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RESEARCH ARTICLE / ÉTUDE ORIGINALE

Claims-Based Co-management in Norway's Arctic? Examining Sami Land Governance as a Case of Treaty Federalism

Aaron John Spitzer* and Per Selle

Department of Comparative Politics, University of Bergen, 15 Christiesgate, Bergen, Norway, 5007
*Corresponding author. Email: aaron.spitzer@uib.no

Abstract

Around the world, Indigenous peoples seek increased control of traditional lands. In northern Canada, such control may be afforded by claims-based co-management regimes. Such regimes are a common, and sometimes celebrated, component of treaty federalism. In Norway, Europe's only Indigenous people, the Sami, now participate in a land-management regime: the Finnmark Estate (FeFo). We explore whether FeFo is, in effect, claims-based co-management and whether Sami thus enjoy the sort of guaranteed shared rule envisioned in treaty federalism. We compare FeFo to Canadian co-management in three dimensions: novelty, independence and Indigenous influence. We conclude FeFo is indeed claims-based co-management. But FeFo falls short of the treaty-federal ideal, for reasons possibly including bureaucratic capture, fragile legitimacy, conflicting interpretations of the Sami interest and conflicting views on the merits of shared rule.

Résumé

Partout dans le monde, les peuples autochtones aspirent à exercer un contrôle accru sur les terres ancestrales. Dans le Nord du Canada, ce contrôle peut être assuré par des régimes de cogestion « fondés sur les revendications ». De tels régimes sont une composante courante, et parfois célébrée, du « fédéralisme des traités ». En Norvège, le seul peuple autochtone d'Europe, les Sami participe maintenant à un régime de gestion des terres, le Finnmark Estate (FeFo). Nous examinons si le FeFo est en fait une cogestion « fondée sur les revendications » et si les Samis jouissent ainsi de la sorte de règle partagée garantie envisagée dans le « fédéralisme des traités ». Nous comparons le FeFo à la cogestion canadienne en trois dimensions : nouveauté, indépendance et influence autochtone. Nous concluons que le FeFo est en effet une co-gestion « fondée sur les revendications ». Mais, pour des raisons telles que la capture bureaucratique, une légitimité fragile, les interprétations contradictoires des intérêts des Samis et les opinions contradictoires sur les mérites d'une règle partagée, le FeFo n'atteint pas l'idéal fédéral du traité.

Keywords: Co-management; Sami; Finnmark Estate; treaty federalism; land claims

1. Indigenous Land Co-management in Canada and Norway

In 2005, Europe's only Indigenous people won back some control of their land. In lieu of outright authority over their long-colonized territories, the Sami of Norway's Finnmark County are now partners in a joint environmental-governance regime, the Finnmark Estate, or FeFo. In a jurisdiction larger than Denmark, and one in which traditional livelihoods such as reindeer herding clash with modern development, the Sami—and the larger ethnic-Norwegian population living among them—exercise co-management over the land and its resources.

According to backers of FeFo, the regime may finally allow Sami to become *herrer i eget hus*—"masters in their own house" (Eira, 2013). The Finnmark County Council, the majority of whose constituents are non-Sami, supported FeFo's creation. But grassroots opposition was fierce: a substantial proportion of Finnmarkers joined a petition campaign condemning FeFo as ethnically biased. Even many Sami question FeFo, some believing it is too divisive, and others feeling it fails to protect Indigenous rights.

Such debates are not unique to Norway. Around the world, contests arise wherever Indigenous peoples press for more say over their cultural, social and economic well-being, especially over traditional territories and resources. Usually their demand is not for full sovereignty but for a new relationship with the colonizing state, facilitating internal self-determination. Ideally, such a relationship might provide Indigenous peoples with guaranteed, substantive self-rule over matters where their interests are exclusive; where Indigenous interests overlap with those of the non-Indigenous majority, the relationship might provide shared rule, in concert with central or regional authorities.

In Canada, this ideal-type relationship has been conceptualized as "treaty federalism" (Abele and Prince, 2006; Ladner, 2003; Youngblood Henderson, 1994). Federalism, of course, aims to reconcile self-rule and shared rule (Elazar, 1987), binding together—and constitutionalizing the authority of—central and subunit governments. Treaty federalism frames Canada as binding not merely the various provinces, nor simply francophones and anglophones, but settlers and Indigenous peoples. Proponents of treaty federalism maintain this union was forged and solemnized by Canada's historic treaties. Moreover, they suggest it must today be honoured and improved, in part through new "modern treaties": land-claims and self-government agreements that recognize Indigenous title over portions of Indigenous peoples' historic territories and that enhance their control of their polities and land.

Yet as Canada's fraught modern treaty-making experience reveals, Indigenous interests in land are seldom exclusive. Unlike matters such as language and spirituality, which can be governed by Indigenous peoples with little effect on non-Indigenous Canadians, Indigenous interests in land often overlap and conflict with those of the majority. A common solution to this problem is shared rule.

Indeed, Canada's modern treaties have followed a pattern: Indigenous groups receive secure title to a limited portion of their traditional lands, while the rest are formally ceded to Canada in exchange for cash settlements, defined benefits and enshrined powers, including Indigenous co-management. Co-management has particularly flourished in northern Canada, where today it is so common as to be the norm (White, 2018). There, approximately 30 such regimes provide

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Indigenous groups with constitutionally backstopped co-management powers over more than four million square kilometres of territory (Natcher, 2013).

Some of northern Canada's claims-based co-management regimes perform relatively simple roles, such as the Laberge Renewable Resources Council's management of fish and wildlife in a portion of the south-central Yukon. Others shoulder dizzyingly complex duties, spanning vast jurisdictions. For example, the Nunavut Impact Review Board assesses the potential effects of proposed development, from railroads to uranium mines, over a territory not much smaller than Western Europe.

Despite this quantity and diversity of claims-based boards, they share an elemental feature: ethnic parity (White, 2008). Always, Indigenous governments wield significant, guaranteed power, nominating a share of each board's members, often one-half. Federal and/or territorial governments pick the remaining nominees. Hence, co-management boards occupy a new dimension of authority, "at the intersection of three orders of government: Indigenous, territorial and federal" (White, 2008: 72).

Scholars have keenly examined northern Canada's co-management regimes, with some pronouncing them a breakthrough in Indigenous self-determination—a rare Indigenous success story (Clark and Joe-Strack, 2017; White, 2002, 2008, 2009; Christensen and Grant, 2007). Co-management has been credited with helping level the power imbalance between colonizer and colonized, "restructuring Indigenous-state relations more broadly" (Natcher et al., 2005: 240). In White's canonical study of co-management in northern Canada, he found such regimes to, in many ways, match the treaty-federal ideal (2002). Little research, however, has been conducted on Indigenous environmental co-management through a comparative international frame. Even less has been done examining Norway's controversial Finnmark Estate as a claims-based co-management regime—and potentially, as a case of treaty federalism.

1.1 The Sami and FeFo

Speakers of a Finno-Ugric language, the Sami have inhabited Fennoscandia for at least two millennia, living until recently in small seminomadic groups, herding reindeer and hunting and fishing. Over the centuries, they experienced in-migration by Norwegians and incorporation into the Norwegian state. Compared to settler colonialism in Canada, incorporation of the Sami was arguably more gradual and peaceful (Falch and Selle, 2018). Still, Sami lands were usurped, and for as much as a century, until the Second World War, the Sami were subjected to intensive assimilation. Moreover, for good or ill, Norway made no treaties with the Sami and did not grant them group-differentiated status or assign them reserved lands. From the outset, Sami were, by law, Norwegians.

Today, Sami are outnumbered by non-Sami even in the heart of their homeland, Norway's Finnmark County. Moreover, Sami are internally divided. While some Sami, especially in inner Finnmark, speak the Sami language, are tightly bound into Sami kinship networks and maintain traditional livelihoods such as reindeer herding, a greater number are highly integrated into the Norwegian mainstream. Indeed, due both to assimilation and passive cultural synthesis, Samihood is for

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many "a partial identity, activated only in certain culturally constructed public spheres" (Bjørklund, 2013: 155). Hence among Sami there exist stark tensions between traditionalism and modernism, especially concerning land and resource use in Finnmark County.

It was in Finnmark that the contemporary Sami rights movement erupted. Prior to 1980, Sami participated in politics as a conventional interest group, pressing for funds and attention in Norway's state-friendly, corporatist governance structure. Then came a "critical juncture" (Lipset and Rokkan, 1967): Norwegian authorities proposed to dam Finnmark's important Alta River, displacing a Sami village and flooding reindeer pastureland. Sami, unable to quash the plan using normal political channels, rebelled. Through marches, sit-ins, hunger strikes and other acts of civil disobedience, they mobilized for renewed control of their lands, culture and language. Activists pressed for self-determination, demanding the Sami be recognized as a distinct rights-bearing Indigenous nation. Other, more loyalist, Sami demurred, emphasizing continued fealty to, and cooperation with, the Norwegian state.

Norway, caught off guard by the Alta conflict, scrambled to accommodate the activists' demands. In 1980, Norway formed the Sami Rights Commission. In 1988, it amended its constitution to recognize Sami interests. In 1989, it established the Sami Parliament, or Sámediggi, to represent Sami across Norway, advise the Norwegian government on Sami affairs and exercise nonterritorial jurisdiction over matters relating to Sami culture. In 1990, Norway became the first signatory of international legislation protecting Indigenous peoples, the International Labour Organization's Convention 169 (ILO 169).

Among other things, ILO 169 requires that signatories identify and protect Indigenous rights to land and natural resources. In 1997, the Sami Rights Commission concluded Norway was in breach of ILO 169's land and resource requirements. In time, formal consultations commenced between Norway's Parliament and the Sámediggi, as well as the Finnmark County Council. Much like Canadian co-management arrangements, the origins of which lie in "political compromise" (White, 2018), what emerged from the Norwegian talks was a high-level "pragmatic compromise" (Semb, 2012): the 2005 Finnmark Act.

The Finnmark Act created several novel institutions. Key among them is the Finnmark Commission, tasked with surveying Finnmark's vast commons to determine, based on "prescription or immemorial usage," the rightful owners of the land. The commission was formed to fulfill Norway's obligation under ILO 169 to insure "adequate procedures … to resolve land claims" (ILO, 1989: Article 14). Like land-claims settlement processes in Canada, its challenge is to clarify territorial rights in the wake of colonization. However, during the decade that the Finnmark Commission has operated, it has managed to survey only a fraction of Finnmark's commons. Moreover, for reasons beyond the scope of this article, it has received relatively few claims to territorial rights and has denied almost all of them. This has alarmed the Sámediggi, the United Nations Special Rapporteur on the Rights of Indigenous Peoples (United Nations, 2016) and various scholars (see, for example, Ravna, 2015), who have all suggested that Norway is in breach of ILO 169.

The other key institution created by the Finnmark Act is the Finnmark Estate (FeFo). FeFo is tasked with managing whatever lands in Finnmark remain in

common. To this end, in 2006, Norway transferred 95 per cent of Finnmark's land —46,000 square kilometres—to FeFo. Most observers expected FeFo's responsibilities to diminish as surveyed common lands were assigned to Indigenous claimants. In the absence of that development, FeFo's jurisdiction remains extensive, and its role in Sami self-determination has moved toward centre stage. Hence, it is the focus of this article.

In Norway, various studies have focused on FeFo (Falch and Selle, 2018; Selle, 2016; Josefsen et al., 2016; Broderstad et al., 2015; Hernes and Oskal, 2008), but those studies have considered the regime in isolation, treating it as a uniquely Norwegian innovation. Through that lens, scholars have documented the challenges of FeFo's creation and have noted some of its ongoing battles. They have made trenchant observations concerning its status as a Nordic outlier, whose regionally devolved power-sharing fits awkwardly into a universalist, centralized state (Falch and Selle, 2018).

Yet, as noted, FeFo has been only superficially examined through a comparative frame. It has been measured only in limited ways against the standard of Indigenous co-management and has not been studied at all through the lens of treaty federalism. We suggest that doing so might reveal much about FeFo—about what, exactly, it is and also about whether it does what it should. Hence, in this article, we compare FeFo with the Indigenous co-management archetype, which is ubiquitous in Canada and prominent in discussions of treaty federalism.

In Norway, we concede, the term *treaty federalism* has an odd ring to it. Norway is unitary, not federal, and as noted, has no history of Sami treaty-making. Among Sami who might consider themselves loyalists—that is, who resisted the rhetoric of Indigenous rights and Sami sovereignty that arose from the Alta conflict—there is little desire for formalized, separate, nation-based political status. Rather, such Sami prefer to remain an interest group operating within, rather than a co-governor alongside, Norwegian public institutions.

Yet for other, more activist, Sami, the vision embodied by treaty federalism is familiar and celebrated. As is true for many Indigenous groups in Canada, these Sami want substantive, entrenched self-rule over matters that touch their own community only and desire shared rule where their interests intersect with the Norwegian majority (Wilson and Selle, 2019; Falch et al., 2016). Indeed, because Sami, like other Indigenous groups, have a distinctive cultural and economic relationship with the land, and because Sami lands are heavily populated by non-Sami, many activist Sami see shared rule as particularly relevant to their cause. Hence, in studying the battle over Sami land rights, we suggest treaty federalism is a useful concept to gauge Sami aspirations and achievements.

To structure our comparison of Canada and Norway, we build on White's 2002 framework. In exploring whether claims boards are a realization of treaty federalism, White asked three core questions: Are the boards substantially different from past forms of environmental management? Are the boards independent from other levels of government, especially the central government? And do the boards allow Indigenous peoples to exercise real power over important resource matters?

To answer these questions in the context of FeFo, we first review the key literature on northern Canada's claims boards, supplementing White's findings with

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those of subsequent researchers. We then juxtapose those findings with an analysis of Indigenous co-management in Norway. Building on our own and other scholars' research into the FeFo regime, we gauge whether FeFo is, in effect, a claims-based co-management body, and if so, whether it is—perhaps like the claims boards of Canada—a realization of the treaty-federal ideal. We end by offering several theories that might explain divergences between FeFo and Canadian co-management.

2. Is FeFo a Governance Innovation?

Indigenous peoples have for decades participated in environmental-management structures, including in Norway, where there is a tradition of including Sami on boards regulating fisheries, national parks and so forth. If Indigenous co-management regimes such as FeFo are a case of treaty federalism, at minimum they must be different—legally, structurally, procedurally—from these past management arrangements. Hence, following White, we explore whether claims-based co-management is "truly different from existing organizational forms" (2002: 95). To answer this, we review the literature on northern Canada's claims boards and then assess FeFo along three dimensions: legal basis, form and role.

2.1 Legal basis

As noted, Canada's claims boards were constituted by modern treaties. These treaties were devised through years of negotiations between ostensible sovereigns, to reconcile pre-existing Indigenous authority with the present rule of the state. In some cases, these settlements precisely detail the aims, forms and functions of the ensuing co-management regimes. In other cases, the settlements compel the federal government to pass enabling legislation that creates co-management boards. Either way, the boards are legally integral to the land-claims settlements. The settlements, in turn, are protected under the Canadian Constitution's Indigenous rights provisions. Hence, Canadian claims that boards enjoy "quasi-constitutional status" (White, 2008: 72).

What is the significance of this status? First, it ensures their permanence. Though Canada could, in theory, dissolve the boards, it would likely be obliged to replace them with similar institutions. Canada's Harper government seemed on the verge of testing that theory in 2014 when it proposed to merge regional boards in the Northwest Territories into a single superboard. Two First Nations sued, winning a temporary injunction. Before the matter could be conclusively adjudicated, the Harper government fell.

Second, constitutional protection prevents Canada's non-Indigenous-dominated governments from sidestepping board processes and decisions. This proved true in the Yukon, where the territorial premier sought to ignore a key co-management decision on the grounds that co-management boards "are not elected and they're not accountable" (Clark and Joe-Strack, 2017). The Supreme Court of Canada stepped in, ruling that the territorial government may not circumvent co-management (Supreme Court of Canada, 2017). White concludes that Canada's claims boards enjoy "importance and permanence far beyond that of run-of-the-mill boards" (2008: 72).

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As noted previously, Norway's FeFo was created by enabling legislation: the 2005 Finnmark Act. That act, much like Canadian land-claims settlements, emerged from intergovernmental consultations—in its case, between the Norwegian government, the Sami, and the Finnmark County Council. In these consultations, the Sámediggi, especially, took a proactive negotiating role. In unitary, state-centric Norway, this intergovernmentalism was unprecedented; some deemed it a constitutional innovation (Falch and Selle, 2018; Josefsen et al., 2016; Hernes and Oskal, 2008). Yet in Canada it would have seemed familiar, a variety of the nation-to-nation talks that characterize modern treaty-making.

Much like Canadian treaties, the Finnmark Act aims to implement state obligations to Indigenous peoples, particularly those spelled out in ILO 169 (Nygaard, 2016). As an international commitment, ILO 169 is binding upon Norwegian law (Ravna, 2013). Thus, much like Canada's co-management boards, the institutions created by the Finnmark Act enjoy distinctive constitutional status. While the Norwegian government could, in theory, dissolve or modify FeFo, it would need to provide some alternate way to fulfill obligations to Sami.

The question of FeFo's constitutional permanence has indeed been tested, not legally but politically. As in Canada's Yukon, FeFo has withstood challenges from the regional non-Indigenous majority. As noted, in 2005 some 11,000 of Finnmark's 70,000 residents petitioned the Norwegian government to reject the Finnmark Act on the grounds that FeFo, in overrepresenting Sami, violates the democratic principle of one person, one vote. Nevertheless, the act passed and FeFo was established.

But if FeFo enjoys Canadian-style permanence, its constitutional power is less clear. For reasons we will discuss below, FeFo has been more cautious than Canadian boards, avoiding overt conflicts with the state. Hence it is uncertain whether in the case of an outright disagreement, FeFo holds a trump card. Some observers feel it does—de facto, and likely de jure (Falch, 2018). But that cannot be known until FeFo's power versus the state is tested, either in politics or in court.

If FeFo's power has not yet been tested against the state, it has been tested against lower-level interests. Interestingly, a key challenge came from Sami themselves. Sami from a village in the Nesseby region charged that based on historic usage, they, rather than FeFo, should manage nearby lands. FeFo disagreed. The case went to the Norwegian Supreme Court, which in 2018 ruled that the duty of management remained with FeFo (Supreme Court of Norway, 2018).

2.2 Form

Canada's claims boards vary in membership structure but share common features. Most noteworthy is their guaranteed share of Indigenous-government nominees. Most Canadian boards are tripartite, with members nominated by Indigenous, federal and territorial governments. Each board includes a full-time chairperson. Sometimes the chair is chosen by board members; other times the federal government acts alone in picking the chair, occasionally engendering controversy (White, 2018).

Most Canadian boards count between six and ten members. Once members are nominated, the federal government typically controls formal appointments. Often

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the federal government is slow to confirm appointments, and it may reject nominees, sometimes with no explanation (White, 2018). Often, at least technically, the federal government can remove sitting members. White cites an instance where the government sacked a member who railed against the "federal agenda." But "the deposed board member had been a federal nominee. Had he been a nominee of an Aboriginal government or organization, the political implications would have been more far-reaching" (White 2008: 78). Appointees' terms are renewable based on the continued support of their nominating government (Natcher et al., 2005). Thus Indigenous governments enjoy substantial, though not exclusive, control over appointment, renewal and removal of their board members.

Many Canadian boards are supported by an executive director and cadre of technical staff, as well as by hired consultants. The chair of the board, executive director and staff are usually headquartered in the relevant territorial capital or regional administrative centre. The civil servants are expected to be nonpartisan, facilitating, but not directing, board activities. Sometimes this is honoured in the breach; White (2018: 561) cites the case of a Yukon board where the executive secretary, a federal official, was accused of undermining co-management.

Much like Canadian co-management regimes, FeFo is governed by a six-person, bipartite board. The parties to the board are the Finnmark County Council—representing all county residents, the majority of whom are non-Sami—and the Sámediggi. Each appoints three board members. Of the Sámediggi's appointees, one must represent reindeer-herding interests. All FeFo appointees must be residents of Finnmark. They sit for terms of up to four years, coinciding in practice with Norway's four-year election cycle. Their terms may be renewed by their appointing bodies for up to 10 years. They may also be removed at any time by their respective appointing bodies. The position of chair typically alternates annually between a county and a Sámediggi appointee. The chair wields a double vote to break ties.

Unlike Canadian boards, the Norwegian state is not a party to FeFo. An initial draft of the Finnmark Act proposed a seven-member body with the state naming one non-voting member; this was rejected by the Sámediggi (Falch and Selle, 2018). Also unlike Canada, the Norwegian state does not sign off on FeFo appointees. Thus, even more so than in Canada, the Sámediggi and Finnmark County Council wield exclusive control over selection, renewal and removal of their board members.

FeFo is supported by an administration of approximately 35 staffers, led by a managing director. The structure, and indeed personnel, of this administration were to some extent inherited from the state authority that previously managed Finnmark's commons (Josefsen et al., 2016). At first, this administration arguably carried forward the state authority's culture and identity—indeed, some suggested that FeFo's civil servants, rather than its board members were setting the agenda and even dominating decision making. With the transfer of FeFo's headquarters from Vadsø to Lakselv, and with gradual employee turnover, the administration has over time become more FeFo's own.

2.3 Role

2.3.1 Mandate

In Canada, certain boards' mandates refer explicitly to Indigenous rights and interests. For example, White notes that boards in the Northwest Territories are tasked with "enhancing the well-being and preserving the way of life of the Aboriginal peoples" (2009: 129). Yet co-management boards are often termed "institutions of public government." This is because their authority extends not just to Indigenous people and matters but to all people in the relevant region. They thus balance the distinct rights and interests of Indigenous peoples with those of the broader citizenry in areas with mixed populations.

Similarly, according to the preamble of the Finnmark Act, FeFo is "to facilitate the management of land and natural resources in Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture." As in Canada, the authority of FeFo extends to all residents. It is neither an organ nor servant of the Sámediggi, county or state. Rather, FeFo is an autonomous body performing a delicate dual role, serving the interests of everyone, especially Sami. Adding to this delicacy is the fact that, by law, FeFo is to operate in a manner that on its face is "ethnically neutral." FeFo is to assign rights and benefits and provide services to residents irrespective of whether they are Sami, so long as doing so does not harm Sami culture.

2.3.2 Function

As noted, Canadian co-management boards typically exercise authority over those Indigenous lands surrendered to the Crown in exchange for the right of co-management. As such, co-management boards assume responsibilities previously performed by federal or regional authorities. In general, these responsibilities fall under one of four categories: wildlife management; land-use planning; licensing, permitting and environmental-impact assessment; and dispute resolution (White, 2008). In many cases, all but the tiniest proposed developments—down to the installation of road culverts—require board approval. Hence, the role of co-management boards is extensive.

As in Canada, FeFo has jurisdiction over lands to which Indigenous people have a historic and enduring stake but to which they do not hold title. On these lands, also as in Canada, FeFo plays a key role in wildlife management, land-use planning, and licensing, permitting and environmental-impact assessment. Perhaps most critically, as in Canada, FeFo is tasked with approving or denying proposed changes to the use of "uncultivated lands," referring mainly to grazing lands and wilderness.

Yet in important ways the management role of FeFo is narrower than that of Canadian boards. While Canadian boards took over many of the duties once performed by other levels of authority, in Norway it is more the case that FeFo is layered *on top* of other authorities. FeFo is constrained from above, by the state, and from below, especially by municipal governments (Falch and Selle, 2018; Broderstad et al., 2015).

From above, FeFo is constrained by Norway's unitary system, where the powers of central authorities remain significant. By comparison, Canadian boards operate in an environment of decentralized federalism, where national authorities wield

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comparatively less, and in recent years in the north, diminishing, power. It is specified in the Finnmark Act that all Norwegian state regulations apply on FeFo lands. Hence, strict national laws govern natural resources in Finnmark (Falch and Selle, 2018; Ween and Lien, 2012). FeFo's task is to manage those resources within the bounds of the law. This presents tensions, as in the case of Norway's 2009 Minerals Act, which is binding upon FeFo despite being opposed by the Sámediggi (Nygaard, 2016).

Regarding constraints from below, FeFo's actions are limited especially by powers and interests of local governments. This is less the case in Canada. Canadian boards contend with few overlapping local authorities; there, ceded land is largely beyond local jurisdiction. For example, Canada's Nunavut contains 25 municipalities covering just over 3,500 square kilometres of land, while the rest of Nunavut's 1.9 million square kilometres are "unorganized." Finnmark is different. Finnmark's 19 municipalities are, taken together, geographically coextensive with the domain of FeFo. Jurisdictionally, FeFo and Finnmark's municipalities completely overlap.

Limits to FeFo's role were evident in 2010 when a mining company applied to mine gold in the municipality of Kautokeino. FeFo did not get involved; rather, the proposal was vetoed by the public municipal government, which is dominated by Sami. Under Norway's 2009 Planning and Building Act, municipalities must typically approve zoning of mines before the state provides a mining permit. Moreover, municipalities must consider how land-use changes might affect "the natural basis for Sami culture, economic activity and social life." The mining company challenged Kautokeino's decision, but the Ministry of Justice sided with the municipality. Insofar as Sami interests were served without the participation of FeFo, it could be said that, at least in the handful of municipalities where Sami dominate local government, FeFo is not a *necessary* condition for Sami land and resource control.

At the same time that FeFo's role is narrowed from above and below, it also performs functions beyond the scope of Canadian co-management. This is because FeFo is not merely a land manager but a landowner. It holds title to all the commons in Finnmark. In its landowning role, FeFo engages in activities such as harvesting and marketing timber, issuing hunting and fishing licences, and selling undeveloped lots. It has even become a regional economic developer, partnering with a power company to build wind turbines and sell electricity. As FeFo generates revenue from these activities, it is sometimes accused of being in a conflict of interest, monetizing its land-ownership in ways contrary to Sámediggi desires (Selle, 2016; Broderstad et al., 2015).

2.3.3 Processes

In Canada, board processes vary. For those boards created under the Mackenzie Valley Resource Management Act, which guides co-management throughout most of the Northwest Territories, all applications for development first go through a screening process (Parlee, 2012). In the small fraction of cases where development is judged likely to have environmental consequences or excite public concern, an environmental assessment is ordered.

Environmental assessments are lengthy, expensive, intensive and transparent, comprising public hearings in affected communities, the public release of

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documents, and exchanges of information between co-management boards and proponents. Once assessments are complete, some boards make a recommendation to the federal government, while others rule directly, approving, rejecting or modifying the development proposal according to certain conditions.

Unlike the scrupulously transparent boards of Canada, FeFo at first (though no longer) conducted its business behind closed doors. According to Josefsen et al., "The lack of transparency probably contributed to people's negative image of FeFo" (2016: 37). Hence, where Canadian boards derive legitimacy from openness, FeFo's opacity possibly came at a cost.

Also varying from the Canadian archetype are FeFo's complex voting procedures. Most FeFo decisions require a simple majority, but where a decision involves development of uncultivated lands, special rules apply. First, FeFo's assessment process must follow assessment criteria promulgated by the Sámediggi to safeguard Sami and particularly reindeer-herding interests (Fitzmaurice, 2009; Falch and Selle, 2018). If even two board members fear such harms, they can demand the matter go before the Sámediggi for review. If three board members fear such harms, they can insist the board employ special anti-majoritarian voting rules. If the matter involves lands in the traditional Sami municipalities of inner Finnmark, one appointee of the county council must abstain from voting. If instead the matter concerns coastal Finnmark, home to fewer Sami, a Sámediggi appointee must abstain. However, the appointee representing reindeer-herding interests never abstains. In this manner, Sami interests are privileged in inner Finnmark, interests represented by the county council are privileged in coastal Finnmark, and reindeer-husbandry interests are privileged everywhere (Stokke, 2014).

3. Is FeFo Independent?

Even if co-management boards such as FeFo are a novel innovation, they could not be considered treaty-federal if they were simply new organs of the Norwegian public sector. Hence, following White (2002), we ask if FeFo is independent of other governments. To answer this, we explore Canadian and then Norwegian co-management along three dimensions: legal standing, funding and board members.

Concerning the legal standing of Canadian boards, almost all are independent entities, separate from, and not beholden to, other government authorities. Concerning their funding, White notes that in northern Canada, "every penny of the boards' funding comes from Ottawa" (2009: 133). Hence, the threat of federal manipulation always looms. Yet he reports that the federal government has seldom used its "power of the purse" to overtly control board actions (White, 2018).

Concerning the independence of individual Canadian board members, most are expected—even legally mandated—to act in the public interest (White, 2018). "Like judges," White says, "they are to make decisions based on their best judgement without direction or influence from outside entities, be they government or Aboriginal organizations" (2009: 127). Of course, governments strive to nominate members whose views are compatible. As well, almost inevitably, members bring with them the biases of their respective cultures, whether bureaucratic, scientific or Indigenous.

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White reports that, especially early on in Canada, nominating governments often failed to respect the principle of independence, demanding allegiance from their members. This was a problem not just for the federal and territorial governments but also for Indigenous governments, as when the executive director of a Nunavut board was fired for failing to expedite an Inuit-backed mine (White, 2018). Today the situation remains mixed. Despite norms and laws, some board members clearly function as government deputies, while others enjoy autonomy. White reports that Indigenous groups have at times been pleasantly surprised by federal and territorial governments' willingness to nominate nonbureaucrats. He even reports instances of board members complaining of too much independence, having been nominated by their governments and then forgotten.

FeFo, like most Canadian boards, is legally independent; it is not an organ of the Norwegian government, the Finnmark County Council or the Sámediggi (Falch and Selle, 2018). Josefsen et al. (2016) observe that FeFo is not responsible to any electorate and that the county council and Sámediggi have no formal role other than appointing and removing board members. In this way, like Canadian boards, FeFo is a new dimension of authority, existing at the intersection of regional and Indigenous government.

Compared to Canadian boards, FeFo's financial independence is striking. As noted, FeFo is a landowner. Through this role, it generates considerable revenue, making it self-financing. FeFo has reaped a surplus of approximately five million kroners annually—just under $1 million Canadian.

Finally, concerning FeFo's board members, they must by law act independently. As Josefsen et al. note, "neither the Sámediggi nor the Finnmark County Council can instruct any board members" (2016: 31). At the same time, as also noted, both the county council and Sámediggi can remove their appointees at any time or refuse to renew their appointments when their terms expire. In this manner, they exercise at least indirect control over their members.

Moreover, as in Canada, FeFo's parent institutions have sometimes failed to avoid direct control. Especially in FeFo's early years, the county council "had a hard time accepting that they did not have any authority in terms of giving direction to the county council–appointed FeFo board members" (Josefsen et al., 2016: 31). More recently, given the Finnmark Commission's failure to assign land title to Sami claimants, and following FeFo's decision on the controversial Kvalsund mine, which we will discuss below, the Sámediggi has sought more influence over "its" members, increasingly formalizing contact with them (Falch and Selle, 2018).

4. Does FeFo Provide Indigenous Power?

Even if FeFo is innovative and independent, it could not be called treaty-federal if the powers it provides to Sami are insignificant. Notes Campbell, "There is a danger in using co-management terminology and theory without a significant transfer of decision-making power" (1996: 6). Hence, following White, we ask, "Do Aboriginal people exercise real decision-making power on important policy issues through the claims boards"? (2002: 95). To answer this, we explore Canadian and then Norwegian co-management along two dimensions: Indigenous influence and Indigenous power over board decisions.

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4.1 Indigenous influence

According to White, Canada's co-management boards have allowed substantive Indigenous influence over environmental decisions. This happens at various stages. First, when developers submit an application, they must typically show they have already consulted with local (usually Indigenous) stakeholders, and that, based thereon, they have made appropriate modifications to their proposal. Upon receiving an application, board staff typically also consult local interests. If the project is sent to an environmental assessment, extensive hearings ensue, held in affected communities. Federal funding may support the participation of local intervenors. Proponents must appear, responding to all public comments. Indigenous commenters are encouraged to, and frequently do, ground their views in traditional knowledge (TK). Throughout, local feedback is documented and placed on the record. In the case of environmental assessments in the Mackenzie Valley, this process has been described as "a 'bottom-up approach,' whereby the board includes and involves a wide range of 'everyday folks' steeped in local knowledge and values" (Galbraith et al., 2007: 34).

Following hearings, Canadian boards issue a decision. White finds their ability to incorporate TK into decisions varies. Boards such as the Nunavut Wildlife Management Board, which oversees animal populations, find it comparatively easy to base decisions at least in part on TK. This is less the case with, say, the Mackenzie Valley Environmental Impact Review Board, which conducts technical development assessments that have no analogue in traditional culture (White, 2006). Yet White concludes that whatever their shortcomings, claims boards are "the best opportunity for imbuing public, non-Aboriginal governmental institutions with TK" (2006: 402).

Some critics have suggested that at the decision-making stage, non-Indigenous board staff have too much influence, while others maintain the opposite, that the boards are a thinly disguised arm of Indigenous government (White, 2002: 108). The latter is in part because of the significant Indigenous presence on the boards. Of course, most Indigenous-government-nominated board members are Indigenous. But so, too, are many federal and territorial appointees (White, 2018). In a 2008 survey of eight boards, White (2008) found Indigenous membership ranging from 42 to 86 per cent. Hence, "a majority of board members, often a strong majority, are Aboriginal" (White, 2009: 127). Though most boards operate predominantly in English, the Nunavut Wildlife Management Board, at least, conducts its business in Inuktitut.

Unlike Canadian boards, which solicit direct input from local stakeholders, and which host extensive and transparent public consultations in communities impacted by management decisions, FeFo operates in a more classically Norwegian style, relating to the public through intermediaries. Stakeholders may send proposals or inquiries to FeFo, but for the most part, they channel questions and concerns through public authorities and civil-society organizations. It is those authorities that, in general, interact with FeFo. TK plays little role in FeFo's information gathering, nor in Norwegian Sami governance more generally (Falch and Selle, 2018).

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After FeFo has gathered input on a matter, it issues its decision. Unlike the management actions of the state, decisions by FeFo bear a clear Sami imprimatur. This is, in part, because of FeFo's Sami trappings. As noted, its headquarters moved from Vadsø, a non-Sami community, to Lakselv, which is significantly Sami. Its new building showcases Sami art and architecture. FeFo's working language is Sami: meetings are often in Sami, and important documents appear in both Sami and Norwegian. Moreover, FeFo's past three executive directors have been prominent Sami. Hence, as with Canadian boards, some observers feel FeFo is, in effect, an arm of Indigenous government.

Yet if FeFo is seen to be a Sami institution, its actions have not, at least in the view of Sami traditionalists, been discernibly Sami in content. Again, FeFo's decisions have, so far, matched the views of the broader Finnmark public. They have not been conspicuously aligned with those of the Sámediggi, nor of reindeer herders—the two authorities tasked with expressing and defending collective Sami views. Nor have FeFo's decisions been notably different than what might have been expected from state institutions (Josefsen et al., 2016; Falch and Selle, 2018).

Indeed, in one prominent and complicated instance, FeFo and the Sámediggi have been at loggerheads. That instance involves the Nussir corporation's ongoing bid to open a copper mine in the coastal Finnmark municipality of Kvalsund. The area's residents predominantly identify as non-Sami; however, given Norway's history of forcibly assimilating Sami, many Kvalsund residents are thought to have Sami roots. Hence the municipal government in 2014 identified Kvalsund as a Sami community. Sami from inland migrate to Kvalsund seasonally to graze reindeer. While the Kvalsund municipality approved the mine, the Sámediggi and Sami reindeer-herding interests (along with environmentalists) are opposed. Sami challenged the municipality's support of the mine, appealing to the state. The state sided with the municipality, issuing the development permit in February 2019. The Sámediggi is appealing again; if that fails, it has vowed to take legal action, not merely to stop the mine but to clarify Sami land-management rights vis-à-vis the state.

Controversially, FeFo sided with Kvalsund, supporting the mine. The board's Sámediggi appointees voted against, but the tie was broken by the county-council-appointed chair. Moreover, the executive director of the FeFo administration, a prominent Sami, championed the mine. Officially, FeFo based its decision on the view that since the mine will create jobs and revenue in Finnmark, it will serve Sami interests, particularly in a municipality where Sami culture is endangered.

This view is condemned by the Sámediggi, reindeer herders and some Sami civil-society actors. FeFo's surprising stance on the Kvalsund matter has been interpreted in at least two ways. Some observers suggest FeFo is simply acting with caution, guarding its fragile political position by siding with the local and county majority, who support development. Others suggest it is instead behaving boldly, challenging the Sámediggi's authority to articulate the collective Sami interest and championing the not-uncommon views of modernist, pro-development Sami. As this clash reveals, FeFo co-management has not necessarily resulted in what traditionalists, at least, might characterize as increased Sami control over land management in Finnmark.

4.2 Indigenous decision-making power

In Canada, even if most board decisions are pro-Indigenous, critics have noted that those decisions are not necessarily legally final. In many cases, board rulings are advisory, with final say falling, de jure, to the federal government. And yet, de facto, Canadian boards almost always get their way. There are several reasons for this. First, as the boards are professionalized, transparent and inclusive of public input, their decisions enjoy popular legitimacy. Second, in many cases, board recommendations operate according to "negative option" provisions: they go into effect unless the federal government rules against them, and this usually must happen within a short period. Third, even if the government rejects a board's decision, it does not get to implement its own. Rather, it must convince the board to modify its recommendations; otherwise, it faces a stalemate (White, 2009: 128). Hence, in Canada, claims-based co-management is "advice with a difference … this is a considerable restriction on the traditional powers of a Minister of the Crown" (White, 2008: 75). To get its own way, the federal government must expend political capital. It seldom opts to do so (White, 2006).

Scholarly opinion varies concerning the de jure finality in Norway of FeFo decisions on resource extraction. In a survey of Indigenous environmental power in Canada, Greenland and Norway—including but not limited to FeFo—Kuokkanen found that Sami were in, by far, the weakest position, enjoying "no real say when it comes to extractive industries" (2018: 5). Larsen agrees. Reviewing impact-assessment processes affecting Indigenous peoples in Norway, Sweden, Canada and Australia, he concludes the Scandinavian states lag behind, "retaining a much more limited consultation and notification approach" (2018: 208). Skogvang shares this negative view: "The Sami rights in mineral matters is … a right to be heard, not a duty for the state to take into account Sami rights" (2013: 344).

Yet Falch and Selle maintain that in the case of mining, the Finnmark Act serves as a significant constraint on Norwegian state power. Practically speaking, they argue, it would be difficult for the state to expropriate land from FeFo against its will, as long as FeFo's decision was justified by the Sámediggi's assessment criteria regarding changes to the use of uncultivated lands (Falch and Selle, 2018; Selle, 2016). Although the state, de jure, holds the trump card, Falch and Selle suggest it would be politically costly to wield it against FeFo and the Sámediggi.

Yet as noted, if in matters concerning development, FeFo has the upper hand, it has not yet sought to test it. Its decisions have, so far, accorded with the preferences of the Finnmark majority. Where in Canada co-management boards have often acted boldly, flouting the wishes of non-Indigenous authorities, FeFo has, in the view of many observers, been guarded. It has avoided "tough decisions" that state or other authorities might oppose (Torvald Falch, pers. comm., November 15, 2018). Thus, observers have questioned whether FeFo is acting in compliance with ILO 169.

5. Discussion and Conclusion

This article set out to determine if Norway's Sami land-management regime, the Finnmark Estate, is in effect a claims-based co-management arrangement—and if

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so, whether it achieves the ideal-type of treaty federalism. Again, treaty federalism is conceptualized as providing Indigenous peoples with guaranteed, substantive self-rule over matters where their interests are exclusive, and shared rule, in concert with national and/or regional authorities, where Indigenous interests overlap with the non-Indigenous majority.

White's canonical 2002 study of claims boards in northern Canada found that they in many ways match the treaty-federal ideal. To determine if FeFo does too, we followed White's analytical framework, comparing FeFo to Canadian boards. We asked: Is FeFo novel compared to past forms of state environmental management? Is it independent from other levels of government? And does it allow Sami to exercise real power over important resource matters?

Concerning FeFo's novelty, we determined that it is largely similar to Canadian boards. Formed by enabling legislation that enacts Indigenous rights, FeFo enjoys constitutional permanence—indeed, it has endured resistance from Finnmark's non-Sami majority. Regarding FeFo's constitutional power, we noted that it has not been tested against the Norwegian state. In legal structure, FeFo is also similar to Canadian boards. It has two parent bodies: the Finnmark County Council, representing all county residents, the majority of whom are non-Sami; and the Sámediggi, representing Sami. Each body appoints three members, renewing or dismissing them at will. Thus, FeFo provides Sami with guaranteed Indigenous representation.

We found that in its legal functions, FeFo is both similar to and different from Canada's boards. FeFo's mandate—to serve all people, with a focus on Indigenous rights—is like that of Canadian boards. Its role, however, is both narrower and broader. FeFo's role is narrowed by the competing powers of other authorities—both of the state, whose laws FeFo must obey, and of Finnmark's local municipalities, whose jurisdiction overlaps with FeFo's and whose powers to regulate development are substantial. At the same time, FeFo's landowner role gives it powers (and incentives) broader than those of Canadian boards, most notably and controversially the power to be an economic developer and thus earn own-source revenue.

In its legal processes, FeFo differs somewhat from Canadian boards. First, it relates to the public for the most part indirectly, through interactions with public officials and civil-society actors. As well, FeFo's voting procedures can be byzantine, employing anti-majoritarian rules to protect non-Sami interests in coastal Finnmark, Sami interests in inner Finnmark and reindeer-herding interests throughout.

We found that, similar to most Canadian boards, FeFo is legally independent; it is not an organ of other governments. Compared to Canadian boards, the financial independence of FeFo is striking. As on most Canadian boards, FeFo's board members are required to act independently. We noted, however, that in Norway, as in Canada, the parent governing bodies may exercise indirect control and sometimes cross the line into direct control.

We found that Indigenous influence in FeFo's decisions is mixed. Unquestionably, FeFo's rulings bear a Sami imprimatur, in a way that actions of the former state administrators did not. FeFo conducts much of its business in an Indigenous language—Sami, and FeFo is seen as being, in many ways, a Sami institution. Yet unlike in Canada, the actual content of land-management decisions

in Finnmark has not markedly changed. FeFo has done little that might challenge the non-Indigenous majority, nor has it done much that has satisfied Sami activists. Indeed, in the controversial instance of the proposed Kvalsund mine, FeFo opposed the interests articulated by core Sami institutions such as the Sámediggi and reindeer herders.

Regarding FeFo's Indigenous board power, we also had mixed conclusions. Again, that power, de facto and de jure, has not been tested. Some observers suggest FeFo is weak compared to Canadian co-management entities. Others, however, suggest FeFo holds a trump card but has chosen not (or has not felt the need) to use it.

Given these findings, we conclude that far from being a sui generis Norwegian novelty, FeFo is, in effect, a claims-based co-management board, similar in a number of ways to the boards of northern Canada. But we also conclude that it is questionable whether FeFo provides Sami with new, substantive Indigenous power. As an ostensibly Sami institution, FeFo's decisions are imbued with Indigenous legitimacy in a way that the old state institution's decisions were not. And yet it is difficult to find examples in which FeFo has acted differently than the state might have or where FeFo has challenged preferences of Finnmark's non-Sami majority. Certainly in the most controversial case, that of the proposed Kvalsund mine, FeFo did not side with the Sámediggi or reindeer herders.

We finish by summarizing four possible, potentially interrelated reasons we encountered that can explain why land-management in Finnmark has not fundamentally changed under FeFo. Each warrant further investigation. First, as noted, it has been suggested that because the FeFo administration was initially inherited from the state land-management authority, those bureaucrats were, and perhaps remain, loyal to the state—and that, moreover, they have influenced or even dominated FeFo's decision making. Again, FeFo's managing director, though a prominent Sami, came out publicly in favour of the Kvalsund mine. In Canada, such a move would likely have been condemned as bureaucratic meddling. Some Sami felt likewise, with one leader stating, "This is a purely political issue from a director, who I thought should be unpolitical" (Larsson, 2017).

Second, as also previously noted, given Finnmarkers' initial opposition to FeFo, the board may be guarding its political capital by acting very cautiously (Selle, 2016). Hence, FeFo has sought to manage Finnmark's lands in the interests of the region at large rather than in a way that appears to favour Sami vis-à-vis the population at large (Falch and Selle, 2018; Selle, 2016). In this manner, perhaps, FeFo deflects non-Sami criticism, avoids political and legal challenges and possibly bides its time, waiting until public sentiment is more squarely on the Sami's side.

A third potential explanation for FeFo's behaviour is that, as we have discussed in relation to the decision on the Kvalsund mine, the regime feels it *has* acted in the Sami interest. The implication here is twofold. First, perhaps FeFo believes the Sámediggi should not have a monopoly on defining and articulating the collective Sami interest. Instead, perhaps FeFo sees itself as sharing, or competing, in speaking for the Sami. After all, by law, FeFo is an independent body and not merely a servant of the Sámediggi. Second, perhaps FeFo not only feels it may speak for the Sami but conceives of the Sami interest differently than does the Sámediggi—as less

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traditionalist and more modernist, supporting industrial development and aligning closely with the interests of the Finnmark majority.

The final, slightly different, explanation for FeFo's behaviour is that, at least in the view of Sami loyalists, FeFo, in its inaction, is acting as it should. The mechanisms and procedures by which land is managed in Finnmark now bear a distinctively Sami imprint. Sami are key participants in decisions regarding land and resources in their homeland. They are now more fully included in Norway's state-friendly mechanisms of governance. Rather than speaking for modernist Sami, or acting strategically in the face of non-Sami opposition, perhaps FeFo is simply playing its part in Norwegian corporatist politics, conceding to Finnmark's majority because they are, after all, the majority.

Whatever the reason, we must conclude that FeFo has, so far, fallen short of the treaty-federal ideal. From the perspective of Canada, where treaty federalism is grounded in the premise of nation-to-nation relations between Indigenous peoples and the state, this is an indictment. Activist Sami, eager for nation-based solutions to land-use conflicts in Norway, might share this view. They charge that Indigenous land management in Finnmark has, in effect, been co-opted—that while it now wears Indigenous garb, it behaves no differently than before. However, for more loyalist Sami, who prefer integration and collaboration over self-rule and shared rule, the concept of treaty federalism may be best left in Canada.

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