

«Norway's commons: Equal Areas - different governance»

Main points of the book

- The title of the forthcoming book by me and Øyvind, as known for some of you which have read the draft
- The aim of the book is to describe, discuss and try to explain why the range resources in Norway are managed as differently as they are.
- The book is written with "our children" in mind, i.e. those who will continue to research this important and interesting area of law when we (hopefully, as some say) retires (if retirement is possible in this job?)

Briefly about the book's main themes

- The book reviews the historical background to, and the status of, the various categories of and regulations of state-owned, former state-owned,

and state-managed outback in Norway with a focus on conditions in the north

- The different ownership conditions and management arrangements in different parts of the country and the historical and legal history background for them

- More about the different resources in question, and the potential that lies in use and development

- The Sami dimension

- Changed use of open land, including industrial interventions
- Financial management and the disposition of profits at the largest players – Statskog and FeFo

The book's main conclusion

- Open-field users in Northern Norway have less influence over the open-field resources on state land in Nordland and Troms and on the Finnmark property than farmers in Southern Norway have in the public domain, which is the dominant state land category in Southern Norway.

- We believe that with this as a premise, that it can be discussed whether the time is not ripe for changes and not least the reversal and restoration of the mistakes of the past when it comes to the legal conditions and the management of the rangelands in the three northernmost counties in Norway in the future.

What I'm going to talk about next

- To say something about all aspects of this topic that are up for consideration in our book is impossible in this short time
- I will therefore focus on the background for the different management of the areas in the three northernmost counties (currently two)
- I will do this by looking at the legal historical development, which has laid the premises for today's arrangements, and openly ask the question whether there are mistakes, misunderstandings, ambiguities and coincidences that form the foundation for the state-led management of state land in Nordland and Troms, and if this is the case if this is a suitable foundation on which to build future administration, regardless of how satisfied

various actors are with the current arrangement. The questions relating to the future of Finnmark carry with them particularly great uncertainties due to the ongoing legal mapping and legal clarification processes.

- My hope is that this will not be a boring history lesson, but also say as much about the present and give an indication of what may happen in the future

The legal history of the commons in Norway

- Southern Norway, overview
- The Gula- and Frostating Acts, ML 1274 and NL 1604, NL 1687 3-12-1:
- Then Alminding shall be, as it has been of old, both the Inner as the Outer
- The Mountain Acts of 1920 and 1975, for state commons, plus the Forest Commons Act of 1992
- The Village Commons Act from 1992
- Plus a number of individual provisions of a "common estate nature" all around

Reading tips: Thor Falkanger, Law of the Commons (2009)

- In a special position is a non-uniform group of land/property estates/private estates (as well as some purchased state properties (Borregårdseiendomene, Meråker Bruk)
- In northern Norway, the above-mentioned legislation does not apply in its main features, because, to put it bluntly, there are no commons there

- South Norway, cont

- Here, the development of law has been more "active" than in Northern Norway already from the late Middle Ages and modern times (1450 Renaissance - 1789 French Revolution) due to a larger population and better conditions for agriculture
- The king (and the church) were the great property managers of the Middle Ages, but it is not always correct to think of the royal power as the "owner" of land seen from today's eyes
- The king managed both property through his right of supremacy as ruler, and partly as "owner" of crown estates

- Managerial and owner roles are already mixed from these early times
- Asmund Schiefloe, who wrote several presentations on the legal history of commons law in the 1950s and 1960s, concluded that the king's right in the 17th and 18th centuries "was not a property right, but only a right of taxation according to the current constitutional doctrine"
- The distinction between “upper” and “lower” property rights is blurred after the monopoly kingdom of the 16th and 17th yearhundreds is vacated, and there is no longer a clear distinction between management and property rights
- Sjur Brækhus and Axel Hærem summarize this development by saying that the right to superior property, with the thinking of natural law, developed into "almost a term for the state's general sovereignty, its authority to impose taxes and to make other interventions in property rights, e.g. by giving laws". But the power of the word was great, "and it was not easy to free oneself from the notion that 'superior property rights' had something to do with property right in our modern meaning of the concept

- Ever since the Middle Ages, the King has assumed the right to build away land for clearing purposes, e.g. in the commons. This was expressed in the Norwegian Act of 1687, which gave the King the right to sell off "Plads i Almindingen" for clearing and to take "Leje og Leding" when the farm was cleared (NL 3-12-4 and 3-12-8)
- Certain areas in southern Norway were sold by the king to village associations, i.e. those entitled to use them, and in this way the village commons arose
- The commons that were not sold to the villagers in southern Norway were called royal commons. As the king's power weakened and the modern state emerged, the areas became known as state commons. The first Mountain Act, regulatory provisions for the state commons, was granted in 1920
- Southern Norway in summary:
- Rt. 1914 p. 35 "Hadeland" I, clarifies the meaning of common law in southern Norway:
- "the public right after the historical development is to be regarded as an agricultural economic institute, which aims to support agriculture by

allowing it access to obtain certain supplies necessary for farming from the public" (Rt. 1914 p. 35 on p. 37).

- The distinction between rural commons and state commons is in principle only valid in southern and central Norway
- In addition, there are large state properties that are not state commons
- These go by names such as private commons, large rural communities, private estates or use. Meråker Bruk, which was recently decided to be bought by the state for eighty million, is the latest example. The farmers in this area fought a year-long battle against the landowner for common rights
- Will the status of this property change as a result of the purchase?

• Nord-Trøndelag as the "frontline" of the areas included in the state commons area

- Nord-Trøndelag is included in the southern Norwegian state commons area by Storting decision in 1926, with certain reservations for the right to logging

- Nord-Trøndelag:
- The "Bruås case" from Rt. 1935 p. 836 is a matter of principle from the "supreme court to adjudicate the cases that have been raised regarding the common people's right to harvest in the state's forests in Nord-Trøndelag". The case concerned the rural people's right of logging in the state's commons in Bruås and Raudå, Nord-Trøndelag
- NL 3-12-6:
- "Alminding's forest must be used by everyone who lives there, as it has existed for ages, as much as is needed for each firewood, building timber and farm use..."
- The Bruås case", continued.
- As in Northern Norway, in Northern Trøndelag logging occurred without expulsion, but the majority somewhat surprisingly points to the fact that in a criminal case from Verran from 1862 it was considered that the farmers' right to logging was so strong that logging without expulsion (public permission) was not judged as theft.
- Justice Lasson, who voted last, relied on an "rentekammer" (Denmark-Norways administration in Copenhagen) description which

said that "practice" was decisive, and in Nord-Trøndelag the "practice" was that logging without permission was not judged as theft, as was done just across the county border in Nordland.

- The "Bruås case" continued:
- "Regarding the question of whether the plaintiffs for their farms can be considered to belong to village groups that are entitled to the right of occupancy in Bruås and Raudå, I essentially agree with what the subordinate right i.a. on the basis of investigations at the scene of the fire have been arrived at. **When the state, through its dispositions over the long course of time, has contributed to the resulting uncertainty, there is hardly any other way to go but to examine what the local conditions naturally seem to indicate. It must be prevented as much as possible that the long-term obstacle to the exercise of rights in the state commons, which in my opinion was due to a misunderstanding on the part of the administration, should lead to a loss of rights.**"
- Nord-Trøndelag, "Hvaassaken", Rt. 1940 p. 407

- A number of smaller farms in Verdal were considered eligible for harvesting in the Hoås state public domain according to NL 3-12-6
- Here the Supreme Court again clearly distances itself from the state's incorrect legal opinions, and says that in line with the legal opinion established with the "Bruås case" the legal situation must be restored in favor of the local population:
- The Hoaas case continued:
- "When, on the basis of all the information in the case, one must take a stand on the claimants' claim, **as far as I understand it must be correct to relax the requirement for the strength of the evidence a claimant in similar cases is generally obliged to provide.** The restrictions based on a mistaken understanding of the law book's 3-12-6, which the administration implemented in the years before and after the turn of the last century, and especially those to which the Trøndelag villages were exposed, when the public commission of 1861 had submitted its report, **these restrictions should not harm the villagers.**" (Judgment, p. 415)
- Nord-Trøndelag in a nutshell

- Application of the proof requirements in favor of the local population
- Responsiveness and sensitivity to "local conditions" and practices
- Willingness to restore and repair government errors
- In later practice, the "Svartskog case" is the most comparable and probably the only example of such an application of the law, alongside the introduction of the burden of proof rule in § 2 of the then Reindeer Management Act in the wake of the "Korssjøfjell case" at the end of the 1980's
- **Nordland and Troms counties**
- In the time after the introduction of the autocratic monarchy in Denmark-Norway in 1660, King Fredrik III sold large areas of land to strengthen the state's finances as a result of expenses incurred by the many wars on the continent. The king handed over the entire fief of Nordland and Troms to Joachim Irgens. In value, it was equivalent to 100,000 riksdaler or a barrel of gold. To this day, the transfer still has significance for the ownership and management of land in Nordland and Troms

- **Fredrik III – Would you buy a used car from this man?**



- Northern Norway has always been the most sparsely populated part of Norway. The climate is not favorable for agriculture, and it is precisely agriculture that is the pivot of public law.
- Nevertheless, there is no doubt that the farmers in Nordland, Troms and Finnmark have used the forest and mountain areas for their needs in

approximately the same way as the southern Norwegian farmers

- In addition, the Sami dimension is present in a different way and to a different extent than further south, something that was thematized and investigated by the re-appointed Sami rights committee (SRU II) in NOU 2007:13 Den nye Samiretten, which is yet another study that has found rest in the state's archives, and in the same breath with archive dust, the Coastal Fisheries Law Committee's report NOU 2008:5 The right to fish in the sea off Finnmark, can be mentioned
- Legal historian Absalon Taranger concluded in his "Dissertation of the legal status of the Haalogaland commons" from 1892, that the farmers in Nordland have been robbed of their common rights on the basis of erroneous government practice:
- "However justified the control may be from a state economic and forestry point of view, it has here, however, led to an illegal situation, as it has deprived the common people of an ancient and exceedingly important right, namely access to obtain forest from the public forests free of charge for farm purposes."

- Despite this, Taranger believed that this was now of little concern, because this erroneous practice was now legitimized through the fact that it had been allowed to stand unchallenged for over 100 years
- In the "Veikvatn case" in Rt. 1918 p. 454, where the Supreme Court established with the support of three criminal judgments from the middle of the 19th century that the common people had not logged in the Veikvatnet common in Folda in Nordland. This case has set a precedent for the authorities' point of view that the common people have not had right of way on state land in Nordland and Troms.
- Taranger's resignation to this long-standing erroneous practice is used as part of the reasoning of the majority, as an argument that the confiscation of the right of action was now a "fixed legal relationship", which was now not willing to be reversed, based on this formal legal justification
- **Taranger, Tank and Robberstad**
- Absalon Taranger and Gunnar Tank were both assistants in the National Archives and shared the interpretation of the royal deed from Fredrik III

to Jocum Irgens of 1666, where they believed that the sale by the king must have occurred with the attachment of the common people's common rights.

- Taranger and Tank's interpretation is countered by Magnus Robberstad in his report "Om allmenning og høgfjell i Nordland og Troms", appendix to the Mountain Law Committee of 1965's recommendation of 1969.
- Robberstad believed that the deed had to be interpreted in the light of "what they thought about it at the time", but realizes that providing evidence for what the relationship was before 1666 was "a hopeless task".
- In summary, Robberstad's consideration and the large amount of material presented to the mountain law committee, which spreads in all directions, does not provide any clarification whatsoever, apart from the fact that the question probably needs to be decided concretely and locally, as Taranger originally recommended and as was done in the cases about the right to work in the North Trøndelag
- The questions about public rights on state land are taken up again in the so-called "Northern

Norway Committee" established in 1971, which was replaced by the Special Commission for Nordland and Troms in 1984

- In the Commission's partial verdict for the Skjerstad field (Case 3/1987), it is shown that the notion that state land in Nordland and Troms is not state commons is based on misunderstandings and incorrect management practices. **It is concluded that the state land in the mentioned counties must still be state commons as long as they have not lost their character of being so via sale or other circumstances that change the law (p. 86)**, but the question of "... what designation the land is given is however irrelevant for the question which the commission is to decide" (p. 8)
- The Commission's decision was appealed to the Supreme Court, which cemented the legal position established by the "Veikvatn judgment"
- "More than 70 years have passed since the Veikvatnet judgment. Whatever the case may be with the original public right, so much time has now passed since the state actually established itself as the common owner of the forest, that this relationship has long since become entrenched. It

concerns a period of at least 150 and perhaps 200 years. **It can be asked whether it is reasonable that farmers in Nordland should have a weaker position when it comes to utilization of the state's unmatriculated land than farmers elsewhere in the country. If the established condition is to be changed, however, this must be done by a change in the law or by measures from the state as landowner" (Rt. 1991 p. 1311 on p. 1321).**

- It must be added that the state did not dispute that the farmers had grazing rights on state land
- **Separately about Troms county**
- Mainly the same considerations as for Nordland used as a basis in the practice of the Norwegian Foreign Affairs Commission
- Nevertheless, a mixed picture due to the "royal charters" in the 17th century and the "Northern Norway Committee's inconsistent practice
- In the "Stormheim case", the Northern Norway committee gave up the state's claim for property rights in the Tromsø area - the Supreme Court then interpreted the Danish king's deed and later transfers to mean that, according to its wording, and today's landowners in the area, were granted

full ownership rights over all land from the sea to the highest mountain peak - in other words, private property rights over areas that would have been judged as state commons in southern Norway

- Has led to absurdities such as a group of private individuals trying to sell Tromsø's city mountain Tromsdalstinden, which is also a Sami sacred mountain, on the open property market
- With the re-appointed Sami rights committee's report "The new Sami law" from 2007, the questions regarding the commons were taken up again
- In the committee's proposal for the Hålogaland Act, a solution with models from both the Mountain Act and the Finnmark Act was proposed
- The most important must be said to be the proposal that state land should be managed by local outback boards
- The bill has been shelved ever since
- The mountain law committee's work, which was completed with NOU 2018:11 The new mountain law was, according to its mandate, limited to southern and central Norway

- Nordland and Troms in summary:
- So far, no willingness has been shown for clarification either from the state as legislator or landowner, as the Supreme Court pointed out in 1991
- The Storting made the following request resolution on 8 June 2017: "The Storting asks the government to investigate whether to give the mountain law the same application in Nordland and Troms as south of the Nordland border. The investigation must be based on the fact that Statskog should still retain responsibility for the forest resources."
- The mountain law committee's chairman has stated publicly that the new mountain law fits well in Nordland and Troms
- Patience with the state's more than thirty-year "work" with the case has long since ended with the two large outlying municipalities Bardu and Beiarn, who have sued the state because the municipalities do not have the same management and discretion over the state public land in these municipalities. The case was rejected in the first instance, but has been appealed by the municipalities.

- **The conditions in Finnmark**
- The border treaty of 1751 a historical landmark
- The state's ownership of Finnmark starts with the land resolution of 1775, where squatters were able to formalize their ownership of homes and meadows they had taken possession of and cleared.
- The subsequent laws on land disposal (of 1863 and 1902) are based on the fact that the state believed it owned the unsold land in "Finnmark's land districts", where the aim was to sell land to establish a permanent (and from 1902 Norwegian) agricultural population.
- This was also the basis for the last act from 1965, where the land clearing person had an option to acquire land that the person concerned had cleared and cultivated, see repealed regulation on sale and attachment § 2
- The concept "the state's unmatriculated land" obviously had a colonial feel to it, and was sharply criticized by the legal historian Gudmund Sandvik. - "The state's unmatriculated land in Finnmark - an outdated doctrine". Sandvik later became a member of the "law group" in the Sami Court Committee which was behind the

devastating report in NOU 1993:34, where he distanced himself from his earlier criticism.

- The state's unmatriculated land in Finnmark comprised at most 96% of an area larger than Denmark
- After the Sami Rights Committee I was set up in 1980, countless investigations followed. In one of the most important NOU 1993:34 Right to and management of land and water in Finnmark, the country's leading district court lawyers concluded that the state owned the land because this was an opinion that had "stuck".
- The Samirettsutvalget I's work culminated in the compromises in the Finnmark Act of 2005, with promises of legal mapping and legal clarification through the Finnmark Commission and the Umarks Court. At the same time, the title to the state's unmatriculated land in Finnmark was transferred to Finnmarkseiendommen (FeFo), governed by three representatives from the Sami Parliament and three from the county municipality. Due to the composition and the leadership alternating between the two blocs, it has proved difficult to make final decisions in matters that are dispu

- In recent research, Steinar Pedersen and Øyvind Ravna have questioned the state's original ownership position
- Pedersen
- In several works by Steinar Pedersen, the question of the justification of the king's/state's claim to have owned Finnmark from the earliest times is repeated and broadcast
- Pedersen's conclusion that the state "annexed" Finnmark in 1848
- The state clearly states here for the first time in a parliamentary resolution that it considers itself to be the private owner of Finnmark from ancient times
- The sparring between Pedersen and the FeFo director on this issue is well taken care of in the latter's archive:
https://www.fefo.no/_f/p1/ic6510b21-b6a7-49c4-b643-fa244a8c9778/steinar-pedersenj-o61120-kommentarer-to-the-fefo-director-s-hearing-draft-about-finnmar266017.pdf
- Ravna
- Øyvind Ravna has pointed out that in parts of Western Finnmark there has been a property arrangement modeled after the Nordland and

Troms system, with extensive ownership rights for the local population which has since been re-evaluated so that the property structures have been harmonized with the then "unmatriculated state land model"

- Øyvind Ravna has also claimed in one of his latest works that in the first land expulsion resolution and the subsequent land sale legislation, there was no distribution of land from a good 'pater familias' to the Finnmarkings, but that it was instead a form of clarification and clarification of unclear and informal ownership
- Finnmark in summary:
- The Finnmark Act, the legal mapping and legal clarification process, as well as the Supreme Court's handling of the cases that have been tried in its wake, have not fulfilled many Finnmarking's expectations regarding the recognition of rights
- In this, there has been a polarization between different groups which has had a divisive effect, and in the Finnmark Commission's investigation of the Karasjok field, the focus has been more on group rights for geographically limited circles

rather than rights based on pure ethnic/cultural criteria

- The cases that have been up until now have rejected in whole or in part the ownership and management rights of the local population in a number of places
- In some of the cases, a "divide and rule argument" has been used. No group has had such a dominant use that it has gained decisive importance, combined with the fact that past government actions have been used as an argument for curtailing local discretion. A typical example is the "Stjernøya case"
- Finnmark summarized and concluded
- It is a paradox that local management of many votes is rejected as relevant for Finnmark when such arrangements work well in southern Norway. Do the Finnmarkings, and the Sami in particular, lack the "ability to live" in their own house?
- The legal approach from the "Svartskogsaken" based on recognition and repair, as well as what has actually resulted from it - a village commons model - has been followed up to a modest extent in the Finnmark processes

- The "Nesseby case" triggered a lot of frustration when the Supreme Court rejected that the local population had the exclusive right to manage the disputed resource area
- In the aftermath of the judgment in the Supreme Court, a compromise has emerged on the management of the area between FeFo and the local population - the "Nesseby model"
- The "Karasjok case" - where the local population was deemed by the Finnmark Commission to have collective property and management rights - is now due for court proceedings in the Foreign Affairs Court, but will probably first receive its final judgment in Norway's Supreme Court. The case will perhaps appear for posterity as the crescendo in the Sami struggle for recognition of legitimate use of land for a long time - a principle that is undisputed and of course in all majority populations legal cultures
- If the majority of Karasjok is found to be collectively owned by the local population, it raises new questions about how a management model adapted to the local conditions should be designed - precisely as Taranger and Tank believed in their time to be the best approach.

- Village commons model, co-ownership model, siida model, Nesseby model, "Finnmarkseiendom in Finnmarkseiendommen" Karasjok property as an independent legal subject with special legal authority or combinations between these are conceivable solutions. I dare not say anything more concrete - it would be like selling the skin of a bear that has been shot without a felling permit.
- After Karasjok, several areas remain in Inner Finnmark for which the Karasjok case can set a precedent
- In the end, a question will probably arise as to whether the end product of the legal mapping process will be, or necessitate changes to, the current state of affairs.
- It was probably taken the wrong way in the crossroads where that led to a compromise arrangement for the whole of Finnmark, although it is easy to sit and judge afterwards
- We live in interesting times anyway!

THANK YOU FOR YOUR ATTENTION AND PATIENCE!