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British Indian policy before 1775

For much of the colonial period the individual colonies exercised a considerable amount of independence in relations with the Indians, but as the settlements grew in numbers and in area the lack of common centralized policies caused severe problems. Settler encroachment on Indian lands in one area, or the mismanagement of trade with the Indians, often led to difficulties that spread far beyond the bounds of any one colony. To the British, local mismanagement of relations with the Indians became particularly serious in the course of the eighteenth century as Great Britain began to contend with France for the control of the fur trade, and ultimately the land, of the eastern half of the Mississippi Valley. The British government came to realize that the acts of one colony or its inhabitants could jeopardize the safety of the whole frontier, and help send the Indians to the support of the French.

Even before the outbreak of the French and Indian War in 1754 the British began to indicate that they were moving toward a new, more centralized policy in regard to the acquisition of Indian lands and the maintenance of boundaries between settlers and Indians. In September 1753 the Lords of Trade, the British administrators responsible for the day to day supervision of the colonies, wrote to

Sir Danvers Osborne, the governor of New York, and told him that he should be particularly careful not to confirm private purchases of lands from the Indians --- "when the Indians are disposed to sell any of their lands the purchase ought to be made in His Majesty's name and at the publick charge." ¹

With the outbreak of the French and Indian War in 1754, a unified Indian policy became even more essential, and in the early years of the war the British appointed two superintendents of Indian affairs to help coordinate Indian policy in departments north and south of the Ohio, and to have charge of political relations with the tribes. During the French and Indian War, in which most of the tribes threw their support to the French, the British began to move toward the decision that the only effective way of conducting relations with the Indians in North America would be to have a general system, shaped by the British authorities, and carried out by their representatives. Ultimately, in the years after the French and Indian War, the British were to attempt to control land purchases from the Indians, the resulting boundaries, and the fur trade. This attempt was not completely successful -- speculators still tried to deal privately with the Indians, individual settlers violated boundaries established under British authority, and it proved impossible to keep any central control over individual fur traders -- but the British in the 1760s made it quite clear that purchases from the Indians, and the establishment of boundaries between Indians and settlers had to be carried out under British authority.

The British began to move toward this policy in the last years of the French and Indian War. They reached the decision that in the interests of peace, economy, and good relations with the Indian tribes, widespread encroachment on Indian lands would have to be stopped. On December 2, 1761, the Lords of Trade sent to the King drafts of an instruction to the governors of the royal colonies "forbidding them to pass Grants of or encourage settlements upon any lands within the said Colonies which may interfere with the Indians bordering thereon."² Two years later, on October 7, 1763, the policies that had been foreshadowed in the 1750s and early 1760s were given a general expression in the Proclamation of 1763. The British government had decided that while it devised permanent policies to deal with the lands obtained from the French in the treaty of Paris in 1763 American settlement would be held at the crest of the Appalachians. Settlers were forbidden to encroach on the lands of the Indians, and all land purchases from the Indians would be under royal authority. There was no time to wait for negotiations to establish a detailed line along the whole American frontier, for news had arrived of Pontiac's Rebellion and widespread Indian warfare. An arbitrary line along the crest of the Appalachians would theoretically separate settlers and Indians. In the following years the British government continued its policy of attempting to centralize Indian affairs under royal control. In July 1764 a comprehensive plan tried to expand the authority of the two British superintendents of Indian Affairs, and attempted a close regulation of the fur trade.³

Although the detailed Plan of 1764 was never formally adopted and the attempt to maintain a centralized control of the fur trade was a failure, the centralized supervision of land purchases was fairly effective. One of the main tasks of the superintendents of Indian Affairs was to transform the arbitrary Proclamation of 1763 into a detailed line demarking the boundaries between the settlers and the Indians. In the years after 1764, the details of the line were worked out in a series of negotiations with the Indians carried on under royal authority. By 1768 a detailed line extended along the length of the American frontier, although settlers and speculators induced the British to move the line further west in the years before the Revolution. There were also widespread illegal encroachments on Indian lands, as well as illegal private land purchases by speculators from the Indians. The British government remained convinced, however, that its goals of peace and economy could only be accomplished if encroachments on Indian lands were prevented. The Lords of Trade made it clear that such encroachments had been a prime motivation in the establishment of a centralized direction of Indian affairs.⁴ In the years from 1763 the British government tried to insist that cessions from the Indians should only be obtained under royal authority and that boundaries should not be violated. In practice, they found that the restraint of land-hungry frontiersmen was an impossible task.

The British feared a rapid expansion of American colonists into the interior. They thought that it would bring about costly Indian

wars, and that it would detach the colonists still further from British control. Thus, the British government continued to search for a policy that would enable it to exercise some general control over westward expansion. On the eve of the Revolution, in 1774, the British in the Quebec Act attached the whole area from the Ohio to the Mississippi to the province of Quebec which had been obtained from the French in 1763. In this way the British hoped to block expansion of the American colonists into the interior, and provide for a more careful regulation of the fur trade.

In trying to shape policies regarding Indian lands, Indian trade, and expansion into the interior the British government met severe resistance from two main groups of colonials -- the fur traders and the land speculators. For different reasons both of these groups resisted close, central supervision of their actions. Many fur traders resented governmental efforts to protect the Indians from illicit dealings and to direct the trade through certain posts. They wanted to trade with the Indians on their own terms, regardless of the effect this might have on Indian relations. In the years before the Revolution, many fur traders ignored government efforts at regulation and acted as they wanted in Indian country.

The land speculators presented a major challenge to British policies for the interior, and later became an important factor in the shaping of western and Indian policies by the new American government. The speculators were often influential colonials who

made a determined effort to shape British western policies in these years. In the decades before the Revolution land companies were formed which hoped to establish large new colonies in the trans-Appalachian West. To accomplish this, they wanted to persuade the British government to open the trans-Appalachian West for settlement, and to confirm private land grants they had obtained from the Indians. Companies such as the Indiana, the Vandalia, and the Illinois-Wabash lobbied vigorously in the years before the Revolution. They failed to achieve their objectives, but were to make determined efforts to achieve their ends under the new circumstances created by the American Revolution. These efforts were to cause considerable complications when the new United States attempted to shape Indian and land policies.

Conclusion

In the twelve years before the American Revolution, the British government tried to maintain the principle that land purchases from the Indians should be made only under royal authority, and for a time it also tried to place the fur trade under direct supervision. The government had developed this centralized policy because of a realization that encroachments on Indian lands and illicit trading could cause costly problems along the whole frontier. Yet, while the principle of centralized authority was inaugurated and defended by British authorities, it met with considerable practical resistance. Fur traders ignored efforts to supervise them, frontiersmen violated established boundary lines, and large-scale land specula-

tors obtained lands from the Indians which they hoped would eventually become legitimate holdings by confirmation from the British Crown. Such confirmation was not given before 1775, but the existing land companies hoped to take advantage of the new situation created by the Revolution.

The Continental Congress and Indian Relations, 1775-1776

When in the spring of 1775 hostilities broke out in Massachusetts between the British and the colonists, it was quickly realized by the Continental Congress that the Indians would be of major importance in any future war. Thus, even before the Declaration of Independence, the Continental Congress began to take steps in an effort to ensure Indian neutrality. It was feared, with good reason, that many Indians were likely to join the British in waging war against the American frontier. As early as June 16, 1775, a committee of Congress was appointed to report steps to be taken for "securing and preserving the friendship of the Indian nations." ⁵ This committee reported on July 12, 1775. It argued that it was of "the utmost moment" to secure the friendship of the Indian nations, and that commissioners should be appointed by Congress to superintend Indian affairs. Congress established three departments (northern, middle, and southern), each with its own commissioners, and the commissioners were empowered to treat with the Indians "in the name, and on behalf of the united colonies." ⁶ Congress clearly believed that it was necessary to have some coordinated control of Indian affairs. The primary object of this at the beginning of the

Revolution was to secure the friendship of the Indians, and to attempt to resist the efforts of the British to enlist the Indians in their cause. From June 1775, throughout the Revolution, Indian affairs formed a regular part of the business of Congress, and from the spring of 1776 a standing committee on Indian affairs was established to deal with what had become a continuous Congressional concern.⁷ The initial efforts to maintain the neutrality of the Indians was somewhat modified in 1776 when it was realized that the Indians were likely to join the British in large numbers. Given this situation, it was decided to accept help from the Indians not simply seek their neutrality.

Conclusion

From June 1775 the Continental Congress assumed that Indian affairs was one of the areas that would have to come under the direction of the central government. Even before the Declaration of Independence, the Continental Congress began to assert its authority in the area of Indian affairs. As in other areas, such as foreign policy, that were considered of national concern, questions relating to Indian affairs were first given to ad hoc committees, and gradually an attempt was made to work out a more coordinated central policy.

Adoption of the Articles of Confederation

From early in the Revolution many in Congress realized that the colonies would have to establish some form of union if they hoped

resist the British effectively. The basic issue in establishing some form of union was the decision as to which matters should be under the authority of the central government. It quickly became apparent that while there was general agreement that control of Indian affairs should be one of the powers given to the central government, there was considerable argument as to the particular form this authority should take. This was because the control of Indian affairs, and particularly land cessions, was interrelated with the contentious question of the ownership and disposition of the western lands. Seven of the colonies had disputed and, in some areas, overlapping claims to land beyond the mountains -- Virginia, North Carolina, South Carolina, Georgia, Massachusetts, and Connecticut by virtue of colonial charters; New York because of treaties with the Six Nations. The most important of these claims was that of Virginia. Her charter extended her claims in the Mississippi Valley northward from Kentucky through a large part of the Old Northwest, and throughout the Revolution Virginia vigorously defended her right of preemption to the whole area enclosed within her chartered bounds. She was particularly anxious that any private grants or sales made by the Indians to land companies before the Revolution should be declared null and void in the area that she claimed. The land question was complicated not only because of the clash between Virginia and the private land companies, but also because the existing state claims to the trans-Appalachian West overlapped and because six states had no western claims.

The private land companies had their main strength in the states that had no claims to western lands, and when claimless Maryland argued that those states with western land claims should, in the national interest, cede them to the central government, Virginia was fearful that this would mean that large areas of her western lands would simply fall into the hands of the private companies for their own profit. The desire of Maryland and the states without western claims to have the landed states cede their claims to the central government, and the anxiety of the landed states, particularly Virginia, to prevent any of their lands falling into the hands of the private land companies, was to delay ratification of the Articles of Confederation from 1777 to 1781.

The first plan for Confederation, written by Benjamin Franklin, was presented to Congress in July 1775. It proposed that the new central government should be given extensive powers pertaining to the Indians: no colony was to engage in offensive warfare without the consent of Congress (article X); a perpetual alliance was to be entered into with the Six Nations, their land was not to be encroached on, no purchases were to be made from them by a private person or a colony; and with the Indians in general all purchases were to be made by Congress for the general advantage and benefit of the united colonies (article XI). This proposal by Franklin also contained the provision that the powers of Congress should include the authority to settle all disputes between colony and colony at limits.⁸ This provision, combined with the general power to make

all purchases from the Indians, meant that Franklin, who was from Pennsylvania, a state without western claims, was apparently presenting a threat to Virginia's control over the lands it claimed beyond the mountains.

The Franklin proposal was not considered by Congress, but the committee proposal that was submitted in July 1776, and was written by Pennsylvanian John Dickinson, followed many of Franklin's suggestions. His draft included the provisions that no colony could wage war unless actually in imminent danger of invasion by the Indians (article XIII); that a perpetual alliance was to be entered into with the Six Nations and all other neighboring Indians; Indian lands were to be secured to them; no land purchases made of the Indians by the colonies or private persons before the limits of the colonies were ascertained were to be valid; and all purchases of land not included within these limits were to be made by the United States (article XIV). To these already strong powers, much more was added in article XVIII of the Dickinson plan. There it was stated that the United States would have the sole and exclusive right and power of "Regulating the Trade, and managing all Affairs with the Indians -- Limiting the Bounds of those Colonies, which by Charter or Proclamation, or under any Pretence, are said to extend to the South Sea, and ascertaining those Bounds of any other Colony that appear to be indeterminate -- Assigning Territories for new Colonies, either in Lands to be thus separated from Colonies and heretofore purchased or obtained by the Crown of Great-Britain from the

Indians, or hereafter to be purchased or obtained from them -- disposing of all such lands for the general Benefit of all the United Colonies." ⁹ This direct linking of the control of Indian affairs to a control over the western limits of the colonies, and even to a direct Congressional control of the lands purchased or to be purchased from the Indians, raised great fears among those states with western land claims. They feared that their lands might be removed for the benefit of private land companies.

In the debates following the presentation of the Dickinson plan, the question of the western claims of the states, and whether the claims could be limited by Congress, was of great concern to the states with such claims. They wanted to be quite sure that they were not losing the power to dispose of the lands within their claimed limits. On August 20, 1776, when a second draft of the articles agreed to by the committee of the whole was presented to Congress and ordered to be printed, the article pertaining to ascertaining colonial limits, and referring to purchases from the Indians was omitted. The proposal regarding Congressional control of Indian affairs was now stated more simply: "The United States Assembled shall have the sole and exclusive right and power of . . . regulating the trade, and managing all affairs with the Indians, not members of any of the States." ¹⁰ The phrase "Indians, not members of any of the States" was later defined by James Madison (see page 18 below) to mean those Indians who did not live within the body of the society of a state or whose persons or property

formed no object of its laws. This definition of the phrase is a reasonable one. The phrase could not be defined territorially, because in 1776 state claims encompassed all the land westward to the Mississippi River and the United States had no lands of its own.

With the united colonies waging a war, and with a major struggle being waged for the control of western lands, consideration of the Articles proceeded slowly. In October 1777 efforts were made to place within the Articles of Confederation provisions permitting Congress to set the western limits of the states, but these efforts were defeated.¹¹ Later in the month Congress placed in article IX provisions designed to make sure that the states claiming western lands were protected. On October 27 Richard Henry Lee of Virginia was successful in proposing the insertion of a clause stating that "no State shall be deprived of territory for the benefit of the United States," and after further discussion of the clause relative to Congressional control of Indian affairs,¹² on the following day an additional statement defining Congressional power over Indian affairs was agreed to. To the clause stating Congressional authority over the Indians was now added the phrase "provided that the legislative right of any State, within its own limits be not infringed or violated."¹³ James Madison later stated that this clause was inserted by the Virginia delegates to save for the states their right of preemption of lands from the Indians. (see below page 18).

It is quite clear both from the manner in which this clause was shaped following Dickinson's original proposal, and from its subsequent

quent interpretation, that the stumbling block in drafting a clause giving the central government power over Indian affairs was the divisive controversy concerning who would control and sell the western lands.

The states with claims to the West, of which the most powerful was Virginia, wanted to make quite sure that they did not sign away their western lands. Although the Articles of Confederation were agreed to in Congress in 1777, they were not to go into effect until 1781. Even though a union was desperately needed, Maryland said that she would not sign until those states with western claims agreed to cede them to the United States. In the meantime the private land companies did all they could to get confirmation of their grants and purchases from the Indians. In May 1779 agents of some of the companies appeared before the Virginia legislature to press their claims to parts of the western lands that Virginia was still refusing to cede to the central government. The Virginia Assembly rejected the claims of the companies, and in June 1779 asserted its right of preemption to all the lands within its chartered limits.¹⁴ With this rejection, the land companies turned again to the Continental Congress and to the states without western claims, hoping to force a Virginia cession that would make it possible for Congress to give them the grants they desired.

Virginia had no intention of ceding her lands for the benefit of private land companies, and when in January 1781 she ceded her land northwest of the Ohio River to the central government one of the conditions she attached was a denial of the legality of any private

land purchases from the Indians. Thus, although Maryland finally agreed to sign the Articles of Confederation in March 1781, and they could now go into effect, the struggle over accepting the Virginia cession continued. The land companies pressed Congress to obtain another cession from Virginia that would allow the confirmation of private land purchases. Virginia would not yield to the land companies and when, in March 1784, the Virginia cession of land northwest of the Ohio was finally accepted by Congress, it was with the condition that private land purchases were invalid.

Conclusion

In shaping the Articles of Confederation there was never any question that the central government would be given the power to manage Indian affairs. The stumbling block in defining Congress' power in this regard, as in some other respects, was who would eventually benefit from the sale of lands beyond the Appalachians. Those states with western claims, particularly Virginia, were determined they would not cede large claims in the Mississippi Valley if this would enable private land companies to profit from such a cession, while the landless states, particularly Maryland, were determined not to agree to a union until it was accepted that large areas of the West would become a public domain. Virginia suspected, with good reason, that the attitude of Maryland was determined at least as much by the attitude of private speculators as by a concern for the public good. In agreeing to a final form of the clause giving Congress control over Indian affairs, individual

states wanted to be quite sure that they were not giving up the right of preemption to lands under their control or to lands which they claimed.

The Articles of Confederation and their Meaning

When the Articles of Confederation went into effect on March 1, 1781, the new Congress of the Confederation was given considerable power over Indian affairs; the problem in the next eight years was to be enforcing these powers. By article VI it was stated that no state could engage in war without the consent of the United States unless it was actually responding to a direct threat of invasion by the Indians. By article IX, clause 1, the United States was given "the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article -- of sending and receiving ambassadors -- entering into treaties and alliances." By clause 4 of the same article IX, the United States was given "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated." ¹⁵

Congress' understanding of its powers in Indian affairs under the Articles of Confederation can be ascertained both by examining contemporary interpretations and by a brief examination of the actual course of Congressional Indian policy in the 1780s. Two extremely useful statements arose in connection with the first

treaty negotiations entered into by Congress in the years after the Revolution. The United States commissioners -- Oliver Wolcott, Richard Butler, and Arthur Lee -- who went to negotiate with the Six Nations at Fort Stanwix in the fall of 1784 encountered difficulties because of New York's desire to carry on independent negotiations with the Six Nations. The commissioners were disturbed to learn of New York's own treaty with the Six Nations, and that the governor of New York had chosen not to transact his business "under the patronage of the United States." The United States commissioners wrote to the President of Congress on October 2, 1784, and told him that "we thought proper to inform the Indians in our conference, that a treaty with an individual State, without the sanction of Congress, could be of no validity." 16

When James Monroe of Virginia informed James Madison of the same state that the United States commissioners were disturbed by the negotiations of New York with the Indians, Madison defined for Monroe what he believed to be the meaning of the Articles of Confederation in Indian Affairs. As a prominent Virginian who had served in the Continental Congress from 1780 to 1783 Madison was well-qualified to do this. Madison was willing to concede that New York might have a right to negotiate for the lands, but the basic question was whether she could exercise this right without the supervision and approval of the United States. His opinion was that in as far as she had exerted her right to treat "in contravention of the Genl. Treaty, or even unconfidentially with the Comisrs. of

Congress. she has violated both duty & Decorum." Madison then went on to define what was meant by the two key qualifying statements about Indian affairs in article IX, clause 4, of the articles of Confederation. By Indians not members of any of the states, Madison stated, "must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no object of its laws." By including a statement that the legislative right within its own limits be not infringed or violated, Madison concluded, it was meant "to save to the States their right of preemption of lands from the Indians." Madison further added, and he was in a position to know, that it was always said that the Virginia delegates made sure that this proviso was in the articles.¹⁷ Virginia had, of course, been much concerned in 1777 and later that private land companies were intending to use any federal control over western lands and land cessions to make a private profit out of western lands.

Madison was never again to be quite this clear about the nature of Congressional control over Indians affairs, but later in his life he again asserted, though this time indirectly, that he believed that the power to conduct treaty negotiations with Indians not members of any of the states lay in Congress. In April 1787 when he jotted down a list of the "Vices of the Political system of the U. States," he included under "Encroachments by the States on the federal authority" the wars and treaties of Georgia with the Indians.¹⁸ Georgia's boundaries in the 1780s extended to the

Mississippi River; she did not cede her western lands to the federal government until 1802. Yet, Madison still considered that Georgia's separate negotiations with the Indians within her boundaries in the 1780s were an encroachment on federal authority. He made a similar comment in June 1789 when jotting down notes at the constitutional convention in Philadelphia. "By the federal articles," he noted, "transactions with the Indians appertain to Congs. Yet in several instances, the States have entered into treaties & wars with them." ¹⁹ As late as the 1830s, near the end of Madison's life, when he wrote a preface to his notes on the debates at the constitutional convention, he stated "In certain cases the authy. of the Confederacy was disregarded, as in violations not only of the Treaty of peace; but of Treaties with France & Holland, which were complained of to Congs. [paragraph] In other cases the Fedl authy was violated by Treaties & wars with Indians, as by Geo:" ²⁰

It seems clear from Madison's various statements from 1784 to the 1830s that he believed article IX of the Articles of Confederation did not permit states to carry on independent treaty negotiations with those Indian tribes that had not been absorbed within the body of the society of a state. The only time that Madison appears to waiver in his definition of the meaning of that clause is in No. 42 of The Federalist, originally a series of articles written for newspaper publication to argue for the necessity of replacing the old Articles of Confederation with the new Constitution. Here Madison was intent on showing why the Articles should be replaced,

and he attacked article IX as being confusing and incomprehensible. Madison did not express such doubt about the meaning of article IX in his private appraisals from 1784 to the 1830s, and I am inclined to agree with Francis Paul Prucha's suggestion that Madison tried to make the Articles of Confederation look black so that the new Constitution might look better. (Prucha, American Indian Policy in the Formative Years, p. 30).

An additional source for an interpretation of the nature of the authority over Indian affairs under the Articles of Confederation are the contemporary statements of Congressional committees regarding Indian affairs. One report of particular interest is that of the committee on Southern Indian affairs which reported in August 1787. The committee complained that the way in which Georgia and North Carolina were construing the fourth clause of article IX concerning Indian affairs would leave the federal powers "a mere nullity." "This construction appears to the committee," it was stated, "not only to be productive of confusion, disputes and embarrassments in managing affairs with the Independent tribes within the limits of the States, but by no means the true one." The committee stated that the principal objects in dealing with the Indians had been making peace and war, purchasing lands, fixing boundaries, and preventing white intrusions on Indian lands: "The powers necessary to these objects appear to the committee to be indivisible, and that the parties to the confederation must have intended to give them entire to the Union, or to have given them

entire to the State; these powers before the revolution were possessed by the King, and exercised by him nor did they interfere with the legislative right of the colony within its limits . . . The laws of the State can have no effect upon a tribe of Indians or their lands within the limits of the state so long as that tribe is independent, and not a member of the state." ²¹

Later in 1787 Congress approved the instructions to the commissioners for negotiating with the Southern Indians. The commissioners were told that they should carefully ascertain the boundaries claimed by the respective states, and be careful that the states should not think that their legislative rights were being infringed upon, "altho' Congress are of Opinion that they might Constitutionally fix the bounds between any State and an Independent Tribe of Indians." ²²

In the early 1790s Secretary of State Thomas Jefferson, who had served in the Confederation Congress after the Revolution, made it clear that while in the Confederation period the individual states had the right of preemption to Indian lands within their limits, this right could only be exercised with the consent of the central government. His key statement is in a letter to Secretary of War Henry Knox on August 10, 1791. He said he was of the opinion that the government should firmly maintain "that the Indians have a right to the occupation of their lands, independent of the States within whose chartered lines they happen to be; that until they cede them by treaty or other transaction equivalent to a treaty no act of a

State can give a right to such lands; that neither under the present constitution, nor the ancient confederation, had any State or person a right to treat with the Indians, without the consent of the General Government." ²³ On two earlier occasions in 1790, Jefferson had made it clear as Secretary of State that he saw a clear distinction between the right that a state had to obtain the Indian title to lands and the right that the general government had to approve and supervize such transactions. ²⁴

Conclusion

From the circumstances surrounding the adoption of the Articles of Confederation, and from interpretations given from 1784 to 1791 by prominent contemporaries and by Congressional statements, it seems clear that it was intended in the Articles to give Congress the power to treat with those Indians that had not been absorbed within the society of a state, and that it was intended that no state should treat with such Indians without the authority of the central government. The best contemporary summary of what was meant by Indians "not members of any of the States" and "the legislative right of any state" was that given by James Madison in 1784: The first, Madison stated, meant those "who do not live within the body of the Society, or whose Persons or property forms no object of its laws;" the Second, Madison stated, was meant "to save to the States their right of preemption of lands from the Indians." Congress under the Articles of Confederation believed that individual states should not act independently in dealing with Indian tribes who still

possessed a potential for independent action and had a tribal existence separate from the society of the states within whose bounds they happened to live.

Indian Policy of the Confederation, 1783-1789

Although the Articles of Confederation went into effect in 1781, Congress was in no position to try to shape a coherent Indian policy until 1783. In March 1781 the war was still going on, the British-Indian alliance threatened the American frontier, and Congress had first to concentrate on defense and on winning independence from Great Britain. With the signing of a preliminary peace treaty in the fall of 1782, it now seemed clear that independence was about to be achieved, and even before the signing of the definitive treaty of peace in September 1783 Congress began an attempt to assert its authority in those areas it considered pertained to the federal government. These concerns were well-summarized in April 1783 when James Madison noted that a committee had been appointed "to report a proper arrangement to be taken in consequence of peace. The object was to provide a system for foreign affairs, for Indian affairs, for military & naval peace establishments; and also to carry into execution the regulation of weights & measures & other articles of the Confederation not attended to during the war." 25

In the spring of 1783 Congress prepared to inform the Indians that a peace had been signed, and to indicate that the United States was prepared "to enter into friendly treaty with the different

tribes." ²⁶ Congress assumed that it was the task of the central government to establish a general peace with the Indians. It also intended to prevent encroachments on to the lands of the Indians until the central government decided what land cessions should be exacted from them as a price for Indian hostility during the Revolution. In the late summer and early fall Congress moved quite rapidly to assume a control over Indian affairs. On September 22, 1783, Congress issued a proclamation prohibiting anyone from settling on, buying, or receiving Indian lands of Indians outside the limits or jurisdiction of any state. To emphasize that it was acting under specific powers delegated to the central government, Congress quoted at the beginning of the proclamation the specific powers in Indian affairs given to the central government by article IX of the Articles of Confederation. ²⁷ Three days later the Pennsylvania delegates to Congress wrote to the Pennsylvania Assembly to say that Congress intended to demand cessions from the Indians as compensation for their hostility in the war, and "that if any particular State made a Purchase it would obstruct the general Measures." ²⁸

In a report adopted on October 15, 1783, Congress strongly asserted a specific direction for American Indian policy. The committee confined its remarks to the middle and northern departments, leaving the South for later action. The main emphasis of the report was that peace should be established with the Indians, but this should be a peace in which large land cessions would be expected from the Indians to provide a fund for the extinguishment of the

national debt. The Indians were to be told that Great Britain had given to the United States all the land westward to the Mississippi River, and that as the Indians had fought on the losing side they could be expelled from American territory. Instead, the United States would draw boundary lines, including a cession of Indian land, separating the Indians and whites within the United States.²⁹ In deciding to assume that the British had given to the United States not only territorial sovereignty but also the right of soil westward to the Mississippi, Congress ignored colonial precedents. Temporarily, Congress was claiming the Indian lands simply by right of conquest.

In March 1784 the President of Congress sent to the commissioners who were to negotiate in the North a commission authorizing them to treat with the Indians in the northern and middle departments of the United States -- "comprehending the whole of the Indians known by the name of the Six Nations; and all to the northward and westward of them, and as far South as the Cherokees exclusive."³⁰ As a result of the October 15, 1783, report treaties were signed by the United States with the Indians at Fort Stanwix (1784), Fort McIntosh (1785), and Fort Finney at the mouth of the Great Miami (1786). In these treaties the United States tried to open up land in what is now eastern and southern Ohio for settlement. The land was not purchased, but rather demanded from the Indians as compensation for Indian hostility during the Revolution.

It was not until May 1784 that Congress received and accepted a report on Indian affairs in the Southern department. The committee

that reported on the South pointed out that many of the principles of the October 15, 1783, report also applied to the South. Again it was suggested that the Indians should make cessions because of their hostility during the Revolution. In fact in the South, Congress found itself in the position of trying to modify state demands for land in an effort to bring peace to the region. Congress agreed that commissioners should be appointed to hold treaties with the Indians in the South on behalf of the United States. It was stated that "no treaty which may have been concluded with the Indians by any State or States and not by the United States in Congress assembled, for obtaining land or for any other purpose, shall be confirmed by the Treaty or treaties now proposed to be held, unless the said treaties which may have been concluded by such State or States appear manifestly and perfectly consistent with the design of the Treaties now proposed to be held." ³¹

This last statement was to cause grave problems for Congress, for in the South Congressional commissioners were to negotiate with Indians that were indisputably within the territorial bounds of individual states. Georgia and North Carolina both had colonial charters which gave them land westward to the Mississippi River, and in the 1780s they tried to thwart the power of the United States government by obtaining land cessions and claiming Indian lands even though such separate negotiations were not recognized by Congress. Although Georgia and North Carolina tried to claim that Indian affairs within their territorial bounds were their own concern, Con-

gress insisted on negotiating with the Indians in those regions. The United States very much wanted to curb state demands and achieve peace in the South, so it could concentrate any force it had in the North where states had ceded land to the central government, and where the government could hope to solve some of its financial problems.

On March 15, 1785, Congress resolved that three commissioners should be appointed "to treat with the Cherokees and all other Indians south of them, within the limits of the United States, or who have been at war with them, for the purpose of making Peace with them, receiving them into the favor and protection of the United States, and removing as far as may be all causes of future contention or quarrels." The commissioners were to notify "the Supreme Executive" of Virginia, North Carolina, South Carolina, and Georgia, in order that they might send "one or more persons to attend during the Treaty, if they think proper." 32

Congress' desire to establish peace in the South proved difficult to accomplish because North Carolina and Georgia were extremely anxious to provide for the advance of their frontiersmen. Georgia had already signed treaties with some Creeks that had been disavowed by the majority of the Creek nation, and North Carolina settlers were advancing on to lands that the Cherokee considered had never been ceded.

In spite of the unwillingness of North Carolina and Georgia to cooperate with the United States commissioners, the commissioners

acted under the authority of Congress to sign treaties with the Cherokees, Choctaws, and Chickasaws in 1785 and 1786. An effort to negotiate with the Creeks failed, because most of the Creek leaders did not come to the meeting place, and the United States commissioners did not wish to sign a treaty with an insufficient representation of the Creek nation. At Hopewell, in November 1785, however, the United States commissioners signed a treaty with the Cherokee. The treaty drew a boundary between settlers and the Cherokees, but it gave to the Americans much less than the state of North Carolina wanted. Its representatives protested what had been done, and in the following years North Carolina settlers violated the boundary established by the United States at Hopewell. In January 1786, also at Hopewell, the United States commissioners signed treaties with the Choctaws and Chickasaws. Again moderate boundaries were drawn, and the North Carolina representatives protested the treaty with the Chickasaws. 33

In signing the treaties with the Cherokees, Choctaws, and Chickasaws, the Confederation Congress ignored the belief of North Carolina and Georgia that United States powers did not extend to Indians who lived within the territorial limits of those states. Yet, unfortunately for the central government, it did not have the money or the power in the 1780s effectively to enforce the policies that it believed should be enforced. North Carolina, Georgia, and their inhabitants violated boundaries that had been established by the Congressional commissioners.

By the summer of 1786 post-Revolutionary Congressional Indian policy was encountering severe difficulties. In the North the Indians had recovered from the initial shock of their desertion by the British in 1783, they bitterly resented the treaties that had been dictated to them from 1784 to 1786, and were beginning to fight to resist the advance of the American frontier. Congress had also discovered that its insistence on dealing with those tribes that had not been absorbed within the society of individual states, and still possessed a potential for resistance, was resisted by states who had their own special desires for lands -- New York, Georgia, and North Carolina all carried out their own separate Indian policies, and because of its lack of money and lack of military power Congress was often unable to enforce what it believed to be its authority.

From 1786 to 1789 the Confederation government attempted to devise Indian policies that would enable it to sell and settle its lands northwest of the Ohio, and which would also prevent states and individuals creating Indian discontent by violating federal agreements. One basic measure, which was passed on August 7, 1786, was an Ordinance for Indian Affairs which restructured the Indian departments of the United States. By the ordinance the Indian department was divided into two districts -- one north and one south of the Ohio. In each there was to be a superintendent responsible to the Secretary at War, and these superintendents would control Indian trade. While this ordinance was being discussed in Congress an attempt was made to put a provision in it which would have guaranteed

non-interference with the rights of any state within its own limits, but finally it was simply agreed that where transactions with any tribe of Indians could not be carried out without interference with the legislative rights of a state the superintendent should act in conjunction with the state. ³⁴ Three days before the new ordinance passed Congress, the Georgia representatives tried "to postpone so much of the Ordinance as relates to the Southern Indians." This motion was defeated; only Georgia and North Carolina voted for it. ³⁵

In 1787 the United States began to change its post-Revolutionary Indian policy. Secretary at War Henry Knox helped to persuade Congress that rather than claiming all Indian lands by right of conquest from Great Britain it would be more politic to revert to colonial practice, and purchase the Indian right of soil. As a result of this decision, the United States in 1789 at Fort Harmar purchased the land in what is now eastern and southern Ohio that had been taken in the 1784 and 1786 treaties of Fort Stanwix, Fort McIntosh, and Fort Finney by right of conquest.

While still intent on obtaining the land northwest of the Ohio for sale and settlement, the United States was also intent on trying to maintain peace in the South. In the last years of the Confederation Secretary at War Henry Knox made it quite clear that he believed that the treaties of Hopewell, which had signed amid the protests of North Carolina, were quite legal, and that in ignoring these treaties the frontiersmen of North Carolina were violating

federal authority. Knox reported on July 18, 1788, that the white inhabitants on the frontiers of North Carolina had frequently committed "unprovoked and direct outrages" against the Cherokees, and that this conduct was "an open violation" of the treaty of peace made by the United States at Hopewell in November 1785. Knox acknowledged that some of the former legislatures of North Carolina had helped bring "entanglements of this business," but the treaty needed fulfilling. He argued that the sentiments of Congress needed to be expressed to these white inhabitants "in order to vindicate the sovereignty of the Union from reproach." Knox recommended that a proclamation should be issued by Congress, by which it would state its determination to enforce the treaty of Hopewell. ³⁶

On September 1, 1788, Congress agreed to a proclamation which pointed out that the United States had by the treaty of Hopewell in November 1785 guaranteed to the Cherokees certain boundaries. These boundaries were reiterated in the proclamation. It stated that the violations of these boundaries on the frontiers of North Carolina were "highly injurious and disrespectful to the Authority of the Union." It was also resolved that the Secretary of War should have troops ready to march to protect the Cherokees and disperse the white intruders. The proclamations and resolutions were to be sent to the executives of Virginia and North Carolina, asking that the states use their influence so that the proclamation could restore peace and harmony "between the citizens of the United States and the Cherokees, and to prevent any further invasions of their respective

rights and possessions." 37 In its last years the Confederation suffered badly from its lack of enforcing power, but Secretary at War Knox and Congress continued to emphasize that the United States had a general responsibility to maintain peace and boundaries along the frontiers of the United States, and to conduct negotiations with tribes that had not become members of individual states regardless of the tribes' location.

Conclusion

In the years from 1783 to 1789 the Confederation Congress attempted, under the authority of the Articles of Confederation, to carry out comprehensive Indian policies that would secure land northwest of the Ohio for sale and settlement, and that would maintain peace along the whole frontier. From 1784 to 1786 this involved federal treaties in the north with the Six Nations, Wyandots, Delawares, Ottawas, Chippewas, and Shawnees, and in the south with the Cherokees, Choctaws, and Chickasaws. All of these tribes still held large areas of land, all of them still maintained an existence separate from that of the state in which they happened to live, and all of them still had the power to cause major disturbances of the peace along the American frontiers. In the treaties in the north -- Fort Stanwix, Fort McIntosh, and Fort Finney -- the United States forced the Indians to cede lands in what is now eastern and southern Ohio as compensation for Indian hostility in the Revolution. In the treaties in the South -- all three at Hopewell -- the United States attempted to keep the peace by establishing firm boundaries for the Cherokees, the Choctaws, and the Chickasaws.

From 1786 the United States began to change its Indian policy by conceding that the Indians had a right of soil that would have to be extinguished by purchase. As a result of this change, the Indian lands northwest of the Ohio that had been obtained at the treaties of 1784 to 1786 were now obtained by purchase at Fort Harmar in 1789. In the South the central government made determined efforts to assert its authority on the frontiers of North Carolina, arguing that the treaty of Hopewell with the Cherokee in November 1785 was, in spite of North Carolina's objections, a perfectly legal treaty which had to be enforced. What Congress lacked in the 1780s was not a belief in its power to control negotiations with all Indians who had not become members of individual states but rather the power to enforce this belief. Accordingly, in the late 1780s, individual states at times encouraged their frontiersmen to violate boundaries established by United States-Indian treaties, and the federal government did not have the power to enforce what it believed to be its legal authority.

Federal Confirmation of Actions Under the Articles of Confederation, 1789-1796

In the first years of the government under the new constitution, federal officials threw additional light on how and why Congress had acted in Indian affairs under the Articles of Confederation. Reporting to President Washington on June 15, 1789, Secretary of War Henry Knox commented that "By having recourse to the several Indian treaties, made by the authority of Congress, since the conclusion of

the war with Great Britain, excepting those made January 1789, at fort Harmar, it would appear, that Congress were of opinion that the Treaty of Paris, of 1783, absolutely invested them with the fee of all the Indian lands within the limits of the United States; that they had the right to assign, or retain such portions as they should judge proper." Knox himself believed that the Indians as prior occupants had the right of soil, and he pointed out that the United States had acknowledged this at the treaties of Fort Harmar in 1789. 38

Knox was particularly perturbed at the way in which the frontiersmen on the frontiers of North Carolina had flouted the November 1785 treaty of Hopewell with the Cherokee. He clearly believed that the new United States government under the constitution had an obligation to enforce the Indian treaties made under the authority of the Confederation Congress in the 1780s. He simply did not accept the North Carolina argument that the authority to deal with the Indians within the bounds of North Carolina lay with the state. In writing to President Washington in July 1789 Knox deplored the "disgraceful violations of the treaty of Hopewell, with the Cherokees." He said such direct contempt of the authority of the United States should not be tolerated. Knox believed that even now, under the new constitution, a declarative law needed to be passed stating that "the Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not to be divested thereof, but in consequence of fair and bona fide purchases,

made under the authority, or with the express approbation of the United States." Knox considered that as the United States would be involved in all wars about boundaries, it was proper that their authority should be required for all measures for which they would have to take the consequences: "No individual State could, with propriety, complain of invasion of its territorial rights. The independent nations and tribes of Indians ought to be considered as foreign nations, not as subjects of any particular State. Each individual State, indeed, will retain the right of pre-emption of all lands within its limits, which will not be abridged; but the general sovereignty must possess the right of making all treaties, on the execution or violation of which depend peace or war."³⁹ Clearly, in July 1789, Knox was concerned that even with the new authority of the United States Constitution, states and individuals would continue to try to resist federal authority.

President Washington tried to support Knox in his efforts to enforce the Confederation treaty of Hopewell. In a message on August 11, 1790, Washington asked the Senate either to authorize him to enforce the boundaries of the treaty of Hopewell or to authorize him to obtain more lands from the Cherokee, provided that no person who should have taken possession of any lands within the area assigned to the Cherokee at Hopewell should be confirmed in possession, but by compliance with such terms as Congress might prescribe.⁴⁰ Although continuing to experience resistance from individual states, the new government of the 1790s, Henry Knox con-

tinued to be concerned that federal authority in Indian relations was still being violated by individual states. On January 22, 1791, Knox reported that Georgia had granted to three private land companies the right of preemption to almost all of the lands of the Choctaws and Chickasaws, and part of the lands of the Cherokees, and that these were the tribes whose boundaries had been defined by the United States at Hopewell in 1785 and 1786. "That, although the right of Georgia to the pre-emption of said lands should be admitted in its full extent," wrote Knox, "yet, it is conceived, that, should the said State, or any companies or persons, claiming under it, attempt to extinguish the Indian claims, unless authorized thereto by the United States, that the measure would be repugnant to the aforesaid treaties, to the constitution of the United States, and to the law regulating trade and intercourse with the Indian tribes." ⁴¹

The fear that Georgia would continue to flout federal authority continued in the 1790s, and there was constant friction between Georgia and the federal government. The federal government, however, was now better able to enforce the powers it had in Indian affairs, and insisted that any cession of land to Georgia or to private land companies given authority by Georgia could only be carried out under the authority of the federal government. As late as the United States treaty with the Creeks at Coleraine in 1796, the argument continued not only over the powers of the federal government in Indian policy under the new constitution but also over the powers of Congress under the Confederation. At Coleraine in 1796 representa-

tives of Georgia at the treaty bitterly objected to the fact that the federal commissioners had not obtained lands that Georgia wanted from the Creeks. The treaty had simply confirmed the earlier treaty of New York (1791) as well as the treaties of Hopewell (1785 and 1786). The Georgia representatives also objected to the fact that in the course of the treaty council the United States commissioners had declared that the treaties Georgia had signed with the Creeks in 1783, 1785, and 1786 were invalid; the Georgia representatives argued that in the 1780s the central government had no power to prevent such cessions. The answer from the United States commissioners was that they were "of opinion, that, under the old Confederation, the authority to make treaties was vested in Congress." ⁴² In essence, some states in the 1780s and 1790s wanted to conduct their own separate Indian policies, and obtain Indian lands without the authority of the central government. In the 1780s the central government did not have the money, the troops, or the organizational structure to enforce its powers with efficiency, and the authority of the United States was violated. After 1789 it was far more difficult for individual states to resist the powers of the central government.

Conclusion

Officials of the new federal government inaugurated in 1789 maintained the validity of Congressional power over Indian affairs in the 1780s under the Articles of Confederation. They would not accept state arguments that the central government in the 1780s did not have the sovereign power over Indian affairs and the establishment of boundaries.

1. Lords of Trade to Sir Danvers Osborne, Sept. 18, 1753, E.B. O'Callaghan, ed., Documents Relative to the Colonial History of the State of New York, 15 vols. (Albany, 1853-1887), VI, 800-801.
2. Ibid., VII, 477-479.
3. See Lords of Trade to Sir William Johnson, July 10, 1764, with enclosed plan for the management of Indian affairs, ibid., VII, 634-641.
4. Lords of Trade to Earl of Shelburne, Dec. 23, 1767, ibid., VII, 1004-1005.
5. Worthington C. Ford, et. al., eds., Journals of the Continental Congress, 1774-1789, 34 vols. (Washington, 1904-1937), II, 93.
6. Ibid., II, 174.
7. Ibid., IV, 317 (April 30, 1776). There is a convenient listing of some of the ways in which Congress dealt with Indian affairs in these years in Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (Washington, 1832), Appendix.
8. Journals of the Continental Congress, II, 197-198.
9. Ibid., V, 549.
10. For debates see ibid., VI, 1076-1079. For second draft, see ibid., V, 674-689.
11. Ibid., IX, 806-808 (Oct. 15, 1777).
12. Ibid., IX, 844 (Oct. 27, 1777).
13. Ibid., IX, 845 (Oct. 28, 1777).
14. The Articles of Confederation are in ibid., IX, 907-925. The Virginia statement is in Laws of the Colonial and State Governments Relating to Indians and Indian Affairs, p. 153.

15. Journals of the Continental Congress, XIX, 214-224.
16. Wolcott, Butler, and Lee to the President of Congress, Oct. 2, 1784, in Neville B. Craig, ed., The Olden Time, II (Pittsburgh, 1848; reprinted, Cincinnati, 1876), p. 408.
17. Madison to Monroe, Nov. 27, 1784, Robert A. Rutland, et. al., eds., The Papers of James Madison (Chicago, Charlottesville, 1962-), VIII, 156-157.
18. Ibid., IX, 348.
19. Max Farrand, ed., Records of the Federal Convention of 1787, 3 vols. (New Haven, 1911), I, 316.
20. Ibid., III, 548.
21. Journals of the Continental Congress, XXXIII, 455-463 (Aug. 3, 1787).
22. Ibid., XXXIII, 709-711.
23. Jefferson to Knox, Aug. 10, 1791, A.A. Lipscomb and A.E. Berg, eds., The Writings of Thomas Jefferson, 20 vols. (Washington, D.C., 1905), VIII, 226-227.
24. Jefferson, "Opinion on Certain Georgia Land Grants," May 3, 1790, Jefferson to Henry Knox, Aug. 26, 1790, in Julian P. Boyd, ed., The Papers of Thomas Jefferson (Princeton, 1950-), XVI, 406-408, XVII, 430-431.
25. Madison, "Notes on Debates," in Rutland, et. al., eds., Papers of Madison, VI, 432-433.
26. Journals of the Continental Congress, XXIV, 319-320.
27. Ibid., XXV, 602.

28. Pennsylvania Delegates to the Pennsylvania Assembly, Sept. 25, 1783, in Edmund C. Burnett, ed., Letters of Members of the Continental Congress, 8 vols. (Washington, 1921-1936), VII, 308.
29. Journals of the Continental Congress, XXV, 681-693.
30. President of Congress to the Commissioners to Treat with the Indians, March 22, 1784, Burnett, ed., Letters of Members of the Continental Congress, VII, 477.
31. Report and Resolutions, May 28, 1784, Journals of the Continental Congress, XXVII, 453-465.
32. Ibid., XXVIII, 160-162.
33. For the treaties at Hopewell with the Cherokee (Nov. 28, 1785), the Choctaw (Jan. 3, 1786), and the Chickasaw (Jan. 10, 1786), see Charles J. Kappler, ed., Indian Affairs: Laws and Treaties, 2 vols. (Washington, 1904), II, 8-16.
34. Journals of the Continental Congress, XXXI, 488-493.
35. Ibid., XXXI, 485.
36. Ibid., XXXIV, 342-344.
37. Ibid., XXXIV, 476-479.
38. American State Papers, Indian Affairs, I (Washington, 1832), pp. 12-14.
39. Ibid., I, 52-54 (July 7, 1789).
40. Ibid., I, 83.
41. Ibid., I, 112-113.
42. Ibid., I, 586-616 (quotation on p. 613).