ANALYSEN UND BERICHTE

The Controversy about the Oil Drilling in the Badger-Two Medicine Area

Territorial Rights of the Blackfeet and the Oil Drilling Projects in the Federal State of Montana[1] – An Assessment from the Point of View of International Law[2]

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1. Facts of the case

The Badger-Two Medicine area in the US Federal State of Montana is part of the so-called Rocky Mountain Front which – outside Alaska – is the largest continuous forest area in the USA. Within the Rocky Mountain Front the Badger-Two Medicine area covers approx. 500 sq.km. of federal forest and borders directly on the Glacier National Park as well as the Blackfeet reservation.

The Pikuni-Blackfeet, who together with the Siksika (Blackfoot), Kainah (Blood) and the North Pikuni (Piegan) formed the original Blackfeet Nation, live in this Blackfeet reservation. At the moment there are about 15000 registered tribal members of the Pikuni-Blackfeet in the USA of which approx. 7000 live in the Reservation in Montana. The Badger-Two Medicine area represents a sacred place for the Pikuni-Blackfeet. The area is the home of Thunder, one of the most important spirits in Blackfeet mythology, the donor of the holy "Thunder pipe medicine bundle", which contains holy objects. In addition, the Pikuni and Kainah held and still hold their sun dances in the Badger-Two Medicine area. The area is the home of their spirits, a place where they fast and pray, where they seek visions and communicate with the Creator. Here, traditionally, the Pikuni-Blackfeet pick medicinal herbs and gather plants for their rituals; here they can pursue their traditional religious rites

1 This study originated from the initial idea of Blackfeet-Chief Heavy Runner and the Association for the Support of North American Incians – Blackfeet Support Group (Berlin).

2 I wish to express my thanks to Julia M. Cole and Mark D. Cole for the English translation of the study.

which are essential to the survival of their culture.[3] Already in 1851, the boundaries of the Blackfeet Nation were described in the treaty of Fort Laramie, concluded between the USA and various American Indian nations, amongst which the Blackfeet Nation, however, was not to be found. Yet today's Glacier National Park as well as the Badger-Two Medicine area were within the boundaries of the Blackfeet Nation.

In 1855, A. Commings and Isaac J. Stevens as plenipotentiaries of the USA concluded the first treaty with the Blackfeet Nation which consisted of the tribes of the Piegan (Pikuni), the Blood (Kainah), the Blackfoot (Siksika) and the Gros Ventres as well as the Flathead Nation. This so-called Lame Bull Treaty of 17 October 1855[4] came into effect in accordance with article 16 after its ratification through the Senate and the President on 15 April 1856. In articles 1 and 2 of the treaty all the contracting parties promise each other to maintain peace and friendship with each other. Moreover, the contracting Indian nations in article 2 also pledged themselves to maintain peaceful relations with other tribes and refrain from hostilities, with the exception of self-defence. In article 3 part of the area, which in the Fort Laramie Treaty from 1855 was shown as belonging to the Blackfeet Nation, is defined as hunting-grounds common to all the contracting Indian parties for a period of 99 years.

Finally, in article 4 it is recognized that certain areas, specified there, constitute territory of the Blackfeet Nation, in which it exercises exclusive jurisdiction. In article 7 the contracting Indian nations grant the citizens of the United States the right to travel through their territory unmolested or live there. In return the USA promise the Indians protection against unlawful actions of their citizens. In addition the USA are granted the rights to run roads and telegraph lines through the Indian territory as well as to set up military posts, agencies, missions, schools and stations there. In return the USA pledge themselves to grant the Blackfeet annual support and to build up and promote their agriculture through a further annual sum, to contribute to the education of the Blackfeet children and to advance their civilization and their conversion to Christianity. According to this treaty the Badger-Two Medicine area and the area of today's Glacier National Park were part of the Blackfeet territory.

Already prior to this treaty, in 1846, the frontier between Canada and the USA was defined. The frontier ran right through the Blackfeet territory, without there having been any agreement with the Blackfeet about it. The consequence of this was that the southern and northern groups each had to come to agreements with different contracting parties.

3 Cf. in detail "Blackfoot culture, religion and traditional practises in the Badger-Two Medicine area and surrounding mountains", historical research associates, prepared by *T. Greiser* and *T. Weber-Greiser*, 9 July 1993.

4 11 Stat. 657.

The previously existing practice in the USA of dealing with the Indian Nations and Tribes through treaties just like with other sovereign states was changed by law on 3 March 1871.[5] The so-called Law of Appropriation provided that no Indian nation or tribe within the territory of the United States was to be regarded as an independent nation, tribe or power, with whom the United States were allowed to deal by means of treaties.

Nevertheless, also after this law there were further agreements between the USA and Indian communities, for instance between the Blackfeet or individual Blackfeet tribes, which led to the extensive cession of land and to separate reservations for the individual Blackfeet tribes.

At the initial stages of these agreements the original culture of the Blackfeet as buffalo hunters had been largely ruined. In 1874 there still were approx. four million buffaloes in the Northwest, five years later merely a few buffaloes remained after the ruthless extermination by white hunters. Moreover, in 1870 the so-called Marias River massacre took place. In this act 173 Blackfeet, mainly children, women and elderly people were killed by the US army in an attack on a Blackfeet village, whilst most of the braves were hunting. As a result of all of these events the Blackfeet had become to a large extent dependent on food rations and support by the USA.

On 10 July 1896 the Congress eventually ratified another agreement[6] concluded between the Indians of the Blackfeet reservation in Montana and the United States on 26 September 1895. This agreement modified additionally the original treaty of 1855 and the agreements made as up to that date. According to article 1 of the agreement of 26 September 1895 the Indians of the Blackfeet reservation renounced all their rights in connection with the part of their territory at that time which today forms the Glacier National Park and the Badger-Two Medicine area. According to the oral tradition many Blackfeet started from the assumption that this land was only to be leased to the USA for fifty years. Supposedly the relevant decisions were deliberately translated wrongly into the language of the Blackfeet who signed the agreement. In the written version of the agreement which was ratified by the Congress it reads that the Indians relinquish their rights, renounce the territory and transfer it to the USA. On the other hand it is stated in the agreement that the Indians continue to hold and reserve the right to enter any part of this land as long as this area remains public land of the USA, to fell and take away timber for the purpose of their schools, agencies and private use. Beyond that the right to hunt and fish is reserved and preserved for the Indians in correspondence with the hunting and fishing regulations of Montana.

5 16 Stat. 566.

6 29 Stat. 321, 354.

Nevertheless it was determined by law on 11 May 1910[7] that part of the area in which the right to enter at any time, to fell and gather timber, as well as to fish and hunt was reserved for the Indians, became a public park with the name of Glacier National Park. Through this law and the Glacier National Park regulations the rights to fell and gather timber as well as to fish and hunt were withdrawn from the Indians in this part of the area, but not in the Badger-Two Medicine area.

The extraordinary religious importance of the area is made clear by the fact that the Blackfeet compare Badger-Two Medicine with Mount Sinai where Moses received the ten commandments from God. Although there is oil there too, no true Christian would ever dream of permitting oil wells there. Hence, the Blackfeet cannot acquiesce in the desecration of their holy mountains.

Already in 1973, the Blackfeet Tribal Council passed a resolution showing the Badger-Two Medicine area as sacred land. This resolution is also confirmed by the resolution of the Blackfeet Tribal Council of 4 February 1993.

In 1981 the plans became public that the combines Fina (Petrofina) and Chevron wanted to drill for oil in the Badger-Two Medicine area. To this end Fina Oil and Chevron USA acquired the mineral lease for the Badger-Two Medicine area. Shortly after, the first trial drillings were made. In 1983, Fina made an application for a permit to drill at Hall Creek, a site within the Badger-Two Medicine area and Chevron made an application for a permit to drill in the Goat Mountain district, situated in the southern part of the Badger. The first Environmental Impact Statement came to the conclusion that it was permissible to drill for oil in the Badger-Two Medicine area, even though environmental damage was to be feared and there was only a 0.5 percent chance of actually finding oil or gas there. After several appeals against the Environmental Impact Statement the US Forest Service commissioned the Historic Research Associates to make a statement about the culture, religion and traditional practices of the Blackfeet in the Badger-Two Medicine area and the surrounding mountains. This statement arrives at the conclusion that the Badger-Two Medicine area is of particular importance to the religious and cultural activity of the Blackfeet, just as had previously been stated verbally in 1989 by the Blackfeet elders and especially Floyd Heavy Runner, chief of the Brave Dogs that are one of the oldest braves of the Blackfeet.

Not only the Blackfeet Indians raised objections to the drilling project, it also aroused the opposition of environmentalists. Besides, the forestry council of Montana State and the Glacier National Park administration disapproved of the Environmental Impact Statement by the US Forest Service which recommends the drilling for oil. Thus the Montana Fish and Wildlife Department drew up a counter-statement with the advice to abandon the

[7] 36 Stat. 354.

drilling for mineral oil. In this counter-statement the US Forest Service is reproached of having used a method which is not scientifically recognized to assess the effects of the oil drilling project on the Grizzly bear population in the area.

All the same, just before the change from the Bush to the Clinton administration, the US Forest Service as executive, referring to the applicable law of 17 January 1993, granted the Fina combine an immediate permit to drill at Hall Creek. As a result there were widespread protests from environmental organisations, human rights groups and Blackfeet in the USA. Some of the big dailies reported the case which also found international attention. Subsequently, the new Clinton Administration issued a decree through the Secretary of the Interior Babbit, on 29 April 1993, which ordered a one-year prohibition to drill. This prohibition to drill was first extended in 1994 until 30 June 1995 by the Secretary of the Interior Babbit and then once more by a decree until 30 June 1996. Meanwhile, this prohibition has been extended for a further year through 30 June 1997. Until that date all drilling for oil in the Badger-Two Medicine area is prohibited.

In addition it is being investigated on the part of the US Forest Service whether a so-called 'traditional cultural district' can be created for the Blackfeet in the Badger-Two Medicine area, where they will be able to pursue their traditional religion and culture. If the Congress approves this project, the 'traditional cultural district' would be included in a National Register. Nevertheless, the proposal does not provide for including the Badger Canyon in the district. In that case also the oil-well planned by Fina would lie outside that particular 'traditional cultural district' of the Blackfeet. Also this project is to be decided in the course of 1996.

In the following the attempt is undertaken to examine whether, by the standards of treaties and international law, it is legal to grant permits to drill in the Badger-Two Medicine area to Fina or Chevron, respectively.

2. The Status of the American Indian Communities according to the jurisdiction of the US Supreme Court

From the outset it is a remarkable occurrence that the European countries and later the USA concluded treaties with the American Indian communities, which, as far as form and content are concerned, corresponded to treaties with other states. Still today in the literature relating to international law attention is only sporadically paid to the existence of these treaties; the descriptions of the history of international law mostly point out that the extra-European communities were excluded from the international community and that their

territory, considered to be unowned, could be occupied.[8] This is apparently incompatible with the concluded treaties, which possibly lack consideration as a result of the fact that numerous collections of treaties did not include the so-called colonial treaties.[9]

The scrutiny of these treaties shows that the United States alone have concluded 366 treaties with the so called Indian Nations and Tribes. This practice of dealing with the Indian Nations and Tribes through treaties in the same way as with other sovereign states only changed after the law of 3 March 1871[10] which explicitly prohibited to conclude treaties in the same way as with sovereign states with the Indian Nations and Tribes within the territory of the United States in future. Great Britain concluded numerous treaties with the Indian communities in North America as well. This is also the case with France in the area which today is Canada.[11]

From the outset the United States have particularly clearly expressed that they did not assume they were allowed to just occupy the land of the Indians. Already the law of 3 March 1789 determined that land and possessions were not to be taken away from the Indians without their consent, with the exception of just and lawful wars, which the Congress had to have approved. Besides section four of the first Non Intercourse Act from 1790[12] stipulated that no purchase of land carried out by an Indian or an Indian nation within the United States was valid, unless it was a result of a treaty with the government of the United States. In the second Non Intercourse Act from 1793[13] it is confirmed once more that Indian land may only be purchased with the consent of the government of the United States. By the mere statement that only lawful wars may be made on Indians, it was affirmed that the Indian nations possessed the capacity of international law in this respect and their status as combatants was recognized.

All the Colonial Treaties, which according to their form and content can be classed as appertaining to international law, refute the theory of the unrestrained right of occupation and of the alleged exclusion of the Indian nations from international law at that time.

Hence, the Supreme Court tried to settle the status of the Indian nations and their relationship with the USA with three important decisions between 1823 and 1832. These decisions

8 Cf., e g. *Wilhelm G. Grewe*, Epochen der Völkerrechtsgeschichte, 1984, pp. 638 ff. with a list of further reading.

9 These treaties, however, have now been printed in: *Clive Parry* (ed.), The consolidated Treaty Series, Special Chronologue 1648-1920, Vol. 1, 2 ff.

10 16 Stat. 566.

11 Cf. *Christophe N. Eick*, Indianerverträge in Nouvelle-France, 1994, pp. 101 ff..

12 1 Stat. 137.

13 1 Stat. 330.

were in each case drawn up by Chief Justice Marshall. The decision Johnson vs. McIntosh[14] is about the hereditary rights to the land, i.e. the aboriginal title, which is still to be considered in detail. In both decisions, Cherokee Nation vs. Georgia[15] and Worcester vs. Georgia[16], Chief Justice Marshall tried to settle the status of the Indian Nations. The Indian Nations and Tribes are referred to as 'domestic dependent nations'. The individual terms are explained in more detail in the decisions Cherokee Nation vs. Georgia and Worcester vs. Georgia.

The US Supreme Court first points out that the Indian Nations and Tribes are states and form individual separate political entities. All the European countries and the United States had treated the Indian Nations and Tribes as states ever since the colonization in North America. Numerous treaties recognized them as nations, who were in the position to maintain military and peaceful relations.

However, the territory of an Indian Nation or Tribe was not to be regarded as a foreign country in relation to the United States. This was a consequence of the Right of Discovery which was recognized by all European states and approved in the treaties between these states. This Right of Discovery gave the USA as the discovering state an exclusive claim in relation to all the other European states, to acquire the discovered land from the Indians. So the Indians were not allowed to dispose of their own land as they pleased, but could exclusively transfer it to the USA.

After all, the Indian communities were also dependent on the United States. In most of the treaties they themselves acknowledged this, since they had entrusted themselves to the protection of the United States. Besides, the Indian communities had in the mean time come into a state of minority. Their relations to the United States resembled those of a ward to his guardian. In this context it is easy to recognize the notion of civilization as held by most theorists of international law, in particular de Vattel, in the 18th and 19th centuries.

However, with the second decision Judge Marshall has considerably limited the statement that the American Indian communities were dependent nations. There he states explicitly that the independence and right of the Indian communities to self-government or self-determination was not changed at all by the fact that the Indians had entrusted themselves in the first instance to Great Britain's and then to the USA's protection. According to a recognized principle of international law weaker powers do not lose their independence and right of self-government through entering in an alliance with a stronger power and claiming

14 21 US 543 (1823).
15 30 US 1 ff (1831).
16 31 US 515 (1832).

protection from it. Thus, above all in the second fundamental decision, it is affirmed explicitly that the Indian communities enjoy the capacity of international law. However, these Indian communities may only maintain relations with the European state which qualifies as discoverer, or by that time the USA, and with no other state. In the opinion of the US Supreme Court this limitation results from the right of discovery which, even though it was hardly reconcilable with the notion of natural law, represented valid international law which the Indians would have to accept.

Explicitly then on the one hand the status of subjects of international law is partially granted the Indian communities. On the other hand this is subject to certain restrictions. Consequently, it is settled that in the opinion of the US Supreme Court the relations between the United States and the Indian communities show both elements of domestic and international law. The position of the United States as trustee of the Indians with the authorization to legislate, i.e. their position of trusteeship, was never questioned by the US Supreme Court. Accordingly, the US Supreme Court interpreted and still today interprets the relation between the USA and the Indian Nations and Tribes as a mixed position of international and domestic law.

Above all it remained questionable to which extent the United States had the right to enact laws as trustee of the Indians and thereby to also override decisions from treaties. The US Supreme Court decided with two decisions on the practice of the USA, which had begun after 1871 and extended steadily thereafter, of modifying the treaties unilaterally or invalidating them by law. In first place it expressed its opinion about this matter in the case United States vs. Kagama[17]. In this decision it is recognized that the Federation holds extensive jurisdiction for regulations as far as Indian affairs are concerned. How this may take effect on treaties was decided by the US Supreme Court in 1903 in the case Lone Wolf vs. Hitchcock[18]. On this occasion the US Supreme Court declared that according to the concept of trusteeship the Congress was empowered to enact laws which were in their best interests for the Indians. Further, the law-courts were not authorized to verify the consistence of such laws with existing treaties. This followed from the 'political question doctrine' which was developed in connection with the foreign and defence policies. The US Supreme Court thus has not expressed an attitude to the question whether such laws, which invalidate treaties or change them, are permissible. On the contrary, it has explicitly declined the control of this question, because it is a political question. In the first instance this jurisdiction had devastating effects. It was used to curtail or invalidate by law almost all the contractual rights of the Indians, supposedly "for the benefit of the Indians".

17 118 US 375 (1886).

18 187 US 553 (1903).

Nevertheless, the US Supreme Court today does not adhere unlimitedly to this legal interpretation. On the contrary it takes a limited control of such laws. At least in its legislation the Congress has to let itself be guided by the existing obligation towards the Indians, i.e. to act for their benefit. However, in my view this control is still too restricted.[19]

Despite the temporary elimination of the autonomy of the American Indians and the attempt to fully integrate the Indians into American society, the US Supreme Court, not least as a result of the new 'self-determination policy' in relation to the Indian nations, still frequently has to deal with treaties and the status of the Indian communities.[20] The starting-point taken by the US Supreme Court continues to be that in the areas reserved for them (reservations) like governmental entities, the Indian tribes not only possess personal sovereignty over their members, but also territorial sovereignty over the area allocated to them. From the point of view of the US Supreme Court the Indian Nations and Tribes are still at present far more than private, voluntary organizations. According to this jurisdiction their sovereign rights are not merely derived sovereign rights. Of course the Indian tribes also possess such derived rights, which were only transferred to them by the American legislation or through treaties. Alongside, in the understanding of the US Supreme Court, the Indian Nations and Tribes, however, also dispose of an inherent sovereignty.[21] This sovereignty still persists inasmuch as the sovereign authority was not explicitly taken away from the Indian Nations and Tribes by federal law or treaties. Thus in the view of the US Supreme Court it is the remnant of that formerly absolute sovereignty which the Indian communities once possessed in their respective areas.[22] Because of the particular status of the Indian Nations and Tribes, which shows still today remnants of elements of international law, it needs to be clarified, whether the drilling projects accord with the concluded treaties and agreements as well as the right of self-determination or the minority rights of the Blackfeet Indians.

19 Cf., e. g. Morton vs. Mancari, 417 US 535 (1974).

20 Cf., e. g. the comprehensive description by *Charles Wilkinson*, American Indians, Time and the Law, 1987, which reviews the jurisdiction from 1959 to 1986 and enumerates already 80 decisions of the US Supreme Court on Indian Law.

21 Cf. Merrion and Bayless vs. Jicarilla Apache, 102 SCT 894 (1982) at 903 ff., 908; United States vs. Wheeler, 435 US 313 (1978) at 322 f.

22 Cf. with regard to the entire passage detailed: *Dieter Dörr*, Die 'Indian Nations and Tribes' in Nordamerika und das Völkerrecht, JöR nF 36 (1987), pp. 489 ff.; *the same*, Die "Wilden" und das Völkerrecht, VRÜ 24 (1991), pp. 372, 384 ff. = 'Savages' and International Law, Law and State, Vol. 47 (1993), 7 ff.; *Petra Williams-Vedder*, Die Rechtsstellung der eingeborenen Völker in den USA und Kanada nach nationalem Recht und Völkerrecht, 1995, pp. 17 ff.

3. The Oil Drilling Permit and the Treaty of 1855

The treaty concluded on 17 October 1855 between the USA on the one hand and the Blackfeet and Flathead Nations respectively on the other[23], which was ratified on 15 April 1856, shows the Badger-Two Medicine area, in article 4, clearly as territory of the Blackfeet Nation. By this contractual decision the Blackfeet Nation was granted exclusive control over this area. Thus this area represented "Indian country"[24] and the Blackfeet Nation possessed territorial rights in this area, which the Federation had recognized through a treaty. According to the jurisdiction of the US Supreme Court[25] this territorial right included the right to fully use the surface of the country and its mineral resources, as long as the Federation had not reserved itself any corresponding rights of use in the relevant treaty. The Federation's rights of use, according to article 8 of the treaty, existed merely in that the United States were allowed to run roads and telegraph lines through the territory as well as to set up military posts, agencies, missions, schools etc.

Hence it is not of importance whether the Blackfeet Nation was entitled to hereditary territorial rights alongside the rights which were recognized in the treaty, nor how these recognized territorial rights are to be assessed. The hereditary territorial rights concerned are the rights of the Indians to the land they have inhabited from time immemorial, which had neither by treaty nor in any other way been recognized or guaranteed by the USA. According to the extremely problematic jurisdiction of the US Supreme Court it is up to the judgment of the legislators to invalidate such hereditary territorial rights, i.e. the 'aboriginal title', as this is a political decision, which is not subject to a judicial review by the US Supreme Court.[26] According to this jurisdiction there does not even exist an obligation for the legislators to compensate the Indians when an aboriginal title is invalidated, i.e. when a hereditary right to land is eliminated.[27] According to the pertinent interpretation this jurisdiction is not consistent with the fundamental decision of the US Supreme Court in 1823[28] on the hereditary territorial rights.[29] In the case at issue there is no need to resort to the hereditary territorial rights, i.e. the 'aboriginal title', because the territory of the Blackfeet Nation – as elaborated above – was explicitly recognized by the USA with the treaty of 1855. Accordingly, the Blackfeet Nation was entitled to justiciable rights over the area referred to in the treaty.

23 11 Stat. 657.

24 Cf. 18 U.S.C.§ 1154 (1948).

25 304 US 111 ff (1938), United States vs. Shoshone Tribe.

26 Cf. United States vs. Santa Fe Pacific Railroad Company, 314 US 339 (1941).

27 Cf. Tee-Hit-Ton Indians vs. United States, 348 US 272 (1955).

28 Cf. Johnson vs. McIntosh, 21 US 543 (1823).

29 Pertinent inasmuch *Petra Williams-Vedder*, op. cit., pp. 25 f.

However, the treaty of 1855 was substantially modified through the following agreements, in particular through the agreement of 20 September 1895, which was ratified by Congress Law on 10 June 1896[30]. These modifications also and above all concern the Badger-Two Medicine area. Hence in the following it is to be clarified how this agreement has taken effect on the territorial rights of the Blackfeet over this area.

4. The Oil Drilling Project and the Agreement of 26 September 1895

The agreement of 26 September 1895, which was ratified by Congress Law on 10 June 1896[31], was concluded by the authorized commissioners of the USA with the Indians of the Blackfeet Reservation in Montana. The agreement was signed by 306 of the 381 male adults from the Blackfeet Reservation.[32] This agreement, which according to the law of 1871 no longer constitutes a treaty on the basis of equality, in article 1 settles the cession of the area in question. According to article 1 the Indians "convey" all their rights to the USA and thus "relinquish and release" their rights, title and advantages in the land of their present reservation in the state of Montana. Nevertheless, in the described area, part of which is constituted by what today is the Badger-Two Medicine area, they retain the right "to go upon any portion of the lands" and "to cut and remove therefrom wood and timber" as well as "the right to hunt upon that lands and to fish in the streams thereof so long as the same shall remain public lands of the United States".

Firstly, it is necessary to clarify the relation of the treaties, which the Indian Nations and Tribes concluded with the United States on the level of equality, to the later agreements. Above it has already been explained that, according to the jurisdiction of the US Supreme Court, the Federation has the power over the Indian tribes to invalidate by law and to modify contractual decisions. In the view of the US Supreme Court this is derived from the plenary power and the consequent particular dependence of the Indian Nations and Tribes on the USA as far as fundamental decisions of the US Supreme Court are concerned, which result in the trusteeship of the Federation. From this position of trusteeship the Congress may also invalidate or curb contractual regulations for the benefit of the Indians. Control through the law-courts happens only to an extremely limited extent; originally this control was entirely ruled out.[33] Hence, if one is to follow the jurisdiction of the US Supreme Court, it is also, and all the more, possible to modify original treaties on the basis of agreements which are put into practice through a relevant law.

30 29 Stat. 321, 354.

31 29 Stat. 321, 354.

32 Cf. Department of the Interior, Report and Treaty, December 24, 1895, page 2.

33 Cf. Morton vs. Mancari, 417 US 535 (1974); Lone Wolf vs. Hitchcock, 187 US 55 (1903).

Such agreements are also customary in Canada, precisely with regard to the rights on land. In this respect in Canada one speaks of 'land claim agreements'. The agreements in question are agreements between the Federation or the provinces and the tribes or communities of indigenous people through which the hereditary territorial rights are invalidated in exchange for cash, property and, as for instance settled in the James Bay Agreement,[34] even for the concession of rights of self-government.[35]

It is, however, questionable how the fact is to be assessed that, according to the opinion of numerous Indians, the decisive part of article 1 was incorrectly translated to the Blackfeet who signed the treaty. Accordingly, the Blackfeet assumed that they were merely agreeing to a lease of the area, but not that they were conveying their rights over the area concerned to the USA and relinquishing all their rights on the land. In this respect the fact could be of importance that the Federation's special obligation to protect ensues from the particular position of the Federation in relation to the Indians, i.e. the ward-guardianship-relation. After all a particular responsibility in the making of laws is also derived from the trustee-ship position of the Federation. Particular regulations for the interpretation of treaties and agreements concluded with the Indian Nations and Tribes follow from it.[36] According to this jurisdiction any ambiguous wording in a treaty must always be interpreted in favour of the Indians, just as the wording of a law has to be unambiguous and unequivocal so that the contractual rights of the tribes can effectively be restricted. This notion which is derived from the obligation of the Federation to protect, must not only be valid for treaties but, obviously, also for agreements. However, the agreement at issue is unambiguous in the wording which was the basis for its ratification as law. No term has been used which could express a lease as well as the conveying of rights. Accordingly, it is not possible to derive from the obligation to protect that the agreement merely resulted in a lease of the area.

Even if the starting-point was the Canadian jurisdiction, which is more extensive and according to which apart from the unambiguous wording of a treaty, also the relevant records of the proceedings and other events which are at the basis of the treaty are to be regarded, one would not come to a different conclusion in the light of the existing documents, which I have access to. Certainly the Canadian law-courts in the first place interpreted the texts of the treaties exclusively on the basis of the wording fixed in writing and from the then point of view of the "white" contracting parties. On the other hand the US Supreme Court made it clear from the beginning that in interpreting a treaty the understanding of the Indian contracting party took precedence.[37] This principle was specified and

34 Cf. *Petra Williams-Vedder*, op. cit., pp. 78 f.

35 Cf. *Petra Williams-Vedder*, op. cit., pp. 101 f.

36 Cf. *Felix Cohen*, Handbook of Federal Indian Law, ed. by Strickland, 1982, pp. 221 ff.

37 Cf. Worcester vs. Georgia, 31 US 515, 579 and 582 (1832).

explained in more detail by the US Supreme Court in the decision Jones vs. Meehan.[38] In this case the US Supreme Court explained that in these treaties there were on the one hand the United States, a powerful nation represented by representatives, who were trained in diplomacy and masters of the written language, who knew their rights and knew which terms could be used in connection with certain contents. On the other hand there were the Indians, who were a dependent and weak people, without a written language and utterly unacquainted with the different expressions of legal language. Therefore the decisions of a treaty were not to be interpreted according to the technical wording, but in the sense which would normally be understood by the Indians.

The Canadian Supreme Court has in the meantime not only adopted these comments,[39] but has developed them further. Thus the Canadian law-courts for instance have in view that the "Honour of the Crown" is involved when treaties are being interpreted, and that therefore a broad and generous interpretation of the text of the treaty is advisable, which is oriented along the lines of the horizon of the Indians, the recipients, and which considers external circumstances, such as for example the behaviour during and after the conclusion of the treaty.[40] The consideration of external circumstances permits the hearing of historians, anthropologists and – where still possible – of contemporary witnesses or their descendants. Particularly the records of members of the delegation and records of the proceedings are to be taken into consideration, which in certain cases even have to be taken into consideration to supplement or amend a treaty.[41] The more recent decisions by Canadian law-courts acknowledge the fact that in the treaties two cultural spheres with differing legal traditions met. This was reflected in the manner treaty negotiations were conducted and in the settlement and interpretation of treaties. The Indian Nations and Tribes did not possess a written language, so for them the negotiations conducted with certain treaty ceremonials – for instance the exchange of Wampum Belts with the Iroquois and Algonquois peoples in the East, smoking the pipe together with the peoples of the prairies – constituted the essence of the agreements; for the British and American parties the text of the treaty, fixed in writing, was decisive. This written text of the treaty in addition had to be translated for the Indians. Thus it is almost necessary that the agreements settled in the treaty documents, did not reflect the result of the previously conducted, complex negotiations. With a generous interpretation of a treaty, however, many inequities can be avoided. It remains difficult in any case to do justice to the meaning some of the clauses in the treaty had for the respective contracting parties. In particular in the case of treaties concerning the cession of land it is debatable whether the Indian contracting party had any idea at all of what the

38 Jones vs. Meehan, 175 US 1, 10 f. (1899).

39 Cf., e. g., R. vs. Sioui, 3 C.N.L.R. 127, 138 (1990).

40 R. vs. Taylor and Williams, 34 O.R. (2 d), 360 (C.A.), 367 (1981); R. vs. Sioui, op. cit., 155 ff.

41 Thus explicitly R. vs. Taylor and Williams, op. cit., 360 ff.

cession of land or the extinction of the "Indian title" really meant. Precisely, the unrestricted transfer and relinquishing of rights in the written treaties often is in strong contrast with the remarks of the Indian leaders of the negotiations. Frequently, the Indian contracting parties assumed that they were merely allowing the settlers to jointly use the land and its resources. Therefore it is quite likely that the Indian leaders of the negotiations assumed that they were only "leasing" the land with the agreement of 1895.[42]

However, the Blackfeet who refer to the corresponding other, oral agreement would have to prove this with appropriate documents or pieces of evidence. In that case, considering that the wording is unambiguous and for lack of other existing documents, which I have access to, it is to be assumed that the rights over the area were conveyed to the USA with the agreement of 1895 and the corresponding law, by which the agreement was ratified.

It remains questionable, however, how the rights reserved for the Indians are to be interpreted. In this respect the meaning of "the right to go upon any portion of the lands" is particularly important. This phrasing, "the right to go upon any portion of the lands hereby conveyed", at any rate is open to interpretation. In this context one ought above all to pay attention to the fact that this agreement was concluded in 1895, i.e. in a period during which the Indian policy of the USA had changed decisively. Ever since the Dawes General Allotment Act[43] the USA had pursued a policy of dividing the reservations to some extent into individual property lots, almost entirely abolishing the tribes as communities and integrating the Indians into American society. For this reason also the Indian acts of worship were progressively forbidden and the attempt was made to integrate the Indians into the Christian religions. From this point of view the decision made in the agreement, that the Indians retained the right to set foot into the ceded territory at any time, had a particular importance. This area was sacred land; from the point of view of the Indians it was a question of continuing to be allowed to arrange acts of worship in this area and gather plants which were important for their religion there. From the point of view of the Blackfeet this decision was consequently to be interpreted to the effect that it included also the right to practise their religion in the area. According to the rule of interpretation, which is a consequence of the need for protection and the obligation to protect, the wording of the treaty is to be interpreted in favour of the Blackfeet Indians. Consequently, the decision in the treaty can be interpreted with reason to the effect that it also implies religious practice in the area in question.

It remains to be clarified whether the right implied in the agreement would be impaired through the drilling for oil. This can only be judged on the basis of the world-view and

42 Cf. with regard to the entire passage *Christophe N. Eick*, Indianerverträge in Nouvelle-France, 1994, pp. 47 ff. with a list of further reading.

43 24 Stat. 388.

religion of the Blackfeet. According to the description in the available documents drilling for oil in this sacred area is an infringement on the religion and world-view of the Blackfeet. For this reason the ward-guardianship-relation between the Federation and the tribes once more gains a particular importance. A special need for protection of the Indian Nations and Tribes and the Federation's obligation to protect them follows from this ward-guardianship-relation. This obligation to protect is by no means only binding for the legislation, but for all three supreme powers of a state. Consequently, also the executive power in its actions has to let itself be guided by this obligation to protect, i.e. to act as trustee for the benefit of the Indians. The three supreme powers act as trustee when they with the best intentions make an attempt to give the Indians, for instance in land treaties, the full value of their land and thereby also pay attention to their other contractual rights, as well as to the rights resulting from agreements. The government, too, has to be guided by this when deciding on the permit to drill for oil.

Accordingly, there is good reason to believe that in the relevant area the obligation to protect, in the light of the rights reserved for the Blackfeet in the agreement of 1895, pleads for not granting a permit to drill for oil.

5. The Oil Drilling Project and the Right of Self-determination of the Blackfeet

Irrespective of the question whether the Blackfeet still today possess at least a partial capacity of international law,[44] it needs to be clarified whether they can at least refer to the right of self-determination of peoples and which consequences result from it. For international law provides regulations to that effect, which are not only effective between states as classic subjects of international law, but also contain obligations towards non-subjects of international law.

Precisely the right of self-determination of peoples belongs to the rights which apply also to non-subjects of international law.

The Legal Principles of the Right of Self-determination

However undisputed the existence of the right of self-determination of peoples is today, one still has to distinguish between the different legal principles which guarantee this right. Firstly, the right of self-determination is mentioned in article 1 number 2 of the UN Charter. With regard to the specification, which the right of self-determination has been subjected to in the practice of the UN which, according to article 31 III of the Vienna

[44] Cf. detailed: *Dieter Dörr*, 'Savages' and International Law, Law and State, Vol. 47 (1993), pp. 7 ff. (16 ff.).

Treaty Convention, has to be taken into account when interpreting, today the opinion prevails that it is a directly effective right.[45]

Moreover, articles 1 of the Human Rights Covenants (The International Covenant on Civil and Political Rights and the International Covenant on Economical, Social and Cultural Rights) both guarantee identically the right of self-determination. The provisions run as follows:

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

However, the Human Rights Covenants are only binding for the contracting states. Since 19 May, 1976, Canada also belongs to the contracting states. Although the USA have signed both Human Rights Covenants, albeit without signing the facultative protocol, they have not (yet) ratified them, because of non-approval by the Senate. Consequently, the USA are not (yet) bound by the Human Rights Covenants as contracting parties.

The Right of Self-determination is, however, also recognized explicitly in numerous resolutions of the UN. The following ought to be mentioned: the 'Declaration on the Granting of Independence to Colonial Countries and Peoples' of 1960, the 'Friendly Relations Declaration' passed in 1970 ('Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the UN') and the 'Declaration on the Inadmissibility of Intervention in Domestic Affairs', which was passed in 1965.[46]

Regardless to what extent the right of self-determination, as established in the Human Rights Pacts, has become part of generally accepted common international law today, the USA at any rate recognize the right of self-determination as a legal principle. Hence the Indian tribes, as already explained, are regarded by the US Supreme Court as entities, which possess "inherent sovereignty". Also other national declarations of the USA recognize the Indian tribes as a people, by treating them as peoples and not as minorities, an instance being the 'Indian Self-determination Act', enacted in 1975.[47] The original populations also define themselves clearly as peoples and not simply as minorities. A decisive argument in favour of this is the fact that they, unlike the immigrant minorities, did not entrust themselves voluntarily to the supreme power of the USA; a constitutional relation with the new rulers was rather forced onto them.

45 Cf., e. g. *Karl Doehring*, in: *Simma/Mosler/Randelzhofer/ Tomuschat/Wolfrum* (eds.), Charta der Vereinten Nationen, 1991, no. in the margin pp. 1 ff.; *Williams-Vedder*, op. cit., p. 196.

46 Cf. *Williams-Vedder*, op. cit., pp. 196 ff. with a list of further reading.

47 Cf. 25 U.S.C.A. §§ 450 ff.

Most clearly, however, the official comment by the American delegation on the CSCE Final Act shows a status of responsible self-determination of the North American original population, which extends far beyond the claim to ethnic, religious or other minorities. The comment expresses the USA's conviction in relation to its original population, which is borne by a legal consciousness, reaffirmed in the official report of the American delegation, where it reads:

> "American Indians have much in common with other United States minority groups. However, it would be extremely misleading to view the rights of American Indians solely in terms of their status as a racially distinct minority group, while neglecting their tribal rights. The Indian tribes are sovereign, domestic, dependent nations that have entered into trust relationship with the United States government. Their unique status as distinct political entities within the United States federal system is acknowledged by the United States government in treaties, statutes, court decisions and executive orders, and recognized in the United States constitution. This nationhood status and trust relationship has led the American Indian tribes and organizations, under both principle VII of the Helsinki Final Act, where the rights of national minorities are addressed, and under principle VIII, which addresses equal rights and the self-determination of peoples."[48]

In an official statement on the Indian policy on 24 January 1983, President Ronald Reagan also declared: "Our policy is to re-affirm dealings with the Indian tribes on a government-to-government basis and to pursue the policy of self-government without threatening termination." Finally, following an invitation of President Clinton on 1 May 1994, a meeting of the 547 tribes which are recognized by the Federation took place, at which President Clinton promised to respect the tribes as sovereign "nations" and to treat them as respectfully as the governments of the 50 Federal States in future.[49]

Consequently, it can be affirmed that the Blackfeet are a people in the sense of the right of self-determination and not a mere minority. From the right of self-determination, however, the claim to secession and external political independence do not follow, because the Blackfeet live within a state, namely the USA, which acts in accordance "with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". From the right of self-determination follows, however, the claim to national self-determination.[50] Consequently, the Blackfeet, like the other Indian Nations and Tribes, are entitled to the right of self-determination as a right to an autonomy which is

[48] Cf. *Getches/Wilkinson*, Federal Indian Law, Cases and Materials, 2. ed. (1986), p. 766.

[49] Cf. Frankfurter Allgemeine Zeitung, 2 May 1994, p. 7 and *Williams-Vedder*, op. cit., p. 14.

[50] Cf. carefully *Williams-Vedder*, op. cit., pp. 216 ff.

safeguarded by international law. International authorities within the scope of the protection of human rights have not taken this circumstance sufficiently into account up to now and have merely attributed the minority status to the Indians. As a minimum guarantee for the protection of the collective rights of native peoples, however, also the minority protection of article 27 of the International Pact on Civil and Political Rights is applicable. Moreover the Indians are however, also entitled to the right of self-determination.

As a consequence of this right of self-determination the USA are no longer free in the organization of the legal position. On the contrary the particular legal status which the Indian Nations and Tribes possess according to existing American law, is also safeguarded by international law and is not at the disposal of legislators and not even of the executive power inasmuch as they are neither allowed to entirely invalidate this status nor worsen it substantially. The policy of assimilation would diametrically contradict the right of self-determination and would be illegal in terms of international law.

This obligation of the USA according to international law has at least consequences for the interpretation of national law. The law-courts in the USA have explicitly recognized this in a series of decisions and have relied on the right of self-determination to support their interpretation.[51] Hence the agreement of 1895 is to be interpreted in accordance with the right of self-determination, too. Precisely the right of self-determination demands that the cultural independence of the original population is strengthened and consolidated. The preservation of one's own religion and world-view is obviously part of one's cultural independence. Hence, in view of the right of self-determination which includes the right of cultural and religious autonomy, the decision in the agreement according to which the Blackfeet retain the right to set foot into the land at any time is to be broadly interpreted. In that case it also includes that both religious ceremonies can be held uninterruptedly and that the sacred land is preserved. Thus the right of self-determination, and the there established cultural and religious autonomy, also argues against permitting oil drillings in the Badger-Two Medicine area.

6. Summary

a) Like the other Indian communities the Blackfeet Nation today still is a dependent domestic nation. As a result of this particular status the relations between the USA and the Blackfeet Nation still shows remnants of elements of international law. The Blackfeet Nation disposes of an inherent sovereignty and exercises not only personal sovereignty over its members but also territorial sovereignty over the area allocated to them.

51 Cf. e.g. Lareau vs. Manson, 507 F.Supp., pp. 1177 ff.; Fernandez vs. Wilkinson, 654 F.2d, p. 1382 (10. Cir. 1981); Filartiga vs. Pena-Irala, 630 F.2d, p. 876 (2nd Cir. 1980).

b) The treaty concluded on 17 October 1855 between the USA and the Blackfeet Nation shows the Badger-Two Medicine area clearly as territory of the Blackfeet Nation. Thus this area represented „Indian country" and the Blackfeet Nation possessed territorial rights in this area, which the Federation had recognized.

c) This treaty was substantially modified through the agreement of 26 September 1895. It is possible to modify original treaties by such agreements according to the jurisdiction of the US Supreme Court and because of the Congress' position of trusteeship.

d) Due to lack of any piece of evidence it is not possible to derive from the obligation to protect that the agreement merely resulted in a lease of the area.

e) It follows from the rights reserved for the Indians in the agreement though that the Blackfeet continued to be allowed to arrange acts of worship in this area. The corresponding decisions in the agreement are to be interpreted in favour of the Blackfeet Indians. By giving permission to drill for oil the rights of the Blackfeet implied in the agreement would be impaired.

f) The Blackfeet hold the right of self-determination of peoples just as the other Indian Nations and Tribes. The Blackfeet are not merely a minority but a people in the sense of the right of self-determination. This has been explicitly recognized by the government of the United States in recent comments.

g) This results in the particular status of the Blackfeet Nation also being safeguarded by international law. Additionally the right of self-determination demands that the cultural independence of the Blackfeet is strengthened and consolidated. Thus the right of self-determination, and the there established cultural and religious autonomy, also argues against permitting oil drillings in the Badger-Two Medicine area.

ABSTRACTS

The Controversy about the Oil Drilling in the Badger-Two Medicine Area

By *Dieter Dörr*

The Badger-Two Medicine area (Montana, USA) represents a sacred place for the tribal members of the Blackfeet Nation and is the home of Thunder, one of the most important spirits in their mythology. For several years now there have been plans to drill for oil in this area and a governmental permit exists though at the moment there is a temporary prohibition to drill because the case is again being discussed. It is questionable whether it is legal to grant permits to drill in this area in respect of environmental matters and in regard to the rights of the Blackfeet that derive from existing treaties and the standards of international law, especially the right of self-determination.

Like the other Indian communities the Blackfeet Nation today still is a dependent domestic nation which results in a particular relation to the USA that still shows remnants of elements of international law. The Blackfeet Nation disposes of an inherent sovereignty and exercises not only personal sovereignty over its members but also territorial sovereignty over the area allocated to them. Based on the treaty concluded on 17 October 1855, the Badger-Two Medicine area clearly represented such „Indian Country" on which the Blackfeet Nation possessed recognized rights. The treaty was substantially modified in 1895 when the Blackfeet „conveyed" all their rights to the USA. Although there is doubt according to the opinion of numerous Indians that the agreement was correctly settled, evidence is missing in this respect. Therefore it is not possible to derive territorial rights directly from the original treaty. Nonetheless the decisions in the latter agreement regarding the rights reserved for the Indians are to be interpreted in favour of the Blackfeet Indians who accordingly still are allowed to arrange acts of worship in this area. This right would be impaired by a permission to drill for oil.

Furthermore the Blackfeet hold the right of self-determination of peoples just as the other Indian Nations and Tribes. They are a people in the sense of the right of self-determination and not only a minority which has been explicitly recognized by the government of the United States in recent comments. For this reason the particular status of the Blackfeet Nation is also safeguarded by international law and their cultural independence is therewith strengthened. In view of this it is considered that the permission of oil drillings in the Badger-Two Medicine area should not be granted.