

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

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to a trader for land Indians had granted or sought to grant "to his Indian family." At least one similar payment was made to "Slater, in trust for Chiminonoquat, for a section of land above said rapids"; this would be used to buy private property for the Ottawa colony.¹⁶²

Article 13

The treaty's thirteenth article modified the great cession of lands to the United States: "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement."¹⁶³ This article had a long gestation. Schoolcraft had been considering the possibility of retained usufructuary rights since late in the previous summer, when he had received orders to seek cessions. In September, he had instructed Brevet Major W. V. Cobbs of the 2nd United States Infantry, Commander of Fort Brady at the Sault, to lay the foundations for a Chippewa cession of lands (a much smaller cession than that which would emerge): "Reservations might perhaps in the event of its acceptance be assented to, including their villages, and the right to hunt and live on the tract, until it is required." Here the right is not just to hunt but to dwell upon the ceded lands, even outside the reserves, until the lands were "required," but for what and by whom was unstated.¹⁶⁴ On November 3 Schoolcraft wrote to the Commissioner of Indian Affairs that he planned, among other things, to offer the Indians "a defined right of hunting on the lands sold."¹⁶⁵

The next intimation of Article 13 comes not from Schoolcraft, but from the ranking

¹⁶² NASPIA 4: 418-419.

¹⁶³ Kappler, ed., Treaties, 2: 454; NASPIA 4: 415.

¹⁶⁴ HRS to Cobbs, Michilimackinac, Sept. 23, 1835, NAM1R69, p. 121.

¹⁶⁵ HRS to Elbert Herring, Michilimackinac, Nov. 3, 1835, NAM1R69 140.

officials at Mackinac in Schoolcraft's absence, who sent it as the position of Chippewa Indians. Nine days after Schoolcraft's departure for Washington, in separate but similar letters, Captain John Clitz and interpreter William Johnston described the terms Chippewas had found acceptable for a cession of lands (again, a much smaller cession than would emerge in Washington). Law bawanchiek, Showons, and Ocunogeeg, Clitz wrote, sought "To have a full right to hunt on the ceded lands, as long as they are unoccupied, and to make such other reservations as they shall think proper."¹⁶⁶ These three Chippewa leaders constituted, from the American perspective at least, the Chippewa delegates from the Sault. They were critical, as it turned out, to the making of the treaty. On Schoolcraft's understanding of their willingness to cede lands hung the crucial turn in the treaty council, at least as Hulbert's notes represent it, from Ottawa opposition to acquiescence.¹⁶⁷ The three would come to Washington with an understanding that they would retain their usufructuary rights to the ceded lands "as long as they are unoccupied."

In late December, realizing that the United States sought an enormous cession from Ottawas and Chippewas, and realizing, too, that getting anything like a proper delegation to Washington in the dead of a Michigan winter and an Indian hunting season was impossible, Schoolcraft drafted a "power of sale." The document never became a formal part of the treaty, though it is mentioned in council. It does, importantly, reveal Schoolcraft's hopes and intentions. The Indians would retain "the privileges of hunting upon the land, and residing upon it, until it is surveyed and sold by the government." The tribes never agreed to this in a treaty ratified by the

¹⁶⁶ Capt. John Clitz to Herring, Michilimackinac, Nov. 17, 1835 NAM1R69 p. 147.

¹⁶⁷ HRSP/DLC/SHSW container 41 part 1, frs. 13930ff, pages 13-14 of Hulbert's Journal. [See transcript.](#)

Senate.¹⁶⁸ The document, a power of attorney at best, is not even filed in the National Archives; it remains only in Schoolcraft's personal papers. The actual treaty stipulation differs substantially.

On January 4, 1836, Cobbs wrote from the Sault that Chippewas in the region were considering a cession to the United States. They were still unaware of the coming treaty in Washington; they proposed that a treaty be held in the near future, somewhere. In exchange for a cession of lands, they sought small reserves, the services of a blacksmith and an interpreter (each staffed by the United States for as long as the Indians lived in the "neighborhood" and had "occasion to use the same"), twenty years of annuities, and the right to "reside and hunt on the above named district of country, until the U.S. may want the same." Cobbs, it should be noted, was responding to Schoolcraft's initiative for a far more narrow cession of lands than that comprehended by the actual Treaty of 1836. It is interesting, however, that he uses the phrase, "until the U. S. may want the same," an active construction, but still vague, since "want" can be synonymous with either "desire" or "need."¹⁶⁹

On January 13, 1836, Schoolcraft wrote again of the Indians' usufructuary rights. He stated that the Indians would be able to use and "occupy" a "large portion" of the ceded lands "for many years," and "in the meantime be in receipt of their annuities."¹⁷⁰ Curiously, here he crossed out the words to the effect that they could occupy the lands "until it is required for

¹⁶⁸ HRSP/DLC/WMU container 40, frs. 13635-13636, 13637. The document is dated in brackets, [Dec. 28, 1836]. That is probably the day Schoolcraft wrote it and sent it off to Clitz. Clitz does not date the day he obtained marks from the leading chiefs at Mackinac.

¹⁶⁹ Cobbs to Elbert Herring, Sault Ste. Marie, Jan. 4, 1836, NAM234R770 200.

¹⁷⁰ HRS to C. C. Trowbridge, HRSP/DLC/SHSW : container 13, fr. 2302.

settlement,” and also words to the effect that they could “occupy and enjoy it while they are receiving” the annuities. This, the first document associated with the treaty under consideration to employ the phrase, “until it is required for settlement,” does so in Schoolcraft’s voice, but he corrects himself, and substitutes a vague, temporal limitation, “for many years.”

The phrase, “required for settlement,” is not used in any other treaty, but something very close to it surfaces in a letter written sixteen years earlier by Schoolcraft’s mentor and superior, Lewis Cass. Cass had in 1820 treated in Schoolcraft’s presence with the Chippewas of Sault Ste. Marie. Reporting the Chippewas’ agreement to cede lands for an American fort at the rapids of the St. Mary’s River, Cass wrote that “the land is not required for the purposes of settlement, but solely with a view to its military occupation.” It is interesting that, for Cass, garrisoning a country, its military occupation, was not settlement.¹⁷¹ One wonders if Schoolcraft poured over earlier treaties and documents relating to them as he waited in Washington for delegations to arrive. One wonders if Cass shared with him his letterbooks, or notes from them. Whatever one wonders, there is a startling similarity between Cass’s phrase of 1820: “required for the purposes of settlement”; Schoolcraft’s elided phrase of January, 1836: “required for settlement,” and the final treaty article: “required for settlement.” The phrase, then, originated with Americans.

Nowhere in the documents from before March 28, 1836, is the article exactly foreshadowed, and when it comes closest to being so, it is crossed out. We have little evidence for what transpired during the talks. Somehow, the U.S. position shifted from "survey and sale," to "required for settlement," a phrase closer to the Chippewa position in November, retaining use

¹⁷¹ Cass to John C. Calhoun, Sault Ste. Marie, June 17, 1820, in Clarence Edwin Carter, ed., The Territorial Papers of the United States, vol. 11, The Territory of Michigan, 1820-1829 (Washington, D.C., 1943), 36-37.

of the lands "as long as they are unoccupied."

On March 15, presenting Indians with the U.S. offer on the first day of the treaty council, Schoolcraft announced that "The usual privilege of residing and hunting on the lands [crossed out: will be] sold till they are wanted, will be granted."¹⁷² Days of resistance to the American offer followed. Sensing opposition, Schoolcraft resorted to language that more closely approximated the Chippewa position, stated in Clitz's and Johnston's letters of November.

The usufructuary rights retained by the Indians in Article 13 are very broad; they are not limited to hunting. As Schoolcraft reported in his letter to T. Hartley Crawford of Sept. 30, 1839, the Indians reserved "the usufructuary right of living and hunting upon, and cultivating the ceded portions of the soil. . . ." Equally important is Schoolcraft's use of the word "actually," when he discusses Article 13, saying that the Indians retained their rights in usufruct "until it was actually required for settlement."¹⁷³

Eleven months after the signing of the original treaty, Schoolcraft recalled that Article 13 had been critical to the Indians' agreement to cede such a large territory. "In yielding to the Ottawas (sic) and Chippewas this right, another consideration had weight. They manifested a disposition to sell but a small portion of the country actually purchased. . . . And the right named [in Article 13] combined with the principle of consolidated reservations, was found to be among the most efficacious reasons, brought forward, to induce them to enlarge the tract ceded. . . ."¹⁷⁴ Schoolcraft, in short, deployed the article to induce the Indians to cede the vast lands.

¹⁷² HRSP/DLC/SHSW, container 41, pt. 1: fr. 13930-ff, p. 9.

¹⁷³ NAM1R38 120-135; also in NAM234R423 frs. 442ff.

¹⁷⁴ HRS to Harris, Detroit, Feb. 27, 1837, NAM234R422 631-634.

Hulbert's incomplete notes of the council do not mention discussion of the initial U.S. declaration: "The usual privilege of residing and hunting on the lands sold till they are wanted will be granted." But there is a distance between this declaration and the final Article 13, just as there is a distance between the December "power of sale" and the final article. Hulbert's notes do reveal considerable Indian resistance to the treaty. Facing resistance, Schoolcraft met it, in part, by threatening to make a separate deal with the few delegates from the Sault region who had come to Washington with their own understanding of retained rights in usufruct: the rights would last as long as the lands were "unoccupied."

The Ottawas and Chippewas understood well that they were yielding a great deal to the United States. American citizens would now have the right to enter, use, and settle the lands. The United States would now control the timber and mineral resources on the ceded lands; it would establish villages and farmsteads, build forts, set up mines, timber camps, and fishing stations, construct roads, dredge harbors, and so on, all without tribal consultation. The U. S. had become the superior power on the lands, but it would protect the limited rights that Indians retained. Ottawas and Chippewas also understood that their American allies and protectors had vast rights to the lands, and, as partners in alliance, they could not damage American resources.

For example, they never mooted the possibility of establishing commercial timber operations under Article 13. The harvesting of timber for a variety of purposes, of course, was an ancient practice, but commercial lumbering was not a usual privilege of occupancy, not as anyone saw it in 1836. It would be an exclusive American right to the ceded lands.

They also knew that Article 13 offered only modest protection of their rights to reside on the land ceded. Any improvements – fences, barns, mills, docks, and so on – that Indians might

make on the ceded lands after the treaty went into effect would be liable to forfeiture, without compensation, if the lands became attractive to settlers and were required for settlement.

Permanent residence on the basis of Article 13 alone was impossible.

Nor did they see their rights to use the lands as exclusive. Much as the ancestors of the Ottawas and Chippewas had come up with ways for multiple families and bands to harvest certain resources from the same lands and waters in places like the “eastern part of Michigan’s Upper Peninsula, and especially in the Ste. (sic) Mary’s River and Straits of Mackinac region,”¹⁷⁵ much as bands of Ottawas and Chippewas had earlier worked out arrangements allowing their peoples access to resources on the same lands in various parts of what is now Michigan,¹⁷⁶ much as the Indians of a western place called “Ki - nu - kqu - ne - she - way - boat” had given John Tanner and his Chippewa brother the right to tap maple sugar from several trees without conveying any other sense of ownership, so the Indians understood that the United States was leaving them with the rights to resort to the lands for the traditional purposes of hunting, fishing, gathering, traveling, and camping, expecting them to peacefully avoid confrontations with American citizens who might also use the lands.

The Indians understood they would retain the right to use the lands until they were occupied by American settlers; the government had sought a more limited right. Schoolcraft’s language veers toward the Indian position. He had conceived of it as early as January. It is in the passive voice, and without a subject to explain what or who is to require land for settlement. Since the treaty is in English, a foreign language to the Indians, we have to assign responsibility

¹⁷⁵ Cleland, “Ethnohistory to Archaeology,” 100; see also the discussion in Chapter 3 of this report.

¹⁷⁶ Blackbird, History, 20-21.

for the wording to the American party, which very much wanted to gain cheap, peaceful, and plausible control over the lands in question.

Indian Gains in the Treaty

On reserved lands, surrounded by lands and waters to which they retained usufructuary rights, Indians would receive payments which could assist their development. Once the treaty was finally agreed to, the Indians would receive \$150,000 in goods and provisions. The Ottawa and Chippewa nations would further receive an annuity of \$29,000 in hard money. This annual payment would be made for twenty years, divided as follows: \$18,000 to the Indians between the Grand River and the Cheboygan River, \$3,600 to those between the Cheboygan and Thunder Bay, \$7,400 to Chippewas within the ceded region on the Upper Peninsula. Another \$1,000 would be invested in stock and held in trust for twenty-one years.

All Indian debts to the limit of \$300,000 would be paid. Congress would appropriate \$5,000 annually for twenty years, and as long afterward as it saw fit, in order to provide teachers, schoolhouses, and books "in their own language" for the Indians. It would provide \$3,000 for missions, again for twenty years and for the duration of Congressional approval. The United States would provide \$10,000 for implements, tools, and animals, and \$300 per year for vaccines and other medicines or medical services on the reservations. Further annual distributions of \$2,000 in provisions, \$6,500 in tobacco, 100 barrels of salt, and 500 fish barrels would be given for twenty years. Indians were to be compensated for improvements they had erected on the ceded lands. The leading chiefs would individually receive their portion of a \$30,000 block, according to a schedule included in the treaty, on its ratification.

Blacksmith shops would be opened and maintained at Grand River and at Sault Ste.