



**MISSION OF NORWAY TO THE
EUROPEAN UNION**

Enquiries to
A.Tjølsen

Our Date

14.12.01

Your Date

27.06.01

Our Reference

Your Reference

CFS 084.400.008

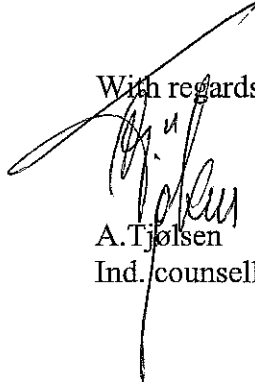
EFTA Surveillance Authority
Rue de Treves 74
1040 Oslo

ENCLOSURE: 1

**LETTER OF FORMAL NOTICE CONCERNING THE ACQUISITION
OF WATERFALLS IN NORWAY**

Referring to your letter dated 27 June 2001 and later contact, please find enclosed the original response dated 28 November 2001 from the Ministry of Petroleum and Energy in Oslo. A copy of this letter was sent you 29 November.

With regards


A. Tjølsen
Ind. counsellor

Arrived EFTA Surveillance Authority Registry
18 -12- 2001
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To :

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DET KONGELIGE
OLJE- OG ENERGIDEPARTEMENT

Ministry of Petroleum and Energy

EFTA Surveillance Authority
Rue de Trèves 74
1040 Brussels
Belgium

Your ref

Our ref

OED 00/2622

EV AT/KrJ

Date

28 NOV. 2001

Letter of formal notice concerning the acquisition of waterfalls in Norway

Dear Mr. Hafstein,

Reference is made to the letter of formal notice of 27 June 2001 from the EFTA Surveillance Authority (ESA) concerning the acquisition of waterfalls in Norway. In its letter, the ESA alleges that Norway has infringed Articles 31 and 40 of the EEA Agreement by maintaining in force the measures laid down in the Act of 14 December 1917 No. 16 (the Industrial Concession Act, hereinafter "the Act") section 2, item 17, and section 4.

The Government of Norway respectfully submits that it does not agree with the opinions expressed by the ESA in its letter of formal notice. This is based firstly on the fact that the management and control of natural resources falls outside the scope of the EEA agreement, and secondly on the fact that the system of property ownership with respect to waterfalls in Norway is covered by Article 125 of the EEA Agreement, and consequently takes precedence over conflicting provisions of the EEA Agreement.

1. FACTUAL AND LEGISLATIVE BACKGROUND

1.1. Objectives of the national legislation. Historical overview

The Norwegian electricity supply, unlike most other countries, is entirely based on exploitation of one vital natural resource – the waterfalls. In other countries, the supply

of electric power is mainly based on thermal power plants, which have a limited lifetime. At the same time thermal power plants are more flexible, in the sense that new capacity can be added and new plants can be built anywhere.

Hydroelectric power, on the other hand, is based on a limited but renewable resource. Once built, such plants are practically speaking there forever. Production capacity is limited by the height of the waterfalls, water flow and precipitation. Production therefore varies considerably from year to year. The need for management and control over the waterfalls is therefore vital, both to ensure the future electricity supplies in Norway and to ensure that socio-economic decisions on the use of waterfalls achieve an optimal balance between a number of often conflicting interests. It is therefore important for the Norwegian Government to have the necessary means to effectuate such management and control. Norwegian legislation on natural resources has enabled the Government to decide which waterfalls may be developed for hydropower production and to develop the hydropower sector in a sound and responsible manner.

To obtain the public control needed over the waterfalls, an element of public ownership is necessary. Public ownership, whether direct or indirect, presupposes that the proprietary rights to the waterfalls are exercised in accordance with the interest of the community as a whole, i.e. publicly owned utilities manage the waterfalls on behalf of the Norwegian State. In the case of private utilities, the condition of reversion is necessary to give the Norwegian Government an opportunity to evaluate the exploitation of a waterfall after the expiry of the concession period. In this context, a period of 60 years cannot be said to be unreasonable.

Historically, the position taken by the Storting (Norwegian national assembly) when it passed the Act was that developed waterfalls should belong to the State and not to private companies or individuals at the end of the concession period. The system was therefore designed to achieve State ownership after 60 years while at the same time providing the private sector with the necessary incentives to develop the natural resources in the interests of society as a whole.

Similarly, the importance for the Norwegian State of ownership to the national natural resources is also reflected by the fact that the Norwegian State in 1963 declared that the property rights to the petroleum resources are vested in the State. This declaration was made in accordance with the 1958 Geneva Convention, before the commencement of any commercial petroleum activities. This declaration of ownership is also reflected in the Petroleum Act (Act of 29 November 1996 No. 72, section 1-1).

1.2. Main elements of the Norwegian system of natural resource management applicable to waterfalls

- Concessions to acquire waterfalls

The provisions requiring concessions when entities other than the State acquire waterfalls exceeding a certain size deal with the control over the use and exploitation of the natural resources. A concession is granted for the exploitation of a waterfall as such, and does not regulate the way the electricity developed from the waterfalls is traded. Concessions apply for a limited period of time, cf. section 2, fourth paragraph, item 17, of the Act. The objective of the provision is clearly to give the authorities control over the management and exploitation of natural resources.

- Mandatory return to the State after 60 years

Section 2, fourth paragraph, item 17, of the Act concerns the right of reversion, i.e. the obligation to return the licensed waterfalls and installations belonging to the waterfalls to the State without compensation, hereinafter referred to as “reversion”.

Ownership of a waterfall gives the State the utmost control over it. After acquiring the proprietary rights to a waterfall, the State may even decide that it shall no longer be exploited for hydropower production. The right of reversion also gives the State the opportunity to re-allocate ownership of waterfalls in accordance with the public interest. Reversion clearly ensures control over the use and exploitation of waterfalls, which is the objective of the provision.

- Exemption from the reversion requirement for public entities

Section 4 of the Act regulates the concessions to acquire waterfalls granted to entities that are political subdivisions of the Norwegian State (municipalities and counties), state-owned enterprises, or companies in which such political subdivisions control at least 2/3 of the capital and votes.

Entities covered by section 4 are not subject to the criterion of reversion after 60 years, which is logical given the fact that they are already owned or managed by the State.

2. ASSESSMENT

2.1. Introduction

Based on the factual and legislative background, as developed further below, it is the opinion of the Norwegian Government that the Norwegian legislation on the acquisition of waterfalls does not infringe the EEA Agreement, for the following reasons:

First, the management of natural resources falls outside the scope of the EEA Agreement.

Second, the system of property ownership with respect to waterfalls in Norway is in any event covered by Article 125 of the EEA Agreement, and consequently takes precedence over conflicting provisions of the EEA Agreement.

2.2. Management of natural resources falls outside the scope of the EEA Agreement

2.2.1. Inapplicability of the EEA Agreement to natural resource management in general

The Norwegian Government would like at the outset to stress that the management and control of national resources lie within a State's full and permanent sovereignty, to be developed at its discretion. This is widely recognised in public international law. We refer in this respect to the UN Charter of Economic Rights and Duties of States¹, Article 2 of which states that:

“Every state has and shall freely exercise full permanent sovereignty... including possession, use and disposal, over all its wealth, natural resources and economic activities”.

This has also been stressed by the United Nations general assembly on a number of occasions, see also UN Resolution on Permanent Sovereignty over Natural Resources². Paragraph 1 of this resolution states that:

“The rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”

The EEA Agreement was never intended to interfere with these principles of public international law, quite the contrary. The management and control of natural resources is not part of the EEA Agreement, and national legislative measures for the management of such resources thus fall outside the scope of the Agreement. This basic premise was the common understanding of the Contracting Parties to the EEA Agreement, and has never been contested by any of the Contracting Parties. This is reflected in numerous Norwegian parliamentary reports, for example Proposition No.

¹ G.A.- Res 3281 (XXIX) 1975

² G.A. Res. 1803 (XVII) G.A.O.R 17th Sess. 1962 paras 1,3,8

100 (1991-92) to the Storting concerning the consent of Stortinget to the ratification of the agreement.

St.prp. nr. 100 (1991-92)

p. 166 second column:

"Resource management includes all matters of importance for the exploitation of our hydropower potential, the design of regulation and production installations, the alignment of power lines and the various conditions attached to such hydropower developments. Resource management is a national responsibility assigned to the State. This will not be affected by the EEA Agreement.

The legislation on concessions for waterfalls, together with the Planning and Building Act, covers both resource management in the widest sense and provisions in concessions connected to specific acquisitions of proprietary rights or lease of waterfalls, power plants etc.

The main features of the provisions relating to concessions for waterfalls can be maintained within the scope of the EEA Agreement. The State will maintain its pre-emption right in connection with the acquisition of waterfalls. Acquisition of proprietary rights or rights of use to waterfalls exceeding a certain size will require a concession. A concession will also be required whenever such rights are being transferred. Neither will the right of reversion to the State be affected by the EEA Agreement."

p. 200 second column:

"The part of the legislation on concession for waterfalls that deals with resource management is not affected by the EEA Agreement.

The strong public ownership in the hydropower sector is consistent with the principles of the EEA Agreement. The same applies to the pre-emption right of the state in connection with the acquisition of waterfalls, reversion to the state when concessions expire, and the provisions concerning the pre-emption right of the state and reversion in connection with the transfer of shares.

This means that the main features of the legislation concerning concession for waterfalls can be maintained after the entry into force of the EEA Agreement." (underlined here)

(our translations)³

This view is also expressed in Proposition No. 82 (1991-92) to the Storting, which deals with the amendments to the Act of 14 December 1917 No. 16 that were found to be necessary as a result of Norway entering into the EEA Agreement.

³ The original Norwegian text can be forwarded, if not already in the possession of the ESA.

Ot.prp. nr. 82 (1991-92)

p. 4 second column:

"Resource management is a national matter assigned to public authorities. This will not be affected by the EEA Agreement."

"The main features of the provisions relating to concessions for waterfalls can be maintained within the scope of the EEA Agreement. The State will maintain its pre-emption right in connection with the acquisition of waterfalls. Acquisition of proprietary rights or rights of use to waterfalls exceeding a certain size will require a concession. A concession will also be required whenever such rights are being transferred. Neither will the right of reversion to the State be affected by the EEA Agreement."

(Our translation)⁴

In Recommendation O. No. 17 (1992-93), p. 7, second column, the Standing Committee on Energy and Industry wrote:

"The majority [of the Committee] points to the fact that public ownership within the power supply is fully consistent with the principles of the EEA Agreement. The majority emphasises that the main features of the provisions concerning concessions for waterfalls can be maintained, the State will still have pre-emption rights relating to acquisition of proprietary rights to waterfalls, and the provisions in the legislation for concessions concerning the right of reversion/pre-emption rights will remain in force."
(underlined here)

(Our translation)⁴

Article 1(1) of the EEA Agreement sets out the aims of the Agreement, which are "(...) to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties (...)". Article 1(2) sets out how these objectives are to be achieved, primarily through the four freedoms (free movement of persons, goods, services and capital) and the freedom of establishment.

The management of natural resources is not among these means. Admittedly management decisions may have an economic impact, but this does not mean that decisions on natural resource management must be scrutinised in the light of the four freedoms under the EEA Agreement.

⁴ The original Norwegian text can be forwarded, if not already in the possession of the ESA.

2.2.2. The contested measures are an integral part of a natural resource management system

As stated in point 1.1. above, the Norwegian electricity supply is entirely based on exploitation of a vital and limited natural resource – the waterfalls. The management and control of waterfalls is therefore essential to future electricity supplies in Norway.

Norwegian policy with respect to the management of its waterfall resources is based on the following principles, none of which are regulated by the EEA Agreement:

- Further cautious development of hydropower capacity
- Exploitation of water resources for other purposes than hydropower production
- Protection of waterfalls from hydropower development and other works
- State management and control
- Public ownership

Norwegian natural resource management with respect to waterfalls involves a number of legislative tools:

- Concessions to acquire waterfalls
- Concessions to regulate the watercourses for hydropower production
- Mandatory reversion of waterfalls to the State after 60 years
- Rules pertaining to different kinds of works in rivers (flood control, embankments etc.)

Decisions made on the basis of these tools can be divided into two categories:

- a) Decisions relating to the actual use of the waterfall
- b) Decisions relating to the acquisition and ownership of waterfalls

The latter category is the one contested by the ESA. However, the two categories must be seen as part of an integrated policy to ensure that waterfalls are developed and used for the benefit of society as a whole. Any restriction that this may entail on private ownership rights cannot be dissociated from the overriding resource management objectives.

As these measures are part of a natural resource management policy, designed in particular to ensure State ownership and control in furtherance of Norway's sovereign rights under international law, they fall outside the scope of the EEA Agreement.

2.3. The system of property ownership with respect to waterfalls in Norway is covered by Article 125 of the EEA Agreement, and consequently takes precedence over conflicting provisions of the EEA Agreement

In Norway, all natural resources of strategic importance belong to or are controlled by the State. Norwegian policy since World War I has been that rights to develop or use such resources may be accorded both to publicly owned entities and to private companies under a system of concessions.

The state ownership to the petroleum resources on the continental shelf is explicitly stated in the Petroleum Act of 29 November 1996 No. 72 Section 1-1. The right to use waterfalls on private property was considered to be part of private rights, which could be bought on the open market. The rapid and uncontrolled development of waterfalls led to the Act of 1917, which prescribes that the rights to develop waterfalls are limited for all others than the State - all other buyers need a concession. A condition in the concessions is the mandatory reversion to the State of all waterfalls without compensation after 60 years.

Public ownership of natural resources, particularly waterfalls, has been considered to be an important way of ensuring that they are developed and used for the benefit of the population as a whole. It is of no relevance here whether one agrees or disagrees with the basic policy underlying the legislation.

Public ownership and reversion to the State is in accordance with the EEA Agreement. This is clear from Article 125 and the drafting history of the corresponding provision of the EC Treaty (Article 222, now – after renumbering – article 295 EC), which was meant to allow for the complete nationalisation of the industry of a member country without infringing the EEC Treaty.

According to Article 125 EEA, the Agreement shall "in no way prejudice the rules of the Contracting Parties governing the system of property ownership".

As explained above, the Norwegian system of waterfall management is based on public ownership. How the State seeks to manage its own property is thus clearly unaffected by the EEA Agreement. All privately owned concessions are time-limited, ultimately leading to the reversion of the installations to the State. The State has no need to require reversion of the publicly owned waterfalls. This is why the condition of reversion only applies to non-public concessionaires.

In the opinion of the Norwegian Government, both the existence and the operation of the mandatory reversion to the State is linked to our national system of property ownership. Consequently, other provisions of the EEA Agreement cannot prejudice these rights.

3. CONCLUSION

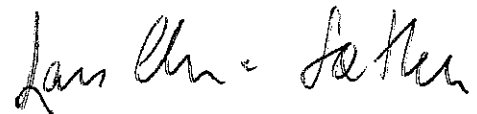
The Norwegian Government submits that the Act of 14 December 1917 No. 16, which secures the State management and control over the exploitation of waterfalls, falls outside the scope of the EEA Agreement.

For the Norwegian Minister of Petroleum and Energy

Yours sincerely,



P. H. Høisveen
Director General



Lars Christian Sæther
Deputy Director General