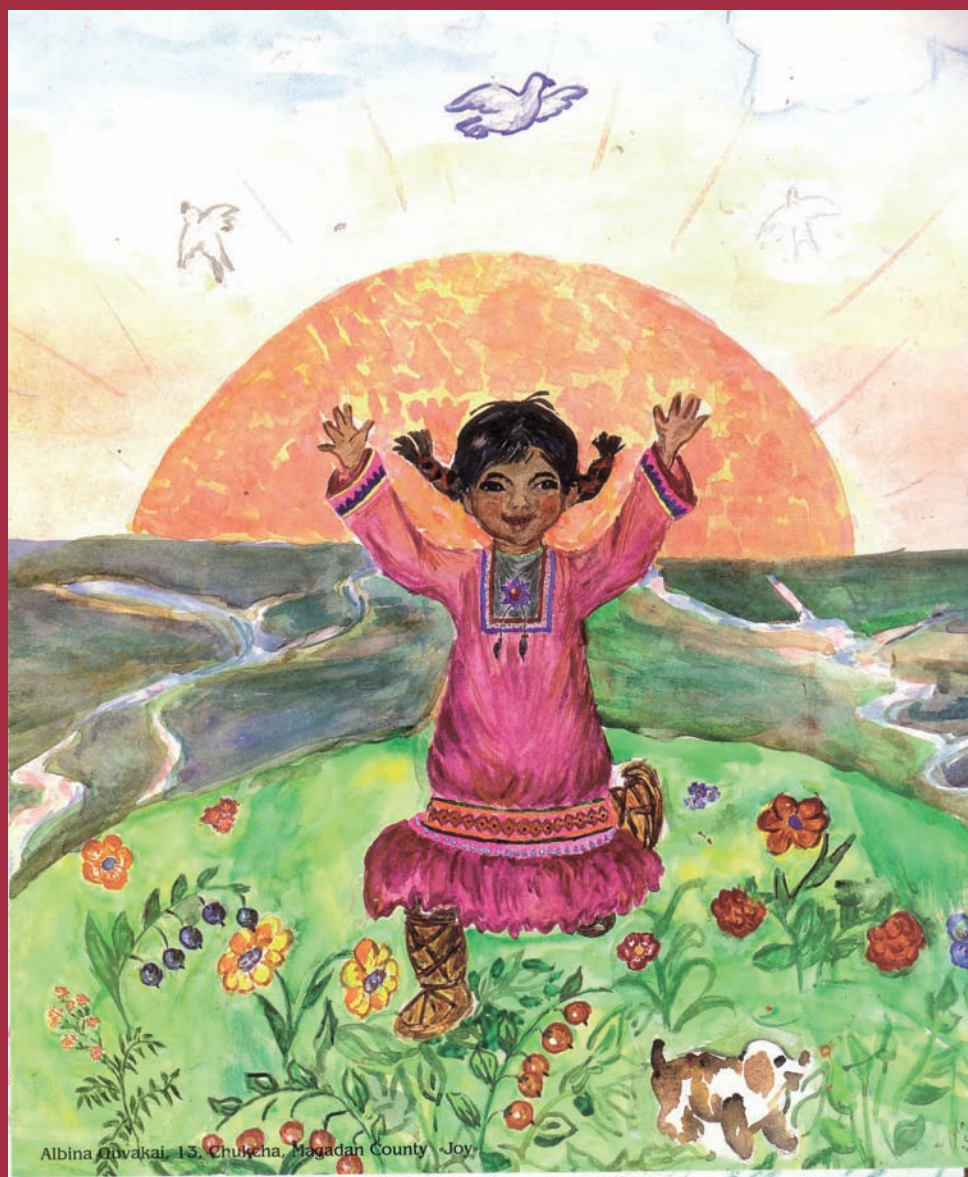


Encroachments as problem for Sami Reindeer Husbandry



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To

Sami Reindeer Herders' Association of Norway

Association of World Reindeer Herders

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The study in this thesis would not have been possible without my key informants Aslak J. Eira, Berit Oskal Eira and Johan Anders Eira.

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Abstract

This thesis is about the loss of pastures as a problem for the Sami reindeer husbandry. The aim is to describe measures that may contribute to a new policy of dealing with the problem of the further loss of pastures perceived for the Sami reindeer areas. Whereas the Sami reindeer husbandry has managed to deal with the development so far, there are voices that claim: “Our land is taken bit by bit: one day it will be too much for us”, and “this does not seem to be understood”. The issue is studied from two different points of view, one shows how the reindeer herders view the problem today, the other shows the legal protection against loss of pastures in the past, present and proposed Norwegian legislation.

The first study argues: To the reindeer herders, encroachments mean that they have to change their use of the areas. The problem is not the change of use. The problem arises when the alternatives for changing the use become too few. Complying with the problem is to improve the alternatives for changes of the reindeer herders’ use of the pastures and to avoid unnecessary damage. This may be achieved by several means, “limited only by imagination”, in the view of the informants used in the thesis, if only the reindeer herders may decide how.

The second study argues: Whereas the Norwegian State at all times has recognized the right of the Sami reindeer herders to use the pastures, the legal protection against any loss of the pastures due to the development in society has been, and is weak. One of the objects of the Sami Right Committee, in their last report in 2007, was to propose legal measures to improve the protection against the losses of pastures in the Sami reindeer husbandry. This thesis argues that their proposal for a consultative institute seem to aim at refusing new losses of pastures, using the reindeer herders to front these refusals. This may prove to be a futile strategy, since new losses are likely to take place, and since there already is a need for improving the pasture conditions. In addition the proposal may lead to tie up the reindeer herders in dealing with the encroachment cases, as well as to give them the blame for the denial of new development.

The thesis argues that the key to success for a new policy to improve the pasture conditions is the knowledge and skills of the reindeer herders to adapt to shifting conditions. Recognition of this knowledge, and a policy to improve the pasture conditions, may at the same time be means to get rid of the remains of colonialism against the Sami reindeer husbandry.

Key words: Sami reindeer husbandry/ pastoralism/management, encroachments, resilience, Reindeer Husbandry Act, Sami Rights Committee, NOU 2007: 13, colonialism.

Table of contents

Acknowledgments	2
Abstract	3
Table of contents	4
1. Introduction	7
1.1. The encroachment problem	7
1.2. The two views investigated in this thesis	8
1.3. The need for a major reform	10
1.4. The reindeer herders' adaptive capacity	11
1.5. Two types of knowledge	12
1.6. The world of the reindeer herders' knowledge – Jakob Meløe's philosophy	13
1.7. Encroachments and colonialism – Nils Aslak Valkeapää	15
1.8. Truth as active participation - the philosophy of Alain Badiou	17
1.9. Keep the boat floating - Johan Mathis Turi	18
1.10. The definitions of 'reindeer husbandry', 'encroachment' and 'resilience'	20
1.11. On the further progress of the thesis, and on the thesis in general	21
2. Encroachments as viewed by the reindeer herders	23
2.1. Introducing my informants Aslak J. Eira, Berit Oskal Eira and Johan Anders Eira	23
2.2. Encroachments as viewed by my key informants	25
2.2.1. The district leader is responsible	26
2.2.2. Encroachments mean hard work	27
2.2.3. Encroachments imply changed use of the reindeer pastures	28
2.2.4. Early and direct contact	29
2.2.5. Lasting traces and human activities	29
2.2.6. Recreational cabins	30

2.2.7. Encroachments that leave lasting traces or are connected to uncontrolled human activities	31
2.2.8. Rescue and recovery – remedies may be taken.....	32
2.2.9. Compensation as a problem	34
2.2.10. The planning act as a parking place for encroachment problems	35
2.2.11. Lack of knowledge about the rights of the reindeer herders as a problem.....	38
2.2.12. The proposal of consultations between the reindeer herders and the authorities.	39
2.2.13. The skills of changing use are ancient skills	40
2.2.14. When reindeer herders give up.....	42
2.3. Author’s reflections.....	43
3. The protection against encroachments in Norwegian legislation.....	49
3.1 The draft Reindeer Husbandry Act of 1966	50
3.1.1. The Reindeer Husbandry Law Committee and the encroachment problem in the 1960s	50
3.1.2. The first right principle in the proposed protection against encroachments	51
3.1.3. Discussions of the 1966 draft Act	52
3.2 The Reindeer Husbandry Act of 1978.....	53
3.2.1 The new reindeer husbandry policy	53
3.2.2. The protection against encroachments in the -78 act compared to the 1966 draft.	55
3.2.3. Encroachments and the Reindeer Husbandry Agreement.....	59
3.2.4. The 1983 draft section 15 in the reindeer husbandry act	60
3.2.5. Improvements of the encroachment protection in later acts	62
3.2.6. Summing up the encroachment protection in the Reindeer Husbandry Act	64
3.3. Protection of the reindeer husbandry as culture in the Constitution	65
3.3.1. Section 110a in the Constitution and Article 27 in CCPR.....	65
3.3.3. The contents of Article 27.....	66
3.3.3. Discussion of the encroachment protection in the Constitution.....	67

3.4. The proposals of the Sami Rights Committee II in 2007	68
3.4.1. No substantial changes of the Reindeer Husbandry Act	68
3.4.2. The proposal of a consultation institution and various other proposals	69
3.4.4. Discussion of the proposals	70
3.5. Discussion of shortages in the protection clauses against encroachments	72
4. Summary and conclusion	73
4.1. The encroachment problem as seen by the reindeer herders	73
4.2. The encroachment problem in Norwegian legislation	77
4.3. Conclusion	81
Literature:	83
Reports, Acts, Publications	87
FRONT PAGE DRAWING AND APPENDIXES	93
Appendix 1 Scenario for Human Impact on the Barents Region, 2002 – 2052	95
Appendix 2 Troms and West-Finnmark Reindeer Husbandry Regions	97
Appendix 3 Gielas Reindeer Pasture District	99

1. Introduction

“Our land is taken bit by bit. One day it will be too much for us!”

“This does not seem to be understood.”

The above reflections are common among reindeer herders in Norway when talking about the encroachments on reindeer pastures. I have worked for the reindeer herders for many years¹, in their organization called the Sami Reindeer Herders' Association of Norway, NRL,² and I often met their resignation when losing parts of their pastures. I know their feelings of not being understood and their feelings of powerlessness. I understand that they often consider giving up when dealing with encroachment cases. In addition, encroachment conflicts may create bad feelings in the society, at a local as well as at a national level, towards the reindeer herders. I have often wondered how the future will be for reindeer husbandry and all the other perceived activities which coexist in the reindeer pasture areas. This is the basic question of this thesis.

1.1. The encroachment problem

For the last thirty years the reindeer herders have seen the encroachment problem as a threat that may destroy Sami reindeer husbandry. Compared to other parts of the world where reindeer husbandry is practiced, the loss of pastures is the most extensive in the Nordic countries (J.M.Turi³ in RF⁴ 2009a: 18). The Sami Reindeer Herders' Association of Norway feels that the pressure on the reindeer pasture areas is the greatest threat to reindeer husbandry today (op.cit.), cf. NRL 2009: 3.

The Reindeer Husbandry Board says in their latest annual report (RS⁵ 2006)⁶:

Encroachments and disturbances in the reindeer pasture areas have accelerated during the last decades. In the United Nations' Environmental Program, UNEP, it is documented that, with the rate of development today, there will be small areas left for reindeer

¹ From 1981 to 2006, I was Secretary General in NRL

² NRL is an abbreviated name of the Norwegian name of the organization Norske Reindriftsamers Landsforbund. Sami Reindeer Herders' Association of Norway is the official English name of the organization. Other translations are used in different papers, also in research. The Sami name is Norgga Boazosápmelaččaid Riikkasearvi.

³ Johan Mathis Turi is the Secretary General in the Association of World Reindeer Herders

⁴ RF is an abbreviation for "Reindriftsforvaltningen", the Reindeer Husbandry Administration in Norway

⁵ RS is an abbreviation for "Reindriftsstyret", the Board of Reindeer Husbandry at the national level

⁶ Author's translation

husbandry by 2050. This point is further reinforced in a joint report on recreational cabins and reindeer husbandry submitted by Norut NIBR Finnmark⁷, the Norwegian University of Life Sciences (UMB), and the Norwegian Institute for Nature Research (NINA): 300 km² pastures will be lost annually in the reindeer regions in North Norway and Trøndelag. In the South Trøndelag and Hedmark Reindeer Region one fifth of the reindeer pastures may be lost during the next twenty20 years.

Cf. also St. meld. nr. 28 (1991-92), St. meld. nr. 33 (2001-2002), RR⁸ 2004, RR 2008, Ot.prp. nr. 32 (2007-2008): nr. 1, 3 and 4, ICRH 2009a.

Research shows that only a few percent of the pastures are usually physically lost in encroachments (Nellemann et al. 2003). Of greater concern is the reindeer's abandonment of areas due to the human activities that follows (Nellemann et al. 2001a,b, Vistnes et al. 2004, Vistnes 2008, and Vistnes et al. 2008).

The Sami reindeer areas have undergone substantial changes the last 100 years. The "Scenario for Human Impact on the Barents Region 2002-2052" shows scenarios for how the situation may be perceived in 2002, 2022 and 2052 in the Barents Region (Appendix I, Jernsletten and Klokov 2002: 102).

Christian Nellemann, Senior officer of UNEP at GRID- Arendal has been studying the pressure on the reindeer pasture areas for many years. Nellemann says that by 2050, if the development continues at the present rate, it will not be possible to use 80% of the summer pastures in Finnmark in the same way that they are used today. "The situation is very serious," Nellemann says. He continues to say that reindeer husbandry in the rest of the country is facing the same challenges (RF 2009a: 18). Cf. Jernsletten and Klokov 2002, Jull 2003, Lie et al. 2006, Nellemann et al. 2001a, 2001b, 2003, Riseth 2003, J.M. Turi 2002a, 2002b, Vistnes and Nellemann 2001, Vistnes et al. 2004, Vistnes 2008, Vistnes et al. 2008. Bård A. Berg has examined negative attitudes towards the reindeer herders in various newspapers in the period 1996 to 2000, in Berg 2001b.

1.2. The two views investigated in this thesis

Encroachment is recognized as a problem that has to be dealt with, in politics, as well as in research. Nevertheless, there exists no agreed policy of how to deal with the perceived future encroachment problem. The Norwegian state has no outspoken strategy on the issue, neither has NRL. Hence, I wanted to look into some aspects of the problem, which, in my view, may

⁷ Northern Research Institute Alta – Áltá

⁸ RR is an abbreviation for Riksrevisjonen, Office of the Auditor General of Norway

be worth recognizing. In this thesis, I have investigated the reindeer herders' view of the encroachment problem (chapter 2), and the protection against encroachment in Norwegian legislation (chapter 3).

As part of a solution to the problem, in the 1980s NRL argued for reindeer husbandry to acquire a right of veto to allowances of encroachments if they caused considerable damage to reindeer herders' livelihoods (NRL 1982). NRL hoped that the Sami Rights Committee, appointed in 1980, with a mission to find solutions to the encroachment problem, would propose a right of veto. In December 2007, the committee⁹ submitted their last proposal, in NOU 2007: 13 *Den nye sameretten* (the New Sami Law), where they did not propose a right of veto for the Sami in reindeer husbandry. Neither did the committee propose substantial changes in the legal protection against encroachments. The encroachment problem, thus, has to be solved in politics, based on similar legal protection that was enacted thirty years ago. The demand for a solution that is acceptable to everybody is not less today than it was at that time, cf. 1.1. The situation represents a challenge to politicians, as well as to researchers.

In an article about the need for research on common property, McCay and Jentoft require “exploring how property rights are understood by various parties and how those meanings are translated into behavior, custom, and law,” and “understanding the nature of conflicts over rights and responsibilities” (McCay and Jentoft 1998: 27).

The encroachment issue may also be seen as an environmental issue. The need for research may be connected to a pronouncement by Hanna et al., saying that broadly viewed “environmental problems are problems arising from incomplete and asymmetric information combined with incomplete, inconsistent, or unenforced property rights” (Hanna et al. 1996: 3). In an article about research for the reindeer husbandry, Reinert refers to a woman reindeer herder who said in 2001 that “it is as though everything we know is worth nothing” (Reinert 2001: 15).

In accordance with the recommendations of the need for research in McCay and Jentoft, and in Hanna et al, I investigate how rights and responsibilities in the encroachment situation are viewed by the reindeer herders and stated in the legislation, and what information and understanding may be lacking to deal with the problem.

⁹ The Sami Rights Committee appointed in 1980 was relieved in 1997, having submitted proposals in 1984 in NOU 1984: 18 *Om samenes rettsstilling*, and in 1997 in NOU 1997: 4 *Naturgrunnlaget for samisk kultur*. The Sami Rights Committee II was appointed in 2001 to finish the mission of the committee as promised by the government in 1980.

The first investigation, in chapter 2, is about the reindeer herders' views on the encroachment issue. I have talked with three leaders of the reindeer herders, Aslak J. Eira, Berit Oskal Eira, and Johan Anders Eira. The issue addressed in the interviews was about encroachments in general, how they understand the rights and responsibilities of the parties in the encroachment situation, and what, in their view, is necessary to understand about encroachments to resolve the problem.

The second investigation, in chapter 3, is about the rights and responsibilities of the parties in the legal protection against encroachments, in past, present and proposed Norwegian legislation. The aim is to get an understanding of the extent of the legal protection to meet future challenges, and the weaknesses in the legal protection.

1.3. The need for a major reform

In "Our common future," the so-called Brundtland report of 1987 by the World Commission on Environment and Development, the commission points to the importance of the indigenous eco-cultural systems (Brundtland 1987: 114-115; Jull 2003: 22):

The isolation of many such people has meant the preservation of a traditional way of life in close harmony with the natural environment. Their very survival has depended on their ecological awareness and adaptation. (...) These communities are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. (...) It is a terrible irony that as formal development reaches more deeply into rain forests, deserts, and other isolated environments, it tends to destroy the only cultures that have proved able to thrive in these environments."

The commission recommended that "the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area." (Brundtland 1987: 115-116)

Commenting on this recommendation, Jentoft concludes (Jentoft 2003: 7): "No doubt, if taken seriously and implemented in practice, the recommendation will result in a major management reform in most countries that have indigenous peoples within their borders."

No 'major reform' has, as yet, taken place in Norway as far as the Sami reindeer areas are concerned. Hence, it may be of interest to compare with a different type of area, where a 'major management reform' actually is taking place. This is in the wild reindeer ranges in Southern Norway: In 2005, the Norwegian Parliament approved a new policy for the protection of wild reindeer in Southern Norway. Securing areas for wild reindeer was approved as one of ten national result goals for the environment (Innst. S. nr. 228 (2004-

2005), cf. St. meld. nr. 21 (2004-2005)). This has been achieved by regional planning and management where the focus has been on the needs of the wild reindeer for large and continuous areas. Activities and encroachments that would disturb the wild reindeer or divide their habitats must be avoided. “The wild reindeer shall deliver the premises” (MD¹⁰ 2006)¹¹ is the new basis of the encroachment policy as far as the wild reindeer areas are concerned. “Important challenges are to secure habitats sufficiently large, and of adequate quality, where the reindeer have the possibilities to wander and migrate” (op.cit.).

The change in policy for wild reindeer is based on research by NINA¹² with the participation of more than thirty researchers from various fields, and developed through extensive communication with the municipalities and local expertise in the areas (St. meld. nr. 21 (2004-2005): Box 11.41). The pastures, as well as the random zones of the pastures, are protected for the wild reindeer. Human activities can only take place on the premises of the wild reindeer (Andersen and Hustad 2004: 27-31, 38-41).

1.4. The reindeer herders’ adaptive capacity

The wild reindeer in Southern Norway and the Sami reindeer are the same animal with the same requirements for their habitats. The logical solution might be to take the same measures to secure the Sami reindeer areas as for the wild reindeer. Likewise, the rights of the reindeer herders for protection of the pastures ought to be equally strong as the ‘rights of the wild reindeer’.

Refusing all further encroachments in the reindeer pasture areas does not seem to be a realistic policy, cf. the perspectives accounted for in 1.1. The *differences* between the situation of the wild reindeer and the Sami reindeer may therefore be as interesting as the *similarities*.

The main difference between the lives of the wild reindeer and the Sami reindeer are the reindeer herders. There is no tolerance of disturbances in the new policy concerning the wild reindeer ranges, whereas multiple uses have taken place in the Sami reindeer pasture areas for at least 100 years. The ranges of the wild reindeer have decreased as a result of human activities in these areas, whereas the Sami reindeer pasture areas to a far lesser degree have been reduced in size as a result of the development of other uses.

¹⁰ MD is an abbreviation for Miljøverndepartementet, the Ministry of Environment

¹¹ Author’s translation

¹² NINA: Norwegian Institute for Nature Research

In my view, this is primarily due to the adaptive capacity of the reindeer herders, their resilience. Consequently, one may say that the adaptive capacity of the reindeer herders is what has saved the Sami reindeer husbandry in spite of the encroachments that has taken place in their areas. From the other side, the side of the encroaching interests, one may say that other human activities in the Sami areas are based on the adaptive capacity of the reindeer herders.

Adaptive capacity is, at the same time, a basic skill that enables reindeer husbandry independent of encroachments. Sami reindeer husbandry is not possible without knowledge of how to relate to the variable and shifting natural and social conditions of the resource area.

1.5. Two types of knowledge

Two different types of knowledge seem to be available for finding solutions to the encroachment problem: the reindeer herders' knowledge and skills to adapt to shifting conditions, and the new environmental knowledge behind the reform of the wild reindeer areas. The experts on the reindeer herders' knowledge are the reindeer herders themselves. The experts of the new environmental knowledge are the ecologists.

The adaptive capacity of the reindeer herders is based on the knowledge needed to comply with the constantly changing and varying natural and social conditions, including changes caused by encroachments. As said by Johan Mathis Turi on the UN Environmental Day in June 2007: "We have some knowledge about how to live in a changing environment. The term 'stability' is a foreign word in our language. Our search for adaptation strategies is therefore not connected to 'stability' in any form, but is instead focused on constant adaptation to changing conditions." (Cited in Reinert et al. 2009: 1) The bearers of this knowledge are the reindeer herders.

This knowledge is not directly connected to the ecologists' knowledge. This knowledge to a small degree is codified in writing.

This knowledge has its purpose in reindeer pastoralism alone. It may enrich and be enriched by other knowledge, but it cannot be replaced by other knowledge.

This knowledge might be called 'Sami knowledge,' as almost all reindeer herders in Norway are Sami. It might be called 'indigenous knowledge,' as most reindeer herders in the world are from indigenous peoples. It might be called 'ecological and environmental knowledge,' as it concerns sustainable adaptation. But, neither the knowledge itself, nor the value of the

knowledge for successful multiple uses of the reindeer areas, can be disconnected from reindeer herding and reindeer herders.

The reindeer herders' knowledge is different from the research-based ecological knowledge, which is knowledge utilized in policies to protect nature, for example, in the protection regime for the large carnivores, the protection regime for the wild reindeer, and in nature conservation. The reindeer herders' knowledge is holistic, compared to the piecemeal knowledge in the study of ecology.

Today it is widely acknowledged that the traditional knowledge of indigenous peoples may contribute substantially to the development of research-based ecological knowledge. (Berkes 2002a, 2002b, Bjørklund 2003, Brantenberg 1999, Eythórsson and Mathisen 1998, Folke and Berkes 2002, Jentoft 1998, Kalstad 1996, Meløe 1990). What about the opposite relation? Is the reindeer herders' adaptive capacity dependent upon ecological research? Scientific ecological knowledge may, of course, be useful for the reindeer herders, but reindeer herding cannot be based upon ecological knowledge alone. Different from the piecemeal scientific ecological knowledge, the reindeer herders' ecological knowledge contains all types of knowledge needed to relate to many different situations. For example, when the pastures are locked by ice, scientific knowledge can explain the locking of the pastures. The reindeer herders' knowledge is needed to find alternative pastures, considering, among other issues, how to avoid ruining the pastures that will need to be used in other seasons, and how to avoid using the pastures of other reindeer herders without their consent.

1.6. The world of the reindeer herders' knowledge – Jakob Meløe's philosophy

The philosopher Jakob Meløe illustrates some essential aspects of knowledge and understanding, in "*Om å forstå det andre gjør*"¹³ (Meløe 1997). He states three sentences about the agent and the world of the agent (Meløe 1997: 338)¹⁴:

- (1) The actor acts within a world and with respect to that world.
- (2) What we understand when we understand what the agent is doing, is the world within which the agent acts or with respect to which he acts,
- (2,,) If we do not understand the world within which the agent acts, or with respect to which he acts, we do not understand what the agent is doing.

¹³ "On understanding what others are doing," my translation

¹⁴ English text by Jakob Meløe, personal communication 4th June 2009

(3) If you do not understand what the agent is doing, do not only look more closely at what the agent is doing (his movements etc.). Locate the place from which the agent is looking and then look at what the agent is looking at (that which guides what he is doing).
(Clause (2) and clause (2') makes the same statement, since (2) implies (2') and vice versa. They are therefore counted as one clause.)

In a personal philosophy seminar on the encroachment issue 4th June 2009, Meløe comments on how he uses the term “world”: the term may refer to the totality of what exists on earth, where we live. But the term may also be used in expressions like “the world of finance”, “the world of reindeer pastoralism”, etc. In that use, the term “world” refers to the totality of what enters into, or belongs to, a certain way of life. The price of stockfish in Nigeria affects the livelihood of coastal fishermen, but not the life of the nomadic pastoralists. Frost before snow, and the locking of pastures, affects the work and the livelihood of reindeer pastoralists, and of the reindeer, but not the livelihood of coastal fishermen. We may say that the world of reindeer pastoralism is the totality of whatever affects the lives and livelihood of the reindeer pastoralists. We may speak of a person being “at home” in a particular world, if he or she has the skill and the knowledge that enables him or her to make a good livelihood and lead a good life within that particular world. Few, if any, coastal fishermen, bureaucrats, etc., will be at home within the world of reindeer pastoralism. Since we are not in position to advise about, or pass judgments on, activities or practices that we do not understand, it follows from the first two clauses that we are in a poor position to advise about, or pass on judgments on, activities or practices within a world where we are not at home. It is only when you have made yourself well at home in a particular world, that you have earned the right to speak as an equal to equals about the problems that arise within that particular world. Such as how to deal with encroachments, or how to avert them. More about Meløe’s philosophy may be found in Melkevik et al 1989, Meløe 1973, 1974, 1981, 1989, 1990, 1993, 1997, and in Greve and Nasset (eds.) 1997.

The above cited sentences are used as guidelines for my inquiry in the encroachment problem in general, and for the two investigations in this thesis:

In chapter 2, I refer illustrations by my three reindeer herders’ informants about what encroachments are in the world of the reindeer herders, what problems arise from encroachments, and what is often overlooked by most people, and by the authorities, in the search for the best solutions to the problem. In Norway, encroachments represent a problem to society because of the damage they cause to Sami reindeer husbandry. In order to understand what encroachments mean to the livelihood of the reindeer herders, it is required to

understand the world of the reindeer herders. This is the world where encroachments represent a problem. In compliance with the Meløe sentences, accessing the encroachment issue without this knowledge may be futile. This is the reason for my inclusion of the view of the reindeer herders about encroachments in chapter 2.

In chapter 3, I view at the acts and regulations for allowing encroachments in the Sami reindeer pasture areas, in past, present and proposed legislation during the last forty years. This is the same period as my informants have been active politicians representing the reindeer herders. In 2007 the Sami Rights Committee submitted their last report, concluding 27 years of efforts to propose, *inter alia*, better protection against encroachments. The laws and regulations for allowing encroachments during this period are clear expressions of the intentions and analysis of the Norwegian state, as well as in the public opinion, of how to deal with the problem. The study may enlighten the statements in the beginning of this thesis, that the encroachment situation may be too much for the Sami reindeer husbandry, and that this does not seem to be understood.

In 1986 Meløe was hosting *The International Wittgenstein Seminar* in Skibotn near Tromsø. He wanted to welcome the guests by telling about “where we are now” (Meløe 1990:68). To know the landscape, or where you are, is to know the use of the area; subsequently Meløe talked about reindeer husbandry and coastal fishing. The title of his lecture was *The Two Landscapes of Northern Norway*. He comments on his message such (op.cit.): “There is just a chance that I shall be able to give you a few glimpses of the two worlds of Northern Norway. But talking alone will not alter your gait or give you new eyes to see with. If there is one philosophical message in what I am going to say, then that is the message.”¹⁵

Likewise, there is a lot more to say and to understand about encroachments than what is found in the chapters 2 and 3 in this thesis.

1.7. Encroachments and colonialism – Nils Aslak Valkeapää

Throughout history, the Norwegian state has at all times taken the Sami reindeer husbandry seriously, and acknowledged the herders’ right to use pastures for their livelihood (Berg 1994, 1998, 2000, Bull et al.2001, Ravna 2007). Nevertheless, there have been features in the policy that resemble colonialism. In my view, the remains of colonial policy are related to a lack of

¹⁵ Meløe gave the same lecture at a symposium in Skiboth in 1987, arranged for a Ph.D. seminar arranged by the Section for Sami Studies/Ethnic Relations at the University of Tromsø

will to make up for past infringements on their rights and to avoid further infringements, as well as to a lack of understanding of the reindeer herders' own ability to manage reindeer husbandry. These are aspects that ought to be kept in mind when studying the encroachment problem.

What ought to be kept in mind is expressed in Nils Aslak Valkeapää poem *My Home is in My Heart* from 1985 (English translation 1994). The poem ought to be read in its totality. Here I cite some of the passages that especially concern the issue of this thesis (Valkeapää 1994):

MY HOME IS IN MY HEART

it migrates with me

...

You know it brother

you understand it sister

but what do I say to strangers

who spread out everywhere

how shall I answer their questions

that comes from a different world

...

They come

and ask where is your home

they come with papers

and say

this belongs to nobody

this is government land

everything belongs to the State

They bring out dingy fat books

and say

this is the law

it applies to you too

...

But I do not see brother

I do not see sister

I cannot

I say nothing

I only show them the tundra

1.8. Truth as active participation - the philosophy of Alain Badiou

Research based on ambition to reform may be problematic because it is difficult to reach the required distance from the problem and evaluate the different aspects of the issue. In this respect I particularly find the philosophy of Alain Badiou interesting.

In *L'Être et l'Événement* from 1988, translated into English in 2005 in *Being and Event*, Badiou argues that the event is constitutional for the subject to find his realization of, and reconciliation with, the truth. The event is the key to discern what is not already acknowledged, and to make use of what is discerned. Referring only to the acknowledged truths would be a philosophical disaster, according to Badiou. The important issue is to point to, and to make use of, that which cannot be discerned. Badiou's ethical maxim is to act upon that which cannot be discerned (Badiou 2008, cf. Badiou 1991, 2005).

Consequently, Badiou maintains that politics are not about the politicians, but about activism based upon the events in present situations. Likewise, science is not about the scientists and the present scientific knowledge. Recasting the truth is the ultimate aim of science, and is prior to veracity and verifiability. Badiou underlines the courage to stay faithful and loyal to the event (op.cit.).

As I understand the concept borrowed from Badiou, the *event* is not “whatever happens”¹⁶. Only events that matters to you, and that enforce new definitions of your situation, are *events* in this meaning. Participating in the Alta demonstrations in the 1970s and 1980s may be an example of an event for many of those who took part, and those who followed what happened. In the philosophy seminar 4th June 2009, cf. 1.6, an example by Sidsel Meløe may illustrate the similar. Sidsel Meløe suggested that the first day at school may be an example of an *event*. Likewise, the experience of encroachments becoming too many to comply with, that “one day it will be too much for us” may be seen as an *event* for the reindeer herders and the siidas experiencing this threat.

“That which cannot be discerned” might be, in the three illustrations above: For the event of the Alta demonstrations, the Sami power arising from the depths of the Alta case, later to enrich the livelihoods of all people living in the Sami areas, with effects for the whole world,

¹⁶ In OCD, “event” is “a thing that happens or takes place, esp. one of importance”, or “the fact of a thing’s occurrence”. “In the event” is “as it turns (or turned) out” (OCD 1990).

¹⁷ may be seen as that which (at the time) could not be discerned. In the event of the first school day, the entrance to the world through reading and writing may be seen as the exciting unknown joy for the child, at the time. In the event of the encroachments becoming “too much for us” (for the reindeer herders and their siidas), “that which cannot be discerned” may be the adaptive capacity and the resilience of the reindeer herders and their siidas. This may, in my view, be the power that may change the encroachment problem from being situation. Recognition of this knowledge, and a policy to improve the pasture conditions, may at the same time be means to get rid of the remains of colonialism against the Sami reindeer husbandry.

I do not claim that the above thoughts of the Badiou’s concepts are correct interpretations of his philosophy. Nevertheless, this thesis is inspired by Badiou’s concepts. This is the reason for amending the thoughts in the thesis, although I do not know Badiou’s philosophy well. More about Badiou’s philosophy can be found in Badiou 1991, 2005 and 2008.

1.9. Keep the boat floating - Johan Mathis Turi

Sami reindeer husbandry in Norway obviously has survived through the past fifty years in spite of many encroachments during this period. The question may be whether the perceived encroachments in the next fifty years will alter the situation, and how the situation will change with the perceived development.

The first encroachments on the Sami reindeer pastures are not of a recent date and Sami reindeer husbandry has complied with the encroachments so far. For example, in spite of the many encroachments in the Sami areas, these areas have been far less reduced than the ranges of the wild reindeer. The Sami reindeer pasture areas today encompass about 40% of Norway, and are similar to the areas that were available fifty years ago.¹⁸ Further, the number of families in Sami reindeer husbandry in Norway seems has remained the same as fifty years

¹⁷ I am referring to the establishment of the Sami Parliament in 1987, the recognition of Sami culture and territorial rights in the Constitution in 1988, and in the Human Rights Act in 1999, the new understanding of the UN Covenant on Civil and Political Rights (CCPR) in NOU 1984: 18, the Norwegian contribution to ILO 169, the UN Declaration of Rights of Indigenous Peoples in 2007, and the draft Nordic Sami Convention in 2005.

¹⁸ The available pastures for reindeer husbandry today are mainly the same as in the 1960s, referred to by the Reindeer Husbandry Law Committee (RLK) in their report from 1966 (RLK 1966). Today reindeer are herded over an area of approximately 146,000 km², 40% of the mainland area of the country (RF 2009b: 3). The size of available pastures in the 1960s and today are not directly comparable, directly comparable sizes are not available.

ago, counting around 500 families.¹⁹ Also, the number of reindeer, although with considerable variation between the years, seems to have remained around 200,000 animals today, as it was fifty years ago.²⁰

The International Centre for Reindeer Husbandry, ICRH, says the following about the development over the last 400 years (ICRH 2009b):

The 1600s are said to mark a transformation of indigenous reindeer economies as competing nation states began a process of colonizing indigenous peoples, encroaching on their lands and utilizing their resources. (.....) The 20th century was a period of intense social, cultural, ecological and economic change for all reindeer peoples. (...) In Scandinavia, the establishment of national borders transformed Sámi reindeer husbandry. Cross border migrations were ended in some areas and placed under strict legislative supervision in others. This period was followed by an intense period of infrastructural development and post war reconstruction.

The adaptive ability of reindeer peoples is commented on as such (op.cit.):

...Sámi herders in Scandinavia continue to hold reindeer husbandry at the centre of their annual cycle. This speaks to characteristics that reindeer peoples possess in abundance: resilience, rapid adaptability and flexibility. Reindeer peoples have shown that not only have they survived the onslaught of the last century on their cultures, languages and livelihoods, they have managed to survive and in some areas even thrive.

Johan Mathis Turi is named in the heading of this subchapter because, in my opinion, he is the main capacity behind the recent ICRH analyses of reindeer husbandry in the world.

I shall end this section on the time perspective of reindeer husbandry with a comment made by Johan Mathis Turi about encroachments in the report of the project “Reindeer husbandry and Barents 2030” (ICRH: 24):

...Even though it can severely disrupt the livelihoods of reindeer herders, oil and gas development may not be the worst that can happen to reindeer husbandry: In contrast to other alternative sources for energy supply that affect our animals, such as windmills and smaller hydro-electric power plants, oil and gas development will often prove to be very profitable. This means that there is at least a financial foundation for positive development of also reindeer herding societies.

There is a saying that “the tide lifts all boats”. The development of the Arctic as a new energy region of the north truly represents a “tidal wave” for the indigenous peoples of the north. I believe the tide will lift all boats, that is to say, all boats that float. When the wave is coming, it is important to also fix the small indigenous boats – not only so that they can ride safely on the flood, but also so that they can settle safely on the shore once the water ebbs away.

¹⁹ The number of families in the Sami reindeer pasture districts was 509 families in 1964 (RLK 1966: 13). In RF 2009b: 9, the number of concession permits in Sami reindeer husbandry was 589. The numbers are not directly comparable, such numbers are not available.

²⁰ The number of reindeer in 1966 was estimated by the Reindeer Husbandry Law Committee to be “at least about 200,000” (RLK 1966: 13). The number of reindeer during the period 1979/80 to 2007/08 has varied around 210,000 reindeer, according to the diagram in RF 2009b: 7. The numbers seem to be comparable.

The perspective today, as well as of a new encroachment policy, may be to keep the boat floating, and to facilitate a safe landing on shore when a new policy is implemented. In Norway, the financial foundation for solutions may be offered through the Reindeer Husbandry Agreement, if NRL and the Ministry of Agriculture agree, and if not compensated in other ways.

1.10. The definitions of ‘reindeer husbandry’, ‘encroachment’ and ‘resilience’

The term “reindeer husbandry” is used in this thesis for the “livelihood and way of life of the reindeer herders”. The term “reindeer husbandry” in this thesis means the same as Meløe’s term “reindeer pastoralism” (Meløe talks about the world of the “reindeer pastoralism”, cf. 1.6). Meløe’s terminology is in accordance with the distinctions in Robert Paine’s analysis in *Herding and Husbandry. Two basic concepts in the Analyses of Reindeer Management* (Paine 1964). Paine distinguishes between “herding” and “husbandry”, both being limited to pieces of the livelihood and way of life of the reindeer herders. Paine’s term for the livelihood and way of life, is, like the term Meløe uses, “reindeer pastoralism”. Paine also uses the term “reindeer management”. Ealát, the Reindeer Herders’ Vulnerability Network Study, uses “reindeer pastoralism” in their studies on “Reindeer Pastoralism in a Changing Climate” (Ealát 2009).

The reason for my choice of terminology is that “reindeer husbandry” is the most used English term in Norway. “Reindeer husbandry” is the English term used for example in the Reindeer Husbandry Act, in the Reindeer Husbandry Agreement,²¹ and in most official documents translated to English. “Reindeer husbandry” is at the same time a secure translation of the Norwegian word “reindrift” for the reindeer herders. This term is used in ICRH: The International Centre for Reindeer Husbandry. In my view, this is the most practical term to use in this thesis, according to the worlds I want to address this world with the research in this thesis. This is the reason for choosing the term that is different from the most accurate term in research, which I hold to be “reindeer pastoralism”..

The term “encroachment” is used as in Oxford Concise Dictionary (OCD), derived from “encroach”. The term “encroach” has two meanings: “1 (foll. by *on, upon*) intrude, esp. on another’s territory or rights. 2: advance gradually beyond due limits.” In chapter 2, I investigate what are encroachments in the view of the reindeer herders. The term is not used

²¹ “Reindeer Husbandry Act” is used recently in the summary in NOU 2007: 13, and in RF 2009. “Reindeer Husbandry Agreement” is used recently in RF 2009.

in the Norwegian acts and regulations of encroachments. These acts and regulations have the aim of avoiding “encroachments” in the meanings 1 and 2 in OCD. The questions in chapter 3 are what past, present and proposed measures are regulating other’s activities in the Sami reindeer herders’ areas, to avoid to “intrude, especially on another’s territory or rights”, and to avoid to “advance gradually beyond due limits”.

The term “resilience” is likewise used as in OCD, derived from “resilient”, with two meanings: “1. (of a substance etc.) recoiling; springing back; resuming its original shape after bending, stretching, compression, etc. 2. (of a person) readily recovering from shock, depression, etc.; buoyant.” In this thesis I use “resilience” about the reindeer husbandry in a reindeer pasture district, or in a *siida*. Ellen Inga Turi has studied resilience in the *siidas*, in *Living with climate variation and change; A comparative study of resilience embedded in the social organization of reindeer pastoralism in Western Finnmark and Yamal Peninsula* (E.I.Turi 2008). She shows that the resilience in the reindeer husbandry is embedded in the *siida* in Western Finnmark, and in the similar *brigade* in Yamal Peninsula. In this thesis, the term “resilience” is used in a similar way, and extended to encompass more than “persons”, as in OCD 2.

In chapter 2 in this thesis, my informants illustrate the resilience of the reindeer husbandry with several examples. In chapter 3, in the investigation of encroachments in Norwegian law, I suggest that one of the factors missing for a successful encroachment policy is activating the ability of the reindeer herders to adapt to changing conditions.

1.11. On the further progress of the thesis, and on the thesis in general

In this thesis I make use of the research based book *Inngrep i reinbeiteland* (Vistnes et al. 2004). My research has points of resemblance with the research in the Ealát network, the Reindeer Herders’ Vulnerability Network Study. Ealát combines scientific and traditional knowledge for development of policies to address issues that may be problematic for future reindeer husbandry. In Ealát, the knowledge of reindeer herders is directly integrated into the research. Ealát studies related questions as this thesis, for example in the IPY project # 399²² that focuses on the (Ealát 2009) “adaptive capacity of reindeer pastoralism to climate variability and change.” In this project, (op.cit.): “The limits of the adaptive capacity of reindeer pastoralism must be defined, documented, and explored together with the potential

²² IPY is the abbreviation for International Polar Year

role of herders' traditional understanding of, and techniques for, reducing their vulnerability for the effects of climate change." What are the "limits of the adaptive capacity of reindeer pastoralism" is not discussed in this thesis. This thesis departs from concern among the reindeer herders that the limit is exceeded for some of the siidas. The thesis view into some aspects of what the encroachment problem may be about, and what are the measures that may solve the problem. Ealát is focusing on the effects of the climatic change. There is a relation between the effects of the climatic change and the accumulative effects of encroachments. In RF 2009a, Nellemann says about this connection (RF 2009a: 18): "Reindeer husbandry can tackle these problems (from the climatic change, author's addition), but it must be allowed to be flexible. Reindeer herders need many pasture areas to choose between." The reindeer herders are concerned about the alternatives to choose between now are becoming too few.

The thesis is written for the Master's of Philosophy in Indigenous Studies Degree, with the limits of (UiT 2007) "approximately 50-70 pages", exceeded in this thesis by less than 10%, which ought to be within the accepted limit according to the instruction.

References at the end of the thesis are divided in one list of literature and one list of reports, acts, and publications.

The further progress of the thesis is as follows: In chapter 2, I account for my research on how the encroachment problem is viewed by the reindeer herders. In chapter 3, I account for my research on the legal protection against encroachments in the past, present and proposed Norwegian law. In the final chapter, in chapter 4, I sum up the findings presented in chapters 2 and 3 and draw my own conclusions.

2. Encroachments as viewed by the reindeer herders

The aim of this chapter is to add substance to the opening phrases of this thesis: What are the encroachments are which are the problems that may destroy Sami reindeer husbandry? What are the things that are not always understood and often overlooked by most people and especially by the government officials?

This issue is not new to me.²³ For the research in this thesis, I have talked with some 20-30 reindeer herders from different reindeer pasture regions and have been updated on what has happened in the last years. Inger Marie Gaup Eira's notes from a joint conference by NRL and the Reindeer Husbandry Administration (RF)²⁴ on the 20th of March 2007 (Eira 2008) are particularly interesting. My talks with Aslak J. Eira, Berit Oskal Eira and Johan Anders Eira during the autumn of 2008, and winter and spring of 2009 form the most substantial input for the study presented in this thesis. Their stories make up the main part of the chapter.

The chapter proceeds as follows: I introduce my informants in chapter 2.1, before retelling the stories of my key informants, in chapter 2.2. In the last part of the chapter, in 2.3, I give my reflections upon their views.

The presentation of their stories is my own but the aim is to present their views. They made special preparations for our talks. If this chapter had been a book or an article, it would have been natural to include my key informants as co-authors; they have accepted to be recognized formally in this thesis.

2.1. Introducing my informants Aslak J. Eira, Berit Oskal Eira and Johan Anders Eira

At the national level, encroachments have been on the agenda of NRL since the beginning of the organization in 1947 (Berg 1997a).²⁵ In reindeer husbandry, encroachments are handled by the leaders and boards of the reindeer pasture districts.²⁶ The pressure from encroachments varies; some of the reindeer pasture districts are under severe pressure, others are less

²³ I refer here to my work as Secretary General in NRL from 1981-2006

²⁴ In Norwegian: *Reindrifftsforvaltningen* which is often used as an abbreviation RF.

²⁵ My informants have taken part in NRL since the end of the 1970s.

²⁶ The reindeer pasture district is the basic geographic unit in Sami reindeer husbandry for matters concerning the relation to the outside world. The district leader and board are elected by and among the reindeer herders in the district. The district board represents the interests of the reindeer husbandry in the district, and may enter into contracts, sue and be sued on behalf of the reindeer herders in the district. Cf. the Reindeer Husbandry Act Chapter 6.I. *Reinbeitedistrikter*.

burdened. My informants have been responsible for handling encroachments at the district level, as well as at a national level, and the districts they belong to are burdened with encroachments to varying degrees.

Aslak J. Eira has his herd in Gearretnjarga reindeer pasture district in the summer, and in the Common pasture district 30/31 from around October/November to around April/May.²⁷ Location of the districts can be seen in Appendix 2. Both districts are in Finnmark. There have been few encroachments in District 30/31. However, a major encroachment was the dam that was built in the Alta-Kautokeino watercourse at the turn of the 1970s/1980s. Aslak J. Eira was the district leader of the Common pasture district 30/31 for ten years, from 1986 to 1996. One of the tasks of the district board in his leadership period was to deal with the consequences for the reindeer herders of the Alta dam construction. Aslak J. Eira was president of NRL from 1998 to 2006. In addition he has had, and still has, many commissions on behalf of the reindeer herders and reindeer husbandry, at the national, as well as at the regional level.

Berit Oskal Eira and Johan Anders Eira have their common herd in Gielas reindeer pasture district in Troms reindeer pasture region. Location of the district can be seen in Appendix 2. The way the district is used in reindeer husbandry can be seen in Appendix 3. The district has suffered from a lot of encroachments. During the last thirty years they have been burdened with a military training field, a road between Norway and Sweden, power lines, windmills, and many recreational cabins. In recent years they have also lost their winter pastures in Sweden, at least for the time being. In addition there are plans for new encroachments including: building a larger power transfer line, a railway, more windmills, and more recreational cabins. Gielas has pastures in six municipalities, two counties and in two countries. Berit Oskal Eira was president of NRL 1982-84, and she has for two periods been the leader of the regional reindeer herders' organization, Troms Reindrifsamers Fylkeslag. She has been a member of the Sami Rights Committee,²⁸ and the Sami Culture Committee.²⁹ She is a member of the Sami Parliament, and she has been deputy minister³⁰ for Sami and minority issues in the Ministry of Labor and Social Inclusion.³¹ At present she is secretary for

²⁷ Bård A. Berg has examined the use of the peninsula Gearretnjarga, in *Samiske sedvaner og rettsoppfatninger på Gearretnjarga (halvøya mellom Revsbotn og Repparfjord i Vest-Finnmark)* (Berg 2001a)

²⁸ In Norwegian: Samerettsutvalget

²⁹ In Norwegian: Samekulturutvalget

³⁰ In Norwegian: statssekretær

³¹ In Norwegian: Arbeids- og inkluderingsdepartementet.

Gielas reindeer district. Her husband Johan Anders Eira has been leader of the district for many years. He has also had commissions for the reindeer herders at a regional and national level, and he is a politician in the Lavangen municipality.

One might argue against using profiled leaders of NRL as main informants for this kind of research, since they can be said to promote the policy of NRL. They might not represent the political views of all the reindeer herders. Such an argument is, in my view, not valid for this research, as I am not acquainted with any other ‚policies‘ among reindeer herders concerning encroachments. A possible candidate to express different views might have been an organization from some 10-15 years ago, Boazo Ealahus Searvi, BES, who was seen as an alternative to NRL by quite a few researchers (Bergstrøm 2005: 223-226 and others).

Concerning land rights though, Bergstrøm does not outline any disagreement between NRL and BES. BES was established in 1987 (Berg 1997a: 141) and faded away during the first half of the 1990s (Berg 1997a: 141-143). As far as the author knows, their constitution, program and archive are not available. There has been no alternative organization to NRL since it was established in 1947, with the exception of BES during the 1980/90s. NRL has been acknowledged as representing the reindeer herders by the parliament and government since its foundation.

Another objection may be that my research might be seen as research about myself, since I have worked intimately with the encroachment issue for many years in NRL. The problem might be to have distance from NRL’s involvement. As I argued in chapter 1, I consider that my previous work for NRL and my concern for the issue has been an advantage for the research.

I do not claim that my key informants have told me absolutely everything about encroachments as viewed by the reindeer herders. Nor do I claim that I have understood all they told me, or that I am able to pass on such information. I hope though, that I may contribute to a better understanding of the encroachment problem, that may in turn, contribute to a new policy on the issue.

2.2. Encroachments as viewed by my key informants

The following is based on the stories told by my key informants on different occasions. I had meetings with Berit Oskal and Johan Anders Eira on the 16th and 17th of September 2008, and with Aslak J. Eira on the 7th of October 2008. Later, they have explained in more detail certain aspects that were not clear to me after the first discussions. My informants have

accepted the notes I took during our discussions. As an introduction to both our meetings, my informants pointed to the importance of understanding the internal responsibilities in the encroachment situations.

2.2.1. The district leader is responsible

In the introductory letter to my informants, I had asked them to take their point of departure in the reindeer pasture map of their districts as a reference. This request was met in different ways by my informants: Berit Oskal Eira and Johan Anders Eira brought the reindeer pasture map of Gielas. Aslak J. Eira did not bring a map, but pointed to the district leader of Gearretnjarga for information on encroachments in the district. The district leader and no one else has the authority to talk about the encroachments in the district. Aslak J. Eira could tell about his period as a leader of the Common pasture district and from his experience as a reindeer herder in Gearretnjarga and from being a leader in NRL.

Aslak J. Eira started his story by stating that having understanding of rights is important within reindeer husbandry: If, for instance, a building contractor had talked with one of the reindeer herders in a district and had gotten the impression that this reindeer herder does not object to his construction plans, he often assumes that he has gotten a green light for his plans from the herders of that district. This kind of “consent” by a reindeer herder may further contribute positively to the handling of the contractor’s application by the concession authorities. Therefore, it is important that new users relate to the organizations that deal with reindeer husbandry and who is elected to deal with the relation to other users and the leaders and the board in the affected reindeer pasture district. Further, it is important that the reindeer herders in the district point to these people in situations concerning encroachments.

The district leader will point to the siida or siidas affected by the measure in question in order to acquire information about possible consequences, and will also look for discussion of counter measures to avoid or reduce the negative impact of the measure for reindeer husbandry. In cases where an encroachment only affects one siida, this siida should be contacted. In case an encroachment affects more siidas, they all should be contacted.

The siidas³² are the users of the areas and the bearers of resilience.³³ Since the district is the basic unit for the representation of the interests of the reindeer herders in encroachment questions, all formalities must go through the district.

If disturbances and damages cannot be avoided, the encroachment will often cause ripple effects for other siidas. The pressure on these will increase. In such cases, all affected siidas and sometimes more than one district, ought to discuss the issue together to consider how the damage could be kept as limited as possible.

Aslak J. Eira said that reindeer herders have internal procedures for such cases. It is not always easy to implement these, however. The reason is that sometimes there is too little time, at other times it does not fit in with the work with the reindeer in the different siidas to be able to meet for common discussions. The reason may also be that some herders do not follow the traditional rules for how to act internally within reindeer herding. The reindeer herders must rely on the district's ability to handle such cases, in relation to the internal rules, as well as in relation to the official rules and procedures for regulation of new use of uncultivated land.

2.2.2. Encroachments mean hard work

Berit Oskal Eira and Johan Anders Eira talked about the demands on the district following encroachments. They were particularly occupied with the hard workload for the district.

Gielas has their pastures within six municipalities,³⁴ there is a lot of work implied in keeping in contact with and relating to all of them.³⁵ The district leader feels that he cannot manage to inform all those concerned and to follow up with the planning of the areas where they have their reindeer husbandry. The reindeer herders in the district live in Lavangen municipality, and take participate in politics and only pay taxes there. The other municipalities often fail to consider reindeer husbandry. According to my informants, there is probably no lack of will; they simply seem to forget it. Even the people in Lavangen may promote their interests in the reindeer areas without remembering reindeer herding.

³² On the formal place of the siida cf. the Reindeer Husbandry Act, Chapter 6.II. Siida

³³ E.I.Turi has concluded that the siidas are the bearers of the resilience to deal with the ever variable and changing natural and social conditions in reindeer husbandry in the two reindeer husbandry communities investigates in her thesis, one from Western Finnmark, the other from Yamal peninsula in northwest Russia. (E.I.Turi 2008).

³⁴ The municipalities are Lavangen, Bardu, Narvik, Salangen and Gratangen in Norway and Kiruna in Sweden.

³⁵ The municipalities are the basic unit for planning and permitting other use of the reindeer areas in Norway, see the Planning and Building Act (lov 14.juni 1985, lov 27.mai 2008, cf. Ot. prp. nr. 32 (2007-2008): 1,3)

Johan Anders Eira estimates that it takes one to two years of work for one man to handle the interests of the district in encroachment issues.³⁶ His district considered establishing a pilot project together with some neighboring districts to co-ordinate the work with the municipalities and to reinforce planning and new uses to take place more on the premises of reindeer husbandry. Berit Oskal Eira suggested that national guidelines³⁷ for the planning and concession officials might have improved the situation when they are handling encroachment issues.³⁸

2.2.3. Encroachments imply changed use of the reindeer pastures

For reindeer herders, encroachments are not about the value for others or for society of the new installation, even if their own lives may also be improved by the road, power transfer line, or other measure in question. Nor are encroachments about the size or the cost of an installation, nor are they about the will of society to avoid disturbances and damage to reindeer husbandry. Encroachments are about the actual negative or destructive effects on reindeer husbandry. The reindeer herders are not mere spectators to encroachments. They have to adapt their way of managing reindeer husbandry to the encroachment, and they are intimate participants in the process.

The adaptation consists of changing the use of the areas. The reindeer herders focus on the changes of use that the encroachment requires. They focus on the options of changing the use of their area without losing the flexibility and resilience needed for managing the ever varying and shifting conditions, such as weather, vegetation, insects and predators. If a new activity does not necessitate a change of use of the areas, it cannot be called an encroachment.

In addition to access to good pastures at all times, factors like the situation in the siida, the working conditions and the social relations within the district are taken into consideration in the evaluation of an applied-for measure. The reindeer herders are dependent on their knowledge about and skills related to all these factors when searching for the best adaptation solution in each encroachment case.

³⁶ The labor burden ought to be seen on the background of the size of reindeer herding in the district. According to the latest official account, Gielas has one siida summer and winter with 5 siida shares. Pr 31 March 2007 1469 reindeer were registered (Ressursregnskap 2006/07:117).

³⁷ In Norwegian: *rikspolitiske retningslinjer*. Cf. the Planning and Building Act

³⁸ The Planning and Building Act of 2008 focuses on the regional planning, cf. Ot. prp. nr. 32 (2007-2008): Ch 3)

2.2.4. Early and direct contact

In most cases the encroachment is a fait accompli that the reindeer herders have to adapt to. In some cases though, the reindeer herders may influence the encroachment so that it implies less problematic changes for reindeer husbandry.

An efficient modification of the encroachment depends on close contact between the people responsible for the encroachment and those responsible for reindeer husbandry in the district. Direct contact gives better results than indirect contact through the municipality or through other authorities. Contact at an early stage, before the applicants of the encroachment have put too much money and energy into their plans, gives better results than contact at a later stage.

My informants all say that early and direct contact between the people responsible for the potential encroachment and those responsible for the reindeer husbandry in the district has the best outcomes. The role of the authorities might be to ensure that such contact takes place, and to instruct the people who are responsible for the potential encroachment to choose alternatives according to what would entail the least problems for the reindeer herders in the district.

2.2.5. Lasting traces and human activities

The reindeer herder, first of all, wants to know whether the planned encroachment leaves long lasting traces or not. If it leaves lasting traces, then lasting change of use is required. If it is a one time disturbance it is necessary to find changes only for that one time. In such cases, it is usually easy to manage the other usage, says Aslak J. Eira.

Additionally, the reindeer herder wants to know what human activity is connected to the encroachment at the times of the year when the reindeer may be in the surrounding area. Particularly the female reindeer and the calves shy away from human activities. Only the male reindeer may be seen close to encroachments where there is activity. Females and calves stay away from such activity. As an example, Aslak J. Eira mentioned that along the route from Skaidi to Klubben³⁹ one never sees females and calves. Only male reindeer may be seen, and only in the springtime and in the autumn if there are mushrooms. The males are usually tamer and can graze between houses and cabins.

Some more examples may illustrate this:

³⁹ Locations in Gearretnjarga reindeer pasture district. The distance between the locations is about 20 km.

A tourist event like the annual Finnmark sledge race with dogs that takes place in the wintertime, may be dealt with if the organizers keep in contact with the reindeer herders concerning the route, and adopt some rules about the behavior of the participants when they are close to the reindeer herds. In most cases the reindeer herders can easily adapt to the sledge races during such circumstances, even if the races take place right across the reindeer pastures.

Another example of intrusions that do no harm to the reindeer or the herder is making installations in small areas not used by the reindeer if the installation is done by helicopter in periods when the reindeer are not in the area. Yet another example may be a summer cabin placed in the winter pastures. This will usually not cause disturbance or damage to reindeer husbandry.

2.2.6. Recreational cabins

Recreational cabins do not necessarily cause any problems. Such cabins are often placed in grazing areas that are used by the reindeer herders only for a few weeks every year. For example in Gearretnjarga they use the grazing area close to the cabin village at Suolovuobmi only for a few weeks in the autumn in connection with earmarking and slaughtering. They take small herds into a small grazing area and after finishing their work, the reindeer are taken into a larger grazing area. In this case, as in many other cases with recreational cabins, the problem for the reindeer herders might have been avoided if the people inhabiting the cabins had stayed away during those few weeks of the year when there are reindeer in the surrounding area. When people are around these areas with their cars and engaging in various activities, they may cause considerable damage and disturbance to reindeer husbandry, Aslak J. Eira says.

As recreational cabins account for a considerable part of the encroachment problems, the situation might be improved if the reindeer herders were in a position to decide the location of recreational cabins. More alternatives for locations of recreational cabins would have been available if the reindeer herders were in a position to restrict the use of the cabins when the reindeer were in the area. Some problems could have been avoided if the municipalities at the stage of the planning of new cabin areas would include some restrictions on the use of the cabins according to the interests of reindeer husbandry.

Similarly, Aslak J. Eira thinks that disturbance from hunters during the hunting season might easily be avoided. For example, one might introduce a similar arrangement as what has been

done with the snow scooter tracks in the springtime. The snow scooter tracks in Finnmark are closed on the 4th May with regard to the game, but also with regard to reindeer husbandry. The hunting season coincides with the rutting season. The reindeer herds are fairly concentrated during this season. Finnmarkseiendommen (FE)⁴⁰ has shown a consideration for the areas where special precautions have to be taken - today it is even possible to get online reviews of where the reindeer herders are located all through the hunting season, making it possible for the hunters to avoid disturbing reindeer husbandry.

When encroachments do not leave lasting traces and if human activities are controlled during the weeks the reindeer are in the area, the negative impact on reindeer husbandry can usually be avoided. There is a limitation though if the district is already in a tight situation with too few alternatives for changing the use of the district. If there has already been a lot of encroachments in the district, or if the district has a scarcity of one of the seasonal pastures for other reasons, the tolerance level for reindeer husbandry is low. In these situations, most events may become a problem. There is however, a major difference between a single disturbance and lasting disturbances.

2.2.7. Encroachments that leave lasting traces or are connected to uncontrolled human activities

Turning to encroachments that leave long-lasting traces and allocate pasture land, Johan Anders Eira told about the Sætermoen military training field in Gielas as an example of such an encroachment. The training field allocates most of the previous main calving land of the district, and altogether about a third of the total pastures in the district. As a result of the establishment of the training field, the calving area in the district became too small, and the reindeer herders had to find additional calving areas. Since all the areas in the district were already in use for other purposes, the establishment of the training field had ripple effects in the district, and led to major changes in the use of the district. In this case, the result was poorer calving land, as well as less flexibility and resilience throughout the whole district.

Johan Anders Eira explained that each new encroachment led to an increasingly more difficult situation for reindeer husbandry in the district, for example, necessitating the need to supply the natural pastures with fodder in some periods of the year. In his view, the limit of

⁴⁰ *Finnmarkseiendommen* is the property owner of most of Finnmark County. Three members of the board are appointed by the Sami Parliament, three members are appointed by the Finnmark County. The board has six members. FeFo, the administration of FE, administrate the lands and resources owned by FE.

encroachments for securing a long term reindeer husbandry in the district has already been exceeded. Giving permission for new encroachments in the district has been risky business for the reindeer herders. As Johan Anders Eira views the situation, the reindeer herders have been left to themselves to deal with the negative consequences of encroachments. Measures to relieve the burden are seldom an issue that comes up in politics.

2.2.8. Rescue and recovery – remedies may be taken

In the situation of Gielas reindeer pasture district today, Johan Anders Eira suggested that there should be careful planning before allowing new encroachments in the district. There ought to have been a policy of no further net loss of pastures and flexibility in the district, and preferably a policy of active recovery. Losses caused by new development ought to be compensated for through measures to strengthen the flexibility and resilience in the district, as well as measures to support an efficient adaptation to the permitted encroachments. Berit Oskal Eira suggests that ethical standards and guidelines for encroachments have been developed and implemented.

Various measures might be considered in each case and in each district. For example, one may re-allocate previously allocated pastures, improve the control of eagles and predators in the district, control traffic when the reindeer are in the surrounding area, and include the reindeer herders in the public surveillance of the areas.

An instance affecting all the districts of my informants is the 420 kV line which is planned to go through the districts to increase the capacity of power transfer. My informants proposed placing the line underground in the places where it would seriously disturb reindeer husbandry. They fear though that such a solution will be viewed as too expensive.

As for existing power lines and other scars in these areas, one might profit by demanding the sowing of scars. Aslak J. Eira says that sowing tracks ought to have been a demand place on everybody, including the reindeer herders. This is easily achieved with good results. He has seen how this is done at Porsangmoen military training field. They have used simple methods with old hay. In soft moors they have planted trees in addition to using old hay. After a few years, the tracks are not visible if one does not know about them. In this way, previously ruined areas may again be taken into use as grazing areas for reindeer husbandry.

A different example is from Biddjovagge.⁴¹ The mining company did not get permission to sow the area when they left the mine, in spite of recommendations to do so from the reindeer herders. The arguments were that re-vegetation through seeds in these barren areas is not natural, and there was no available knowledge on re-vegetation of the original heather and lichen fields. As Aslak J. Eira views the matter, sowing might have been a good start for the vegetation to recover. Meanwhile, one might have gotten good pastures with ‘sidnu’⁴², and avoided the area to be a desert while the natural vegetation recovered.

The use of helicopters instead of making roads and tracks from heavy vehicles in the terrain has reduced the damage from construction work. One of the problems of the tracks from construction work is that everybody feels free to use these tracks. This generates new traffic in the areas.

An example of success from Gielas is when the Army some years ago applied for permission to lay a power transfer cable to an already existent link where they previously had used an aggregate that did not disturb reindeer husbandry. If the cable had been based above ground it would have closed a migration route. The district requested that the cable be installed underground, which is what they ended up doing. In addition, the construction work was carried out at a time when the reindeer were in other locations.

Another example from Gielas is an agreement with Kiruna municipality about the closing of the snow scooter slopes when requested by the reindeer herders.

In districts where predators and eagles are a problem, one may consider relieving the pressure, for example, by keeping the calving areas free of these animals and birds.

The reindeer herders may take part in the management of the nature reserves and the uncultivated areas, for example as employees in *Statens naturoppsyn* (SNO), the executive authority for supervision of these areas according to various nature acts.

In summary, a lot may be done to reduce the negative impact of encroachment. “Imagination is the only limitation,” Aslak J. Eira says. There are many successful examples, but there are also many examples where the interests of the reindeer herders have been ignored.

⁴¹ The copper and gold mines in Biddjovagge, near Kautokeino, in Finnmark County, were operated from 1970. The mines were closed in 1991.

⁴² A grass appreciated by reindeer to eat.

2.2.9. Compensation as a problem

In the case of the Sætermoen military training field, the losses for the reindeer herders were economically compensated. Economic compensation has also been the result in many other cases where the rights of the reindeer herders were expropriated to provide space in their districts for other purposes. Economic compensation is not without its own problems.

The main problem is that money alone cannot make up for the loss of pastures and adaptive alternatives. To some extent, money may make up for the necessity of extra work and investments to adapt to an encroachment, and to reduce the damage of an encroachment. In these cases, compensation ought to be paid according to the extra expenses. This rarely occurs. Compensation is usually a one-time payment to the district or the siidas.

Johan Anders Eira tells about a recent example of compensation in the Gielas reindeer pasture district. In this case the district had succeeded in acquiring annual compensation for extra work and expenses caused by a windmill park in their district.⁴³ This was an alternative to being “paid out” with a one-time compensation. In addition, the district in this case succeeded in getting a clause about the return of the area to reindeer pastures when or if the windmill park will be closed down.

In Gearretnjarga, a recent case in court may illustrate a similar principle. The case was about the right to build a village of cabins for recreational purposes. The claim of the district in this case was not economical compensation, but to have the construction sentenced as illegal. The reindeer herders won the case because the construction work was neither allowed by the district, nor were the rights of the reindeer herders expropriated.⁴⁴ Aslak J. Eira hopes that the sentence prevents further steps toward implementing the plans of the cabin village.

Aslak J. Eira remarks that the principle approach of the districts in some cases seems to be difficult for others to understand. The lawyers for the reindeer herders, and in some cases the reindeer herders themselves, may become too occupied with the money, he says. The challenge for the reindeer herders is to keep focused on reindeer husbandry and the measures to improve the resilience in the district. Too much focus on compensation may harm the credibility of reindeer herders, and nurture the idea among others that the rights of the reindeer herders are for sale.

⁴³ The case referred to is the extension of the wind mill park at Nygårdsfjellet

⁴⁴ Referring to a case for Hammerfest tingrett: “Reinbeitedistrikt 21 Gearretnjarga mot Skaidi Utvikling AS”, judged on the 30th of November 2007, case nr 07-097401TVI-HAFE.

The problem of buying the rights of the reindeer herders through compensation may be seen more clearly if some reindeer herders would have to leave reindeer husbandry as a way of life. In such cases, economic compensation would have been paid to the reindeer herders who leave reindeer husbandry, and not to the remaining herders. The principle problem, as viewed by Aslak J. Eira, is that the right to reindeer husbandry as a way of living will be transferred to those who have left the reindeer culture. This may be a rare case. In most cases encroachments lead to the loss of rights being distributed between the nearby *siidas* and districts. Aslak J. Eira adds that these matters are difficult, not only for others, but also for the reindeer herders. He asks: “Who is to decide if not those who are working in reindeer husbandry today?”

Similar problems arise when the rights are expropriated. It is more appropriate to view encroachments as a *loan* or *rent* of the rights, with an explicit clause on return after use, as was done in the case of the extended windmill park in Gielas.

2.2.10. The planning act as a parking place for encroachment problems

Aslak J. Eira characterizes the planning act⁴⁵ as a parking place for the interests of the reindeer herders in encroachment issues. Most enterprises that are planned in the reindeer pasture areas need a permit from the concession authorities. The concession authority is, in principle, the municipalities. Applications for allowing a planned enterprise are handled by the municipalities according to the Planning and Building Act.⁴⁶ The Reindeer Pasture Districts are in most cases given notice of all new enterprises in their district, and take part in the treatment of the applications according to the planning act. The problem Aslak J. Eira is referring to is that when applied for enterprises gets as far as to being treated for the concession authorities, it is already in most cases too late to change the plans. Requiring alternatives for location or various modifications of the enterprise is seldom an option. At this time it is frequently too late to discuss counter measures to avoid or reduce the negative impact of the enterprise to the reindeer husbandry. The efforts of the reindeer pasture districts in the processes according to the planning act often fail to better results for the reindeer husbandry. On the contrary, the result may be bad feelings towards the reindeer herders at the local, as well as at the national level. The reindeer herders risk to be blamed for additional

⁴⁵ The Planning and Building Act

⁴⁶ The Planning and Building Act was revised in 2008. The previous act was from 1985. Aslak J. Eira refers to the 1985 act.

costs of the new enterprise. In the few cases of denial of an enterprise for the reason of the enterprise causing damages to the reindeer husbandry, the reindeer herders may be blamed for hindering the development. Consequently, the planning act, in Aslak J. Eira's view, is a parking place for the interests of the reindeer husbandry. Instead, or ahead of the treatment in the municipalities, the responsible for new enterprises and for reindeer husbandry ought to discuss the matter at an earlier stage, says Aslak J. Eira.

In order to aid the planning and concession authorities, the reindeer pasture districts have made maps of their uses of the district⁴⁷ (LMD⁴⁸ and RF⁴⁹ 2007: 6). Map of Gielas Reindeer Pasture District is available in Appendix 3.

Aslak J. Eira regards the map of Gearretnjarga as a useful tool, if "people had bothered to study the meaning of them." He thinks the map could have been even better if more explanations had been added⁵⁰. At the same time he underlines that a map is only a tool and that access to the map does not guarantee the correct use of the map. In addition, he remarks that the map does not reflect changes in the use of the district, for instance, after an encroachment.

Another map problem is that a physically tiny encroachment may split up a larger area. This is difficult to map. All areas have first priority at some time, not every year, not at the same time of the year, but as an alternative when natural, or in some cases, social conditions necessitate different solutions.

Johan Anders Eira illustrates the same issue by pointing to the loss of the district's winter pastures in Sweden in 2005. Since then, the district has used pastures in various places to make up for the loss. It is not easy to map this loss and the change of use.

To illustrate the incorrect use of a map an example is provided by Aslak J. Eira, from a case where Kvalsund municipality used the map of Gearretnjarga when planning the location of recreational cabins in the municipality. The municipality obviously tried to consider the interests of reindeer husbandry - they avoided the surroundings of a working fence drawn on

⁴⁷ The official reindeer husbandry management, "*Reindrifstforvaltningen*" has made reindeer maps of all the districts in Norway, based upon information from the boards of the districts. The maps are available online at <http://kart.reindrifst.no>. The maps are the responsibility of the boards of the district, who according to the Reindeer act § 62 shall make a plan for the district containing all information about reindeer herding activities in the district necessary for the official planning.

⁴⁸ LMD is a shortening for Landbruks og matdepartementet, the Ministry of Agriculture and Food.

⁴⁹ RF is an abbreviation for Reindrifstforvaltningen, the Reindeer Husbandry Administration.

⁵⁰ The explanations for the maps can be seen in Appendix 3.

the map. Instead, they allocated the area for recreational cabins within a grazing area. In this case Aslak J. Eira thinks that it might have been better to move the fence and protect the grazing land. Fences and construction may in most cases be moved, but grazing land may not.

Another example illustrates the same sort of situation: Some years ago there was a fire in the winter pastures of Gearretnjarga in the Common district 30/31. The reindeer herders asked the firemen to put out the fire at once, but the firemen did not want to intervene in the fire until the cabins of the reindeer herders were threatened. For the reindeer herders it was more important to save as much as possible of the winter pastures than their cabins.

Johan Anders Eira is not satisfied with the map of Gielas, and he refers to some shortcomings of the maps which led to encroachments that might otherwise have been avoided. In one case, an important migration route was not marked as such on the map, and consequently this route was closed by an encroachment.⁵¹ In another case, a migration route became too narrow because of an encroachment. The migration routes are drawn as lines in the Gielas map, and they are only drawn in the places where they cross valleys and roads. The encroachment was placed in the migration route but outside the line drawn on the map. In this case the map made it difficult to argue the case, and ended up being a loss for the reindeer herders.

The conclusion of my informants is that the maps may be valuable as a tool. Correct use of the map requires that the reindeer herders are consulted in each case. According to my informants, it seems very difficult for others to understand that all areas are important to the reindeer herders at certain times and during conditions.

Another tool for the concession authorities is the consequence analysis. Up to the beginning of the 2000s, consequence analyses were required only for large enterprises. In 2005, there were new requirements.⁵² The consequence analyses may now offer important information for the concession authorities in preparing for and deciding about applications for enterprises in the reindeer pasture areas. Still, the question remains about how reliable these analyses are. The consequences of an encroachment for reindeer husbandry are connected to the changed use of the area and the loss of flexibility and resilience that follows.

The changes of use in the Stilla area⁵³ after the Alta case⁵⁴ may be an example of unexpected changed use following an encroachment. Aslak J. Eira tells how the use of the area was

⁵¹ According to the Reindeer husbandry act § 22 migration routes and transfer zones cannot be closed.

⁵² In Forskrift 1.april 2005 nr. 276 om konsekvensutredninger

⁵³ The Stilla area is within the Common Pasture District 30/31

changed after the dam construction. Prior to the dam, the area was used as autumn pasture for District 20 and District 23 at the same time as the herds of other districts used the area as a migration corridor between the summer and winter pastures. The construction work included a new road in the area leading to a lot of disturbance of reindeer husbandry. District 20 and District 23 had to move out of the area as a result of the construction work. The area was lost as an autumn pasture. Consequently, another district started to use the area as a summer pasture. As seen from the outside, the area is still used as a reindeer pasture, and has therefore not been lost as pasture for reindeer. At the same time, the encroachment led to a major change of use, which might hardly have been predicted.⁵⁵

In this case, according to Aslak J. Eira, the new use of the Stilla area implied a considerable redistribution of the pastures between the siidas in the Common district 30/31. The new use has slowly been stabilized and recognized by the reindeer herders in the area. The district board played a decisive role in the internal negotiations between the affected siidas. It had not been possible to anticipate the development in the consequence analysis worked out prior to the allowance for the dam construction. Aslak J. Eira view the case as an example of the capabilities of the reindeer husbandry to comply with complicated cases, if they are permitted to deal with the cases in their own ways, as in this case.

In general, my informants say that in addition to analyzing the losses of pastures and flexibility, the consequence analyses ought to consider the internal relations, the working conditions and the production aspects. The consequence analysis cannot replace the direct contact between the reindeer herders and the persons responsible for the planned encroachment.

The consequence analysis does not include a requirement to await the discussions within the district or districts involved about how to comply with the losses of the reindeer husbandry.

2.2.11. Lack of knowledge about the rights of the reindeer herders as a problem

The lack of knowledge about the rights of the reindeer herders is another problem. For example, Aslak J. Eira says that it seems that the areas surrounding the cabins are often looked upon as areas where the reindeer herders have lost their rights. In connection to this,

⁵⁴ The dam construction in Alta was in the beginning of the 1980s.

⁵⁵ The summing up of the consequence analysis in the dossier to the Parliament who was the concession authority in the case presented the consequence for reindeer herding as “loss of fodder for 21 reindeer for 105 days, and that is all” (Meløe 1981).

he mentioned a situation when the people in the cabins asked the reindeer herders to take off the bells on the reindeer, since they could not sleep with the noise of the bells.

My informants have had the experience that locals often have a better understanding of the rights than townspeople. Aslak J. Eira tells that in earlier times the reindeer herders seldom received complaints about reindeer in the fields of the farms. In his view, more specialized farming and less cooperation with the reindeer herders may explain why the reindeer herders now receive more complaints in his district.

Another problem is that the reindeer areas are looked upon as part of the wilderness by others, particularly people from the south. The consequence is that these people do not consider the use of the area by the reindeer herders.

Another kind of problem mentioned during our discussions is the noise from other activities in the areas. “Earlier it used to be so nice and quiet,” Johan Anders Eira says.

2.2.12. The proposal of consultations between the reindeer herders and the authorities

The Sami Rights Committee discussed issues relating to the protection of the reindeer areas (NOU 2007:13). The main proposal to improve the protection against encroachments is to institutionalize consultations between the planning and concession authorities and the reindeer herders on encroachment issues. In 2008, the planning act was changed, rendering the reindeer herders more visible in the act compared to the previous planning act of 1985, and stimulating the cooperation between the municipalities in the planning processes.

Berit Oskal Eira comments that the new planning act, cf. 2.2.10, may be of importance to advance the cooperation between the municipalities, and to focus on the interests of reindeer husbandry in the planning process. In her view, the initiative ought to come from the reindeer pasture districts for “their” municipalities to utilize the improvements in the new planning act.

After a hearing process, the proposal of the Sami Rights Committee for a new act relating to administrative procedures and consultation is now being considered by the government. Berit Oskal Eira’s comment on whether this may be an improvement if adopted, is: “Yes, but how are we to find time for everything? Consultations imply not only the time necessary for the consultations themselves; in addition there will be the following-up processes that may take even more time.”⁵⁶

⁵⁶ Author’s translation from Norwegian

Berit Oskal Eira prefers the proposal of the expert group from the Nordic Sami Convention from 2005, requiring *negotiations* and *consent* from the reindeer herders.⁵⁷

“Negotiations” are directed more concretely towards the opportunity to ask for alternatives, as well as to discuss amending measures for the loss of pastures and flexibility that may be caused by the encroachment.

More about the draft Nordic Sami Convention can be found in Åhrén et al. *The Nordic Sami Convention: International Human Rights, Self-Determination and other Central Provisions* (Åhren et al. 2003). The draft, as well as the treatment in Norway, can be found at www.regjeringen.no.

In some cases, the Sami Parliament may contribute and support the reindeer herders. At the same time, the Sami Parliament represents all Sami, and the interests of developing the Sami livelihoods in all the Sami areas. Energy supplies, roads, and tourist enterprises may be of importance for the development of Sami areas. The various Sami interests may, hence, be in conflict with each other. What is important, according to Berit Oskal Eira, is that the rights of the reindeer herders are taken seriously and that the development does not lead to a further net loss of pastures and resilience for reindeer husbandry.

2.2.13. The skills of changing use are ancient skills

The ability to change use is not introduced to the reindeer husbandry with encroachments. An old saying among the reindeer herders is that “one year is not the brother of another year,” meaning that you can never base reindeer husbandry on the “same procedure as last year”⁵⁸. One of the main skills in reindeer husbandry is to find the best use of the pastures under changing conditions.⁵⁹ Aslak J. Eira talks about different conditions in relation to the plants.

⁵⁷ The draft Article 36.2 reads (NSC 2005): “Before public authorities, based on law, grant a permit for prospecting or extraction of minerals or other sub-surface resources, or make decisions concerning utilization of other natural resources within such land or water areas that are owned or used by the Saami, negotiations shall be held with the affected Saami, as well as with the Saami Parliament, when the matter is such that it falls within Article 16.” The draft Article 36.3 reads (op.cit.): “Permit for prospecting or extraction of natural resources shall not be granted if the activity would make it impossible or substantially more difficult for the Saami to continue to utilize the areas concerned, and this utilization is essential to the Saami culture, unless so consented by the Saami parliament and the affected Saami.”

⁵⁸ This interpretation of the proverb is given by Aslak J. Eira. I am aware of a different interpretation in Gaski 2006: 129, going: “All years aren’t the same, so even if everything did not turn out right for you one year, nothing says that next year won’t be good.”

⁵⁹ Cf. also Bjørklund 2003: “The pastoral task is to obtain the optimal relation in time and space between pasture and animal” (Bjørklund 2003: 124, referring to Bjørklund 1990). “Saami reindeer herding has seen significant changes through the centuries, but some ecological basics remain constant. In management terms, these are reflected through concepts such as mobility and flexibility. However, a wide concept of variation is also

As an example he mentions years where there are a lot of mushrooms. In such years, the reindeer get restless; this may lead to the mixing of herds. „Mushroom years’ demand another use of the pastures than years with few mushrooms. Then there is the need for large grazing areas until the separation of the herds has taken place.

Another example given by Johan Anders Eira and Berit Oskal Eira is when the pastures are „locked’⁶⁰ so that the reindeer do not have access to the pastures. Consequently, the reindeer herders have to find new pastures, and if such pastures are not available, other solutions must be found. Locked pastures require different ways of herding than situations with „good snow conditions,’ which in the reindeer herders’ terminology is called: „buorre guohtun’⁶¹.

Other examples from the discussions with my informants are: Conditions one year may require early migration between the winter and summer pastures, while another situation may require later migration. One situation may require rapid migration while another requires slower migration. Insect summers require other use of the areas from summers with fewer insects. Social relations may be of importance in the herders’ considerations. The reindeer herders must know about the use and needs of the neighboring herds. The old skills of adapting to the ever shifting natural conditions are particularly important to find and manage the changes of use required by encroachments.

Aslak J. Eira is concerned about deterioration of the old knowledge and the skills in reindeer husbandry resulting from the influence of agricultural management of reindeer husbandry since the end of the 1970s.⁶² This was the background for the engagement of NRL since the end of the 1990s to get a new reindeer husbandry act.⁶³

important.” (op.cit.) “This has of course been the everlasting problem – and solution – in pastoral adaptations in Northern Norway.” (op.cit.)

⁶⁰ „Locked pastures’ is a common expression among the reindeer herders, referring to situations where layers of ice prevent access to the pastures. John Henrik Eira, the leader of NRL from 1994 to 1998, has often explained about others such situations by comparing it to a locked refrigerator: There may be plenty of food in the refrigerator, but this is no help if it is locked.

⁶¹ According to Reinert et al. 2009 the reindeer herders’ term „buorre guohtun’ conveys “how easy it is for the reindeer to dig through the snow in order to reach their food. If it is easy for the animals to reach the food through the snow, one says there is „buorre (good) guohtun.’ This means that the snow is dry and grainy, and that the snow-cover is not very thick. Under such conditions the reindeer do not have to use a lot of energy to get to their food.”

⁶² Cf. Bjørklund 2000, where Bjørklund argues that the governmental interference in reindeer husbandry, through the reindeer husbandry act and the reindeer husbandry agreements, has implied a serious deterioration of these skills of the reindeer herders. Bjørklund says that (Bjørklund 2000:129) “The fact that the size and composition of the herd are now regulated by government economists has had serious consequences for the maintenance of pastoral knowledge.” He further says (op.cit: 133): “The fact that the recruitment today depends upon legal rules of Norwegian origin, and thus political circumstances in Norwegian society, has profound consequences for the pastoral management of both knowledge and labour. As for knowledge, the traditional way

Aslak J. Eira comments on the new act (RF 2009a: 20): “New reindeer husbandry legislation was absolutely necessary. The 1978 Act took its template from agriculture. We didn’t recognize ourselves in the 1978 Act. In many ways, the new legislation is NRL’s legislation, because very many of our opinions were incorporated.”

Aslak J. Eira sees more autonomy for reindeer husbandry as the most important step forward. He continues to say: “Under the old legislation, it was the state that decided almost everything, but now the reindeer owners have a much greater say. Obviously this is an unusual situation for reindeer husbandry, but we can handle this responsibility.” (Op.cit.)

The Reindeer husbandry act was not changed to alter the relation between reindeer husbandry and the outside world. The new act may, nevertheless, have an impact on the encroachment problem by recognizing the reindeer herders’ responsibility for reindeer husbandry and thereby improving control based on the old knowledge and skills of adaptation.

2.2.14. When reindeer herders give up

Aslak J. Eira is concerned about the situation when reindeer herders give up trying to find the best solutions. This often happens, especially in districts with few people and few resources. In reindeer areas with many encroachments, Aslak J. Eira says that the limit of toleration has been exceeded for a long time. One might expect that the reindeer herders in these districts might be more able to resist encroachments. They have good arguments, and they have the experience to handle encroachment cases; the reality is quite different, he says. In such districts the reindeer herders may have given up, since they experience that they seldom succeed in their efforts. It is easier to take care of the interests of the reindeer herders in districts with fewer encroachments. Districts with many encroachments need special attention and help, Aslak J. Eira concludes.

of recruitment meant that without knowledge and skills one could not establish oneself as a reindeer owner. But within today’s administrative system, there is not necessarily a connection between knowledge and recruitment. It is not skills and knowledge that decides who gets a permit, but other circumstances.... It has always been a basic pastoral value that all children should be able to try out their interests as herders. But it was also very well accepted that not all had the abilities to succeed. Today, it is not only one’s competence and skill, but rather an official permit which makes a person able to succeed in economic terms.”

⁶³ The new act was prepared by the Reindeer Husbandry Law Commission (in Norwegian: Reindriftslovutvalget), with a majority of reindeer herders as members. The commission was led by Professor Kirsti Strøm Bull. The commission was appointed in 1998, and submitted their report in NOU 2001: 35. In 2007 the new Reindeer Husbandry Act of 1 July 2007 was adopted, in most essentials building upon the proposal in NOU 2001: 35

2.3. Author's reflections

My question to the informants was how the reindeer herders view their rights and responsibilities connected with encroachments. I wanted to get an understanding of the remarks from many herders that “one day it will be too much for us” and that “this does not seem to be understood.”

There was not much use of the words “rights” and “responsibilities” in the talks with my informants. Their understanding seems to be that the reindeer herders view the reindeer pasture areas as their areas, in a way that demands a return to reindeer husbandry when other uses expire. The rights of the reindeer herders are not seen as gifts from the state or from society, but are rights acquired through previous and present use of the areas. Hence, such rights include the right of protection against damages caused by new use of the areas. The reindeer herders do not talk about “acquiring” or “getting” new rights. Instead, the reindeer herders are consequent about using the word “recognition” of their rights. According to my informants, what has not, as yet, been recognized, is the protection against encroachments.⁶⁴

The explanation of my informants of “encroachments” departs from encroachments requiring “changes of the use of the areas”. The main problem is not necessarily the change of use as such. The basic encroachment problem arises when there are too few alternatives for changing the use according to the needed flexibility in the reindeer husbandry to deal with the ever varying and changing natural and social conditions. My informants do not only focus on the needs of the reindeer, or on the conditions of the pastures, as would be natural when one studies the implication of encroachments for the wild reindeer.

By pointing to the change of use following encroachments in the Sami reindeer pasture areas, my informants also point to the skills and knowledge of the reindeer herders to adapt to the changing conditions. This skills and knowledge is the adaptive capacity of the reindeer husbandry, the *resilience*, cf. chapter 1. My informants illustrates in several ways that the *siidas*, as well as the interaction between *siidas*, and even between districts, is needed to comply with encroachments, cf. E.I.Turi 2008. This resilience is the key to understanding why and how Sami reindeer husbandry has tolerated encroachments, whereas the wild reindeer cannot survive in encroached areas.

⁶⁴ The topics in this paragraph were not a big issue during the talks with my informants referred above. The reason is that my informants know that I know their view upon these issues. Berit Oskal Eira especially asked if I needed any additional information, or examples, to illustrate the issues for my understanding.

The resilience belongs to the world of the reindeer herders and the siidas and reindeer pasture districts. Meløe explains about a person being “at home” in a particular world, if he or she has the skill and the knowledge, including the moral and spiritual skill and knowledge that enables him or her to make a good livelihood and lead a good life within that particular world, cf. 1.6. We are in a poor position to advise about, or pass judgments on, activities or practices within a world where we are not at home, Meløe says. Nevertheless, others may point to the skill and knowledge. Pointing to the resilience in reindeer husbandry seems to be especially relevant for understanding what encroachments mean to the Sami reindeer husbandry. The reason is that the reindeer herders, possibly more than many other livelihoods and ways of life, have skills and knowledge about adaptation to ever changing natural and social conditions. In the words of Johan Mathis Turi: “We have some knowledge about how to live in a changing environment.” (in Reinert et al. 2009: 1); cf. 1.5.

To repair and restore damages caused by encroachments is to increase the flexibility of the siidas for the constant demand of changing the use to comply with the shifting conditions. Encroachments in areas that are seldom used may cause similar problems as encroachments in areas used more often. All areas have the first priority at some time. All areas are needed to comply with the varying and shifting conditions, as “one year is not the brother of another year.”

Through the understanding of encroachments as change of use, and the negative impact of encroachments as a decrease of alternatives for changing the use, my informants have explained why the use of the reindeer pasture districts is difficult to map, and why the reindeer herders ought to be asked each time there are encroachment issues. Likewise, my informants have explained why consequence analyses ought to be based upon the discussions among the affected siidas and districts to be the most reliable. This is also the reason for the need for direct and early contact between the people responsible for reindeer husbandry and the encroachment. There is little meaning for the reindeer herders to enter encroachment issues at a time when it is too late to alter the location and form, or when the decision in reality has already been made.

In my view, the ability or skills to change use and to co-operate with encroachments seems to arise from two ancient types of skills by the reindeer herders. The first is similar to the skills needed for meeting the ever varying and changing natural conditions in reindeer husbandry through changes in of the use of the available pastures. This skill is different from the natural adaptive capacity of wild reindeer. The second is the skills needed for interacting with others.

Also, this skill has been a qualification needed in reindeer husbandry from ancient times. It may stem from the need for cooperation between the siidas in order to meet the natural challenges to the best of all. It may, in addition, stem from a long standing cooperation with other inhabitants and users of the reindeer pasture areas regarding utilization of the natural resources in the area, the exchange of goods, and the exchange of information and knowledge.

In general, my informants seem to be more optimistic about the future than what may be understood by the comments in the beginning of this thesis. It seems that my informants hold the view that the encroachment burden may be reduced if society and the state had a better understanding of the problem and could see that a lot might be done to reduce the problem.

What is often not understood is the law, or logic, of reindeer husbandry and the role of the knowledge of the reindeer herders to comply with the problem. According to the 3 sentences of Meløe, others have not earned the right to speak as an equal to equals about encroachments in Sami reindeer husbandry. This does not exempt the society, in particular the state, from the responsibility for the encroachment problem to be dealt with in an adequate way. Neither is it good enough to leave the responsibility of denials and additional costs to the reindeer herders, even if one points to their skills as the knowledge base for evaluating whether to allow an encroachment.

It is not required that the state understands encroachments in the same way as the reindeer herders. The minimum requirement seems to be that the state understands the role of the adaptive capacity of the siidas, and aim at increasing the flexibility for each of the siidas. In this matter the state ought to rely on the reindeer herders finding the best solutions for increasing the flexibility in each siida. In my view, as well as in the view of my informants, an additional requirement is to secure that the areas allocated by encroachments are returned to the reindeer husbandry when the enterprise or activity occupying land expires.

McCay and Jentoft say that one ought to understand “the nature of conflicts over rights and responsibilities,” cf. chapter 1. In my view, my informants have contributed to such an understanding about the encroachment conflicts. This understanding is, at the same time, interesting for developing a policy to comply with the problem. My informants have also illustrated how the comment by Hanna et al., cf. chapter 1, may be relevant for understanding encroachments as problems arising from “incomplete and asymmetric information combined with incomplete, inconsistent or unenforced property rights”. In addition, my informants have illustrated their experiences around the lack of understanding and respect for the reindeer

herders. Thereby, in my view, they have illustrated the remains of colonial policy in the encroachment situation. The right to protection against further loss of flexibility is not respected. The role of the adaptive capacity of the reindeer herders is not acknowledged.

My informants seem to have a long-sited perspective when talking about encroachments. It is not ‚too late’, or ‚five to twelve’, and they do not expect the problem to be ‚solved tomorrow’; although the tolerance limit in their view has been exceeded in many of the reindeer pasture districts. The time perspective is long-sited.

The optimism of my informants may partly stem from their extensive contact and negotiations with the state, as they have all represented the reindeer herders on many official missions and occasions. They have experienced that the Norwegian state cares about the future of reindeer husbandry. My informants underline that it is not about the will of the society and the state. They simply do not understand. Some herders may doubt this, especially those who have the experience that their interests are not properly considered in the encroachment cases.

One example of progress is the new Reindeer Husbandry Act, recognizing the reindeer herders’ ability to handle reindeer husbandry on their own terms. Another basis for optimism may be the focus of my informants on all that may be done to repair and make up for the encroachment damages, and examples of the will of society to do so when they understand the significance for reindeer husbandry of certain reparative measures. In addition to the few examples mentioned in 2.2., my informants mentioned many examples of the efforts of the Reindeer Husbandry Administration to assist in negotiations and implementation of solutions in difficult matters.

My informants also provide warnings to society and the state about why they ought to be recognized and considered in the encroachment policy. One is the drain on the reindeer herders’ time and energy by involving them in encroachments when the alternatives, in reality, are locked or have already been decided upon. The other is that the most important contribution of the reindeer herders is not as bearers of *opinions*, but as bearers of the best *available knowledge* of the consequences of encroachments, and of the reparative and recovery measures that may have the best effect.

In reality, if there are not alternatives to the encroachment in question, it may be a better option for the reindeer herders to remain silent instead of fighting for their interests. One reason for staying silent may be to avoid open conflicts with their neighbors and the incoming new users, and thereby laying a better foundation for the cooperation to come. Another reason

may be to avoid becoming scapegoats for delaying the development that most people want, when this, at the same time, is seen as the most realistic outcome.

These are the main results of the discussions with my informants, whom at the same time I view as the experts on the matter. I do not look upon the results to be controversial among the reindeer herders. There are, of course, different views as well as additional views that might have been revealed and included by other methods for acquiring information than the one used in this thesis. It is my view, however, that the information and analyses I have referred to in 2.2 is representative of a general view shared by most reindeer herders. I base this conclusion upon my own experiences, my conversations with other reindeer herders for this thesis, as well as upon written information by NRL and WRH, ICRH and Ealát, and in *Reindriftnytt* published by the Reindeer Husbandry Administration.

As always, when trying to understand an unknown landscape, one ought to be careful not to overestimate the completeness of the new understanding, cf. 1.6. On the other hand, the new understanding is valuable, and one ought to be faithful to the discerning, cf. 1.8.

The discussions with my informants provide a platform for pointing to a strategy for addressing the encroachment problem. In chapter 4, I return to what, in my view, is worth recognizing in a new encroachment policy in Norway. The following chapter, chapter 3, is about the legal protection against encroachments in Norwegian legislation.

3. The protection against encroachments in Norwegian legislation

This chapter is about the legal protection against encroachments in the Sami reindeer pasture areas in past, present and proposed Norwegian legislation, beginning with the proposal of the Reindeer Husbandry Law Committee⁶⁵ from 1966,⁶⁶ in 3.1. Most attention will be paid to the Reindeer Husbandry Act from 1978,⁶⁷ in 3.2. This is because the content of the core provision concerning encroachments was given for the first time in 1978, and in all essentials is the same in the current act, the Reindeer Husbandry Act of 2007.⁶⁸ The comparison between the 1966 draft and the 1978 act may render visible some of the principle matters in the discourses about protection against encroachments during the last decades. I will present and discuss a proposal by the Ministry of Agriculture in 1983. This is because the proposal may contribute to the understanding of the current act. 3.1. and 3.2., when seen together, will show that the attitude in the Ministry of Agriculture towards the encroachment protection has changed in the period 1966 to 2007. The changes in the legislation in 1996 will be reviewed in brief. The significance of the amendment of the section 110 a in the Constitution in 1988, and the contents of this section for the protection against encroachments, will be discussed, in 3.3. The proposals of the Sami Rights Committee of 2007 will be discussed, in 3.4. Finally, I will discuss the shortages in the protection clauses against encroachments, in 3.5.

The sources for my outline and discussions are the reindeer husbandry acts and draft acts, including the preparatory work for the acts and the discussions in the Storting⁶⁹ about these acts. Similarly, the legislation on planning, nature protection, minerals, Finnmark, and on the amendment in the Constitution, are sources for this chapter. Concerning the 1966 draft, and the proposals in NOU 1997: 4, all the materials of the committees preparing the proposals, are sources.⁷⁰ Further, the documents from the Reindeer Husbandry Agreement from 1976 to 2009 are sources for my outline, as well as the government's report in St. meld. nr. 28 (1992-93), and the Parliament's discussion on this report. Further, the Office of the Auditor

⁶⁵ In Norwegian: Reindrifstlovkomiteen

⁶⁶ The proposal is presented in: Innstilling fra Reindrifstlovkomiteen, submitted 23. November 1966, referred to as RLK 1966

⁶⁷ Lov 9. juni 1978 nr. 49 om reindrift

⁶⁸ Lov 15. Juni 2007 nr. 40 om reindrift (reindrifstloven)

⁶⁹ Stortinget is the Norwegian Parliament. In www.stortinget.no the English name "the Storting" is used.

⁷⁰ The documents from the Reindeer Husbandry Law Committee of 1966 are available in the NRL archive, given to the archive by Anders Fjellheim, who was a member of this committee. The documents of the Sami Rights Committee's proposals in NOU 1997:4 are available to me as a member of this committee, cf. NOU 1997:4, submission letter to the Ministry of Justice and the Police, dated January 1997.

General's survey of sustainable use of reindeer grazing resources in Finnmark County is a source, as well as the decision in 2008 to follow up the investigation (RR 2004, 2008). All of NRL's archive up to the 1st of July 2006 and parts of the archive after this date are also sources. The literature used is mostly Arnesen, Berg, Bull, Ravna and Skogvang; see the literature list. The understanding of International Law is likewise built on the ILO conventions 107 and 169, the Declaration of the Rights of the Indigenous Peoples, and the draft Nordic Sami Convention, as well as literature by Anaya, Henriksen, Minde, Scheinin and Åhrén; see the literature list. In addition, I have used the outline of the content of the current law in NOU 2007:13 *Den nye sameretten*. The sources directly referred in the following text are listed in the reference.

3.1 The draft Reindeer Husbandry Act of 1966

The Reindeer Husbandry Law Committee was appointed in 1960 to discuss the current reindeer husbandry act which was at that time from 1933, and also to propose changes to this act. The 1933 act was based on the remains of an ideology which supposed that Sami reindeer husbandry was a dying, and even inferior, way of living.⁷¹

3.1.1. The Reindeer Husbandry Law Committee and the encroachment problem in the 1960s

The Ministry of Agriculture and the reindeer herders were well represented in the committee.⁷² The land owners and farmers were not represented. One may ask why this was the case.⁷³ Part of the answer may be given in the report of the committee, saying that the pasture conflicts between reindeer and cattle had decreased considerably, as a result of the dismantling of the mountain dairy farming and the changes to cultivated pastures (RLK 1966: 15).

The proposal of the committee was unanimous. One may therefore presume that the Ministry of Agriculture, as well as the reindeer herders, approved of the general ideology and strategy in the report and draft act presented in 1966.

⁷¹ Cf. Berg 1994: 96-105, Berg 2000: 122-125, Bull et al. 2001: 228-235.

⁷² Harald Løbak (MP) was chairing the committee. The other members were dr. juris. Henry Nærstad, who was deputy secretary (in Norwegian: ekspedisjonssjef) in the Ministry of agriculture, barrister-at-law (in Norwegian: høyesterettsadvokat) Harald Ulrik Sverdrup Thygeson, official for Sami issues (in Norwegian: *lappefogd*) Arne Pleym, and the Sami reindeer herders Mikkel Mikkelsen Logje and Anders Fjellheim. The secretary was Hjalmar Pavel, who at the time of the appointment was advisor in the Ministry of agriculture. (RLK 1966: 3.) Sverdrup Thygeson represented the leisure time hunters' interests. He was a leader of Norges Jeger og Fiskerforbund.

⁷³ The previous century had been characterized by pasture conflicts between the reindeer herders and the settling population in the areas, cf. for example Berg 1994, 1997a, 2000; and Bull et al. 2001

The committee had several meetings with the reindeer herders in the various reindeer pasture regions. At these meetings, the reindeer herders claimed that their material conditions became steadily more problematic as other industries and interests had become active in the areas (RLK 1966: 26)⁷⁴. The reindeer herders claimed that there was too much arbitrariness when allowing new use in the reindeer pasture areas. They demanded better control, and compensation for the loss of rights caused by encroachments (RLK: 27).

3.1.2. The first right principle in the proposed protection against encroachments

The committee based their proposals upon the view that the reindeer herders, in principle, had the first right to those reindeer pasture areas where they had historically been the exclusive users. The Sami were the first users of these areas; hence their use in principle had priority in conflicts with use of newer origin. All other use of the areas was of newer origin, and mostly taken up by settlers. The committee said that “the rights of the reindeer herders are in reality a kind of easement resting upon all ground in areas where reindeer herding has taken place from time immemorial” (RLK 1966: 26).⁷⁵ The previous rights had not disappeared as a result of others taking the areas into use, or by changes of ownership to the areas (RLK 1966: 27/28). Section 1 in the draft act expresses this: “In the areas where reindeer husbandry has been or is conducted on the basis of use from time immemorial, there shall be an opportunity to continue to conduct reindeer husbandry with the rights and obligations that throughout history have been appointed to reindeer husbandry, and according to the provisions in this act.”⁷⁶ There was no similar provision in the prevailing act of 1933. Subsequently, new activities had to take place on the terms of reindeer husbandry, except when the areas were needed for infrastructure and industry development.

The proposed provisions for allowing encroachments in the Sami reindeer pasture areas were that no enterprises or activity causing considerable damage or disturbance to reindeer husbandry were to be allowed, except those who had a right of expropriation⁷⁷ or a right of

⁷⁴ The problems reported were: Roads and railways made migration harder and destroyed pastures. Waterpower regulations and other industrial enterprises destroyed pastures, closed migration routes, and disturbed the reindeer herding in other ways. The development of farming and forestry led to problems for reindeer herding by allocating pastures for other purposes, making it more difficult to use the remaining pastures, and at times closing the migration routes. Recreational cabins for the increasing population in the reindeer areas allocated pastures and disturbed reindeer herding in other ways. Increasing “invasion” of tourists, leisure hunters and fishermen disturbed reindeer herding in different ways. (RLK: 27)

⁷⁵ Author’s translation.

⁷⁶ Author’s translation.

⁷⁷ In Norwegian: ekspropriasjonsrett

relief.⁷⁸ Those enterprises might be denied if they hindered migration between and within the seasonal pastures.

Activities of the land owners and farmers were limited to what did not cause considerable damage and disturbance to reindeer herding. The committee illustrates the practicable procedures in such cases: If a land owner or farmer wanted to build a cabin, he was obliged to inform the reindeer pasture district that might be affected. The board of the Reindeer Pasture District might deny the cabin permit, if the district found that the cabin might cause considerable damage or disturbance for the reindeer husbandry. The decision of the district board might be appealed to the Ministry of Agriculture (RLK 1966: 28). The committee does not seem to make any distinction between those who had been living in the areas from old times, and those who had become established more recently.

Enterprises causing less than “considerable” damages might be allowed, with economic compensation of the limited damage they might cause.

Economic compensation was a principle for all encroachments causing problems for reindeer husbandry, whether the damage was considerable or not. As a general rule the compensation was to be included in a fund for promoting reindeer husbandry. The reason for this was that the rights belong to reindeer husbandry as a whole, not to a single reindeer herder. In situations of an encroachment causing extra work and expenses for one or several reindeer herders, compensation was to be paid to these reindeer herders in addition to the general compensation for the loss of pastures allocated by the encroachment (RLK 1966: 35-36).

The draft act required that all traffic in the reindeer areas would adapt to reindeer husbandry.

3.1.3. Discussions of the 1966 draft Act

The development of infrastructure implied difficulties for reindeer husbandry already in the 1960s. One may assume that the burden was by far as heavy as it is today. The draft act of 1966 certainly opposed what were the remaining ideas of reindeer husbandry having lower status than that of other livelihoods. What may be questioned is whether the draft act stemmed the accumulative effects of infrastructure and industry development in a long-term perspective. The draft act did not require adaptation of these enterprises to the reindeer husbandry in particular to avoid unnecessary damage. Only economic compensation was required.

⁷⁸ In Norwegian: avlørningsrett

In addition, one may ask whether the draft act might have implied an increased level of conflicts with land owners and farmers. The committee may have anticipated that the previous level of conflicts with these right holders were fading out as the farmers shifted to modern ways of running cattle breeding. The reactions from the farmers' organizations in the hearing process indicate that this was too easy of an assumption. The proposal was met with harsh resistance from the landowners and farmers, as well as from some of the state institutions. In the hearing, the Directorate for the State Owned Forests,⁷⁹ as an example, argued that the proposal did not consider other interests than those of reindeer husbandry in an adequate way (Ot. prp. nr. 9 (1976-77): 11). The farmers' organizations, The Norwegian Farmers' Union⁸⁰ and Norwegian Farmers and Smallholders Union,⁸¹ were critical of the historical review of the committee. They did not agree on the interpretation of the rights of the reindeer herders as presented by the committee. They did not accept regulations that limited the development of farming in the reindeer pasture areas (op.cit:13). From the comments above, one may assume that the proposal of the committee might have led to new conflicts if adopted.

The statement by the Sami Reindeer Herders' Association of Norway, NRL, in the hearing may be of interest. NRL argued that reindeer husbandry during the centuries has been cut back by the settlement of the areas suitable for cultivation. It was NRL's opinion that new areas ought to be made available as compensation for the loss of areas. (Op.cit:14, NRL 1968)

3.2 The Reindeer Husbandry Act of 1978

The Reindeer Husbandry Act of 1978 represented a new reindeer husbandry policy of the Ministry of Agriculture compared to the policy behind the 1966 proposal.

3.2.1 The new reindeer husbandry policy

The Ministry of Agriculture drafted a new law in 1976,⁸² building to some extent on the 1966 proposal, but also taking the objections from the farmers and property owners into account. After a rather stormy process, the draft was adopted in 1978.⁸³ The 1976 draft was met with

⁷⁹ In Norwegian: *Direktoratet for statens skoger*. (Author's translation)

⁸⁰ Norges Bondelag. English name of the organization by e-mail to the author from the organization 11 May 2009

⁸¹ Norges Bonde- og småbrukarlag. (The English title of the organization by e-mail to the author from the organization the 11th of May 2009)

⁸² In Ot. prp. nr. 9 (1976-77) Om lov om reindrift

⁸³ Among others, NRL objected to the 1976 draft. In the Parliament there were different views upon the draft. As result, the draft was sent back to the government in 1976. The government proposed the same draft act again in 1977. The act was adopted in 1978. In most main features, the 1978 act is equivalent to the 1976 proposal. More

objections from the reindeer herders (NRL 1977). In the Parliament there were different views on the draft. As a result, the draft was not adopted in 1976 but sent back to the government.⁸⁴ In 1977, the government promoted the same act as the one a year earlier.⁸⁵ In 1978, the Parliament adopted this draft. The Reindeer Husbandry Act of the 9th of June 1978⁸⁶ then substituted the 1933 act.

By 1976 there had been a change of the staff⁸⁷ and political leadership in the Ministry of Agriculture. The politician and Sami bailiff, Ole K. Sara, had become state secretary in the ministry. Sara seems to have played a decisive role in the new reindeer husbandry policy developed in the ministry in the 1970s. In the legislation process, it seems that Christensen (in the new staff of the ministry) played a decisive role together with Sara (Ravna 2007: 596).⁸⁸ The change of policy is obvious in Ot. prp. nr. 9 (1976-77), as well as in the object clause of the 1978 act. The 1966 draft did not contain an object clause, as the legislation was not seen as a tool of the reindeer husbandry policy in this draft. One of the main differences between the 1966 draft and the 1978 act is that the law in the latter is seen as one of several tools in the reindeer husbandry policy.

The ministry acknowledges that the development in farming, forestry, communications, industry, and leisure activities caused problems for reindeer husbandry (Ot. prp. nr. 9 (1976-77: 39/40). On the other hand, the ministry argued that reindeer husbandry was overpopulated. Alternative livelihoods were needed in the reindeer pasture areas, and the reindeer husbandry had to adapt to other livelihoods and interests. As there were no alternative areas appropriate for expansion of reindeer husbandry, the strategy of the ministry was to develop reindeer husbandry through new technology and new organizations. In addition, the number of families and the number of reindeer in each family had to be reduced to comply with the problem of overpopulation (op.cit: 40, 41, 43).

details about the adoption process may be found in Ot. prp. nr. 9 (1976-77); Innst. O. nr. 98 (1976-77); Ot. prp. nr. 24 (1976-77); Innst. O. nr. 37 (1977-78); Bull 1997: 53-54; and Ravna 2008: 67-68.

⁸⁴ Cf. Stortingsforhandlinger 31 May 1977: 741

⁸⁵ In Ot. prp. nr. 24 (1977-78)

⁸⁶ Lov 9. juni 1978 nr. 49 om reindrift.

⁸⁷ By 1976, the previous deputy secretary in the Ministry of Agriculture, Henry Nærstad had retired. Helge Christensen was constituted as deputy secretary in his place. Ravna 2007: 596 describes in more detail the staff changes, and his analysis of the change of policy in the ministry.

⁸⁸ In addition to Ravna 2007, I build upon personal communication with Sverdrup Thygeson in the end of the 1960s, and Arnesen in the 1980s.

The ministry argued further that the Sami do not have exclusive rights to the areas. Even though they have been dominating in reindeer husbandry, others have been in the areas prior to historical times, and utilized the natural resources as a basis of their livelihoods (op.cit: 41).

The object clause in the 1978 act reflects the strategy referred to above. It states that the object of the act is to facilitate utilization of the pastures for the benefit of society, and in a way that at the same time offers economic security for the reindeer herders, secures their rights and maintains reindeer husbandry as an important factor for the maintenance of Sami culture.⁸⁹

Berg explains the new reindeer husbandry policy, as a result of the economic and political development in Norway during these years. In the 1970s, there was an international low conjuncture counteracted by the Norwegian government by focusing on the primary livelihoods. He also points to the favorable popular opinion for these livelihoods stemming from the popular vote in 1972 on Norway entering the EEC (Berg 2000: 377-381).

Ravna suggests that one of the reasons of the change of policy in the Ministry between 1966 and 1976 was caused by the staff changes in the ministry (Ravna 2007: 596).

3.2.2. The protection against encroachments in the 1978 act compared to the 1966 draft

As the Reindeer Husbandry Act of 1978 is a political tool in the new reindeer husbandry policy, the 1978 act is not directly comparable with the 1966 draft. The main differences in the protection against encroachments in the 1978 act compared with the 1966 draft are, in my view, what follows.⁹⁰

Like the 1966 draft, the 1978 act built on the premise that reindeer husbandry has to accept encroachments like water course regulations and industrial enterprises, except for enterprises hindering the migration between and within the seasonal pastures. Most of the encroachments were likely to take place on state owned property. The ministry argues that “naturally” the interests of the reindeer herders were considered in terms of this connection.⁹¹

Unlike the draft act of 1966, the 1978 act did not deny other encroachments which caused considerable damage and disturbance. The relation between reindeer husbandry and other

⁸⁹ Section 1 in the Reindeer Husbandry Act of 1978

⁹⁰ Bull 1997: 34-90 gives a detailed analysis of the encroachment protection in the 1978 act, including the changes in 1996. My outline of the differences between the 1966 draft and the 1978 act is built on the readings of the act and its preparatory works, and RLK 1966.

⁹¹ See draft section 11 in the 1966 draft act, and Ot. prp. nr. 9 (1976-77): 42

right holders is commented on in Ot. prp. nr. 9 (1976-77) on page 42: “In relation to the property owner or other holders of special rights of subjective character, the concrete conflicts of interest that may arise, shall be solved according to the usual principles of law.”⁹² Which right that must give way in conflict situations was a question to be decided according to the general principles of law. One may say that reindeer husbandry and other livelihoods in the area were seen as equal. As the draft act of 1966 built upon the reindeer herders in principle having the *first right*, the 1978 act build upon the principle that all livelihoods were *equal* in the law.

Section 15 in the 1978 act, corresponding to section 63 in the current act,⁹³ prescribes a procedure for possible conflicts with the farmers and land owners. Section 15 states that other right holders may not dispose their property for “unusual” enterprises if this implies considerable damage or disturbance for normal reindeer husbandry. What was considered “normal” use was allowed, even if this implied damage and disturbance to reindeer husbandry, if the landowner’s disposal was not “unnecessary or unreasonable” (section 15 in the 1978 act, corresponding to section 63 in the 2007 act).

The procedure prescribed in section 15/63 does not follow as a direct consequence of the status of the various rights in the areas. The procedure in section 15 seems to be amended in the law for expedient reasons.⁹⁴ Hence, it does not seem correct that section 15 in the 1978 act is an alternative to the encroachment provisions in the 1966 draft,⁹⁵ as for example, may be an interpretation of Ragna 2008: 73, footnote 36. In my view, the most obvious comparison to the section 15 in the 1978 act is the comment in RLK 1966 at page 28, cf. 3.1. The RLK says that the boards of the Reindeer Pasture Districts might deny new cabins, if these caused considerable damage to reindeer husbandry. The most obvious comparison to section 10 and 11 in the 1966 draft act is, in my view, found in Ot. prp. nr. 9 (1976-77) at pages 42-43. Here, the Ministry of Agriculture argues against the principles in section 10 and 11 in the 1966 draft act. My argument builds upon the comment to section 15, as well as on the proposal by the Ministry of Agriculture of a new section 15 in 1983. The comment on section 15 in Ot. prp.

⁹² Author’s translation. (The Norwegian text reads: ”I forhold til grunneieren og andre som måtte ha særretter av subjektiv karakter, vil konkrete interessekonflikter som kan oppstå måtte løses ut fra vanlige rettsgrunnsetninger.”)

⁹³ The wording of the section was changed in 1996 and in 2007. The changes were not meant to change the contents of the provision, although Bull 1997 argues that there are some substantial differences between the content of the section 15 in the 1978 act and the changes in 1996 (Bull 1997: 64-67).

⁹⁴ cf. the comment of section 15 in Ot. prp. nr. 9 (1976-77): 59

⁹⁵ The encroachment provisions in the 1966 draft were mainly the draft sections 10 and 11

nr. 9 (1976-77), page 59, begins with: “In this section, not having any parallel in the current act or in the proposal by the Reindeer husbandry law committee,....”. In 1983, the Ministry of Agriculture proposed a new section to substitute section 15. The 1983 proposal differed substantially from section 15 in the 1978 act. The ministry did not view the, at the time, current and the proposed sections 15 as principally different, at least not in 1983. I shall return to the 1983 proposal in 3.2.4.

The 1966 draft required economic compensation for all damage and infringement on the rights of the reindeer herders caused by encroachments.⁹⁶ The 1978 act presupposed compensation for enterprises where the rights were expropriated (Ot. prp. nr. 9 (1976-77): 43). The Ministry of Agriculture at the same time commented that in many cases reindeer husbandry would be better off with measures for adaptation of the encroachment to reindeer husbandry, and economic funding for improvement of reindeer husbandry in general (op.cit: 43, 59). In cases without expropriation, the 1978 act presupposed that the right of economic compensation was to be evaluated in each case according to the general compensation principles in law (op.cit: 59).

Like the 1966 draft, the 1978 act restricted general traffic by others into the reindeer pasture areas.

Unlike the 1966 draft, the 1978 act gave the ministry legal authority for expropriation to the advantage of the reindeer husbandry (section 31). The 1966 draft did not contain a similar provision.

Building upon a principle of *equal rights*, instead of reindeer husbandry in principle having a *first right*, the 1978 act represented weaker legal protection for reindeer husbandry than the 1966 draft, particularly against the expansion of farming, forestry, and recreational cabins.

It was unclear what was meant by ‘unusual,’ ‘normal,’ ‘unnecessary,’ and ‘unreasonable’ in section 15. In addition to the weaker legal protection, the 1978 act left *ambiguity* and *uncertainty* about the concrete range of the protection and of the compensation for encroachments.

More important in the discourse about the 1978 act in the following years, was the ambiguity and uncertainty about the status of the rights of reindeer herders in the 1978 act. The question

⁹⁶ In draft section 11 in the 1966 proposal

was whether these rights were fully equal to other property rights, or based only on the reindeer husbandry act.

Different opinions about the question of the origin of the rights seem to have been the main dispute in the adoption process of the 1978 act. According to the discussions in the Standing Committee of Agriculture⁹⁷ in the Storting in 1978,⁹⁸ the matter was not clear at the time. The committee awaited clarification in the Nordic Council and elsewhere. Subsequently, the committee remarked that it did not take a stand on the issue. The discussion of the act in the Storting⁹⁹ does not further clarify the matter.¹⁰⁰

The ambiguities and uncertainties of the act seem to have been a separate source of encroachment conflicts in the years to follow. For example, it may have contributed to the invisibility of reindeer husbandry in the Planning and Building Act of 1985, and in the municipalities. Since reindeer husbandry was invisible, it may have led to further unnecessary conflicts and required unnecessary work for the reindeer herders. The ambiguity may have contributed to negative attitudes towards the reindeer herders, shown, for example, in Berg 2001b. The ambiguity may further have contributed to the situation described by the Office of the Auditor General of Norway in 2004, being seriously concerned about the reindeer pastures in Finnmark. The Auditor General concluded that their study shows (RR 2004)¹⁰¹:

...a significant number of area encroachments are at the expense of the reindeer grazing area in Finnmark. The scope and the effect of the actual reallocation of land in the reindeer grazing areas has been poorly documented and assessed by the municipalities and the Norwegian Reindeer Husbandry Administration. In over half of the individual cases, the municipalities did not take the opinions of the district boards for reindeer husbandry into consideration.

⁹⁷ The Agriculture Committee (in Norwegian: Landbrukskomiteen) was one of several standing committees in the Storting at the time. Today, the issues on the Sami reindeer husbandry is reviewed by the Standing Committee of Business and Industry.

⁹⁸ In Innst. O. nr. 37 (1977-78): 5-6

⁹⁹ In Stortingsforhandling, Odelstinget nr. 2 1977-78: from page 212

¹⁰⁰ For a deeper review of the general discourse on the basis of the rights, see in addition: 1. Berg 1997a: 100-104 and Berg 2000: 321-324. 2. The following documents from NRL's archive: Årsmelding 1975-76; the protocol from the NRL General Assembly in issue 6/76 "Ny reindrifstlov"; letter from NRL to the Ministry of Agriculture 1 September 1976: Ny reindrifstlov; notes from NRL's conference on Ot.prp.nr.9 19-20 October 1976; letter from NRL to the Storting 11 December 1976: "Behandling av proposisjon om en ny reindrifstlov"; notes from a meeting between NRL and the Storting in Bardufoss 22 January 1977; letter from NRL to the Storting 10 February 1977: "Proposisjon til ny reindrifstlov"; letter from NRL to the Storting 26 April 1977: "Ot.prp.nr.9 (1976-77). Ny reindrifstlov"; speech by cabinet minister Øksnes at NRL's General Assembly 1977; summary from a meeting between NRL and the Ministry of Agriculture 4 November 1977; letters from NRL to the Storting 5 January and 17 February 1978: "Proposisjonen til ny reindrifstlov"; note by Henry Minde of 20 December 1976: "Bruksmåte og bruksrett i sameområder; letter from Knut Bergsland to NRL 15 January 1977: "Ny reindrifstlov"; note from Bjørn Dalan to the Sami Institute 25 April 1977: "Ny reindrifstlov." 3. Arnesen 1998: 21. 4. Bull 1997: 48-55; 5. Ravna 2008: 66-69.

¹⁰¹ Citation from www.riksrevisjonen.no from Doc. No. 3:12 (2003 – 2004) in English

3.2.3. Encroachments and the Reindeer Husbandry Agreement

The main shortage of the protection against encroachments in the 1978 act is, in my view, the absence of a legal demand for the adaptation of new use of the areas to the needs of the reindeer husbandry, and the absence of a legal demand seeking other than economic compensation. To be considered though, is that the 1978 act, and subsequently the current reindeer husbandry act of 2007 ought to be seen in connection with other parts of the reindeer husbandry policy, and what measures there are in other parts of the policy to comply with the encroachment problems. The 1978 act ought to be seen as one of the legs of the new reindeer husbandry policy of the Ministry of Agriculture in the 1970s. The other leg was the institutionalizing of negotiations between the reindeer herders and the Norwegian state,¹⁰² founded in the General Reindeer Husbandry Agreement, adopted by the Parliament in 1976.¹⁰³ This is an agreement between the Norwegian state and the Sami reindeer herders, represented by NRL. According to the general agreement, the Ministry of Agriculture and NRL negotiate annually¹⁰⁴ about economic transfer to reindeer husbandry. Other matters of importance to the reindeer husbandry may also be discussed.

In the General Reindeer Husbandry Agreement of 1976, there is a separate section about encroachments: “The reindeer husbandry is, to a greater degree than other livelihoods, dependent on the natural conditions and climatic variables. It is therefore vulnerable towards encroachments, and to the extent that such cannot be avoided, they must be implemented in such a way that unnecessary damage and disturbance for the reindeer husbandry is avoided.”¹⁰⁵

What was not taken into the 1978 act as separate requirements was agreed upon in the General Agreement from 1976. The shortage in the 1978 act may therefore be viewed as a shortage of specific requirements *in the legislation* of how to avoid damaging encroachments, and unnecessary damage for those encroachments that were permitted. The 1983 proposal of a new section 15 was addressing this question.

Two additional remarks about the agreement before entering the discussion of the 1983 proposal:

¹⁰² See for example St. meld. nr. 28 (1992-93): 7

¹⁰³ In Norwegian: Hovedavtale for reindriftnæringen, in St. prp. Nr. 170 (1975-76)

¹⁰⁴ During the first years, every second year

¹⁰⁵ Author’s translation.

1) One is about compensation for large, extra expenses resulting from the changes to reindeer husbandry caused by encroachments of different kinds. Examples of such changes are ferry transfer of reindeer between the mainland and the islands and peninsulas in Finnmark and Troms in the spring and the autumn, and truck transfer between seasonal pastures where the migration routes have been closed. Access to the necessary locations and routes for natural migration have been closed by the new settlements and industries, particularly in the coastal areas. Another example is the need of foddering the reindeer in seasons with scarce pastures in Troms and Nordland. Ferry and truck transport, as well as foddering, cost more than the traditional migration and grazing. The extra costs for these changes have been paid through the Reindeer Husbandry Agreement since the end of the 1970s. In addition, the Agreement contains an arrangement to pay the costs of fences and other conflict-reducing measures for the reduction of the conflict level to farmers and various other entities.

In the annual accounts of reindeer husbandry,¹⁰⁶ the part of the expenses paid through the agreement is accounted for as subsidies, and not as compensation. This way of viewing the expenses may not be fair. The element of these costs being the result of encroachments is concealed.

2) The other comment about the reindeer husbandry agreement is that the quoted section of the General Agreement was left out in 1993, when the agreement was changed.¹⁰⁷ There is no explanation in the official documents from this agreement about why the section on encroachment protection was left out in the new General Reindeer Husbandry Agreement of 1993.

3.2.4. The 1983 draft section 15 in the reindeer husbandry act

The problems with section 15 in the 1978 act were that it did not give adequate protection against encroachments, and that the content was unclear. In 1983 the Ministry of Agriculture proposed a new section 15, in draft Ot. prp. dated the 7th of June 1983 (draft Ot.prp. 1983).¹⁰⁸ The purpose of the proposal was not to change the content of the 1978 act, but to clarify a procedure for avoiding unnecessary damage to reindeer husbandry, to give the reindeer

¹⁰⁶ Totalregnskapet for reindriftsnæringen, by Økonomisk utvalg for reindriften (the Economical Commission for Reindeer Husbandry). The members of this commission are appointed by the Ministry of Agriculture and Food, and NRL

¹⁰⁷ See for example St. prp. nr. 66 (1992-93). The purpose of the change was to include the Sami Parliament in the negotiations between the Norwegian state and NRL, cf. St. prp. nr. 66 (1992-93).

¹⁰⁸ The draft Ot. prp. dated 7 June 1983, here from the NRL's archive. The draft is commented on in NOU 2007: 13: 813. The draft section 15 in the draft Ot. prp. is cited.

pasture areas parallel protection to the protection of cultivated areas in section 54 of the then Cultivated Land Act¹⁰⁹ (draft Ot.prp. 1983: 1-7). The Ministry of Agriculture, thus, did not view the 1983 proposal as a proposal implying changes of the principles in the act.

At the time, the Sami Rights Committee was working with the principle matters of rights. Proposals from NRL about principle changes of the act were referred to this committee (draft Ot.prp. 1983: 1).

The ministry proposed to define „areas of special value”¹¹⁰ within the regional reindeer areas, and to protect these areas especially by introducing a veto regime. The aim was to protect additional areas than migration routes against encroachments that imply considerable damage. In these areas, no such enterprises were to be permitted.

According to the proposal, the Regional Reindeer Husbandry Boards¹¹¹ were given the authority to refuse applications for enterprises. The authority included the opportunity to lay down conditions for the applied for measures and enterprises. The draft particularly mentions conditions about future extension of the enterprise, location of the enterprise, and the opportunity to require alternatives.

This proposal builds on the principle that the new use was to adapt to reindeer husbandry as far as possible. Such a principle was not included, neither in the 1966 draft nor in the 1978 act, and is not included in the current act. According to the 1983 draft, the special protection applied for all types of encroachments. In addition, there were no limitations of what kind of measures the draft section would apply to. As explained to NRL at the time, the protection applied for various other limitations of the reindeer herders’ disposal of the pastures, for example, when protecting areas according to the nature protection act, and when designating areas for the various large carnivores¹¹².

In my view, the 1983 draft of a new section 15, corresponding to section 63 in the current act, met the problems in the encroachment protection in the 1966 draft and the 1978 act, by requiring adaptation of new activities to the reindeer husbandry in the area, as well as by clarifying the ambiguities in the 1978 act. In addition, the 1983 draft was compliant towards an increasing level of lost resilience and flexibility. The draft might have simplified early and

¹⁰⁹ Authors’ translation - lov 12 mai 1995 nr. 23 om jord (jordlova)

¹¹⁰ In Norwegian: „særverdiområder”

¹¹¹ In Norwegian: Områdestyrene. These boards were appointed according to section 7 in the 1978 act, corresponding to section 72 in the current act.

¹¹² Personal participation in NRL seminar, where this was explained by Arnesen.

direct contact between the reindeer herders and those responsible for the applications for new activities, as well as negotiations between the parties in the possible conflicts.

The proposal was sent for a hearing and met strong resistance from various competing interests. Even the reindeer herders were skeptical, as they feared that special protection of areas of special value would lead to weaker protection of the remaining areas (NOU 2007:13: 813, NRL 1984, FD 1984). In the hearing, NSR was skeptical about giving more rights to the reindeer herders than to other Sami (FD 1984). In FD 1984, the ministry indicates that the summary of the statements would show that many “heavy interests” in the society supported the legal protection of the reindeer pasture areas. As far as the author knows, the ministry never summed up the statements in the hearing.

The proposal was never promoted to the Storting for adoption. The 1983 draft illustrates the flexibility of the encroachment protection in the 1978 act, as viewed by the Ministry of Agriculture at the time. This strengthens the presumption above, that section 15 in the 1978 act ought not to be compared to the encroachment provisions in the 1966 draft act¹¹³ sections 10 and 11 in the 1966 proposal, and that section 15 ought to be read as a practicable regulation, not as a matter of principle.

3.2.5. Improvements of the encroachment protection in later acts

The reindeer husbandry act was changed in 1996.¹¹⁴ In 2007 a new act was adopted.¹¹⁵

The preparatory work of the change in 1996¹¹⁶ acknowledged the independent basis of the rights of the reindeer herders. The burden of proof of the right to use the pastures in the defined reindeer pasture areas were turned, implying that in cases where other right holders claimed that the reindeer herders did not have the right to certain pastures within these areas, it was the task of the other right holders to prove that the right of the reindeer herders did not exist.

The 1996 revision also implied that the reindeer pasture districts worked out standard documentation of their use of the areas in maps. This simplified the consideration of the interests of the reindeer herders in the municipalities, in the planning and concession processes.

¹¹³ Sections 10 and 11 in the 1966 draft act (RLK: 55)

¹¹⁴ Lov 23 februar 1996 nr. 8

¹¹⁵ Lov 15 juni 2007 nr. 40 om reindrift (reindriftsloven)

¹¹⁶ Ot. Prp. Nr. 28 (1996-97) Om lov om endringer i reindriftsloven, jordskifteloven og viltloven

The 1996 revision gave the Regional Reindeer Husbandry Boards¹¹⁷ the authority to create conditions, or to deny, larger arrangements causing considerable damage to reindeer husbandry in the region.

The 1996 revision clarified the basis of the rights of the reindeer herders as rights based on immemorial use. This clarification in the reindeer husbandry legislation is important in legal respects. In addition, the clarification may have substantial effects on the general attitudes towards the reindeer herders. At least, one of the possible causes of negative attitudes was removed from the legislation.

The Reindeer Husbandry Act of 2007 replaces the 1978 act. The changes concern the internal organization of reindeer husbandry, not the relations to other interests. The changes may have implications for the protection against damaging use by others through clarifying the responsibilities of the use of the areas, see chapter 2.

It is stated directly in the act that the right to reindeer husbandry is based upon „time immemorial and present use’¹¹⁸ and that compensation shall be paid in cases of encroachments. Consequently, the insecurity and ambiguity in the 1978 act, clarified in the 1996 revision, was rendered more visible in the 2007 act.¹¹⁹

The 2007 act includes reference to International Law on indigenous peoples and minorities, and state that the act shall be implemented in accordance with International Law.

Some few words about the changes in the Planning Act in the period:

Consequence analysis prior to permitting new activities on uncultivated land was a requirement according to the Planning Act of 1985. The requirements did by far encompass all cases that might cause damage to reindeer husbandry. The requirements were enhanced

¹¹⁷ In Norwegian: *Områdestyrene*. According to section 7 in the 1996 revision, corresponding to section 72 in the current act, the Regional reindeer husbandry boards have 5 or 7 members. The County council (in Norwegian: fylkestinget) appoints 3 or 4 of the members, the Sami parliament appoints 2 or 3 of the members. It is required that there are active reindeer herders among the members. The organizations of the reindeer herders have a right to propose the members of the boards.

¹¹⁸ In Norwegian: ’alders tids bruk’

¹¹⁹ The Supreme Court is seen to have left the view that the rights of the reindeer husbandry are based solely in the Reindeer Husbandry Act in 1968, in the Brekken case (Rt 1968 side 394) and in the Altevann II case (Rt 1968 side 429), cf. NOU 2007: 13: 770-771. In 2001, in the Selbu case, the Supreme Court said that the rights of the reindeer herders is an independent right to use uncultivated land based on immemorial use (Rt 2001 side 769 på side 788, cf. op.cit.) Rt. Is an abbreviation of *Norsk retstidende*.

and clarified in 2005 for activities implying the possible damage and disturbance to reindeer husbandry.¹²⁰

The planning act was changed in 2008.¹²¹ The changes implied that reindeer husbandry became visible in the act, and clarified the legal obligations towards reindeer husbandry that follows from the rights being acknowledged as customary rights.

3.2.6. Summing up the encroachment protection in the Reindeer Husbandry Act

In sum, the later changes of the reindeer husbandry act and the planning act clarifies the ambiguities in the 1978 act. The rights of reindeer husbandry are clearly being recognized on an equal basis as the rights of other right holders in the reindeer pasture areas.

Section 15 in the 1978 act was particularly unclear if interpreted as a principle, rather than a practicable arrangement. In the 2007 act, the corresponding section 63 is clearly designating the procedure, and not the principle relation, in conflict situations. In other words: the legal protection against encroachments in reindeer husbandry act is still weak.

The remaining problem is that this procedure does not meet the needs of specific procedures for avoidance of unnecessary damage and for direct and early contact between the parties in the conflicts over use of the reindeer pasture areas. The need for administrative procedures in these respects is increasing, as the flexibility and resilience of reindeer husbandry is decreasing, resulting from the constant new encroachments.

The review of the reindeer husbandry act above is limited, and does not go in details about the encroachment legislation. The aim has been to review the main features of the protection against encroachments in the Reindeer Husbandry Act, as well as the public debates about the encroachments, as developed during the last 40 years. The purposes have been two: One is to through light on the comments by the reindeer herders in the opening of the thesis, that the encroachments are about to destroy Sami reindeer husbandry, and that this does not seem to be understood. The other is to see what limitations there are in the encroachment protection in the legislation for meeting a new situation, and a new level of encroachments perceived in chapters 1 and 2. The review may have limited interest for other purposes.

In the next subchapter, I shall review the protection of reindeer husbandry as Sami culture in the Constitution.

¹²⁰ Forskrift 1. April 2005 nr. 276 om konsekvensutredninger

¹²¹ Lov 27. Juni 2008 nr. 71 om planlegging og byggesaksbehandling (plan- og bygningsloven) (plandelen)

3.3. Protection of the reindeer husbandry as culture in the Constitution

The Sami Rights Committee was appointed in 1980. The mandate of the Committee was to investigate the legislation on the rights of the Sami people in Norway and to propose new legislation, with the purpose to secure the Sami future, including that of Sami reindeer husbandry (NOU 1984: 18: 42-45).

3.3.1. Section 110a in the Constitution and Article 27 in CCPR

The first report of the Sami Rights Committee was presented in 1984 in NOU 1984: 18 *Om samenes rettsstilling*. The main proposals were to include a new provision about the obligations towards the Sami people in the Constitution, and to establish a Sami Parliament. A new section, section 110a, was amended in the Constitution in 1988. Section 110a reads: “It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”¹²²

The proposal of the Sami Rights Committee for the new amendment in the Constitution was based on the committee’s interpretation of Article 27 in the United Nation’s Covenant on Civil and Political Rights (CCPR) (NOU 1984:18¹²³). Carsten Smith, the leader of the Sami Rights Committee in 1984, has later summed up the relation between section 110a and Article 27. He says that they must be said to require the same. (NOU 2007: 13: 190¹²⁴). According to the Human Rights Act from 1999,¹²⁵ Article 27 is given priority over other Norwegian law.¹²⁶

Article 27 in CCPR reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The content of Article 27 has developed through the statements and decisions of the United Nations Human Right Committee. In 1984, the Sami Rights Committee interpreted Article 27 as an article protecting the right of the Sami reindeer herders to enjoy their own culture, as well as protecting the reindeer pastures as far as these pastures are needed for the enjoyment of the culture. In 2007, the Sami Rights Committee II often refers to Article 27 as the most

¹²² From the translation of the Constitution at www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution

¹²³ See in particular 6.8, 9.4, and 10.9. Cf. NOU 2007: 13: 190.

¹²⁴ The committee refers to Smith *Om samenes rett til naturressurser – særlig ved fiskerireguleringer*, later printed in *Lov og Rett* 1990 from page 507 and in *Rettstenkning i samtiden* (1992) from page 188.

¹²⁵ Lov 21. mai 1999 nr. 30 om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven)

¹²⁶ Section 3 in the Human Rights Act of 1999

important international instrument for protection of indigenous peoples against inappropriate encroachments.¹²⁷ The wording of Article 27 is vague on the concrete protection against encroachments. However, the article is rendered concrete on the basis of the praxis of the UN Human Rights Committee. Subsequently, the content of the legal obligations of Article 27, as well as that of section 110a in the Constitution, is dynamic.¹²⁸

3.3.3. The contents of Article 27

According to the analysis of the Sami Rights Committee II in NOU 2007:13, the praxis of the Human Rights Committee points to the following demarcation of the protection against encroachments in Article 27 (NOU 2007: 13: 189-214):

1. The persons encompassed by the article have a demand for protection of their culture against infringements in the execution of their culture. Such a protection is not the demand of persons belonging to the majority (op.cit:193).
2. The states not only *can* use positive discrimination in favor of these persons. If the situation requires they are *obliged to* do so (op.cit: 193).
3. The right is an individual right, but also has a collective feature. The threshold for violation of the article 27 is lowered by the right being individual (op.cit: 194-195).
4. The states have no “margin of appreciation” in their judgment of how far the article reaches in concrete cases. The article is a material limit on what the states can do in the Sami reindeer areas. Small infringements may represent a threat to the culture. Previous inequities and encroachments ought to be considered. Appropriate remedies for facilitating the continuous enjoyment of the culture, like allocating new lands for the enjoyment of the culture, and economic compensation for historical inequities, may be relevant measures to make up for encroachment damages (op.cit:195-197). The Sami Rights Committee concluded that it does not necessarily require much for a case to be a violation of Article 27 (op.cit: 204).¹²⁹ The obligations must be evaluated concretely in each case. This is a necessity and follows from the content of the rights (op.cit: 202).

The implication of additional work and expenses does not seem to imply violation of Article 27, cf. for example the Human Rights Committee’s statement in the first Jouni E. Länsmann

¹²⁷ For example in NOU 2007: 13: 172.

¹²⁸ The Sami Rights Committee discusses the right of Sami cultural protection according to Article 27 in CCPR in NOU 2007:13: 189-214.

¹²⁹ The Sami Rights Committee use Uggerud 2000 as support for this conclusion.

case in 1995, and the fact that the logging at stake was (op.cit: 202) “...resulting in additional work and additional expenses for the authors and other reindeer herds men, does not appear to threaten the survival of reindeer husbandry.”¹³⁰

3.3.3. Discussion of the encroachment protection in the Constitution

Following from the praxis of the Human Rights Committee, section 110a in the Constitution, as well as the Human Rights Act of 1999, primarily address the loss of flexibility and resilience as an accumulative effect of encroachments, rather than the loss of pastures, or the additional work caused by a particular encroachment. Hence, these acts put weight on the avoidance of unnecessary damage and countermeasures to reduce the negative impact of past, present, and applied for encroachments, rather than economic compensation for extra work and expenses caused by encroachments. The provisions protect against physical encroachments, as well as limitations of the reindeer herders’ disposal through regulations.

Section 110a in the Constitution, and the Human Rights Act, thus, may render the protection against damages that is incomplete in the reindeer husbandry act, if the praxis by the Human Rights Committee continues to develop along similar lines as it has done in recent years.

In later years, reference has been made to Article 27 in several encroachment cases, for example in the case of the fusion of the military training fields Mauken and Blåtind in Troms county,¹³¹ and in the Beiarn energy enterprise in Nordland county.¹³² The protection of the large carnivores may also become a violation of Article 27, in circumstances where this protection leads to a considerable limitation of the reindeer husbandry in an area¹³³.

The Reindeer Husbandry Act of 2007 states that the act shall be implemented in accordance with the rules in International Law about indigenous peoples and minorities.¹³⁴

In my view, focusing on the accumulative effects of encroachments, avoidance of unnecessary damage, and real compensation of lost flexibility, section 110a in the Constitution, and the Human Rights Act, contributes substantially to the legal encroachment protection for Sami reindeer husbandry.

¹³⁰ Jouni E. Länsman v. Finland (Communication No. 671/1995) para. 10.6, here from NOU 2007: 13, page 202

¹³¹ Uggerud 2000: 41-67, cf. NOU 2007: 13: 204

¹³² Jon Gauslaa in Dagbladet 7 September 2000, cf. NOU 2007: 13: 204

¹³³ Uggerud 2001

¹³⁴ In section 3

3.4. The proposals of the Sami Rights Committee II in 2007

In the second report of the Sami Rights Committee, in NOU 1997: 4¹³⁵ the committee proposed a right for the Sami Parliament to deny encroachments causing considerable damage to Sami interests. This proposal is neither adopted in the Finnmark Act, nor in the Reindeer Husbandry Act of 2007.

The Sami Rights Committee II was appointed in 2001 to fulfill the tasks of the committee as promised by the government in 1980. The committee submitted their proposals in December 2007,¹³⁶ twenty-seven years after the appointment of the first Sami rights committee in 1980. The mandate of the Sami Rights Committee included proposing better protection against encroachments in the reindeer husbandry areas than in the 1978 act, the prevailing reindeer husbandry act in 1980. The content of the encroachment protection was not changed in the revisions of the act in 2007. Proposals of changes were left for discussion in the Sami Rights Committee. According to research, cf. 1.1, the encroachment problem has increased considerably during the twenty-one years from the appointment of the first committee in 1980 to the appointment of the second committee in 2001.

Subsequently, it might be reasonable to expect that this committee pay special attention to propose concrete legal measures for greater protection against encroachment for reindeer husbandry.

3.4.1. No substantial changes of the Reindeer Husbandry Act

The Sami Rights Committee does not propose substantial changes to the encroachment protection in the Reindeer Husbandry Act. (NOU 2007: 13: 131).

The principle of the responsibility of adaptation in the encroachment situation, thus, remained the same as in the 1978 act, and was kept in the current act of 2007. According to the Reindeer Husbandry Act, reindeer husbandry has to adapt to encroachments when there is a preponderance of interest to the new activity compared to the interests of reindeer husbandry in the affected reindeer pasture district. The committee seems to be of the opinion that this protection is “good enough.”

The committee commented on the absence of substantial changes in the Reindeer Husbandry Act as such (op.cit: 131): “However, one assumed that the provisions in chapters 17 – 21 of

¹³⁵ NOU 1997: 4 Naturgrunnlaget for samisk kultur

¹³⁶ In NOU 2007: 13 A and B Den nye sameretten

the report may become of great importance to the protection of the reindeer husbandry areas. Therefore, no special provisions on protection of the areas have been proposed in the Reindeer Husbandry Act.”

3.4.2. The proposal of a consultation institution and various other proposals

In chapters 17-21, the Committee proposed a new act relating to administrative procedures and consultations in the case of measures that may influence natural resources in Sami areas.¹³⁷

The aim of the proposed act is to secure the publication of applied for measures, consultations and duties to report on the consequences of a measure for the enjoyment of Sami material culture (op.cit: 133).

In the draft act of administrative procedure and consultations, the Sami Rights Committee proposed a new consultation institution. The aim is to grant the real possibility to influence the process, as well as the content of decisions on encroachments. There is no requirement that agreement must be reached, or that the affected Sami have decisive influence on the outcome of the case. However, consultations must be carried out in good faith and be arranged such that they are a suitable tool to achieving agreement on the measure at issue (op.cit: 132).

The committee adds that the state cannot “consult away from” the absolute requirement of cultural protection in Article 27, and underlines that implementation of consultations (op.cit: 133) “will not exempt the relevant decision-making bodies from the obligation they have to make an independent assessment of the effects of a planned measure on Sami culture etc.”

According to the draft act of administrative procedure and consultations, the reindeer herders have a right to be consulted when they may be directly affected by a measure, whether this is an applied for encroachment, or a proposed regulation or a new act.

Bodies under duty to consult will be governmental authorities, including the government itself, the ministries and other underlying government agencies, municipalities and county municipalities. The implementation of the consultations (op.cit.) “shall be made in good faith and with the aim of achieving agreement on the measures at issue.”

¹³⁷ The title of the proposed act in Norwegian is “Lov om saksbehandling og konsultasjoner ved tiltak som kan få virkning for naturgrunnet i tradisjonelle samiske områder (saksbehandlings- og konsultasjonsloven)”

Further, the Committee proposes a provision for a (particularly) qualified preponderance of interest for allowing new activities into the areas, if the measure in question may have a significant negative impact on the future use of these areas. Yet another proposal is for the opportunity to stipulate conditions in order to prevent or reduce the “unfortunate results” of an encroachment or of a regulation (op.cit.).

Likewise, in chapters 17-21 the committee proposes various changes to legislation in the planning act, the nature protection act, and the mining act.

The proposed provisions in the planning act is rendering Sami use of the areas more visible and vesting the Sami Parliament with a direct role in area planning. These proposals have mainly been adopted in the new planning act of 2008. The proposed provision in the Nature Diversity Act is to state preservation of Sami areas as a potential object for preservation. The committee proposes that the Administrative Procedure and Consultation Act shall apply for mineral claims regulated by the Mineral Act. In areas of significant importance to future Sami use the Committee proposes that consent of the holder of the rights must be obtained as a presupposition for prospecting. It also proposes changes to the act to allow the King to make regulations that imply that the mining companies are to pay also pay a fee to the holders of rights of use, as for example, the reindeer herders and siidas (op.cit: 133-135).

3.4.4. Discussion of the proposals

It is my position that the proposals of the Sami Rights Committee are insufficient in several ways.

The most serious objection is that the proposals mostly concentrate on the refusal of further damaging encroachments. This strategy may prove to be of limited success. The reindeer pasture areas will probably be claimed for other purposes in the years to come, like tourist enterprises, mineral extraction, additional energy supplies, and recreational cabins. These anticipated developments will imply further fragmentation of the pastures, and add to the accumulative problem of the loss of resilience if not met with countermeasures.

The committee does not propose efficient procedures for enforcing countermeasures against damage resulting from new encroachments by adapting the new activity to reindeer husbandry, rather than the other way around. The proposals do not contain obligations to compensate for the loss of resilience caused by new encroachments, nor do the proposals contain provisions to make up for problems caused by earlier encroachments.

Another shortfall is that the committee does not propose procedures that guarantee direct contact between the affected reindeer herders and their opponents at an early phase. It has occasionally proven to be too late for adaptive measures by the time the applications reach the concession authorities. Earlier contact might be one of the main factors for minimizing the harm caused by encroachments.

Negotiations ought to take place during the planning phase and continue throughout the operation phase. A possible provision might, for example, be to demand a joint statement between the parties, where the representatives from the reindeer pasture districts state their ideas as to how to minimize any damage, and the applicants of the encroachments commit themselves to follow any agreed upon measure, if their application is approved.

Another problem may be that consultations at a later stage may increase conflicts and diminish the chances of reaching an outcome that is in the best interest of reindeer husbandry.

Yet another problem seems to be that consultations may add to the workload of the reindeer pasture districts¹³⁸.

By formalizing consultations, the reindeer herders may appear to be responsible for the refusal to allow the encroachments in those cases where the verdict is to refuse the encroachment. This may lead to the reindeer herders getting blamed for the refusal in those cases, as well as lead to negative attitudes towards reindeer husbandry.

Finally, the proposals do not contain any clause about the return of the lost areas when, or if, the enterprise under consideration closes down.

The proposals of the Sami Rights Committee II may contribute to the protection of reindeer husbandry becoming somewhat better than it is today. Nevertheless, in my view, the proposals, do not meet the demands of an efficient encroachment protection to meet the present and perceived encroachment problems.

The Sami Rights Committee did not require an analysis of the encroachment problem as far as reindeer husbandry is concerned.¹³⁹

¹³⁸ I am referring to the comments of Johan Anders Eira and Berit Oskal Eira in chapter 2.

¹³⁹ In NOU 2007: 13 A and B, and in NOU 2007: 14, containing the research developed for the commission, at the request of the commission, about the right to, and use of, the lands and waters in the mandate area of the commission (NOU 2007:14: 19). None of the 17 contributions in the report contain any registration and analyses of the problems that the present, and perceived, level of encroachments may cause to Sami reindeer husbandry.

The encroachment situation has not been specifically analyzed since the 1960s with regard to solving the problem of finding appropriate protective measures. It may seem that the Sami Rights Commission's focus has solely been on other Sami interests. The question of how serious the loss of flexibility is in reindeer husbandry today, and in the perceived future, in the various reindeer pasture districts, do not seem to have been the background for the proposals of the committee.

3.5. Discussion of shortages in the protection clauses against encroachments

Summing up; - the problems that in my view have not been resolved in the proposal of the Sami Rights Committee are:

- Providing for procedures that focus on adapting encroachments to reindeer husbandry.
- Focus on compensation of the loss of flexibility, as well as on the accumulative effects of that loss of flexibility and resilience
- Securing direct and early contact between the applicants of encroachments and the reindeer herders, thereby avoiding unnecessary conflicts and additional work for the reindeer herders
- Demanding the return of lost areas, if and when, the permitted use has expired
- Enforcing special caution and measures in reindeer pasture districts with particularly small margins of resilience.

The current, and in particular the proposed protection regime, seems to be occupied with the mere denial of damaging encroachments with the main tool being consultations. This may turn out to be futile as well as ineffective, as there will be the need to use the areas for other purposes in the future, including for the development of Sami livelihoods in these areas. The regime may lead to unnecessary conflicts, unnecessary work, and an increase, not a decrease of the reindeer herders experiencing that their efforts are futile.

4. Summary and conclusion

In this chapter I shall sum up the two investigations in chapter 2 and chapter 3, and draw some conclusions on the encroachment problem.

4.1. The encroachment problem as seen by the reindeer herders

In chapter 2, I argued that the accumulative effects of encroachment have become more noticeable for the reindeer herders today than in earlier times. Previously, the effects of encroachments were mostly connected with changes in the use of the pastures as a result of each individual case of encroachment.

The environmental research considers the effects of encroachments as effects on the animal behavior. This research has not measured the impact of encroachments on Sami reindeer husbandry. To measure this impact, Aslak J. Eira, suggests in chapter 2 that encroachments should be understood as the change of the use of the pastures. The impact of an encroachment for reindeer husbandry is thus the impact in terms of the change of use required by the encroachment. The problem is not necessarily the (often small) loss of pastures, but the ripple effect of the whole area losing value as pasture, and the reduced flexibility. He describes the cumulative encroachment problem as a situation where there are too few alternatives left for dealing with the shifting natural and social conditions. „Encroachment’ may be defined as „new enterprises and activities in the reindeer pasture areas, necessitating long-lasting change of use of the pastures in the district. The encroachment concepts, derived from Aslak J. Eira’s story, are for the practical purposes of this thesis the same as the concepts used by my other informants, Berit Oskal Eira and Johan Anders Eira.

The basic encroachment problem for Sami reindeer husbandry is the loss of alternatives to change the use according to the shifting natural and social conditions. The consequence is that the reindeer will have to gather in the remaining undisturbed areas, and some of the pastures will have to be used more than once during the year. The problem increases with each new encroachment, as each encroachment reduces the necessary flexibility for dealing with the ever shifting natural and social conditions.

The encroachments during the last hundred years have led to the situation today and encroachments may be the greatest threat to Sami reindeer husbandry, particularly when taking the scenarios by UNEP for the future into consideration. The encroachment problem is

a type of problem that always becomes worse if alternatives, similar to those lost through the encroachments, are not made available.

To measure the encroachment problem, one should examine the situation in the various reindeer pasture districts. In districts with more siidas, and with separate pastures for each siida, one should study the situation for each of the individual siidas. The encroachment problem varies from district to district. The pressure stems from roads, power lines, military training fields, recreational cabins, and so on. There are no plans to counteract the kind of pressure that development may cause to Sami reindeer husbandry.

My key informants engage in their reindeer husbandry in different types of districts in relation to the encroachment pressure. Aslak J. Eira belongs to Gearretnjarga reindeer pasture district in Finnmark, with summer pastures on a peninsula with relatively few encroachments, and winter pastures in the national park in the Common district 30/31 in the inland. Berit Oskal Eira and Johan Anders Eira belong to Gielas reindeer pasture district in Troms and Nordland. Their whole district is under severe pressure from various encroachments.

My key informants have all represented the reindeer herders in Norway in various assignments during the last thirty years. They speak with the authority of district leaders and politicians. The encroachment problem has been one of the central commitments in their work for the reindeer herders over the years. Aslak J. Eira says that the encroachment level has exceeded the limit of what can be tolerated in many of the districts a long time ago. Johan Anders Eira reckons that the level of encroachments in Gielas is too high for successful future reindeer husbandry. As a consequence, the herders have had to fodder the reindeer periodically for many years.

The damage caused by encroachments is independent of the purposes of the encroachment. My informants, however, identified two main types of challenges for the reindeer pasture districts:

The first is the recreational cabins where my informants suggest that the reindeer pasture districts ought to have more influence on the location of these cabins. It is not realistic to negotiate about the location of each new cabin. In addition, the problems experienced today would decrease considerably if the reindeer pasture district had the opportunity to make conditions of use of the cabins during the weeks when the reindeer graze in the surrounding areas. They do not see other feasible ways to avoid severe damage and disturbance to reindeer husbandry from cabins.

The other challenge is large enterprises, for example roads, railways, military training fields, windmills and energy supplies. These enterprises ought to adapt to reindeer husbandry as far as possible. There should be less consideration of the cost of adaptation measures. My informants regarded the costs of adaptation as part of what ought to be included in the total costs of these enterprises.

One of the obstacles my informants identified for large enterprises is the absence of direct negotiations between the people responsible for reindeer husbandry, and those responsible for the planned enterprises at an early stage, before the plans are locked to specific alternatives for locations, as well as other features of potential importance to reindeer husbandry. In addition, the status of representatives from the reindeer pasture districts in their contact with the people responsible for planned encroachments should be clarified, and information about the rights of the reindeer herders ought to be disseminated to the entrepreneurs.

The workload of the reindeer pasture districts stemming from encroachments is substantial, particularly in districts with many encroachments and in districts encompassing many municipalities, such as Gielas. Johan Anders Eira estimates this workload in Gielas, a small district with five families, to be 1-2 persons on fulltime. As a general comment, Aslak J. Eira says that contrary to what one may think, the reindeer pasture districts with a lot of experience handling encroachments do not seem to be more successful than districts who handle encroachments more seldom. At the same time, these districts have experienced lack of success too often. Some of them may even give up trying to explain and promote the interests of the districts as a result of such experiences.

My informants considered it unpleasant to have to say no, or to enter into conflicts with few options for success. It would have been better if the negotiations about the adaptation measures had taken place at an early stage of the process, and before the plans were prepared for the concession authorities. To talk only with the concession authorities instead of directly with those responsible for the encroachments may lead to unnecessary conflicts and turn the reindeer herders into scapegoats for hindering the interests of the majority. In addition, the conflicts may influence future cooperation in a negative way.

No matter how successful the adaptation of the encroachment may be, new encroachments reduce the alternatives for reindeer husbandry in the affected district. According to the views of my informants, the absence of measures to improve the flexibility is the fundamental problem. Measures to increase flexibility are rarely a question that is addressed, neither at the

local level, nor at the national level. Undoubtedly, more could have been done to increase flexibility and counteract encroachments as a problem for reindeer husbandry. My informants mention taking action like sowing seeds in wounded pastures, taking down cables and power lines, conditioning human activities at the times of the year when the reindeer are in the surrounding area, and other measures which are, according to Aslak J. Eira “limited only by imagination.” In severe cases, when the district suffers from an overly high level of encroachments for dealing with the constant natural and social changes, there are other measures, like for example reducing the level of predators in the district or including unproductive fields into the pastures. As long as there are not countermeasures to increase the flexibility at the same speed as it has been reduced, the problem will become ever more severe for reindeer husbandry and more difficult to resolve these problems. As far as possible a strategy to keep the necessary flexibility in all reindeer pasture districts should have been the primary goal and presupposition for allowing encroachments to take place. Special attention should be paid to increase the flexibility in districts with limited flexibility, for example, in districts requiring annual foddering or car transport between the seasonal pastures.

It may seem like a paradox that these districts often are the same districts that must pay constant attention to a large number of encroachment plans, attention that requires a lot of work, with few results, leaving less energy to focus on the countermeasures. As a pattern, there is more pressure from encroachments along the coastal and fjord areas than in the inland.¹⁴⁰ To a large extent the population is concentrated in these areas. The reindeer herders are always a small minority in these municipalities, and they are citizens only in one of the municipalities where they have their reindeer husbandry. There are no plans to select and limit encroachments according to the situation in the reindeer pasture district. Today, almost all attention is drawn towards handling each separate encroachment case, and not towards seeking measures to make up for the loss of flexibility in the reindeer pasture districts.

Economic compensation for the loss of future income from reindeer husbandry is not a compensation for the loss of flexibility in the reindeer husbandry. The future is dependent on the preservation of flexibility, and the loss of flexibility can never be compensated for as far as the loss of future income is concerned. Economic compensation can, at best, pay the reindeer herders' extra work and costs. My informants do not, in principle, accept that their

¹⁴⁰ The pattern is different in the South Sami areas in South Trøndelag and Hedmark. Similar mechanisms between the municipalities and the reindeer pasture districts may be found here as well, connected to places with high population density in these areas.

rights can be bought out forever. In principle, the areas allocated or reduced as pastures for reindeer ought to be returned to reindeer husbandry when, and if, the new activity is closing down.

4.2. The encroachment problem in Norwegian legislation

My key informants are all in their fifties and they have all been dealing actively with encroachment problems since they were young. The period of their experiences is therefore over last thirty to forty years. In chapter 3 the encroachment protection in the Norwegian legislation is investigated, going back to the draft Reindeer Husbandry Act by the Reindeer Husbandry Law Committee submitted in 1966. The draft act built upon the premise that reindeer husbandry, in principle, has the first right to the reindeer pastures used exclusively, or almost exclusively, by them for centuries. New activities in the reindeer pasture areas consequently had to take place on the terms of the reindeer husbandry. The new activities, at that time, had been cultivation of land for fields in small-scale farming, in addition to extension of forestry. As the small-scale farming changed their ways of production and limited their use of uncultivated lands, the previous conflicts between the settler population and the reindeer herders were supposed to decrease. The draft act was, therefore, not seen by the committee as being provocative to the settled population at the time. The proposal was nevertheless met with harsh resistance from the farmers' organizations. As far as enterprises in the interest of society, of building communication and industry, the 1966 committee was of the opinion that enterprises with a "right of expropriation" or a "right of relief" had to be tolerated by reindeer husbandry, in spite of recognizing that such enterprises would represent an infringement on the rights of reindeer husbandry. The problem of accumulative effects of such encroachments was not resolved in the draft act of 1966.

Some major changes took place during the ten years between the 1966 draft act by the reindeer husbandry law committee and the draft act by the Ministry of Agriculture submitted for adoption by the Parliament, in Ot. prp. nr. 9 (1976-77). There was a low conjuncture for further development of the industry, as well as a revival of the primary livelihoods. The goal was to help these livelihoods to become economically sustainable through principles of organization taken from the industry, and new knowledge taken from research on agriculture. For example, the farmers in the reindeer pasture areas became interested in extending their income from recreational cabins and to introduce new types of seed corns developed in the south, but that were less sustainable to reindeer grazing. The interests of the farmers against

the reindeer herders, hence, had to be considered in a different way than it had been in 1966, when the perspective was that the conflicts between the two livelihoods were decreasing. Reindeer husbandry was encompassed by the renewed interest in the primary livelihoods. The general analysis was that reindeer husbandry had fallen behind other development, and needed particular attention from society for a successful revival. In addition, the importance of a successful revival of the reindeer husbandry was based upon the increasing recognition of Sami culture. The draft act of 1976 included an object clause of developing reindeer husbandry for the interest of society, for better welfare for the reindeer herders, and for reindeer husbandry to continue as an important representation of Sami culture. The act was one of many measures in this policy. The other major measure were the Reindeer Husbandry Agreement from 1976 between the reindeer herders' organization and the state.

The protection against encroachments in the 1978 act, based on the 1976 draft, was built upon a principle of equal rights for the new incoming farmers and reindeer husbandry in the areas. The farmers and land owners were not denied the right to extend their activities into the reindeer pasture areas, even if this implied infringing on the rights of reindeer husbandry, as long as the new activities of the farmers was seen as being "normal." The 1978 act represented a weaker legal protection than what was proposed in the 1966 draft. At the same time, the 1978 act did not clarify the basis of the rights of the reindeer herders, e.g. whether the rights had an independent basis in the customary use or whether the rights were regulated in the reindeer husbandry act alone. Ambiguity and uncertainty about what was "normal" use by the farmers, and about the basis of the rights of the reindeer herders, may be separate factors in explaining what may be seen as the unnecessary loss of flexibility, and unnecessary conflicts, in the years to follow. The rights and the interests of the reindeer herders were often overlooked, and little attention was paid to counteract the loss of flexibility caused by encroachments.

The rapid growth of the welfare state in the following period, as a result of the oil economy emerging from the 1980s, led to an increasing need to extend energy supplies. The remaining accessible energy supplies were, to a large extent, located in the Sami reindeer pasture areas. Utilization required the building of dams and windmill parks, as well as large transfer lines through the pasture areas to the south. The new energy policy did not take into consideration the infringement on the rights of reindeer husbandry caused by this policy. The 1978 act like the 1966 draft act, did not require compensation other than economic compensation for the lost rights.

The limits of the 1978 act and the ambiguity and uncertainty about the basis for rights of the reindeer herders and the extent of the protection against new modes of farming, were solved during the later changes in the act of 1996 and in the new Reindeer Husbandry Act in 2007. The basic problem of avoiding loss of flexibility in reindeer husbandry without compensating for the loss with corresponding and equivalent new flexibility has remained. The Reindeer Husbandry Act does not contain any new measures to enforce this kind of compensation. Nor does the act contain requirements to avoid unnecessary damage and infringement on the rights of the reindeer herders caused by encroachments. A relatively unknown proposal from the Ministry of Agriculture in 1983 was reviewed in some detail in chapter 3. The goal of the proposal was to avoid unnecessary damage by encroachments, and to deny encroachments that would cause considerable damage to reindeer husbandry in a region if it could not be counteracted by other measures taken by society. The proposal was never submitted for adoption into the Storting.

One of the results of the Sami Rights Committee, appointed in 1980 to propose new laws for revival of the livelihoods of the Sami, was the amendment of section 110a in the Constitution Act of 1988. The requirements to protect reindeer husbandry following from section 110a are the same as the requirements in article 27 in the UN Covenant of Civil and Political Rights, CCPR, and supported by amending article 27 in Norwegian law in the Human Rights Act of 1999, with priority of article 27 to other Norwegian law in cases of conflict. To put it shortly, the Norwegian state is legally obliged in the Constitution and the Human Rights Act to secure the rights of the reindeer herders to enjoy a future in reindeer husbandry, to use positive measures to secure the right, even if such positive measures can discriminate and infringe upon other rights in society. How far the protection of reindeer husbandry in these acts goes is not clear. Praxis by the UN Human Rights Committee in terms of their statements as well as in the decisions in cases about whether article 27 has been violated or not in recent years demonstrates that they consider the effects of positive measures taken to counteract the negative impact of encroachments, as well as measures taken to avoid unnecessary damage from encroachments.

The Sami Rights Committee II completed the twenty-seven years' commission of the Sami Rights Committee from 1980 in NOU 2007: 13: *Den nye sameretten*. Meanwhile, from the 1990s, attention has been drawn towards the north as a region worthy of development on its own terms, not only as an area supplying energy for the south. According to the committee, their proposals for changes in the Reindeer Husbandry Act are not substantial. The proposals

do not follow up the proposal by the 1983 proposal by the Ministry of Agriculture. It seems that the committee regards the principle arrangement of the relation between reindeer husbandry and society and other interests as being sufficient in the Reindeer Husbandry Act of 2007. The committee proposes, however, to institutionalize consultations between the concession authorities and the Sami, including the reindeer pasture districts, in cases of planned encroachments. The districts cannot refuse encroachments, but they may have a substantial influence on the outcome of the decision by the concession authorities of whether or not to allow the application of the enterprise and in establishing conditions for the allowed encroachments. The committee did not analyze the encroachment problem for reindeer husbandry, neither in the research required by the committee, nor by internal initiative.

The legal obligations to protect reindeer husbandry against damages from each planned encroachment seems to rest upon the interests of the reindeer herders being evaluated as being more important in each case than the applying enterprise. Violation of rights shall be economically compensated. There are no obligations for compensation of the loss of alternatives for dealing with the changing natural and social conditions of reindeer husbandry, except those following from section 110a in the Constitution Act, and from the Human Rights Act of 1999.

The legal protection in the 1966 draft Reindeer Husbandry Act may also have been too weak, if implemented, taking into account the dramatic increase of encroachments with the right of expropriation that have taken place from the 1970s on, and the further increase of encroachments that may be forecasted as the result of national policy for the North and other development. The 1966 draft may have been giving reindeer husbandry sufficient protection to avoid serious losses in flexibility in 1966 and the following years, but cannot be seen as an ideal legal protection for the future. The praxis by the Human Rights Committee on Article 27 in the UN Covenant of Civil and Political Rights (CCPR) point in the direction of more attention to counter-measures and to measures for rebuilding flexibility, especially in the districts that have lost too much flexibility for the development.

One may ask whether my view upon the proposals of the Sami Rights Commission is in accordance with the view of NRL. NRL is going to participate in negotiations on the proposals. The complete view of NRL is for this reason not available (in May 2009). I participated in NRL's seminar 9th January 2009 on the proposals in NOU 2009: 13. The comments to be referred from this seminar are personal comments at the time. They may nevertheless be of interest. In this seminar, Kristina J. Eira, NRL's representative in the Sami

Rights Committee II, said that the protection against encroachments is not good enough in the proposals, but “probably better than today, seen as a whole” (notes by the author from the seminar, author’s translation). Per Mathis Oskal, one of the members in the internal committee to review the proposals commented that the reindeer herders seem to be (op cit.) “administered to death” – and that “the reindeer herders must be clerks or executive officers to survive. Also others must have the responsibility. One cannot shove everything on the reindeer herders.” These are similar to my conclusions on the proposals of the committee.

4.3. Conclusion

1. The legal protection of reindeer husbandry against the continual losses of flexibility and resilience in the Reindeer Husbandry Act is weak. Stronger legal protection is not likely to be proposed in the near future since it has not been proposed by the Sami Rights Committee in their last white paper.

2. The challenge for reindeer husbandry, as well as for the Norwegian society, hence, is to avoid new losses of flexibility, and to make up for past losses of flexibility - in politics - with little support of specific measures in the legislation. New arrangements may draw on the ideas behind the 1983 proposal, though not as measures prescribed in the legislation, but rather as a policy with general acceptance in the population.

3. The main challenges seem to be:

a) To obtain a restricted selection of new encroachments to be allowed in the Sami reindeer pasture areas;

b) To avoid unnecessary losses of flexibility from the encroachments that are allowed;

c) To begin working with measures to improve the flexibility, particularly in those districts that already have limited flexibility, and in those districts where they are in danger of losing too much flexibility in the future;

d) The tendency of the reindeer herders not to bother becoming active in the planning and concession processes ought to not be overlooked.

4. Being dependent upon acceptance from the population, it is a challenge for the reindeer herders to avoid open conflicts that may draw a lot of public attention. For the same reason, it is important to avoid provocations that may induce tendencies in the population to make the reindeer herders into scapegoats for hindering a desired development.

5. The knowledge and experience of the reindeer herders of adapting to changing natural and social conditions seems to be the key for meeting the above mentioned challenges in an expedient way. This knowledge ought to be dually recognized, and positioned in a way to obtain full effect of this knowledge. This knowledge is needed for decisions of allowing or refusing new enterprises in the Sami reindeer pasture areas, what conditioning measures to apply, and what reparative measures will give the best result. The knowledge and experience of the reindeer herders to comply with conflicts with other interests is part of the adaptive capacity of the reindeer herders.

6. Two problems do not seem to be addressed properly as of yet: One is to enforce direct negotiations between the people responsible for reindeer husbandry and those of the planned enterprises about measures to take to avoid unnecessary loss of flexibility. The other is to enforce measures to increase flexibility, particularly in districts considered by the reindeer herders to have a scarcity of alternatives.

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FRONT PAGE DRAWING AND APPENDIXES

Front page drawing: The title of the front page drawing is *JOY!* The artist is the Chukcha Albina Clovakai from Magadan County at the age of 13. The drawing is taken from the book *.JOY! ILLU! РАДОСТЬ!* with children drawings from reindeer husbandry in the world, edited by Nils-Aslak Valkeapää on behalf of *World Reindeer Peoples' Union*. The drawing was rewarded 3rd prize in a drawing contest in 1993 at the Reindeer Peoples' Festival in Tromsø 1993, where reindeer peoples from the whole world met for the first time in history. More than 300 drawings were presented for the contest. None of the drawings in the book focus on encroachments. *Association of World Reindeer Herders* has given permission to use the drawing at the front page of the thesis.

Appendix 1: *Scenario for Human Impact on the Barents Region, 2002-2052* shows scenarios for severe, medium and low human impact in 2002, 2022 and 2052, in the report *GLOBIO. Global methodology for mapping human impacts on the biosphere*. The report is presented within the United Nations Environmental Programme, in 2001, cf UNEP 2001; Nellemann et al. 2001. Here copied from Jernsletten and Klokov's report *Sustainable Reindeer Husbandry*, submitted to Arctic Council 2002 from the *International Steering Committee*. According to the preface, the "report puts reindeer husbandry on the circumpolar agenda as part of the activity of the Arctic Council... The project is a joint Norwegian-Russian initiative with support from several countries." Johnny-Leo L. Jernsletten was the project manager.

Appendix 2: *Troms and West Finnmark Reindeer Husbandry Regions* shows the location of 21 Gearretnjarga District, Common District 30/31 in West Finnmark and 21 Gielas District in Troms, as presented in *Melding om reindrif*, the Reindeer Husbandry Administration's annual account of the reindeer husbandry prior to *Ressursregnskap for reindrifsnæringen*. Due to ongoing changes of the district organization, the maps are not available online for the time being. They are available at question to the Reindeer Husbandry Administration, cf. www.reindrif.no.

Appendix 3: *Gielas Reindeer Pasture District* shows the use of the pastures in Gielas Reindeer Pasture District at the time the map was made. According to Johan Anders Eira, the district leader, the map was made in the 1990s. The map is followed by the general explanations, in Norwegian, of the maps of the reindeer pasture districts. The maps are available at <http://kart.reindrif.no>. The presented map, as well as the standard explanations, is prepared by Håvard Hagen at the Reindeer Husbandry Administration in 2008.

Appendix 1 Scenario for Human Impact on the Barents Region, 2002 – 2052

SUSTAINABLE REINDEER HUSBANDRY

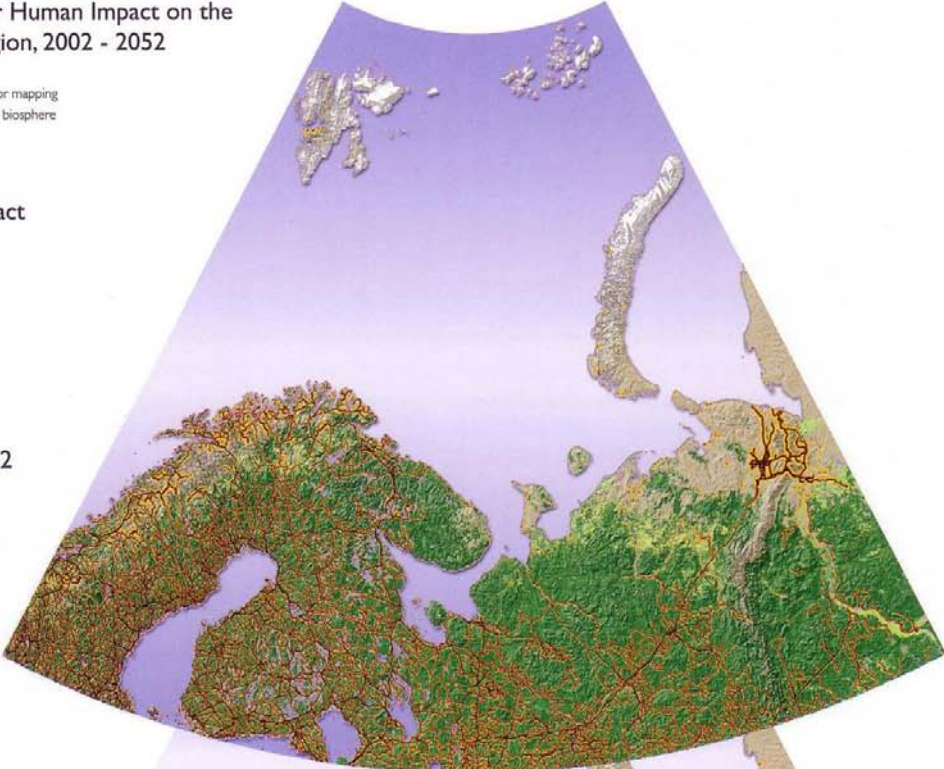
Scenario for Human Impact on the Barents Region, 2002 - 2052

Map © GLOBIO
Global methodology for mapping
human impacts on the biosphere

Human Impact

- Severe
- Medium
- Low

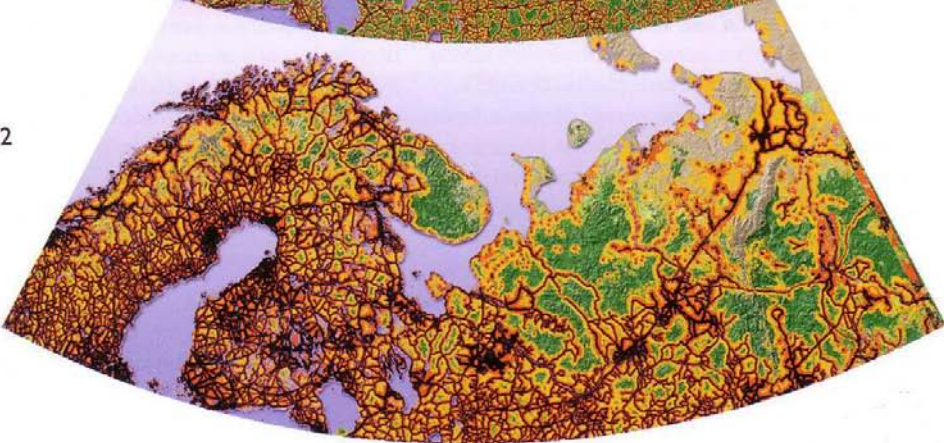
Barents 2002



Barents 2022



Barents 2052

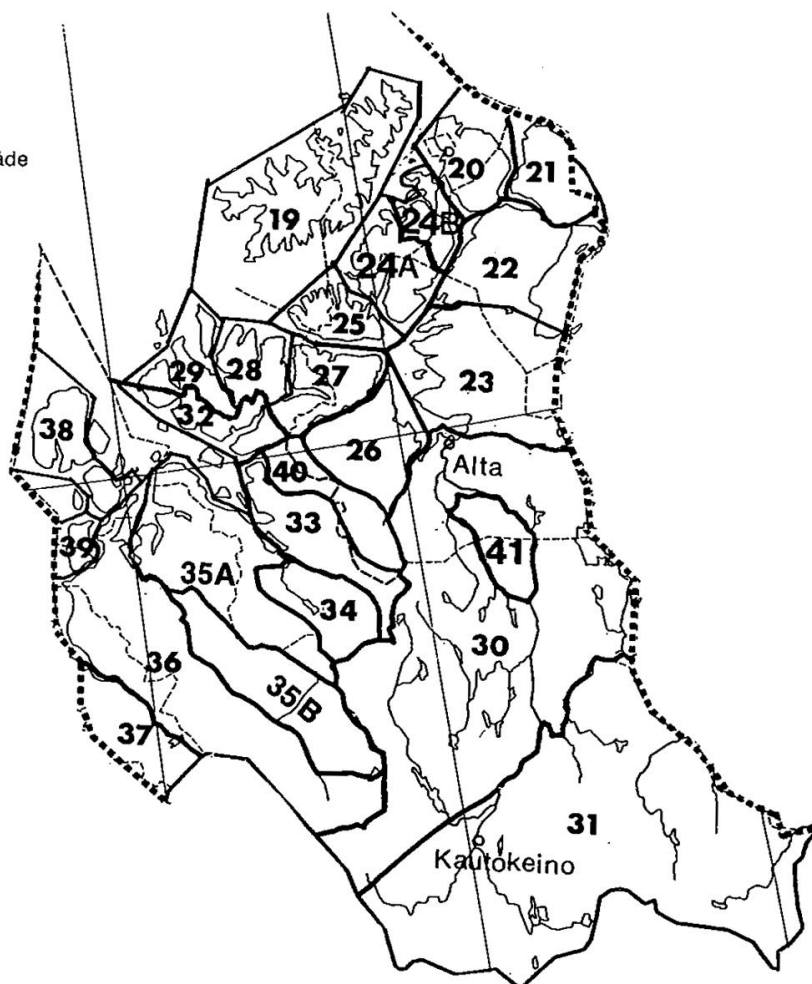


Appendix 2 Troms and West-Finmark Reindeer Husbandry Regions

Vest-Finmark reinbeiteområde

Tegnforklaring:

- Distriktsgrense
- - - Områdegrense
- · - · Kommunegrense
- - - - Fylkesgrense
- ==== Konvensjonsområde



VEST-FINNMARK

- 40 Orda
- 32 Silvetnjåga
- 33 Spalca
- 34 Áborášša
- 35A Fávrosorda
- 35B Beahcegealli
- 36 Cohkolat og Biertavárri
- 37 Skárfvággi
- 38 Ullisuolu
- 39 Árdni Gávvir
- 19 Sállan
- 20 Fálá
- 21 Gearretnjárga
- 22 Fiettar
- 23 Seainnus Návggastat
- 24A Oarje-Sievju
- 24B Nuorta-Sievju
- 25 Stierdná
- 26 Lakkonjárga
- 27 Joahkonjárga
- 28 Cuokcavuotna
- 29 Seakkesnjárga ja Sildá
- 30 Guovdageainnu gidda- ja čakčaorohat
- 31 Guovdageainnu dálveorohat
- 41 Beaskádas fra 1.4.1992

Uløya
 Arnøy/Kågen
 Sørøy
 Kvaløy

Seiland vest
 Seiland øst
 Stjernøy

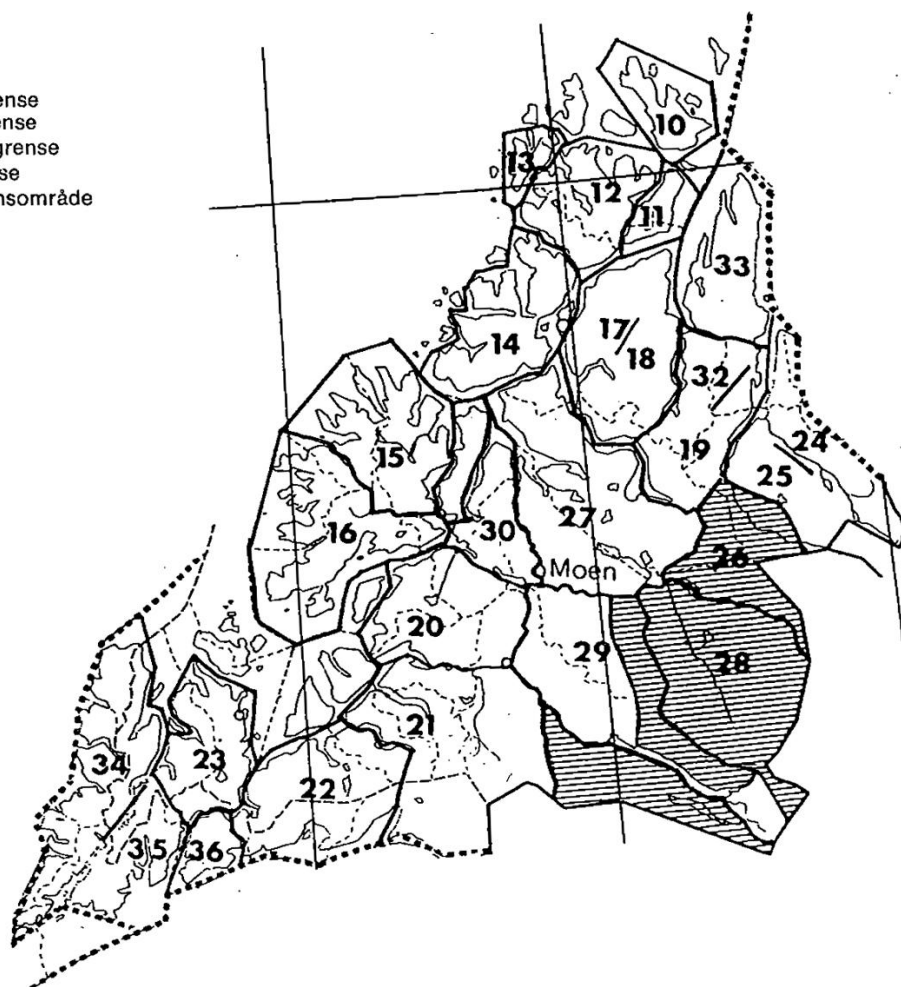
Bergsfjordhalvøy
 Frakfjord med Silda
 Kautokeino vår- og høstbeite
 Kautokeino vinterbeite

I tillegg er distrikt 19/32 og 33T fra Troms reinbeiteområde forvaltningsmessig underlagt Vest-Finmark reinbeiteområde i økono-

Troms reinbeiteområde

Tegnforklaring:

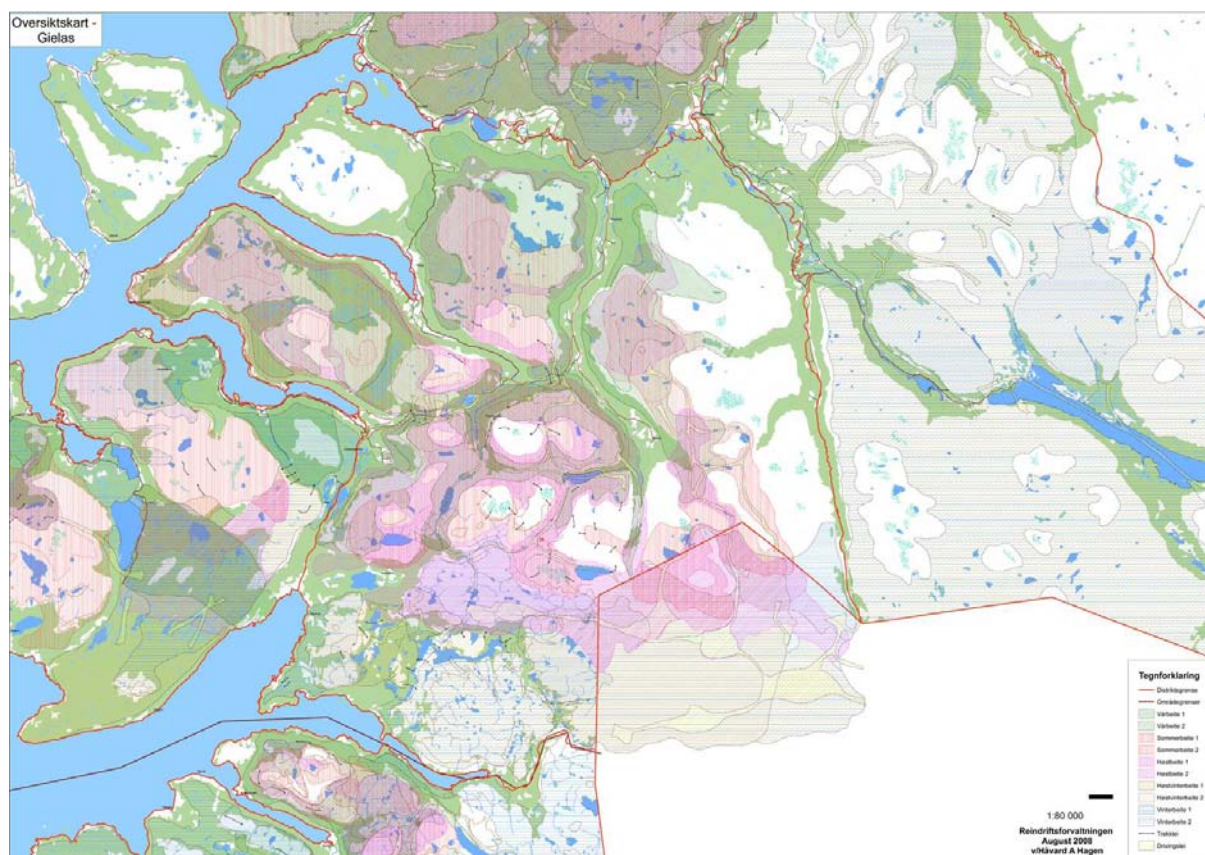
- Distriktsgrense
- - - Områdegrense
- Kommunegrense
- Fylkesgrense
- ==== Konvensjonsområde



TROMSØ

- | | |
|-------------------------|-------------------------|
| 10 Várdna | Vannøy |
| 11 Ráidna | Reinøy |
| 12 Ráidnet | Ringvassøy |
| 13 Ruobba | Rebbenesøy |
| 14 Sállir | Kvaløy |
| 15 Oarjlt Sázzá | Nord-Senja |
| 16 Nuorta Sázzá | Sør-Senja |
| 17 Stuoranjárga | Tromsdalen |
| 18 | Andersdalen |
| 19/32 Láhku/Guhkesvággi | Lakselvdalen/Lyngsdalen |
| 20 Stallonjárga | Hjertind |
| 21 Gielas | |
| 22 Roabat | Grovfjord |
| 23 | Kongsvikdalen |
| 24 Nuortanjárga | Helligskogen |
| 25 | Falsnesfjellet |
| 26 Rosta | Tamok |
| 27 Mávki | Mauken |
| 28 Deavddis | Dividalen |
| 29 Uncanjárga | Altevatn |
| 30 | Fagerfjell |
| 33 Iltunjárga | Rendalen |

Appendix 3 Gielas Reindeer Pasture District



REINDRIFTENS AREALBRUKSKART

DEFINISJONER OG PRESISERING AV BEGREP.

Områdegrense: Grense mellom 2 reinbeiteområder, f.eks. mellom Vest-Finnmark og Troms reinbeiteområder.

Distriktsgrense: Grense mellom 2 reinbeitedistrikt.

Konvensjonsgrense: Grense for svenske reineieres beiteområder i Norge i hht. den norsk-svenske beitekonvensjonen.

Vårbeite 1: Kalvingsland og tidlig vårland, de deler av vårområdet som beites tidligst og hvor hoveddelen av simleflokken oppholder seg i kalvings- og parringsperioden.

Reservekalvingsland inkludert.

Vårbeite 2: Oksebeiteland og øvrig vårland, der okserein og fjorårskalver oppholder seg i kalvingstida. Hit kan også kalver med simler trekke senere på våren.

Sommerbeite 1: Høysommerland, sentrale deler som regel over skoggrensa, der reinen oppholder seg midtsommers og får dekket sine behov for beite, ro, avkjøling og minst mulig insektsplage innenfor korte avstander.

Sommerbeite 2: Lavereliggende sommerland, mindre sentrale og/eller mindre intenst brukte områder,

Høstbeite 1: Parringsland, de deler av høstområdet der oksereinen samler simleflokkene til parring under brunsten.

Høstbeite 2: Tidlig høstland, partier der reinen bygger seg opp etter insektplagen og spres på

leting etter sopp.

Høstvinterbeite 1: Intensivt brukte områder, som ofte pakkes til med snø og blir utilgjengelige for reinen utover vinteren.

Høstvinterbeite 2: Spredt brukte områder for samme periode som høstvinterbeite 1.

Vinterbeite 1: Senvinterland, intensivt brukte områder som normalt er mest sikre mot store snømengder og nedising på midt- og senvinteren.

Vinterbeite 2: Tidlig benyttede og ofte lavere beliggende vinterområder, som regel mindre intenst brukte.

Drivingsleier: En lei eller trasé i terrenget der reinen enten drives eller trekker selv.

Drivingsleier, høst: Markerer at den aktuelle drivingsleien brukes om høsten og/eller høstvinteren på tilbakeflyttingen til vinterområdet. Høstflyttingen foregår som oftest mer spredt og over atskillig lenger tid enn vårflyttingen.

Oppsamlingsområde: Område med naturlige avgrensninger hvor reinen samles midlertidig under innsamling til flytting, kalvemerking, skilling eller slakt,

Trekkleier: Viktige naturlige trekk mellom beiteområder og forbi passasjer, der reinen trekker av seg selv, enten enkeltvis eller i flokk.

Båt transport: Seilingslinje ved pramming av rein.

Svømmelei: Svømmelinje der reinen vanligvis svømmer over sund, fjorder eller lignende.

Reindriftsvei: Veg som er bygd for bruk under reindrift, f.eks. til reindriftsanlegg. Trenger ikke så høy standard. Også kjørespor.

Bro for reindrift: Bro som er bygd for å kunne kjøre over en elv, vanligvis med 4-hjuling, ved utøvelse av reindrift.

Sperregjerde: Permanent gjerde som sperrer for rein, f.eks. mellom 2 reinbeitedistrikter, for å hindre sammenblanding

Midlertidig sperregjerde: Mobilt sperregjerde som settes opp ved behov.

Fangarm: Ledegjerde ved inndriving av rein.

Beitehage: Et lukket gjerde der reinen samles/oppbevares i påvente av å taes in i et arbeidsgjerde.

Merkegjerde: Gjerdeanlegg hvor det bare foretas merking av rein.

Skille-/opplastningsgjerde: Gjerdeanlegg som brukes til skilling av rein og opplasting av rein for transport til slakteri eller annet sted. Kan være i bruk flere ganger i året.

Kombinert merke-/slaktegjerde: Gjerdeanlegg som brukes både ved merking og slakting av rein.

Feltslakteanlegg: Gjerdeanlegg som brukes ved feltslakting av rein.

Midlertidig arbeidsgjerde: Mobilt arbeidsgjerde som settes opp når det er behov for det.

Oppføring kan skje uten formell tillatelse og gjerdet skal fjernes etter bruk.

Bolig: Bolighus for reindriftsutøvere, enten hovedbolig eller sesongbolig. Vanlig standard.

Gjeterhytte: Hytte som benyttes av de som passer reinflokken og som er oppført i områder hvor reinen befinner seg over lengre tidsperioder.

Mye brukt teltplass: Et sted som man årlig kommer til og hvor man bor en viss tid i telt/lavvo.

Gamme: Et hus med jordvegger.

Naust/lager: Et bygg oppført i forbindelse med gjeterhytte/bolig for oppbevaring.