The Meaning of Article 13 of the Treaty of Washington, March 28, 1836

Gregory E. Dowd

University of Michigan, Ann Arbor

Gregory Evans Dowd October 11, 2004

CHAPTER SEVEN: ARTICLE 13 IN THE CONTEXT OF FEDERAL LAND PREEMPTION POLICY

The U.S. Attorney General and Article 13

It took less than a year for Article 13 to register as an issue in Washington, D.C. In 1837, the U. S. Attorney General, Benjamin Butler, issued an opinion equating settlement with the disposition of the public land to individuals. This section will examine Butler's opinion and the disputes that brought it on. It is my opinion that the Attorney General's equation of "settlement" with the sale or grant of land to individuals had some humanitarian intent under the circumstances, which involved the seizing, by squatters, of Indian improvements in the ceded lands. That intent harmonized with the Attorney General's and agent Schoolcraft's duty to maintain peace and order. It is also my opinion that the opinion was opportunistic, even prejudiced; it reduced both Indian rights and squatters' prospects in favor of the interests of propertied, well-connected American citizens. Intent aside, Butler's opinion not only misreads Article 13; it fails to reflect the Indians' understanding of that article when they assented to the Senate's modifications of the treaty in 1836. The Attorney General's opinion, moreover, is invalidated by the use of the word, "settlement," in nineteenth-century federal land policy, which, too, centrally involved squatters.

In the winter of early 1837, after a meeting held by townsmen in Grand Rapids, three prominent citizens formally queried Schoolcraft about Article 13.

> Have the Indians an exclusive right to the occupancy of those lands until they are surveyed and offered for sale? In case squatters settle upon those lands, have the Indians a right to demolish their buildings and drive them off? In fine what is your opinion of the

said article touching the entire claims of the Indians--and the meaning of said article?[1]

The three signers of this letter were "D. A. Lyman," "A. D. Rathbone," and "N. H. Finney." They specify several concerns: is the right of occupancy exclusive, in other words, do Americans have the right to occupy the lands with Indians? Might Indians legally drive off squatters? And finally, what does the whole article mean? The first question, importantly, uses loaded language not in the actual article: "until they are surveyed and offered for sale." The second question, moreover, did not reflect any reality in the Grand Valley in 1836: there is no evidence of Indians actually threatening Americans with violence. These townsmen were careful writers (at least one was an attorney). They also had strong interests. Obscure to us today, they were not obscure in Michigan in the 1830's. They desired to see the public lands opened for public sale, closed to Indian uses, and closed to potentially disruptive squatters.

The three signers were men of property; two of them would become men of substance. Dwight Lyman had come from Connecticut in 1835, opened a store in Grand Rapids, built an elegant, two-story Greek-revival structure in town, and soon turned his attention to milling.[2] Alfred Rathbone, member of the school committee, later school inspector, and still later a drafter of the 1850 city charter, "dealt largely in real estate." One local historian describes him as "alert, far seeing and methodical; as a result he became wealthy and left an estate which was so invested that his family has ever since been and is now numbered among the capitalists of Grand Rapids." Another local historian reports that, "Prominent among early lawyers," Rathbone gained the

---

[1] D.A. Lyman, A.D. Rathbone, N.H. Finney to HRS Grand Rapids, Feb. 20, 1837 (copy) NAM234R422 fr. 634.

[2] Albert Baxter, History of the City of Grand Rapids, Michigan (New York and Grand Rapids, 1891), 60, 72, 77, 101, 424, 426, 762, Bentley.

position of postmaster in 1838, and he routinely contributed to the Grand River Enquirer.[3] Noble H. Finney was an editor of the Grand Rapids Times, a paper that promoted the region. Like Rathbone, he became a postmaster, this time for nearby Vergennes. He was honored by the state legislature with the title, "Colonel," in 1838, and, again like Rathbone, he served on the Grand Rapids School Committee. By 1839 he was serving the area in the state legislature.[4] That Rathbone and Finney both served on the school committee with William Richmond, a prominent Democrat, is noteworthy.

Richmond, whose name does not appear on the letter to Schoolcraft, would serve as Michigan Indian agent during the Polk administration. He himself had come to Grand Rapids in 1836. He had strong interests in real estate, banking, road and bridge-building, and, later, railroads. His father, a Democratic Congressman from New York, put him in contact with both Lewis Cass and the Michigan Governor, Stevens T. Mason.[5] Rathbone and Richmond both signed a promotional tract in 1843, extolling the virtues of the region and its inhabitants to prospective immigrants. The tract encouraged the purchasing of lands (it did not mention the possibility of squatting).[6] Finney and Rathbone shared with Richmond prominence at Grand Rapids, and their mutual interest in its economic development put them at odds with both squatting (or preemption) and with any continued Indian usufructuary rights that might cloud title

---

[3] Dwight Goss, History of Grand Rapids and its Industries (Chicago, 1906), 729 (quotation), Bentley; Baxter, History, 72, 87, 97, 227, 261, 302, 739, 747, 753 (quotation).

[4] Baxter, History, 60, 73, 74, 220, Chapter XXX; Tuttle, History, 42; Michigan Historical Commission, Michigan Biographies, 2 vols. (Lansing, 1924) vol. 1: 292, Bentley.

[5] Baxter, History, 545-546.

[6] Goss, History, 257-260.

to lands. Squatters, crossing the Grand River and establishing themselves on public lands, hoping for the first right to purchase the lands after the passage of a future preemption act, were threatening to deny these citizens access to nearby investment property.

Technically, it was illegal for American citizens to establish farms on public lands without first purchasing them or receiving them in grant. But the eviction of squatters on public land was rare. From 1799 to 1820, Congress had passed several acts that retroactively granted "preemptionists" the right to the first purchase of lands that they had already actually settled. The laws were always retroactive. They were not "homesteading" laws promising future settlers the right to claim public lands. They were instead laws providing squatters with legal protection, within tight limits, to lands squatters had already, effectively if not legally, taken out of the public domain. They were also generally restricted to a certain region.[7]

In 1830, "An Act to grant pre-emption rights to settlers on the Public Lands" won congressional approval and Jackson's signature. The act resembled earlier acts, but it was more general. "This law entitled a settler who had occupied and cultivated any part of a tract up to 160 acres in 1829 to purchase that land at the minimum government price."[8] This was still only retroactive protection for the squatter. Squatting still "constituted criminal trespass."[9] But squatters had good reason to hope for more such bills forgiving their trespass and permitting them to purchase the lands at a bargain price. More than amnesties, these bills provided squatters with the critical advantage of the right of first purchase, if they could demonstrate that they

---

[7] Laura Jensen, Patriots, Settlers, and the Origins of American Social Policy (New York, 2003), 143-144, 146; Kenneth E. Lewis, West to Far Michigan: Settling the Lower Peninsula, 1815-1860 (East Lansing, 2002) 122.

[8] Lewis, West to Far Michigan, 122; Jensen, Patriots, Settlers, 172.

[9] Jensen, Patriots, Settlers, 176.

actually settled the land.

Leading citizens at Grand Rapids, hoping for the orderly settlement of lands north of the river, and hoping, too, for the opportunity to purchase those lands, had good reason to oppose squatting. If squatters poured across the river and established claims before the Land Office opened the claimed lands for sale, a new preemption law (such as the radically general one that would pass in 1841) would deny the Grand Rapids citizens the right to purchase any lands already staked out by preemptionists. The recent experience in Michigan suggests the extent of lost opportunities facing the Grand Rapids investors. Kenneth Lewis finds that "In Michigan, squatter settlement ranged well ahead of official land openings, spreading rapidly across the interior." In 1834-1835, the territory saw an "onslaught of preemption claims," especially in western Michigan, served by the Kalamazoo land office. In 1833, 694 acres sold under preemption laws; that figure jumps to 4,363 acres in 1834 and 37,045 acres in 1835.[10] No one interested in land could ignore the implications. Laws against squatting had proven ineffective in the past. But if Indians possessed rights to the ceded lands until the moment of public sale, their continued legal presence (within tight limits) might provide a disincentive to squatting. Hoping for such a ruling, the Grand Rapids' citizens had turned to the federal government.

Like the city fathers of Grand Rapids, the Grand River Ottawas also opposed the squatters. But they did not resort to Article 13. Instead, the Indians decried the squatter's seizing of their improvements as a violation of Article 8. Months before the citizens of Grand Rapids sent Schoolcraft their queries, Rev. Slater had already submitted the Indians' protests to the agent. In December, 1836, Slater alerted Schoolcraft that preemptionists were not only taking

---

[10] Lewis, West to Far Michigan, 123.

lands north of Grand River, they were also attempting to take over some of the Indians' improvements (houses, barns, and so on). This was a pressing issue for two reasons. First, with squatters claiming Indian structures as their own, Ottawas might lose the compensation promised by the treaty. Second, the squatters were deviously planning to use those very improvements to establish their claims to the land under the doctrine of preemption. Slater observed that, "Previous to our leaving the Rapids the Indians leased their houses and fields together with their saw mill to different individuals that no injury may be sustained until the appraisal should be made by Govt." Slater continued:

> Last evening I received information that preemptionists were determined to take possession of the houses and fields and also the mill, on account of our leaving and declare that they will not desist from their purpose without the Agent of Indian Affairs sanction the authority of the Indians to hold their improvements till appraised and paid.[11]

If Slater is accurate, it is the squatters themselves who first sought to know who was to benefit from the Indians' improvements. The squatters wondered whether Indians could lease improvements to "individuals" who might seek to hold those improvements, to the exclusion of others, until the land was offered for sale. It is, of course, highly likely that the "individuals" in question, those possessing the wealth to rent the Indians' improvements in an effort to hold the land until the public offerings, were men of substance in the region.

This was not the only word Schoolcraft had received regarding the abuses of the preemptionists, for on January 24, 1837, he sent information "respecting the forcible seizure of Indian dwellings and property north of Grand River" to the Commissioner of Indian Affairs. Three men had crossed into the public lands, and they were carrying away the valuable milled

---

[11] Leonard Slater to HRS, Richland, Dec.. 28, 1836, NAM1R41 562-564.

flooring in a house belonging to one of the leading Grand River Ottawa. The Ottawas wondered if the government would permit them to suffer these "aggressions."[12]

The contest was not a simple one between Indians and squatters, but a complicated triangular conflict among Indians, squatters, and speculators. Ottawas sought payment for their improvements. Squatters sought to establish preemption claims and did not wish to be blocked from doing so by either Indians or investors who had leased Indian improvements. The leading citizens of Grand Rapids sought both opportunity in lands north of the river and orderly relations with Indians, the latter an essential ingredient to regional prosperity.

Schoolcraft immediately understood the importance of the questions that were coming to him from the region, and he must have seen that his treaty had failed to account for preemption, an enormous lapse given the doctrine's importance to land policy in Jacksonian America. He had once hoped for a different Article 13. The "power of sale" that he had drawn up in late December, 1835, would have terminated the Indians' usufructuary rights when the lands are "surveyed and sold," but the actual treaty protected them until the lands are "required for settlement," and the articles of assent protected the rights until the lands are "required for actual survey and settlement." Now preemptionists, as actual settlers on unsold public lands, were claiming Indian improvements and disrupting the investment plans of leading citizens. If the squatters (actual settlers) terminated Indian rights, and if the federal government was manifestly unwilling to arrest squatters, what power could stop the squatting? The questions coming to him from the Grand Valley induced Schoolcraft to reinterpret the article in conformity with his pre-

[12] HRS to C.A. Harris, Detroit, Jan 24, 1837, NAM1R37 143; Slater to HRS, Barry, Jan. 18, 1837, annexed in same; Schoolcraft's letter (but not Slater's) is also in HRSP/DLC/SHSW, container 42, Part 1: fr. 15272.