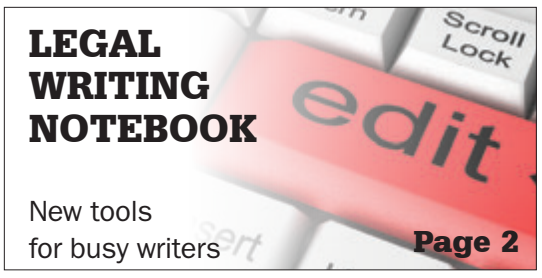

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No attorney fees owed for subro recovery

By Barbara L. Jones
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An ERISA health insurer is not obliged to pay attorney fees to a plaintiff's lawyer who recovered the insurer's subrogation claim, the Court of Appeals ruled last week in O'Brien & Wolf v. South Central Minnesota Electrical Workers' Family Health Plan.

The plan had not agreed to pay attorney fees and a contract implied in law had not been established, the court said.

"Because justice and fairness do not obligate the Plan to pay the firm for the legal services it provided [the injured plaintiff], no implied-in-law contract existed between the law firm and the Plan," said the court in an opinion written by Judge Kevin Ross.

The full subrogation payment of $152,739 was paid to the plan. The firm had claimed a one-third contingent fee, or $50,913. The firm has not decided whether to seek further review, said partner Daniel Heuel. Attorneys for the ERISA plan could not be reached for comment.

It is not uncommon for plaintiff's attorneys to assist a subrogee and, at least for state plans, receive a fee for doing so. The court said it expressed no view on such practices under non-ERISA policies.

Preemption undecided

The injured plaintiff, Travis Schurhammer, was injured in a snowmobile collision in 2014. He retained

ERISA | Page 10

STAFF PHOTO: KEVIN FEATHERLY

Paul Schnell, at the lectern, addresses a crowd after being introduced as the state's new corrections commissioner on Dec. 20. At left, an amused Gov.-elect Tim Walz and Lt. Gov. Peggy Flanagan look on.

Walz touts corrections head's style

Paul Schnell makes leap from police chief to prison boss

By Kevin Featherly
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Asked what qualifies his choice for corrections commissioner to lead the state's prison system, incoming DFL Gov. Tim Walz pointed to Paul Schnell's leadership style.

"I think that it's Paul's collaborative approach to this," Walz said as he introduced Schnell at a Dec. 20 press conference inside a St. Paul school.

Schnell, 57, has worked in law enforcement for 20 years, including stints as police chief over three suburban departments. For 10 years before that, he worked in community corrections, including one job working with youth offenders at Carver County Court Services. In 1993, he became a deputy sheriff and his law enforcement career took off.

During the commissioner search process, Walz said, stakeholders repeatedly said that Schnell has the leadership qualities needed to bridge the ethnic disparities among incarcerated Minnesotans.

Native Americans, who comprise fewer than 2 percent of Minnesota's population, make up 10 percent of the

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SUBMITTED IMAGE: MINNESOTA HISTORICAL SOCIETY

An oil painting of Indian agent Lawrence Taliaferro made around 1830. Taliaferro helped pressure the leaders of Upper Mississippi Valley Native communities into signing a series of ruinous treaties with the federal government in the 1820s and 1830s.

The moral arc of Indian agent Lawrence Taliaferro

Politics of the Past

Editor's Note: This article draws from a variety of books, magazines and articles. A full list of sources is available online.

By Zac Farber
Staff Writer

The former Indian agent Lawrence Taliaferro was living in Pennsylvania in 1862 and 1863 when the U.S. government executed 38 Dakota prisoners of war and expelled the Dakota people from their Minnesota homelands.

Taliaferro had played a crucial role in the seizure of Native American land in the Upper Mississippi Valley, but in the two decades since his retirement, he'd found it increasingly difficult to defend his government's actions.

As European settler-colonists streamed into Minnesota, the Dakota had been squeezed into tiny reservations and pushed to the brink of starvation. Taliaferro came to see white men like Govs. Henry Hastings Sibley and Alexander Ramsey as "knaves or fools" whose choices had driven the Dakota to armed conflict.

"They were as children led to the slaughter, no man seemed to care for them, and they became desperate," Taliaferro wrote in 1864.

Taliaferro had always viewed Native nations paternalistically — persuading Dakota, Ojibwe and Ho-Chunk leaders to sign away their ancestral land rights out of the belief that they needed to assimilate into Western society to survive.

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Taliaferro

Continued from page 1

Yet his faith in his race's superiority was waning. He was appalled that government officials repeatedly broke promises made to Native leaders about treaty payments and hunting rights, and looked the other way as they were shamelessly defrauded by fur traders. Where Taliaferro had relied on persuasion and gifts to rid Native people of their territory, his successors leaned on coercion and violence.

Taliaferro's moral arc would never reach all the way to repentance; he never expressed regret for orchestrating exploitive treaties. But with Ramsey calling for the Dakota to be exterminated, it proved impossible for him to ignore the ugly implications of western expansion.

"It became plain to [my] mind, painful as the bare idea was, that the final rulers of this great and growing nation would destroy it," Taliaferro wrote. "O, white man, what degradation has your thirst for gold brought upon the poor savage!"

'Spirit and energy'

Taliaferro was the scion of a wealthy, influential eastern Virginia family. His uncle was a U.S. congressman and his father counted James Monroe as a personal friend.

Born in 1794 on a plantation in King George County, Taliaferro spent his youth wandering the pastoral landscape, his life made more than comfortable by the efforts of his family's many slaves.

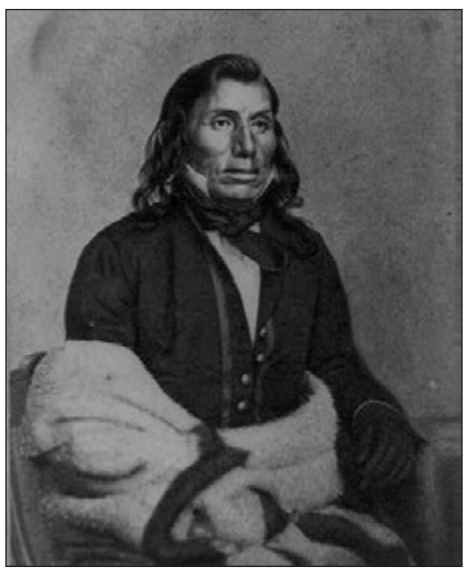
At the outbreak of the War of 1812, Taliaferro's mother enlisted him and his four grown brothers as volunteer militiamen.

The exacting strictures of military life agreed with the 18-year-old Taliaferro. He studiously obeyed his superiors and, with Monroe's help, earned an Army commission before his 20th birthday. An ambitious, hard-working soldier, Taliaferro remembered his general — the future president William Henry Harrison — telling him, "You look young, sir, but I think you have spirit and energy."

Taliaferro served in the Army's recruitment office in Chillicothe, Ohio, and guarded prisoners in Frankfort, Kentucky, before he was ordered to the Niagara frontier, where he commanded a detachment and helped prepare for the American invasion of Canada.

After the war, in July 1818, Taliaferro fell sick and was sent to the mineral springs outside Bedford, Pennsylvania, to recuperate. Upon his recovery, he rode 140 miles by horseback to Washington to meet with Monroe, who'd been sworn in as president the previous year.

Monroe praised Taliaferro, by then a first lieutenant, for proving himself "above his rank." The president wanted him to resign from the Army and accept a diplomatic post representing the federal government to Native American nations. "Go home to your mother, and remain until you hear from me," Monroe told him.



SUBMITTED IMAGE: LIBRARY OF CONGRESS

The Mdewakanton leader Ta Oyate Duta (His Red Nation, also known as Little Crow) once praised Taliaferro for his candor, telling him there was "no sugar in your mouth."

The position of Indian agent was a large, amorphous and complicated job to give to a 24-year-old. He would be responsible for enforcing trade laws, preempting conflict, acquiring land and distributing annuities.

The job's larger goal, as Taliaferro understood it, would be twofold: To inculcate Native people with Western values and to defend them against illegal exploitation by whites.

With time, he'd realize that the U.S. government's only true priority was assimilation.

Frontier justice

When Taliaferro arrived in July 1820 at the confluence of the Mississippi and St. Peter's rivers, construction on Fort Snelling was still underway. Across the water stood a trading post for the American Fur Company. Five Dakota communities lived in the surrounding area.

Just west of the fort site, Taliaferro established the headquarters of the St. Peter's Indian Agency — a multi-room log council house, decorated with a prominent American flag and flanked by a handful of smaller buildings. For the next two decades, he would rarely venture far from this remote frontier compound.

Dakota and Ojibwe people far outnumbered whites in the Upper Mississippi Valley, and Taliaferro's authority emanated mostly from his ability, as he put it, to "secure the confidence" of Native leaders. (For most of his career Taliaferro was only officially responsible for the Dakota, but he worked informally with nations across the Upper Midwest.)

Taliaferro launched a vaccination initiative and spent thousands of dollars of his own money on flour and meat for the poor. He hired a blacksmith to repair traps and guns. And he handed out gifts of vermilion, tobacco, mirrors, whiskey and blankets, carefully awarding the largest bounties to the most respected Native elders.

He also extended his influence through kinship ties — by hiring Native and mixed-race staff at the Indian Agency and by fathering a child with the daughter of the Dakota leader Mahpiya Wicasta (Cloud Man). (Their métis daughter, Mary, was born in 1828, and Taliaferro paid for her education.)

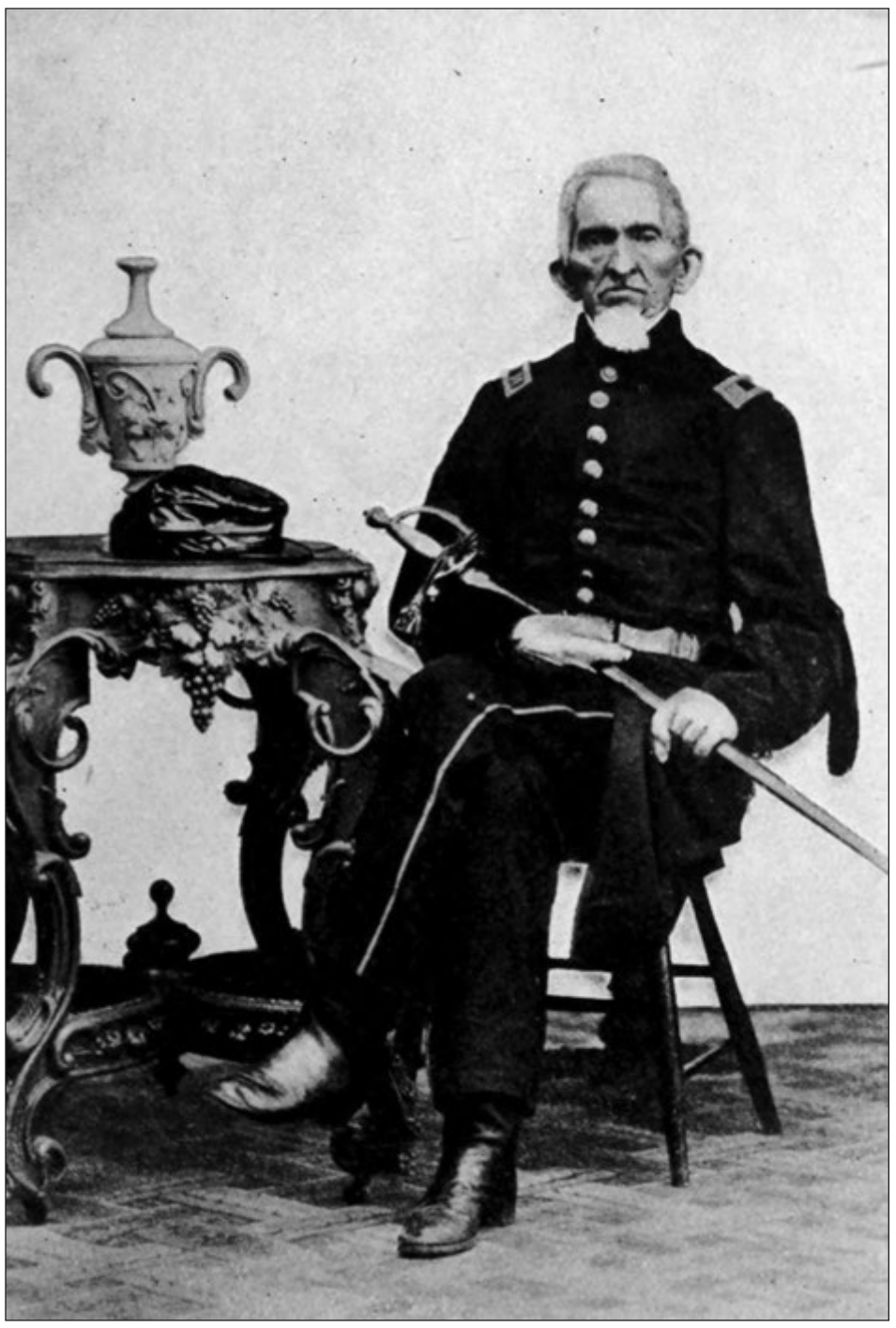
Taliaferro prided himself as an impartial, fair-minded upholder of the law.

"[I am] one that uniformly tried to do his duty to God and his fellow man," he wrote, and am "determined to cause the Indian trade to be well conducted for their benefit on principles of equal justice for all."

Yet he only partially grasped how the basic economics of the fur trade were working to upend Native communities' collectivist, consensus-based social structure, and forcing them into material dependence on whites.

Bears, beavers, deer and other game became increasingly scarce as a result of overhunting, and the Dakota had to travel farther west each year to find food to eat or pelts to sell. Once John Jacob Astor solidified a monopoly over the Mississippi watershed, he was able to depress the price of muskrats threefold and pay poverty wages to even the shrewdest Dakota hunters. "It would be better at once to knock us in the head than to starve us to death," said the Mdewakanton leader Ta Oyate Duta (His Red Nation, also known as Little Crow).

Taliaferro avoided interrogating the role his extensive gift-giving had played in subverting Native communities' self-governance and furthering colonial expansion.



SUBMITTED IMAGE: INTERNET ARCHIVE BOOK IMAGES

Lawrence Taliaferro established the headquarters of the St. Peter's Indian Agency near Fort Snelling in 1820. Until his retirement in 1839, he served as the U.S. government's official representative to, first, the Dakota and western Ojibwe people and, after 1826, just the Dakota.

Instead, he blamed Natives' plight entirely on corrupt fur company agents and their "unfeeling, heartless course of oppression." He denounced them as "officiously interested men who eat of their dainties, wipe their mouths and say, 'I have committed no sin.'"

Taliaferro resolved to punish white traders who charged Natives extortionary prices or tricked them into signing fraudulent documents. Risking death threats, he suspended the licenses of the most deceitful traders and refused to protect predatory lenders who were assaulted as they tried to reclaim their goods.

Taliaferro's crackdown on traders earned him numerous enemies.

"How to get rid of me at this post," he wrote, "seems now the main object of Tom, Dick, and Harry — so that those who may come after me can the more easily be bribed or threatened into silence and acquiesce in the plans on foot to cheat and destroy the Indians."

But his bravado had firm limits; he wouldn't defy his superiors.

When Taliaferro tried to limit the quantity of trading posts in the region in 1824, he was countermanded by Secretary of War John Calhoun, who ordered that sites be opened to "subserve the convenience of both the Indians and the traders."

Taliaferro capitulated and the number of trading posts increased from four to 13 within two years.

The business of white supremacy

Taliaferro could be hardheaded in defending his principles, but at heart he was neither a rebel nor a reformist, and over his lifetime he enslaved twenty-one African American men and women.

At Fort Snelling, he rented out his slaves to soldiers even though slavery was technically illegal in the Upper Mississippi Valley. In 1836 Taliaferro earned a footnote in U.S. constitutional history by officiating the marriage of Harriet Robinson, his former house slave, to Dred Scott. The Scotts later used their residence in free territory as a legal basis for their claim to liberty in the Supreme Court case Scott v. Sandford.

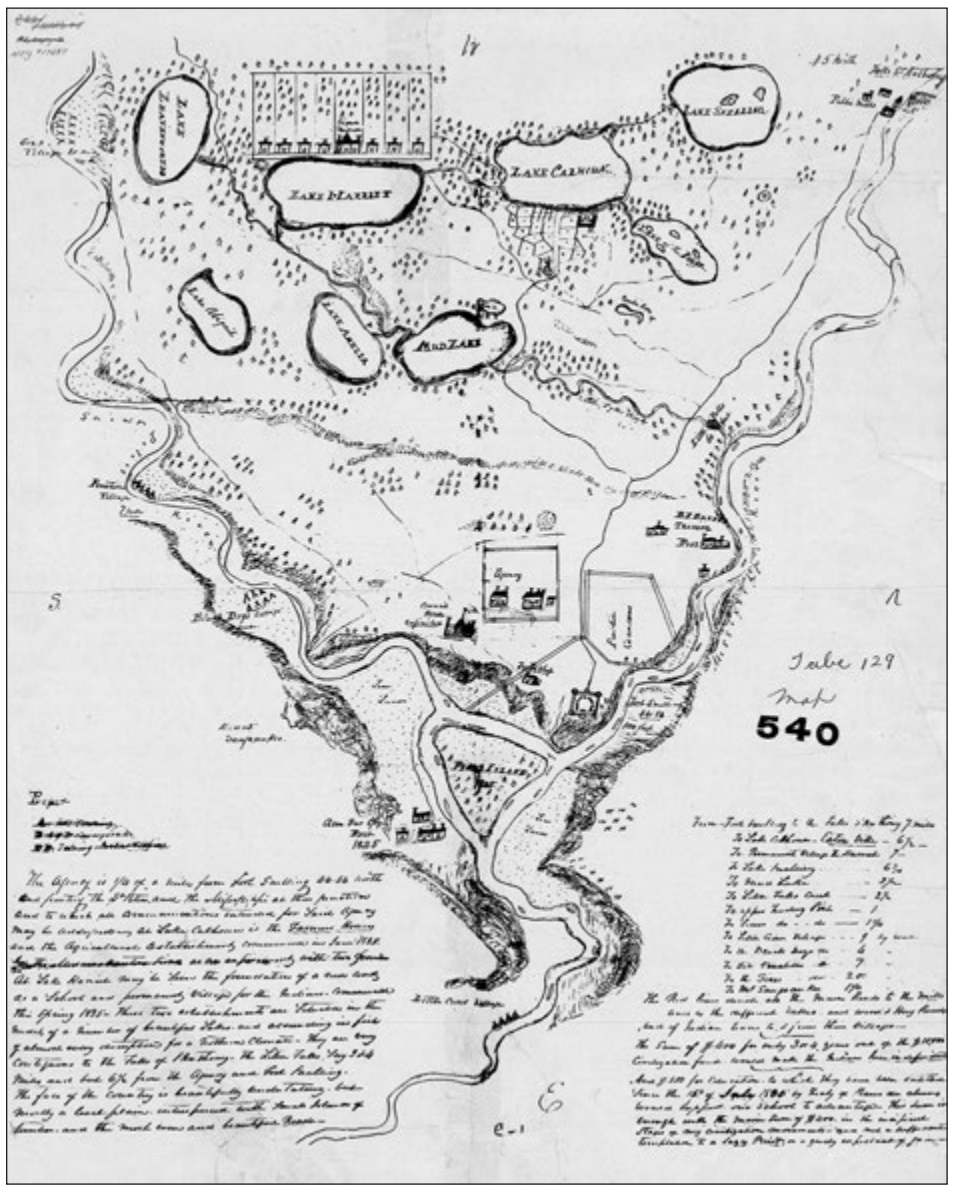
Taliaferro, like most slaveowners of his time, was unopposed to punishing transgressions violently. One of his slaves, he remembered, received so harsh a beating that "the Indians prayed the agent to forbear." And even after he set the last of his slaves free in 1842, he stopped short of renouncing the institution of slavery. He described his decision to emancipate as "a solemn act not influenced by any earthly powers."

In Taliaferro's dealings with Native Americans, his reflexive white supremacy took a different form. He felt greater pity for their suffering, but he was ultimately only willing to accept them as people to the extent that they adopted the habits and customs of his race.

He never became fluent in the Dakota language, and he speculated in his autobiography about the inscrutable "savage heart," asserting that God had given him the power to "soften [it] and control it for good."

To that end, he lectured Natives about the Christian Sabbath and helped funnel money into missionary schools in an effort, as he wrote, to "civilize, instruct and evangelize the benighted Indian."

Responding to the overhunting crisis triggered by the fur trade, Taliaferro urged Native communities to adopt European agricultural practices. Pushing traditionally nomadic populations into permanent settlements would make it



SUBMITTED IMAGE: MINNESOTA HISTORICAL SOCIETY

Taliaferro drew this map of the Fort Snelling area in 1835. He included the St. Peter's Indian Agency, the American Fur Company trading post and a number of Dakota villages — including the farming community he helped Mahpiya Wicasta (Cloud Man) launch on the eastern shore of Bde Maka Ska (Lake Calhoun). The map is oriented roughly west.

easier for missionaries to proselytize.

At Taliaferro's suggestion, Mahpiya Wicasta established a farming village on the eastern shore of Bde Maka Ska in August 1829. Taliaferro nudged the project along by hiring consultants and doling out seeds, draft animals and metal tools. The Dakota took to calling him Maza Baksa (Iron Cutter), and by 1835 the hundred-member community grew squash, potatoes, cabbage and corn.

But Taliaferro faced setbacks in his attempts to westernize "my little colony of Sioux agriculturalists." To his consternation, the Dakota villagers delegated most of the cultivation work to women and some chose to give away their surplus harvest to relatives. The village was abandoned in 1839 amid fears of conflict with the Ojibwe and promises of treaty settlement payments from whites.

While some Dakota leaders like Mahpiya Wicasta had been willing to experiment with the "white man's way" as a path to political independence, their people were ultimately uninterested in becoming farmers. On multiple occasions in the 1830s, Dakota villagers sabotaged Taliaferro's agricultural projects by killing the cows and oxen he gave them.

The larger processes of cultural conquest, however, could not so easily be deflected.

'Running marks round our country'

Taliaferro's persistent campaign of charm, friendship and tribute led most of the region's Native leaders to trust he had their best interests at heart. Between 1820 and 1831, he held more than 200 "peace and friendship" councils between the Dakota and the Ojibwe. "Since our Father came into our Nation, our young men have sense, and our wives and children rest quiet," the Dakota leader Black Dog said.

Taliaferro used this hard-earned confidence to cajole Native leaders into signing a series of ruinous treaties.

Western civilization, with its logging and farming and cities and cash economy, was marching toward the Mississippi, and Taliaferro thought he knew best how to help Native communities adapt. He would serve as a mediator — explaining to Native leaders the inevitability of capitulation and appealing to his superiors for favorable terms and fair enforcement.

In 1824, Taliaferro took a group of Dakota, Ojibwe and Menominee leaders to Washington D.C., hoping to impress on them the inexorable strength of the federal government.

The following year, at Prairie du Chien, Taliaferro gathered a delegation of hundreds of Native leaders and listened as his boss, the former explorer William Clark, browbeat them about the necessity of creating boundaries between their nations. "Your tribes do not know what belongs to them and your peoples thus follow the game into lands claimed by other tribes," Clark said.

The assembled delegates had no concept of private land ownership and didn't see the value of borders. "In running marks round our country or in giving it to our enemies, it may make new disturbances and breed new wars," the Ojibwe leader Noodin (the Wind) said.

Yet, seeking peace, the Dakota, Sauk and Meskwaki (Sac and Fox), Menominee, Ho-Chunk (Winnebago), and Bahkhoje (Ioway) peoples placed their faith in Taliaferro and agreed to establish what President Martin Van Buren called "a dividing line between their respective countries."

The introduction of borders magnified tensions between Native nations. The Ojibwe tried to destroy survey markers and one Dakota chief told Taliaferro, "We suffer more than [can] be well conceived."

Though Native leaders had been promised that the U.S. government did not want their land, the treaty laid the groundwork for their removal — the boundaries established at Prairie du Chien provided a blueprint for future land cessions.

In 1830 Taliaferro engineered a treaty in which the Dakota and the Sauk and Meskwaki agreed to exchange their land between the Des Moines and Missouri rivers for yearly annuity payments in order to create a "common hunting ground" along the Prairie du Chien line. A similar treaty was negotiated between the Dakota and the Ojibwe.

Taliaferro hoped these treaties would ease conflict between the nations, but in fact they created a fierce competition for limited resources and further undermined cooperative relationships between Native communities just as the fur trade was imploding.

Forcible negotiations

Taliaferro was frustrated that his treaties had failed to curb hostilities or help Natives achieve economic independence, and he worried about the "rascality and frauds permitted by the treaty making power generally."

But he felt that the only option for Native leaders threatened by the encroachment of whites was to sell even more of their birthright and live on the proceeds.

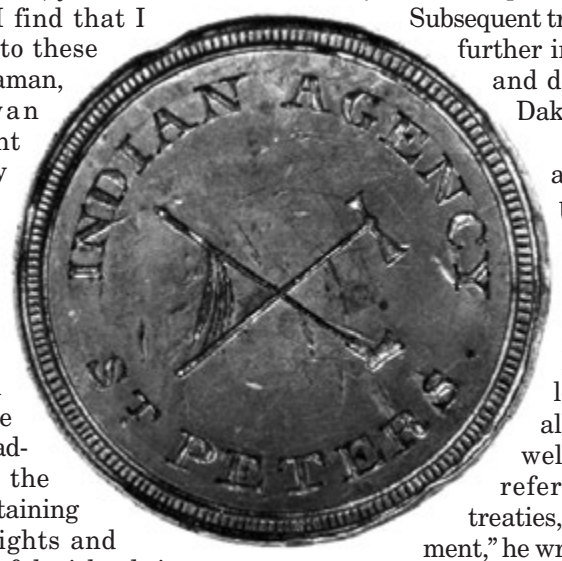
In three 1837 treaties, Taliaferro helped pressure Dakota, Ojibwe and Ho-Chunk leaders into ceding all their land east of the Mississippi River.

Taliaferro set the terms of the treaties without consulting with Native leaders or considering their cultural understanding of land rights, and he had the hubris to imagine that his personal integrity would be enough to foil all "diabolical plans."

While Taliaferro was successful in limiting the amount of treaty settlement money earmarked for traders, the structure of the deals deprived Native communities of autonomy and allowed the U.S. government to manage annuity payments and allocate large portions of the money toward farming tools, missionary schools and other westernizing initiatives.

Influential mixed-race descendants of white men and Native women received an outsized share of the payouts, and one much-maligned clause gave $450 per year for two decades to Taliaferro's interpreter, Scott Campbell.

Brought to Washington by Taliaferro, Dakota leaders felt they had little choice but to accept an offer of about $1 million ($26 million in today's dollars) for their land, even though it was valued at $1.6 million. The Dakota leader Ehake told a U.S. official that while his people were "naked, you are rich and well clothed." "I find that I have no claims to these lands," said Mazaman, a Wahpetunwan leader. "I thought I had but my friends here say that I have not."



During negotiations, Taliaferro's superiors manipulated and misled the Dakota. Tribal leaders emphasized the importance of retaining their hunting rights and their ownership of the islands in the middle of the Mississippi, but their demands weren't included in the treaty, and it appears they were deceived about the contents of the documents they signed.

When they later complained, Taliaferro told them (according to his diary) "to say nothing about islands which had been sold nor the land — but leave the whites alone and [don't] seek to disturb settlers."

A staunch defender of the legal process, Taliaferro partially attributed Dakota discontent over the treaty to the "much ridiculous stuff infused into their minds." But he also blamed the treaty's poor reception on the U.S. Senate, which delayed in ratifying the agreements for nearly nine months.

"There [is] no game to be found on the ceded territory sufficient for the consumption of their families," Taliaferro wrote in a letter. "They say, 'We shall be rendered desperate, and we must see our children starve in our lodges unless we soon get relief from the government.'"

By 1839, the treaty's botched rollout had badly damaged Taliaferro's credibility with Dakota leaders. His relations with traders were also deteriorating — to the point that one man broke into his bedroom and threatened him at gunpoint.

Hated and isolated, Taliaferro announced his resignation. "I leave the whole nest [of] Indians and traders," he wrote in his journal. "I am disgusted with the life of an agent among such discordant materials and bad management on the part of Congress."

Taliaferro moved to Bedford, Pennsylvania, where he rejoined the army as a quartermaster and served as county treasurer before his death in 1871.

A vexed legacy

In the decades following Taliaferro's departure from the Indian Agency, the exploitation of Native communities by whites became starker.

The 1837 treaties prompted a wave of settler-colonists to flood in from the East, and by 1860 whites in Minnesota outnumbered Natives 5 to 1. U.S. government officials did little to defend Natives' treaty-protected hunting and fishing rights, and looked the other way as they were extorted, defrauded and otherwise abused. Taliaferro's successors used negotiating tactics that amounted to a thuggish legal banditry, with naked economic interests superseding even the pretense of fair play.

Taliaferro had gone to great lengths to minimize the meddling of the fur-trade tycoon Henry Hastings Sibley in the 1837 treaty negotiations. But by 1851, Sibley had ascended the ladder of politics — becoming the Minnesota Territory's first congressional delegate — and he helped dictate the terms of the Treaty of Traverse des Sioux. The Dakota people ended up with only $60,000 after forfeiting millions of acres of their land, while traders took home more than $240,000. Sibley himself pocketed $66,000.

Subsequent treaties went even further in impoverishing and deracinating the Dakota people.

In his 1864 autobiography, Taliaferro expressed revulsion at these cruel displays of greed. "The Indians finally lost confidence in all white men, and well they might, in reference to Indian treaties, and their fulfillment," he wrote. "The human heart seemed deceitful above all things and desperately wicked."

Yet Taliaferro smugly placed the blame on others. "But for the treaty of 1857," he wrote, "the Sioux bands of the Dakota nation would have been a peaceable and thriving people."

Taliaferro was undeniably a blinkered, self-justifying, often-callous bureaucrat who faithfully served an oppressive cause. But he was also a man of principle — leery of violence and willing to defy social pressures in defense of his convictions.

Ta Oyate Duta, the Dakota chief who commanded fighters in the War of 1862, remembered Taliaferro's tenure as Indian agent wistfully.

"Since you left us a dark cloud has hung over our nation," he said.