FINAL SUBMISSION BY THE OFFICE OF THE ATTORNEY GENERAL TO BORGARTING COURT OF APPEAL

[List of parties and counsel omitted]

1 Statement of claim

1. That the appeal be dismissed
2. That the Government/Ministry of Petroleum and Energy be awarded the costs of the case for the Court of Appeal.

2 Basis for the statement of claim and applicable law

2.1 Main outline

The case concerns the validity of a decision made by the King in Council of State on 10. June 2016 regarding the award of exploitation permissions under the 23rd licencing round according to Section 3-3 of the Petroleum Act.

The Oslo District Court found in their judgement of 4. January 2018 that the decision was valid. In the Government's opinion, the District Court's conclusion is correct. The Government does also mainly agree with the reasoning of the District Court, with some additional nuances, in particular regarding the interpretation of Section 112 of the Constitution.

The appellants have stated two main reasons for invalidity. First, they claim that the environmental consequences of the decision, seen as a whole, will be so damaging that they are in breach of a material limit in Section 112 §1 of the Constitution. Secondly, they claim that the procedure leading up to the decision is erroneous.

The Government's view is that the decision regarding the 23rd licencing round is valid. The decision was made in 2016 following thorough professional, administrative and political processes which were fully compliant with Norwegian law. This was clearly within the limits set by Section 112 of the Constitution, regardless of whether Section 112 be interpreted according to ordinary principles of legal interpretation as claimed by the Government, or according to a radically expansive interpretation as desired by the appellants. The decision is clearly not in breach of principles of international law, neither under environmental and climate law nor according to traditional human rights (European Convention on Human Rights "EMCH").

Regarding the procedure, the process leading up to the decision regarding the 23rd licencing round was fully compliant with the rules in the Petroleum Act and ordinary administrative law, from the start in 2013 and until the decision in June 2016. If the appellants claim any mistakes in procedure, they are in reality making an argument against the system defined in

the Petroleum Act, not the actual practice in the case at hand. That argument has no legal basis, neither in Section 112 of the Constitution nor in any other source of law.

Further, the appellants claim that the procedure leading to the decision regarding the opening of the South-East Barents Sea ("SEB") in 2012-2013 did also contain procedural errors. In the Government's opinion this is not relevant, unless the appellants claim that the very decision regarding the opening of SEB in 2013 was invalid. As far as the Government is able to see, that claim has not been made, nor is there any legal basis for making such a claim. Moreover, the Government disagree that there has been proven any errors of procedure, and indeed none that could have influenced the entirety of the assessments the Cabinet or the Parliament made when SEB was opened in 2013.

The Government has constantly had to underline that the case is only made against *a single decision* – the award of the 23rd licencing round in June 2016. The reason is that the appellants' arguments are general in nature and appear more as an attempt to obtain a declaratory judgment regarding the constitutionality of Norwegian petroleum policy, with arguments that to a certain extent far exceeds the limits of the actual case concerning validity of the decision.

The Government will therefore draw the Court of Appeal's attention to the fact that this is a case regarding the validity of the decision the King in Council of State made on 10. June 2016 on the award of exploitation permissions under the 23rd licencing round . This issue governs the relevant facts and the applicable legal assessments.

The decision under the 23rd licencing round concerned 10 permissions with an aggregate 40 blocks awarded to 13 different companies. Seven of the permissions (with 14 blocks) are located in the South Barents Sea, where there has been conducted petroleum activity since the late 1970s. The remaining 3 permissions (with 26 blocks) are located in the South-East Barents Sea, which were opened for petroleum activity by the Parliament in June 2013, following the agreement concerning the demarcation line with Russia in 2010. By comparison, over the years 2970 blocks have been awarded on the Norwegian continental shelf, 581 of these in the Barents Sea. However, , the activity on the remaining parts of the Norwegian continental shelf is not legally relevant for the case, beyond use as background and context.

Furthermore, the Government will underline that the contested decision under Section 3-3 of the Petroleum Act primarily allows the companies a right to conduct exploration drilling, on the further conditions applicable for such activity and subject to specific approval from the authorities in each individual case. If this activity results in any commercially viable findings, the company must apply for approval of a plan for development and operations according to Section 4-2, such approval will be subject to new considerations, including environmental effects.

In the blocks awarded in the 23. Round, exploration activity has been conducted for three years now. So far, no commercially viable findings has been made. As far as the Government understands, there are no claims that the exploration drilling under the 23. Round has had any actual negative impact on the environment or the climate, nor is this the case. The case at hand therefore concerns solely the hypothetical future consequences of the decision made in 2016.

2.2 Regarding the claims of unconstitutionality

2.2.1 The interpretation of Section 112 of the Constitution

The primary legal issue in the case is how to interpret Section 112 of the Constitution (previously Section 110b). The parties appear to a certain extent to agree that this is the issue. Section 112 expresses an important political principle. From a legal perspective, Section 112 may be important as a guideline for Parliament when passing laws, as a guideline for the administration when applying laws and as a factor when interpreting other rules. Section 112 §2 contains a right to information, while §3 contains a duty to act. The duty to act is legally binding for the Government, although to which extent it confers a legal right on private parties that may be claimed before a court it is more open.

The parties disagree on whether Section 112 grants private parties material rights beyond this, how far such material rights would go, and how far they could, and ought to, be subject to judgement by the courts. The disagreement not only concerns the delimitation of rights, but the very understanding of Section 112 §1 and §3 and the relationship between these two provisions.

As the Government understands the submissions of the appellants, in broad terms, three different alternatives for interpreting Section 112 have been submitted. These are fundamentally different, even though they may overlap:

1. Section 112 §1 is a fundamental principle but not a prohibition that, seen in isolation, will trigger a right for a private individual to a specific result. The legal issue lays in the link to Section 112 §3 – the duty to act. The courts must assess whether the duty to act has been complied with.
2. Section 112 §1 must be interpreted in connection with Section 112 §3. §1 may provide a material threshold, but whether that threshold has been exceeded depends on whether relevant acts has been made. The courts must assess partially which negative effects a particular decision or act may have, partially what compensatory acts has been made.
3. Section 112 §1 contains an independent right that, according to the actual facts, may have been breached, independent of which compensatory acts have been made, as long as the damages exceed a certain level. This will be the issue for the courts to assess, and the issue may be further divided in two possibilities – either the right is absolute, or the right may be more relative (with unwritten criteria for exceptions).

The Government will claim before the Court of Appeal, as before the District Court, that under ordinary principles of interpretation, alternative 1 is correct. This result follows from the nature of the provision and the wording, read in context. Further, the history and the preparatory works show that Parliament (acting under the procedure to amend the Constitution) did not mean that Section 110b) should contain a material right, nor was it the intention of the amendment of Section 112 §3 in 2014 to introduce such a fundamental change. Legal considerations of equity ("reelle hensyn" in Norwegian) also supports this interpretation including fundamental principles of democracy, separation of powers, judicial review, as well as the need for a predictable and legally manageable issue to assess before the courts.

Secondarily, the Government will claim alternative 2, which was applied by the District Court. Under this alternative, the Government may agree with the main outline of the Court's reasoning (cf. p. 17-28 of the judgement) but with some nuances and additional remarks.

According to the Government's view, there is no basis in legal sources for alternative 3, which is the appellants' interpretation. Significant legal considerations of equity also counter such a very expansive interpretation of the provision, which would result in an extensive judicialization, not merely of importance to the democratically rooted policy in this field, but also potentially for a wide range of other fields – and which wouldchange the relationship between the state powers in a fundamental manner.

The Government considered the questions raised by the interpretation of Section 112 in detail before the District Court and will do so before the Court of Appeal. In the Government's view, the essential point of law is the link between the fundamental principles in the two initial paragraphs and the duty to act in the third paragraph, as revised and clarified in 2014. This is a constitutional duty imposed on state authorities – Parliament, cabinet and administration – and which in principle exists regardless of whether it provides corresponding rights for private individuals that may be enforced and verified by the courts.

Consequently, in the Government's opinion, the legal issue in the case at hand is not whether the decision regarding the 23rd Round violates an (unclear) material threshold in Section 112 §1, but whether the government (Parliament and Cabinet) has acted to the extent required by Section 112. This issue raises questions regarding how far the duty to act actually goes, what it will take to establish that the duty to act has been complied with and how far the Courts may, and ought to, go in verifying these issues.

Furthering that argument, the Government will refer to the fact that Section 112 is not worded as a prohibition against decisions which allow activities that may have negative impact on environment and climate, but as a duty for the authorities to act in order to mitigate negative effects. This may be fulfilled by prohibiting or limiting a certain kind of emissions. But it may also be fulfilled by compensating negative effects for the environment in *other* areas. This is a general principle, but is particularly relevant when Section 112, as in the present case, is claimed within the area of *climate policy,* where the effects of permissions that may create

emissions in a certain area typically is attempted compensated or reduced by initiatives in other areas.

Regarding the application of Section 112 to issues of climate policy, the Government notes that even though the Section is originally worded with a view to more traditional environmental issues, it must be possible to apply Section 112 to climate issues, depending on circumstances. This will be valid, both in the case where Section 112 expresses an important political and fundamental principle, as a guideline for interpreting other provisions and where the authorities' discretionary powers are verified. Furthermore, the duty to act defined in Section 112 §3 must also cover national measures regarding climate. At the same time, Section 112 is not worded in a manner that covers the particular issues raised by climate policy, and there are limits to the extent Section 112 may, or ought to be, used in order to judicialize this area.

In order to comply with Section 112, the most important acts the authorities perform, are the general rules provided by Parliament and government in Acts and Regulations. This is done partially by specific Acts on environment and climate (the Pollution Act, the Act on Natural Diversity, the Climate Act, etc.), and partially by rules in other legislation that protects environmental concerns. In the petroleum laws, Section 112 has been operationalised by, *inter alia*, the rules on assessments on environmental concerns in Sections 3-1 and 4-2 and further by complementary rules in Regulations and administrative practice of long standing. In these cases, Section 112 will also be relevant as a part of the interpretation of these rules. Apart from this, Section 112 must be considered fulfilled by the rules provided and described above. In the case at hand, this means that new and separate (unwritten) procedural requirements from Section 112 cannot be derived, beyond those created by Parliament in the petroleum laws.

Furthermore, Norwegian authorities comply with their obligations under Section 112 by conducting an active climate and environmental policy, in the same manner as shifting majorities in Parliament and Cabinet have done over many years, both generally and on individual areas, through creation of policy, policy decisions and other acts of government. Which actual decisions are made will vary over time, and depend on several factors – both political and professional in nature. There will often be professional or political disagreements regarding which actions may be most suitable to solve an environmental challenge. Other times, economy may be an issue. Nor is it uncommon that environmental and climate considerations must be assessed against other legitimate issues and interests of society.

In this context, the Courts must be able to assess under Section 112 whether the authorities have taken any initiatives at all within a given area – especially in areas where they are granting permissions to activities that may have negative impact on environment or climate. However, should the authorities indeed have taken such initiatives, it is not evident that Section 112 opens for judicial review of the choices that has been made – including whether the initiatives taken are suitable or adequate. In the Government's view, the legal sources indicate that Section 112 is not meant to judicialize such issues.

If the courts were nonetheless to consider themselves competent to conduct a judicial review, this must be subject to a high threshold that respects the authorities' legitimate need for a margin for manoeuvre, as well as the many political and professional considerations and trade-offs that are made on an ongoing basis – by the competent administrative authorities, by Cabinet and by the elected majority in Parliament.

In this regard, the Government notes that there were broad agreement in Parliament regarding the opening of the South Barents Sea in 1989 and the subsequent development of this area, as well as the opening of the South-East Barents Sea in 2013 and the activity that has been conducted in this area thereafter. Even though the decision on the 23rd Round formally was made by Cabinet (the King in Council of State), the award of permissions have been voted on three times by Parliament – in 2014, 2015 and 2016. During the last years, Parliament has also voted in several other issues that raise similar or related issues regarding the relationship between petroleum policy and climate- and environmental policy. All of the factual issues raised by the appellants in the present case have been, or are presently, before Parliament as part of the political debate. The decision regarding the 23rd Round in 2016 is thus an integral part of a democratically rooted policy, constantly debated, and supported by a broad majority in Parliament. In the Government's opinion, this is a strong argument against the courts setting the decision aside.

2.2.2 The application of Section 112 to the decision in the 23rd licencing Round

As the parties disagree on the fundamental interpretation of Section 112 of the Constitution, the parties consequently also disagree on the legal issue for interpretation and the legally relevant facts.

If the Government's primary view regarding the interpretation of Section 112 is applied, the review of fact and application may be fairly concise. In that case, the decision regarding the award of the 23rd Round does neither materially nor procedurally violate the authorities' duties to act under Section 112. Consequently the decision is valid. The main point will then be to demonstrate the initiatives made by Parliament and government over the later years that may be of relevance.

Alternatively, if Section 112 is interpreted as containing a material threshold, the question will be which, if any, potentially damaging consequences follow from the decision regarding the 23rd Round in 2016, whether these consequences exceed the threshold under Section 112 §1 and furthermore, whether they in that case are compensated by initiatives under Section 112 §3, or under other unwritten exceptions.

The Government will claim that, regardless of interpretation, the decision regarding the 23rd Round does not violate Section 112 of the Constitution as it has not created, nor may it generate with any degree of probability and causality, such environmental damage to climate or environment that any threshold under Section 112 may be violated.

Throughout the procedure, the appellants have claimed that several different effects of the decision "in total" violate a threshold under Section 112. These claims follow three broad categories:

(i) Traditional environmental consequences of exploration, development and operation of potential fields that may be developed and exploited under the production licenses included in the 23rd Round, including issues regarding emissions, the ice shelf, particularly vulnerable areas, etc.

(ii) Norwegian (national) emissions of CO_2 to air and other gas emissions that may influence the climate as a consequence of future development and operation of potential fields that may be developed and exploited in the production licenses included in the 23rd Round.

(iii) Global emissions resulting from the export and combustion in other countries of the oil and gas that may be produced in fields opened under the production licenses included in the 23rd Round.

Regarding category (i) the District Court agreed with the Government that the risk of traditional environmental damage caused by the decision regarding the 23rd Round is limited, and that the authorities have taken necessary measures to prevent such damage from occurring. Themeasures to prevent environmental damage on the Norwegian continental shelf are based on extensive experience over years regarding activity under demanding operational conditions. The risk of traditional environmental damage was extensively investigated and assessed during the procedures that led to the decision on the 23rd Round, both regarding the Barents Sea in general and the South-East Barents Sea in particular, including the blocks covered by the 23rd Round. The conclusion was that the risk of traditional environmental damage during the exploration phase and the development of potential fields in the relevant area was limited and may be handled within the existing regulatory regime. If any commercially viable fields are discovered, impact assessments will be made under Section 4-2 of the Petroleum Act before any potential approval of a plan for development and operations.

Regarding category (ii) the District Court supported the Government's view that the activity on the blocks covered by the 23rd Round will generate at most a marginal increase in national emissions and that Norwegian authorities have introduced a series of measures intended to limit such emissions from the Norwegian continental shelf. Norwegian climate targets are met in cooperation with the EU and emissions to air from the petroleum activity on the continental shelf is a part of the ordinary EU quota system. Furthermore, the sector has been subject to a significant CO_2-tax since 1991, as well as other measures. Regarding the areas covered by the 23rd Round, it is in any case far too early to tell what emissions may be produced by a potential development and exploitation. This will depend on what is found, the development solution selected, and the conditions placed on the development. As long as activity on the continental shelf is a part of the EU quota system, decisions regarding development of a particular field will not generate increased emissions within the quota system.

Regarding category (iii), the District Court supported the Government's view that global emissions caused by Norwegian oil and gas being exported to and combusted by other countries cannot be covered by the legal regime of Section 112. This follows from an internal Norwegian interpretation of Section 112, and of the entire international system for cooperation on climate issues. This interpretation has also been consistently applied in Norwegian climate policy and climate legislation. We refer to the District Court's assessment on p. 18-20 of the judgement, further elaborated in the Reply to the Appeal, and the Government will return to the issue in the proceedings before the Court of Appeal. If this interpretation is applied, there are no reason for further assessments on this point.

Should the Court of Appeal find that combustion abroad resulting from Norwegian export, in principle could be subject to Section 112, the Government will reply that the duty to act under §3 of this provision is fulfilled by the international initiatives and efforts made by Parliament and Cabinet. Furthermore, the Government would have to address the question of what level of emissions that could be expected from a development of the blocks included in the 23rd Round and which legal requirements the court must apply with regards to measurability, probability and causality. The potential effects of Norwegian export for the global climate is a large and complex debate, currently running on several professional and democratic arenas – and which the Courts have limited basis for assessing.

2.3 The importance of international law and sources of law

Throughout the proceedings, the appellants have referred to international rules and sources of law, and this was also included in three amicus curiae before the District Court. However, the legal argument to be supported by these sources of law has not always been clear.

In the Government's opinion, the international rules and sources of law referred to so far, may be divided into three categories of different character and different legal relevance to the matter at hand:

(i) International agreements under international law regarding environment and climate (including the Paris Agreement)
(ii) Traditional human rights (especially the ECHR)
(iii) National court decisions on environment and climate from other countries

Regarding the first category, it is the Government's understanding that the appellants do *not* claim that Norway has violated its duties under international public law regarding environment and climate, neither under the Kyoto Agreement, the Paris Agreement or any other binding agreements. This has not been claimed neither on general grounds nor regarding the decision on the 23rd Round – and such an argument would have been without any legal basis. On the contrary, the Government will claim that the fact that the Cabinet and Parliament so far have complied with their international obligations and continuously strive to do so in the future as well, is a significant argument that the authorities comply with Section

112 and that the provision has not been violated neither in general nor by the decision regarding the 23rd Round.

Regarding the second category, the Government notes that the original argument in the Statement of Claim was limited to applying traditional human rights, including ECHR Art. 2 and 8 and the Covenant on Economic, Social and Cultural Rights ("ICESCR") Art. 12, as a support when interpreting Section 112 of the Constitution. Violation of these provisions were not claimed as a separate basis for rendering the decision invalid. Furthermore, these issues were granted so little attention during the main hearing that the District Court considered that the claim was no longer maintained (cf. p. 27-28 of the judgement). The Government agrees with the Distric Court's view. However, Int, the Statement of Appeal, the appellants again claimed that ECHR Art. 2 and 8 and ICESCR Art. 12 are of importance when interpreting Section 112. In the latter exchange of pleadings this claim is now expanded with a claim that the decision regarding the 23rd Round creates a *per se* violation of ECHR Art. 2 and 8.

The Government will reply that the appellants constitute organisations that do not have protection under ECHR Art. 2 regarding the right to life and Art. 8 regarding the right to privacy. These are individual – not collective – rights that may only be claimed by individuals having rights under the said provisions. In the Government's opinion, the fact that the appellants do have legal status under Section 1-4 of the Civil Procedures Act does not change that issue.

Secondly – and more important – the Government will claim that there is no legal basis for claiming that the decision regarding the 23rd Round violates ECHR Art. 2 and 8. Even though these provisions, from different angles, protect life and health, they do not provide any right to environmental protection by themselves. The limited case law from the European Court of Human Rights regarding the application of these provisions on environmental issues concerns entirely different issues than those under consideration in the present case. Regarding climate emissions, no case law from the European Court of Human Rights indicates that this could be construed as an infringement of individual rights under the ECHR, nor is the Convention expressed, or by its nature able, to govern the legal issues that would arise in such a case.

As ECHR Art. 2 and 8 do not contain any rights of relevance to the issue at hand, it follows that they cannot be used as supporting argument for an expansive interpretation of Section 112 (that would also follow from the principle of autonomous national interpretation of constitutional matters). It is consequently no legal basis for claiming violation of the "corresponding constitutional provisions" in Section 93 and Section 102, as the appellants argue in their latest pleading.

Regarding the third category, the Government notes that there is a significant increase in the number of cases regarding environment or climate issues before the national courts in several countries. This is an interesting context, analytically. Legally, it is of little or no relevance. Most of these cases concern interpretation of national rules and to the extent they also concern interpretation of international law, the conclusions of foreign courts are of no direct relevance

regarding the interpretation of Norwegian sources of law. Nor are any of the cases directly comparable to the case at hand. However, the Government would underline that the main tendency in the international development so far, is that the courts do *not* try to judicialise environmental policy by intervening to any greater extent than supported by clear legal basis. That context may have a certain interest for the assessment of the present case.

2.4 Regarding the claims of procedural errors

In addition to the claim that the decision violates a material threshold in Section 112, the validity of the decision regarding the 23rd Round is also contested on the basis of procedural errors; breach of the duty to conduct assessments, factual errors and errors in the reasoning behind the decision.

The claims regarding procedural errors are thoroughly reviewed by the District Court (cf. p. 28-46 of the judgement) and the Government will refer to this assessment with further argument where necessary.

In general, the Government notes that the decision regarding 23rd Round in June 2016 was the result of a long and thorough process starting in 2013, complying with all the demands regarding assessments, case management and reasoning that follow from the Petroleum Act and general provisions of administrative law.

To the extent the appellants disagree with the case management, the Government will argue that this is actually a disagreement with the system as such, as defined in the Petroleum Act, and not the manner in which that system was applied in the present case. This disagreement cannot be founded on Section 112 nor on any other legal basis. On the contrary, the Petroleum Act complies with the demands that may be interpreted from Section 112.

Another weakness in the appellants' critique against the case management is that they confuse the various stages of the decision making processes that under the Petroleum Act may result in a decision to award permissions, and later to allow development and operations. In this manner, the appellants seek to impose demands on the procedure for award of concessions under Section 3-3 which are contrary to the system of the Act and which are also safeguarded at later stages of the process.

Consequently, the Government will again have to review the system in the Petroleum Act before the Court of Appeal, with main focus on the three stages that are of particular relevance to the case:

1. Opening of new areas – Section 3-1 of the Act
2. Award of production licenses – Section 3-3 of the Act
3. Approval of development and operations – Section 4-2 of the Act

The lawsuit concerns the validity of a decision in phase 2. The blocks subject to the decision regarding the 23rd Round are located in two maritime areas that were opened in 1998 (South Barents Sea) and 2013 (South-East Barents Sea) respectively. None of the blocks awarded in the 23rd Round have proceeded to phase 3, a phase which requires identification of commercially viable fields.

The procedure and the issue for assessment differs in each of these phases, as it is different questions to be decided and different forms of decisions to be made in each.

Regarding the duty to conduct impact assessments ("konsekvensutredninger" in Norwegian), the Parliament has decided, by means of the system in the Petroleum Act, that such assessments shall be made in connection with two of the three phases – phase 1 and 3 respectively. When deciding on opening new areas, Section 3-1 of the Petroleum Act requires that "an evaluation shall be undertaken of the various interests involved in the relevant area." In this evaluation, "an assessment shall be made of the impact of the petroleum activities on trade, industry and the environment, and of possible risks of pollution, as well as the economic and social effects that may be a result of the petroleum activities." Under subsequent approval of potential plans for development and operations, Section 4-2 of the Petroleum Act requires the companies to submit plans with descriptions of relevant "economic aspects, resource aspects, technical, safety related, commercial and environmental aspects," and the Ministry is also authorised to require further descriptions of environmental effects. These rules are elaborated further by detailed rules in the Petroleum Regulation.

Inversely, the Act does *not* impose a duty to conduct assessments in connection with the individual decisions regarding awards of production licences under Section 3-3 of the Petroleum Act. There are several other steps and assessments during the process in phase 2. The Government will present this process for the Court of Appeal, a process which lasted from 2013 to 1016 and which complied with all requirements that follow from Section 3-3 and the Regulation and guidelines.

In addition to claiming procedural errors in the case management leading to the decision regarding the 23rd Round based on Section 3-3, the appellants have also claimed that there were errors in the preceding procedure under Section 3-1 which led to the opening of the South-East Barents Sea in 2013. The claim is based, *inter alia*, on alleged errors in the economic calculations from 2012 which were included in the extensive documentation that was presented to Parliament and formed basis for their decision. The Government will reply that no such errors existed. The procedure leading up to the Parliament's decision in 2013 was very thorough indeed. Furthermore, the Government will claim that the statement has no legal bearing on the present case unless the appellants claim that the entire decision opening the South-East Barents Sea in 2013 was invalid – and there is evidently no grounds for such a claim.

3 Evidence and other issues

The documents submitted in the case will be used in evidence to the extent they directly or indirectly illustrate issues of importance regarding the validity of the decision covering the 23. Round.

As the case, in the Government's view, primarily concerns issues of interpreting the Constitution and relevant fact may be illuminated by means of the submitted documents, there is no need for witnesses or explanations by the parties.

Director General OIe Anders Lindseth will meet as representative for the Ministry of Petroleum and Energy.

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Submission dated 15. October 2019 by the Attorney General, Fredrik Sejersted.