

2022-02-02

Event No 5.2.1-2021-2117



Ministry of Enterprise and Innovation

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Opinion regarding application for mining concession for the area Kallak K nr 1 in Jåhkåmåhkke/Jokkmokk Municipality, Norrbotten County

Your ref: Dnr. N2017/04553

1. Background

Jokkmokks Iron Mines AB (The Company) has applied for a mining concession for the area Kallak K nr 1 (Gállok) in Jokkmokk Municipality. The case is being prepared in the Government Offices and the Sami Parliament has been invited to submit its views on the case. The Sami Parliament has previously delivered its opinion on the case to the Government Offices and to the County Administrative Board in Norrbotten County regarding the following topics among others:

- Mining operations in Gállok with appurtenant operations and transport would significantly hamper the reindeer husbandry of several Sami communities due to the loss of reindeer foraging land and because the reindeer husbandry functions of the areas will be lost.
- Large parts of the reindeer foraging lands which cannot be used during mining operations will remain unusable even after closedown and restoration.
- Mining operations in the area in question bring more far-reaching consequences to reindeer husbandry, other Sami land use and Sami culture than presented by the Company.
- The consequences to reindeer husbandry of the operations applied for with cumulative effects are to be judged in an overall perspective together with peripheral activities and transport.
- It is the obligation of Sweden to take into account international undertakings and the principles of indigenous peoples' rights.
- In Jokkmokk Municipality, reindeer husbandry and related Sami industries constitute the biggest private sector industry and ensure long-term employment and jobs.
- Economic compensation cannot replace lost foraging land and the loss of Sami culture.
- A new mine with associated transport means negative impact on Laponia World Heritage Area.
- Coexistence between mining operations and reindeer husbandry is in this case not a possibility.
- In weighing in different national interests, reindeer husbandry should be given priority, since it promotes in the most appropriate way long-term stewardship of land, water and the rest of the physical environment.

Since the last opinion from the Sami Parliament in 2017, there has been evolution of the law as regards indigenous peoples' rights at the international and national level. At the same time, new research has emerged that spotlights among other things the inability of the state to take into account Sami rights on issues to do with the exploitation of land and water within Sápmi, on how new mining and wind power developments impact Sami land use, and how the health of Sami people is affected by these processes.

In this opinion we summarise our main message and spotlight legal developments, established practice and research since our previous opinion. Presentations by the Sami communities and the County Administrative Board of the impact of a possible new mine on reindeer husbandry should in our opinion be central to the Government's deliberations.

1.1 The case in a Sami political context

The Riksdag and the Government have, by adopting a consultation order on issues concerning the Sami people, clearly signalled that the influence of the Sami people over their affairs is to be strengthened. The Government has also decided to set up a truth commission to increase knowledge and awareness of the violations and racism to which the Sami have been subjected. In the so-called Renmarkskommitté, which the Government set up to put forward proposals for a new reindeer husbandry act and analyse the right of the Sami people to hunting and fishing, also amendments that can be required in other legislation on consideration to reindeer husbandry. In addenda to this, the Government has expressed its objective to ratify the Nordic Sami Convention in June 2022. In the initial convention text, it is stated that the rights to land is the basis for Sami culture, language and social life, and protects individual and collective property rights to land and water.

In connection with the most recent Universal Periodic Review of how Sweden meets its commitments as regards human rights, the Government accepted several recommendations on the Sami people's rights. The recommendations consisted among other things were to continue to take measures to ensure that the Sami people can fully exercise their rights as an indigenous people, which includes access to their traditional areas and way of life, and to strengthen efforts to make clear the status of the Sami has an indigenous people in legislation on land and natural resources; furthermore, to continue to evolve measures to ensure that involved Sami reindeer husbandry communities are consulted and can participate on issues related to land rights, water and natural resources in compliance with the principle of Free, Prior and Informed Consent (FPIC).¹

Against the background described above it would consequently be expected that the Government carefully consider what Sami representatives have unanimously put forward in the case of the present application.

The Governments consideration of the present application can in context not only be taken into account as an isolated examination, but also as a clear indication of the Governments understanding and respect for the industries, culture and rights of the Sami people.

¹ A/HRC/44/12 items 156.259, 260, 263

2. Summary

In delivering the opinion, the Sami Parliament makes the overall assessment that reindeer husbandry in the area is the land use that in the most appropriate way promotes long-term stewardship of land, water and the physical environment otherwise based on ecological social and socioeconomic considerations. Based on this conclusion, the national interest in the reindeer industry should be given priority over the national interest in minerals. Additionally, to take into account Sweden's international and national undertakings with respect to the Sami people means that the mining concession for Kallak K nr. 1 should not be granted.

The involved Sami communities already see their reindeer husbandry severely restricted by exploitation by the forestry industry, hydropower, infrastructure, power lines, quarries, etc. This in addition to climate change and the considerable pressure from predators means extensive cumulative effects in connection with a possible mine start-up.

The operations in the application affect reindeer husbandry and its conditions, both in and beyond the concession area applied for (in the immediate vicinity and in a wider area). The assessment of the impact of the concession on the reindeer industry must therefore also include encompass the area of operations, planned transport routes linked to the operations (impact on foraging land, expansion, traffic, etc.).

In the opinion of the Sami Parliament, the proposed conditions in themselves bring about the total destruction of nature-based reindeer husbandry. The conditions would thereby cause, rather than prevent, extensive harm to reindeer husbandry and Sami culture.

Land and water are preconditions for maintaining reindeer husbandry, other Sami land use and the Sami culture in the area. A new mine with associated impoundments and infrastructure would prohibit the use of migratory trails in the area, and the use of the foraging lands that have been identified as areas of national interest in the reindeer industry (see Figure. 1). That means that the functional connection that both the reindeer industry and the Government have identified as a precondition for continued reindeer husbandry is negated. When conditions for reindeer husbandry in Gállok are negated, it means ultimately that also the conditions for maintaining Sami culture in the area are removed.

Reindeer husbandry cannot be seen solely as an interest to be weighed against other interests, but is – exactly like other Sami land use – a precondition for Sami culture, *árbediehtu* (traditional Sami knowledge), the Sami languages, way of life and traditions in the area. The reindeer husbandry right, which is based on usage since time immemorial and Sami culture, is protected through the Instrument of Government and Sweden's international undertakings. The Sami Parliament urges the Government in the current examination to diligently adhere to current legislation and the most recent evolution of the law in this field to ensure the compatibility of the decision with international law in a procedural and material sense.

3. Starting points

Land and water are prerequisite to the survival of reindeer husbandry and Sami culture

The close links of the Sami to the land, like those of other indigenous peoples, must be acknowledged and understood as the fundamental anchor point of their culture, spirituality, integrity and economic survival. The relationship to the land is not merely a question of possession and production: there is also a material and spiritual aspect which they must enjoy to the full to preserve their cultural heritage and pass it on to future generations. In this respect, the realisation of indigenous peoples' land rights can also be a necessary precondition for practising their right to life in itself and to prevent their extinction as a people.³

The land rights of indigenous peoples differ from the usual interpretation of property rights under civil law and reindeer husbandry constitutes a central element in the Sami people's cultural identity and traditional livelihood.⁴

The land in the area has traditionally been used by the Sami and is a precondition for the conservation of the culture. It is therefore necessary that the Sami continue to be assured use of the area.⁵

The Sami people's right to maintain their culture, including reindeer husbandry shall be accorded special importance in deliberations

In the Instrument of Government Ch 1 Sect 2 Paragraph 6 it is set out that possibilities for the Sami people and ethnic, linguistic and religious minorities to retain and develop their own culture and community life shall be promoted. Through adoption of the regulation the special status of the Sami people was clearly marked. Promoting the interests mentioned in the regulation also became a mandatory goal for the public sector. Even though the regulation expresses a goal for community activities and does not in itself bring any rights for individuals, in the *Girjas* case, the Supreme Court stated that the regulation can still have certain material significance in the application of the law where the issue involves weighing in a number of factors. Sami interests in being able to maintain their culture, including reindeer husbandry, shall be accorded special weight in such deliberations.⁶

When Sweden joined the EU, the right to reindeer husbandry was noted in Protocol 3 of the Treaty of Accession as a sole right for the Sami people in traditional Sami areas. There, the parties to the agreement stated among other things that Sweden is determined to maintain and develop the Sami people's livelihoods, language, culture and way of life, and that Sami culture and livelihoods are dependent on primary sources of income such as reindeer husbandry in traditional Sami settlement areas.⁷

³ See interpretation of international practice in CERD decision no. 54/2013, CERD/C/102/D/54/2013

⁴ See CERD/C/102/D/54/2013

⁵ Cf NJA 2020 p. 3 p. 131

⁶ NJA 2020 p. 3 p. 92

⁷ 11994N/PRO/03

Sami customs are to be taken into account when resolving disputes linked to land rights Article 8.1 of the ILO Convention no 169 sets out that due regard shall be paid to the customs and customary practices of indigenous peoples when applying national legislation. In the Girjas case, the Supreme Court states that the regulation expresses a general principle under international law. Applying this principle in resolving disputes connected to land rights that involve Sami people thus means that a Sami custom that has been noted shall be taken into account.⁸

Through Article 10(c) of the UN Convention on Biological Diversity, Sweden has undertaken – as far as possible and where appropriate – to protect and encourage the customary use of biological resources in accordance with traditional, cultural customs compatible with the requirements for preservation and sustainable usage.

Sami reindeer husbandry communities’ knowledge is especially valuable and shall be respected

Under the ecosystem approach – arrived at within CBD – decisions are made on the basis of best available knowledge.⁹ Sami reindeer husbandry communities and their reindeer herders possess the most relevant and detailed knowledge about their land use and the needs and conditions of reindeer husbandry. Traditional Sami knowledge, *árbediehtu*, enjoys special protection through Sweden's undertakings in accordance with Article 8(j) of CBD to respect, preserve and maintain knowledge, innovations and practices of indigenous peoples embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Traditional knowledge shall therefore be accorded great importance in the case.¹⁰

According to UNESCO, Sami languages are endangered, and among them the Lule Sami language is severely endangered. Reindeer husbandry is an important base and culture bearer for the Sami languages, and thereby, *árbediehtu*. Conditions for preserving the vulnerable Sami languages, *árbediehtu* and Sami culture shall therefore be weighed in and taken into account during the deliberations of the Government.

The reindeer husbandry right is based on usage since time immemorial and is protected by regulations on property protection

In the Taxed Mountains Ruling (Skattefällsdomen) in 1981, the findings were that the reindeer husbandry right and the thereto affiliated rights to hunting and fishing constitute an asset covered by property protection under the Instrument of Government and thereby also property protection under the European Convention.¹¹

⁸ NJA 2020 p. 3 p. 130

⁹ see e.g. Environmental Protection Agency guide *Ekosystemansatsen – en väg mot bevarande och hållbart nyttjande av naturresurser*, 2007

¹⁰ Every treaty signatory shall as far as possible, and where appropriate: j) subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity, and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. ¹¹ Article 1 of the European Convention's 1st additional protocol, to which Sweden is bound through the Act(1994:1219) on the European Convention for the Protection of Human Rights and Fundamental Freedoms.

That the reindeer husbandry right is based on usage since time immemorial means that the rights that reindeer herding Sami are judged to have under the Reindeer Husbandry Act may not without impediment be taken from them: the rights are protected under the regulations on property protection in Ch 2 Sect. 15 of the Instrument of Government. The regulation in Sect. 1 Paragraph 2 of the Reindeer Husbandry Act thereby gains relevance to the intransience of the rights.¹²

Intervention in the protection of private property according to what follows from the established practice of the European Court shall be proportionate. That means it shall be purposeful, that is shall meet the interests which are given as legitimate. Even if there is a general interest which can justify an intervention, it must be weighed against the interests of the individual and the measures must be carried out in such a way that they do not place an unreasonable burden on the individual.

Even if the property right is not absolute, Sweden must certainly respect the principle of proportionality when limiting or regulating Sami land rights, and thereby take into account their special status. This is in order that their very survival is not jeopardised.¹³

4. Carrying out reindeer husbandry in the area

The deposit in question lies within the year-round lands (the lands that are used for reindeer foraging at all times of year) above the cultivation boundary, where the reindeer husbandry right is strongest.

The areas above the cultivation boundary have been described as areas exclusively for the use of the Sami,¹⁴ where land use as a primary rule may not be changed to cause significant disruption for reindeer husbandry. The Björkholmsberget area constitutes a core area and contains preferred reindeer foraging lands, stopover forage and gathering areas and is identified as a national interest in the reindeer industry. The area is multifunctional and links year-round lands with winter forage lands and is continuously used for reindeer foraging throughout the year. There are also several other nearby areas of national interest in the reindeer industry.

The area is crossed by two important migratory trails of national interest, where Björkholmsberget constitutes a place for stopover foraging in the spring and autumn migrations. Because of its proximity to regulated watercourses, which hampers both the wandering and migration of reindeer, Björkholmsberget is strategically important as a gathering area and stopover foraging area for the Sami reindeer husbandry community. The possibility to use the different seasonal areas and migrate between them is usually termed *functional connection*, which is fundamental to the continued pursuance of reindeer husbandry in a coherent yearly cycle.

Reindeer husbandry is dependent on free foraging in nature and a contiguous natural landscape, but due to the ongoing fragmentation of land within the affected Sami communities, forage resources have become increasingly difficult to access. The affected Sami communities are already severely impeded by the extensive competition over land use, and no alternative reindeer foraging lands are available.

¹² NJA 2020 p. 3 p. 117

¹³ See para 6.10 in the opinion from the UN racial discrimination committee in the so-called Rönnebäcken case CERD/C/102/D/54/2013 and Poma Poma v. Peru, CCPR/C/95/D/1457/2006, Item 7.6. "*The measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.*"

¹⁴ Supreme Court finding T 853-18, Item 47

Hydropower buildout in the area has affected the functional connection, since ice conditions have deteriorated and present a risk for both reindeer and reindeer herders. The traditional migratory trail became impassable and Jåhkågasska tjiellde Sami community therefore was forced to find other migratory routes. In the area in question, the Sami community is geographically only 12 km wide. Mining operations in Gállok with the disruption zone (up to 14 km¹⁵) would cause a total barrier, since the migratory trails are cut off and the functional connection disappears, and the reindeer are hindered from freely wandering (See Figure 1).

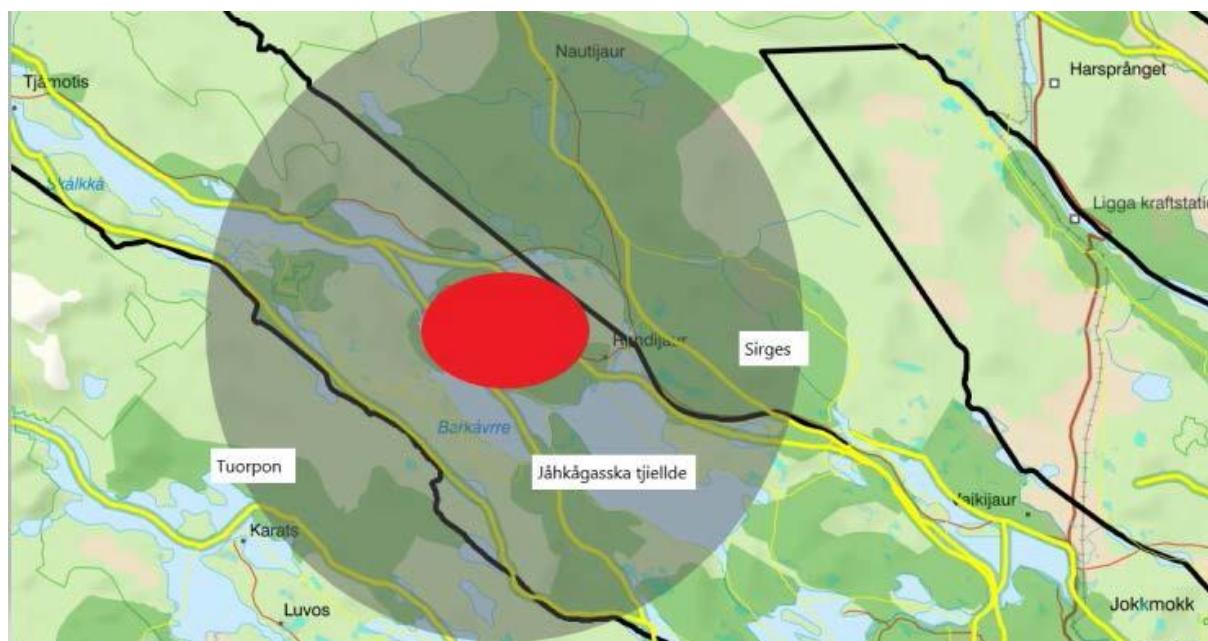


Figure 1. Area of operations in red, with disruption zone in grey. The green marked area shows the area of national interest in the reindeer industry, with migratory trails in yellow. The black lines are the boundaries between Jåhkågasska tjiellde, Sirges and Tuorpon Sami reindeer husbandry communities.

The large-scale forestry that is ongoing within the affected Sami reindeer husbandry communities has left big scars in the landscape, with loss of reindeer foraging. (See Figure 2.) Most of the forests hosting hanging lichen are gone today and much of that which was formerly pine moor with ground lichen has been replaced by dense young-growth forests which hamper the growth of ground lichen.

¹⁵ Skarin, A & Åhman, B. 2014. Do human activity and infrastructure disturb domesticated reindeer? The need for the reindeer's perspective. *Polar Biol.* 1-14. Doi: 10.1007/s00300-014-1499-5.

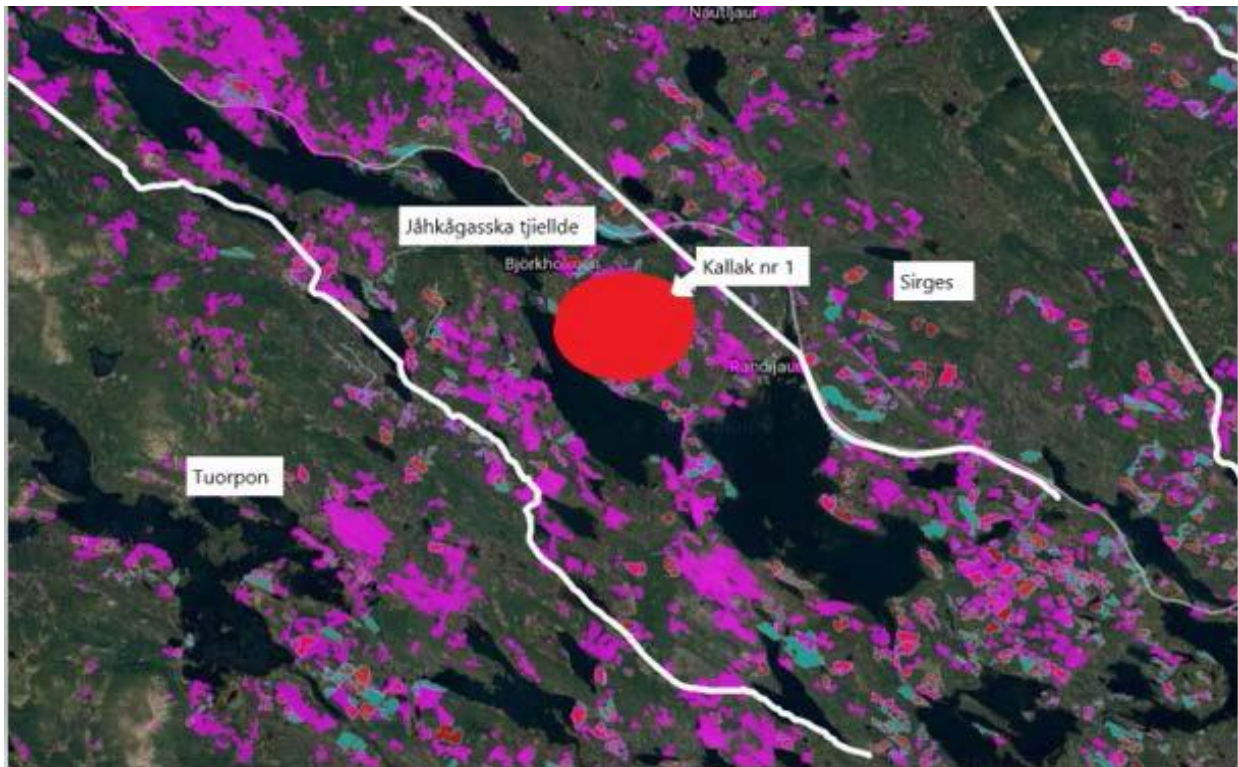


Figure 2. Pink shows clear-cut areas, red shows failed areas while light blue shows selling notices. The white lines are the Sami community boundaries between Jähkågasska tjiellide, Sirges and Tuorpon.

To summarise, it can be stated that the reindeer husbandry of the affected Sami communities is already greatly restricted by exploitation from forestry, hydropower, infrastructure, power lines, quarrying, etc. This in addition to climate change and the severe impact of predators, meaning extensive cumulative effects arise in the event of a mine start-up.

5. Mining operations would significantly hamper carrying out reindeer husbandry

According to Ch 3 Sect 5 Paragraph of the Environmental Code, areas of national interest in reindeer husbandry shall be protected against measures that cause significant difficulties for carrying out reindeer husbandry. The basis that this protection is that reindeer husbandry often has to give way when influential exploitation interests makes demands to use land and water within the reindeer husbandry. The Government has made it known that there shall be basic conditions for reindeer husbandry within, in principle, every Sami reindeer husbandry community. That means secure access to areas within both year-round and winter foraging lands which are of crucial importance to the possibilities to pursue reindeer husbandry.¹⁶

The term *significant* refers to such measures as can have a lasting negative impact on the interest in question can temporarily have a highly significant negative impact on it.¹⁷ In the opinion of the Sami Parliament, significant difficulties can have several causes. One such situation can arise when a facility, for example a mining operation, is established on reindeer foraging lands. Impact which can cause significant difficulties for the reindeer industry can also exist when

¹⁶ Prop. 1985/86:3 p. 57 f.

¹⁷ Prop. 1985/86:3 p.155

a measure is carried out outside areas worthy of protection, i.e. areas identified as being of national interest and areas which are important. This is because it is the consequences to the area in question of the measures that are to be assessed.¹⁸

A new mine in Gállok creates a total barrier in the landscape which closes off several important migratory trails. (See Figure 1.) This means that the reindeer can neither be transported manually nor freely wander past the area of operations. When movement in the area is rendered impossible, accessibility to other areas with their functions is lost. This would bring lasting negative impact on carrying out reindeer husbandry within the affected Sami communities. It is the function of an area which is crucial in deliberations. It is thus not relevant to place importance on the size of the project area in relation to the total foraging lands. The importance of a certain area can be considerably greater than indicated by stating its percentage of a given area, especially when the loss must be seen cumulatively, i.e. when weighing in other losses.

The operations applied for affect reindeer husbandry and its conditions in the area outside the concession area applied for (both directly adjoining and in a wider area). Assessing the impact of the concession on the reindeer industry must therefore encompass the area of operations, planned transport routes linked to the operations (impact on foraging land, expansion, traffic and so on).

5.1 New research

The Sami Parliament has previously put forward that the consequences of any new mine in Gállok are more far reaching for the reindeer industry and Sami culture than the Company has reported and would also affect future generations. Several research projects, which have analysed Swedish legislation and authorities' permit policy with regard to mining and its effects, show that there is a large knowledge mismatch concerning the actual effects of the mining industry on Sami land use, and that the consequences are often greater than the impact predicted in environmental examinations. Research results indicate extensive effects during the operating period, as well as after operations cease. In addition to land loss, blocked migratory trails, disruption to reindeer herds, disrupted yearly cycles, reduced lean meat content and economic losses, mining operations also cause mental stress, reduced use, and loss of, traditional knowledge. Ultimately, becoming involved in reindeer husbandry is made more difficult for younger members of the Sami communities where there are established mining operations.¹⁹ Procedures surrounding the possible new mine in Gállok have already given rise to negative psychosocial health effects for several members of Jåhkågasska tjiellde in the form of anxiety, stress and concern.²⁰

¹⁸ se prop. 1985/86:3 p. 117 f

¹⁹ Klöcker Larsen, R. Boström, M. and Muonio sameby (Sami community). 2021. De kör över en ända: konsekvenser av gruvan i Kaunisvaara för Muonio sameby. Stockholm Environment Institute.

²⁰ Blåhed, H. & San Sebastian, M. 2020. Det är ju faktiskt framtiden som tas ifrån en. Umeå University

5.2 Conditions connected to the decision

That the mining industry and reindeer husbandry would be able to coexist without any major impact on the reindeer industry is a common misconception.²¹ This applies even when mining operations are combined with conditions in connection with the concession decision or later environmental permit examination. In this case, it has been put forward (by the Company) that if the concession is combined with damage limitation conditions/measures, it can, despite the negative impact of mining operations, enable continued reindeer husbandry in the area. The conditions proposed are partly a question of economic compensation and partly an alternative method to pursue reindeer husbandry, among other things through supplementary feeding and road transport of reindeer.

Economic compensation cannot make up for the loss of foraging land for reindeer husbandry and the negative impact on Sami culture. Transporting reindeer by road past the concession area can be considered in some eventualities, but is not always possible for reasons of animal protection (e.g. transport of in-calf cows). To bring forward the relocation of reindeer on an annual basis means that the yearly cycle of reindeer husbandry is changed, which affects the other foraging areas of the Sami reindeer husbandry community. Traditional knowledge is also lost, since the affected Sami communities can no longer use the migratory trails, stopover foraging, etc. Migratory trails will be impacted negatively over stretches of dozens of kilometres, since transport to and from the concession area would follow the migratory trails of both Jåhkågasska tjiellde and Sirges reindeer husbandry communities.

The conditions which the Company proposes mean drastic changes, above all for Jåhkågasska tjiellde, since they are forced to depart from the traditional reindeer husbandry based on foraging in nature yet again to adapt to exploitation operations. This thereby removes a cornerstone of traditional reindeer husbandry based on foraging in nature: conditions for the reindeer themselves to find forage, the reindeer's possibilities to move between the different seasonal foraging lands and the traditional/cross country relocation of reindeer, which means that in the long term, reindeer husbandry is negated. According to the Sami Parliament, mining operations with associated conditions are in breach of the reindeer herders' right to practise their culture in accordance with national legislation and international undertakings.²² It is the assessment of the Sami Parliament that the proposed conditions in themselves would cause, rather than prevent, extensive harm to reindeer husbandry and Sami culture.

6. National interest deliberations according to Environmental Code Ch 3 Sect 10

In environmental impact assessments and the environmental deliberations made today, reindeer husbandry is described only as an opposing land use interest and an agro-industry. This means that the effects of mining operations and their actual impact on reindeer husbandry and Sami culture are not taken into account to the extent required and decisions are made on inadequate documentation. Among other things, insufficient consideration is shown to the social, cultural and cumulative effects²³. Interventions and changed land use in Sápmi have today reached a historically extensive level, which has increased the need to understand and take into account the cumulative effects.

²¹ Klöcker Larsen, R. Boström, M. and Voernese Sami community. 2021. Renen får aldrig betesro. Stockholm Environment Institute.

²² Cf Reasoning on the findings of the Supreme Court in Norway in the Fosen ruling

²³ Klöcker Larsen, R. M.fl. 2020. Omtvistade Landskap. Environment Protection Agency.

The cumulative effects of all changes can in certain areas make it impossible to continue to pursue economically or ecologically sustainable reindeer husbandry and thereby Sami culture too is affected.

6.1 International undertakings

In the assessment of which national interest takes priority, Sweden's international undertakings are important.²⁴ Since the application of international law in national legislation is based on the so-called dualistic principle, it concerns primarily regulations under international law that have been incorporated in national legislation or application in conformity with the law. Additionally, the Supreme Court in the Girjas case has expressed that it is at the same time natural that importance is attached to international legal principles in interpreting current law, even though incorporation through legislation has not taken place.²⁵

There are several instruments in international law where Sweden's undertakings towards the Sami people and their rights find expression (e.g. the Convention on the Rights of the Child²⁶, the Council of Europe Framework Convention for the Protection of National Minorities, the UN Convention On the Elimination of All Forms of Racial Discrimination, the UN International Covenant on Economic, Social and Cultural Rights, the UN International Covenant on Civil and Political Rights and the Declaration on the Rights of Indigenous Peoples²⁷). They cannot all be presented in detail in this opinion, so in the following text only a few principles and regulations of particular importance will be highlighted.

The Sami Parliament urges the Government in the current examination to diligently adhere to current legislation and the most recent evolution of the law in this field to ensure the compatibility of the decision with international law in a procedural and material sense.

UN International Covenant on Civil and Political Rights - Article 27

According to Article 27, an indigenous people²⁸ shall not be denied the right in community with the other members of their group to enjoy their own culture, to profess and practise their own religion, or to use their own language. According to the UN Human Rights Committee, which monitors compliance with the convention, the right to one's own culture – especially for indigenous peoples – is closely associated with a certain territory, a particular way to live and use natural resources, and can include both industries such as fishing, hunting and reindeer husbandry, and customs and traditions and their material prerequisites. According to the committee, the Article gives states an obligation to take positive legal protective measures such as legislating to protect these rights and to ensure

²⁴ Prop. 1997/98:45 part 2 p.35

²⁵ NJA 2020 p. 3 p. 94

²⁶ See in particular Article 30: in states where there are ethnic, religious or linguistic minorities or individuals who belong to an indigenous people, a child belonging to such a minority or such an indigenous people shall not be denied the right together with other members of his or her group to enjoy their own culture, to profess and practise their own religion, or to use their own language.

²⁷ According to Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples, indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

²⁸ The wording is ethnic, religious or linguistic minorities, but according to customary practice encompasses indigenous peoples. The committee has specifically expressed that reindeer husbandry, as part of traditional Sami economic activities, is of central importance to Sami culture, and is protected by Article 27.

the participation of indigenous peoples in decisions that affect them.²⁹

The committee's established practice gives guidance on application of the Article and has interpreted what is considered to constitute a violation of the right for minorities and indigenous peoples to practise their culture in community with others. The so-called Fosen judgment of the Supreme Court in Norway makes clear and sums up conclusions from its central findings.³⁰

Interventions that cause substantive negative impact to indigenous peoples' possibilities to practise their culture in accordance with the wording of the Article are to be understood as violations. On the other hand, competing activities which have a certain limited impact on the way of life of members of indigenous groups may be compatible with the right to protection under the Article. However, such competing activities are in no way permitted if taken together they mean that the right of indigenous peoples to practise their culture is denied them. If a competing activity renders it impossible for a member of an indigenous people to continue to practise his or her culture, then it is forbidden, regardless of how favourable it can be for society otherwise. Of significance in assessing the impact are among other things, duration, extent, consequences and cumulative circumstances. Another central aspect is the possibility in a meaningful way to have been able to participate in decisions on operations that impeach upon their traditional culture-based activities. Through the last mentioned it is made clear how the protection of culture is linked to the right to free, prior and informed consent (see below).³¹

Taken together, Sweden's obligations according to the Article mean that the traditional land area of an indigenous people and their possibilities to pursue their culture-based industry may never be restricted to such an extent that the locally affected individuals lose their possibility to make a living through their traditional industry. This is an absolute requirement and thus brings an *obligation* for the state to ensure that the Sami can practise traditional reindeer husbandry within every part of the reindeer husbandry area, applicable down to the level of the individual. Against the background of the threat to the continued survival of reindeer husbandry posed by the mining operations in question, it is the opinion of the Sami Parliament that a decision to grant a concession would be in breach of the Article.

Free, prior and informed consent – FPIC and consultation

FPIC is a norm under international law based on a ban against racial discrimination and on the right to self-determination. International practice has numerous times confirmed the interpretation that a lack of appropriate consultation with an indigenous people can constitute a form of racial discrimination.

Even though FPIC shall not be construed as a veto right, it means that Sami influence must be ensured throughout the entire process. FPIC and the right to be consulted do not mean merely that the affected Sami people shall be heard or involved, but that there shall be a real possibility to wield influence.

²⁹ See general comment No. 23 (50) (Art. 27), *Kitok v. Sweden*, Comm. No 197/1985, B. Ominayak, Chief of the Lubicon Lake Band v. Canada, No. 40 (A/38/40)

³⁰ The above and the *Länsman* rulings I and II: *Länsman v. Finland*, Comm. No 511/1992, *Länsman v. Finland*, Comm. No. 671/1995, *Poma Poma v. Peru* Comm. No 1457/2006

³¹ See *Länsman v. Finland* and cf judgment of the Supreme Court in Norway in the so-called Fosen judgment). In *Poma Poma v. Peru* it is expressed that ***participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.***

The UN Expert Mechanism on the Rights of Indigenous Peoples, EMRIP, which is tasked among other things with giving non-binding advice on the rights of indigenous peoples based on the Declaration on the Rights of Indigenous Peoples, has stated that consultation shall be a qualitative process with consent as its goal. Furthermore, the state or interest that chooses to continue with the project despite the lack of consent from the indigenous people is moving in legal grey zone and risks a legal review of the project.

If it concerns major, irreversible interventions on traditional land which seriously threatens the culture of the indigenous people, then according to EMRIP's interpretation of FPIC it means that the intervention must not be carried out.³²

UN Convention On the Elimination of All Forms of Racial Discrimination - Article 5 d (v)

Article 5 d (v) of the convention forbids discrimination regarding the right to own property, both individually and in community with others. In its statement of the 26 November 2020, the UN Committee on the Elimination of Racial Discrimination (CERD) declared that a decision to grant a mining concession in Rönnbäcken, without the consent of the affected Sami people, within their customary lands where they pursue a traditional industry, brought about a concrete threats to reindeer husbandry and huge emotional stress to the members, and that the decision means that their rights within the framework of the Article have been violated.

On the case, the committee states that failure to take into consideration the inherent right of indigenous peoples to use and enjoy land rights constitutes a form of discrimination, as does the failure to take suitable measures to ensure practical compliance with their right to give free prior and informed consent (FPIC) when projects within their traditional areas can impinge upon their rights. The committee has urged Sweden to respect and correctly apply the principle of FPIC and expresses that exploitation and use of natural resources as a legitimate common interest does not absolve states from their obligation not to discriminate a group within an indigenous people who are dependent on the same land.

Furthermore, deliberations concerning common interests are to take place in practice, not merely theoretically or abstractly.³³

6.2 Long-term stewardship of land, water and the rest of the physical environment

According to the Environmental Code, land use shall be decided in a stewardship perspective where priority shall be given to the land use that most suitably promotes long-term stewardship of the land, water and the rest of the physical environment. Such an assessment encompasses ecological, social and socioeconomic considerations. It is furthermore set out that the purpose of legislation is to achieve reasonable use of natural resources in an overall assessment in both a long-term and a short-term perspective. It is also set out that the regulations in Ch 3 of the Environmental Code express the necessity of deliberations between conservation and exploitation interests in the perspective of long-term stewardship. This means among other things that short-term economic motives must not lead to disregard for the long-term need for the protection of values linked to land and water areas which in a general view are important. Furthermore, land use and spatial planning must take place in a way that is compatible with an ecologically sustainable society and safeguard material prosperity for coming generations. When there is doubt over what should be decided or done, the choice should be that which most probably favours sustainable development.³⁴

³² See report from the UN Expert Mechanism on the Rights of Indigenous Peoples A/HRC/39/62 See also

³³ CERD/C/102/D/54/2013

³⁴ Prop. 1997/98:45 p 186 and p 241

Ecological and social considerations

The Sami Parliament has in previous opinions pointed out the importance of reindeer husbandry to the conservation of biodiversity and long-term conservation of valuable natural and cultural environments and how a new mine in the area thus brings a negative impact on the conditions for achieving global sustainability goals and environmental quality goals and interim targets of importance to biodiversity and ecosystem services.

Arguments have been put forward on the need for mines and minerals extraction for the so-called green transition. In this context it is therefore relevant to point out that in this case it is not a question of rare earth metals, but of iron ore.

Social considerations means deliberations in the perspective of rights, where impact on among other things social structures, relations, values, customs and life conditions is taken into account. The possibility of influence and codetermination over one's own life situation is crucial to well-being and health.

The opinion from UNESCO on how mining operations would affect Laponia World Heritage Area gives further support to the assessment, as do the previous opinions from the Sami Parliament.

Socioeconomic considerations

In Jokkmokk Municipality, reindeer husbandry and related Sami industries (in for example duodji crafts, food craft and tourism) form the largest private sector industry and ensure long-term employment and jobs. This cluster of several hundred close-to-nature Sami enterprises should be strongly prioritised also based on a sustainability and climate perspective. Jokkmokk Municipality emphasises new jobs and the vitamin injection which the mining investment will generate. Its opinion completely lacks any detailed analysis of the future of Sami industries and what will be lost. According to the OECD report on the Sami and Swedish rural policy, Sami society, Sami culture and the Sami industries are necessary for rural development and regional growth in Northern Sweden.³⁵

Northern Sweden faces unique challenges related to sparse population and long distances, but at the same time has unique strengths – the common cultural heritage of the Sami constitutes one of these strengths. Many Sami enterprises use traditional knowledge in their stewardship of the landscape and in the production of goods and services. Sami enterprises balance their participation on the market with both business-related assessments and non-market related values, and thus emphasise the importance of sustainable culture in a long-term perspective. The foremost Sami business sectors in Northern Sweden are reindeer husbandry, tourism, food and the cultural sector, as well as other rural industries.

The OECD further states that even if there is growth potential for the reindeer industry, it is also limited by factors such as pressure from predators, climate change and competing land use (e.g. mining).

The unique culture and traditions of the Sami are an important part of regional tourism strategies. A growing nature-based tourism sector with activities such as hunting, fishing, skiing, snowmobile tours and dogsledding tours have the potential to create new sources of income and future jobs for the Sami.

³⁵ OECD, 2019 “Linking the Indigenous Sami People with Regional and Rural Development in Sweden”.

Sami food production and duodji (handicraft and art craft) also have growth potential.³⁶ According to the County Administrative Board, a mining operation with an estimated life of approximately 14 years (excluding construction and decommissioning) which leads to considerable state investment costs for necessary infrastructure is seen as neither socioeconomically motivated nor as reasonable use of natural resources otherwise. This not least in a long-term perspective and against the background of the Statement of Purpose of the Environmental Code, regarding sustainable development that assures present and future generations a healthy and sound environment; and the responsibility of mankind to manage nature well, as well as the principles of good stewardship.³⁷

To favour mining production in the area on the basis of the inadequate documentation which the County Administrative Board describes is, in the opinion of the Sami Parliament, highly perilous in a socioeconomic perspective. With a new mine in the area, the social, cultural and ecological sustainability of reindeer husbandry is negated. Reindeer husbandry and other Sami industries in the area are nature-based, with the joint goal of long-term sustainability. To then restrict the possibility of these industries in favour of a relatively short-term mine start-up damages the credibility of an argumentation that rests on the necessity of the mine start-up as part of the green transition.

To summarise, it is the assessment of the Sami Parliament that reindeer husbandry in the area is the land use that in the most appropriate way promotes long-term stewardship of land, water and the rest of the physical environment based on ecological, social and socioeconomic considerations.

The national interest in the reindeer industry, based on this conclusion, shall be given priority over the national interest in minerals. To additionally take into account Sweden's international and national undertakings with regard to the Sami people means that a mining concession for Kallak K nr 1 shall not be granted.

Decisions on the Sami Parliament's opinion were made by chief executive Fredrik Österling after presentation by Lars-Ove Sjajn, Head of Reindeer Industry and Environment Department.

Giron (Kiruna) and Staare (Östersund) 2 February 2022

Fredrik Österling

Lars-Ove Sjajn

³⁶ Ibid.

³⁷ See Ch 1 Sect. 1 and Ch 3 Sect 1 of The Environmental Code