanwix and the Treaty of Fort Harmar. *See id.* at 470, 478–79 ("The great object of the treaty ... was to remove complaints respecting lands" (quoting the United States' chief negotiator, Thomas Pickering)). The effect of the Treaty of Canandaigua was to restore to the Six Nations—in particular, the Seneca—land ceded to the United States, New York, and Pennsylvania. It also relinquished Haudenosaunee—in particular, Seneca—claims over the Erie Triangle, a tract of land near present Erie, Pennsylvania that runs from New York's western border to Ohio's eastern border and guarantees Pennsylvania access to Lake Erie. *See id.* at 483–86.

The Treaty of Canandaigua thus accomplished three objectives: "(1) it secured for the United States whatever title the Six Nations had to the Ohio Valley, thereby strengthening its claims against those of other nations [such as the British and French]; (2) it returned to the Senecas the land they had lost at Fort Stanwix in 1784; and

(3) it secured by treaty, which seemed a stronger assurance than legislation to the Six Nations, their reservations in New York, laid out in state agreements." *Id.* at 486. The core of the Treaty of Canandaigua concerned the Senecas, "and those segments of other tribes that shared their territory, the Cayugas and Onondagas," because those nations in particular "presented a threat to national security" by virtue of being among the most powerful of the Six Nations, the most aggrieved by previous treaties, and therefore the most likely to present a military impediment to the United States' war with the nations in the Ohio Valley. *See id.*

1. The Treaty of Canandaigua

The Treaty of Canandaigua contains seven articles. *See* 7 Stat. 44. The preamble states that the purpose was to "remov[e] from [the Six Nations'] minds all causes of complaint, and establish[ ] a firm and permanent friendship" between the Six Nations and the United States.[9] Most relevant to this appeal, Article III describes the boundaries of the Seneca Nation's territory, and then states:

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9. Article I states that "[p]eace and friendship are hereby firmly established ... between the United States and the Six Nations." 7 Stat. at 44. Article II contains an acknowledgement that land reserved to the Oneida, Onondaga, and Cayuga nations by treaties with the state of New York would never be claimed nor disturbed by the United States, and contains nearly identical language to Article III. *Id.* at 45. In Article IV, the Six Nations commit not to "claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof." *Id.*

> Now, the United States acknowledge all the land within the aforementioned boundaries, 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.

7 Stat. at 45. The Haudenosaunee recorded the Treaty of Canandaigua in the Two Row Wampum, a belt consisting of two parallel rows of dark colored beads on a background of white beads, which signify two peoples "coexisting peacefully, neither imposing their laws or religion on the other." *Lazore*, 11 F.3d at 1186.[10]

B. The Treaty of Canandaigua Creates No Exemption to Federal Income Taxation.

The Treaty of Canandaigua offers no textual support for an exemption to the federal income tax. Article III's promise not to "disturb the [Seneca] ... in the free use and enjoyment" of their land cannot be "reasonably construed

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10. Because this case is before us on a motion for summary judgment, we note that many of the historical facts surrounding the Treaty of Canandaigua and the Treaty with the Seneca were not submitted as part of the record *per se*. Nevertheless, neither party disputes the historical record, and in fact both parties have cited to some of the same cases and authorities from which we draw contextual support.

as supporting an exemption from the income tax." *See Lazore*, 11 F.3d at 1187. Several other circuit courts have examined the Treaty of Canandaigua and rejected the idea that this language created an exemption from similar federal taxes. *See, e.g.*, *Lazore*, 11 F.3d at 1186–87 (finding members of the Mohawk Nation were not exempt from federal income taxation by virtue of their status or by operation of the Treaty of Canandaigua); *Cook v. United States*, 86 F.3d 1095, 1097–98 (Fed. Cir. 1996) (rejecting an argument that the Treaty of Canandaigua created an exemption for members of the Onondaga Nation from federal excise taxes on the sale of diesel fuel on Onondaga land). Like other treaty provisions which secure the "peaceful possession" of American Indian land, guaranteeing the "free use and enjoyment" of the land "applies to the use of land," not to taxes levied upon individuals who profited from the use of the land. *See Cook*, 86 F.3d at 1097–98.

Neither the context of nor history surrounding the Treaty of Canandaigua suggests that the parties intended to address taxation at all. The Perkinses argue, counterfactually, that the United States' goal of "removing from [the Six Nations'] minds all causes of complaint," 7 Stat. at 44, would have been undermined by taxing members of the Seneca Nation since doing so "would have" given cause for complaint. *See* Pet'rs' Br. 19. But this ignores that the "great object of the treaty ... was to remove complaints respecting lands" that had been ceded by the Senecas as punishment for their participation in the Revolutionary War. *See* Campisi & Starna, *supra*, at 479.[11]

11. Few citizens welcome taxation, but the Treaty's focus was Haudenosaunee complaints respecting land.

Thus "free use and enjoyment" is better interpreted as preventing American encroachment onto Seneca lands, or interference with the Seneca Nation's use of its lands. *See, e.g.*, *Jourdain v. Comm'r*, 617 F.2d 507, 508–509 (8th Cir. 1980) (per curiam) (finding language in the Treaty with the Tribes of Indians of Greenville guaranteeing freedom from "molestation from the United States" sought only to prevent "interference with the rights of Indians to hunt and otherwise enjoy their land, not the 'right' to be free from federal taxation.").

This conclusion is supported by more contemporaneous examples of encroachment by private citizens onto Seneca land. For example, less than sixty years after the Treaty was concluded, the Supreme Court applied the Treaty of Canandaigua and two later treaties, the 1838 Treaty with the New York Indians (hereinafter the "Treaty of Buffalo Creek") and the 1842 Treaty with the Seneca, to permit an action in trespass against private citizens who forcibly removed a member of the Seneca Nation from the Tonawanda territory. *See, e.g.*, *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 371–72, 15 L.Ed. 684 (1856). Therefore, we find the language "free use and enjoyment" creates no exemption from federal income taxation.

The Perkinses urge us to follow dicta from several courts interpreting the Treaty of Canandaigua or analogous language that suggests the treaty might create an exemption for income derived from the land. *See, e.g.*, *Lazore*, 11 F.3d at 1187; *Hoptowit v. Comm'r*, 709 F.2d 564, 566 (9th Cir. 1983). The Third Circuit, for example, hypothesized that the Treaty of Canandaigua's guarantee

of "free use and enjoyment" "might be sufficient to support an exemption from a tax on income derived directly from the land." *Lazore*, 11 F.3d at 1187 (citation omitted). In *Lazore*, two members of the Mohawk Nation claimed they were generally exempt from paying federal income taxes by virtue of their membership in the Mohawk Nation. *See id.* at 1181. The Lazores received income as compensation for their employment, Mr. Lazore was a mechanic and Mrs. Lazore was an executive director for the Mohawk Indian Housing Corporation. They claimed that their membership in the Mohawk Nation exempted them from federal taxes, and did so by pointing to, among other sources, the Treaty of Canandaigua. *See id.* at 1182. The Third Circuit disagreed with the Lazores that the Treaty of Canandaigua's guarantee of "free use and enjoyment" was "capable of being reasonably construed as supporting an exemption from the income tax," but speculated based on the Circuit's analysis of *Hoptowit* that "[t]he language relied on by the Lazores might be sufficient to support an exemption from a tax on income derived directly from the land." *Id.* at 1187 (citing *Hoptowit*, 709 F.2d at 566). Because the language could not be construed more broadly to serve as a *general* exemption from income tax liability, the Third Circuit rejected the Lazores' claim. *See id.*

Similarly, the Ninth Circuit postulated that "any tax exemption created by" the language "exclusive use and benefit" in the Treaty with the Yakimas of 1855, 12 Stat. 951 (June 9, 1855), "is limited to the income derived directly from the land." *Hoptowit*, 709 F.2d at 566. In *Hoptowit*, the Ninth Circuit rejected claims that payments to a member of the Yakima Indian Nation for service as

an elected Tribal Council Member were exempt from federal income taxation. *See id.* at 565. Hoptowit argued that treaty language setting out certain land "for the exclusive use and benefit of [the Yakima]" "guarantee[d] the Tribe's right to distribute the income from the reservation's resources for the exclusive benefit of its members," and "express[ed] a tax exemption as clearly as was possible a half century before the enactment of federal income taxation." *Id.* at 565–66 (quoting 12 Stat. at 952). The Ninth Circuit had previously relied on *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956), to draw a line between income earned in compensation for services and income that was "derived directly from the land." *See id.* at 566 (discussing *Comm'r v. Walker*, 326 F.2d 261 (9th Cir. 1964)). The Court found that its analysis was "equally applicable" to *Hoptowit*, and that "any tax exemption created by [the Treaty's] language is limited to the income derived directly from the land. It [did] not extend to the use of that income to compensate Hoptowit for his service as a Tribal council member." *Id.*

The Perkinses argue that *Lazore* and *Hoptowit* compel us to accept that "free use and enjoyment" "confer[s] a federal tax exemption for income earned from the sale of gravel mined on the Seneca Nation's territory." Pet'rs' Br. 27–28. We disagree. *Lazore* and *Hoptowit* attempt to extend the Supreme Court's logic in *Squire* beyond the statutory context—the General Allotment Act—in which *Squire* was decided.

The General Allotment Act was intended to conform American Indian land ownership to the individual

property ownership existing in much of the United States by dividing American Indian reservations into uniform parcels of private land called "allotments." *See* 24 Stat. at 388; *see also United States v. Anderson*, 625 F.2d 910, 912 (9th Cir. 1980). Allotments were generally inalienable because they were held in trust by the United States for an individual American Indian and his or her heirs. *See Anderson*, 625 F.2d at 912. At the end of the trust period, allottees were to receive their lands "in fee, discharged of said trust and free from all charge or incumbrance whatsoever." 24 Stat. at 389.

In *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956), the Supreme Court found that the General Allotment Act exempted from federal capital gains taxes proceeds from the sale of timber on land allotted to a member of the Quinaielt Tribe of Indians. Amendments to the General Allotment Act provided to the Secretary of the Interior the power to "issue" a "patent in fee simple," thereby removing "restrictions as to sale, [e]ncumbrance, or taxation" once the Secretary was "satisfied that any Indian allottee is competent and capable of managing his or her affairs ...." *Id.* at 7, 76 S.Ct. 611. Amendments to the Act supported exempting the timber revenue from federal taxation because "it [was] not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." *Id.* at 8, 76 S.Ct. 611. Furthermore, because the timber at issue constituted the primary value of the allottee's land, unless the revenue from its sale was preserved for the allottee and was not taxed, he would not "go forward when declared competent with the necessary chance of economic survival" that the

Act sought to impart. *Id.* at 10, 76 S.Ct. 611. Thus "to prepare the Indians to take their place as independent, qualified members of the modern body politic ... it [was] necessary to preserve the trust and income derived directly [from allotted land]." *Id.* at 9, 76 S.Ct. 611 (internal quotation marks and citation omitted).

If the Perkinses had mined gravel from land held in trust by the United States for Alice or one of her ancestors, it is evident that *Squire* would operate to exempt the gravel-mining income from federal taxes. However, as the tax court noted, the Perkinses were right to abandon their reliance on the General Allotment Act prior to summary judgment. The General Allotment Act has never applied to the Seneca Nation's territories. *See* 25 U.S.C. § 339. Furthermore, the Seneca Nation's land remains held in fee simple by the Nation itself; it is neither "allotted" to nor held in trust for any individual member by the United States Government.

The key to the Supreme Court's decision in *Squire* was that "[t]he purpose of the allotment system was to protect the Indians' interest and to prepare [them] to take their place as independent, qualified members of the modern body politic." 351 U.S. at 10, 76 S.Ct. 611 (internal quotation marks omitted). Thus it was "necessary to preserve the trust and income derived directly [from the allotted land]." *Id.* at 9, 76 S.Ct. 611 (citation omitted). The paternalistic rationale of *Squire* is intimately related to the idea that certain land was held in trust for American Indian individuals; it has little application where the relevant income derives from a license over land belonging

to an American Indian nation, or from land not allotted to the individual American Indian.[12]

Other courts have rightly refused to extend *Squire* to income derived from land that is not allotted to an American Indian taxpayer.[13] The specific tax exemption created by the Supreme Court's interpretation of the General Allotment Act "was to provide the allottee with

12. This is especially so where Congress has historically treated American Indian nations themselves—through their governing entities—differently from individual members of those nations. *Compare, e.g.*, *Uniband, Inc. v. Comm'r*, 140 T.C. 230, 241, 245 (2013) ("[F]ederally recognized Indian tribes are not subject to Federal income tax" because "Congress has never imposed the Federal income tax on Indian tribes.") *with Federal Power Comm'n*, 362 U.S. at 116, 80 S.Ct. 543 ("[I]t is now well settled by many decisions of [the Supreme] Court that a general statute in terms applying to all persons includes Indians and their property interests.").

13. *See, e.g.*, *Anderson*, 625 F.2d at 914–15 (finding the General Allotment Act did not exempt from income taxes income derived by Sioux member of Fort Peck Tribes from cattle ranching on tribal land "under land-use program licenses"); *Fry v. United States*, 557 F.2d 646, 648–50 (9th Cir. 1977) (finding income derived by taxpayers, who were members of the Confederated Tribes of the Colville Reservation, from logging operations on reservation land was not exempt from federal income taxes even if the income derived by the Tribe from the same logging operation was tax exempt); *Holt*, 364 F.2d at 41–42 (finding no income tax exemption for taxpayer, a member of the Cheyenne River Sioux, who derived income from cattle and grazing operation on tribal land pursuant to a lease granted by the tribe because tax was neither an encumbrance upon tribal land, nor did retention of title to the land and cattle by the tribe create a trust relationship).

unencumbered land when he became competent,"[14] "not to benefit him simply because he was an [American] Indian." *Anderson*, 625 F.2d at 914 (internal quotation marks omitted). Furthermore, if income derived from allotted land was taxable, and the tax was not paid, the resulting tax lien would "make it impossible for [the American Indian taxpayer] to receive the land free of [e]ncumbrance at the end of the trust period." *Id.* (internal citations omitted).

The logic of *Squire* does not extend to exempt from taxation income derived from land reserved to the Seneca Nation by the Treaty of Canandaigua. To the extent dicta in *Lazore* and *Hoptowit* suggests otherwise, we disagree. The Seneca Nation's land was never subject to the General Allotment Act, and even though individual members of the Nation may obtain possessory interests in the land, the Nation otherwise retains the land in fee simple. Like the petitioners in *Holt* and *Anderson*, the Perkinses extracted gravel from the land pursuant to a license granted by the Seneca Nation; they were neither allotted that land by the Nation nor by congressional act. The land was not held in trust for their benefit, and therefore the exemption from *Squire* has no application to their petition. Furthermore, taxing the income that individual members derive from extracting natural resources from Seneca land will not interfere with the Seneca Nation's "free use and enjoyment" of that land: unpaid taxes will not create a lien or encumbrance on the land—only on the income and chattel of the individual members engaged in extraction.

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14. "Competence" in this context refers only to an American Indian's ability to alienate the land allotted to him or her without the United States' permission. *See Anderson*, 625 F.2d at 913 n.2.

The Perkinses further argue that the Treaty of Canandaigua's promise of "free use and enjoyment" to the Seneca Nation itself extends to the Nation's "Indian friends," a term which they assert includes Alice as a member of the Seneca Nation. We disagree. That term is better understood as referring to the affiliated nations making up the Six Nations, including the Onondagas and Cayugas. The Supreme Court has interpreted that term in other treaties with the Seneca to specifically refer to the Cayugas and Onondagas. *See, e.g.*, *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 368, 15 L.Ed. 684 (1856) (discussing that the Treaty of Buffalo Creek set aside land west of Missouri as intended for the "[t]he Seneca tribe, including among them their friends, the Onondagas and Cayugas ...."); *see also* 1838 Treaty of Buffalo Creek, 7 Stat. 550, 553 (Jan. 15, 1838) ("It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them ...."). Nothing in the Treaty of Canandaigua suggests nearly identical language should be viewed differently.

To the contrary, the context and negotiations surrounding the Treaty of Canandaigua demonstrates that "Indian friends" refers to the nations affiliated with the Senecas. The Senecas and their allies (their "friends") presented a military threat to the United States that the federal government sought to neutralize through treaty. And if there were any doubt, that language is not used in Article VII, wherein the United States and the Six Nations specifically address actions by "individuals on either side." 7 Stat. at 46, Art. VII. Article VII does not use the term "Indian friends" or "their friends" to refer

to individual members of the Seneca Nation or of any of the other Six Nations.

Finally, in an effort to construe "free use and enjoyment" as providing textual support for an exemption from taxes, the Perkinses argue that the Treaty of Canandaigua must be read *in pari materia*, or construed together, with the 1842 Treaty with the Seneca, which contains an explicit textual exemption from taxation that we discuss in detail below. *See* Pet'rs' Br. at 21–25. We disagree that the two treaties must be construed together. The Treaty with the Seneca was concluded in large part to remedy a specific grievance related to state taxes and liens placed upon Seneca land. In contrast, the language "free use and enjoyment" in the Treaty of Canandaigua is better understood as restoring to the Seneca Nation autonomy and control over specific lands that were ceded in the treaties of Fort Stanwix and Fort Harmar.

We therefore reject the Perkinses argument that any guarantee of "free use and enjoyment" in the Treaty of Canandaigua exempts their gravel-mining income from federal income taxation. Because the Treaty of Canandaigua contains no textual support for an individual exemption from federal income taxation, we need not proceed to interpret the treaty liberally.

IV. The 1842 Treaty with the Seneca

A. Historical Background

The Treaty with the Seneca has a more convoluted history than the Treaty of Canandaigua. In 1786,

Massachusetts settled a dispute over territory with New York by purchasing rights of pre-emption over lands in Western New York that included the Allegany, Cattaraugus, Buffalo Creek, and Tonawanda territories of the Seneca Nation. *See, e.g.*, *In re New York Indians*, 72 U.S. (5 Wall.) 761, 761–62, 18 L.Ed. 708 (1866). This meant that Massachusetts had exchanged claims over much of what is now Western New York for the right to purchase that land from the Haudenosaunee should they ever choose to sell it. *See id.* at 762–63. Massachusetts eventually sold those pre-emption rights, and by 1838 they became vested with two private businessmen: Thomas Ogden and Joseph Fellows. *See id.*

In 1838, Ogden and Fellows purchased all of the Seneca Nation's land in New York, including the Buffalo Creek, Cattaraugus, Allegany, and Tonawanda territories for $202,000. With this purchase, the Seneca Nation entered into the 1838 Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838). The Treaty of Buffalo Creek contemplated that the Senecas would relocate west of the Mississippi within five years, that the federal government would hold part of the purchase price in trust for the Nation, and that half of the purchase price would be paid severally to individual members of the Seneca Nation for improvements on the purchased land.[15] *See* 7 Stat. at 551–53. Ogden and Fellows

15. The attempted removal of the Haudenosaunee to the West has a complex history that is not strictly relevant to this appeal. *See generally* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 420 (1942). In summary, while members of certain Haudenosaunee nations did relocate to Wisconsin and Kansas, the Seneca Nation in particular resisted resettlement and instead opted to remain in Western New York. *See id.*

would not have a possessory right over the land until 1845. *See, e.g.*, *New York Indians*, 72 U.S. at 763.

In 1840 the legislature of the State of New York passed an act assessing a highway tax on the Allegany and Cattaraugus territories. *See id.* In 1841, the legislature passed another act that authorized county assessors to assess taxes and survey for roads on land in the Allegany, Cattaraugus, and Buffalo Creek territories. *See id.* at 763–64. Under those two acts, county supervisors assessed taxes on land that was part of the Cattaraugus territory—land still occupied by the Seneca Nation, and not yet vested to Ogden and Fellows. *See id.* at 764. When those taxes went unpaid, the state imposed liens upon the assessed land and seized that land which, under the Treaty of Buffalo Creek, the Senecas had a right to occupy until 1845. *See id.* at 764–65. From 1840 to 1843, portions of the Cattaraugus territory were sold for unpaid taxes, despite the fact that the Seneca Nation continued to occupy the land. *Id.* The Supreme Court eventually invalidated those taxes under the Treaty of Buffalo Creek and the Treaty with the Seneca, *see New York Indians*, 72 U.S. at 767–72 (finding the taxes imposed on land occupied by the American Indian nations at issue were invalid until after the Senecas had vacated the land), but there were other disagreements between Ogden, Fellows, and the Seneca Nation arising from the Treaty of Buffalo Creek, *see, e.g.*, *Fellows*, 60 U.S. at 367–72.

For example, although the Treaty of Buffalo Creek contemplated that the Haudenosaunee would relocate West of the Mississippi within five years, there were no

provisions outlining any method of removal. *See, e.g.*, *Fellows*, 60 U.S. at 366. Even after the later 1842 Treaty with the Seneca, the Supreme Court entertained an action for trespass brought by a member of the Tonawanda band of the Seneca Nation against Fellows and several other men who had taken possession of his timber mill through force of arms. *See generally Fellows*, 60 U.S. at 367–73. Furthermore, certain members of the Seneca Nation disputed the validity of the deed granting land to Ogden and Fellows on the grounds that it was not signed by a majority of the chiefs of the Seneca Nation, and alleging that bribes and fraud were used to secure signatures to the deed. *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 420 (1942).

1. The 1842 Treaty with the Seneca

The United States concluded the 1842 Treaty with the Seneca in an effort to resolve disagreements stemming from the Treaty of Buffalo Creek, including restoration of Seneca ownership over the Allegany and Cattaraugus territories. *See* 1842 Treaty with the Seneca, 7 Stat. 586 (May 20, 1842). The preamble of the Treaty with the Seneca is specific: it recites the history of the Treaty of Buffalo Creek, including Ogden and Fellows's purchase of Seneca land, and states that all parties to the treaty "have mutually agreed to settle, compromise and finally terminate all such [diverse] questions and differences on the terms" of the Treaty of Buffalo Creek. 7 Stat. at 587.[16]

16. The Treaty with the Seneca also provided for payments to individual members of the Seneca Nation for improvements made on land within the Buffalo Creek and Tonawanda territories that Ogden

Appendix A

Article IX of the Treaty with the Seneca states:

> The parties to this compact mutually agree to solicit the influence of the Government of the United States 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 assessments 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.

7 Stat. at 590.

B. The Text of the 1842 Treaty with the Seneca Does Not Support an Exemption to Federal Income Taxation

Because the Treaty with the Seneca clearly contains textual support for an exemption from taxes of some kind, this Court must construe the treaty liberally, interpreting it as the Seneca would have understood it, and analyzing the language employed in light of its historical background. *See Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196, 119 S.Ct. 1187; *Choctaw Nation of Indians*, 318 U.S. at 432, 63 S.Ct. 672 ("[T]reaties cannot be re-written or expanded

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and Fellows had purchased. *See id.* at Arts. III–VI, 7 Stat. at 588–89. Furthermore, if the Senecas relocated West of the Mississippi, any individual members of the Nation owning improvements on the Cattaraugus or Allegany territories would be paid for the value of such improvements when sold. *Id.* at Art. VI.

beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."); *Seneca Nation of Indians*, 382 F.3d at 259. However, even construing the Treaty with the Seneca liberally, we find insufficient textual and historical support to read into the treaty an exemption for individual members of the Seneca Nation for taxes on income derived from Seneca land.

Article IX exempts "the lands of the Seneca Indians" "from all taxes, and assessments for roads, highways, or any other purpose until such lands be sold and conveyed" by the Seneca. 7 Stat. at 590. The Treaty neither addresses taxing the income of individual members of the Nation, nor does it address income that derives from "the lands of the Seneca." And while we are bound to interpret ambiguities liberally in favor of the Perkinses, we cannot rewrite the Treaty with the Seneca or expand it beyond its terms to cover individual federal income taxation. *See Choctaw Nation of Indians*, 318 U.S. at 432, 63 S.Ct. 672. Similarly, interpreting the treaty as the Seneca would have understood it does not counsel finding an exemption covering the Perkinses' gravel-mining income.

Only by reading the specific words "to protect such of the lands of the Seneca ... from all taxes" in isolation is it possible to ignore that Article IX as a whole was intended to prevent the imposition of specific taxes imposed by the State of New York on land belonging to the Nation. *See New York Indians*, 72 U.S. at 763–64. As a result, Article IX of the Treaty with the Seneca cannot be construed to create an exemption to income taxes on income earned from land owned by the Seneca Nation. *See, e.g.*, *Choctaw*

Nation of Indians, 318 U.S. at 432, 63 S.Ct. 672 (finding that, absent evidence of understanding warranting departure from plain language of agreement it "must be interpreted according to its unambiguous language"); *Mescalero Apache Tribe*, 411 U.S. at 156, 93 S.Ct. 1267 ("[A]bsent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.");[17] *Ramsey*, 302 F.3d at 1078.

None of the cases specifically interpreting the Treaty with the Seneca suggest otherwise. For example, *New York Indians* invalidated New York State's tax assessments on Seneca land, which implicated the very purpose and language of the Treaty with the Seneca. *See* 72 U.S. at 769–72. Furthermore, contrary to the Perkinses' argument, *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 15 L.Ed. 684 (1856), is inapposite. *Fellows* permitted a member of the Tonawanda band of the Seneca Nation to sue Joseph Fellows and other individuals for trespass after they sought to forcibly dispossess him of his land in Genesee County. *See id.* at 366–69. An individual right to

17. While *Mescalero* interprets a federal statute rather than a treaty, there is no reason to think that a different rule would apply when doing so would create a hodge-podge of laws that tax individual citizens differently. We also reject the Perkinses' scattershot of arguments that claim any exemptions available to the Seneca Nation must also inure to the benefit of its individual members, *see, e.g.*, Pet'rs' Br. 33–34; Pet'rs' Reply Br. 22–24, because, as noted above, American Indian nations are treated differently from individual members, *see supra* n.12.

an exemption from federal income taxes does not reason from a legal conclusion affirming a possessory interest in land. Nor did the Supreme Court discuss or interpret Article IX—even though it recited and discussed several of the other articles of the Treaty with the Seneca. *See generally id.*

In *United States v. Kaid*, 241 F. App'x 747 (2d Cir. 2007) (summary order), this Court rejected arguments that the Treaty with the Seneca prohibited taxation of cigarette sales made on reservations to non-American Indians, because "the treaty ... clearly prohibit[s] only the taxation of real property, not chattels like cigarettes." *Id.* at 750–51 (citing *Snyder v. Wetzler*, 193 A.D.2d 329, 330–32, 603 N.Y.S.2d 910 (1993) (finding Article IX of the Treaty with the Seneca "refers only to taxes levied upon real property or land" in light of the history behind the treaty), *aff'd*, 84 N.Y.2d 941, 620 N.Y.S.2d 813, 644 N.E.2d 1369 (1994)). The Perkinses are correct that *Kaid* is not binding on this panel; and their argument is supported by the fact that *Kaid* and other state court decisions interpreting the Treaty with the Seneca deal with excise taxes on goods rather than income "derived" from Seneca land. We nevertheless agree with our colleagues' reasoning in *Kaid*, and we refuse to read the Treaty with the Seneca so expansively as to apply to income taxes where that income was derived from the sale of gravel on Seneca land. Doing so would contort the plain language of an otherwise unambiguous treaty. We decline to expand the treaty without any support in the historical record for doing so. *See, e.g.*, *Five Civilized Tribes*, 295 U.S. at 420, 55 S.Ct. 820; *Mescalero*, 411 U.S. at 156, 93 S.Ct. 1267; *Ramsey*, 302 F.3d at 1079.

C. That the Perkinses' Income Derives from Seneca Land Does Not Compel a Different Result.

Although we find the tax exemption contained in Article IX is limited to Seneca land,[18] we must determine whether an exemption from taxes on land must extend to the Perkinses' gravel-mining income since their income "derives" from Seneca land. It does not. There are good reasons to treat income earned on the sale of gravel extracted from Seneca land differently than the real property itself.

First, there is a meaningful difference between taxing income derived from land allotted to individual American Indians under the General Allotment Act and income derived from land belonging to an American Indian nation. Taxes levied upon real property may lead to tax liens and dispossession from that real property, whereas taxing *income* earned from selling natural resources—such as timber or gravel—does not present the same concern. This is especially so where, as here, the land is not owned by the taxpayer.

Second, ownership of mineral rights, including for the mining of gravel and sand, are routinely separated from ownership of real property. Many states—including New York—have historically taxed mineral and subsurface rights separately from real property itself. *See, e.g.*, *Smith*

18. We only address the scope of the tax exemption appearing in Article IX of the Treaty with the Seneca to the extent necessary to determine the Perkinses' appeal. We need not determine whether that exemption is limited to state—as opposed to federal—taxation.

v. Mayor of New York, 68 N.Y. 552, 555 (1877) ("[O]ne may be taxed as owner of the fee of land, and another for the trees, buildings and other structures thereon, and the minerals and quarries therein."). To the extent natural resources such as gravel or timber can be harvested and then sold, it is obvious that those items are severable from, and can be taxed separately from, the land itself. Article IX of the Treaty with the Seneca was aimed at preventing the State of New York from taxing land belonging to the Seneca Nation, not the sale of resources derived from that land.

Finally, the Seneca Nation treats ownership of the land, possessory interests in land, and the right to extract gravel and other resources from its land differently. *See, e.g.*, J.A. 98–102 §§ 102(C), (F), (R), (U), 302. The Nation itself holds the land in the Allegany and Cattaraugus territories in fee simple, and it grants to individual members possessory interests in plots of land. *See* J.A. 100 § 102(R); *see also* Statement of Undisputed Facts, *Perkins v. United States*, No. 16-cv-00495 Dkt. 72-1 at ¶ 8 (W.D.N.Y). The Nation may then permit members or non-members to extract gravel from land belonging to the Nation. *See* J.A. 102 § 302.

Because a property interest in a permit to extract gravel from certain land is different from possession of the land in fee simple, it is logical that one rule would apply to taxation of the surface or subsurface of the land and another would apply to the product of mining from a permit to that land. This is especially true in light of the historical context underpinning the Treaty with the Seneca.

We find neither textual nor contextual support for extending the tax exemption contained in Article IX to income derived by individuals from Seneca land.

CONCLUSION

We **AFFIRM** the judgment of the tax court and remand for further proceedings consistent with this opinion.

APPENDIX B — DECISION OF THE UNITED STATES TAX COURT, DATED MAY 30, 2019

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 28215-14

ALICE PERKINS & FREDRICK PERKINS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

This case is calendared for trial at the Buffalo, New York trial session commencing June 3, 2019. On May 28, 2019, the parties filed a Joint Stipulation of Settled Issues, wherein respondent conceded the section 6662(a) accuracy-related penalties, which was the only issue remaining for the 2008 and 2009 taxable years at issue in this case.

Pursuant to the determination of the Court as set forth in its Opinion (150 T.C. No. 6) filed March 1, 2018, and incorporating herein the parties' Joint Stipulation of Settled Issues, filed May 28, 2019, it is hereby

Appendix B

ORDERED AND DECIDED that there are deficiencies and penalties due from petitioners for the taxable years 2008 and 2009 as follows:

		Additions to tax	Accuracy-related penalties
Year	Deficiency	I.R.C. Section 6651(a)	I.R.C. Section 6662(a)
2008	$198,696	$49,645.50	-0-
2009	203,355	50,837.00	-0-

/s/ Joseph H. Gale
Judge

ENTERED: MAY 30, 2019

SERVED: MAY 30, 2019

APPENDIX C — OPINION OF THE UNITED STATES TAX COURT, FILED MARCH 1, 2018

UNITED STATES TAX COURT

ALICE PERKINS AND FREDRICK PERKINS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

March 1, 2018, Filed

Docket No. 28215-14

OPINION

HOLMES, *Judge*:

Alice Perkins is an enrolled member of the Seneca Nation, which has been and remains the largest Indian nation within the Iroquois Confederacy and the largest population of Indians in western New York.[1] Perkins and

1. Nomenclature is fraught in this field. The Senecas refer to themselves in their own language as the O-non-dowa-gah. Their government strongly prefers to be called a nation rather than a tribe, and the official name of the Nation in English is the "Seneca Nation of Indians." *See* Seneca Nation of Indians, https://sni.org (last visited Sept. 12, 2017); Seneca Nation of Indians FAQ, https://sni.org (last visited Sept. 12, 2017).

her husband live on Seneca property and got permission from the Nation's government to mine and sell gravel during 2008 and 2009. They argue that their income from these sales is exempt from federal taxation under the terms of several treaties signed when the United States were in their infancy, which the Perkinses say promise that the federal government won't tax members of the Seneca Nation on this kind of income. Both parties are before the Western District of New York in an essentially identical refund case, and the Perkinses recently won the argument there, withstanding the Government's motion to dismiss. *See Perkins v. United States*, No. 16-CV-495(LJV), 2017 U.S. Dist. LEXIS 123543, 2017 WL 3326818 (W.D.N.Y. Aug. 4, 2017).

The Commissioner nevertheless argues that we have dealt with this issue many times before and there's no tax exemption to be found. He thinks this case is ripe for summary judgment.

Background

Alice Perkins and her husband Fredrick live on the Allegany Territory of the Seneca Nation. In 1985 Alice began a trucking business called A&F Trucking. The

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The Nation's own website is agnostic on the question of referring to Senecas as "Indians" or "Native Americans." *See* Seneca Nation of Indians FAQ. Much of the literature in this area refers to "Indian law" and "Indian treaties" and the like, however; so to maintain some continuity with this legal-historical past, we will use the traditional nomenclature, but we will use "Nation" when we refer to the Senecas' government and collective term for themselves in English.

Perkinses' tax returns suggest Fredrick worked for the company as a truck driver.

The record doesn't tell us all the services A&F Trucking performed, but it does show that the Perkinses were interested in mining gravel on the Nation's land. This meant they had to win permission from the Nation's Council. Alice won that permission for A&F Trucking in 2008. No one disputes that she mined and sold the gravel in both 2008 and 2009. In June 2009 the Nation withdrew the permit, but the business had piled up enough gravel to continue to sell it into 2010. The record does not tell us how much gravel was dug up or who bought it, but the Perkinses' tax returns show that the business had almost $1.5 million in gross receipts from 2008 and nearly $1.7 million from 2009.

The Perkinses didn't file their 2008 and 2009 tax returns until October 2011, which means both returns were late. The Perkinses attached a "detail sheet" to each return that said the income from the gravel was from "Native American land not subject to federal income taxes." On disclosure statements, they explained:

> The taxpayer is claiming that the revenue from gravel income earned from the depletion of his land is not subject to federal income tax[.] The US Tax Court concluded that a federal income tax exemption was created by the Indian General Allotment Act of 1887 ch 119 for income that an individual Indian allottee derives directly from the land held in trust for

> him citing *Squire v. Capoeman* * * * [Spelling corrected.]

The Commissioner soon showed up to dispute this claim. In August 2014 he sent the Perkinses a notice of deficiency for their 2008 through 2010 tax years. He said that the gravel income was taxable and that he would impose penalties under sections 6651(a)(1) and 6662(a).[2]

The Perkinses responded by filing a Tax Court petition for their 2008 and 2009 tax years.[3] During discovery, the Perkinses sent an email to the IRS stating that their argument was now based on two treaties—the Canandaigua Treaty, Nov. 11, 1794, 7 Stat. 44,[4] and the Treaty with the Seneca, May 20, 1842, 7 Stat. 586 (1842 Treaty). The Commissioner saw his chance and moved for summary judgment on the issues of whether the gravel income is taxable and whether the Perkinses should pay penalties.

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2. All section references are to the Internal Revenue Code in effect for 2008 and 2009, and all Rule references are to the Tax Court Rules of Practice and Procedure unless we say otherwise.

3. The Commissioner initially disputed a number of other items in the notice of deficiency, but the only argument the Perkinses made in their petition was that the gravel wasn't taxable and they shouldn't have to pay penalties. That means that we deem the other items in the notice of deficiency conceded by the Perkinses under Rule 34(b)(4).

4. The Canandaigua Treaty is also known as the Treaty of the Six Nations, which is the name some courts use. *See, e.g., Sylvester v. Commissioner*, T.C. Memo. 1999-35, 1999 WL 49773, at *2 n.3.

Appendix C

For their 2010 tax year the Perkinses paid the alleged deficiency and filed a refund suit in U.S. District Court. *See Perkins v. United States*, 119 A.F.T.R.2d (RIA) 2017-595 (W.D.N.Y. 2017). After some pretrial maneuvering, the Government in that case made the same argument that the Commissioner makes here—that neither the Canandaigua Treaty nor the 1842 Treaty exempts the Perkinses' gravel-sales income from federal taxation. *Id.* at 2017-596. Magistrate Judge Scott of the Western District of New York issued a report and recommendation that the District Court deny the Government's motion to dismiss based on the Canandaigua Treaty but grant its motion based on the 1842 Treaty. *Id.* at 2017-600 to 2017-601. Both parties objected, *see* Fed. R. Civ. P. 72, and District Judge Vilardo very recently adopted Judge Scott's recommendation about the Canandaigua Treaty but rejected his recommendation about the 1842 Treaty, Perkins, 2017 U.S. Dist. LEXIS 123543, 2017 WL 3326818, at *1. He denied the Government's motion to dismiss. 2017 U.S. Dist. LEXIS 123543, [WL] at *5.

This presents an unusual opportunity for two courts to analyze the same question about the same taxpayers at the same time.

Discussion

We begin with some general principles. We may grant summary judgment when there's no genuine dispute of material fact and a decision may be rendered as matter of law. Rule 121(b); *see, e.g., Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965

(7th Cir. 1994). There is no genuine dispute of material fact here, so we may move straight to the law.

The relevant law begins with a reminder that American Indians have all been American citizens since 1924. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253. Federal tax law applies to every American, including Indians and their property interests. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116-17, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960); *Commissioner v. Walker*, 326 F.2d 261, 263 (9th Cir. 1964), *aff'g in part, rev'g in part* 37 T.C. 962 (1962). The Code taxes "every individual" on "all income from whatever source derived," *see* secs. 1(a)-(c), 61(a), unless the income is specifically excluded, *see generally* ch. 1, subch. B, p. III, Items Specifically Excluded From Gross Income. Indians are subject to the tax law just like other Americans unless there's a specific exclusion in a treaty or statute. *Squire v. Capoeman*, 351 U.S. 1, 6, 76 S. Ct. 611, 100 L. Ed. 883, 1956-1 C.B. 605 (1956); *Superintendent of Five Civilized Tribes, for Sandy Fox, Creek No. 1263 v. Commissioner*, 295 U.S. 418, 421, 55 S. Ct. 820, 79 L. Ed. 1517, 1935-1 C.B. 158 (1935).

History does affect how we construe those exceptions. The normal maxims —cited almost every day our Court releases opinions—that deductions "are a matter of legislative grace," *see, e.g., Indep. Coop. Milk Producers Ass'n v. Commissioner*, 76 T.C. 1001, 1014 (1981), and that exemptions from tax are strictly construed, *see, e.g., McCamant v. Commissioner*, 32 T.C. 824, 834 (1959), are displaced a bit when Indians are involved. We construe treaties and statutes in favor of Indians because courts

have viewed Indians as being in a more vulnerable position in relation to the United States government. *See Choate v. Trapp*, 224 U.S. 665, 675, 32 S. Ct. 565, 56 L. Ed. 941 (1912) ("The construction, instead of being strict, is liberal; doubtful expressions * * * are to be resolved in favor of [the Indians]"). "Generally, treaties are construed more liberally than private agreements and the history, negotiations, and practical construction adopted by the parties are all relevant to treaty interpretation. Moreover, Indian treaties 'are to be construed, so far as possible, in the sense in which the Indians understood them.'" *Seneca Nation of Indians v. New York*, 382 F.3d 245, 259 (2d Cir. 2004) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S. Ct. 672, 87 L. Ed. 877, 97 Ct. Cl. 731 (1943)). Still, we can't use this canon "to create favorable rules" for them. *Jourdain v. Commissioner*, 71 T.C. 980, 990 (1979), *aff'd*, 617 F.2d 507 (8th Cir. 1980). With these constraints in mind, we turn to the parties' arguments.

We start with the Perkinses' return position. On their returns, the Perkinses reported their income but in an explanatory attachment denied it was taxable under the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. secs. 334, 339, 341, 342, 348, 349, 354, 381 (2012)).[5] As the Perkinses

5. The General Allotment Act divided reservations into parcels and held the "allotments" in trust for individual Indians. General Allotment Act of 1887, ch. 119, secs. 1-5, 24 Stat. at 388-390; *United States v. Anderson*, 625 F.2d 910, 912 (9th Cir. 1980). After the statutory trust period ended, allottees got their land "in fee, discharged of said trust and free of all charge or incumbrance

later recognized, however, the General Allotment Act specifically exempted "the reservations of the Seneca Nation of New York Indians in the State of New York." *See id.* sec. 8, 24 Stat. at 391. That exemption remains in effect to this day. *See* 25 U.S.C. sec. 339.[6] We agree with the Commissioner—and now even the Perkinses—that this Act doesn't apply to the Perkinses and does not excuse them from paying tax on the income they earned selling gravel.

The Perkinses realized this during the audit and raised some new arguments based on the Nation's treaties with the Federal Government. The first of these is the Canandaigua Treaty. The Perkinses focus our attention on the part of the treaty that says:

> [T]he United States will never claim the * * * [Seneca Nation's Treaty-defined lands], nor *disturb* the Seneka Nation, nor any of the Six

whatsoever." General Allotment Act sec. 5, 24 Stat. at 389; *see* 25 U.S.C. sec. 348 (2012); *Squire v. Capoeman*, 351 U.S. 1, 3, 76 S. Ct. 611, 100 L. Ed. 883, 1956-1 C.B. 605 (1956); *Stevens v. Commissioner*, 452 F.2d 741, 745 (9th Cir. 1971), *aff'g in part, rev'g in part* 54 T.C. 351 (1970) *and* 52 T.C. 330 (1969). Also at that time "all restrictions as to sale, incumbrance, or taxation of said land * * * [were] removed." 25 U.S.C. sec. 349 (2012). Congress likely assumed the Act would bring about the end of the reservation system, although the more direct goal was to promote assimilation. *Hagen v. Utah*, 510 U.S. 399, 424-25, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994) (Blackmun, J., dissenting).

6. The Seneca Nation vehemently opposed allotment of tribal lands. *See* Laurence M. Hauptman, "Senecas and Subdividers: Resistance to Allotment of Indian Lands in New York, 1875-1906", 9 Prologue: The Journal of the National Archives 105 (1977).

> 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.

Canandaigua Treaty, art. III, 7 Stat. at 45 (emphasis added). The Perkinses argue that the guaranty not to "disturb * * * the free use and enjoyment" of the Seneca Nation's land includes a tax exemption for income derived directly from the land.

The first question here is whether this treaty even provides rights to individual Indians, rather than to the Nation as such. Focus on this passage: "[T]he United States will never claim the * * * [Seneca Nation's Treaty-defined lands], nor disturb the Seneka 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." *Id.*

The District Court read the phrase "or of their Indian friends residing thereon" as creating rights for the Perkinses themselves. *Perkins*, 2017 U.S. Dist. LEXIS 123543, 2017 WL 3326818, at *4. We must respectfully disagree—the phrase is part of a list that includes the Nation and any of the other nations of the Iroquois Confederacy. We don't think that the phrase "or of their Indian friends residing thereon and united with them" can reasonably be read as creating personal rights—the class of "Indian friends" being limited to those "friends" who have become "united" with one of the Iroquois nations.

Appendix C

This Court has consistently rejected the argument that the Canandaigua Treaty creates a tax exemption for individual members of the constituent nations of the Iroquois Confederacy. *See Sylvester v. Commissioner*, T.C. Memo. 1999-35, 1999 WL 49773, at *2-*3; *Maracle v. Commissioner*, T.C. Memo. 1991-98, 61 T.C.M. (CCH) 2083, 2084 (1991); *George v. Commissioner*, T.C. Memo. 1989-401, 57 T.C.M. (CCH) 1168, 1168-69 (1989); *Nephew v. Commissioner*, T.C. Memo. 1989-32, 56 T.C.M. (CCH) 1122, 1123 (1989); *see also Lazore v. Commissioner*, 11 F.3d 1180, 1182, 1187 (3d Cir. 1993) (finding that the Canandaigua Treaty did not exempt wages earned by members of the Mohawk Nation—another party to the Canandaigua Treaty), *aff'g* in relevant part T.C. Memo. 1992-404, 1992 WL 163978.

By its express terms, the treaty protects the Seneca Nation's lands from being "disturbed", which is different from creating a tax exemption. The rest of that sentence—"it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase"—doesn't make sense as a tax-exemption provision, but makes perfect sense as a restriction on alienation of the Nation's lands. The inclusion of "Indian friends residing thereon and united with them" means that the Nation gets to choose who is a member of the Nation and perhaps even can be seen as a promise not to use non-Seneca Indians as putative sellers of Seneca land.

The Court of Federal Claims has also analyzed this particular provision in the Canandaigua Treaty and held that excise taxation does not prevent "free use and

enjoyment" by Indians. *Cook v. United States*, 32 Fed. Cl. 170, 174-75 (1994). This is also how the Supreme Court has construed similar language in other Indian treaties. *See Superintendent of Five Civilized Tribes*, 295 U.S. at 421 ("Non-taxability and restriction upon alienation are distinct things"). The Eighth Circuit has likewise held that the promise that land would be free of "molestation from the United States" meant free from "interference with the rights of Indians to hunt and otherwise enjoy their land, *not the 'right' to be free from federal taxation*." *Jourdain*, 617 F.2d at 508-09 (emphasis added) (discussing the Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49). And we have ourselves held that a treaty reserving "the right of taking fish, at all usual and accustomed grounds and stations" didn't create a tax exemption for income derived by using the rights guaranteed by the treaty. *Earl v. Commissioner*, 78 T.C. 1014, 1017-18 (1982) (quoting the Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132).

But the Perkinses argue there's more under the surface in this case. They point out that previous cases that analyzed the Canandaigua Treaty arose from challenges by individual Iroquois to the taxation of income from *wages* or similar types of income. They say that their income was different because it was derived from the Nation's *land*. The District Court agreed. *See Perkins*, 2017 U.S. Dist. LEXIS 123543, 2017 WL 3326818, at *3. The Perkinses argue that this changes everything, and they cite several cases that speculated in *dicta* that the Canandaigua Treaty "*might* create an exemption from taxation on income derived directly from the land." *Lazore*, 11 F.3d at 1185 (emphasis added) (discussing *Hoptowit v.*

Commissioner, 709 F.2d 564 (9th Cir. 1983)); *Sylvester*, T.C. Memo. 1999-35, 1999 WL 49773, at *2-*3 (noting "that none of petitioner's income was *derived directly or indirectly from the use of Indian land*" in ruling that the income wasn't exempt under the Canandaigua Treaty) (emphasis added)). Neither court explained what part of the treaty or caselaw led it to make these comments.

We can sort out this issue by going back to *Capoeman*. The Supreme Court in *Capoeman*, 351 U.S. at 8-9, held that the General Allotment Act created an exemption for "income derived directly" from land if the land is allotted and still held in trust. Of course, the parties agree that the General Allotment Act doesn't directly apply to the Perkinses, but the Perkinses seem to argue there's a general exemption—or perhaps a presumption of some sort—for exempting all income derived from Indian land.

But *Capoeman* did not create a general exemption for all income derived from land. An applicable exemption from taxation in a treaty or statute is still required. *Capoeman*, 351 U.S. at 6 ("Indians are citizens and * * * in ordinary affairs of life, not governed by treaties * * *, they are subject to the payment of income taxes as are other citizens. * * * [T]o be valid, exemptions to tax laws should be clearly expressed"). The Ninth Circuit stretched *Capoeman* to include income derived directly from land that has been *allotted* under *any other act with similar language* to the General Allotment Act. *Stevens v. Commissioner*, 452 F.2d 741 (9th Cir. 1971), *aff'g in part, rev'g in part* 54 T.C. 351 (1970) and 52 T.C. 330 (1969).

Still, the "Capoeman exemption applies only to income derived from *allotted* land." *Jourdain*, 617 F.2d at 508 (emphasis added). The exemption was intended to ensure Indians received "unencumbered" land when it was released from trust and became the property of the Indian who received the allotment. *Wynecoop v. Commissioner*, 76 T.C. 101, 106 (1981). It was not intended to benefit Indians "simply because the income was derived from land located on an Indian reservation." *Id.* And courts before the District Court's recent opinion have consistently held that income derived from common tribal land—as opposed to allotted land—is taxable. *Anderson*, 625 F.2d at 914 (income from cattle ranching under a tribal license was taxable); *Fry*, 557 F.2d at 648 (income from logging on reservation land was taxable); *Wynecoop*, 76 T.C. at 107 (dividends from stock received in exchange for mineral leases of tribal lands were taxable); *see also Holt*, 364 F.2d at 41-42; *Earl*, 78 T.C. at 1019; *Jourdain*, 71 T.C. at 989; *Tonasket v. Commissioner*, T.C. Memo. 1985-365, 50 T.C.M. (CCH) 489, 492 (1985).

The land here wasn't allotted to the Perkinses. "Allotted" means land set aside in trust for individual Indians, in contrast to land held by the Nation. *See, e.g., Capoeman*, 351 U.S. at 3. The Perkinses admitted that the "[g]ravel at [i]ssue was taken from land that was part of the common lands recognized by federal treaties to be the territories of the Seneca Nation." They also admitted that the "gravel at issue was not taken from land that was allotted to petitioner-husband during 2008 and 2009." The Perkinses wouldn't admit or deny whether the gravel was taken from land allotted to Alice, but if the gravel was

taken from common land, it couldn't have been specifically allotted to Alice.

The District Court refers to *Capoeman* but does not discuss its analysis of the distinction between allotted and tribal lands or the taxability of income from each. We therefore must again respectfully disagree with its holding. We hold instead that the Canandaigua Treaty doesn't exempt the Perkinses from paying taxes on the gravel income.

The Perkinses also say we should understand the Canandaigua Treaty in light of how the Seneca Nation understood it. *See Jones v. Meehan*, 175 U.S. 1, 11, 20 S. Ct. 1, 44 L. Ed. 49 (1899). Citing *Lazore*, 11 F.3d at 1186, the Perkinses argue that the Iroquois understanding of the Canandaigua 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" signifying "two peoples * * * coexisting peacefully, neither imposing their laws or religion on the other."[7]

7. As the Perkinses point out, the Iroquois used wampum belts—belts made from strings of shells or beads—to memorialize agreements. *See*, e.g., Colin G. Calloway, "Treaties and Treaty Making", *in* The Oxford Handbook of American Indian History 539, 541 (Frederick E. Hoxie ed., 2016). The Two Row Wampum initially commemorated a 17th-century agreement between the Iroquois and the Dutch. *Lazore v. Commissioner*, 11 F.3d 1180, 1186 (3d Cir. 1993), *aff'g in part* T.C. Memo. 1992-404. In *Lazore*, the court heard testimony explaining that in the Iroquois' view, the principles of the Two Row Wampum "were the basis for treaties with France, Great Britain, and the United States, including the Treaty of Canandaigua." *Id.*

Like the court in *Lazore*, however, "we are constrained from finding an exemption in the absence of some textual support." *Id.* at 1187. The Two Row Wampum does not provide this required support.[8]

We now turn to the 1842 Treaty. The Perkinses cite the following portion of its text:

> 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.

1842 Treaty, art. 9, 7 Stat. at 590 (emphasis added).[9] The Perkinses argue that this treaty explicitly provides a tax

8. Although neither the Perkinses nor *Lazore* discusses it, we note that George Washington had a specific wampum belt made to commemorate the Canandaigua Treaty. *See, e.g.*, Richard W. Hill, Sr., "Linking Arms and Brightening the Chain: Building Relations Through Treaties", *in* Nation to Nation: Treaties Between the United States and American Indian Nations 37, 56 (Suzan Shown Harjo ed., 2014). That belt shows two figures under the roof of a longhouse linking arms with thirteen figures that represent the original States. *Id.* This wampum belt, however, also does not give us the textual support we need to find a tax exemption.

9. The 1842 Treaty ceded back to the Seneca Nation land it had previously sold to the Ogden Company, including the Allegany Territory. *See* 1842 Treaty, art. 1, 7 Stat. at 587; *Hauptman*, supra, at 107.

exemption for income derived from the use of tribal land. The Second Circuit has held that the 1842 Treaty "clearly prohibit[s] only the taxation of real property." *United States v. Kaid*, 241 F. App'x 747, 750 (2d Cir. 2007) (citing *Snyder v. Wetzler*, 193 A.D.2d 329, 603 N.Y.S.2d 910, 912 (N.Y. App. Div. 1993) (1842 Treaty "clearly refers only to taxes levied upon real property or land"), *aff'd*, 84 N.Y.2d 941, 644 N.E.2d 1369, 620 N.Y.S.2d 813 (N.Y. 1994)). In the Perkinses' parallel District Court case, after questioning the precedential import of *Kaid*,[10] Judge Vilardo found it also lacked persuasive value because *Kaid* dealt with products unrelated to Seneca land and the parties in *Kaid* were not Indians. *Perkins*, 2017 U.S. Dist. LEXIS 123543, 2017 WL 3326818, at *5 ("[T]here is no reason to believe that the [Second Circuit] even thought about taxing the products of the real property"). Indeed, the District Court questioned whether real property "can even be distinguished from the dirt, gravel, and foliage that comprise it." *Id.* We, on the other hand, are persuaded by the Second Circuit's reading of the 1842 Treaty, and we don't find it difficult to distinguish real property from the gravel severed from it. Black's Law Dictionary 1412 (10th ed. 2014) defines real property as "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." The gravel wasn't attached to the land when it was sold,

10. Because *Kaid* is a summary order published in the Federal Appendix, Judge Vilardo remarked that it's not precedential in the Second Circuit. *Perkins*, 2017 U.S. Dist. LEXIS 123543, 2017 WL 3326818, at *4 (citing 2d Cir. R. 32.1.1(a) (citation of summary orders)). We are nonetheless persuaded by the Second Circuit's reading of the 1842 Treaty.

so the Perkinses aren't exempt from tax on the sale of the gravel under the 1842 Treaty. *Cf. In re Briggs Ave. in New York*, 196 N.Y. 255, 89 N.E. 814, 816 (N.Y. 1909) (a building that is severed from real property becomes personal property).

That leaves the issue of penalties. The Commissioner asserted two: a failure-to-timely-file penalty under section 6651(a)(1) and an accuracy-related penalty under section 6662(a).

Section 6651(a)(1) adds 5% per month (up to a maximum of 25%) to the tax already owed for failure to file a return on time. The Commissioner has produced the Perkinses' 2008 and 2009 returns to show that they were filed late, so he has met his burden of production. *See* sec. 7491(c). The Perkinses' 2008 tax return was due in October 2009 and their 2009 return was due in October 2010. They didn't file either until October 2011. The Perkinses also didn't address penalties in their brief, so we deem this issue conceded for that reason as well. *See* Rule 151(e), *Petzoldt v. Commissioner*, 92 T.C. 661, 683 (1989); *Tufft v. Commissioner*, T.C. Memo. 2009-59.

The Commissioner also determined that the Perkinses are liable for accuracy-related penalties under section 6662(a). Section 6662(a) penalizes a taxpayer on the portion of the underpayment of tax attributable to any substantial understatement of income tax. Sec. 6662(a), (b)(2). The Commissioner also has the burden of production here. Sec. 7491(c). An understatement is substantial if it exceeds the greater of $5,000 or "10 percent of the

tax required to be shown on the return." Sec. 6662(d)(1)(A). The Perkinses' true tax liability for 2008 is just shy of $200,000, but they initially didn't report any taxable income. For 2009 their correct tax liability is just over $200,000 but, as for 2008, they originally didn't report any taxable income. These understatements are of course greater than 10% of the tax the Perkinses should have reported, which is greater than $5,000.

This would ordinarily be enough for us to hold that the Commissioner has met his burden of production on the section 6662 penalty. The Second Circuit, however, recently held in *Chai v. Commissioner*, 851 F.3d 190, 221 (2d Cir. 2017), *aff'g in part, rev'g in part* T.C. Memo. 2015-42, that section 6751(b)(1) "requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency * * * asserting such penalty." It also held that "compliance with § 6751(b) is part of the Commissioner's burden of production and proof in a deficiency case in which a penalty is asserted." *Id.* The Commissioner has not met even his burden of production on the section 6662 penalty here, and so we cannot find that he has established his entitlement to judgment as a matter of law on this penalty, even though the Perkinses didn't make any arguments about the penalty in their brief.[11]

An appropriate order will be issued.

Reviewed by the Court.

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11. The Perkinses also filed a motion for leave to file supplemental materials, which we will grant. We considered the supplemental material in this Opinion.

VASQUEZ, MORRISON, BUCH, and NEGA, JJ., agree with this opinion of the Court.

Concur by: LAUBER (In Part); PUGH (In Part)

LAUBER and PUGH, JJ., concurring in part and concurring in the result: We agree with the opinion of the Court that the Canandaigua Treaty, Nov. 11, 1794, 7 Stat. 44, does not exempt from Federal income tax the revenues of petitioners' gravel mining business. The opinion of the Court reaches the same conclusion with respect to the Treaty with the Seneca, May 10, 1842 (1842 Treaty), 7 Stat. 586, reasoning that it exempts from tax only "the lands of the Seneca" and that the gravel petitioners mined is distinct from those lands. But as Judge Foley convincingly shows in his dissenting opinion, there are unresolved factual and legal issues as to whether gravel mined from Indian land is part of Indian land. Although summary judgment on that theory is inappropriate for that reason, we would sustain summary judgment for respondent on two alternative grounds: first, that the 1842 Treaty, like the Canandaigua treaty, did not confer rights on individual members of the Seneca Nation, and second, that the 1842 Treaty addresses exemption only from State, not Federal, taxes.

The opinion of the Court correctly notes that we should interpret the 1842 Treaty as the Seneca understood it. Doing so requires understanding the historical background of the 1842 Treaty and analyzing the language the parties employed. *See Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S. Ct. 672, 87 L. Ed.

877, 97 Ct. Cl. 731 (1943). The 1842 Treaty had a very narrow purpose, namely, to resolve disagreements that had arisen under a treaty the United States had signed with the Seneca four years previously. *See* Treaty at Buffalo Creek of 1838, 7 Stat. 550 (1838 Treaty). When the text of the 1842 Treaty is read against this historical background, it is clear that the 1842 Treaty conferred rights on the Seneca Nation, not its constituent members, and that it covers only taxes imposed by the State of New York.

The land on which petitioners conducted their gravel mining business is within the Seneca reservation. Before 1838, the Seneca lived on four distinct reservations in upstate New York: the Buffalo Creek, Cattaraugus, Allegany, and Tonnewanda reservations. In 1838 the Seneca sold all four reservations to a pair of private businessmen, Thomas Ogden and Joseph Fellows, for $202,000. In the 1838 Treaty, executed concurrently with the deed of sale,[1] it was agreed that the Seneca would move west of the Mississippi River by April 4, 1845, but that they could remain on the Allegany and Cattaraugus reservations until that date. 1838 Treaty, arts. 2, 3, 10, 7 Stat. 550, 551-553.

In 1840 the New York Legislature imposed a highway tax, and in 1841 it imposed a road tax, on the land (then owned by Ogden and Fellows) that had constituted the Allegany and Cattaraugus reservations. Act of May 9,

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1. The 1838 treaty was signed on January 15, 1838, but was not proclaimed until April 4, 1840.

1840, 63d sess., ch. 254, secs. 1 and 2; Act of May 4, 1841, 64th sess., ch. 166, secs. 1, 3. If either tax went unpaid, the State could impose liens and seize land on which the Seneca were then residing and on which they had the right to reside until 1845. The taxes and the enforcement mechanism were controversial, resulting in a lawsuit that eventually found its way to the U.S. Supreme Court. *See In re New York Indians*, 72 U.S. (5 Wall.) 761, 763-764, 771-772, 18 L. Ed. 708 (1866).

Numerous disagreements on this and other points arose concerning the proper interpretation of the 1838 Treaty. The 1842 Treaty, which essentially replaced the 1838 Treaty, was intended to "settle, compromise, and finally terminate" these "divers questions and differences." 1842 Treaty, 7 Stat. at 587 (fifth "whereas" clause). Under the 1842 Treaty, Ogden and Fellows retained ownership of the land that formerly constituted the Buffalo Creek and Tonnewanda reservations. The Seneca were restored to ownership of the Allegany and Cattaraugus reservations, but the Treaty vested in Ogden and Fellows the right to purchase the land comprising those two reservations when the Seneca moved west. *Id.* art. 1. And in lieu of the purchase price stipulated in the 1838 Treaty, the 1842 Treaty provided that the Seneca would ultimately be paid, for release of the Buffalo Creek and Tonnewanda reservations, "a just consideration sum" to be determinated by a panel of arbitrators. *Id.* arts. 3 and 4, 7 Stat. at 588.

Article 9 of the 1842 Treaty is the provision that concerns us here. When quoting this provision, *see* op. Ct.

p. 17, the opinion of the Court omits the first 18 words, which are quite significant in our view. Article 9 in its entirety reads as follows:

> The parties to this compact mutually agree to solicit the influence of the Government of the United States 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 assessments 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. [*Id.*, 7 Stat. at 590.]

When this language is read against the historical context, it seems clear that the 1842 Treaty, like the Canandaigua treaty, did not create a tax exemption for individual members of the Seneca Nation. *See In re New York Indians*, 72 U.S. at 771-772. Rather, the parties agreed that the remaining tribal lands—i.e., the lands comprising the Allegany and Cattaraugus reservations—would be protected only as long as those lands remained in the Seneca's possession. There is no dispute that the Perkinses mined and sold the gravel to generate income for themselves, not for the Seneca Nation. The 1842 Treaty, then, has no application to this case.

It also seems clear that the "taxes" to which the 1842 Treaty refers are taxes imposed by the State of New York. As the opinion of the Court correctly notes, article 9 has always been interpreted to refer "only to taxes levied upon

real property or land." *See* op. Ct. p. 18 (quoting *Snyder v. Wetzler*, 193 A.D.2d 329, 603 N.Y.S.2d 910, 912 (N.Y. App. Div. 1993), *aff'd*, 84 N.Y.2d 941, 644 N.E.2d 1369, 620 N.Y.S.2d 813 (1994)). In 1842 there was no Federal tax on real property or land. Indeed, no Federal tax on land had existed during the previous 26 years.[2]

Given the extremely narrow focus of the 1842 Treaty—to settle disputes that had arisen about interpretation of the 1838 Treaty—it seems highly unlikely that the parties intended article 9 to confer immunity from a Federal tax that did not then exist and had not existed for a generation. Indeed, article 9 is limited to the lands of the Seneca Indians "within the State of New York." All parties to the 1842 Treaty expected that the Seneca would eventually move west of the Mississippi River. If the Seneca had been concerned about the possible future appearance of a Federal property tax, they presumably would not have agreed to limit the Federal exemption to property within New York.

The type of taxes to which article 9 refers is also instructive. It refers to "assessments for roads, highways,

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2. The Fifth Congress enacted the first direct tax on land in the fixed amount of $2 million. Act of July 9, 1798, 1 Stat. 597. The Jefferson administration declined to renew the tax (and also repealed contemporaneously enacted excise taxes). *See* Act of Apr. 6, 1802, 2 Stat. 148. Other Federal taxes on land, generally imposed in a fixed amount on a one-time basis, were enacted in 1813, 1815, and 1816, but then disappeared until the Civil War. Act of Aug. 2, 1813, 3 Stat. 53; Act of Jan. 9, 1815, 3 Stat. 164; Act of Mar. 5, 1816, 3 Stat 255. *See generally Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542-543, 19 L. Ed. 482 (1869).

or any other purpose" levied on land that "may from time to time remain in * * * [the Seneca Nation's] possession * * * until such lands shall be sold and conveyed by the said Indians." Under the 1842 Treaty, the land that was to remain in the Seneca's possession consisted of the Allegany and Cattaraugus reservations, which were the target of the objectionable highway tax and road tax—i.e., "assessments for roads * * * [or] highways"—that the New York Legislature had enacted in 1840 and 1841. Given this historical context, article 9 seems clearly designed to protect the Allegany and Cattaraugus reservations from New York taxes until the Seneca sold the land and moved west.

Perhaps most instructive are the introductory words of article 9, whereby "[t]he parties * * * mutually agree to solicit the influence of the Government of the United States to protect * * * the lands of the Seneca Indians" from taxation. This would be an extremely odd—we would guess unprecedented—way to express an exemption from Federal taxation. To start with, a sovereign Government cannot "influence" itself. If the United States had intended to confer immunity from Federal taxation in article 9, it would presumably just have said so. And if the Seneca had bargained for immunity from Federal taxation, they presumably would have demanded an explicit statement to that effect, which the United States (had it intended to grant such an exemption) could easily have supplied.

The natural interpretation of these introductory words is that the United States would exercise its influence to prevent *New York* from taxing the Seneca's land, as the New York Legislature had sought to do in 1840 and

1841. The State of New York was not a party to the 1842 Treaty, and principles of sovereign immunity would have prevented the United States from attempting to interfere with an otherwise-constitutional New York tax.[3] The best the United States could do was to pledge to use its influence to dissuade New York from taxing Seneca reservation land while the Seneca continued to occupy it. This campaign apparently succeeded: In 1857 New York abolished the 1840 highway tax and the 1841 road tax. *See In re New York Indians*, 72 U.S. at 771.

For these reasons, we conclude that article 9 of the 1842 Treaty does not confer immunity from Federal taxation and does not even address that subject. Like the rest of the 1842 Treaty, article 9 was intended to address one of the "divers questions and differences" that had arisen in the wake of the 1838 Treaty—namely, New York's attempt to impose road and highway taxes on the land comprising the Allegany and Cattaraugus reservations, ownership of which the 1842 Treaty revested in the Seneca. In article 9 the United States agreed to use its influence to prevent New York from taxing the land within those two reservations so long as the Seneca continued to occupy that land. That article accordingly has no application to Federal taxation.

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3. *See Dobbins v. Comm'rs of Erie Cty.*, 41 U.S. (16 Pet.) 435, 447, 10 L. Ed. 1022 (1842) (State taxing power "is a sacred right, essential to the existence of government—an incident of sovereignty"); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436-437, 4 L. Ed. 579 (1819) (distinguishing State taxes assessed on a Federal instrumentality's land from State taxes imposed on its constitutionally authorized operations).

Unlike the opinion of the Court, we would not reach the issue of whether gravel constitutes real property. Instead, we would grant summary judgment for respondent because article 9 of the 1842 Treaty conferred rights on the Seneca Nation, not its constituent members, and because immunity from Federal taxation was not among the rights conferred.

MARVEL, GALE, THORNTON, GOEKE, GUSTAFSON, PARIS, KERRIGAN, and ASHFORD, JJ., agree with this opinion concurring in part and concurring in the result.

FOLEY, J., dissenting:

The Treaty with the Seneca, May 20, 1842, 7 Stat. 586 (1842 Treaty) states that the United States will "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*". 1842 Treaty, art. 9, 7 Stat. at 590 (emphasis added). When determining whether summary judgment is appropriate, we must view all facts in the light most favorable to the Perkinses (i.e., the nonmoving party). *See Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). In addition, "treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit". *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) (internal citations omitted). The opinion of the Court, however, construes the treaty narrowly rather than liberally and cites *United States v. Kaid*, 241 F. App'x 747, 750 (2d Cir. 2007), an irrelevant nonprecedential summary order, and Black's Law Dictionary as its only authorities.

Appendix C

The opinion of the Court concludes that gravel mined from Indian land is not part of Indian land, reasoning that "[t]he gravel wasn't attached to the land when it was sold, so the Perkinses aren't exempt from tax on the sale of the gravel under the 1842 Treaty." *See* op. Ct. p. 18. More convincingly, the United States District Court for the Western District of New York stated that

> [g]iven the liberal principles of treaty construction that apply here, there is no reason to believe that one rule would apply to taxing the dirt, gravel, and foliage that make up the property and another to the property itself—if "the property" can even be distinguished from the dirt, gravel, and foliage that comprise it.

Perkins v. United States, No. 16-CV-495(LJV), 2017 U.S. Dist. LEXIS 123543, 2017 WL 3326818, at *5 (W.D.N.Y. Aug. 4, 2017). The opinion of the Court's conclusion, *see* op. Ct. p. 18, that it is not "difficult to distinguish real property from the gravel severed from it" ignores the complexities relating to mineral rights and property law. *See Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 55, 103 S. Ct. 2218, 76 L. Ed. 2d 400 (1983) (holding that in the context of the Stock-Raising Homestead Act of 1916 (SRHA) (since repealed), "valuable minerals" include gravel); *Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727, 729 (9th Cir. 1988) (analyzing the subsurface and surface ownership rights of sand and gravel); *Res. Conservation Grp., LLC v. United States*, 96 Fed. Cl. 457, 465 (2011) (holding the Navy correctly determined that embedded gravel and sand were real property pursuant to 41 C.F.R.

sec. 102-71.20); *cf. BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 185-186, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004) (declining to extend *W. Nuclear, Inc.*, 462 U.S. at 36, and holding that sand and gravel were not considered "valuable minerals" pursuant to the Pittman Underground Water Act of 1919). Simply put, the opinion of the Court fails to address the requisite legal and factual issues. Thus, the grant of summary judgment is not appropriate.

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 16, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORDER

DOCKET NO: 19-2481

ALICE PERKINS, FREDRICK PERKINS,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of November, two thousand twenty.

Appellants, Alice Perkins and Fredrick Perkins, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc.* The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

Appendix D

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/Catherine O'Hagan Wolfe