



OSLO COUNTY COURT

INTERLOCUTORY ORDER

Pronounced on: 8 October 2020
Case no.: 20-099057TVI-OBYF
Judge: Judge Eivor Grindstuen
Subject matter of the case: Claim for interim injunction

Jillen-Njaarke Reinbeitedistrikt	Attorney Pål Gude Gudesen, Attorney Svein Steinfeld Jervell
Reindeer Herders Association of Norway	Attorney Pål Gude Gudesen Attorney Svein Steinfeld Jervell

versus

Øyfjellet Wind AS	Attorney Morten Plesner Smørdal
Eolus Vind Norge Holding AS	Attorney Pål-Martin Abell

No restrictions on access to public disclosure

INTERLOCUTORY ORDER

On 8 July 2020, Jillen-Njaarke Reinbeitedistrikt (reindeer grazing district) petitioned for an interim injunction against the State (represented by the Ministry of Petroleum and Energy, (the state) and Øyfjellet Wind AS (Øyfjellet) requesting an immediate halt to construction work on the development of Øyfjellet wind power plant. The petition contained the following statement of claim:

1. Further construction work/development of Øyfjellet wind power plant is halted pending a final and enforceable judgment in the lawsuit over the validity of the licencing decision for the development.
2. Jillen-Njaarke reindeer grazing district is required to file a lawsuit over the matter within three months. If this does not occur, the injunction will cease to be valid.
3. Øyfjellet Wind AS and the Ministry of Petroleum and Energy are ordered to pay costs.

The court decided to hold oral proceedings. The deadline for submitting a response was set at 26 August 2020.

In the pleading of 20 July 2020, Eolus Vind Norge Holding AS (Eolus) entered the case, cf. Section 15-3 of the Dispute Act, cf. Section 13-2 and the principle in Section 32-8. It was noted that Eolus transferred all of the shares in Øyfjellet to Aquila Capital in December 2019. At the same time, an agreement was entered into between Eolus and Øyfjellet that Eolus should manage and be responsible for the development of Øyfjellet wind power plant on behalf of Aquila Capital. It was noted that the agreement entails that Eolus would assume the primary risk of deviations from the agreed assumptions about the progress and development costs of the project and thus bear the primary financial risk in the event of a halt to the project as a result of the petition, and that Eolus would be impacted both financially and directly by having to halt the development of the wind power plant. There were no objections from the parties in the case to the entry as a defendant.

In the defence reply of 25 August 2010, the state asserted that the claim against the state had to be dismissed on the grounds of insufficient legal interest cf. Section 1-3 of the Dispute Act. It was noted that the claim in the petition was an immediate halt to construction work until a final and enforceable judgment was in place for the principal action and that the state therefore did not have the necessary connection to the injunction claim. It was reported that if the action against the state was concluded without further work due to the action being withdrawn or dismissed, the state would not claim costs. Both Øyfjellet and Eolus agreed with the state's assertions regarding legal interest. In the pleading received by the court on 31 August 2020, the plaintiff withdrew the petition for an interim injunction when concerning the state, and the court issued an order of voluntary

dismissal on 1 September 2020.

At the planning meeting on 9 September 2020, counsel for the reindeer grazing district gave notice that the Reindeer Herders Association of Norway (NRL) would probably join as intervener in the action. This intervention was declared in the pleading of 15 September 2020 pursuant to Section 15-7, subsection 1 (b) of the Dispute Act, cf. Section 15-7, subsection 3. The NRL stated that it supported the legal assertions brought by the reindeer grazing district and that the same statement of claim would be submitted. There were no objections from Øyfjellet or Eolus to the NRL joining as intervener.

The court hearing was held in Oslo County Court over four days from 21 – 24 September 2020. Evidence was presented and testimony from the parties and witnesses was given as stated in the court record. Amended claims are stipulated in the parties' assertions below and in the court record.

The background to the case

In the following, the court will review the background of the case, which forms the basis for the court's assessment.

On 13 November 2014, Øyfjellet was granted a licence by the Norwegian Water Resources and Energy Directorate (NVE) to build and operate Øyfjellet wind power plant in Vefsn Municipality. On the same day, Fred. Olsen Renewables AS's application for a licence for Mosjøen wind power plant was rejected. The decision was upheld by the Ministry of Petroleum and Energy (OED) in their decision of 16 November 2016.

The planning area for Øyfjellet wind power plant is located in the mountainous area west of Mosjøen town centre in Vefsn Municipality.



The map above shows the reindeer grazing district inside the black line. Winter pastures are indicated in grey, and migration routes in yellow. The planning area for the wind power plant is within the purple area.

Reindeer herding has taken place in the Jillen-Njaarke reindeer grazing district since the 17th century. The reindeer grazing district is 4,162 km² in size. The number of reindeer is capped at 2,200 animals. These are divided into 1,800 for the eastern *siida* and 400 for the western *siida*. *Siida* is defined in more detail in Section 51 of the Reindeer Husbandry Act. The Jillen-Njaarke reindeer grazing district was created in 1999 by a merger of the former Brurskanken reindeer grazing district and the Brønnøy/Kvitfjell Reindeer Grazing District, today corresponding approximately to eastern *siida* and western *siida*, respectively. Reindeer herding in the western *siida* was discontinued in 2012, however resumed after a decision by the reindeer grazing district on 26 November 2013. After a long processing period and several reversals, the decision has now been upheld through the reversal decision of 17 June 2020.

Reindeer grazing rights in the area are affected by the development of wind power at Øyfjellet. Reindeer graze in different areas at different times of year, and are highly land-intensive animals. Reindeer herding operates with eight seasons. Rotation is crucial for the grazing areas, so that the vegetation recovers and there is no over-grazing. In summer, the

reindeer diet consists of about 50% lichen, while in winter it is almost 100%. Climatic conditions render winter pastures along the coast favourable because there is less snow.

The winter pastures are divided into five zones. Winter grazing zone 5, which is the subject of the present case, is located in the far north, and west of the planning area towards the coast, i.e. Hundåla, the Husvik area and Visten surrounded by Sørfjorden, Vefsnfjorden and Halsfjorden. The migration route from this winter pasture runs north from Fjellskardet and through the planning area to Demmeldalen and Håndåla, respectively. There is an alternative migration route over Håndålvatnet, which is outside the planning area. However, poor ice conditions and drainage of the water render the ice unsafe. One migration route is the migration corridor between different grazing areas.

The reindeer herding district is committed to securing the possibility of future use of winter grazing zone 5. For the last two winter seasons, reindeer have been gathered at Sjømoen east of Vefsna and transported to winter grazing zone 5 by truck and ferry. In the spring of 2019 and 2020, the animals were herded back to the areas east of Vefsna.

The other four winter grazing zones are along the coast, south of winter grazing zone five. Grazing zones 1 and 3 are located in Brønnøy and Sømna municipalities. Grazing zone 2 is located on Brønnøyhalvøya peninsula with an eastern border running from Velfjorden to Ursfjord. Grazing zone 4 is located in Indre Velfjord, and the areas towards Harrangsfjorden/Bindalsfjorden.

consists of 72 wind turbines.

Brief summary of the NVE's proceedings

The objective of the licencing process pursuant to the Energy Act is to clarify the most important interests associated with the project for which an application has been submitted, including both advantages and disadvantages, as well as to determine specific terms and conditions. The relationship with affected landowners and rights holder is a key issue during the process.

The basis for the decision regarding the wind farm at Øyfjellet consisted of the application with the impact assessment, comments received and the NVE's expertise relating to wind power. The impact assessment concerning reindeer herding in the area was prepared by Norconsult and was dated 13 December 2013. The NVE processed two applications for wind power plants at the same time. The other area was Mosjøen. A licence to develop in that area was not granted.

The NVE's process is described as follows in section 4.1 of the decision:

"The processing of larger wind power cases starts with the NVE receiving a notification. The notification is advanced notice that the planning of a wind power plant has commenced, and is submitted in accordance with the rules in the Planning and Building Act relating to impact assessments. Once the notification has undergone an extensive round of consultations, the NVE sends the developer an assessment program that describes what assessments have to be carried out before an application can be processed. When an application with an impact assessment has been received, the NVE then sends this for an extensive consultation process. During both rounds of consultations, meetings are held with local and regional authorities and there are also public meetings.

Based on the application with the impact assessment, meetings, consultation statements, any additional assessments, inspections and separate assessments, the NVE will then decide whether there is an adequate basis for making a decision and whether a licence should be granted. Thematic conflict assessments and any regional plans for wind power are also part of NVE's decision-making basis. NVE's decision can be appealed to the Ministry of Petroleum and Energy. Appeals from agencies with a legal interest in filing an appeal will be sent to the Ministry of Petroleum and Energy together with any objections in the case. The entire process from notification to final decision takes a minimum of two to three years."

The NVE received notification of the planning of Øyfjellet wind power plant on 5 July 2011, and the notification was sent for consultation to the affected stakeholders on 21 November 2011. The NVE arranged meetings with local and regional authorities and a public meeting in Mosjøen on 6 December 2011. The NVE's draft assessment programme was submitted to the Ministry of the Environment before it was adopted on 4 January

2013.

The NVE received a licence application with an impact assessment for Øyfjellet wind power plant from Eolus on 6 January 2014. The documents were sent for public consultation on 4 February 2014, with a deadline for submissions of 11 April 2014. The consultation process was announced in regional newspapers and in the Norsk lysingsblad (Norwegian Government Gazette). In connection with the consultation process, the NVE organised an information meeting with Vefsn Municipality and a public meeting in Mosjøen on 19 February 2014. A consultation and objection meeting was held with the Sámi Parliament (Sametinget) on 26 June 2014, and there was consultation with Jillen-Njaarke reindeer grazing district on 6 November 2011 and 24 June 2014.

The NVE arranged an on foot inspection of the planning area and route for the access road on 25 June 2014 which was attended by representatives of the developer, Vefsn Municipality, Helgeland Outdoor Council and a landowner. A final meeting was arranged with bus inspections for Øyfjellet and Mosjøen wind power plant on 20 August 2014. This was attended by representatives of the developers, Vefsn and Grane Municipalities, Nordland County Council, the Norwegian Environment Agency and Jillen-Njaarke reindeer grazing district. In connection with this, a helicopter inspection was carried out over the planning area with representatives from the reindeer grazing district.

Objections were submitted by the Sámi Parliament and the County Governor of Nordland, the latter on the grounds of the impact on reindeer herding. An objection meeting was held with the County Governor on 19 August 2014. The County Governor stated that important public interests were in conflict and that decisions regarding these types of matters should be made at an overarching national level. The objections were upheld.

The NVE received 24 remarks to the application. The following is cited from section 4.6 of the decision:

"Vefsn Municipality supports the project, however emphasises the impact on reindeer herding and outdoor recreation. Nordland County Council is positive towards the project, however recommends dialogue with the reindeer herding industry. The Norwegian Environment Agency is of the opinion that the application and impact assessment provide a good overall depiction of the situation, however recommends that the southern border of the planning area is moved north due to visibility from Lomsdal-Visten National Park. Brurskanken Turlag (hiking association) and other consultative bodies are negative towards the project due to the effects on outdoor recreation. Some also mentioned the effects associated with the access road.

The Norwegian Environment Agency has submitted a thematic conflict assessment for the measure. Øyfjellet wind power plant is considered to be in conflict category D (major conflict). It is emphasised that the methodology does not take into

account the size of the project. In its thematic conflict assessment, the Norwegian Reindeer Husbandry Administration has concluded that the project will be in category D for reindeer herding. They wrote that areas of particular importance to reindeer herding will be affected, and that migration routes will be impacted if the project is realised. The Norwegian Defence Estates Agency (Forsvarsbygg) found that the measure was in category A (no conflict) with regard to the interests of the Norwegian Armed Forces."

On 13 November 2014, the NVE granted Eolus a licence and expropriation permit for the construction and operation of Øyfjellet wind farm. The application for Mosjøen was rejected. The following is cited from section 7 of the NVE's decision:

"The NVE finds that the licence application with the impact assessment, submitted remarks, meetings and inspections constitute an adequate basis for deciding on whether a licence should be granted for the wind power plant for which an application for construction has been submitted, and on what conditions a licence should potentially be granted.

It is the NVE's assessment that the overall benefits of establishing Øyfjellet wind power plant with grid connection outweigh the disadvantages associated with the project. The NVE therefore grants Eolus Vind Norway AS a licence pursuant to Section 3-1 of the Energy Act to construct and operate Øyfjellet wind power plant with grid connection and associated infrastructure. A licence is granted for installed power of up to 330 MW.

The NVE has placed emphasis on there being good wind conditions in the planning area and that Øyfjellet wind power plant will contribute to Norway being able to meet its obligations relating to its renewable energy targets. Based on the NVE's assessment, production will be more than 1 TWh/year in the event of full development. The NVE is of the view that the project will be competitive in the Norwegian-Swedish electricity certificate market.

The NVE finds that the most significant negative consequences of Øyfjellet wind power plant relate to the landscape, outdoor recreation and reindeer herding. However, these consequences are not significant enough for the licence application to be rejected. The NVE accepts that Øyfjellet wind power plant is a large wind power project, however that the impact will be relatively minor when compared to other Norwegian wind power projects. The NVE has processed the application for Øyfjellet wind power plant together with the application for Mosjøen wind power plant. Emphasis has been placed on the cumulative effects of these wind power plants in both cases, and the application for Mosjøen wind power plant has been rejected.

The NVE has reduced the southern part of the planning area towards Fjellskardet

due to the effects on reindeer herding and outdoor recreation. In addition, conditions have been set that wind turbines must not be constructed in direct connection with the peak of Stortuva.

The NVE places emphasis on the fact that Vefsn Municipality and Nordland County Council are positive about the project, however would also emphasise that the County Governor of Nordland and the Sámi Parliament have submitted objections to the application.

The NVE has set a number of conditions for the licence, including conditions relating to remedial measures for reindeer herding and outdoor recreation, the drafting of an environmental, transport and construction plan and measures relating to the closure of the plant."

Licence condition 16 applied to reindeer herding:

"In cooperation with Jillen-Njaarke reindeer district, the licensee will prepare a proposal for remedial measures for reindeer herding in the area. Among other things, the proposal shall include measures relating to the migration route through the planning area and shall be presented in the detailed plan for the measure, cf. condition 13. The detailed plan must be approved by the NVE."

The decisions were appealed to the Ministry of Petroleum and Energy (OED).

Brief summary of the OED's process

The reindeer grazing district and Green Warriors of Norway (Norges Miljøvernforbund) appealed NVE's decision to approve a licence for Øyfjellet wind farm. The Sámi Parliament and the County Governor of Nordland had objections that related to reindeer herding.

The Ministry carried out an inspection of the planning areas on 24 May 2016. An open meeting was held in Mosjøen in connection with the inspection. The Ministry consulted the reindeer grazing district on 25 May 2016 and the Sami Parliament on 25 October 2016. Minutes were compiled from the consultation meetings. The Ministry held an objection meeting with the County Governor of Nordland on 13 September 2016.

The following is quoted from the introduction to the Ministry's remarks:

"In the appeal process, the Ministry shall consider the views presented by the appellants. The Ministry may review all aspects of the case and thereunder take new circumstances into account, cf. Section 34, paragraph two of the Public Administration Act. In the Ministry's assessment of whether the decision to grant a licence pursuant to the Energy Act shall be upheld, the benefits and disadvantages

of the project for which a licence has been sought must be weighed against each other. The Energy Act shall ensure the generation, conversion, transmission, trading, distribution and use of energy are conducted in a manner that efficiently promotes the interests of society, which includes taking into consideration any public and private interests that will be affected.

In the discretionary assessment that is carried out in the case under appeal pursuant to the Energy Act, the environmental impact of the measure is assessed from a holistic and long-term perspective, whereby the socio-economic benefits are weighed up against any loss or degradation of biodiversity. Sami interests and the consideration of biodiversity must be weighed up against the benefits of establishing the wind power plant. Disadvantages and harm to Sami interests must be assessed in light of the protection afforded to minorities under international law, with the framework this sets for the measures that may be permitted.

The principles in Section 7 of the Nature Diversity Act, cf. Section 8-12, are used as guidelines for decisions pursuant to the Energy Act. In this context, reference is made to the management objectives for habitat types, ecosystems and species in Sections 4 and 5 of the Nature Diversity Act."

In its appeals process, the Ministry considered the protection afforded to indigenous people by international law that applies to Sami reindeer herding and the United Nations International Covenant on Civil and Political Rights (ICCPR) relating to cultural heritage and minorities. The starting point was established that infringement of the right to cultural practice will constitute a violation, and it will thus not be possible to grant a licence pursuant to Section 3-1 of the Energy Act. Following a specific discussion, the OED concluded that there was no violation of Article 27 of the ICCPR.

The County Governor had objections to the wind power plant out when concerning reindeer herding. Reference was made to the deterioration of important areas of particular value such as migration routes, early spring pastures, calving land and branding areas, as well as the prohibition against closing migration routes. The County Governor also made reference to uncertainty associated with whether the diversion of migration routes could be a remedial measure, and that reducing the availability of the winter pastures could impact the production potential and sustainability of the district. The project was given a D (major conflict) in the thematic conflict assessments when concerning reindeer herding.

The NVE established that the reindeer grazing district was more negative towards Reinfjellet than Øyfjellet. Following an overall assessment, the NVE found that greater emphasis should be placed on reindeer herding in the assessment of Mosjøen wind power plant than Øyfjellet wind power plant.

The following information about the reindeer herding operations was recorded from the consultation with the reindeer grazing district:

"Eastern siida has had stable operations for a long time, while western siida has been down for a while, however operations have now been re-established. Operations in the district, particularly in Eastern siida, have been largely the same for many generations. Both humans and animals have adapted to the operating pattern. The operations follow the natural migration of the reindeer. Eastern and Western siida have summer pastures on the eastern and western sides of Vefsna respectively. The winter pastures towards the coast are common for both siida. Winter grazing is generally the minimum factor for the district. The winter pastures in the north that are north-east of Øyfjellet's planning area have been heavily exploited in previous operations. Therefore, in recent years, the district has used the winter pastures furthest to the south towards Sømna, in order for the northern areas to have the opportunity to regenerate.

[...]

With regard to Øyfjellet, a migration route passes through the planning area for the wind power plant. The migration route is used for herding to the northernmost parts of the winter pastures along Vefsnfjorden. There is an alternative migration route over Hundålvatnet lake, outside the planning area, however this migration route requires safe ice on the lake in order to be used. During periods without safe ice, the migration route through the planning area needs to be used. The district notes that migration routes have special protection pursuant to Section 22 of the Reindeer Husbandry Act. If the establishment of the wind power plant has the consequence that the winter pastures in the north-east cannot be used because the migration route is unable to be used, this will have major consequences for reindeer herding, because the winter grazing area is a scarcity factor for the district."

In its decision, the Ministry established that the planning area is registered as grazing areas and that migration routes pass through the area. It was noted that it was not clear that adequate replacements could be established for the migration routes and that these are afforded special protection under the Reindeer Husbandry Act.

"The NVE has accepted that there will be serious cumulative effects from realising both Mosjøen and Øyfjellet wind power plants, especially for reindeer herding, outdoor recreation and the landscape. Based on this, the NVE is of the opinion that a licence should not be granted for both projects, and, following an overall assessment of the benefits and disadvantages, finds that a licence should be granted for Øyfjellet.

The Ministry agrees with the NVE that the two projects must be viewed in context, and that cumulative effects are relevant in the overall assessment of each project. In connection with this, the Ministry notes that both projects are very large, (around 300 MW/ 1 TWh/year), each of which affect large areas and there is a relatively short distance between the two planning areas. The Ministry agrees with the NVE's conclusion that there is only room for one of the projects.

Based on an overall assessment, the Ministry has assigned particular weight to the consideration of reindeer herding, however has also taken into consideration

outdoor recreation, and found that a licence shall be granted for Øyfjellet wind power plant."

The NVE's decision regarding Øyfjellet wind farm was upheld on 16 November 2016 subject to an amendment to condition 16 in the licence:

"The licensee shall ensure that an agreement is entered into with Jillen-Njaarke reindeer grazing district for a proposal for remedial measures for reindeer herding in the area during the construction and operational phase. Among other things, the proposal must ensure access to the winter pastures in the northwest through remedial measures related to the migration route through the planning area. Measures to ensure migration to and from the winter pastures in the northwest must be submitted to the County Governor of Nordland for an assessment pursuant to the Reindeer Husbandry Act. The proposed remedial measures must be presented in the detailed plan for the measure, cf. Condition 13. The detailed plan must be approved by the NVE. If no agreement is reached between the licensee and the reindeer grazing district on remedial measures, the NVE must consult the reindeer grazing district before the detailed plan can be approved."

It was emphasised that potential diversion of the migration route cannot take place without the consent of the Ministry of Agriculture cf. Section 22 of the Reindeer Husbandry Act.

Amendments/adjustments were made to the construction licence on 11 October 2018 and 18 December 2019.

The licencing issue has not been brought before the courts.

On 16 November 2017, Øyfjellet petitioned for an appraisalment to determine compensation for expropriation.

The deadline in the licence for completing the wind farm at Øyfjellet is 31 December 2021. Turbine deliveries will start in spring 2021, and this will require that roads and turbine bases are fully constructed. The electricity certificate deadline expires on 31 December 2021. Exceeding this deadline will result in a loss of ten million euros.

Construction licence and pre-accession

A final construction licence was granted by the NVE on 11 October 2018.

Construction work was scheduled to commence in early September 2019. The reindeer grazing district did not consent to the commencement of the construction work. An application for consent to pre-accession before appraisalment was submitted on 21 November 2019. On 10 July 2019, the OED agreed to consent to pre-accession pursuant to Section 25, paragraph one, first sentence of the Expropriation Act. With consent to pre-accession as grounds for enforcement, Eolus sent a petition for possession to the

execution officer in Vefsn on 14 August 2019, cf. Section 13-2 of the Enforcement Act and Section 55 of the Judicial Assessment Act. The enforcement officer consented to possession on 12 September 2019. The decision was appealed by the reindeer grazing district. The execution officer upheld the decision, however ruled that this should have suspensive effect. Øyfjellet appealed the decision to grant suspensive effect. On 4 December 2019, the court decided not to reverse the enforcement officer's decision to execute possession, however reversed the decision to grant suspensive effect. The order was not appealed.

MTA plan (environmental, transport and construction plan)

Several conditions were set for the licence. Of key importance to the case is licence condition no. 15 as amended after the OED's appeal process, cf. above.

The licence conditions stipulate that the licensee shall submit a detailed plan to the NVE (licence condition no. 12) and an environmental, transport and construction plan (MTA plan) (licence condition no. 13) which further specifies how the project shall be constructed, operated, maintained and shut down after the end of the licence period. The MTA plan must be approved by the NVE before construction work commences. The requirement for an MTA plan is a standard condition pursuant to the Energy Act.

There was dialogue between Eolus and the reindeer grazing district during the first half of 2017, including a meeting to discuss the district's involvement in the drafting of the MTA plan. The draft agreement was sent to the reindeer grazing district after the meeting.

Appraisalment was requested on 16 November 2017. In the ongoing appraisalment case before Alstadhaug District Court, the district has not asserted that appraisalment must be refused due to the licence being invalid. The court may conduct a full review of this issue, cf. Section 48 of the Judicial Assessment Act.

A new meeting was held between the parties on 8 February 2018 at which the parties discussed Eolus' proposal to divide up the MTA plan to create a separate MTA plan for the access road. The reindeer grazing district provided no further comments to the wording that was amended after the meeting. The County Governor had no remarks to the separate MTA plan and this was submitted to the NVE on 27 February 2018.

In a letter to the OED of 13 April 2018 on behalf of the reindeer grazing district, the district opposed the division of the MTA plan. A meeting was held between the parties on 23 October 2018. Work on a separate MTA plan was suspended in late autumn 2018, and work then commenced on a unified MTA plan. At the request of the reindeer grazing district, a new expert reindeer herding study was also commissioned from Protect Sápmi, and paid for by Eolus.

The report from Protect Sápmi took time. Eolus finalized a new proposal for a unified

MTA plan in early May 2019. The plan was sent for consultation, and the district submitted a consultation statement on 15 June 2019 in which there were objections to the licence being granted, and critical remarks to the proposed MTA plan, including the outlined remedial measures to protect the migration route. Eolus responded to the objection on 1 July 2019.

The report from Protect Sápmi is dated 10 July 2019.

Eolus submitted remarks regarding the study to the NVE on 22 August 2019 together with an expert report from Naturrestaurering AS. At the request of the reindeer grazing district, a new consultation with the NVE was held on 27 August 2019 with an inspection of the area.

The unified MTA plan was approved in the NVE's decision of 18 December 2019. The conditions relating to reindeer herding were as follows:

- *"Access to the winter pastures in the northwest (winter grazing zone 5) shall be protected by facilitating movement through the planning area. The plan for facilitating movement through the planning area must be sent to the NVE. The licensee must ensure that an agreement is entered into with Jillen-Njaarke reindeer grazing district for a plan to facilitate movement through the planning area during the construction and operational phase. If no agreement is reached between the reindeer grazing district and the licensee, the case must be sent to the NVE for approval by 10 March 2020.*
- *Construction activities which impact the migration of reindeer must be suspended during the migration."*

Construction work commenced just prior to Christmas 2019. The work on the supply road from Tverrådalen has largely been completed. Work is now underway on constructing the internal roads in the facility.

The reindeer grazing district appealed NVE's approval of the MTA plan to the OED on 20 December 2019 and also requested suspensive effect. This was rejected by the NVE.

Spring migration 2020

The reindeer grazing district used winter grazing zone 5 in the winter of 2019. The plan for the spring of 2020 was to move the reindeer to spring and calving pastures by using the migration route within the planning area. The parties did not agree on the implementation of this. The parties held a meeting on 11 February 2020 together with lawyers and Protect Sápmi. Minutes from the meeting were exchanged after the meeting.

Eolus prepared a concrete proposal that, in the absence of an agreement, was sent to the

NVE on 9 March 2020. The County Governor supported the reindeer grazing district and stated that the work was deemed to constitute a closure of the migration route. Both parties made various submissions. A telephone conference was also held. Eolus submitted several supplementary measures in connection with the implementation of the spring migration to the NVE on 6 April 2020. The NVE handed down a decision on the spring migration on 8 April 2020. The decision entailed a construction shutdown for one month from 10 April to 10 May 2020.

Øyfellet appealed the NVE's decision. The OED granted suspensive effect on 16 April 2020. The spring migration was carried out on 27-29 April 2020. Construction work was halted during the migration.

The OED's appeal process for the MTA plan

The appeal of the MTA plan was submitted to the OED on 19 May 2020 and is now under consideration. In the submission, the decision of 18 December 2019 was upheld.

Jillen-Njaarke reindeer grazing district has principally asserted the following:

The licence condition and prerequisite for the licence

Based on the licencing decision from the OED and the NVE's subsequent decision regarding the MTA plan, it is asserted that the licence is invalid because prerequisites and conditions for the licence were not met. Non-compliance with the licence condition entails that the construction work was unlawfully commenced.

The licence condition stipulates the requirement that if the parties do not reach an agreement on remedial measures, the measures should be established through an approved MTA plan and thereby clarified before construction commences. This has not occurred.

The licence is based on an incorrect factual premise because it assumes that wind power development in a migration route is compatible with reindeer herding and Section 22 of the Reindeer Husbandry Act, provided that remedial measures which have not been approved are subsequently and unclearly determined. If the issue had been correctly assessed, no licence would have been granted for the development.

In connection with this, it is asserted that there was a procedural error in the licencing decision due to an inadequate impact assessment, cf. Regulations relating to Impact Assessments, and this had a decisive effect on the decision, cf. Section 41 of the Public Administration Act. The following is quoted from Norconsult's impact assessment from December 2013:

"Reindeer can migrate and graze relatively unhindered in an area that has wind power plants, and over time one must expect a certain adaptation."

In its impact assessment, Norconsult did not assess the decisive criterion of "cumulative effects" for reindeer herding. Making an assessment based on alternative 0 (no change based on the present situation), which was what was done in the report, is fundamentally incorrect when the current situation has not been assessed. Reference is made to the international law assessment from Ulfstein, which the OED agreed with, and to the previously applicable Regulations relating to impact assessments. It was not until the report from Protect Sapmis in 2019 that there was a complete intervention assessment of the district.

Based on more recent and current research, there is a consensus that wind power plants and reindeer cannot coexist. The research shows that reindeer avoid wind power plants at distances of up to 10 kilometres. This entails that, in all probability, it will still not be possible to use grazing gardens and other infrastructure associated with potential transport by truck through the planning area, because it will not be possible to get the reindeer into the area.

The OED has not fulfilled its obligations to ensure that updated knowledge is used as a basis cf. Section 28 of the Regulations relating to impact assessments.

The subsequent impact assessment concludes that, at a minimum, very extensive measures will be required to maintain the possibility of accessing the winter pastures in the northwest. However, the assessment unequivocally concludes that it is not possible to maintain the current migration route. The measures outlined in the impact assessment have not been investigated and no processes have been initiated to attempt to acquire the necessary and extensive rights.

It is asserted that the consequences of the wind power plant on reindeer herding entail that the licence is in violation of international law through Article 27 of the United Nations International Covenant on Civil and Political Rights. International law represents a substantive bulwark to the public administration's exercise of authority.

The plaintiff would note that the defendant seeks to paint a very negative picture of the reindeer herding district's approach to the case, and the reindeer herding district has been largely portrayed as unreliable and uncooperative. This is of course not an accurate depiction of the situation. The reality is that, based on subsequent assessments of and new knowledge about the consequences of wind power plants on reindeer, the reindeer grazing district has understood that the consequences of the wind power plant will be irreversible and will destroy future operations in the reindeer grazing district.

This is in contrast to what both the NVE and OED had envisioned for them throughout the entire licencing process, on the basis of a very thin knowledge base in the impact assessment.

Section 22 of the Reindeer Husbandry Act

Research shows that wind power plants prevent reindeer herding from being carried out in the areas appropriated by the wind power plant itself, including in a larger zone of several kilometres from the wind power plant. This was also accepted by Frostating Court of Appeal following the submission of extensive evidence in LF-2018-150314.

This entails that the construction of the wind power plant constitutes a closure of the migration route, which is in violation of Section 22 (1) of the Reindeer Husbandry Act.

A potential remedial measure involving transport by truck through the migration route when there is no agreement between the parties for anything else, is incompatible with the protection of migration routes in accordance with Section 22 (1) of the Reindeer Husbandry Act. In any case, this is not a decision that the OED and NVE have the authority to hand down, cf. Section 22 (2) of the Reindeer Husbandry Act, and the issue can therefore not be decided by the licensing authorities.

Substantiating the principal claim

It is therefore principally asserted that it has been substantiated that the development pursuant to the licence decision and decision on the MTA plan is unlawful, cf. Section 34-2, subsection 1 of the Dispute Act.

In the alternative, in the event that the claim is not deemed to have been substantiated, it is asserted that delay poses a risk pursuant to Section 34-2, subsection 2 of the Dispute Act. If the construction work is not halted immediately, the ongoing terrain interventions will permanently destroy the grazing areas and migration route. Internal roads on the high plateau and lifting sites for the wind turbines will appropriate large areas, as well as involve cutting points that may make the area impassable for reindeer and reindeer herders.

Basis for security

It is asserted that there is a basis for security pursuant to Section 34-1, alternative a and b of the Dispute Act. A reindeer grazing district has a specially protected right to use its migration route for access to associated grazing areas. Commencing the construction work and completing the development will close the migration route and cut off access to the winter grazing areas. This entails that crucial prerequisites for continued reindeer herding will disappear, and will thus constitute a violation of Article 27 of the ICCPR.

In accordance with this, the requirement for a basis for security has been satisfied.

Basis for security – pursuing the claim will be considerably impeded

It is asserted that pursuing or implementing the claim will be considerably impeded by

permitting construction to commence without an agreement between the parties, or stipulated remedial measures that are in accordance with Section 22 of the Reindeer Husbandry Act.

The developer's actions after the MTA plan was approved demonstrate that the reindeer grazing district will be run roughshod over without their rights to grazing areas and migration routes being safeguarded. This is also reflected in the Ministry's decision to postpone implementation during the spring migration on the basis of references to the developer's financial loss.

Basis for security – avert considerable harm or inconvenience

It is also asserted that the condition in Section 34-1, subsection 1, alternative b of the Dispute Act has been met.

The migration route's function of providing access to the winter pastures in the northwest is of crucial importance to the reindeer grazing district, and with it the preservation and continuation of Southern Sami language and culture. It is also of public interest and an obligation under international law to ensure the preservation of Southern Sami culture, which is on UNESCO's list of endangered languages.

It is thereby asserted that an injunction "*... is considered necessary to achieve a temporary arrangement in a disputed legal relationship in order to avert considerable harm or inconvenience (...) that the defendant's conduct gives reason to fear*".

Assessment of proportionality

It is asserted that there are no grounds for an exemption from an interim injunction based on the assessment of proportionality pursuant to Section 34-1, subsection 2 of the Dispute Act.

In this case, the assessment of proportionality must also be based on the protection afforded to reindeer herding as an industry under international law. Neither national nor international law permits the displacement of the reindeer herding industry on the basis of financial considerations. The same must also apply when balancing the interests in this context.

The court's decision on an interim injunction

It is asserted that there are no grounds for setting requirements for security for possible compensation as a condition for the injunction, cf. Section 34-2, subsection 1, second sentence of the Dispute Act.

It is principally asserted that there are no grounds for furnishing security pursuant to Section 34-2, subsection 3 of the Dispute Act because the claim is deemed to have

been substantiated. In the alternative, it is asserted that it cannot be deemed reasonable to furnish security in a case such as this. These are inviolable rights that may be lost when construction is complete, and the reindeer grazing district's ability to safeguard these rights will be rendered impossible if it is required that security be furnished for possible compensation.

The developer has also taken a conscious risk by failing to enter into meaningful discussions with the reindeer herding industry, while at the same time applying for commissioning and construction start without having clarified the arrangement with the reindeer grazing district. This is conduct that is contrary to the licence decision and the licence condition. An interim injunction to suspend construction is a consequence of a partially accepted appeal from the developer for deferred implementation of the decision relating to the MTA plan

The reindeer grazing district submitted the following statement of claim:

In principal:

1. Further construction work/development of Øyfjellet wind power plant is halted pending a final and enforceable judgement in the lawsuit over the validity of the development in accordance with the licencing decision of 16 November 2016.
2. Jillen-Njaarke reindeer grazing district is required to file a lawsuit over the matter within three months. If this does not occur, the injunction will cease to be valid.

In the alternative:

1. Further construction work/development of Øyfjellet Wind Power Plant will be halted pending a final decision on the diversion of the migration route pursuant to Section 22, subsection 2 of the Reindeer Husbandry Act.

For all instances:

1. Øyfjellet Wind AS and Eolus Vind Norge AS are ordered to pay costs.

NRL

NRL agrees with the assertions presented by the reindeer grazing precinct and therefore has the same statement of claim.

Eolus Vind Norge Holding AS has principally asserted the following:

Introduction

Eolus asserts that the district has neither substantiated the principal claim nor the basis for security in its petition for an interim injunction claiming a halt to the construction work for

the development of Øyfjellet wind power plant pending a final and enforceable judgment in the lawsuit pertaining to the validity of the licensing decision pursuant to the Energy Act.

The petition for an interim injunction is characterized by strong and undocumented characteristics. The district has also used this form of argument for the licensing authority. Eolus finds grounds to emphasise the considerable focus the Supreme Court has had on the evidentiary value of contemporaneous documentary evidence rather than subsequent testimony given in court. Among others, we refer to Rt-1999-74 and Skoghøy – Dispute Resolution (2017), pages 908-911, with reference a number of Supreme Court decisions in recent years.

The principal claim

Introduction

The district has asserted that the licence is invalid because the licence condition relating to reindeer herding has not been met and also cannot be met. It has also been asserted that the licence is invalid as a result of procedural errors in the form of inadequate assessments. Finally, it was asserted that the establishment of the wind power plant entails unlawful closure of the migration route pursuant to Section 22 of the Reindeer Husbandry Act.

Licence condition no. 15 relating to reindeer herding

The licence for Øyfjellet wind power plant sets conditions for safeguarding the relationship with the reindeer herding industry. This is achieved through remedial measures stipulated in the MTA plan. The NVE has approved the MTA plan with the remedial measures. The District's appeal of the MTA plan is being considered by the OED, which will hand down a final and enforceable decision on the remedial measures. The condition in the licence has been met.

The licensing authorities have conducted a comprehensive and extensive licence assessment process, and there has been a focus on the district. A special condition was stipulated for the licence which regulates the relationship with the reindeer herding industry. The reason for this licence condition was to ensure there is a possibility of future use of one of several winter pastures used by the district, i.e. winter grazing zone 5.

Winter grazing zone 5 itself is not affected, however a migration route from the winter pasture passes through the planning area for the wind power plant. Winter grazing zone 5 constitutes a smaller part of the district's combined winter pastures. The most important winter pastures are located further south along the coast. Access to these pastures is not impacted by the project.

Winter grazing zone 5 has not been used much by the reindeer herders in the district, and

only in the last two winters. It was only after it became clear that the wind power plant would be constructed that the district chose to move large parts of the herd to winter grazing zone 5. The herd was moved by truck and ferry from Sjømoen. To the best of Eolus' knowledge, when returning from winter grazing zone 5 during the past two spring migrations, the district has chosen to herd the animals on foot, and most probably partly through the planning area. This migration will also be fully possible after the wind power plant has been completed.

The licence stipulates that the parties shall cooperate on a practical arrangement for the migration. This also presupposes that the reindeer herders make a constructive contribution. If the district chooses not to contribute, the licence condition states that the licensing authorities shall stipulate the remedial measures through the processing of the MTA plan. This is what has occurred.

Several remedial measures were planned in the proposed MTA plan, which could be further specified following input from the district (document collection p. 818 et seq.). The proposals included limited movement in the planning area, use of fences to make the migration more efficient, measures relating to the gathering of reindeer before and after migration, reindeer herder hut, clearing of the migration route if there is regrowth in the area, increased herding efforts and financial compensation for this etc.

The MTA plan was sent for consultation in the usual manner, however the district's statement contained *no* specific input to the proposal. The district instead attacked the basis for the licence that was granted in 2016. The NVE held a further consultation meeting with the district before a decision to approve the MTA plan was made on 18 December 2019.

In the MTA plan and the NVE's decision, the licence condition relating to reindeer herding was supplemented as required by condition no. 15, and the district was ensured continued access to winter grazing zone 5.

In the alternative, it is not an easy task to follow the reasoning that the alleged non-fulfilment of a condition in the licence shall result in the license becoming invalid. Non-compliance with an administrative decision does not mean that the decision will become invalid. For energy licences, violations of conditions are sanctioned through energy legislation, for example, through fines or, in the worst case, revocation of the licence. It is the licensing authority that has the authority to impose such sanctions.

Procedural errors

With regard to the assertion of procedural errors, reference is made to the very extensive licence assessment process, including with regard to the impact of the wind power plant on the reindeer grazing district. The impact assessment is not the sole basis for the licensing authority's decision, and this decision must be based on the overall information available in the case on the date the decision is made. It is the overall administrative

process that is decisive to the issue of procedural error. There is no doubt that the OED based its decision on the assumption that the wind power plant can make migration more work-intensive, and this is the background to licence condition no. 15.

Section 22 of the Reindeer Husbandry Act

The district has asserted that the licence is invalid because it will be impossible to move through the planning area, and that this will entail illegal closure of the migration route pursuant to Section 22 of the Reindeer Husbandry Act.

Both the assessments in the case and the licensing authorities have found that it will be possible to move reindeer to and from winter grazing zone 5 using the remedial measures that have been planned, cf. above.

The research presented does not support the argument that the district will also be prevented from using the migration route through the planning area in the future. Some of the studies conducted on domesticated reindeer indicate that reindeer that are freely grazing may *reduce* the use of areas close to wind power plants that are in operation. The research shows that the clear majority of reindeer continue to graze in areas around wind farms, even without active herding. Reference is also made to the section on licence condition no. 15.

Article 27 of the ICCPR

The threshold for breach of Article 27 of the ICCPR is at a completely different level, cf. HR-2017-2247-A with further references.

Basis for security

The district has not substantiated that there is a basis for security, cf. Section 34-2 of the Dispute Act.

The district's core argument for there being a basis for security is that they cannot move past the wind power plant. It is absolutely possible to move past the wind power plant, and will also be possible in the future. No significant harm or disadvantage has occurred nor will occur. The potentially increased disadvantages the district inflicts on itself by refusing to cooperate on remedial measures do not establish a basis for security

The wind power plant is scheduled to commence operations in the second half of 2021. The first time that it appears applicable for the district to migrate through the planning area when the plant is in operation is in spring 2022. The district has had nearly four years to file a lawsuit against the state regarding the validity of the licence, but has chosen not to do so. The claim to halt construction work for several months pending a lawsuit is not based on a desire to obtain a final and enforceable judgment before the wind farm has been completed. The claim is based on a desire to stall the construction work.

If the court finds that the conditions for an interim injunction have otherwise been met, it is asserted that the extensive financial and social consequences of halting the construction work argue against an injunction being granted, cf. Section 34-1, subsection 2 of the Dispute Act. There is a billion kroner project at stake, which is contributing to a significant increase in renewable energy production in Norway. This must be weighed up against the fact that the district can use these winter pastures regardless of whether one is of the view that traditional migration through the wind park will be more difficult.

Eolus has submitted the following statement of claim:

In principal:

1. The petition for an interim injunction is rejected.
2. Eolus Vind Norge Holding AS is awarded costs.

In the alternative:

1. The plaintiff is ordered to furnish security that is determined at the court's discretion.

Øyfjellet Wind AS has principally asserted the following:

Øyfjellet has essentially endorsed the factual and legal assertions presented by Eolus. The following was asserted in the closing statement:

Overview

Øyfjellet Wind AS ("Øyfjellet Wind") disputes that there are grounds for granting the petition for an interim injunction.

Jillen-Njaarke reindeer grazing district has not substantiated a principal claim against Øyfjellet Wind.

The principal claim

Invalid licence

The reindeer grazing district asserts that the development is unlawful because the licence decision is invalid. The reason that the licence decision is invalid is partly due to the licence conditions not being met, partly due to defect in the contents (conflict with Article 27 of the ICCPR), and partly due to procedural errors.

Non-fulfilment of licence conditions

Øyfjellet Wind has made arrangements for an agreement to be entered into with Jillén-Njaarke reindeer grazing district. Repeated attempts have been made to establish a constructive dialogue and reach an agreement, however, the district has unfortunately not been willing to contribute to an agreement being entered into. Therefore, according to the

licence condition, it is the authorities that must decide what remedial measures need to be implemented. This matter is now awaiting a decision by the Ministry of Petroleum and Energy. The licensee has also submitted proposals for remedial measures to the County Governor of Nordland and presented these in the detailed plan. The NVE also consulted the reindeer grazing district before the detailed plan was approved. All obligations stipulated in condition no. 15 are therefore satisfied.

If the court should nevertheless find that the licence condition has not been met, the question will then be what legal effect this will have. It is the licencing authorities that may potentially assert that the licence condition has not been met, and impose sanctions on the licensee. Under no circumstances is it the case that non-compliance with a licence condition will automatically result in the licence being deemed invalid.

Defect in the contents

It is not correct that the construction of the wind farm will entail that the reindeer owners will be "refused" the right to exercise their culture, cf. Article 27 of the ICCPR. The threshold for establishing a violation of Article 27 of the ICCPR is very high. Measures that only have a limited impact on reindeer herding will not constitute a refusal.

The reindeer herding district has several winter pastures that can be used. It is also possible to move reindeer to and from winter grazing zone 5 with the remedial measures that are currently planned. There is no reason to assume that the proposed measures will be relaxed as a result of the Ministry of Petroleum and Energy's consideration of the MTA plan. The reindeer herding industry has also been consulted during all phases, their input has been carefully considered during the licencing process, adaptations to the project have been made out of consideration to reindeer herding, and additional work and additional expenses will be compensated. Application of the provision is not possible in a case such as this.

Procedural errors

The licence decision was subject to a long and extensive administrative process by the Norwegian Water Resources and Energy Directorate, as well as an equally extensive appeal process with the Ministry of Petroleum and Energy. The licence authorities have handed down decisions based on an overall assessment of all information obtained through consultations, hearings, research reports, impact assessment etc. The NVE's basis for making a decision on the cumulative effects is also adequate. Furthermore, it has not been substantiated that any procedural errors influenced the content of the licence decision, which entails that the decision cannot be deemed invalid, cf. Section 41 of the Public Administration Act. Recent research does not provide a basis for a different conclusion.

Section 22 of the Reindeer Husbandry Act

As an alternative principal claim, the reindeer grazing district has asserted that the development is still unlawful because it is in violation of Section 22 of the Reindeer Husbandry Act. This has not been substantiated. The development will not result in the closure of the migration route. That the wind farm impacts or disadvantages migration is

not sufficient for establishing violation of the provision.

The probability requirement

The reindeer grazing district asserts that it is not necessary to substantiate the principal claim because there is risk posed by delay, cf. Section 34-2 of the Disputes Act. This is not correct. The interventions in the area that have consequences for the migration route are reversible. In the unlikely event that the reindeer district is successful in an invalidity action against the state and the licence is revoked, the terrain interventions will be remediated and the landscape will be restored to a state that will not harm and disadvantage the reindeer grazing district.

Basis for security

The reindeer grazing district asserts that the construction work significantly impedes the options for pursuing or executing the principal claim because a reversal would be a less genuine alternative the longer the work proceeds, cf. Section 1 b. To this, reference is made to what has been stated regarding potential reversal of interventions that are of significance to the migration route.

It is also not correct that suspending the construction work until there has been a decision in the principal claim is necessary to avert considerable harm or inconvenience, cf. Section 34-1, section 1 b of the Dispute Act. The reindeer grazing district has the option of moving the reindeer through the area without significant loss or inconvenience. When viewed in light of the remedial measures that have been proposed (rectification of difficult road cutting points, suspension of work during migration, etc.), any potential harm and inconvenience will not be significant. The reindeer herding district itself can contribute to further averting the inconvenience by using one of the other winter grazing zones until a decision has been handed down for the principal claim.

Assessment of proportionality

An order to suspend construction work pending a decision on the principal claim would be disproportionate, cf. Section 34-1, subsection 2 of the Dispute Act. If required, Jillen-Njaarke reindeer grazing district can use other grazing areas until a potential action relating to the principal claim has been decided. In any case, there are only a few days per year in which the reindeer will be moved and, as stated above, the inconvenience will be significantly reduced as a result of the remedial measures.

Furthermore, suspending the construction work would have very serious consequences for Øyfjellet Wind. Large amounts have been invested in the construction project, and suspending construction would result in significant losses every single day. If the suspension is maintained for such a long time that turbine delivery is delayed, the right to electricity certificates lapses, the commissioning deadline in the licence is exceeded and Øyfjellet Wind is forced to default on the energy purchase agreement with Alcoa, then Øyfjellet Wind will suffer a significant financial loss. There is thus an obvious disparity

between the inconvenience the reindeer grazing district will experience compared to the consequences that suspending the construction work would have for Øyfjellet Wind.

In the event of an interim injunction, it is requested that security is furnished for compensation as a condition for entry into force and implementation, cf. Section 34-2, section 1, second sentence of the Dispute Act.

Øyfjellet Wind AS has submitted the following statement of claim:

In principal:

1. The petition for an interim injunction is rejected.
2. Øyfjellet Wind AS is awarded costs.

In the alternative:

2. The plaintiff is ordered to furnish security that is determined at the court's discretion.

The Court's assessment:

Pursuant to Section 34-2 of the Dispute Act, an interim injunction can normally only be granted if both the claim in respect of which the request for an interim injunction is made and the basis for security are proven.

As mentioned under the assertions from Øyfjellet, there is essentially correlation between the respective assertions from Eolus and Øyfjellet. When, in the following, the court makes reference to assertions from Eolus, this will therefore apply to the defendants jointly. The same applies in the relationship between the reindeer grazing district and the intervener NRF cf. the parties' assertions.

Principal claim

The principal claim in the case relates to the assertion that the development of Øyfjellet wind farm is unlawful. The court must conduct a prejudicial assessment of the principal claim in which the court must accept the facts that appear most probable. No qualified predominance of probability is normally required, cf. among others, Rt-1997-1197 and Rt-2002-108, as well as Gyldendals Rettsdata, remarks to Section 34-2.

The reindeer grazing district has cited several grounds for its assertion of illegality.

It has principally been asserted that the licence decision is invalid due to procedural error. It has been asserted that the incorrect facts were accepted because an incorrect conclusion was used as a basis for the consequences for reindeer herding. It has also been asserted that the impact assessment that was conducted was deficient and contrary to the Regulations relating to impact assessments because there was no overall assessment of the

intervention situation in the impact assessment. It has further been asserted that the consequences of this may be in violation of Article 27 of the United Nations International Covenant on Civil and Political Rights.

In the event that the court finds that the licence decision is valid, it is asserted in the alternative that the subsequent adoption of the MTA plan is invalid because it is contrary to licence condition no. 15 due to the migration route not being protected as required. It is further asserted that the MTA decision is in violation of Section 22 of the Reindeer Husbandry Act, because it principally entails unlawful closure of the migration route, or alternatively, unlawful diversion/closure through the requirement for transport by truck on developed roads.

If the court should find that the MTA decision is also valid, it is finally asserted that there is nevertheless a violation of Section 22 of the Reindeer Husbandry Act both during the construction period and the operational period. The NVE and OED do not have the competency to hand down decisions to close or divert migration routes.

The scope of the courts' right of judicial review

To begin with, it is noted that the courts' right of judicial review in connection with administrative decisions is limited to the application of the law and subsumption, including the facts that form the basis for the assessment. To some extent, discretion is also subject to judicial review if there is there is discrimination, arbitrariness or strong unreasonableness. There has been no disagreement between the parties on this legal starting point.

The use of winter grazing zone 5

The reindeer grazing district has noted that the defendant has asserted that the reindeer grazing district has not previously used the grazing areas in the planning area and winter grazing zone 5. In connection with this, reference is made to the letter of 22 August 2019 in connection with the NVE's approval of the MTA plan. Therefore, the court will first provide some remarks regarding the use of winter grazing zone 5. Reference is made to the map of the reindeer grazing district that has been inserted above.

Eolus has noted both in pleadings and in court that winter grazing zone 5 has not been used by the reindeer grazing district since the early 1980s, and made reference, among other things, to the report on the district division in Nordland from 2012. Eastern siida has used winter grazing zone 5 in the past few years. Eolus made note of the "new use" and suggested that this use was motivated by opposition to the wind farm itself.

As Appfjell stated in court, it was historically the grazing areas around the Seven Sisters (Syv søstre) which were used until these areas were protected in 1980 due to over-grazing. The rules of use for the district that were drawn up in 2011 state that Eastern siida has used

all the grazing zones for winter pastures. This use is evidenced by, among other things, the facts entered in the court record for Brønnøy District Court in Case No. 2/1984 of 27 August 1984. Reference is also made to the documented dialogue between the parties from earlier in the process that appears in the minutes of the meeting of 28 June 2017.

Case law stipulates that reindeer grazing rights are retained over time even if the activities have been discontinued, cf. Rt-1985-532, when the right was retained despite reindeer herding having been discontinued for 34 years.

Winter grazing zone 5 does not constitute the most important part of the winter pastures for the reindeer grazing district. Reference is made to Norwegian Institute for Agricultural and Environmental Research (Bioforsk) Report No. 93 from 2007, which includes a recommended cap on the number of reindeer in the reindeer grazing district on winter pastures. A recommended cap of 298 reindeer was given for winter grazing zone 5. The fact that the collective winter pastures are a prerequisite for continuing reindeer herding activities was accepted by the OED in the licencing process, including that the winter pastures constitute a minimum factor. The following is cited from the minutes of the consultation meeting between the OED and the reindeer grazing district:

"Eastern Siida has had stable operations for a long time, while western siida has been down for a while, however operations have now been re-established. Operations in the district, particularly on the eastern side, have been about the same for many generations. Both humans and animals have adapted to the operating pattern. The operations follow the natural migration of the reindeer. Eastern and Western siida have summer pastures on the eastern and western sides of Vefsna respectively. The winter pastures towards the coast are common for both siida. Winter grazing is generally the minimum factor for the district. The winter pastures in the north that are north-east of Øyfjellet's planning area have been heavily exploited in previous operations. Therefore, in recent years, the district has used the winter pastures furthest to the south towards Sømna, in order for the northern areas to have the opportunity to regenerate.

[...]

With regard to Øyfjellet, a migration route passes through the planning area for the wind power plant. The migration route is used for herding to the northernmost parts of the winter pastures along Vefsnfjorden. There is an alternative migration route over Hundålvatnet lake, outside the planning area, however this migration route requires safe ice on the lake in order to be used. During periods without safe ice, the migration route through the planning area needs to be used. The district notes that migration routes have special protection pursuant to Section 22 of the Reindeer Husbandry Act. If the establishment of the wind power plant has the consequence that the winter pastures in the north-east cannot be used because the migration route is unable to be used, this will have major consequences for reindeer herding, because the winter grazing area is a scarcity factor for the district."

Use and access to the grazing areas is a right. The court refers to the OED's

decision of 16 November 2016 where it states that:

"The Ministry assumes that a prerequisite for granting a licence for Øyfjellet wind power plant is that the reindeer herding district is ensured access to the winter grazing areas"

The court finds it to be clear that winter grazing zone 5 is part of the reindeer grazing district's requirement for winter grazing and is therefore covered by the framework for the licence.

Invalidity due to procedural errors

The reindeer grazing district's principal assertion is that there have been procedural errors. Reference has been made to Section 41 of the Public Administration Act:

"If the rules of procedure set out in this Act or regulations made in pursuance thereof have not been observed in dealing with a case concerning an individual decision, the administrative decision shall nevertheless be valid when there is reason to assume that the error cannot have had a decisive effect on the contents of the administrative decision."

Furthermore, reference was made to the errors being of decisive importance, and to the Supreme Court's statement in Rt- 2009-661, paragraph 72:

"If the procedural error has resulted in an inadequate or incorrect decision-making basis on a point that is of significance to the administrative decision, or the error otherwise entails disregarding fundamental conditions for proper procedure, somewhat more will generally be required. Compared with the interests that must be safeguarded through the rules pertaining to impact assessments, and the complex assessment process that is arranged, the path to invalidity may therefore be short when the procedural error consists of an absent or incomplete impact assessment. "

The court agrees with this legal starting point.

The reindeer grazing district has specifically asserted that the incorrect facts were used as basis as a result of an incorrect conclusion regarding the consequences for reindeer herding on the date the decision was handed down in 2016. The reindeer grazing district has referred to the impact assessment from Norconsult, which was the basis for the licensing process in 2014, and which, among other things, states that reindeer can migrate relatively unhindered in an area with wind power plants, and that it was human activity that caused the reindeer to avoid this area. However, on the date the decision was handed down in 2016, it had long been a prevailing view among researchers that man-made infrastructure had a negative impact on reindeer. Therefore, knowledge that existed when the assessment was carried out was not taken into consideration. Incorrect conclusions

were drawn which resulted in errors in the licence decision, because both the NVE and OED accepted that movement through the planning area is possible and that the migration route near the development.

It has been noted that expert witness Christian Nellemann confirmed this summary of the research to the court in his testimony. Furthermore, particular reference was made to the Kalvvatnan decision of 11 November 2016, which is asserted as being very similar to the present case, and where the Ministry referred to Swedish studies that demonstrate significant negative effects of wind power plants, (the SLU report), and that *"if the challenges become more permanent in nature, this may be in violation of Section 22 of the Reindeer Husbandry Act"*. It is the reindeer grazing district's assertion that if the NVE and OED would have had the correct information as the basis for their decision, a licence would not have been granted. The error therefore had an effect on the decision cf. Section 41 of the Public Administration Act.

Both Eolus and Øyfjellet have rejected the existence of procedural errors and noted that both the NVE and OED conducted extensive administrative procedures in connection with the licence being granted. It has been noted that it is the overall administrative process that is decisive, and that the question is whether it was adequate, including whether a reasonable prediction was made in terms of future consequences, cf. Rt-2012-1985, paragraph 77.

Before considering the assertions regarding procedural errors, the court will review the research on reindeer herding and wind power, including the reindeer's avoidance of wind power plants, which has been presented as evidence.

Research into the consequences of wind power development for reindeer herding

The court has received documented excerpts of various research reports, and four expert witness statements were presented to shed light on the consequences of wind power development for reindeer herding.

In 2017, Norwegian Institute for Nature Research (NINA), published "Wind Power and Reindeer – a Synthesis of Knowledge", which was prepared by, among others, Colman and Skarin, who are expert witnesses in the present case. The report is a compilation of studies of the impact that wind power plants have on reindeer. Section 5.1, Summary of Effects, states the following:

"Wind turbines and rotors: At two of the facilities studied in Sweden and partly in a new study from Norway, it has been found that reindeer have reduced their use of areas within 3-5 km of these facilities. At the same time, there has been a study in Sweden and four studies in Norway that have not fully or partly documented such negative effects. The reason for these differences was previously discussed and includes topography, season, grazing conditions, natural variation between years (especially with short time series), proximity to other infrastructure, different

behaviours between herds/populations and the design/implementation of the various studies. In order to strengthen knowledge about the effects of wind power plants on reindeer, long-term studies are required that take into account the combined effects of wind power plants and which look at the importance of the overall impact within the reindeer grazing area. Such future impact studies should also integrate (scientifically documented) local and cultural knowledge."

The court also finds grounds to refer to section 5.2.1, Mechanisms of action and remedial measures:

"There is a great deal of local knowledge among reindeer herders regarding loss of land, fragmentation and barrier effects/avoidance. This knowledge must be presented in a dialogue between reindeer herders and the developer/municipality as early as possible when planning wind power plants in order to reduce the effects of operations and to mitigate conflicts. In other words, the knowledge and operational patterns of reindeer herding in the individual areas must be included in the planning of wind power plants, and this also applies in relation to detailed planning (after a licence has been granted)."

The SLU Report from 2016 (from the Swedish University of Agricultural Sciences) was prepared by, among others, expert witnesses Skarin and Nellemann. Section 7, Conclusions, states the following:

"The results from our studies consistently demonstrate that the reindeer are negatively impacted by wind farms. This is not surprising since several studies conducted before the spring found that infrastructure and human activity are often negative factors for the reindeer. However, the manner in which reindeer avoid wind turbines appears to be unique in that they seek out areas where the wind turbines are topographically obscured, probably to avoid seeing them and to attenuate the sound of the wind turbines. The reindeer mainly select sheltered areas in the vicinity of the wind turbines, or they avoid the wind farms completely.

In our studies, we saw effects at a distance of 3-4 km from the wind farms. The precise distances at which the reindeer are affected depends on the conditions in each area. Behavioural changes become clearer when the wind farms are centrally located within a grazing area, such as in the calving area in Malå or the winter pastures at Gabrielsberget. However, even Stor-Rotlidens wind farm, which is located at the edge of the main grazing area, impacts on the reindeer's choice of grazing area.

The study from Gabrielsberget shows that it is possible to attract or force the reindeer to stay close to the wind farms in the winter through supplementary feeding and intensive monitoring of the reindeer herd. However, even when the reindeer could be kept close to the wind farm, they still preferred to stay in or near areas

where they could not see the wind power plant. "

The court summarises the review of research into reindeer herding and wind farms conducted for the court by expert witness, researcher Anna Elisabeth Skarin:

A study from Vikna (2004) involved 3-5 animals in enclosures. Skarin stated to the court that one cannot consider this study in relation to avoidance because it was not possible to choose the grazing area.

Two studies have not shown much impact from the wind farm – Kjøllefjord (fieldwork in the period 2006-2010, analysis and publication in 2011-2012) and Fakken (fieldwork in the period 2007-2014, GPS supplementation from 2009, publication 2017). Both concerned high-lying summer pastures on peninsulas with a limited area for the reindeer to move on. The methodology involved observing the animals and registering reindeer dung. No GPS measurements were made of the reindeer during the operational period. Skarin stated that the reindeer in this case had no alternative areas to move to. The court finds that these two studies do not have much relevance in the present case.

At Gabrielsberget (2016), which was a good winter pasture without alternative areas, tests were carried out with various measures including with and without feeding, and with more and less herding. The measurements were made with GPS. With herding and without feeding, the result was avoidance of 3 km and more. With feeding and with and without herding, the reindeer moved closer to the wind farm, however the reindeer seemed to prefer that the wind turbines were out of sight. Herding was necessary to keep the reindeer in the wind farm. Herding and feeding enabled the reindeer to be kept in the wind farm.

In Stor-Rotliden (2016), which was also a good winter pasture with alternative grazing areas, one observed the effect of the topography in that the wind farm was less visible from the grazing areas. However, there were few observations before the wind farm was constructed. The reindeer spread out more after the wind farm was constructed. A 5% change was recorded.

At Ragonvidda (2017), use was reduced within 11-20 kilometres in summer and autumn, and was about 25% less during the construction phase.

Both GPS and dung counting were used at Malå (2018). The area is located in forest, and the reindeer move between the coast and further inland. The wind farm consists of two smaller farms. The GPS data is from before, during and after construction. This study also concluded that visual aspects are of major significance to avoidance, and the use of areas where the wind turbines were not visible increased by 79%. It was stated that the use of dung counting as a method is significantly more uncertain than GPS observations.

Skarin clarified that "avoidance" does not mean total avoidance, but a change. She summarized that the research shows that the reindeer avoid wind farms where they are

visible. It is not known whether sound is also an influencing factor. Avoidance is greater when there is no forest. The reindeer will move faster through the wind farm area. Having reindeer in wind farm areas involves more work, especially in winter, because it becomes difficult to keep the reindeer together. Existing infrastructure also affects the situation. On the other hand, the reindeer also make use of roads, especially in forest areas, due to insects.

When specifically concerning Øyfjellet, Skarin noted that she has not been to the area and only knows it from maps. It was her assessment that it would be difficult to move the reindeer through the wind farm, if indeed possible at all. Moving the reindeer would involve additional work for the reindeer owners, and it would be difficult to use a helicopter. The alternative migration route across the ice at Hundålsvatnet was considered very unsafe.

Senior Adviser at the Protect Sapmi Foundation, Anders Johansen Eira, has, together with two colleagues, prepared the report from Protect Sapmi for the reindeer grazing district which included an assessment of land intervention, an expert reindeer herding impact assessment and statement of possible measures. Eira himself is a reindeer owner and his testimony is summarized as follows:

When Øyfjellet is developed, 54% of the total area in the district will be affected. In order to determine the actual grazing situation, land intervention must be assessed in relation to different seasons. For winter pastures, 72% are affected. If winter grazing zone 5 is cut off due to Øyfjellet wind power plant, reindeer herding will not be sustainable in the district.

Skarin and Eira agreed that the impact on reindeer herding must be assessed on a regional scale, not on a local scale.

Eira considered the migration route across Hundålsvatnet to be dangerous, and thus non-existent. In Eira's opinion, the wind farm would also entail the closure of the existing migration route that runs through the planning area. Therefore, the situation is that the current arrangement must be replaced with something unknown and there is thus a high risk associated with this. This involves a total diversion. The following complementary proposed measures were put forward in the report:

- Blast out a new migration route along Hundålsvatnet.
- Transport by vehicle across the wind farm may work. If so, large grazing gardens for gathering the reindeer must be established. This arrangement would be labour-intensive and must be supplemented with feeding.
- Transport by boat – must be carefully investigated in this case.

Eira stated that he was doubtful that it would be possible to get the reindeer herd into the wind farm. Various avoidance effects can occur, such as the reindeer taking larger

detours, avoiding entire areas, and the animals becoming traumatized both individually and as a flock. If the herd is able to be moved into the internal road network in the wind farm, there may be several different barrier effects such as the division of the herd, some turning, some stopping, etc. The area currently has a unifying effect that "holds on" to the reindeer herd, however this will cease to exist. It is crucial to look to the knowledge in the reindeer grazing district. Eira himself is a reindeer owner and cited experience of how difficult it can be when the herd stops and you cannot get it to go the way you want. Eira also noted that studies have not proven that adaptation can be a solution.

Expert witness, Director of the Norwegian Center for Global Analysis Christian Nellemann, has a background from the area at Øyfjellet in connection with the establishment of a national park back in 2004, as well extensive experience with research into reindeer herding and their interaction with wind turbines, roads, etc. Nellemann noted that the present case concerns two factors: Use of migration routes and loss of land. The function of the migration route is to link the seasonal grazing areas together and is a necessary and traditional part of reindeer herding. Nellemann made reference to a similar case involving development in an area with a continuous migration route: Jamal Peninsula, Russia. The area, which was an industrial area for oil and gas, was less developed in comparison with Øyfjellet, and the management of the reindeer herd was different in nature. The reindeer owners lost two primary migration routes in this area and the end result was that the reindeer had to be herded around the outside of the industrial area.

Nellemann also clarified to the court that "avoidance" means reduced use. He also reported that in all of the cases he has looked at, he has experienced reindeer being right next to installations. Based on 100-150 studies of domestic reindeer, wild reindeer and caribou, Nellemann summarized that 80% of cases show harmful effects on reindeer or avoidance, depending on the size of the area, type of terrain, etc.

Nellemann commented that he was not familiar with the description of Skarin's report from 2017 in the report of 11 September 2020 from Naturrestaurering AS, that was prepared in connection with the present case. It was also noted that approximately 40 studies have been carried out with GPS in the past ten years. 2-3 of these studies have concluded that no negative effects were demonstrated. According to Nellemann, all of these were financed by the industry.

Nellemann noted that dissent is natural in research. Based on his knowledge of current research, the conclusion was that, with the exception of some animals, reindeer will not use the wind farm area as a grazing area, and he strongly doubted whether the migration route will work to herd the reindeer through, and cited the fact that this was not achieved in Jamal with domestic reindeer. Hundålsvatnet is not an option due to unsafe ice. The lake can be drained by 25 meters. The effect will be the loss of spring pastures throughout the entire development area, and probably in the avoidance zone around this. The connection to other grazing areas will be lost, and migrating in alternative stages can result

in greater losses to predators because the reindeer will be concentrated in smaller areas. It was Nellesmann's view that the consequences for reindeer herding in Øyfjellet have been grossly underestimated, and that the area, which is considerable, will be lost.

With regard to the impact of roads on reindeer, Nellesmann noted that size and specific conditions and plowed edges will be decisive, while crossroads covered with snow are not problematic.

Nellesmann also had experience in restoration and removal of interventions. His experience was that if installations, buildings, ski runs and roads are removed, then the reindeer will reclaim the area. He stated that no adaptation to interventions has been observed in Setesdal-Ryfylket after 25 years.

Expert witness associate professor, researcher and general manager of Naturrestaurering AS Jonathan Edward Colman has an extensive background involving work with reindeer in various situations dating back to 1992. He has conducted specific research into reindeer and wind farms, and submitted a report on this work in 2004/2005. The report is still the basis for the NVE. The VindRein project, which was initiated by the development industry and Norwegian Reindeer Husbandry Administration, was commenced in 2005. There was a partnership with NINA in 2017, and a close collaboration with Skarin in 2018 through Vindval, which involved the exchange of data from Fosen from the past 10-12 years. Colman otherwise accepts assignments from both developers and state institutions, most recently a report prepared on assignment from Eolus and Øyfjellet in the present case through Naturrestaurering AS.

Colman has conducted research into reindeer land use, and to some extent their movements before, during and after development.

Colman made reference to Skarin's review of studies of wind farms that she presented in court, and stated that he agreed with the summary. Six of the seven studies were GPS studies, three in Norway, and three in Sweden. In 50% of the cases, there was no negative impact on land use. A study from Sweden and one from Norway had clear negative effects, while the final study was difficult to interpret.

Colman also noted there is no research into wind farms and herding. There has been little research into this and it was therefore his assessment that it is difficult to determine what the situation will be for Øyfjellet. Colman stated that he was not aware of equivalent cases in which a wind farm has been located in the middle of a migration route, however noted that a great deal of other herding takes place past most of the obstacles by using lead reindeer, fencing and increased teams. The most important factor is the reindeer herders themselves and their knowledge and experience, as well as the fact that domestic reindeer are controlled by humans.

The wind farm can make herding difficult, with roads, plowed edges, road cutting points,

and the wind farm itself. According to Colman, remedial measures will be crucial. However, it is difficult to determine what remedial measures will be needed. These need to be tested and adjusted. Proposals which Colman is currently considering are to reduce/stop activity in the wind farm, however not necessarily the turbines, level out steep roadsides, use strategic guide fences, place feed that attracts the animals forward, and human herding. In addition, the topography will be a natural guide. There is a risk that the reindeer will come to halt, however this could be due to many other reasons.

In Colman's view, trucks will be able to replace a migration route. He considered all three measures proposed by Protect Sapmi to be good solutions; boats are already used today, trucks will be quite similar to boats, while it would be a more long-term solution to conduct blasting along hundålsvatnet, however he would first test other remedial measures.

The experts revealed that research experiments that have been carried out must be applied to the terrain conditions in the specific instance.

In LF-2018-150314, the Fosen appraisalment, the Court of Appeal concluded that there was a solid scientific basis for the reindeer avoiding wind farms to a significant extent when there are alternative grazing areas to migrate to, and that the avoidance in the specific case was so significant that the area had to be considered lost as a grazing area. The court notes that the second appraisalment was not final and enforceable.

The court notes that the difference with the present case is that a wind farm will be established in a migration route, not in exclusively grazing areas. The distinction applies even if the reindeer naturally graze on the path through the migration route that is located in the planning area, and that climate change may lead to the increased use of high-lying ridges as grazing areas. The key question is whether the reindeer will avoid the wind farm even when migrating and thus prevent migration from being able to take place. The court would emphasise that the entire area is designated as a grazing area.

It is the court's assessment that a summary of present research materials suggests that the reindeer will largely avoid wind farms when they have alternative grazing areas. However, this case involves a migration route where the reindeer have to be herded through the wind farm, and not use the area as a grazing area and stay there over a longer period. The fact that the reindeer avoid areas where the wind turbines are visible is, however, considered to be applicable in the present cause.

The reindeer grazing district has asserted that the effect of the wind turbines will be the same as when they are visible in a grazing area, i.e. that when the reindeer approach and move towards the planning area and see the wind turbines, there is a high probability that they will stop, and they will be unable to be herded any further. The court's understanding of the statements from the experts is that they spoke about what they consider most probable based on their expert knowledge. There is no specific research into wind farms in migration routes, and the only comparable case is Nellemann's reference to Russia.

The court notes that in the case of Gabrielsberget, the research showed that feeding and intensive herding made it possible to keep the reindeer in the wind farm. Furthermore, the court refers to Skarin's statement that the reindeer will move faster through a wind farm than grazing areas. There are differing views on whether it will be possible to herd the reindeer into the wind farm. Skarin, Eira and Nellemann have varying levels of doubt about this. Colman was of the view that it should be possible and made reference to remedial measures together with the knowledge and expertise of the reindeer owners. Eira outlined three complementary remedial measures that Colman considered to be good but secondary to first attempting herding.

There is no research that specifically addresses the effect of wind farms on migration routes. There is little specific experience and knowledge to refer to that confirms or refutes the effect of various remedial measures. The court's summary of the expert assessments that have been presented is that the court finds it difficult to be able to conclude that the reindeer will avoid the migration route at Øyfjellet to such an extent that it must be considered closed, cf. Section 22 of the Reindeer Husbandry Act. The specific research into this is insufficient at the present time. There is also unanimous consensus about Hundålsvatnet having limited value as an alternative migration route.

Assertion of procedural errors due to incorrect factual assumptions for granting the licence

The court will then return to the reindeer grazing district's assertion above, which is based on the OED having made erroneous conclusions about the effect of wind power on reindeer in 2016, despite the existence of better knowledge.

The court would note that it is the circumstances on the date the decision was handed down that must be assessed. When assessing procedural errors, the overall administrative process is decisive and whether this was reasonable. Reference is made to Rt-1982-241, the Alta case:

"However, the application is only the first step towards the basis for the decision that must be made pursuant to Section 8. After an application that includes the information deemed necessary pursuant to Section 5 has been received, the Ministry may, in connection with the application being submitted for review and sent to stakeholders for comment pursuant to Section 6 no. 2, decide that statements shall be obtained from experts at the applicant's expense. This should be done "when it is deemed probable that the regulation will result in significant harm to the industries concerned."

This arrangement in the Act's procedural rules indicates that the application must generally be able to be based on the applicant's general experience material and knowledge – including the applicant's assessment of the statements he/she may have received pursuant to Section 4a of the Act. However, since the application is also the basis for the consultation process, more comprehensive material is often needed

for meaningful statements to be made. During their processing of the application, the licensing authorities must be able to use their own experience and expertise to complement the decision-making basis. The complete basis for the licensing authorities' decision on the application is the result of an interaction between the application, consultation statements and expert reports. I therefore do not agree with the appellants that the effects for all significant interests need to be investigated already before an application for regulation is submitted to the stakeholders for comment."

The court refers to section 3 of the Ministry's decision:

"Migration routes

[...]

With regard to Øyfjellet, there is a migration route that runs north from Fjellskardet and through the planning area to Demmeldalen and Håndåla respectively. There is an alternative migration route over Håndålvatnet, outside the planning area, however use of this migration route is sometimes prevented due to poor ice conditions. As stated in the minutes from the consultation meeting, the consequences of wind power on Øyfjellet depend on whether it is also possible to move reindeer to and from the winter pastures in the northeast after the potential establishment of the wind power plant.

Measures to ensure movement to and from the winter pastures in the northwest were discussed during the consultation. The reindeer herding district did not rule out the possibility that the establishment of fences and increased use of feed to gather the reindeer could have some effect. The establishment of an alternative migration route on the west side of Hundålvatnet was also discussed. The reindeer herding district stated that it is not possible at the present time to herd the reindeer from Eidet and up to Eideåsen because the terrain is too steep, however did not rule out the possibility of making adjustments that enable migration. However, the reindeer herding district stressed that no measures to mitigate the establishment of wind power in existing migration routes have been investigated.

The Ministry assumes that a prerequisite for granting a licence to Øyfjellet wind power plant is that the reindeer herding district is ensured access to the winter grazing areas. In connection with the protection that migration routes have pursuant to the Reindeer Husbandry Act, the Ministry refers, not least, to the fact that access to winter pastures is a prerequisite for being able to continue reindeer herding in a profitable manner, because winter pastures are a minimum factor in the district.

The impact assessment outlines possible transport by boat as an alternative, however has not investigated this in further detail. The Ministry finds that transport by boat appears to be a vulnerable and inflexible solution, and expects that an assessment of remedial measures will be based on the assumption that migration

may take place over land as it is today. Whether this occurs through measures along existing migration routes or in the form of diverting migration routes needs to be further investigated. The NVE has set conditions out of consideration to the reindeer herders.

[...]

The construction period

Irrespective of the extent to which established technical interventions will impact the reindeer, it must be assumed that a construction period involving a high level of human activity and loud machines and construction work will have a disruptive effect on reindeer herding. Research also indicates that reindeer who have been frightened away by construction work take longer to resume the use of an area than reindeer who have been shielded during the construction period.

Therefore, in the Ministry's view, it is crucial for reindeer herding that, prior to a potential construction period, a plan is established for how the construction work can be adapted to reindeer herding, and what remedial measures are needed to prevent as much harm to operations as possible. The NVE has set conditions that the environmental, transport and construction plan (MTA plan) must describe specific needs and options for adapting construction activities to reindeer herding, and other relevant measures to reduce the disadvantages for reindeer herding during the operational phase, see in particular item 8, paragraphs two and four of the construction licence.

The Ministry notes that Jillen-Njaarke has winter pastures along the entire fjord from Sømna to Vefsnfjorden. The district stated that they do not use the entire winter pasture every winter, and that this use varies successively from year to year following an assessment of factors such as the grazing conditions. In the Ministry's opinion, it should therefore be possible to arrange a specific agreement between the district and the developer which entails that the winter pastures closest to Øyfjellet's planning area are not used during the construction period."

The decision sets forth a clear precondition that the grazing area in winter grazing zone 5 must be maintained, that it constitutes a minimum factor for reindeer herding, and that migration routes are protected under the Act. Furthermore, it was found that a solution for a migration route must be further investigated, because it was assumed that human activity during the construction period will still have a disruptive effect on the reindeer. Conditions were set out of consideration to reindeer herding.

The reindeer grazing district has cited the Kalvvatnan decision and asserted that it is very similar to the present case. However the situation in that case was that the Ministry placed emphasis on more recent research and concluded that there could be permanent negative effects during the operational phase. The Kalvvatnan decision was handed down five days before the decision for Øyfjellet. The new research was therefore known when the Øyfjellet decision was affirmed.

The court notes that the planning area in Kalvvatnan affected pastures, migration and calving areas, as well as areas used for moving and calf branding. In the discussion, the Ministry referred to the fact that the area has already been impacted by several measures such as hydropower, roads, central pipeline networks and the Nordland railway line (Nordlandsbanen), and noted that there is a tolerance limit for intervention. The Ministry then reviewed the research results in "Reindeer and Wind Power II" and the conclusions regarding proven reduced grazing, less calm grazing 3-4 km from the power plant, that the reindeer seek out areas where they cannot see the wind turbines, and that no adaptation has been proven after 3-4 years of operation.

In relation to migration routes, the following was stated in the Kalvvatnan decision:

"The Ministry would note that it is uncertain as to whether a wind power plant will have such an impact on a migration route that closure is, in practice, a possibility, however, at least for the construction phase, it must be assumed there will be significant challenges associated with using the migration route through the northernmost planning area. If the challenges become of a more permanent nature, this may be in violation of Section 22 of the Reindeer Husbandry Act. In the view of the Ministry, it will be difficult to find an adequate alternative to this migration route, because only a narrow area between Øvre Kalvvatnet and Grytendalen is suitable for migration."

Based on the review of the Ministry's statements in the two cases, the court cannot see that it has been substantiated that the decision for Øyfjellet was based on incorrect facts. The court notes that when assessing the *grazing areas* in the Kalvvatnan decision, reference was made to more recent research on the reindeer's behaviour which differed from what was used as a basis for Norconsult's impact assessment. With regard to migration routes, both decisions express uncertainty about how the migration route shall be secured in order to avoid it being impacted to such an extent that it is considered closed, and in both cases the construction period was considered to be the most vulnerable period. The specific assessment for the migration route in Kalvvatnan was that it would be difficult to find adequate alternatives for the narrow area.

For Øyfjellet, the direct impact on grazing areas does not have the same key importance to the assessment as for Kalvvatnan. The planning area is recognized as a grazing area in the reindeer grazing district, however it is the migration route and its function as a right that is subject to consideration. It was found that the migration route must be maintained during the construction period, however that remedial measures are required.

Conditions were therefore set for cooperation with the reindeer grazing district. It is possible that there may be a need for a change in migration route, however not until after a decision by the Ministry of Agriculture, which is the correct authority to hand down such a decision.

Eolus has noted that the core of the argument for procedural error is what the future consequences will be. Predictions must be reasonable at the time they are made. (Asylum Children Rt- 2012-1985). Based on available research, the court concluded above that the migration route through the planning area has not been lost by it having to be considered closed. In the view of the court, the Ministry made a reasonable prediction when considering the migration route in the licencing process for Øyfjellet.

There were no procedural errors in the form of incorrect factual assumptions or unreasonable predictions.

Assertion of procedural error due to inadequate impact assessment

The court will then consider the question of whether the impact assessment was inadequate and in contravention of the Regulations relating to impact assessments because there was no overall assessment of the intervention situation.

The requirement for an impact assessment is stipulated in Section 4 of the Regulations in force at that time, cf. Appendix II, No. 19, which has since been continued in new provisions. The court refers to the overview of the NVE's administrative process in a separate section under the background to the case above. The impact assessment that was included with the application was prepared by Norconsult AS. The NVE established an impact assessment programme on 4 January 2013 with the following content:

“Reindeer herding

- *The reindeer grazing district's use of the area to be developed must be described.*
- *Direct and indirect impact and expected loss of grazing area as a result of the planned wind power plant and associated infrastructure (power lines, road systems, substation/service buildings, installation sites et.) must be described and assessed.*
- *Existing knowledge about wind power plants/power lines and reindeer must be briefly summarized.*
- *There must be an assessment of how, during the construction and operational phase, the wind power plant can impact the reindeer herders' use of the area through barrier effects, intimidation/noise and increased traffic.*
- *The potential effects of the planned wind power plant shall be viewed in connection with any plans for other wind power plants and other plans that will have a significant impact on reindeer herding in the geographical proximity.*

Method:

The assessment shall be carried out on the basis of existing information pertaining to grazing, calving, airing areas, movement and migration routes, scope of use, etc.

and existing knowledge of wind power plants/power lines and reindeer herding, possibly supplemented with inspections. The reindeer grazing district/siidar, Norwegian Reindeer Husbandry Association, and the Sámi Parliament shall be contacted."

The reindeer grazing district noted that the impact assessment did not consider the cumulative effects for the reindeer grazing district, and that this was not covered by the assessment programme referred to above. Several parts in the decisions made reference to cumulative effects, however no actual assessment was carried out. Reference is made to Annex III of the Regulations relating to impact assessments, which states that the impact assessment must be prepared based on an established plan or assessment programme and must, to the necessary extent, include:

"b) The impact assessment.

[...]

When several development measures in an area can collectively result in significant effects, the cumulative nature of the measure in relation to other measures that have been implemented and planned in the development measure's area of influence must be assessed. In the areas where reindeer herding interests are impacted, the overall effects of plans and measures within each reindeer grazing district must be assessed."

According to the reindeer grazing district, there was no complete impact assessment until Protect Sapmi's report was presented. This report showed that reindeer herding was already under heavy pressure from previous interventions and that winter pastures are a critical resource. The figures are discussed above in the summary of Eira's statement. The report provided a different knowledge base which, according to the reindeer grazing district, shows that the significance of the wind power plant was and is far more serious than what has been assumed by the NVE and OED.

The court would again note that it is the overall administrative process that is of decisive importance, cf. above. However, there is no invalidity if there is reason to assume that the error cannot have had a decisive effect on the contents of the administrative decision, cf. Section 41 of the Public Administration Act.

Neither Eolus nor Øyfjellet have disputed the assertion that the impact assessment from Norconsult does not meet the requirements stipulated in the Regulations referred to above. However, it has been noted that the licencing authority's decision-making basis does not exclusively consist of the impact assessment, but rather is based on the overall information available in the case on the date of the decision.

The court refers to the summary of the licencing process included under the background to the case above. The court also makes reference to the thematic assessments included in the NVE's decision, including: reindeer herding, wind resources, power plants, industrial enterprises, cabin areas, hydropower plants, power

line routes, other wind power plants, the landscape, visual effects, impact on landscape values locally and regionally, cultural heritage sites, outdoor recreation, tourism industry, biodiversity, impact on birds, protected areas, roads, water, etc. which established an extensive decision-making basis.

NVE notes that the effect on the migration route through the planning area is one of the most important consequences for the wind farm. Reference is made to the fact that the wind power plant will impact the reindeer grazing district during both the construction and operational phases, and that the reindeer grazing district has already been impacted by several interventions in its grazing areas, including other power plants, industrial enterprises and cabin areas. Several hydroelectric power plants have been established in the vicinity of the planning area. The overall result is that, together with Øyfjellet wind power plant and plans for new interventions, this places pressure on reindeer herding. Øyfjellet was assessed in comparison with the wind farm in Mosjøen.

The subsequent licence assessment from Protect Sapmi arrived at a different conclusion regarding the consequences of the wind power plant. Based on an overall assessment of the above factors, the court finds that the NVE carried out an extensive and prudent licencing assessment process based on the existing knowledge base. The assessment was that there is a risk associated with implementing the project, however it was found that remedial measures for the reindeer herding industry will safeguard the interests of the reindeer herding owners in such a manner that migration routes will not be closed and winter grazing zone 5 will be maintained. The preservation of the Southern Sami culture and language was of key importance. In the view of the court, the NVE's report essentially conducts the impact assessment which is asserted as not having been carried out. If it can be established that there was a procedural error in the requirements set out in the Regulations relating to impact assessments, the court nevertheless cannot see that this had a decisive effect on the content of the decision. The assessments were later affirmed by the OED.

There were no procedural errors in the form of an inadequate impact assessment and unreasonable prediction.

The licence decision is invalid because the consequence of this entails violation of Article 27 of the United Nations International Covenant on Civil and Political Rights (ICCPR)

The reindeer grazing district has asserted that the consequences of the wind farm may entail a violation of Article 27 of the ICCPR. For its part, Eolus has noted that key grazing and calving areas are not affected in this present case. The district has been consulted a number of times during the process. Both Eolus and Øyfjellet have noted that the threshold for the provision to apply is at a completely different level than in this case.

Article 27 of the ICCPR is applicable as Norwegian law cf. Sections 2 and 3 of the Human Rights Act. The provision is an independent counter-balance to administrative discretion

when deciding on a licence pursuant to the Energy Act where the threshold pursuant to the wording is "denied":

Minority groups "[s]hall not be denied the right, in community with the other members of their group, to enjoy their own culture (...)".

This entails that members of ethnic minorities must not be denied the right to cultivate their own culture. The parties in the present case agree that the Sami are protected by the provision, and that reindeer herding is a part of the Sami culture that has protection.

LF-2018-150314 (The Fosen appraisalment) extensively dealt with the provision with reference to HR-2017-2247-A (Reinøyforbindelsen) in which the Supreme Court concluded that somewhat more will be required before Article 27 has been violated, and HR-2017-2428-A (Sara) in which the Supreme Court formulated a type of test for whether a violation has occurred. Reference was also made to the decision in the European Court of Human Rights' case of Ángela Poma Poma v. Peru concerning the draining of large areas as a result of water being diverted from wells and causing the deaths of large numbers of cattle. The Court of Appeal provided the following summary:

- Article 27 provides protection not only against legal restrictions, but also actual restrictions.
- It appears that the threshold is somewhat lower with the two most recent Supreme Court decisions, however a good deal more is still required.

Winter grazing zone 5 is a minimum factor, and it is assumed in the licence decision that the reindeer grazing district shall be ensured access to the grazing areas and that remedial measures must be clarified. The court has previously concluded that it cannot be established that the migration route has been closed in violation of Section 22 of the Reindeer Husbandry Act. In the view of the court, this entails that it also cannot be stated that the establishment of the wind farm threatens the existence of the reindeer herding industry at Øyfjellet.

Remedial measures have not been clarified, and it may be a question of whether these measures, depending on what they consist of, may result in deviations from traditional reindeer herding that entails violation of the right to exercise Sami culture. Options that have been mentioned are boat and truck. Feeding has also been mentioned as a means of enticing the herd through the wind park. The court notes that it is not uncommon for the reindeer herding industry to transport reindeer by boat and motor vehicle, and in the last two years eastern siida has used boats for transport to winter grazing zone 5. In the view of the court, the proposed remedial measures that have been discussed cannot be considered such a major deviation from traditional reindeer herding that this in itself constitutes a violation of the right to exercise Sami culture.

The court notes that there has been dialogue with the reindeer grazing district during the

entire process with the wind farm, including in writing, orally and through meetings, and the court assumes that the dialogue has been genuine.

It is also common to rotate the use of winter pastures depending on overgrazing. It is possible to use other winter pastures during the construction period. However, if the reindeer owners nevertheless choose to use winter grazing zone 5, the time period for the use of remedial measures will be limited. The culture of passing down knowledge between generations will remain intact.

In the view of the court, the consideration of preserving the Southern Sami culture and language has been safeguarded. The wind power plant does not constitute an intervention that denies the Sami people the right to engage in reindeer herding.

The court has concluded that there is no violation of Article 27 of the ICCPR.

In accordance with this, the court has concluded that the licence decision is valid and that the development at Øyfjellet is lawful.

Invalid MTA plan

In the event that the court decides that the licence decision for the wind farm at Øyfjellet is valid, the reindeer grazing district has asserted in the alternative that the subsequent decision regarding the MTA plan is invalid. Two grounds were asserted for invalidity. First, it was asserted that the MTA plan is invalid because the migration route is not secured as stipulated in the licence condition, thus entailing that licence condition no. 15 has not been met. Second, it was argued that the MTA plan is in violation of Section 22 of the Reindeer Husbandry Act because it entails the illegal closure of the migration route.

Eolus has disputed the assertions and argued that the licence condition was satisfied, and has the purpose of facilitating an agreement on remedial measures between the parties and ensure access to winter grazing zone 5 and is within the framework of the licence. The system is that the proposal must be presented to the County Governor, and the remedial measures shall be presented in the detailed plan, which in turn must be approved by the NVE. If the parties fail to reach an agreement, the NVE shall consult the district before the detailed plan can be approved. Rejection on the grounds of insufficient legal interest in reviewing the validity of a decision which is undergoing appeal proceedings was insinuated, however not asserted. The court will therefore not provide any further comment to this.

In a letter of 24 October 2018 to Vefsn Municipality, the OED expressed its opinion regarding what the licence condition entails if no agreement is reached:

"However, if no agreement is reached through negotiations, I would have specified that the licencing authority can then take control and stipulate remedial measures directly. "

The court makes reference to the NVE's "Background for decision relating to amendments to the licence, MTA and detailed plan" of 18 December 2019. Here the position of the reindeer grazing district is the same as what has also been asserted to the court, i.e. the district is critical of the fact that the report from Protect Sapmi was not part of the MTA and detailed plan, that the report was not sent for consultation, and that submitted proposals for remedial measures were not based on the report. In response to this, the NVE notes that, during the appeal process, the OED established that access to winter grazing zone 5 had been sufficiently assessed and that they had used the assessments from Protect Sapmi as a basis when approving the MTA and detailed plan. It was also stated that:

"In the NVE's view, moving reindeer through the planning area will ensure adequate access to the winter pastures in the northwest. The NVE will impose conditions for the use of this solution. During the construction phase and until the access and internal roads have been constructed, the move will take place by herding through the planning area. The NVE will set conditions for the construction activities that affect the move to be halted during the move. The NVE expects that the move shall be efficiently planned and implemented. The reindeer grazing district is of the opinion that the entire wind power area will be lost as grazing land when the wind power plant is established. The NVE has not placed emphasis on the use of the area as grazing land in connection with the processing of the plans."

The NVE found that once access and internal roads have been established, moving shall take place by truck through the planning area, unless otherwise agreed, and transport by boat/ferry may also be an option. Reference is made to the fact that moving through the planning area during the construction and operational phase requires necessary auxiliary facilities, gathering areas and increased herding. In connection with this assessment, the NVE set its conditions:

"The NVE will set the condition that the plan for facilitating movement through the planning area must be sent to the NVE. The licensee must ensure that an agreement is entered into with Jillen-Njaarke reindeer grazing district for a plan to facilitate movement through the planning area during the construction and operational phase. If no agreement is reached between the reindeer grazing district and the licensee, the case must be submitted to the NVE for approval by 10 March 2020."

The NVE left it up to the licensee to clarify matters relating to the Reindeer Husbandry Act with the reindeer herding authorities. The NVE found the proposals presented in the MTA and detailed plan to be adequate, and expected that the remedial measures would be implemented in consultation with the reindeer grazing district.

Pursuant to the Energy Act, the NVE has the authority to stipulate conditions for implementing the measure that can reduce negative effects from the wind power plant

and associated grid connection and other infrastructure. Pursuant to Section 3-4 of the Energy Act Regulations, the NVE may stipulate conditions for granting a licence for electrical installations.

The court accepts that there has been relatively extensive contact between the parties relating to remedial measures, albeit somewhat varying in intensity. The reindeer grazing district's attitude towards the wind farm has changed since receiving feedback about there being a higher level of avoidance than what had been expected based on other projects. The court refers to Appfjell's testimony, in which he referred to conversations with Utsi, who is a reindeer owner in Fosen. The report from Protect Sapmi also contributed to creating greater scepticism about the consequences for the reindeer.

The court notes that the work to protect the migration route as presupposed in the licence condition is ongoing in the sense that the MTA plan, as this was approved by the NVE, is undergoing appeal proceedings with the OED.

It is the court's interpretation of the condition stipulated by the NVE that it involves following up and enforcing the licence condition set by the OED. Since the parties have not been able to reach an agreement, follow-up of the licence condition is further ensured by setting a deadline for the parties. The court does not agree with the reindeer grazing district that there is any conflict with regard to the rank of the administrative bodies in connection with the decisions. The MTA plan and the NVE's decision supplement licence condition 15.

It is the court's understanding that the reindeer grazing district has asserted that a valid MTA plan cannot be approved without specific fulfilment of the requirement in licence decision no. 15 for remedial measures to be in place. Based on the manner in which the licence condition has been worded, the court does not see that there are grounds for such an interpretation. This would then mean that a situation in which there is disagreement would entail that one party can halt the progress of the project. Instead, the outlined approach if no agreement is reached in accordance with the condition has been followed. It is also noted that the reindeer grazing district's interpretation also does not correlate with how both the NVE and the OECD interpret the licence condition cf. above. The deadline that was set was out of consideration to the movement of reindeer in the spring and the need for clarification, which is a supporting element for the court's interpretation. The process may repeat itself if the parties do not reach agreement on the next move. The court also finds reason to note that the parties may have a certain duty to adapt, and reference is made to Rt-2000-1578.

The reindeer grazing district has also asserted that the MTA plan is in violation of Section 22 of the Reindeer Husbandry Act, because it principally entails the unlawful closure of the migration route, or alternatively entails unlawful diversion/closure through orders to use transport by truck on developed roads, and that this constitutes grounds for invalidity.

Section 22 of the Reindeer Husbandry Act states the following:

“Reindeer herders are entitled to freely and unhindered herd and move their reindeer in the parts of the reindeer grazing area where the reindeer may legally roam and are also entitled to move with reindeer along traditional migration routes. Migration routes also include permanent loading and unloading sites for transportation of the reindeer.

The migration routes of the reindeer herders must not be closed, however the King may consent to divert migration routes and open new migration routes if legitimate interests provide grounds for doing so. Any damage resulting from the diversion of a migration route or the opening of a new migration route shall be compensated through a decision by the Land Consolidation Court. The King may also decide that the detailed specification of the new migration route shall be left to a discretionary assessment.”

The court refers to the review of the NVE's decision on the MTA plan above and the description of what the NVE considers to be adequate remedial measures. Reference is also made to the court's conclusion above relating to the documented expert reports and statements, and the question of whether the wind farm will actually mean that the migration route will be closed. The court's assessment is that it has not been proven that the migration route is or will be closed in the present case.

An application can be made to change the migration route. The authority lies with the Ministry of Agriculture. No changes have been applied for in the present case. It emerged during the proceedings that if the reindeer grazing district considers it desirable, or that there is a need for such an application, Eolus is positive to this. The court therefore agrees with the reindeer grazing district that neither the NVE nor the OED has the authority to make such a change. This sets limits on what these bodies can decide on.

In accordance with this, the court finds that the MTA decision was valid.

The development is unlawful and in violation of Section 22 of the Reindeer Husbandry Act

It has been asserted on behalf of the reindeer grazing district that, given the conclusions arrived at by the court above, there is still a violation of Section 22 of the Reindeer Husbandry Act both during the construction period and during the operating period. The reindeer grazing district noted that the process for the most recent migration was inadequate and that there was in actual fact no halt to the construction work based on the interests of reindeer herding. Furthermore, reference was made to the County Governor's assessment that there has been an unlawful closure because remedial measures are inadequate.

Eolus has noted that it is the function of the migration route that has special protection, and that it has not been proven that the migration route has been closed.

As a matter of form, it is noted that remedial measures must be presented to the County Governor. There is no requirement for the County Governor to grant its approval.

A condition in the licence is that construction work which impacts on the migration must be suspended during the migration. In addition to this are the remedial measures included in the MTA and detailed plan after the consultation statement from the County Governor was received. A prohibition against the closure of the migration route is not the same as it being affected, which is what the NVE has accepted in this instance. The purpose of the remedial measures is to reduce the disadvantages for the reindeer herding industry. The decisions by the NVE and OED consistently made reference to the party that has the authority to decide on the diversion of the migration route, and that this thus constitutes a counter-balance.

In connection with the spring migration in 2020, construction work was halted following dialogue with the reindeer owners. The migration was carried out from 27 to 29 April 2020. The reindeer flock was herded through the planning area by helicopter and snowmobiles. It transpired that some reindeer had remained on the winter pasture after the migration had occurred. These reindeer were partly herded across the planning area without a halt to the construction work being requested, and some reindeer remain in the winter grazing zone. At this point in time, the construction work consisted of snow clearing of the entrance road to the planning area.

The court refers to the assessments made concerning Section 22 of the Reindeer Husbandry Act based on a summary of research in the area above. Together with the circumstances addressed above, the court cannot see that there was a breach of Section 22 of the Reindeer Husbandry Act. The development is lawful.

Summary - principal claim

In accordance with this, the court has concluded that the reindeer grazing district has not substantiated any principal claim. The court has concluded that the licence decision is valid since the court has not found there to have been procedural errors or infringement of Article 27 of the ICCPR. Furthermore, the court has concluded that the decision under the MTA plan is valid. The court has not found grounds to state that there is a violation of the rights pursuant to Section 22 of the Reindeer Husbandry Act, or the rules governing authority that are stipulated in the provision.

In accordance with this, it is not necessary for the court to consider the issue of whether there is a basis for security.

The court notes that section 7.2.2 of the petition made reference to Section 34-2, subsection 2 of the Dispute Act and asserted that “delay poses a risk”, thus entailing that an interim

injunction can be granted despite the principal claim not having been substantiated. The reference was included in relation to the assertion that the court can issue an interlocutory order without a prior oral hearing cf. Section 32-7, subsection 2 of the Dispute Act. The court has found no grounds to state that delay poses a risk and the court has therefore considered the petition in accordance with the general rule that the principal claim must be substantiated.

The plaintiff's petition for an interim injunction is rejected.

Costs

Eolus has claimed coverage of fees of NOK 1,578,720, excluding VAT. Eolus has the right to deduct VAT, and therefore no claim has been submitted for coverage of VAT. It was stated that 379.5 hours were used. It was reported that costs for only one lawyer have been claimed from and including the court hearing.

In addition, Eolus has submitted a claim for coverage of expenses for expert witness Jonathan E. Colman of NOK 42,000, excluding VAT.

The total claim for costs amounts to NOK 1,620,720, excluding VAT.

Øyfjellet has claimed coverage of fees of NOK 774,000, excluding VAT. Øyfjellet also has a right to deduct VAT, and therefore no claim has been submitted for coverage of VAT. It was stated that 175 hours were used. It was reported that costs for only one lawyer have been claimed from and including the court hearing.

In addition, Øyfjellet has submitted a claim for coverage of expenses in the form of travel expenses and meals for Erik Mortensen and counsel totalling NOK 5,374, excluding VAT.

The total claim for costs amounts to NOK 779,374, excluding VAT.

In comparison, the fee claim from the reindeer grazing district amounted to NOK 673,650, excluding VAT, for 249.5 hours, i.e. NOK 848,313, including VAT. Expenses in the form of remuneration to witnesses and copying etc. were stated at NOK 44,992. Payment of VAT was claimed because the reindeer grazing district does not have a right of deduction. The total claim for costs amounts to NOK 893,305, including VAT.

No claim for costs was submitted by the intervener, the Sami Reindeer Herders' Association of Norway (NRL) .

The court has found fully in favour of Eolus and Øyfjellet in this case. Based on this result, the defendants shall be awarded costs, cf. the general rule in Section 32-10 of the Dispute Act, cf. Section 20-2, subsection 1.

The reindeer grazing district has asserted that, in the event that the plaintiff loses the case, the plaintiff must be exempt from liability for costs because there are compelling grounds that make this reasonable cf. Section 20-2, subsection 3 (a), (b), and (c) of the Dispute Act. Both defendants disputed that an exemption applies and made reference to large parts of the lawsuit having been funded by Motvind Norge, and that the basis for applying the exemption does not apply. The defendants disagreed that partial funding from a third party influences whether the provision is applicable. The plaintiff is Jillen-Njaarke Reindeer Grazing District.

Section 20-2, subsection 3 of the Dispute Act states the following:

“(3) The court can exempt the opposite party from liability for legal costs in whole or in part if the court finds that compelling grounds justify exemption. In particular, the court shall take into account

- a) a) whether there was just cause to have the case heard because the case was doubtful or because the evidence was clarified only after the action was brought,*
- b) b) whether the successful party can be reproached for bringing the action or whether the party has rejected a reasonable offer of settlement, or*
- c) c) whether the case is important to the welfare of the party and the relative strength of the parties justifies an exemption.”*

The preparatory works state that there is an exception and that the condition "compelling grounds" entails that a qualified basis is required to make exceptions to the general rule. A specific discretionary assessment must be carried out.

The provision is not exhaustive in terms of the factors upon which particular emphasis should be placed. The preparatory works note that there may be grounds to make exceptions in certain cases that involve a principle interest. If the resourceful party that is successful in the action has the principle interest, there may be good reasons for why the unsuccessful party should not be assigned liability for what relates to the issue of principle importance, cf. Rt-2011-586. The present case raises important issues that are of major significance to the parties involved. However, this applies to ordinary issues pertaining to licencing laws. There are many cases within the same field of law that involve the same issues, either by way of a discretionary process or for validity actions in connection with administrative decisions. The court therefore cannot see that there are important issues of principle that would provide grounds for making exceptions to the general rule in the Act.

In Section 20-2, subsection 3 (a) of the Dispute Act, it is only the first alternative of whether the case was doubtful that is applicable, and reference is made to the fact that the evidence in the case was not clarified until after the commencement of legal proceedings. There must be a qualified doubt, and this doubt must have made it reasonable to bring an

action. It is the court's view that this case was not doubtful. The court does not find Section 20-2, subsection 3 (b) to be applicable in the present case and reference is made to the facts of the case. Section 20-2, subsection 3 (c) was inserted in the Dispute Act to take into consideration the consequences the action has for the parties, and that the starting points, including the possibility of paying the successful party's costs, can be very different. The preparatory works state that particular emphasis must be placed on whether the successful party is a central government, municipality or other strong counterparty.

The basic condition for applying subsection 3 is that there are "compelling grounds". In relation to Section 20-2, subsection 3 (c), the court notes that, in the present case, the reindeer grazing district stands against two significant players in the energy industry, and that there is a disparity in strength between the parties. The case concerns important issues, and fundamental rights for the reindeer grazing district. Based on the information the court has received, the reindeer grazing district received financial support for the lawsuit from Motvind Norge. As mentioned above, the court has not had any doubts about the outcome, nor has the court had to consider important issues of principle. Based on an overall assessment, the court has not found that there are sufficiently compelling grounds to suggest there should be a deviation from the general rule.

The reindeer grazing district had further remarks regarding the statements of costs from both Eolus and Øyfellet AS. It was asserted that the fee claims from both defendants are unreasonably high and was also noted that the work of two lawyers was not necessary until the main hearing. Attorney Abell stated that the majority of the hours accrued prior to the main hearing involved work he carried out, that the defendant was responsible for much of the documentation in the case, that the case was extensive, and that it was necessary to review many years of history during the preparatory proceedings.

Pursuant to Section 20-5, subsection 1 of the Dispute Act, full compensation for costs shall cover all necessary costs incurred by the party in relation to the action. In assessing whether costs were necessary, emphasis must be placed on whether it was reasonable to incur these in view of the importance of the case.

In its recommendation to the new Dispute Act the Standing Committee on Justice stated, among other things, the following regarding costs:

"The committee is of the view that the courts should play a far more central role in controlling the level of costs than at present, and sees that the reluctance of the courts to reduce claims for costs that are submitted can contribute to a higher cost level. The committee therefore endorses the proposal to give the courts more effective tools to control and influence claims for legal fees, and would emphasise the importance of the courts using these to ensure there is a more reasonable cost level."

The following is stated in Schei et al, "Comments to the Dispute Act", 2nd edition p. 726 et

seq:

"The court shall exercise genuine control over the fee claim. This includes both hourly rates and time used. [...] However, it is the total claim that is of decisive importance, Rt. 1985 p.1027. A lawyer who is a specialist may claim a higher hourly rate than usual if this is compensated by the fact that the work is performed in less time than a generally competent lawyer would have used.

In accordance with the general views expressed by the legislators that are referred to [...], the intention is to tighten the rules in relation to current practice, cf. Proposition. Page 448. If the court finds that the fee claim is excessive in relation to what the litigation assignment should have required, the amount will be reduced to what the court deems correct [...]

The clear general rule must be that a party that chooses to be assisted by counsel that is particularly costly must itself bear the additional costs of this, cf. Proposition, page 447. It is only if the nature, complexity etc. of the case entail that particularly costly assistance is required to adequately perform the litigation assignment that coverage of this may be claimed from the counterparty."

It further states on page 729 et seq, that:

"Pursuant to subsection 1, first sentence, when making the assessment of whether the costs were necessary, emphasis must be placed on whether it was reasonable to incur these in view of the importance of the case. This is a deliberate tightening of the rules in comparison with previous law. [...]

Subsection 1, second sentence is an important and specific expression of the principle of proportionality in Section 1-1, subsection 2.

The restriction is primarily of independent significance in small and medium-sized cases where the core of the case is that no compensation shall be paid for costs which, based on the importance of the decision, were unreasonable to incur, even though the costs contributed to strengthening the case. In many instances, it will not be a single expense item or act of litigation that is problematic, but rather the sum total of many individual items or the amount of legal work that results in the overall costs being disproportionately high. The claim for compensation may be reduced in such an instance. The parties and their counsels acting on their behalf must, by virtue of the principle of proportionality that shall be of fundamental importance in a modern process, have a duty to adapt the preparation of the case and the expenses to the subject matter of the case."

In accordance with this, the court must conduct a genuine assessment of whether the costs were necessary and reasonable. It is clear that the defendants must be able to engage legal assistance in order to safeguard their interests. The nature, scope and complexity of the dispute suggest that a competent commercial lawyer be engaged who, in turn, spends the

necessary time on refuting assertions from the plaintiff.

Attorney Abell and Attorney Sandvik together used a total of 379.5 hours. This amounts to an hourly rate of NOK 4,160, excluding VAT. Attorney Smørdal and Associate Attorney Lien spent a total of 175 hours. No differentiation was made between the respective hours used by the partner and associate attorney. The average hourly rate amounts to NOK 4,422, excluding VAT.

For their part, Attorney Gudesen and Attorney Jervell stated an hourly rate of NOK 2,700, excluding VAT, and that 249.5 hours were used.

The court notes that the hourly rate for Eolus and Øyfjellet is high when compared to Attorney Gudesen and Attorney Jervell. Nevertheless, the court finds that, in isolation, the hourly rate used is not unreasonable in a dispute involving the type of complexity in the present case, and is within what one must expect in terms of price levels at the respective law firms. It is clear that the defendants have contributed to the information in the case. However, the court finds that the time use was somewhat excessive. Reference is made to the fact that Eolus used 130 hours more than the reindeer grazing district.

Øyfjellet had largely had the same assertions as Eolus and reference is made to the defence reply, which, for this reason, was relatively succinct. Attorney Abell had the most extensive submissions during the court hearing, and this therefore necessarily limited the scope of work for Øyfjellet. The court finds that Øyfjellet's time use was also somewhat excessive.

In accordance with this, it is the court's assessment that a discretionary deduction must be made in the fee claims from Eolus and Øyfjellet. The court finds that Eolus' fee claim can be set at NOK 1,160,000, excluding VAT, which means 279.50 hours of work, and for Øyfjellet can be set at NOK 560,000, excluding VAT, which gives an estimated 126 hours.

The court has no comments regarding the submitted expense claims.

In accordance with this, Eolus' total claim for costs amounts to NOK 1,202,000 (NOK 1,160,000 + NOK 42,000,).

In accordance with this, Øyfjellet's total claim for costs amounts to NOK 565,374, (NOK 560,000 + NOK 5,374).

CONCLUSION

1. The petition for an interim injunction is rejected.
2. Jillen-Njaarke reindeer grazing district shall pay costs to Eolus Vind Norge AS amounting to NOK 1,202,000, within two weeks after this interlocutory order has been issued.
3. Jillen-Njaarke reindeer grazing district shall pay costs to Øyfjellet Wind AS amounting to NOK 565,374, within two weeks after this interlocutory order has been issued.

Eivor Grindstuen

Instructions on the right of appeal in civil cases are enclosed.

Instructions on the right of appeal in civil cases

The rules in Chapters 29 and 30 of the Norwegian Dispute Act relating to appeals apply for civil cases. Somewhat different rules apply for appeals against judgments, appeals against orders and appeals against decisions. More information and an overview of the rules are provided below.

Appeal deadline and fees

The deadline for submitting an appeal is one month from the date the ruling was communicated to you, unless otherwise is expressly stipulated by the court. The following periods do not apply when the deadline is calculated (court holidays):

- from and including the final Saturday before Palm Sunday until and including Easter Monday,
- from and including 1 July until and including 15 August,
- from and including 24 December until and including 3 January.

The party that appeals must pay a processing fee. The court that has pronounced the ruling can provide more information about the fee.

What must the notice of appeal include?

The notice of appeal must state:

- the ruling that is appealed,
- the name of the appellate court,
- the names and addresses of the parties, their party representatives and counsels,
- the errors in the appealed ruling that are alleged,
- the factual and legal grounds for the alleged errors,
- the new facts, evidence or legal grounds that will be presented,
- whether the appeal applies to the ruling in its entirety or only to certain parts thereof,
- the claim to which the appeal relates, and a prayer for relief that states the outcome you are claiming,
- the basis upon which the court may hear the appeal, if there can be any doubt as to this, and
- your views on the further hearing of the appeal.

If you wish to appeal a judgment by the District Court to the Court of Appeal

Judgments from the District Court can be appealed to the Court of Appeal. You may appeal a judgment if you are of the view that there is:

- error in the facts described by the court in the judgment,
- error in the application of the law (incorrect interpretation of the law),
- procedural error.

If you wish to appeal, written notice of appeal must be sent to the district court that has pronounced the ruling. If you represent yourself without legal counsel, you may submit the appeal orally by appearing in person at the district court. The court can also permit counsels that are not lawyers to submit oral appeals.

An appeal of a judgment is normally decided by judgment after an oral hearing before the court of appeal. The appeal hearing shall concentrate on the parts of the district court's decision that are disputed and doubtful when the case is before the court of appeal.

The court of appeal can refuse to hear an appeal if it deems it be clear that the district court's judgment will not be amended. In addition, the court can refuse to hear certain claims or grounds for appeal, even if the rest of the appeal will be heard.

The right of appeal is limited in cases that apply to amounts of less than NOK 250,000.

If the appeal concerns an amount of less than NOK 250,000, consent from the Court of Appeal is required for the appeal to be heard.

When assessing whether to grant leave, the Court of Appeal must take into consideration:

- the nature of the case,
- the parties' needs for review, and
- whether there appear to be flaws in the appealed ruling or the hearing of the case.

If you wish to appeal an order or decision by the District Court to the Court of Appeal

As a main rule, an *order* can be appealed on the grounds of:

- error in the facts described by the court in the order,
- error in the application of the law (incorrect interpretation of the law),
- procedural error.

Orders that apply to a procedural ruling and that are pronounced based on a discretionary assessment, can only be appealed on the grounds that the discretionary assessment was unjustified or clearly unreasonable.

A decision can only be appealed on the grounds that:

- the court was not entitled to hand down this type of ruling pursuant to the provision that has been applied, or
- that the ruling is obviously unjustified or unreasonable.

If the district court has decided the case by judgment, the district court's rulings over the procedure cannot be appealed separately. In such an instance, the judgment can instead be appealed on the grounds of procedural error.

Appeals against orders and decisions are submitted to the district court that pronounced the ruling. The appeal is normally decided by order after a written hearing in the court of appeal.

If you wish to appeal a ruling by the Court of Appeal to the Supreme Court

The Supreme Court is the appellate court for rulings by the Court of Appeal.

Appeals to the Supreme Court against judgments always require consent from the Appeals Committee of the Supreme Court. Such consent shall only be granted when the appeal applies to matters that have significance beyond the scope of the present case, or if it is of particular importance for other reasons to have the case heard by the Supreme Court. Appeals against judgments are normally decided after an oral hearing.

The Appeals Committee of the Supreme Court can refuse to hear appeals against *orders* and *decisions* if they do not raise issues that have significance beyond the scope of the present case and if there are no other considerations that suggest that the appeal should be heard or that it, in the main, raises extensive evidence-related issues.

When an appeal against an order or decision by the district court is decided by order in the court of appeal, the ruling cannot, as a main rule, be appealed further to the Supreme Court.

Appeals against orders and decisions by the court of appeal are normally decided following a written hearing by the Appeals Committee of the Supreme Court.