



"L'accès à la terre et ses usages"
Rencontres Lascaux - 8 & 9 Juin 2009

COMMON PROPERTY AND COMMON SPACE: COMMUNITY, PROPERTY RIGHTS AND THE ENVIRONMENT *

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The common lands of England and Wales offer an interesting case study in the conceptualisation of “common” rural space. They illustrate many paradigm features of contested common pool resources – they have a multi faceted role as a agricultural resource, are an important source of natural capital providing ecosystem services, and provide a public space for open air recreation and communal enjoyment. These potentially conflicting roles are represented within a framework of plural legal concepts that are, however, in many ways unique to English law. The Commons Act 2006 is introducing major reform of the governance structures for managing common land that will require a reappraisal of the orientation of these conflicting land use demands, and a re-conceptualisation of property rights in the commons.

Property Rights and “Common” Land

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

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use rights. On the contrary, most common land in England and Wales 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 that entitle the persons possessing those rights to use the land and its products. The most important are rights of pasturage (grazing rights for livestock), turbary (the right to take peat for fuel) and estovers (the right to take bracken or ferns, and growing timber for repairing buildings). The law on common rights has its origins in the medieval manorial system and the Enclosure 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. Most common land in upland areas is also "access land" over which the public have a statutory right to roam, and local communities frequently also hold rights over common land e.g. a right to fish in standing waters and/or streams and rivers (a right of piscary) or to enjoy recreational access to the common.

Historically, rights of common are usually attached ("appurtenant")² to the "dominant tenement" which they benefit. In areas where the common provides an important agricultural resource the most important common right is invariably pasturage. Prior to the introduction of registration for common rights by the Commons Registration Act 1965, the number of animals permitted to graze the common was usually limited by the principle of couchancy and levancy. This common law rule 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 by the ability of the dominant tenement to accommodate and feed the number of livestock grazed on the common in the winter months when they were not turned out on the common itself. The size of the dominant holding, and the quantity and quality of fodder it could produce, were therefore determinative of the number of livestock that the farm could put to the common in the summer months.

The other common law mechanism for controlling grazing livestock 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. 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 many are not strictly "common" rights but rights governed and granted by individual Inclosure awards³. Not all stinted and regulated pastures were, however, governed by Inclosure Awards. Some originated in shared pasture closes separated from the common in the medieval period or sixteenth and seventeenth centuries, while others appear to have been manorial waste that was converted from an unstinted pasture to a stinted pasture with fixed "beast gates" in comparatively recent times⁴.

² 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 *Tyrningham's case* [1584] 4 Co.Rep. 36a (76 ER 973). They are very rarely encountered today.

³ See Gadsden G.D., *The Law of Commons* (Sweet & Maxwell, 1988) at 1.59 and 1.75.

⁴ For example in the Ingleton area of the North Pennines: see Winchester and Straughton, "Ingleton Commons" (working paper available at see <http://commons.ncl.ac.uk/resources>).



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The common law principles of levancy and couchancy, and of stinting, were expressed as attributes of the property rights of appropriators holding rights over the commons. Their importance as property instruments for arranging the governance of the commons was effectively destroyed, however, by the Commons Registration Act 1965. The 1965 Act required the registration of both land which is common land, and the registration of all rights over common land⁵. In the case of common rights, it required the registration of rights whether they were exercisable at all times or only during limited periods⁶ and defined the rights that had to be so registered in wide terms to include "cattle gates or beast gates (by whatever name known) and rights of sole or several pasture or herbage or of sole or several pasture"⁷. All rights that were not registered during the relevant application period⁸ ceased to be exercisable over common land registered under the Act⁹.

In the case of pasturage rights for animals, the 1965 Act stipulated that a definite number of grazing animals be stated in the register and that the right should be exercisable in relation to animals not exceeding that number¹⁰. The broad impact of the legislation was to require the registration of fixed numbers of common grazing rights irrespective of whether they had existed *sans nombre* under the rule of levancy and couchancy¹¹, or had previously been stinted. The overall effect, therefore, was to commodify grazing rights as a fixed right to graze a defined number of animals on the common land against which the right was registered. The number of rights registered was not, however, subject to an appraisal prior to registration - either as to whether it truly reflected the carrying capacity of the common or whether it accurately reflected historic practice and land use in the neighbourhood. The result, therefore, was that excessive numbers of grazing rights were registered on many commons, especially on those that were previously regulated by the principle of levancy and couchancy¹². This has, in the intervening years, caused innumerable problems for the effective management of common land, some of which the changes in the Commons Act 2006, discussed below, are intended to address. The 1965 Act also failed to require the alteration of the register when farms were bought and sold, or where rights were transferred independently of land. The result is that most registers do not accurately identify the current entitlement to the rights they record. The 2006 Act requires each commons registration authority to maintain registers of common land and common rights, but the registers

⁵ Section 1(1) Commons Registration Act 1965.

⁶ Rights to pasture animals on the common during fixed periods in the summer months (for example from Lady Day, 25th March, annually) were therefore registrable.

⁷ Section 22(1) Commons Registration Act 1965.

⁸ Two periods for application for registration were prescribed by reg. 5 of the Commons Registration (General) Regulations 1966 (SI 1966/1471), each with a subsequent period for objections to provisional registrations. The relevant application periods were (i) January 2 1967 to June 30 1968 (objections to provisional registrations to be made by September 30 1970) and (ii) July 1 1968 to January 2 1970 (objections to provisional registrations to be made by July 31 1972).

⁹ Section 1(2) *ibid.*

¹⁰ See section 15 *ibid.* This provision has implications for ascertaining the maximum sustainable grazing on the common, to which we return below: see n.

¹¹ The phrase "sans nombre" was used to describe some pasturage rights when annexed to dominant land. The assumption has always been that the phrase was used to describe rights quantified under the rule of levancy and couchancy (where the number of animals allowed on the common was numerically uncertain), in contrast to those governed by stinting where a certain number was fixed by the right itself. See *Chichly's Case* [1658] 145 ER 409. Its customary origins may, however, be more obscure. For an erudite discussion of the origins and legal status of rights *sans nombre* prior to the Commons Registration Act 1965 see Gadsden *op.cit.* at para. 3.137-3.139. And see A.J.L. Winchester, *Harvest of the Hills* *op.cit.* at 79-81 and Figure 4.1.

¹² G.D.Gadsden, *The Law of Commons*, (Sweet & Maxwell 1988) at para 4.22, p.115.



originally established under the 1965 Act will be the basis of the new registers¹³. Many of the defects in the registration system will therefore continue to complicate arrangements for the sustainable management of the commons.

While property rights in the commons may be unique, they demonstrate very clearly the wider problems that English lawyers have in reconciling either environmental stewardship or public rights over the commons (such as recreational access) 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 exploitative 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 common pool resource and environmental governance. A new and dynamic theory of property rights in the commons is needed if we are to rationalise the changes introduced by the Commons Act 2006.

Property Rights Models and the Commons

"Property" is not a thing – for example land - but rather the relationship that one has with it¹⁴. Ultimately it defines the relationship of power that one asserts over a resource such as 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. 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 claimed¹⁵. A classic example of this approach is found in Honore's analysis of the key characteristics of property ownership¹⁶. 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 execution¹⁷. 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. with the dominant tenement to which they attach). Yet they are a clearly recognised and economically important species of property right.

¹³ Section 3 Commons Act 2006. Some provision is made for corrections to the registers, but these do not address the problems identified here.

¹⁴ See for example K.Gray and SF Gray, "The Idea of Property in Land", in *Land Law: New Perspectives* at p. 15.

¹⁵ 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.

¹⁶ 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.

¹⁷ See A.Honore, "Ownership" in (Guest ed.) *Oxford Essays in Jurisprudence* (Oxford 1961) Ch V p 107ff. .



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Most research on new economic models for property now stresses the dynamic nature of property rights¹⁸. 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)¹⁹. The function of property rights, according to economic theorists, is to provide access to a stream of benefits and 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 biodiversity²⁰.

The most useful methodology for rationalising the conflicting land use demands to which common land is object is one based on a resource allocation model for property rights. This would suggest that the bundle of legally recognised property "rights" over land will define, distribute and reflect different elements of resource utility that accrue to the "owner" of the right in question. According to this analysis "property" comprises not a bundle of abstract rights protected by legal rules, but rather a bundle of individual elements of land based utility. As Gray has observed²¹, it follows that where there is any addition to, or subtraction from, the bundle of utility rights enjoyed by a person, it is possible to argue that a transaction or movement in "property" has occurred. Viewed in this sense, a property right gives a legally protected right of access to a resource. Moreover, the advent of modern land use planning, and of legislation protecting living natural resources, has arguably produced a situation where the "property" of the owner, viewed in this sense, represents merely a residuum of socially permitted power over land resources²². Where legislation has imposed land use restrictions – for example in the interests of environmental protection - Gray would argue that property has become "quasi public" in the sense that the constituent elements of resource utility that it represents are partly privately owned and partly assumed by the state²³. In the special case of common land, additionally, we must remember that the public have additional rights because of the land's unique status as a communal resource, in most cases, for recreational and other public use.

Environmental law, in particular, is fundamentally concerned with the limitation or redistribution of property rights in this sense – as elements of utility - in order to pursue a public interest objective in environmental protection. Property rights are therefore of fundamental importance to an understanding of the application of environmental law in

¹⁸ 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).

¹⁹ L.Libby, "Conflict on the Commons: Natural Resource Entitlements" (1995) 76 *American Journal of Agricultural Economics* 997.

²⁰ See H. Demsetz, "Towards a Theory of Property Rights" [1967] 57 *American Economic Review* 347, at 348ff.

²¹ "The Idea of Property in Land", in *Land Law: Themes and Perspectives* 15, above note 29, @ p.40.

²² Gray terms this a "state-approved usufruct": "The Idea of Property in Land", above note 29 @ p.40.

²³ See for example K.Gray and S.Gray, "Private Property and Public Propriety", Chapter 2 in (J.McLean ed.) *Property and the Constitution* (Hart, Oxford, 1999) at 18-20.



regulating land use. Common land is unique in that it is subject to multiple land use rights, and is therefore able to illustrate the role of environmental law as a mechanism for reallocating utility rights more clearly than some other forms of property institution²⁴.

The Commons as Environmental Resource

The total area of registered common land in England is currently 369,394 hectares, a figure which rises to 399,040 hectares if common land that is exempt from registration (such as the New Forest) is included²⁵. The commons contain a high number of internationally important wildlife habitats and supply important ecosystem services for protected species under the EC Wild Birds and Habitats Directives.

The principal legal mechanism for 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")²⁶, Special Protection Areas and Special Areas of Conservation²⁷. A large proportion of the common land in England and Wales has wildlife designations subsisting over it - in England 210,806 hectares of common land, approximately 57% of the total area of common land, is in notified SSSIs²⁸. In 2003, no less than 67% of the common land in SSSIs, by area, was assessed by Natural England²⁹ as being in unfavourable condition³⁰. The latest data indicates that currently only 19% of common land within SSSIs is in favourable condition: 48% is in unfavourable but recovering condition³¹, 27% in unfavourable condition with no change and 6% in an unfavourable declining position³². The poor condition of natural habitats on common land is clearly evidenced by the statistics: while only 19% of common land in SSSIs

²⁴ For example freehold or leasehold tenure.

²⁵ See *Trends in Pastoral Commoning in England: a study for Natural England* (March 2008, The Pastoral Commoning Partnership with H&H Bowes) at p.26.

²⁶ 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.

²⁷ 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.

²⁸ See *Trends in Pastoral Commoning in England: a study for Natural England* (March 2008, The Pastoral Commoning Partnership with H&H Bowes) at Table 3.1 and Table 3.2 on p.27

²⁹ The criteria used by Natural England and the Countryside Council for Wales when undertaking condition assessments of SSSIs, SACs and SPAs are set out in guidance from the Joint Nature Conservation Committee: see *JNCC Guidance on Common Standards Monitoring* available at <http://www.jncc.gov.uk/page-2272>. The condition categories are the following: favourable maintained; favourable recovered; favourable unclassified; unfavourable recovering; unfavourable no change; unfavourable declining; unfavourable un-classified; partially destroyed; Destroyed.

³⁰ *Agricultural Use and Management of Common Land: Report of the Stakeholder Working Group*, (DEFRA 2003) Appendix A.

³¹ The methodology employed by Natural England to classify site condition stipulates that a site is in "unfavourable recovering" condition if all necessary management measures are in place to address the unfavourable condition of the site. In many cases this is achieved by concluding a management agreement for the site with the owner or occupier that will, in the foreseeable future, return the protected features of the site to a favourable conservation status. See generally *The State of the Natural Environment 2008* (Natural England research report NE85) at p.49.

³² See data in Figure 3.1 of the *Trends in Pastoral Commoning in England* report (2008), above n.56.



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is in favourable condition, the overall condition of the habitats on 80% of the total area of the national SSSI network was assessed by Natural England as “favourable” in 2008³³.

Common land is also an important component in environmental policy for landscape protection. In England 48% of common land is in National Parks and 30% is in Areas of Outstanding Natural Beauty. The importance of common land to national mosaic of designated wildlife and landscape areas is clear: 88% of the common land in England is to be found within one or more of the principal designated areas³⁴. These designations often intersect and overlap.

Despite the importance of common land as an environmental and landscape resource, the legal structures for common property rights make achieving satisfactory environmental management of protected commons difficult. The primary responsibility for these difficulties lies with the Commons Registration Act 1965, which (as noted above) enshrined in the commons registers a static and inflexible system of property rights that failed to take account of the needs of sustainable resource management, or the principles of “ecological” management as a component of sustainable development. The implementation of an environmental management scheme on common land requires the participation of all commoners with registered exploitation rights over the land. This can be difficult to achieve, especially in cases (as is not uncommon) where the identity of the person holding the rights is unknown or where a commoner has unused rights. Where a common has, for example, large numbers of registered grazing rights, it will usually be the case that active graziers will have substantial numbers of unused rights to graze additional livestock. These rights will have to be accommodated within an environmental scheme if it is to be legally effective and binding. The commons registers established under the 1965 Act are also often inaccurate and fail to record the current ownership of rights, which makes the establishment of environmental management more difficult.

A further problem is caused by the inflexible nature of the property rights reflected in the commons registers. Many commoners registered rights to graze only sheep or cattle (not both) when common land was registered in the late 1960s, primarily reflecting the current agricultural use of the land at that time. Many did not register rights of estovers or turbary, as these were (at that time) redundant in terms of their economic contribution to the farm enterprise. Many environmental stewardship schemes now require participants to stock mixed cattle and sheep in order to provide a more balanced and ecologically beneficial type of grazing regime – for example as required to control infestations of Molinia vegetation and bracken. If the commons registers do not give the holders of rights to graze cattle as an alternative to sheep, the property rights of the farmer will not permit this innovation. Similarly, flexible modes of management may be sought by public bodies sponsoring environmental management schemes, whereby grazing is prohibited for part of the year (closed seasons) in order to protect certain habitat features, and encouraged at other times. Many of the common rights registered in the 1965 Act failed to include details as to when stock were permitted on the common and when they were to be removed. This, therefore, introduces a further complication to the achievement of flexible management that is responsive to the ecological requirements of the habitats present on common land.

³³ See *The State of the Natural Environment 2008* (Natural England research report NE85) at para3.2.4.2.

³⁴ see *Trends in Pastoral Commoning in England* (2008) above n.56 at Table 3.2.



These problems are not only important for the sustainable management of the commons. They also make it more difficult for landowners and commoners to gain access to additional public funding under agri-environment schemes operated within the rural development programmes for England and Wales, such as Environmental Stewardship and Higher Level Stewardship (in England) and Tir Gofal (in Wales). Much common land is in the uplands and farming the commons is, in many cases, an economically marginal activity. The ability to access public funding under the rural development measures is therefore important to the sustainability of rural communities that depend upon large open upland commons as an agricultural resource.

The Commons Act 2006 – A New Approach

The resolution of many of these problems requires the development of a more 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 in the Commons Act 2006 could, if fully utilised, facilitate a move towards a more dynamic model of property rights in the commons. Part 2 of the 2006 Act makes provision for statutory commons councils to be established which will have legally binding powers to manage each common. The size, nature and regional jurisdiction of each council will vary, and the Act does not lay down a template model for commons councils. Neither will the adoption of a commons council be compulsory. The holders of common rights will have to demonstrate to the secretary of state that there is "substantial support" for the establish of a commons council³⁵ - especially from persons having legal rights over the common (including for instance the owner of the soil), the common rights holders themselves, and others with legal functions which relate to the management and maintenance of common land³⁶. Commons councils will be established by order, and will be corporate bodies³⁷.

The development of a flexible and dynamic re-conceptualisation of common property will therefore be dependent upon the willingness of commoners and other stakeholders to use the 2006 Act to initiate self-regulation by commons councils. The Act provides that each commons council, once established, will have the power to introduce legally binding regulations to regulate agricultural activities, the management of vegetation and the exercise of common rights on the common³⁸. The rule making power goes somewhat further than this, however³⁹, 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

³⁵ Section 27(4) Commons Act 2006

³⁶ Section 27(5) *ibid.* Local authorities in the area concerned may, for example, have statutory functions in relation to the common under development control law or in relation to public rights of way.

³⁷ Section 26 *ibid.*

³⁸ Section 31(3)(a) and 31(4) Commons Act 2006

³⁹ See Section 31(3)(b) – (f) *ibid.*



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common and to remove unlawful boundaries and other encroachments⁴⁰. These powers will be subject to confirmation in each case by the Secretary of State⁴¹.

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). 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 wish⁴² i.e. a "living" register similar to that regulating grazing on Dartmoor under the Dartmoor Commons Act 1985⁴³. Where this power is used, the living register will exist alongside, and separately from, the commons register originally established under the Commons Registration Act 1965, which will continue to record legal entitlements to exercise common rights.

As a corporate body a commons council will also be able to hold common property rights itself. At present, even in those cases where a commoners association exists and manages common land effectively, this is not possible, as the association is (in legal terms) an unincorporated association with no corporate legal personality. This simple reform could facilitate more flexible management in several ways. It is, for instance, possible to create new rights of common under the 2006 Act⁴⁴. In cases where a mixed grazing regime is required to improve the ecological management of a common, new common pasturage rights could be created giving a right to (for example) graze cattle. The new rights could be vested in the commons council. This would both provide for more participatory management of the common by commoners, through the commons council, and also facilitate its entry into agri-environment schemes (such as Higher Level Stewardship) where flexible and improved ecological management is otherwise difficult to achieve on common land.

The introduction of binding rules governing grazing on the common will also enable a commons council to bind inactive graziers so as to prevent them from exercising previously unused common rights. This is another reform that should 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 agreements⁴⁵. If a commons council were to introduce agricultural management rules of this kind, a situation will arise whereby some commoners will have registered rights that they are not legally entitled to exercise. This will considerably

⁴⁰ Section 31(3)(f) *ibid.* And see *Consultation on Agricultural Use and Management of Common Land* (DEFRA 2003), Proposals 1 - 7

⁴¹ See section 33 Commons Act 2006

⁴² See section 31((3)(b) and (c) Commons Act 2006.

⁴³ 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.

⁴⁴ See section 6 Commons Act 2006.

⁴⁵ For an example, see the Environmentally Sensitive Area agreement currently in place on Eskdale common in Cumbria: <http://commons.ncl.ac.uk/casestudies/eskdale>.



reduced their economic value, although the “rights” themselves – being registered on the commons register – will still subsist.

Towards “Dynamic” Property Rights in the Commons?

The management powers given to commons councils by the 2006 Act therefore give rise to a number of interesting questions, not least whether their exercise would involve a “taking” of property without compensation. They also highlight the importance of the distinction between property rights theories located in the discourse of ownership entitlements and “rights”⁴⁶, and more dynamic property models that stress its central role as a mechanism for the allocation of land-based utility rights⁴⁷. 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 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 Higher Level Stewardship), 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 more dynamic role of property rights in delivering environmental management of the commons, as envisaged by the Commons Act 2006.

Conclusion

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 registered common 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

⁴⁶ 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.

⁴⁷ For example Kevin Gray, “Equitable property” (1994) 47 *Current Legal problems* 157- 214.



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distribution of elements of land-based utility in the common. In practice the commons registers have rarely done so, in any event, and this may not, therefore, be as radical a conclusion as it may at first appear. The role of property rights as a tool for organising the management of the commons will also be commensurately reduced in those cases where commons councils are established and assume power to regulate land use by appropriators.