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Property Rights in the Commons: Issues for Environmental Governance

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"Common Property" and Property Rights Theory

The legal status of common land in England and Wales is on the one hand curious, in that it manifests attributes of customary law no longer relevant to other forms of land tenure, and on the other hand entirely paradigmatic of the difficulties of reconciling prevalent notions of property rights with new mechanisms for environmental governance. Common land is not "common" in the sense of being a community resource with communal ownership and land use rights. On the contrary, most common land is privately owned, but has customarily been subject to "rights of common" held by third parties over the same area of land. Though usually owned by private individuals, or by public or private organisations, common land is subject to rights of common (such as grazing rights) that entitle the persons possessing those rights to use the land and its products. The law on common rights has its origins in the medieval manorial system and in the Inclosure Acts of the nineteenth century, and most "rights of common" originate in local custom. Much common land was originally the wasteland of a manor. It will usually consist of open land with rights of common grazing exercisable by the owners or occupiers of farms adjoining the common.

* Professor of Law, Newcastle University. This paper draws on research funded by the AHRC under project AH/E510310/1, "Contested Common Land: environmental governance, law and sustainable land management c.1600-2006", part of the AHRC *Landscape and Environment* programme. I am indebted to Dr Angus Winchester, Margherita Pieraccini, Julia Aglionby and Ian Dawson for their comments and suggestions on this draft. Special thanks are due to Angus Winchester for information on the historical evidence of grazing figures on Eskdale and other commons in the North of England.

Historically, rights of common are usually attached ("appurtenant")[1] to the "dominant tenement" which they benefit. In many areas the most important is the right of pasturage, and the number of animals permitted to graze the common was often limited by the principles of couchancy and levancy. This common law principle dictated that the number of grazing animals permitted on the common was determined by the needs of the dominant land to which the rights were appurtenant (typically an adjoining farm), and in particular the ability of the dominant tenement to accommodate them over the winter when they were not turned out on the common itself. This was the case in two of the case study areas in the AHRC Contested Commons project – Eskdale in Cumbria and the Elan Valley river catchments in central Wales – both upland open grazing areas. Eskdale is unusual in that documentary evidence of the customary land usage practised within the manor exists in the *Eskdale Twenty Four Book*, which records the award of "four and twenty sworn men" chosen by the consent of the steward of the manor to ensure "the right Commodity, Profit and benefit of Common and perpetual Order and Stay" among the tenants of the manor in 1587. Several copies of the *Eskdale Twenty Four Book* are extant, although the original 1587 award does not itself survive. The award was confirmed by a codicil sworn by a further "jury of xxiiii" in 1701, and the surviving manuscript copies are of a copy made in 1692 to which the 1701 award has been appended. The principle of levancy and couchancy is referred to as a guiding principle for regulating the pasturage rights on Eskdale common in several passages in the award[2].

Less prevalent was the practice of stinting i.e. determining the number of animals to be grazed by reference to a fixed number ("stint" or "beastgate") allowed on the common from each farm. A third case study in the AHRC Contested Commons

[1] Rights can also be "appendant". Appendant rights originate in the customary right of someone who was granted feudal tenure of arable land to graze his cattle – the animals necessary to plough and manure the lord's arable land – on the wasteland of the manor. See generally *Tyrringham's case* [1584] 4 Co.Rep. 36a (76 ER 973). They are very rarely encountered today.

[2] The terms "levancy" and "couchancy" are not themselves used. The principle is nevertheless referred to, for example, in terms that record (i) that "every one [of the tenants is] to have their sheep lying in their own cow pasture in Winter time at their own discretion" (ii) and perhaps more explicitly "And we judge that no Tenant or Tenants shall take any Cattle to Grassing within the said Lordship upon paine of vis viiid every beast so taken *but such like as the[y] Winter*…" (emphasis added) : *A copy respecting the Common etc. belonging to the Lordship of Eskdaile, Miterdaile and Wasdailehead dated 18th March 1587* respectively at page 9 and a later passage headed "Against taking of Cattle or Horses in Summer" (copy obtained courtesy of the Eskdale commoners association)..

project – Ingleton – contains several examples of stinted commons. Stinted commons occupy a special, and perhaps idiosyncratic, position. Although they were registrable as common land under the Commons Registration Act 1965, there is a question whether most pasturage rights over stinted and regulated pastures should have fallen into the registration system at all, as they are not strictly "common" rights but rights governed and granted by individual Inclosure awards[3]. Not all stinted and regulated pastures were, however, governed by Inclosure Awards. Not all of those in the Ingleton case study were, for example. Some originated in shared pasture closes separated from the common in the medieval period or sixteenth and seventeenth centuries, while others (for example Scales Moor in North Yorkshire[4]) appears to have been manorial waste that was converted form an unstinted pasture to a stinted pasture with fixed "beastgates" in the nineteenth century.

While property rights in the commons may be unique, they also demonstrate very clearly the wider problems that English lawyers have in reconciling environmental stewardship with common law theories of "property". Indeed, in the case of common rights these problems are, if anything magnified. The central problem is the representation of property rights in the legal discourse as a static (and abstract) concept, centred on its interpretation as a bundle of land use and ownership rights. This is in stark contrast to the mobile and dynamic models of property and property right that have emerged in recent years from studies of the interaction of property rights with instruments of environmental governance. As this paper will endeavour to show, a new and dynamic theory of property rights in the commons is needed if we are to rationalise and understand the modern environmental governance of our common lands.

Reconciling "Property" and "Environment" in the Commons

"Property" is not a thing (e.g. land) but rather the relationship that one has with it[5]. Ultimately it defines the relationship of power that one asserts over a resource such as land. More than this, the bundle of property "rights" over land that the law recognises

[3] See Gadsden G.D., *The Law of Commons* (Sweet & Maxwell, 1988) at 1.59 and 1.75.
[4]Register of Common Land, Register Unit CL 272 (North Yorkshire County Council)
[5] See for example K.Gray and SF Gray, "The Idea of Property in Land", in *Land Law: New Perspectives* at p. 15.

will define, distribute and reflect different elements of resource utility that accrue to the "owner" of the right in question. Environmental legislation is fundamentally concerned with the limitation or redistribution of property rights in this sense – as elements of utility - in order to pursue a communitarian objective in environmental protection. Property rights are therefore of fundamental importance to an understanding of the application of environmental law in regulating land use. Common land is unique in that it is subject to multiple land use rights, and therefore illustrates the role of environmental law as a mechanism for reallocating utility rights more clearly than some other forms of property institution[6].

The development of a jurisprudence of environmental property has been hampered by the conceptual uncertainty that surrounds the basic notions of "property" and property "rights" in English Law. "Property" is a highly malleable concept, capable of being viewed in different ways that stress differing facets of the relationship of the property holder with land. In legal discourse property is often viewed as an abstract construct, characterised by the presence of "incidents" of ownership, and of conceptually abstract "rights" which make up the essential ingredients of ownership. A classic example of this approach is found in Honore's analysis of the key characteristics of property ownership[7]. Honore lists ten "rights" which he regards as essential indicia of ownership, even though not all need be present together: the right to possession, to use, to manage, to income and capital, to security, the incident of transmissibility, incident of absence of termination and liability to execution[8]. Other legal theorists view property rights primarily as comprising items that are either the subject of direct trespassory protection by the law, or are capable of separate assignment as parts of private wealth[9]. The focus here is on whether there is a legally protected right to the exploitation and use of land: whether that right is actually utilised (and if so in what manner) has commanded little interest in legal analyses of the nature of property rights in land. It follows that most legal theorists have a "static" view of property rights that fails to encompass the functional relationship of property with the environment.

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[6] For example freehold or leasehold tenure.
[7] See A.Honore, "Ownership" in (Guest ed.) *Oxford Essays in Jurisprudence* (Oxford 1961) Ch V; and "Ownership" in A.Honore, *Making Law Bind: Essays Legal and Philosophical* (1987) 161.
[8] See A.Honore, "Ownership" in (Guest ed.) *Oxford Essays in Jurisprudence* (Oxford 1961) Ch V p 107ff. .
[9] J.W.Harris, *Property and Justice* (Oxford 1996) at 140-142.

This approach – viewing property ownership as constituent primarily of a "bundle of rights" – is a characteristic of the western liberal property concept, which emphasises the power to exclude others, and the right of the owner to the beneficial use and enjoyment of the land and personal property over which ownership is claimed[10]. It is, however, inherently unsuitable as a theoretical basis for the analysis of rights subsisting over common land. Common rights fail to exhibit many of Honore's characteristics – transmissibility is absent, for example, and there is no right to capital – and can only be assigned as parts of private wealth if transferred with land (i.e. the dominant tenement to which they attach). Yet they are a clearly recognised and economically very important species of property right.

Most of the research on new economic models for property stresses the dynamic nature of property rights[11]. Whether an entitlement is exercised will depend upon a range of economic indicators conditioning the decision making of the holder of the property right concerned. The holder's legal entitlement provides the framework within which this decision-making will take place. Dynamic theories of property rights emphasise their role in unlocking a stream of benefits, and view the right to that stream of benefits as an expression of the relative power of the bearer, with the holder of a property right able to command certain responses by others enforced by the state (through law)[12]. The function of property rights, according to economic theorists, is primarily to provide incentives to internalise the potential environmental externalities that have emerged (and continue to emerge) from the growing technical potential of agricultural production to generate pollution and damage biodiversity[13].

Because of their static (and conceptually abstract) approach to the notion of "property", legal theorists have difficulty in categorising environmental laws within

[10] See for example Murray Raff, "Environmental Obligations and the Western Liberal property Concept", [1998] 22 Melbourne University Law Review 657; Joseph Penner, "The 'Bundle of Rights' Picture of Property" [1996] UCLA Law Review 711.
[11] See for instance D.W. Bromley, *Environment and Economy: property rights and public policy* (Oxford 1991); I.D.Hodge, "Incentive Policies and the Rural Environment" (1991) 7 *Journal of Rural Studies* 373; B. Colby, "Bargaining over Agricultural Property Rights" (1995) 77 *American Journal of Agricultural Economics* 1186 (adopting a bargaining model).
[12] L.Libby, "Conflict on the Commons: Natural Resource Entitlements" (1995) 76 *American Journal of Agricultural Economics* 997.
[13] See H. Demsetz, "Towards a Theory of Property Rights" [1967] 57 *American Economic Review* 347, at 348ff.

the established framework of the legal discourse on property rights. Most environmental legislation is introduced to further public policy objectives, whereas the common law understanding of property rights within the western liberal property tradition is largely derived from a discourse centred on private law notions of ownership and trespass, and from the law of nuisance. Indeed, a traditional view would see the essentials of any property institution as based upon "trespassory rules" and located at different points on the "ownership spectrum"[14]. The latter comprises a range of open-ended relationships presupposed and protected by trespassory rules that may be either civil or criminal in orientation. In environmental law, on the other hand, property institutions fulfil a dynamic role, modifying land use entitlements where this is deemed necessary to protect or enhance biodiversity. The development of a new theory of "environmental" or "green" property rights – one that captures the dynamic relationship between environmental regulation and property rights – requires a radical reappraisal of property rights in English Law. Ecology evolves and changes over time, and if environmental regulation is to be effective in protecting biodiversity it must adopt legal mechanisms that can evolve and adapt in response to changes in the ecological cycle of habitats and wild species of flora and fauna. At its broadest, the law must recognise the immutability of the laws of nature, and structure the system of property rights in ways that take account of the principles of ecology.

Some commentators have argued cogently for a "co-evolutionary" approach that enables environmental law to adapt property rights in response to evolutionary changes in the natural resources it seeks to protect[15]. English law has in recent years adopted a number of new, and flexible, legal instruments for promoting environmental protection and these arguably reflect the need to provide a legal framework for adapting property rights in step with changes in the ecological condition of those features of the natural environment the law seeks to protect. These include; public law mechanisms, such as environmental conditions attached to farm subsidies ("cross compliance"), planning agreements and planning conditions; contractual mechanisms providing for environmentally beneficial land management by landowners, such as management agreements made under the Wildlife and

[14] J W Harris, "Private and Non Private Property", (1995) 111 LQR 421 @ 425.
[15] See for example T.W. Frazier, "The Green Alternative to Classical Liberal Property Theory", (1995) Vermont LR 299 (esp. at 323 ff); M.B.Metzger, "Private Property and Environment Sanity" [1976] 5 Ecology LQ 792; Murray Raff, above note 4.

Countryside Act 1981 or under rural development programmes within the common agricultural policy; and the increasing use of soft law instruments, such as codes of practice, to encourage environmentally responsible land management. All of these have a prominent role to play in the environmental governance of common land.

Environmental Management of Common Land: the Statutory Context

The principal legal mechanism for promoting and protecting biodiversity is the designation of geographically distinct high nature value areas for protection, the primary wildlife designations in England and Wales being Sites of Special Scientific Interest ("SSSIs")[16], Special Protection Areas and Special Areas of Conservation[17]. A large proportion of the common land in England and Wales has wildlife designations subsisting over it - in England 180,000 hectares of common land, just short of 50% of the total area, is in notified SSSIs, and 67% of this area in wildlife sites has been assessed by Natural England as being in unfavourable condition[18]. A further 48% of the common lands lie in National Parks and 31% is in Areas of Outstanding Natural Beauty. These designations often intersect and overlap. There are, for example, four SSSIs within the Eskdale common case study area[19], the whole case study area is within the Lake District National Park, and much of it is also within the Lake District High Fells SAC.

The interaction of the legal mechanisms for designating sites with the property rights regime applicable to common land causes numerous problems. The legal provisions in the Wildlife and Countryside Act 1981 for the notification and protection of SSSIs

[16] Notified under Part 2 Wildlife and Countryside Act 1981, as amended by Sched. 9 Countryside and Rights of Way Act 2000. This is the principal wildlife habitat designation in England and Wales.
[17] These are designated under the Conservation (Natural Habitat) Regulations 1994 SI 1994/2176 as "European Sites". As a matter of policy, all European Sites are also designated as SSSIs under the Wildlife and Countryside Act 1981.
[18] *Agricultural Use and Management of Common Land: Report of the Stakeholder Working Group*, (DEFRA 2003) Appendix A.
[19] Beckfoot Quarry SSSI, Nab Gill Mine SSSI, Scafell Pikes SSSI, and Wasdale Screes SSSI. The environmental management issues for Eskdale common are primarily concerned with the Scafell Pikes and Wasdale Screes SSSIs. Some of the Scafell Pikes SSSI is not, strictly speaking, common land. The top of the Scafell Pike range is lord's freehold land, and not included in Register Unit 58 of the Register of Common Land (Eskdale common), although the environmental management issues are the same. Its peculiar status derives from its forest status in the medieval period – ScaFell and Slightside were recognised by the sixteenth centuries as the lord's deer fences or "friths" which, although not physically enclosed, were nevertheless separate from the common land on the adjacent Eskdale common.

take no account of the fact that a site may include common land. Where a potential SSSI includes common land this may cause problems both in applying the initial procedures for notifying the site, and subsequently in securing a management agreement to regulate the land use for nature conservation. Similarly, the principal legislation governing the registration and classification of commons rights - the Commons Registration Act 1965 - was drafted without reference to the particular requirements of environmental management.

(a). Section 28(1) of the 1981 Act places a duty on Natural England and the Countryside Council for Wales ("the Councils"), when notifying an SSSI, to notify every owner and occupier of any of that land affected. Similarly, legislation gives them the power to conclude a management agreement with any owner, lessee or occupier of land in an SSSI[20]. The term "occupier" was given a wide interpretation by the House of Lords in Southern Water v NCC[21], and will include most categories of occupier holding common rights over land that is notified as SSSI. The holders of registered common rights will all be notified under section 28 of the 1981 Act when an SSSI is established (providing they can be traced), along with the freehold owners and tenants of affected land[22].

(b). Once an SSSI has been established, the Wildlife and Countryside Act 1981 seeks to protect the site from unsympathetic land uses by imposing a statutory consultation procedure before potentially damaging operations can be carried out. The site notification for each SSSI will specify any potentially damaging operations that, if carried out, would appear to the Council to be likely to damage the conservation interest of the site[23]. The notified operations will be selected having regard to scientific criteria and will be dictated by the need to achieve favourable conservation status for the protected habitat in question. The nature of the occupier's legal occupation rights will not be a relevant consideration in this exercise, and the

[20] see section 15(2) Countryside Act 1968, section 7 Natural Environment and Rural Communities Act 2006 (general power available to Natural England)

[21] [1992] 3 All ER 481 (" any person who has a stable relationship with the land which is not transient" per Lord Mustill).

[22] The practice of Natural England (and its forerunner English Nature) and CCW has been based upon a statement made in the House of Lords on 17th October 1990 by Baroness Blatch, to the effect that in the (then) Nature Conservancy Councils view both section 15 Countryside Act 1968 and section 28 Wildlife and Countryside Act 1981 cover crofters and holders of common rights (Nature Conservancy Council PPG 4/91).

[23] Section 28(4)(b) Wildlife and Countryside Act 1981.

potentially damaging operations which are notified will be the same whether the site includes common land or not. It is a criminal offence to carry out any of the specified operations without the Council's consent[24]. An operation will be lawful, however, if carried out with written operational consent from the Council, under the terms of a management agreement or under a Management Scheme established for the SSSI[25]. These provisions are targeted at initiating a statutory consultation when a landowner proposes to carry out a notified operation, and this will often result in the conclusion of a management agreement to protect the site.

The property rights regime for common land causes problems in relation to both aspects of environmental governance – notifying sites for protection and their subsequent environmental management. These will be considered separately below, using data from the Eskdale case study in the AHRC Contested Commons project to illustrate the issues raised.

Notifying Common Land for Protection

When notifying an SSSI which includes common land, the Councils will use the Commons Registers established under the Commons Registration Act 1965 as a point of reference, and notify all those with registered common rights e.g. of pasturage (grazing), turbary or estovers. The Commons Registers are often inaccurate, however, and the problems of tracing the current holders of registered rights may be considerable, for example where a holding with common rights has been transferred or divided and sold, or where the commoner is "inactive" i.e. not currently exercising his/her entitlement. The Commons Registration Act 1965 permitted the amendment of the Commons Register following a transfer of common rights[26]. There was no duty to notify changes in ownership or tenure.

The Commons Registers are, consequently, currently often out of date, inaccurate and unrepresentative of the current land use on the common. This renders the process of

[24] Section 28P ibid. Punishable by a fine not exceeding £20000 on summary conviction or an unlimited fine on indictment.
[25] There are special provisions for establishing schemes, introduced by Schedule 9 Countryside and Rights of Way Act 2000: see now Section 28E Wildlife and Countryside Act 1981.
[26] See section 13 Commons Registration Act 1965, and the Commons Registration (General) Regulations 1966, SI 1966/1471.

establishing an SSSI unnecessarily complex and time consuming. In the case of Eskdale, for example, English Nature served notification of the Scafell Pikes SSSI on 30 commoners with registered rights in 1988 – notwithstanding that a few years later (in 1995) only 10 "active" graziers were exercising common grazing rights on the common. There are now only 8 active graziers. The owner of the soil must also be notified, and where there is no known owner (a not uncommon occurrence, though not the case in Eskdale) Natural England must notify the "relevant local authority", a body it is not always easy to identify[27]. The problems have in the past sometimes been aggravated by the practice of leasing or licensing rights for the use of others[28] and by the existence of rights enjoyed by virtue of a landlord/tenant relationship with the owner of the soil, which are not strictly registrable[29]. The qualitative research conducted in the Eskdale case study revealed no evidence of the leasing or licensing of rights on Eskdale common, however.

These problems may be compounded where the SSSI includes land over which common rights exist "in gross", as these can be transferred by the holder independently of the dominant land for the benefit of which the rights are exercised. Rights held in gross are comparatively rare, but not unknown. In the case of Eskdale, for example, two entries in the Commons Register record rights in gross, numbering in total 873 sheep grazing rights[30]. Even if the initial site notification catches all active commoners, any subsequent severance and transfer of rights held in gross, independently of the dominant tenement, may render the statutory consultation procedure for notified operations ineffective. If the new holder of the transferred common rights was not himself served with the SSSI notification, the consultation procedure will not apply to land use changes he subsequently proposes, such as an increase in grazing livestock numbers. A further question concerns whether the holder of rights in gross can be said to be an "occupier" of the common land over which the rights are exercisable. The wide interpretation of "occupier" adopted in *Southern*

[27] Natural England, pers. comm. 13th December 2007.
[28] This practice was widespread, although of questionable legality: see Gadsden,GD *The Law of Commons* (1988) at 6.23 – 6.30. It is now impermissible by virtue of section 9 Commons Act 2006, except for short terms of 2 years (in England) and 3 years (in Wales) as permitted by regulations made by DEFRA and the Welsh Assembly Government
[29] See Gadsden at 4.10, 4.11, and Aitchison, J and Gadsden, GD in (Howarth W and Rodgers CP (Eds.)) *Agriculture Conservation and Land Use* Univ. of Wales Press 1992 at p.174.
[30] Register of Common Land, Register Unit CL 58, Rights Section, Entry nos. 62 and 65. Both are held by the National Trust through Countryside Commons Ltd.

Water v NCC[31] , based on the functional relationship of the occupier with the land, would indicate that a commoner with rights in gross which are being exercised at the time of the SSSI's notification would probably constitute an "occupier" for the purposes of notification etc. The position of a commoner with rights in gross that are not being exercised is, however, less certain. The position is not helped by the fact that many rights in gross are inaccurately registered in the Commons Registers[32], as are rights over stinted and regulated pastures, which, not being strictly common land but governed by individual Inclosure awards, should not have fallen into the registration system at all[33].

Some of these problems have been eased by recent legislative measures. The Countryside and Rights of Way Act 2000 introduced new provisions to improve the protection of SSSIs where there is a change of occupation[34]. These place a duty on the owner of land included in an SSSI to notify the Council when he disposes of an interest in the land or where he becomes aware of a change in its' occupation. This is problematic in the case of a common because the possessor of common rights will not usually be the owner of the soil i.e. the owner of the land over which the common rights subsist. Where the owner of the soil is also the landlord of tenants whose farms have a turn out on the common[35], it would require the owner to notify Natural England when a change of tenancy occurs. Rights held in gross are also problematic in this context, for similar reasons to those outlined above. Where rights in gross are transferred, can it be said that there has been a "change in occupation" of the part of the common over which those rights are exercisable, given that the rights themselves are not formally attached ("appurtenant") to nearby land that may benefit from them? New powers in the Natural Environment and Rural Communities Act 2006 also now preserve the status of an SSSI notification where Natural England have taken all reasonable steps to ensure that each occupier has been notified, if it later transpires that a commoner with exercisable rights has not been served with the notification[36].

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[31] [1992] 3 All ER 481, above note 19.
[32] See Gadsden at 3.43, 3.44 and Aitchison and Gadsden (ibid.) p.174.
[33] See Gadsden at 1.59 and 1.75.
[34] See section 28Q Wildlife and Countryside Act 1981, inserted by sched.9 Countryside and Rights of Way Act 2000.
[35] The National Trust is, for example, the owner of four of the farms with a turn out on Eskdale Common. While four of the active graziers are National Trust tenants, however, the other four are not.
[36] Section 70B Wildlife and Countryside Act 1981, inserted by section 57 Natural Environment and Rural Communities Act 2006.

Environmental Management of the Commons

The deficiencies of the registration process under the Commons Registration Act 1965 are well known[37]. This paper has already referred to the inaccuracy of the registers, and the problems that can arise when notifying sites for protection. The fact that grazing rights registered on the Commons Register under the 1965 Act are often inaccurate - both as to the historical number of animals grazed and the identity of the rights holder - can also cause problems in implementing environmental management schemes on common land. Registered grazing rights bear no necessary relation to either the carrying capacity of the land itself, or to the "optimum" level of stocking needed to prevent overgrazing. The 1965 Act contained no provision restricting the registration of rights by reference to agronomic or environmental criteria[38]. Moreover, the effect of permitting the registration of pasturage rights for fixed numbers of grazing stock was to abolish the common law doctrine of couchancy and levancy, whereby the grazing of stock on common land was restricted by reference to the needs of the dominant tenement and its ability to feed stock over winter when they are off the common[39].

The net effect of the 1965 Act was that the grazing rights registered thereunder simply reflected what landowners claimed when registering within the time scale laid down in the Act. They are theoretically based on the historic turn out on the common concerned, although in practice numbers were sometimes inflated, and many of the rights registered may not have been exercised at all, may only have been exercised in part, or exercised at certain periods and not others. On Eskdale common, for example, 12330 rights of pasturage for sheep and followers are registered in the rights section of the Common Land Register. Historical evidence of grazing numbers on Eskdale common demonstrates that at certain periods livestock grazing was intensive and may

[37]See generally *Common Land: The Report of the Common Land Forum* (Countryside Commission, 1986).
[38]This was one of the principal deficiencies of the 1965 Act identified by the Common Land Forum, and undoubtedly led to inflated numbers of rights being registered for some commons : R*eport of the Common Land Forum* ibid. at paras 015 - 018. The Common Land Forum recommended that registrations should be reopened in appropriate cases so that registrations could take account of the carrying capacity of the common.
[39] See *Bettison v Langton* [2001] 3 All ER 417.

have exceeded the figures currently reflected in the register: at other times it was not. In 1839 a Tithe Commissioner's Report claimed that there were "probably twenty thousand" sheep in the tithe district, which covered Wasdalehead and Netherwasdale, in addition to Eskdale itself and Miterdale[40]. More accurate figures are given in the parish summaries of the Agricultural Statistics published in the late nineteenth and early twentieth centuries. These record substantial numbers in the late Victorian period. There were 12500 sheep and lambs grazing in Eskdale in 1877, and a further 5740 recorded in Netherwasdale[41]. In 1897 the figure recorded in Eskdale, Miterdale, Wasdale and Netherwasdale was 17443 sheep and followers[42], and by 1907 it had increased to 18746[43]. These figures would tend to indicate that the numbers subsequently registered under the 1965 Act were not far from the numbers of sheep historically grazing on Eskdale common. The principle of levancy and couchancy should, in theory, have provided a check on the level of grazing permitted on the common land in Eskdale by limiting it to the number of stock that graziers could over winter on the holdings to which their rights attached. There is little direct evidence, but the volume of stock recorded on the common would indicate that the principle had ceased to have any practical limiting effect by the mid-nineteenth century. The Tithe Commissioners report in 1839 commented that " far more sheep are kept in the district than the lands will keep in condition, and a very great number of lamb hoggs *are sent to winter on inclosed grounds in distant parts of the country*"[44] - if correct this would clearly breach the rules of levancy and couchancy set out in the *Eskdale Twenty Four Book*[45].

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[40] Public Record Office/R18/716, Tithe File: Netherwasdale, Eskdale and Wasdale, Report on the Agreement for the Commutation of Tithes. Visited 11 July 1839 by John Job Rawlinson, Assistant Tithe Commissioner (answer to question 11). Netherwasdale is outside the case study area for the AHRC project, and outside CL 58 (ESkdale common). The figures given in the report would therefore require discounting to give a figure for sheep grazing on Eskdale common, but even allowing for this, the figure would probably have been considerably in excess of the 12300 rights for sheep and followers registered under the Commons Registration Act 1965 on CL 58.

[41] Public Record Office, Agricultural Statistics, Parish Summaries MAF 68/520 Cumberland 1877, sheet 7.

[42] Public Record Office, Agricultural Statistics, Parish Summaries MAF 68/1660 Cumberland 1897, sheet 1. The figures for Netherwasdale and Eskdale are aggregated in the 1897 and 1907 returns. The total grazing figures for Eskdale and Wasdalehead given separately in 1877 (above, note 41) produce a similar aggregate total figure for the two parishes, however, which would indicate a relatively stable level of grazing on Eskdale common itself between 1877 and 1897.

[43] Public Record Office, Agricultural Statistics, Parish Summaries MAF 68/2230 Cumberland 1907, sheet 8.

[44] Public Record Office/R18/716, Tithe File: Netherwasdale, Eskdale and Wasdale, Report on the Agreement for the Commutation of Tithes (above note 40) - answer to question 11, emphasis added.

[45] Above, note 2.

By contrast in 1995, immediately prior to the introduction of sheep grazing reductions under the Environmentally Sensitive Areas programme, only 8565 sheep were grazing the common according to Natural England – this at a time, moreover, when the headage payment regime of the common agricultural policy encouraged farmers to maximise sheep numbers on the fell. Many registered rights of pasturage were clearly not being utilised, or only utilised in part. The Eskdale commons register also records 14 rights of turbary, although peat cutting has not been practiced on the common for many years. Similarly, there are 5 registered rights of estovers, none of which are currently exercised as changes in farming practice mean that bracken is no longer needed for animal bedding. The commons register reflects, in other words, a static system of property rights in the common that encapsulates historical claims to land use made during the registration process completed in the late 1960s, and little else. It certainly does not reflect the actual usage of the common, or in many cases accurately reflect the current ownership of the various rights registered in the rights section of the register.

The management sought by Natural England in order to address the environmental problems prevalent on common land, such as overgrazing, may differ markedly from the rights registered in the commons register. Eskdale presents many issues that are typical of upland commons with high nature value, and which contain statutory wildlife designations such as SSSIs. The two principal SSSIs on the common are Scafell Pikes SSSI and the Wasdale Screes SSSI. In the case of Scafell Pike, the site hosts upland and montane heaths, and the summit boulder field hosts rare assemblages of lichen heath. Both are highly sensitive to sheep grazing pressures, and the site was assessed by Natural England in October 2004 as “unfavourable recovering”. The Wasdale Screes SSSI runs along the southern shore of Wast Water and forms a classic geomorphological example of one of the best screes in Britain, with cliffs in the higher areas and unstable screes below. The gullies sustain a rich montane and lowland flora with a number of nationally rare plant species present, plus heather and bilberry heath. When the two units in the SSSI - the upland dwarf shrub heath above the screes (unit 1) and the rock screes themselves (unit 2) – were last assessed in October 2003 and October 2004, 70% of the SSSI was adjudged by

Natural England to be in an unfavourable condition with no sign of improvement, and 30&% was unfavourable but recovering[46].

Natural England has power to establish statutory Management Schemes within SSSIs[47], and to enter into management agreements with individual landowners providing for conservation management and the payment of compensation[48]. The priority management identified by Natural England to address the problems in both SSSIs involved a reduction in sheep grazing pressures, and the removal of additional stock in the winter. The common was entered into Tier 1 (Heather fell) of the ESA programme in 1995, under a management agreement negotiated on behalf of the commoners by the Eskdale commoners association. This resulted in a reduction of the sheep grazing the common to 5139 in total in summer, and 3852 in winter. ESA applies across the whole common i.e. across both the SSSI and non-SSSI land. Further reductions in sheep grazing numbers have subsequently been introduced under the Sheep and Wildlife Enhancement Scheme ("SWES"). SWES agreements were individually negotiated with the 10 active commoners in 2003, and provide for approximately a further 40% reduction in sheep grazing numbers on the SSSI land within the common, with two of the commoners removing their entire flock from the common. The target annual average grazing density across the common under SWES is 0.8 ewes per hectare.

The Eskdale case study is illustrative of the problems for establishing environmental management schemes to which the commons registration system gives rise. These fall broadly under the following three heads:

(a). Environmental schemes for the management of commons can at worst be thwarted, and at best made more difficult to establish, by the practical difficulties of identifying the current holders of grazing rights with whom to enter into management

[46] The area showing signs of recovery was in unit 1, the upland dwarf shrub heath area of the SSSI.
[47] Section 28J Wildlife and Countryside Act 1981 (inserted by Sched 9 Countryside and Rights of Way Act 2000).
[48] Section 15 Countryside Act 1968, section 7 Natural Environment and Rural Communities Act 2006. Similar power exists in relation to nature reserves under section 16 National Parks and Access to the Countryside Act 1949: and in relation to "European" wildlife sites protected by the EC Habitats Directive, under the Conservation (Natural Habitats & C) Regulations 1994, SI 1994/2716, reg. 16.

agreements[49]. This is essentially the same problem as that alluded to above in relation to the problems of notifying land as an SSSI or SAC. Although satisfactory ESA and SWES agreements were concluded on Eskdale common, Natural England's officers stressed the additional difficulties caused by the need to identify all commoners and owners, problems caused by inadequate rights of access to identify conservation features, and the need to notify everyone with a registered interest in the common[50].

(b). A key problem for establishing management schemes is the need to accommodate the interest of every commoner with registered rights, whether they are actively utilising them or not. Where notification is at issue, the question is rather different – is the registered commoner an "occupier" of the land? In practice many commoners with registered rights will not be exercising their full right of turn out on the common, and some may not be exercising their registered rights at all. Paradoxically, the most difficult issues surround the "inactive" commoner. It clearly makes sense for Natural England to target those producers actively utilising their rights, as it is conservation management by these graziers that will deliver the objectives of ESA and SWES. Management agreement payments will in practice, however, only be paid on the basis of registered rights. The potential for "inactive" commoners to upset the environmental management of the common by subsequently exercising commons rights is considerable, and dictates that their interest must also be accommodated if a workable scheme is to be established. This can lead to tensions within the farming community, and arguably to an inappropriate use of public funds to "buy out" common rights that are not (and may never have been) exercised.
The negotiation of the 1995 ESA agreement on Eskdale common is illustrative of this problem. To secure the agreement, annual payments were made to eleven commoners who were not, prior to ESA, actively using their registered rights, on the basis that £1 p.a. was paid for each registered (but unused) common right – involving 1275 grazing rights for sheep in total. The problem of the "inactive grazier" also impacts upon the farm subsidy entitlements of those graziers actively grazing the common. The entitlements to payments under the CAP single farm payment scheme have been calculated by reference to all the rights registered for each common, as reflected by

[49] See generally C.P.Rodgers, "Environmental Management of Common Land : Towards a new Legal Framework?" (1999) 11 JEL 231-255.
[50] Natural England, pers.comm.. 13th December 2007.

the commons registers themselves, irrespective of whether they are being exercised[51]. Each commoner will be allocated entitlements over a notional area of the common[52]. The number of entitlements (or to be more precise the notional area of the common) allocated to each common grazier was then calculated as a proportion of the total of registered grazing rights for the common, by reference to the number of rights that producer holds relative to the total number of registered rights. The effect of this calculation is to "dilute" the single farm payment entitlement of active commoners, and this in turn makes them economically more dependant on agri-environment payments under ESA and the SWES scheme. It should be added that, in order to claim the single farm payment, the claimant has to be a "farmer" within the meaning of the regulations governing the common agricultural policy[53]. Many common rights will be held by individuals or organisations that are not farmers, and will be ineligible. Despite this, their rights (whether used or not) will enter the calculation of single payment entitlements for active graziers, further diluting the number of entitlements to which the latter may be entitled.

(c). The third problem concerns the *type* of livestock management required to achieve the beneficial environmental management that Natural England require in SSSIs. In some cases the rights reflected in the commons register may not entitle graziers and other land managers to implement the type of management required. The Eskdale case study illustrates this problem neatly. The key land management objectives set by Natural England in order to return the Scafell Pikes and Wasdale Screes SSSIs to favourable condition are the encouragement of heather regeneration on the common, the restoration of woodland in the Gill Woods area of the common, and the re-establishment of juniper shrub. Achieving these objectives will require not only a reduction in sheep grazing pressures on the common, but also the reintroduction of mixed grazing with cattle. When the current SWES and ESA agreements on Eskdale common expire in 2013 the future of sustainable farm management on the common will depend upon it being accepted into the Higher Level Stewardship (HLS) scheme.

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[51] See *Single Payment Scheme: information for farmers and growers in England* (DEFRA and the Rural Payments Agency, March 2005) at p.3.

[52] An entitlement is issued for each hectare of eligible land. Single farm payment entitlements were initially issued in 2005.

[53] As to which see art. 2(a) of EC Council Regulation 1782/2003, OJ L270/1, 21.10.2003. To qualify as a farmer an individual or other legal person must be engaged in an "agricultural activity" as defined in ibid. art.2(c).

A mixed grazing regime with sheep and cattle will be required by Natural England for entry to the scheme. The grazing regime required for HLS may, however, conflict with the register of common rights.

Historically, cattle were grazed on Eskdale common and most (but not all) registered rights of pasturage include an alternative right to pasture cattle instead of sheep. Twenty-eight of the rights of pasturage in the rights section of the register have cattle grazing rights as an alternative to sheep. Curiously, 14 allow the grazing of cattle at a conversion rate of 10-ewes/one cow, and a further 14 allow the grazing of cattle at a conversion rate of 20-ewes/one cow. If a prospective entrant to HLS does not have registered rights for cattle grazing, or does not have sufficient rights calculated by reference to the registered conversion rate applicable to his registered rights, it follows that Natural England may not be able to insist upon mixed grazing in the manner sought. The commons register may therefore be an impediment to the achievement of the type of environmental management required to bring the common back into favourable conservation status. A solution may be sought in the use of the "surplus" grazing rights possessed by the owner of the soil. The owner is entitled to any surplus grazing over and above that held by registered commoners, and this might be licensed to graziers who have insufficient rights in order to enable them to stock cattle under HLS[54]. The owner of the soil in Eskdale is the National Trust, and four of the principal active graziers are National Trust tenants. The other four active graziers are not, however, and it remains to be seen whether the landowners would, if necessary, be willing to licence their surplus rights to graziers outside the National Trust estate. These problems highlight one of the points made above, namely that the registration process under the Commons Registration Act 1965 took no account of the sustainable management of the commons when enshrining grazing (and other) rights in the registers as property rights. It also emphasises the problems that a "static"

[54] For the purpose of calculating the owners entitlement (if any) under the Single Payment Scheme, the Rural Payments Agency calculate whether there is any "surplus" grazing available to the landowner by assuming a stocking rate of 0.25 LU/ha in Severely Disadvantaged Area ("SDA") moorland and 0.75 LU/ha in SDA non-moorland areas. Eskdale common is mainly SDA moorland for this purpose. This will produce a figure for notional maximum stocking on the common, when multiplied by the area of the common in question. A comparison of this figure with the total of registered rights on the common will indicate whether there is any "surplus" grazing available to the landowner. See further *Single Payment Scheme: information for farmers and growers in England* (DEFRA and the Rural Payments Agency, March 2005) at p.4 for further information and worked examples.

framework of property rights can engender, when the requirements of environmental management will usually require a flexible approach under which property rights can be adapted to meet the needs of conservation management.

Conclusion – Towards a "Dynamic" Property Rights Model?

The problems outlined above underline the need to move toward a dynamic model of property rights for our commons. The categorisation of fixed property rights reflected in the commons registers complicates the environmental management of common land, distorts the management choices available to commoners and the statutory agencies, and impacts upon the economic viability of farming in marginal upland areas by reducing commoners' single farm payment entitlements.

The reforms enacted in the Commons Act 2006 could facilitate a move towards a more dynamic model of property rights in the commons. This will be dependant, however, upon the willingness of commoners and other stakeholders to use the new statutory powers to initiate self-regulation by establishing statutory commons councils. The 2006 Act provides that each commons council will have the power to introduce binding regulations to regulate agricultural activities, the management of vegetation and the exercise of common rights on the common[55]. The rule making power goes somewhat further than this, however[56], and can also be used to make rules governing the leasing or licensing of grazing rights. The commons council will also have power to remove animals illegally grazing the common and to remove unlawful boundaries and other encroachments[57]. These powers will be subject to confirmation in each case by the Secretary of State[58].

The commons councils will also have power to establish "live" registers of common rights, so as to give an accurate picture of the entitlements affecting a common, the current holders of those entitlements, and the manner in which they are being exercised (e.g. the number of animals stocked on the common by each commoner).

[55] Section 31(3)(a) and 31(4) Commons Act 2006
[56] See Section 31(3)(b) – (f) ibid.
[57] Section 31(3)(f) ibid. And see *Consultation on Agricultural Use and Management of Common Land* (DEFRA 2003), Proposals 1 - 7
[58] See section 33 Commons Act 2006

This would require compulsory registration of all formal and informal transfers of grazing entitlements, and the supply of information as to stocking numbers by adjoining landowners turning stock out onto the common. There is, accordingly, provision in Part 2 of the 2006 Act for commons councils to establish live registers of ownership and usage if they so wish[59] i.e. a "living" register similar to that regulating grazing on Dartmoor under the Dartmoor Commons Act 1985[60].

The introduction of binding rules governing grazing on the common will enable a commons council to bind inactive graziers so as to prevent them from exercising previously unused common rights. This will facilitate the speedier conclusion of environmental management schemes on common land. It will also remove the necessity to accommodate the property rights represented by registered (but unused) rights in environmental management agreements, such as the ESA agreement currently in place on Eskdale common. If commons councils introduce agricultural management rules of this kind, however, a situation will arise whereby some commoners will have registered rights that they are not legally entitled to exercise. This will considerably reduced their economic value, although the "rights" themselves – being registered on the commons register – will still subsist.

This scenario could give rise to interesting questions, not least whether there has been a "taking" of property without compensation. It also highlights the importance of the distinction between property rights theories located in the discourse of ownership and "rights"[61], and more dynamic models of property that stress its central role as a mechanism for the allocation of land-based utility rights[62]. Viewed through the prism of traditional property theory, a commoner will retain a property right because his theoretical "right" (to graze, take peat, bracken etc.) will still be reflected in an entry in the commons register, even if he cannot exercise it. If we apply a dynamic model of property focussing on utility rights, however, the position looks entirely different. The

[59] See section 31((3)(b) and (c) Commons Act 2006.
[60] Grazing rights on Dartmoor are governed by a separate system of registration in the Dartmoor Commons Act 1985. This operates quite differently to the Commons Registration Act 1965, most notably in requiring changes in the ownership and use of common rights to be notified and entered in the public registers established by the Act.
[61] For example A.Honore, "Ownership" in (Guest ed.) *Oxford Essays in Jurisprudence* (Oxford 1961) Ch V; J.W.Harris, *Property and Justice* (Oxford 1996) at 140-142. Above footnotes 5-7.
[62] For example Kevin Gray, "Equitable property" (1994) 47 *Current Legal problems* 157- 214.

passing of agricultural management rules by a commons council will abrogate the property rights of commoners whose right to graze is thereby restricted or removed. The fact that they retain registered rights is irrelevant insofar as those rights will have ceased to give access to a resource (i.e. the taking of grass by grazing). The commons register will have ceased to reflect the allocation of the agricultural resources to which registered rights notionally give access, and as it will no longer reflect the true distribution of land-based utility it cannot be said to represent the true allocation of property rights in the common. A grazier whose rights have been restricted by the commons council will not, moreover, be able to trade them in a management agreement (for example under SWES or HLS), unless they continue to confer access to an element of utility i.e. an exercisable right of access to common grazing. A "bargaining" model of property rights would hold that, insofar as the rights have been restricted and cannot be accommodated in an economic exchange, they could no longer be viewed as a species of property right. The more traditional interpretations of property based in ownership discourse are wholly inappropriate, therefore, either to describe the flexible nature of the property relationship in commons, or to capture the dynamic role of property rights in delivering environmental management of the commons.

In conclusion, it is suggested that the impact of the new self regulatory powers in the Commons Act 2006 can only be interpreted using a dynamic model of property rights that defines property by reference to its' ability to unlock either a stream of benefits or access to a resource. If a "paper" (i.e. registered) right is not able to unlock economic benefits for its owner, because its exercise is prohibited by the management rules introduced by a commons council, then it will cease to be a property "right" in this fuller sense, even though (being registered) it will remain a legally recognised right. As noted above, the commons register will no longer accurately reflect the distribution of elements of land-based utility in the common. In practice the commons registers have rarely done so, in any event, as the Eskdale case study amply demonstrates. This may not, therefore, be as radical a conclusion as it may at first appear.

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