

## IX

### Interpreting the Canandaigua Treaty

#### Pickering's Post-Treaty Explanations.

At Canandaigua in November of 1794, Federal Treaty Commissioner Pickering set out to do what Secretary of State Jefferson had argued in February of 1793 was not Constitutionally possible. Pickering tried to restore to “Indian Title” status land on which “Indian Title” had been extinguished.<sup>1</sup> In the Cabinet’s February, 1793 discussions, not even Treasury Secretary Hamilton had been willing to endorse restoration of “Indian Title” to land whose fee title was owned by states or private individuals. Pickering had thus even out-Hamiltoned Hamilton, in proposing to hand back to the Senecas lands southwest of Buffalo Creek whose fee title belonged to Robert Morris, as well as lands along the Niagara River held in fee by New York State. None of this had been federally authorized in advance, or agreed to by Morris or New York State. Pickering knew he would have lots of explaining to do about why he had made an unauthorized public offer to sixteen hundred assembled Iroquois.

On November 12, 1794, one day after completing the Canandaigua Treaty, Pickering wrote Secretary of War Knox that Athe great object is obtained; an express renunciation which takes in all the lands in Pennsylvania, including the Triangle which comprehends Presqu’Isle; and a pointed declaration that they will never obstruct the people of the U. States in the free use

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<sup>1</sup> See above, pages 171-74.

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and enjoyment of them.”<sup>2</sup> On January 2, 1795, President Washington forwarded the Treaty to the Senate with the observation that the Canandaigua gathering had been convened for a number of reasons, but “particularly, on the ground of a projected settlement by Pennsylvania at Presqu’Isle, upon lake Erie.”<sup>3</sup> Following Senate consent to and the President’s proclamation of the Treaty, Pickering, now Secretary of War, on January 27, 1795, sent a copy of it to Pennsylvania’s Governor Thomas Mifflin, noting that by it “the temporary obstacles to the establishment formerly contemplated by the State of Pennsylvania at Presqu’Isle are removed.”<sup>4</sup> At no time was there any doubt in the minds of Washington, Knox or Pickering that Iroquois opposition to the Presque Isle settlement had prompted the Canandaigua Treaty, or that the overcoming of this opposition was its principal accomplishment.

To obtain the Treaty’s “great object,” Pickering had however been prepared to pay a high price, which became the focus of federal executive and Senate concern when the text of the Treaty reached Philadelphia. This price had nothing to do with Pennsylvania’s Erie Triangle (which the Treaty didn’t mention) but rather involved the area immediately to the east, wholly within New York State, which had not been represented at Canandaigua. There had seemed no reason to invite New York State to what was expected to be a discussion of Pennsylvania land rights.<sup>5</sup>

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<sup>2</sup> TPP 60:207-09.

<sup>3</sup> ASPIA 1:544-45.

<sup>4</sup> Jemison and Schein 298.

<sup>5</sup> General Chapin did urge Governor Clinton to come to Canandaigua to negotiate with the

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Onondagas and Cayugas about the sale of their New York reservations, but Chapin thought of this as a matter of State concern, and suggested Clinton take advantage of the federal treaty conference to resolve a bit of State business. See Chapin's letter to Clinton dated September 27, 1794, New York State Archives, Legislative Assembly Papers, 40:243-44, following up his letter of July 13, 1794 in New York Historical Society, *Henry O'Reilly Papers* 10.

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When he finally read Pickering's Treaty, Knox became concerned about its departure from established U.S. policy. Knox therefore requested Pickering, as recounted in Pickering's carefully phrased restatement, to outline his "reasons for relinquishing what title the U. States might have acquired to certain lands in the country of the Six Nations which were ceded by the treaty of Fort Stanwix."

On his own initiative, Pickering had negotiated with the Iroquois a roll-back of the 1784-89 line, something that Washington and Knox had repeatedly affirmed could not be done. Pickering evidently calculated---correctly, as it turned out---that the federal government would be willing to swallow this embarrassment in order to resolve a crisis that could have led to an international war provoked by Pennsylvania. Pickering knew he would be challenged when he returned to Philadelphia, but having spent several months at Canandaigua drafting and redrafting the Treaty, and debating with himself the intricacies of each alternative version, he was more than ready to respond. Asked by Knox on the morning of December 26, 1794, to put his reasoning on paper, Pickering completed his elaborate reply the same day:

1. I knew that the U. States had no right to any part of the Seneca Country but by virtue of the cessions made by the States of New York and Massachusetts which Congress had accepted.

2. I knew that the line of cession [made by New York State in 1782], when ascertained by Mr. [Andrew] Ellicott [in 1790], was what now constitutes the eastern boundary of the triangular piece of land which the U. States sold to Pennsylvania [in 1792].

3. I knew that by the [1786 Hartford] agreement between the two States, New York and Massachusetts, the pre-emption right to all the land in question belonged to Massachusetts, excepting a strip a mile wide, along the Strait of Niagara, which I understood New York was to retain; and that the whole lay within the jurisdiction of New York.

4. I knew that by the [1777] Constitution of the State of New York, no purchase or contract for the sale of lands made of or with the Indians within the limits of

that State, could be *binding on the Indians*, or deemed valid, unless made under the authority, and with the consent of the legislature of that State. And from the nature of the case, I knew that such authority and consent could never have been given, in regard to the lands in question, when in the terms of the [1784 Continental Congress] treaty of Fort Stanwix, they were ceded to the United States.

5. I knew therefore that the United States had no right to the lands which I relinquished. In truth, when I proposed to give up the tract between the Pennsylvania Triangle and the Meridian of the mouth of Buffalo Creek, I felt myself embarrassed not in making the relinquishment itself but for words to express it which should not be deceptive, by presenting an idea of something *very valuable*, while in fact the subject of the relinquishment was *a shadow*. The words used in my speech were these: “All this tract you, by former treaties ceded to the United States: but I am now willing to relinquish *all their claim to it*.”

6. I knew the practical construction of the New York Constitution on this point. John Livingston and others [in 1787] obtained from the Six Nations a vast cession of land within that State, which had been made void [by the New York Legislature in 1788], because done without the Consent of the Legislature. And I considered that the United States had no better right than individuals to receive from the Indians a cession of the same lands.

7. It is true that I strenuously endeavored to obtain the strip of land four miles wide, along the Strait of Niagara, etc.; and I also inserted an article to comprehend land round the Fort of Oswego, to the extent of six miles square because the same had been comprehended in the [1784] treaty of Fort Stanwix; but not seeing how the *United States* exclusively could hold these lands I had draughted another article, in these words, “All the cessions and relinquishments of the rights and claims of the Six Nations and each of them hereby made, shall be for the benefit of the United States and any of them, and of any citizen or citizens thereof, to whom, according to their laws and usages, the right of taking and holding the Same, does or shall belong.” The form which the treaty finally assumed, superseded this provision.<sup>6</sup>

Pickering here displayed impressive mastery of the pre-1789 New York State legal setting of Iroquois rights. Obviously, Pickering was determined not to repeat the embarrassments of 1791, when ignorance of New York State law and treaties led him astray and resulted in a reprimand from President Washington, who ordered him to make a humiliating face-to-face apology to New

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<sup>6</sup> TPP 62:192-7. Emphasis in original.

York's Governor Clinton.

Prior to March 4, 1789, Pickering contended, the 1777 New York State Constitution was the supreme arbiter of tribal occupancy rights within New York State. These had been authoritatively modified by the New York Legislature's 1782 cession of territory to the United States and the 1786 Hartford Compact with Massachusetts approved by the Legislature. But under the New York State Constitution, *no extinguishment of "Indian Title" within New York State was valid unless confirmed by the Legislature*. This had been demonstrated for example in the case of the 999-year "Livingston Lease." While the 1784 and 1789 Continental Congress Treaties with the "Six Nations" contained purported extinguishments of "Indian Title" within New York State, these extinguishments were never consented to by the New York Legislature and therefore were of no avail. Remarkably, Pickering argued that the New York State Legislature had as much right to invalidate the Continental Congress's 1784 Treaty of Fort Stanwix as it had to invalidate a private lease! The Senecas consequently retained, unaffected by two U.S. Treaties, whatever aboriginal land rights within New York State they possessed prior to these Treaties. If ratified, the Canandaigua Treaty would thus not resuscitate any "Indian Title" but simply acknowledge that the Continental Congress's attempted extinguishment of "Indian Title" within New York State had been in vain. In defense of his unprecedented new use of federal power within New York State, Pickering ingeniously professed great deference to New York State's *pre-Constitutional* rights.

Pickering's argument made a significant logical leap from the contention that the Continental Congress could not have *directly acquired* from a tribe land rights within New York

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State to the assumption that the Continental Congress also did not have the power to extinguish “Indian Title” within New York State. President Washington and Secretary Knox had often maintained that the Continental Congress in 1784 did legally extinguish “Indian Title” within New York State *on behalf of whoever might hold the fee*. Thus, while the Continental Congress had not *acquired* land rights as a result of such an extinguishment, the Senecas had indeed *lost* their rights. Pickering’s argument that the 1784 and 1789 Continental Congress Treaties were invalid insofar as they claimed to have extinguished “Indian Title” within New York State because New York State law was supreme prior to March 4, 1789, and this law prohibited any extinguishments of “Indian Title” without explicit State consent---not only contradicted the position taken repeatedly by Washington and Knox but also ignored the fact that the 1784 and 1789 Continental Congress Treaties were post-Revolutionary War peace treaties, and as such clearly within the competence of the Continental Congress under the Articles of Confederation, which New York State had ratified.

Neither Knox nor Washington seems to have commented for the record on Pickering’s December 26<sup>th</sup> letter. Knox was about to leave office, and presumably had no desire to tangle with Pickering on his way out the door. Washington apparently chose not to enter into a controversy that seemed unlikely to lead to positive results. Washington’s policy interventions tended to be so decisive that he consciously limited the number of such interventions, and chose to allow a great many controversies on which he did have views to pass without comment. Washington permitted Pickering’s Treaty to go forward because it did solve a pressing political crisis, and could be renegotiated (as Pickering himself had pointed out) once British troops

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withdrew from U.S. soil. But the President offered no endorsement of the Treaty in his cover letter transmitting it to the Senate on January 2, 1795. He also enclosed Pickering's Instructions, so the Senate could compare Washington's pre-Treaty Instructions to what Pickering had wrought.

Pickering's December 26<sup>th</sup> letter had implied that the Treaty changed nothing in terms of intra-New York State land rights, and so could be ratified without worry that it affected the rights of State or private parties, whose formal consent might otherwise have been considered legally necessary. But in case the consent of private parties was deemed necessary, it just so happened that the only private party directly affected would be consulted in the context of Senate deliberations. None of Pickering's post-Canandaigua letters alluded to Robert Morris. But Pickering, Knox and Washington all knew that Morris's interests were impacted by the Treaty, and that Morris would have his chance to object or consent to the Treaty in his capacity as U.S. Senator from Pennsylvania.

Pickering had met with Morris's son Thomas during the negotiations at Canandaigua, so Robert Morris presumably knew something of what was contemplated even before the Treaty reached the Senate. Personally, he may not have been happy. But as a U.S. Senator from Pennsylvania, he could not very well vote his private interests in a matter so vital to the State he represented. Pickering was no doubt aware that the extreme urgency of settling the Erie Triangle matter to Pennsylvania's satisfaction meant that he could ignore Morris's short-term interests with some confidence that Morris would not object.

**Senate Action on the Treaty.**

In the Senate, the Treaty was referred to a committee consisting of John Brown of Kentucky, Caleb Strong of Massachusetts---and Robert Morris of Pennsylvania. Although no New Yorker was on the committee, Caleb Strong had worked closely in the past with New York's Senators to protect the interests of Massachusetts preemption right holders.<sup>7</sup> But the pivotal figure on the committee, and no doubt in the Senate's deliberations on the Treaty as a whole, was Morris, who had a huge financial stake in the region, and who by negotiating the Big Tree Treaty with the Senecas in 1797 would solve many of the problems generated by Pickering's Canandaigua Treaty. Morris's assurances that he personally could live with this Treaty would have carried great weight.

The Senate Executive Journal records that on January 9, 1795, the Senate gave its consent by a two-thirds vote, indicating that there may have been some votes cast against the Treaty; how New York Senators Rufus King and Aaron Burr voted is unrecorded.

**Pickering's Long-Range Iroquois Agenda.**

Senate approval and Presidential proclamation of the Canandaigua Treaty ended all Iroquois claims to Pennsylvania's Erie Triangle. The task assigned Pickering by Washington had thus been accomplished. An immediate threat to the nation had been averted by bold diplomacy. The seriousness of the threat seemed to justify daring measures, and Pickering's unexpected approach to a solution was quietly accepted by the President and Senate. What not even

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Pickering could have realized was that his roundabout way of averting an immediate threat would open up controversies that more than two centuries later are still far from settled. In solving an urgent Pennsylvania problem, Pickering created a long-term New York State problem.

The Treaty's text provided only a summary of highlights of Pickering's plans, couched in language meant to placate the Iroquois at Canandaigua, and also seems to have been successful in not arousing too many suspicions in Philadelphia. The formal Treaty text subtly allowed for the unfolding of Pickering's plans for each of the distinct Iroquois groups assembled at Canandaigua, but only Pickering's extended conversations in separate meetings with each of these groups reveal what he hoped to see ultimately accomplished.

Pickering expected---as it turned out, accurately---that the gathering at Canandaigua of one-third of all U.S.-resident Iroquois might prove to be the last-ever meeting between the United States and the "Six Nations." Three years earlier at Newtown, Pickering had tried to interest the "Six Nations" in disbanding as a Confederacy and shifting to reservation-based agriculture practiced by scattered groups. This 1791 effort had proved abortive, but at Philadelphia in 1792 a second step toward this goal had been taken, and at Canandaigua in 1794 Pickering seized the opportunity presented by a military crisis to propel his program forward. For the Cayugas and Onondagas, his plan anticipated either emigration to British Canada or merger with the Senecas, following the sale of their New York State reservations. The Oneidas and their

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<sup>7</sup> William Maclay, *Journal*, New York: D. Appleton, 1890, 125.

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allies would become prosperous agriculturalists on the New York State lands they already held near Oneida Lake. Impressed by their progress, the Senecas would allow themselves to be reservationized, by relinquishing the extensive aboriginal hunting lands they currently occupied to Robert Morris, who owned fee title, accepting from Morris in return fee title to individual tracts adequate for their agricultural support.

Article Two of the Canandaigua Treaty compressed into a single sentence two radically distinct future paths to be taken on the one hand by Pickering’s favorite Iroquois tribe, the Oneidas, and the Onondagas and Cayugas on the other. Pickering seems not to have cared greatly about the Onondagas and Cayugas. But since the Oneidas, Onondagas and Cayugas all possessed State-created reservations, and the Treaty was a legal document, these three tribes were dealt with identically in Article Two of the Canandaigua Treaty, which read:

The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga nations, in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them, or either of the Six Nations, nor their Indians friends, residing thereon, and united with them, in the free use and enjoyment thereof; but the same reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Many today assume that the words “the United States” and “the people of the United States” are here used interchangeably, which would imply federal responsibility for any “purchase” of these New York State reservations. In fact, Pickering used two distinct terms to distinguish mutually exclusive parties. “The United States” meant the U.S. federal government, while “the people of the United States” meant every other U.S. party. Pickering himself, in a letter to Secretary Knox written the day after the Treaty was completed, used the phrase “the

people of the United States” to refer to Pennsylvania.<sup>8</sup>

The phrase “the people of the United States” is followed by the words “who have the right to purchase.” Whoever possessed the “right to purchase” also possessed the obligation to pay, and this the federal government was obviously not going to do. The Treaty thus did not affirm that the federal government possessed the “right to purchase” the Oneida, Onondaga and Cayuga State reservation lands. To be sure, Pickering personally believed that these lands might well be subject to federal regulation under the 1793 Indian Trade and Intercourse Act. But this theory was far too speculative to put into a Treaty, and the 1793 Indian Trade and Intercourse Act was in any case due to expire in 1796. So the Treaty made no mention of the 1793 Indian Trade and Intercourse Act, and Pickering divulged his intention to explore the applicability of this Act to New York’s State reservations only in meetings with the Iroquois at Canandaigua.

**Pickering’s Oneida Agenda.**

Conferring with the Oneidas on Saturday, October 11, 1794, Pickering learned that they had leased one hundred square miles of their State reservation for twenty-one years to a man named Peter Smith for two hundred dollars annually. Appalled, Pickering spent his Sunday in reflection and on Monday informed the Oneidas that he had “thought a great deal of the condition of the natives of this land” hoping some new path might be discovered in which they might walk with more safety.” He now believed he had the answer. “Among the whites,” Pickering explained,

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<sup>8</sup> TPP 60:207-09. See also Washington’s January 19, 1791, letter to Cornplanter, ASPIA 1:144.

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the poor, the ignorant and the young, who cannot take care of themselves, are under the guardianship of the laws. Those laws mark out the path in which such helpless people are to walk; and persons are appointed as guides to keep them from losing the path, and to prevent people more knowing, but having bad habits from leading them astray. Now, Brothers, you the natives of this land...are in the condition of the helpless people just described; and need the guardianship of our laws...especially in the management of your lands.

Since the Oneidas' ability to lease land and enter into other sorts of contracts was already regulated by New York State, they found nothing surprising in Pickering's basic argument. What was startling was his announcement that the *federal* government might be prepared to function as their guardian. Moreover, whereas the State merely restricted the Oneidas' ability to sell land and limited the length of any lease they might negotiate, Pickering suggested that the federal government could maximize their returns from their land assets by acting as a fiduciary trustee. The 1793 Indian Trade and Intercourse Act, Pickering told the Oneidas, "declared that no sale of Indian lands should be valid unless made at a public treaty held under the authority of the United States. Now, Brothers, it is my opinion that the lease of your lands to Peter Smith, is by this law made void."

Realizing the Oneidas were "struck" rather than persuaded by this argument, Pickering added,

I have explained to you what I take to be the true meaning of the law: and I believe I am not mistaken. Perhaps some may tell you that the President and Great Council of the United States have no right to meddle with your lands, not even to keep you from being cheated out of them. But pay no regard to such men. Consider them as deceivers, who want to take your beds from under you. The makers of the law were wise and good men, who would not do what they had no right to do. Keep fast hold of your lands, therefore, and do not give up even those you have leased, until wise men, who understand all our laws, have examined into the matter and found who is right.

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As Pickering acknowledged in his own notes, what he had said was only his “opinion.” That Pickering tried to make this clear to the Oneidas is corroborated by the report of Quaker observer William Savery, who recorded that Pickering stressed that it might “not even be in the power of [the federal] government to reclaim the lands which Smith had got upon lease.”<sup>9</sup> Pickering explained that all he could do was check out the possibility that the 1793 Indian Trade and Intercourse Act might offer a way of invalidating their lease agreement with Peter Smith.

To launch a test case of the applicability of the 1793 Indian Trade and Intercourse Act to leasing of the Oneidas’ State-regulated lands, Pickering recommended that the Oneidas “send a petition to the President, praying that he would cause it [i.e., the land leased to Peter Smith] to be restored. And if it should be restored, then I would advise you to lease it” on better terms at a federal treaty.

Stirred by Oneida complaints, Pickering publicly suggested that the land sale section of the Indian Trade and Intercourse Act might empower the federal government, acting as the Oneidas’ fiduciary trustee, to declare invalid inequitable private leases of their State reservation lands. Moreover, added Pickering,

I now tell you further, that the State itself cannot buy it, unless the agents appear at a Council Fire kindled by the United States, and in the presence and with the approbation of the commissioners appointed by the President, agree on the price. And after this, the paper containing the articles of the treaty signed by the chiefs must be laid before the President and his Council of wise men, and be approved by them, before it can have any strength....I know you will be told the State has all the power over your lands, and that the President and his Council have nothing

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<sup>9</sup> Jemison and Schein 268.

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to do with them....But, Brothers, even if the right of the United States to interfere were doubtful, your own right is certain. The land is yours, and the State cannot take it from you without your own consent.

Pickering's words here seemed somewhat stronger. Leasing for a term of years of State reservation lands might not be a federal responsibility, but surely permanent *sales* of such lands must be. Pickering wasn't sure even of this, so he concluded with an all-purpose exhortation to "Speak strong and be not afraid. Follow this advice, and nobody can hurt you: for the United States will protect you." Pickering knew he was starting something, but could not have anticipated that his appointment to succeed Henry Knox as Secretary of War would give his speculations retroactive weight. Once Pickering took charge of implementing federal tribal policy, the Oneidas had reason to assume that the federal government would do what Pickering had told them it should do. As Secretary of War, Pickering knew his credibility was at stake.

On his return journey from Canandaigua, Pickering had stopped at Oneida, where on December 2, 1794, he concluded an Agreement in which certain themes implicit in the general Treaty came to the fore. At Oneida, Pickering was dealing exclusively with tribal groups that were staunchly pro-U.S., and many of whose members were motivated to become agriculturalists. The Agreement negotiated by Pickering at Oneida "stipulated" that the federal government would provide \$5000 "to be distributed among individuals of the Oneida and Tuscarora nations, as a compensation for their individual losses and services during the late war." "Stockbridge Indians" and the "only man of the Kaughnawaugas now remaining in the Oneida country" were also to be "considered in the distribution" of the \$5000 fund. The United States would furthermore pay the full cost of erecting one or two saw-mills and one or two grist-

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mills, and the full cost of operating them for three years, during which period the mill operators were to “instruct some young men of the three nations in the arts of the miller and sawyer.” After three years, the men paid to erect and manage these mills would depart, and the young Oneida, Tuscarora and Stockbridge men trained at the mills could be expected to carry on the operation of these mills themselves and support themselves thereby.<sup>10</sup>

On December 3, a day after completing the federal treaty covering Revolutionary War reparations, Pickering turned his attention to the future and persuaded the Oneida “sachems, chiefs and warriors” to accept an “instrument” by which they agreed that

Every Oneida man who desires to have land set apart for his separate use and cultivation, shall be allowed to occupy 200 acres; and the land so occupied and cultivated in the manner of the white people, shall be had by such man and his posterity so long as any of them shall remain: with power to sell the same to any person of the Oneida nation, but not to any of the white people.<sup>11</sup>

Ever since 1791, Pickering had been urging the New York Iroquois to divide their lands into family-size farms. In the case of the Senecas, this would have freed up hunting lands for the private enrichment of Robert Morris. Since the Oneidas already had a State reservation of manageable dimensions, Pickering was able here to focus on the next stage, the development of this tract for the private enrichment of individual Oneidas.

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<sup>10</sup> Kappler 2: 37-39.

<sup>11</sup> Walter Pilkington, ed., *The Journals of Samuel Kirkland*, Clinton: Hamilton College, 1980, 278. See also Jeremy Belknap and Jedidiah Morse, “Report on the Oneida, Stockbridge and Brotherton Indians, Museum of the American Indian, Heye Foundation, *Indian Notes and Monographs*, 54:29-30.

**Pickering’s Onondaga and Cayuga Agenda.**

To members of the historic “Six Nations” as well as to their “Indian friends united with them” who had opted to remain in the United States, Pickering promised security as they moved to the status of yeoman farmers on regulated reservations. Concurrently, Pickering offered a polite and orderly good-bye designed to sever within a short time all U.S. legal relations with pro-British Iroquois groups such as the already-departed Mohawks as well as with the Onondagas and Cayugas, who were contemplating a move to Canada.

These two tribes had been split during the Revolutionary War, with a majority of each tribe siding with the British and settling near Niagara in 1779. After the War, most (though not all) Onondagas and Cayugas moved to Grand River, and their interest in their New York State reservations then became limited to turning them to a profit. Although minority factions of both these tribes wished to continue living on the reservations assigned them by New York State in 1788-89, the majority factions hoped to persuade these holdouts to move with them to Grand River.

Pickering believed that the majority factions would prevail, and the Onondagas and Cayugas would quickly liquidate their remaining New York State land rights. Pickering seems to have been unimpressed by the Onondaga and Cayuga minorities who wanted to stay on their New York reservations. Thus, even as he listed them in the Canandaigua Treaty’s text, Pickering was simultaneously launching the process that he expected would lead to sale of these

reservations.

On November 3, 1794, eight days before the Canandaigua Treaty was concluded, Fish Carrier and five other pro-British Cayuga chiefs sought out Pickering. Fish Carrier explained:

Brother. To your great surprise you see a number of the Cayuga chiefs calling upon you early this morning. We have something which lays very heavy on our minds, and has been there for some time.... We have a little piece [of land], and we would wish to do with it as we ourselves please: It is but a little piece, and we reap no benefit from it, not even to the value of a penny. We want to dispose of it, so that our women and children may reap some benefit from it.

We now desire the privilege of disposing of that land as we see fit; and we desire that privilege to be granted to us by the State of New York.<sup>12</sup>

On November 15, four days after completion of the Treaty, Fish Carrier returned, this time accompanied by Onondaga chiefs. According to Pickering's summary, Fish Carrier said,

Brother Commissioner.... Now listen to the mind of the two nations here present.... This business we first desire should be laid before General Washington, and by him be sent to the York People; and we desire General Washington to request the York People to grant what we desire; and for them to let us know quick whether they will be so kind as to comply with our request.

Final discussions took place the next day, on which occasion Pickering presented the Cayuga and Onondaga chiefs for their approval a written "expression of their minds" based on their various speeches to him. This read:

Brother, it is the situation of our lands which makes our minds uneasy. We have but two small pieces left: and we are desirous of reaping from them all the benefits which they are capable of yielding. The York people have got almost all our Country: and for a very trifle. They will not then deny us the liberty of disposing

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<sup>12</sup> TPP 62:99-105.

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of the little that remains, in such manner as will do most good to our old women and children and children's children. For this reason we desire to dispose of our land for an annual rent, to be paid to us and our posterity forever....[A]ll they will produce will be but a trifle when divided among so many families: but it will at least relieve the poor, if we can obtain the just value of our land....

We desire this business may first be laid before General Washington and by him be sent to the York people: and we request General Washington to ask the York people to grant what we desire. And we desire them to let us know quickly whether they will comply with our request. If they do, let them first inform General Chapin of their determination, and he will inform those at the Westward as well as those at the Eastward. We shall want his assistance, if our requests respecting our annual dues are complied with.

Nothing was said about the desire of minority factions to remain on the two State reservations, and by implication both reservations were to be offered intact to New York State. Nor did the chiefs' speech make any reference to the 1793 Indian Trade and Intercourse Act or to the appointment of a federal treaty commissioner to supervise these transactions. Obligated to move circumspectly toward his goal of establishing a federal protectorate over New York reservations, Pickering specified only informal federal facilitation.

### **Pickering's Seneca Agenda.**

If idealism motivated Pickering's arrangements for the Oneidas, and pragmatism his approach to the Onondagas and Cayugas, cynicism characterized his approach to Seneca land rights. Just how self-conscious this was is apparent in the Pickering Treaty's use of the same word ("property") for valuable State reservation land, and for the Senecas' "nearly worthless" aboriginal hunting ground use right on millions of acres to which Robert Morris held fee title, and from which he hoped to reap huge profits.

The Senecas assumed they possessed a quite different kind of "property" right than

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Pickering knew to be the case under U.S. law. Even if their British adviser William Johnston had not been ordered out of Canandaigua by Pickering, the Senecas would probably never have agreed to a treaty that openly described them as possessors of a hunting ground use right with negligible and diminishing sale value. As Red Jacket repeatedly emphasized, the Senecas believed they owned their lands in full right and expected market value payment for them. Desperately needing Seneca approval, Pickering introduced ambiguous language into the Treaty, reasoning that it would have to be renegotiated anyway, once British troops withdrew from U.S. soil. In 1797 the Canandaigua Treaty was indeed totally rewritten by Robert Morris's Big Tree Treaty, which consigned the Senecas to reservations and extinguished for a pittance the Senecas' aboriginal "Indian Title" occupancy rights on millions of acres secured to them three years earlier. Pickering certified this betrayal of the Senecas in his capacity as U.S. Secretary of State.

For the Senecas, the 1794 Canandaigua Treaty was an early application of a process used often thereafter, by which tribes acquired "federal treaty title" to a delimited portion of the territory they had traditionally claimed by aboriginal right. The nature of the Senecas' aboriginal "Indian Title" was not changed thereby; it was still a hunting ground use right to be *extinguished* and (unlike New York's State reservations) was supposed by federal officials to have no sale value beyond the amount of commercial game on the land. Possessing federal treaty title meant only that the Senecas after 1794 had a federally recognized right rather than a disputable claim to occupy Robert Morris's land.

### **Pickering's Accomplishments as a Federal Treaty Commissioner, 1790-1794.**

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The supreme irony of the Canandaigua Treaty is that it was designed to pave the way toward an *end* to the political existence of the surviving constituents of the “Six Nations” Confederacy, yet today the Treaty is hailed as the *beginning* of treaty relations between sovereigns. From the White House on November 10, 1999, on the eve of the 205<sup>th</sup> anniversary of the signing of the Treaty, President Clinton sent “Warm greetings to everyone gathered in Canandaigua, New York, to celebrate the Treaty of 1794 between the Iroquois Nations and the United States. This historic treaty signed by President Washington,” affirmed President Clinton, “recognized the Six Nations and the United States as sovereign entities.”<sup>13</sup>

While serving as Secretary of War and Secretary of State, Pickering would continue to be actively concerned with tribal treaty negotiations. But the Canandaigua Treaty was Pickering’s last as a negotiator. Notwithstanding the many other high offices he held, Pickering’s service as a Federal Treaty Commissioner is conventionally regarded by historians as Pickering’s finest career accomplishment. The title of Edward Hake Phillips’s article---“Timothy Pickering at his Best: Indian Commissioner, 1790-1794”<sup>14</sup>---is widely regarded as apt. In their history of *The Age of Federalism*, Stanley Elkins and Eric McKittrick for example conclude that “Indian diplomacy, as it turned out, was the one undertaking of Pickering’s life that came close to being an unqualified success.” By contrast, Elkins and McKittrick are withering in their judgment of Pickering’s later public services. Elkins and McKittrick call Pickering “exceedingly narrow and self-

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<sup>13</sup> Jemison and Schein, ix.

<sup>14</sup> *Essex Institute Historical Collections* 102(3)(July, 1966):163-202.

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righteous...furtively proud and ambitious...characteristically censorious and vindictive”<sup>15</sup> and describe how these traits manifested themselves in catastrophically flawed judgments on public issues and personalities during his tenures as Secretary of War and Secretary of State. But Elkins and McKittrick go too far when they characterize Pickering as a “scowling hack.” No one capable of manipulating President Washington can be dismissed as a hack.

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<sup>15</sup> Stanley Elkins and Eric McKittrick, *The Age of Federalism*, New York: Oxford University Press, 1993, 623-25.

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Garry Wills has recently defended Pickering as a fearless, incorruptible “ideologue” whose views on many issues, notably slavery and tribal rights, were far in advance of his contemporaries. But Wills also acknowledges that Pickering’s career was characterized by numerous impolitic miscalculations.<sup>16</sup> The blunders that undermined Pickering’s performance as Secretary of War and Secretary of State do make his service as a Federal Treaty Commissioner seem comparatively praiseworthy. But the same character flaws that led to his failures as Secretary of War and Secretary of State also marred his work as a Federal Treaty Commissioner. As Elkins and McKittrick observe, self-righteousness was both his weakness and his strength, and just happened to have fewer destructive consequences in tribal diplomacy. Yet, while certainly less catastrophic for the nation than his later career, his tribal diplomacy scarcely merits unstinted praise. Because Pickering’s self-image as a just man involved a sense that he must do right by deserving and defenseless people, he worked hard on behalf of tribes. But unlike Sir William Johnson whom he presumptuously imagined he resembled, Pickering had no desire to spend his career among the Iroquois, and little personal fondness for the tribal leaders he hoped would be impressed by his righteousness.

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16 “*Negro President*”, *Jefferson and the Slave Power*, Boston: Houghton Mifflin, 2003, 133.