August 26, 1977

MEMO

To: Panelists, Consultants, AFSC staff members (Ed & Kathleen)
From: Carol Brewster, AFSC Maine Indian Program Committee

The typed version of the tape done on August 13 with three of the panelists at the Vassalboro Friends Quarterly Meeting in So. China is badly garbled, virtually illegible and incomplete. Unfortunately, the tape was perhaps too faint in significant places for the typist (who was not at the meeting) to decipher.

I've compared this with my notes of the meeting and am sending you an abridged version of the panel discussion based on my notes.

Bob Cates called & gave me the addresses. Enclosed is the typed tape (½ typed) — pretty hard to understand. Dorothy must have had a difficult time hearing it & trying to make sense of it.

Carol

Panel discussion concerning the Indian Land claims Case in Maine
at Friends Quarterly Meeting, August 13, China, Maine
Participants: Moderator (questions)-Bob Cates, AFSC Me. Indian Comm. Chr.
Panelists-Robert Neuman, professor of ethics and philosophy
Colby College
Willard Walker, professor of anthropology
Wesleyan University
James Mitchell, attorney and former director of the
Maine State Housing Authority

QUESTION: SHOULDN'T THE CLAIMS BE EXTINGUISHED BECAUSE OF AGE?

Mitchell: If old documents are to be discontinued, we'd have to discontinue the U.S. Constitution. These aren't new claims...The Indians have petitioned the state legislature for many years.

Walker: There have been attempts to evict Indians from their tribal land as recently as the 60's. The Indians staged a "sit-in" to avoid being dispossessed.

Neuman: New invasions of tribal land have occurred fairly continuously.
Let's look at two perspectives:
1-as a friend of the dispossessed, concerned about a history of injustice; and
2-the perspective of judicial balancing.
Where do the elements of justice lie? Conquest is an ancient kind of title. I hope we've moved beyond this kind of claim.

Mitchell: The 1790 Non-Intercourse Act is valid and applies to the Passamaquoddies. That's pretty clear. In Rhode Island the Court ruled that none of the following defenses would be heard: laches as a defense, statue of limitations, adverse possession, operation of state laws, and public policy. The issue was resolved in district court. The Indians got 200 acres.
The Indians are the only racial group recognized by the Constitution. In the 1830's while the Cherokee cases wereebeing tried, Supreme Court Chief Justice John Marshall called Indian tribes "domestic, dependent nations".

Walker: The special legal rights of Indians are older than 200 years. The European crowned heads agreed the land was the Indians' and had to be bartered for, had to be bought.

Neuman: We've been talking about the land-based status of American Indians. When you move from this concept to a modern industrial concept it is difficult to translate an old claim of 1790 to today.

Mitchell: Land was taken from Indians because they weren't "civilized", because they wouldn't farm it. Now we're saying they can't have it because they are "civilized".

QUESTION: DOES THIS CLAIM WRECK THE ECONOMY OF MAINE?

Neuman: The "transition period" argument has force...Cloudy title to land creates problems... No construction, or land sales or bond sales, etc.

Walker: The transition period has lasted many years for Indians. Their title was clouded.

Mitchell: Mortgages were not available in Maine to Indians on reservations until 1975. In 1975 the state agreed to a guaranteed progam.
As for a possible economic disruption:
- a financial settlement. It would bring more money into Maine.
- a land settlement. The tribes are looking at timber and public lands. Selling timber and tourism means no real change.

Neuman: as for the equity in giving Indians paper company land, what about injustice to the corporation?

Mitchell: Large paper companies use land for timber and paper production. They would continue to buy timber from the tribes. It is politically easier to work out a settlement with a large landowner than with many small landowners.

Walker: In 1820 when Maine became a state, Maine assumed Massachusetts' obligations to the Indians.

QUESTION: IF THE INDIANS WIN IN MAINE, WON'T THERE BE LAWSUITS THROUGHOUT THE COUNTRY? IS THIS JUST THE TIP OF THE ICEBERG?

Mitchell: Maine isn't the tip of the iceberg. It's the rest of the iceberg. This is the largest of the land claims cases pending.

QUESTION: IF INDIANS WIN THE CASE AND WIN MONEY AND LAND, WOULD THEY BE ABLE TO MANAGE IT?

Walker: Incompetence is difficult to assess. The way to keep a people incompetent is to keep their money and land away from them. At one time, before the arrival of the European, Indians were good custodians of the land. There were salmon in the rivers and the rivers were clean. If the tribes are incompetent, they'll lose all their land and money to white people. Otherwise, they'll manage well.

Bauman: That's the irony of the "white man's burden" approach. Yes, they're not ready for it while we keep them from responsibility.

Walker: The real loss for the tribes has not been real estate, but the chance to run their own affairs.

Mitchell: The Indians have been legal wards, but they might be better at taking care of themselves.

QUESTION: WHAT IS AN INDIAN? HOW CAN INDIANS BE CITIZENS AND ALSO MEMBERS OF A TRIBE? WHY DON'T THE INDIANS WANT TO BE PART OF THE MELTING POT?

Walker: the pseudo-biological definition is ½ Indian blood= Indian. State services have only been given to those Indians on the reservations in Maine. It is a mistake to let the state impose a definition on the Indians. Instead, ask the Indian community.

Mitchell: An Indian tribe is a body of Indians of the same race united in a community on a defined territory.

Bauman: About the melting pot question....One attitude in this country is for the melting pot idea, for homogenization. Another attitude supports unity without similarity-a recognition of differences. There are many ethnic communities in the U.s. The 60's and 70's have seen an emergence of the second attitude in this country--respect and appreciation for differences.

QUESTION CONCERNING CLAIM - 12½ million acres, not over 3500 Indians
land ⇒ money

Bauman: How do you right an old wrong without creating a new injustice?

Mitchell: The claim represents only a small percentage of the federal and state budgets.

Walker: The obvious solution is a settlement, but the Governor and Attorney General (of Maine) talk litigation.

Bauman: The land claim reflects Indian values - common ownership, indivisibility.

From Bob Reuma

QUESTION #1: THE LAND CLAIM IS AN OLD ONE.

Many of us are puzzled about this aspect of the situation. We believe that we know how to handle injuries or resolve disputes which arise out of the recent past, but one which goes back, as this one does, before the birth of our country, seems to pose special difficulties. Those difficulties, of course, concern not merely time, but that the parties to the dispute are not merely private parties, or these in relation to a government, but include as well a semi-sovereign nation within the confines of a sovereign nation.

Nor is the question really about the age of the claims, for there are many ancient claims and rights which are nevertheless clear and unambiguous. Rather the question has to do with whether the passage of time has clouded the issues, or led to contradictory claims with their distinct validations.

Bur the question is not really a single question, but a bundle of questions. So let us sort them out.

One sub-question has to do with the reliability of ancient evidence. Memories fade. Conditions are forgotten. Meanings and standards shift. It is for these reasons that a statute of limitations is a wise legal procedure. The general procedural rule that seems to follow is a conservative one: it is better to go with previous prevailing interpretations and understandings, than with disruptive ones, on the assumption that the evidence must have seemed in the past to past interpreters to support the established opinion.

In the present case that would mean that standing land titles should be respected. Both Indians and non-Indians would have to share this opinion, for any stable society must depend on the reliability of adjudicated land and property claims, or else nothing is secure. Even many human rights are dependent on secure property rights. If proper title can be disrupted today, then in principle it can be disrupted tomorrow. Today's winner would be tomorrow's loser. Indeed we would all lose. Dependable procedures are a social imperative.

The conclusion seems to be that well recorded and adjudicated claims within the last 200 years should stand. That is, from the founding of this country, or at least from the Non-Intercourse Act of 1790. The Passamaquoddy appeals to this principle when he protests invasions of his land rights under the 1794 treaty. The non-Indian appeals to it when he shows that his land claim is founded in purchase or inheritance of a clear title.

But now another sub-question arises: when we say the issue is an old one, exactly how old is it?, 1794?, 1790?, 1776?, When the U. S. Constitution was adopted?, Or earlier? Some of the royal charters go back to 1620, and the aboriginal land claim goes back 3,000 or even 10,000 years.

Probably all these dates must be considered. That means, in turn, that different kinds of land claims are involved, and even changing conceptions of what constitutes a legitimate claim. This is another sub-question of the "old claim" issue.

The king of England thought that he had a claim through discovery, and conquest, and that he could convey this title through charter. The original inhabitants thought they had a claim through conquest or occupation and through contributions to the

Revolutionary cause; but they had a different sense of what it meant to own land and who it was who could own. Maine received some land from the State of Massachusetts, but also both bought and sold land within its borders. Are these claims all justified? Are they compatible with each other?

We cannot today, nor should we attempt to, answer these questions. But a few observations can cut through the confusion to the issues that do concern us as citizens.

1) In some measure the change in standards, for example our present reluctance to use conquest as a justification, and our defense--and that of the framers of the constitution--of aboriginal title, can be, and I believe should be, viewed as a progress in moral sensitivity. Let us not revert to what was, at least in this respect, a less enlightened moral judgment. In any case, the issue does not concern the <u>fact</u> of aboriginal title, for that is uncontested, i. e. in reservation land, but, rather the <u>extent</u> of aboriginal title, and what are present just remedies for past injuries to that title. It should be clear that we should not condone, or use, past or present violence to resolve disputes about land claims. There are lawful procedures for resolving such disputes and they must be used. Whites have prided themselves on these procedures in the past. Indians have learned to use them. Now we must let those procedures take their course, and contribute to them where we can.

2) The Non-Intercourse Act of 1790 now is law of the land, for eastern Indians as it has been for western Indians.

This means that the U. S. government has responsibility for protecting native Americans in the east, and verifying any land sales involving Indian title. I am not clear on whether this change in the interpretation of a law can be applied retroactively, or, if Maine Indian land titles have been violated, how that can be rectified without violating what appear to have been non-Indian property rights for the last 200 years. Again these issues need to be resolved, rapidly and fairly, through litigation or negotiation.

3) Not only should we recognize the recent legal change in the status of Maine Indians, but I believe we should welcome this change on moral grounds. In effect, we can now say with some punch to it, that we are proud of the diversity of cultures within our borders; that a land based native American culture should be maintained and protected as a precious and unique living national heritage. Americans, both of native and foreign descent, can be proud of that heritage and its protection.

4) In protecting the rights and heritage of one group of Americans, we must be careful not to injure the rights and heritage of another group of Americans, or if there is unavoidable injury, that burden must be spread over the entire population. If the Passamaquoddies and the Penobscots in fact have a proper claim to land they do not now control, then it would not be just to merely evict the present "owners", who thought they had a bona fide title, without compensation. That would be rectifying one injury by creating another injury. Ownership of the

land, and the control of positional goods, may not be sharable; but to some extent the loss of that benefit can be stated in money terms and that loss can be shared as widely as possible. I would think that rectification is a federal responsibility rather than either an individual or a state responsibility. It should be added that if loss of land can be partially rectified by money payments, then that principle could apply to past Indian losses or future non-Indian losses.

One last comment before leaving the general question of the "old issue". As is already evident, to call it an old issue is misleading if it conceals the contemporary growing edge of the problem. It is also misleading if it implies that any and all relevant grievances are 200 years old. Unfortunately there has been a continuous history of erosion of Indian land. Worse yet, the original hurt to an Indian that died 200 years ago did not disappear when that injured person died. It was passed on to his descendants in increased burdens and reduced resources, above all in frustrated hopes and shattered image of self and group. That too must be redressed to whatever degree possible.

It is true that an injury to a long dead person cannot be rectified by an action taken today; but the continued transmission of that injury to living descendants can be ameliorated.

(The above speaks, not only to #1, but also somewhat to #6 and #7).

QUESTION #3: ECONOMY WILL BE RUINED.

The economic problem is not a single problem but a nest of problems or concerns. Some are private while some are public, and some are short while others are long range. Most of them are questions about what happens after or while anticipating a change, but there are also economic problems, chiefly concerning Indians, if there is no change.

Assume then that a change in land ownership is to be expected, and soon. Much of the problem concerns the unsettled character of the transition; what will happen and when. With uncertainty there is a clouded title to land. When ownership becomes clouded then the apparent owners might refuse to pay taxes and bond companies might not guarantee public loans because of the uncertainty of future property tax collections. For the moment this particular threat appears to have passed. There remains another set of problems: property of uncertain ownership could not be bought or sold. That would curtail real estate transactions and bank mortgages. With uncertain ownership, construction would stop or not be started. Job and property worries would bring about a conservative reaction and depress local economic activity. A protracted period of uncertainty, brought about by slow negotiations, prolonged litigation, or contested settlements would disrupt ownership, jobs, banking, and business activity for at least the length of the period of uncertainty. This could easily be ruinous for the economy of and within the state.

Once the transitional period was over, we can presume that the economy would gradually return to normal, provided that the disruption had not been too long or too severe. The return to normalcy

would occur once title was clear whether the subsequent owners were new owners or not. I believe that for normalcy to occur with a change in ownership, everyone would have to be convinced that title transfer had been legitimate and fair. If not, no one could be assured of future title guarantees.

Clearly the best solution would have to be not only fair and just, but also very speedy.

Another set of economic problems are those of the private or corporate landowner who might be dispossessed. He doesn't know whether to continue to pay taxes, to continue paying on his mortgage, to continue construction and maintenance. If he has a change of fortune and needs to sell his property, he knows that he cannot, or cannot easily, for a period of time, do so. He might be tempted to remove the movable portions of his holdings and transfer them to an area of clear title.

Are there assurances for him, and are they enough? The present Indian position appears to be to limit claims to areas of large corporate landowners upstate, and to not evict. That might give the small owner some consolation, but clearly not the corporate owner, and it is hard to see the distinction in justice between the two cases. No matter whether one likes or dislikes large landowners, corporate or not, to violate their legally recognized rights is a violation that hurts all of us, and to undercut their previously grounded and substantiated expectations of ownership would cut into their operations, reduce their employment capability, and possibly drive them from the state.

Landowners, large and small, know that they can fight against dispossession, or for compensation for dispossession, in the courts.

But that is small comfort when most of us cannot afford the costs of such litigation, especially if the legal adversary is a branch of the U. S. government. Somehow more adequate assurances on these matters must be given than I can presently bring forth.

One other economic argument has been used, and needs to be countered. Namely, that the Indians, if they win their case, could not be trusted to manage that magnitude of property and that a mismanaged economy would run quickly down hill. Briefly, this argument appears to me to be an unprovable pre-judgment; it is condescending and often rascist. This type of argument appears to be used exclusively by the "haves" when the "have-nots" threaten to unseat previous patterns of dominance. I have heard the argument used against Blacks, women, domestic minorities, and for maintaining countries in colonial or semi-colonial status. The only response I know, briefly, is:

1) One learns to manage by managing, and one learns responsibility by having responsibilities.
2) In every group there are some that can develop these abilities, and there may be some that have not, or could not develop them.
3) There is no reason for shutting out any natural group of humans, other than on grounds of individual merit, from leadership, management, or ownership roles.
4) If training and educational opportunities are needed to develop the requisite abilities, let us quickly determine the objectives and programs for acheiving them, and get them underway.

QUESTION #5: MELTING POT, WHY NOT THE INDIANS?

My answer to this question is twofold. First, I believe that the "melting pot" metaphor can now be seen to be an incorrect application of a correct and important principle. The important principle is to judge people on individual merits, and give everyone an opportunity to prove himself or be himself in his own way, without prejudice because of his origin, skin color, religion or creed. We once thought that this principle was to be acheived by melting everyone down into homogeneous similarity, but that conclusion is surely impossible and undesirable. We cannot want one average religion, one average skin color, one average creed or set of customs. We need the beautiful diversity of pluralism, each of us free to pursue our own way and preserve our own heritage provided only that this freedom of each does not handicap or frustrate the corresponding freedom on the part of another. We are right to prize our several backgrounds without embarrassment, be they Polish, German, Chinese, or Indian, provided that they are hyphenated, that is Polish-American or Japanese-American, i. e. compatible with each other. That rules out only fascist and domineering patterns. Recently we have found that there are even advantages in being bi-lingual, provided only that we have a common language among us.

Secondly, even granting this, we have to recognize the special uniqueness of native Americans. This is expressed and guaranteed in the constitution. It recognizes that they, as the earlier inhabitants, have a land based claim to existence that our greater power and numbers should not over-ride. Restruction may be unavoidable, but elimination of their tribal/nation claim is neither legal

nor morally defensible. In a sense we are still their guests. The ancestors of most non-Indians--unfortunately, not all--chose of their own volition in the last several centuries whether to come to America. Indian ancestors did not, at least not in the same sense, and did not invite the Europeans to join them. In addition, there is much we can learn from them: communalism, respect for the rivers and ocean and Katahdin, of how to roll with the seasons. I find in the sense of community, in the stewardship concept of property, and in the idea of accommodation to nature echoes of an earlier christianity that we have too completely forgotten.

The unique status of native Americans as both full citizen and not, as members of a "domestic dependent nation" as well as of the sovereign United States, may seem to give them unfair advantage over the rest of us. Ironically, the actual effects seem to be the reverse of that. They appear to have the worst of both worlds, rather than the best. This need not be the case, however. I believe that we are now realizing that, and that the present task is to undo such past damage as we can, in justice and fairness to <u>all</u> of us.