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Property rights, land use and the rural environment: A case for reform^{☆,☆☆}

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ABSTRACT

English Law confers extensive land use rights as an integral attribute of property entitlements and land ownership. Property rights have, however, been subject to incremental reform by a number of different legal and policy instruments since 1945. Many have been introduced since the UK's accession to the European Community in 1972 and are derived from European Union environmental law, and from the law of the Common Agricultural Policy. Others derive from planning law and policy. There has, as a consequence, been an extensive modification to the allocation of land-based utility recognised in property rights, although the common law theory of property entitlements has remained unaffected. This paper considers the impact of these developments on property rights theory, and anticipates the further modifications to property concepts that will be required by a land use policy increasingly focussed on the promotion of environmental stewardship in the countryside. It makes the case for the introduction of a general duty of environmental stewardship as an attribute of property ownership in the law of England and Wales. It considers the contribution that this would make to the delivery of a stable and effective environmental policy for rural land use, and towards a recognition of the wider community interest in, and reliance upon, the sustainable management of land.

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Introduction

English law confers extensive land use rights as an attribute of property ownership, sometimes articulated in the common law maxim *cuius est solum eius est usque ad coelum et ad inferos*: he who owns land owns everything reaching to the heavens and down to the centre of the Earth (see further Gray and Gray, 2005, 14ff). This principle is now so heavily qualified, especially in relation to exploitative rights, that it is virtually meaningless and certainly misleading. But it remains emblematic of the fact that the common law does not itself recognise any qualification of the owner's property domain which might impose obligations of environmental stewardship or trust as an attribute of property entitlements. Nevertheless, recent years have seen a major realignment of property rights and a growing recognition in public policy instruments

that exploitative rights over land must incorporate stewardship obligations.

There is, as yet, no unified or consistent approach to property rights reform. Instead, the common law model has been subjected to incremental reform by a number of different legal and policy instruments, some of general scope and application, and some of more limited range. Many have been introduced since the UK's accession to the European Community in 1972 and are derived from European Union environmental law, and from the law of the Common Agricultural Policy. This paper will consider the impact of these developments on property rights theory, and will anticipate the further modifications to property concepts required by a land use policy increasingly focussed on the promotion of environmental stewardship. It will make the case for the introduction of a general duty of environmental stewardship as an attribute of property ownership in the law of England and Wales.

Property rights paradigms and land use

"Property" is a mobile concept, capable of different interpretations that capture the different functions that property rights perform, and the differing facets of the relationship of the property holder to the land. Two closely related, but different, property models are fundamental to an understanding of the relationship between property rights and land use. They are

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an entitlements-based model that captures the role of property rules in defining the legitimacy of ownership entitlements, and a resource allocation model that focuses on the role of property rights in allocating and defining access to the resources that land represents.

These two models are closely related, and reflect the differing functions that property rights perform – on the one hand in defining legally sanctioned rights to land and its produce, and on the other as an allocative tool for defining the access to the land resource that the entitlement confers. Neither are they mutually exclusive. A property entitlement rule will often also fulfil a resource allocation function. For example, a leasehold entitlement will define the terms on which the tenant has access to the land resource, and allocate fewer resource rights to him than would a freehold estate. The landlord will commonly reserve mineral and game rights, thereby restricting the land resource available to the tenant for economic exploitation. A reallocation of resource entitlements can also be effected, however, by legal and economic instruments external to the property entitlement rules which define the landholder's interest in the land. Examples might include environmental legislation restricting potentially damaging land uses, "soft law" instruments such as codes of practice, and economic instruments to encourage land management for nature conservation.

Entitlement theories often see property as an abstract construct, characterised by the presence of "incidents" of ownership and of conceptually abstract "rights" which make up the essential attributes of ownership – for example the right to possession, to use, to manage, to income and capital, to security, the incident of transmissibility, absence of termination and liability to execution (Honore, 1961, 107ff). Others see property rights as primarily comprising items that can be subject to direct protection by the law, or which are capable of separate assignment as parts of private wealth (for example Harris, 1996, 140–142). 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 how) is of little relevance to an entitlements based analysis, which therefore fails to encompass the functional relationship of property with the environment. Defining "property" in this way as constituting primarily a "bundle of rights", is a characteristic of western liberal jurisprudence, 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 (Raff, 1998; Penner, 1998).

Resource allocation models of property rights stress that they represent the elements of resource utility that, taken together, make up a land interest. The bundle of property rights over land that the law recognises will define, distribute and reflect different elements of resource utility that accrue to the owner of the right in question (Gray and Gray, 1998, 39). This approach has greater potential for capturing the dynamic interrelationship between property and instruments of environmental governance. Whenever legislation alters the allocation of utility rights over land, then a form of property transfer has occurred. 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 public policy objective in environmental protection. It also resonates with economic models for property that stress the dynamic nature of property rights (see Bromley, 1991; Hodge, 1991; Colby, 1995). These see the function of property rights as being primarily to provide incentives to internalise the potential environmental externalities that have emerged from the growing technical potential of agricultural production to generate pollution and damage biodiversity (Demsetz, 1967).

Environmental protection – incremental modification of property rights

Applying a resource allocation model, modern legislation can be seen to have effected an extensive reallocation of property rights in land, while leaving property entitlements largely intact. Three examples will be considered in this paper. These illustrate the impact of a process of "salami slicing" which has resulted in the removal of elements of resource utility and a commensurate restriction of land use rights. All three also demonstrate a gradual move towards a more extensive reallocation of property rights to the state in the period from 1945. The legal form which these measures have taken is important, as all have employed public law instruments to vary resource allocation rights, without impacting upon the core content of the common law model of property entitlements.

Environmental law

The principal measures on the protection of wildlife habitats in English Law are contained in Part 2 of the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats, & c.) Regulations, 1994. The 1981 Act provides for the notification and protection of Sites of Special Scientific Interest (SSSIs) by conservation bodies. There are currently over 4000 notified SSSIs in England covering 1,074,301 ha by area. The designation stratagem for protected habitats originated in the Huxley report (*Wildlife Conservation Special Committee, 1947*) and the National Parks and Access to the Countryside Act 1949. The 1949 Act avoided any direct interference with property rights, and introduced a requirement for consultation with the Nature Conservancy Council on planning applications in designated areas.

The Wildlife and Countryside Act 1981 strengthened the environmental regulation of land use, but retained a protectionist philosophy focussed on preventing damage to SSSIs. The 1981 Act left property entitlements intact and assumed an absolute right to resource use and exploitation by landowners, even if it was environmentally damaging. Section 28 of the 1981 Act imposed restrictions on a landowner's right to carry out operations in an SSSI where the site notification identified them as potentially damaging operations likely to damage the conservation interest of the site. Landowners were required to serve notice of their intention to carry out a potentially damaging operation, and to engage in a statutory consultation with the conservation body before carrying it out. The consultation period was initially limited to four months, during which it remained a criminal offence to carry out notified operations, but on its conclusion they could be lawfully carried out without redress¹. The protection of the site would depend upon the conservation body "buying out" the landowner's property entitlement in a management agreement, or on the Secretary of State making a nature conservation order to protect the site (see Ball, 1996; Rodgers, 1998; Rodgers and Bishop, 1998; Livingstone et al., 1990). Ministerial guidance provided for the payment of compensation under management agreements, as a lump sum representing loss of land value or an annual payment representing the profits foregone by the landowner as a consequence of complying with the terms of the agreement (*Department of the Environment, 1983*).

The Countryside and Rights of Way Act 2000 further strengthened the law by empowering the conservation bodies to

¹ This procedure was subjected to judicial criticism by the House of Lords in *Southern Water Authority v Nature Conservancy Council* [1992] 3 All. E.R. 481. Lord Mustill referred to the statutory consultation procedure as "toothless" ([1992] 3 All.E.R. 481 at 484 g).

indefinitely refuse operational consent to “operations likely to damage” the conservation interest of a site (hereafter “OLDs”), subject to a right of appeal to the Secretary of State (1981 Act, section 28E(3)(5), 28F, as amended). It also introduced measures to require positive management of wildlife features by landowners (see generally Reid (2009), Rodgers (2008)). When notifying an SSSI, Natural England or the Countryside Council for Wales (hereafter “the conservation bodies”) must now serve a site management statement giving their views about the management of the land and the conservation and enhancement of its natural features, flora and/or fauna (1981 Act, section 28(4) as amended). The statement will provide the operational context within which decisions will be made on applications for consent to carry out OLDs. If necessary, a management agreement can be offered in which the landowner trades property entitlements in order to protect the nature conservation interest in the SSSI. It is obligatory to do so in some cases, for example where operational consent has been given by the conservation body, but is later withdrawn or amended (1981 Act, section 28M). The conservation bodies were also given power to make management schemes for SSSIs and, if a scheme is not being adhered to by landowners, to serve management notices requiring positive land management to protect and enhance conservation features. The introduction of a power to make land management notices is a radical innovation, with considerable implications for the reallocation of property rights to the state.

Land use controls are more extensive in sites that form part of the European *Natura 2000* network designated under the Conservation (Natural Habitats, & c.) Regulations, 1994. As a matter of public policy all European sites in England and Wales are also notified as SSSIs under the Wildlife and Countryside Act 1981. Although the legal controls in European sites are modelled on those in the 1981 Act, the conservation bodies have more limited power to grant operational consent for OLDs than if the site is simply an SSSI. They must carry out an environmental assessment of any proposal for operational consent and can only grant consent if they are satisfied that the proposed operations will not adversely affect the conservation status of the site (Conservation (Natural Habitats, & c.) Regulations, 1994, reg. 20(1)(2)). They have power to make byelaws in European sites prohibiting the killing or disturbance of wildlife and prohibiting any interference with the vegetation, soil or other features of the site (ibid. reg. 28). They can also apply to a magistrate for a restoration order if an OLD has been carried out without their consent (ibid. reg. 26).

Instruments within the common agricultural policy

The legal principles underlying the single farm payment scheme and the rural development measures following the 2003 Common Agricultural Policy (CAP) reforms are also premised upon a reallocation of property rights. Environmental land management schemes that will attract incentive payments are governed by rules in the 1999 and 2005 EC Rural Development Regulations. Direct support payments to farmers are, moreover, now subsumed within the single payment scheme, “decoupled” from production and subject to “cross compliance” requirements making payment conditional upon the observance of basic land management prescriptions. Cross compliance consists of two elements: adherence to statutory management standards relating to public, animal and plant health, environmental protection and animal welfare requirements, including for example compliance with standards under EC environmental directives such as the 1992 Habitats and Species Directive, and a requirement to maintain land that is no longer in agricultural production in “good agricultural and environmental condition” (arts. 4 and 5, and Annex 111 of Council Regulation 1782/2003). These have been implemented by statutory

instrument² in England and Wales, and require the observance of a number of basic land management requirements, including the completion of soil protection reviews and the avoidance of overgrazing and unsuitable supplementary feeding of livestock.

In general terms, cross compliance measures are targeted at protecting the rural environment as it now exists, while the improvement or enhancement of farmland biodiversity is a matter for agri-environment schemes introduced under the Rural Development Regulation (Dwyer et al., 2000; Cardwell, 2003, 246ff.). Some of these, including Entry Level Stewardship and Higher Level Stewardship in England, provide incentive payments for habitat improvement or restoration. To qualify for environmental stewardship payments, however, farmers must meet conditions going beyond what is required by “good agricultural practice”. The legal order for the CAP is premised on the philosophy that they must observe basic environmental standards without compensation, but that environmental services going beyond this are purchased through the agri-environment schemes (CEC, 1999, para 3.2.1). The rural development measures therefore assume that landowners must bear environmental compliance costs up to a reference level of good agricultural practice reflected in property rights (Rodgers, 2003; CEC, 2000). The 2003 CAP reform applied the Polluter Pays principle of EC environmental law to the agriculture sector (see Cardwell, 2006). The incorporation of environmental management standards within property rights by the legal order for the CAP represents a fundamental move away from the philosophy of earlier UK legislation such as the Wildlife and Countryside Act, 1981. It also complements the changes to the law of habitat protection in the Countryside and Rights of Way Act, 2000 (above), and represents a further transfer of resource utility in land to the state.

Development control

The Town and Country Planning Act 1947 redistributed property rights by imposing public control of development rights in land. The impact of planning control has been more limited in a rural context than some of the measures discussed above. Planning policy explicitly recognises property rights, and supports the right of property owners to be able to use or develop their land as they judge best, “unless the consequences for the environment or the community would be unacceptable”. The focus of development control is on ensuring that consented development is not environmentally damaging (see PPS 1 para 17–20). The introduction of environmental impact assessment for potentially damaging infrastructure projects has been important in this regard.

Special rules are applied to protect habitats such as SSSIs to ensure that the conservation interest is considered as a material factor in development control decisions. And stricter planning guidance for European wildlife sites imposes a presumption against the grant of development consent in *Natura 2000* sites (PPS 9 2005; regs. 48 and 49 Conservation (Natural Habitats & c.) Regulations, 1994). These rules complement those discussed (which apply for the control of land uses that do not involve “development”) and ensure that, where development does require planning permission in *Natura 2000* sites such permission can only be given in very limited circumstances, for example if there are imperative reasons of overriding public interest at stake and there are no alternative solutions to the proposed plan or project. But outside protected areas, development control has a more limited role in rural land

² See the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (England) Regulations 2005, SI 2005/3459 as amended, reg. 4 and Schedule; Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (Wales) Regulations 2004, SI 2004/3280, reg. 4 and Schedule.

management. Agriculture is mostly outside the ambit of the planning system³. Resource entitlements remain largely unaffected by development control, and the choice of legal instruments to implement policies for sustainable land management reflects this. This explains why management contracts and codes of practice have been favoured as mechanisms for modifying agricultural property rights.

Nevertheless, there has been a gradual extension of planning control over rural land use in the past 20 years. This is reflected in new policy guidance stressing the importance of policies for sustainable land use in development plans in rural areas (PPS 7, 2004). It is also reflected in a tightening of the rules in the General Development Order for the exercise of permitted agricultural development rights, for example the introduction in 1992 of local authority scrutiny of projects for the design and location siting of farm buildings executed with permitted development rights. And in 2006 environmental impact assessment was introduced for projects to restructure land holdings and convert semi-natural land to intensive agricultural use. These measures all restrict the use of resource entitlements without prior regulatory approval, while leaving property entitlements intact.

Common property and sustainable management

Common land in England and Wales displays unique qualities that illustrate the importance of the distinction between the property entitlement and resource allocation models of property rights. Common land is privately owned, but is subject to multiple land use rights for agricultural exploitation, recreation and environmental protection. The property entitlements of common right holders are expressed as incorporeal hereditaments, *profits a prendre* giving a right to take the produce of the land – for example, pasturage (grazing rights), turbarry (the right to take peat) and estovers (the right to take ferns or bracken for animal bedding). The rights will normally be appurtenant (attached to) a dominant tenement – typically a farm adjoining the common. Common rights were registered under the Commons Registration Act, 1965, which imposed a static model for common property entitlements. The register will give a fixed number of grazing rights for each dominant tenement to which rights attach, and these represent its maximum grazing entitlement over the common. Transfers of rights and land subsequent to registration were not compulsorily registrable, however, and the commons registers are often inaccurate and fail to record the contemporary ownership and use of common rights.

Common land is a significant land resource, totalling 369,394 ha in England – 399,040 ha if common land that is exempt from registration (such as Epping Forest and the New Forest) is included (Pastoral Commoning Partnership, 2008, 26). A large proportion of the common land in England and Wales supports wildlife designations – in England 210,806 ha, approximately 57% of the total area of common land is in notified SSSIs and 48% in National Parks (ibid Tables 3.1, 3.2). Natural England data suggests that only 19% of common land within SSSIs is currently in favourable condition: 48% is in unfavourable but recovering condition, 27% in unfavourable condition with no change and 6% in an unfavourable and declining position (Natural England, 2008, Figure 3.1). The poor condition of natural habitats on common land, relative to land of other tenure types, is clearly evidenced by the statistics: while only 19% of common land in SSSIs 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 2008 (ibid para 3.2.4.2). Improving the environmental management of protected habitats on common land is a key priority for the delivery of DEFRA’s public service agreement target to get 95% of SSSIs in England into favourable condition by 2010.

The sustainable management of common land is problematic. The Commons Act, 2006 introduced reforms to facilitate the self-regulation of commons by stakeholders. Part 2 of the 2006 Act makes provision for the establishment of statutory commons councils which will have legally binding powers to manage commons. Their adoption is optional, and it is therefore likely that their size, nature and regional jurisdiction will vary. Stakeholders will have to demonstrate to the Secretary of State that there is “substantial support” for the establishment of a commons council, especially from persons having legal rights over the common, for instance the owner of the soil, commoners themselves, and others with legal functions which relate to the management and maintenance of common land (Commons Act, 2006, section 27(4)(5)). Commons councils will be established by order and will have the legal status of corporate bodies (ibid section 26).

The development of a flexible and dynamic re-conceptualisation of common property will depend upon commoners and other stakeholders using the 2006 Act to initiate self-regulation by commons councils. The Act provides that each commons council 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 common (ibid section 31(3)(4)). They can also regulate the leasing or licensing of grazing rights, and will have power to remove animals illegally grazing the common and to remove unlawful boundaries and other encroachments (ibid section 31(3)(b)–(f)). These powers will be subject to confirmation in each case by the Secretary of State (ibid section 33).

The commons councils will be able to establish “live” registers of common rights, so as to give an accurate picture of common entitlements, their current owners, and the manner in which they are being exercised. This would require the compulsory registration of all formal and informal transfers of grazing entitlements, and information from adjoining landowners as to numbers of livestock turned onto the common (ibid. section 31(3)(b)–(c)). 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 be able to enter legal agreements and hold common property rights itself. At present this is normally impossible, as commoners associations are typically unincorporated associations with no corporate legal personality. This simple reform could make a major contribution to more flexible commons management. It is possible to create new rights of common under the 2006 Act (ibid section 6). In cases where a mixed grazing regime with cattle is required to improve the ecological management of a common, new common pasturage rights could be created and vested in the commons council. This would provide for more effective participatory management of the common by commoners, acting through the commons council, and also facilitate the common’s entry into agri-environment schemes such as Higher Level Stewardship. Flexible ecological management is difficult to achieve on commons, where registered rights sometimes fail to reflect the desired grazing regime.

The introduction of binding rules governing common grazing will also enable a commons council to bind inactive graziers and 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

³ Sections 55(2) (e), (f) Town and Country Planning Act 1990. A wide variety of developments connected with agriculture are, furthermore, given automatic planning consent under the Town and Country Planning (Permitted General Development) Order 1995, Sch.2 Part 6 (S.I. 1995/418).

the necessity to accommodate the property rights represented by registered (but unused) rights in environmental management agreements. Were a commons council to introduce agricultural management rules of this kind, some commoners would have registered rights that they are unable to exercise. This will reduce their economic value, although the “rights” themselves – being registered on the commons register – will subsist as legal property entitlements.

The management powers conferred on commons councils highlight the importance of the distinction between property entitlement models, and more dynamic property rights models that stress their role as a mechanism for the allocation of land-based utility rights (for example Gray, 1994). Viewed through the prism of a property entitlement model, 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.

The resource allocation model of property rights produces a different perspective. The introduction of agricultural management rules that restrict or remove land use rights will abrogate commoners' property rights. The fact that they retain registered rights is irrelevant because those rights will have ceased to give access to a resource such as 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 accurately represent the allocation of property rights in the common. Likewise, a “bargaining” model of property rights would hold that, insofar as the rights no longer give access to resource utility they cannot be accommodated in an economic exchange, and cannot therefore be considered a species of property right. It follows that a property entitlement model is wholly inappropriate to describe the flexible nature of property relationships in common land, or to capture the more dynamic role of property rights in delivering environmental management envisaged by the Commons Act, 2006.

Natural England has sponsored pilot studies to establish “shadow commons councils” in three areas – Cumbria, Bodmin Common in Cornwall and Minchampton in Gloucestershire. The shadow Cumbria commons council offers an interesting model for the future development of self regulatory common management. The preferred option here is to establish a county-based statutory council, with council representation from common land units in different regional sub divisions of the county. This would achieve economies of scale in setting up and managing a statutory council, while maintaining the principle of local control by user groups and commoners. If the pilots are successful and lead to the widespread adoption of statutory councils in the future, this will have the potential to radically improve the sustainable management of both upland and lowland commons. It will also have major implications for the adjustment of resource rights in the commons, and usher in a more flexible and dynamic regime for common property rights.

Human rights and property rights

Environmental regulation that imposes substantial community-orientated constraints on land use raises the difficult question of when uncompensated land use regulation shades into confiscation. To what extent can human rights law act as a barrier to further modifications of property rights by future environmental legislation? And to what extent should the cost of implementing public policy on environmental protection be borne by individual property owners whose land use rights have been restricted? The issue here is one of who should bear the cost of environmental protec-

tion, not the desirability or statutory competence of environmental regulation (Joseph, 2003). The application of a resource allocation model of property rights clarifies a number of the issues that arise in “human rights” challenges to the environmental regulation of land use. The fundamental question in most cases is the extent to which the cost of implementing environmental policy should be funded by public resources, or by restricting the economic benefit that can be reaped from a resource (such as land) by its owner through the imposition of land use constraints – and thereby imposing on individual property owners the economic cost of environmental protection.

Article 1 of the Protocol to the European Convention of Human Rights guarantees the peaceful enjoyment of possessions, with the important caveat that the state has the right to enforce such laws as it deems necessary “to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”. What is the necessary balance between the public interest in environmental protection on the one hand, and the individual property rights of the landowner on the other? In cases under the Wildlife and Countryside Act, 1981 the courts' stance was initially to adopt a position strongly supportive of private property rights (see *Cameron v Nature Conservancy Council* (1991); *Thomas v Countryside Council for Wales* (1994)). In several more recent cases brought under the Human Rights Act 1998 they have, however, adopted a more communitarian stance. The role of human rights jurisprudence in this area is not to adjudicate on the allocation of resources reflected in environmental legislation such as the Wildlife and Countryside Act 1981, and reflected in the property rights of landowners in SSSIs and other protected sites. Rather, it is to ensure that the manner in which that allocation has been arrived at in individual cases reflects the procedural norms of distributive justice or protects essential social values reflected in the convention rights themselves. The principle of proportionality plays a key role in this regard in ensuring that the actions taken by the conservation bodies, both when notifying SSSIs and when subsequently exercising statutory powers over land management, are proportionate to the public interest in environmental protection that is being pursued in each case.

The significance of the changes made by the Countryside and Rights of Way Act 2000 to property rights in SSSIs has been explicitly recognised by the courts. In *Aggregate Industries UK Ltd v English Nature* (2003) it was held that the confirmation of an SSSI notification by English Nature was itself determinative of the claimant's civil rights to use and enjoy its property, and therefore engaged Article 1 of the Protocol. The legal effect of the notification was that the landowner was no longer able to use or cultivate its land as it saw fit, and as it had formerly been able to do within the constraints of the law, because it now needed English Nature's permission to carry out many activities for which it was not formerly required. Significantly, it has been accepted *arguendo* in later cases that the initial notification of a site as an SSSI also involves a clear determination of the owner's civil rights (*Boyd v English Nature*, 2003).

The property rights implications of the statutory consultation provisions for potentially damaging operations in an SSSI were considered in *Fisher v English Nature* (2004). In *Fisher* it was held that issuing a list of OLDs was not itself a breach of article 1. All that the statutory mechanism requires is that a consultation be initiated, and that the consent of Natural England be obtained before an operation is carried out. If a landowner applies for operational consent then a fair balance can be struck in determining whether consent be granted in the particular case. The required balance is between the public interest in protecting the wildlife habitat for which the site was notified (a habitat for nesting stone curlews in the *Fisher* case) and the claimant's interest in carrying out the oper-

ation. The legislative regime for managing SSSIs was held not to be disproportionate, principally because it includes a mechanism for achieving the required balance between the individual and collective interests (and thereby of course the allocation of resources) in individual cases. In holding the regime to be convention-compliant the Court of Appeal placed considerable emphasis upon the fact that the landowner is free at all times to apply to be absolved from the bonds imposed upon him by the SSSI notification by applying for operational consent. The key to the regime's compliance with the convention appears to have been the facility for appeals to the Secretary of State against a refusal of operational consent (section 28P, 1981 Act).

The Court of Appeal's approach in *Fisher* strongly reinforced the legitimacy of the reallocation of property rights to the state by the 1981 Act, and the corresponding restriction of the resource utility rights of the landowner. Nevertheless, the application of land use controls in an SSSI must adhere to the proportionality principle if their exercise is to be legitimate, in the sense that Natural England's actions must in each case be proportionate to the public policy interest that is being pursued. These issues were tested in *Trailer and Marina (Leven) Ltd. v Secretary of State and English Nature* (2004). The applicants challenged the manner in which the revised *Guidelines on Management Agreement Payments*, introduced in 2001, applied to reduce the payments to which they were entitled for conservation management of SSSI land. Their principal objection was to the transitional provisions in the 2000 Act and the replacement of the formula under which compensation was payable on the basis of the net profits foregone if potentially damaging operations were not carried out.

Where land was already designated an SSSI prior to the 2000 Act the notification provisions were (to use Lord Justice Neuberger's phrase) largely "toothless". It was argued in *Trailer and Marina* that the amendments in the 2000 Act – giving "teeth" to notifications already made under the 1981 Act – had resulted in an infringement of the article 1 Protocol rights of the landowners. They argued that the combined effect of the new restrictions on land use in the 2000 Act and the revised Financial Guidelines was to render their property interest valueless. The Court of Appeal held, however, that the amended land use regime for SSSIs was not inherently incompatible with article 1, and did not amount to a disguised appropriation of ownership. Viewed as a case of land use control, and not expropriation, the relevant test was essentially subjective. Provided that the state could properly take the view that the benefit to the community outweighed the detriment to the individual, a fair balance will be struck without the requirement to compensate the individual for the diminution in the value of his property rights in the land (judgement at para 26). In the light of the purpose of the legislation, and of the safeguards applied to protect landowners where operational consent for damaging operations was sought, they considered that the benefit to be enjoyed as a result of the amendments made by the 2000 Act, although achieved at the expense of the owners and occupiers of SSSIs, was such that there could not be said to have been an infringement of the convention rights of the latter.

In these decisions the courts have indicated very clearly that they are willing to uphold uncompensated restrictions on property rights, and in so doing permit the allocation of the economic cost of implementing environmental protection measures to individual landowners – with a consequent reallocation of the control of land-based resources from the individual to the state. This is in marked contrast to the position obtaining, for instance, in the United States, where the courts have upheld a more individualist perspective on property rights and have refused to recognise any element of public obligation to avoid the environmental degradation of privately owned land (for example in *Lucas v South Carolina Coastal Council* 1992).

Property rights reform and future land use policy

The legal instruments introduced by modern environmental legislation, and by the Commons Act 2006, are focussed on altering the resource allocation represented by property rights – to modify access to, and use of, the land resource where this is necessary to pursue a public policy objective. They have not altered the fundamental paradigm for property entitlements. In this author's opinion, a more radical approach is required, combining reform of the basic constituents of property entitlement rules with ongoing modification of property rights as tools of resource reallocation. A model for environmental property rights would modify those property entitlements that currently confer a right to undertake environmentally damaging land use, and incorporate an explicit recognition of a basic responsibility of environmental stewardship as an integral component of property entitlement rules at common law.

What obligations would a duty of environmental stewardship impose, and how would they be determined? The stewardship component of property entitlements could be based upon a model reflecting a "suitable for use" standard, not dissimilar to that already used in contaminated land sites, where the legal standard for cleanup is dependent upon the use for which land has development consent. Where land is registered for agricultural use on the Rural Land Register, therefore, the stewardship obligation would reflect the principles of sustainable agriculture incorporated in the rules of good agricultural practice and in the cross compliance requirements for the single payment scheme, including the obligation to maintain land in good agricultural and environmental condition. The principles of good agricultural practice are currently subsumed in property rights, but are not clothed with legal enforceability outside the confines of a voluntary agri-environment agreement. Similarly, cross compliance will only impose enforceable land management obligations if a landowner is claiming the single farm payment. These mechanisms therefore involve only a very limited reassignment of property rights. The reform suggested here would clothe these principles with wider legal enforceability and effect a permanent and broadly-based reassignment of property rights, intended to underpin future land use policy for environmental protection. If planning permission was sought for development, any conflicts between environmental and other land use policies would be resolved in the planning arena, as at present.

The reform of property entitlement rules to incorporate a duty of environmental responsibility would have important consequences for the interrelationship of the property entitlement and resource allocation functions of property rights. The formal expression of property entitlement rules as integral to estates and interests in land gives them primacy over adjustments in property rights effected by economic instruments and by public law mechanisms. At the moment, the property owner's entitlement will have priority unless his rights are adjusted by statute, or he chooses to reassign them in an economic exchange such as a land management agreement. The primacy granted to the owner's property entitlement at common law will determine the payment of compensation for reassigning legally vested rights.

The reassignment of property rights by a management agreement is temporary and only endures for the lifetime of the contract. Similarly, adjusting property rights through the application of cross compliance imposes a transient measure of environmental regulation. The management rights traded in return for direct support payments are automatically reassigned to the property owner on termination of the subsidy arrangement. Moreover, if the producer is willing to farm without subsidy the cross compliance technique is inapplicable. It can only be used to reassign private property rights if economic conditions are such that producers are

dependent on subsidy for production, and are willing to trade elements of resource utility conferred by property entitlements in an interdependence arising from their participation in direct support arrangements within the CAP. The exposure of these mechanisms to fluctuations in the market for agricultural commodities may also increase the cost of the incentives necessary to encourage producers to join environmental management schemes.

The delivery of a basic level of environmental management for the rural environment is a public policy objective that should not be dependent on market forces for its effectiveness. And improvements in environment resource management could be more effectively protected if cross compliance conditions applied irrespective of whether landowners claimed the single farm payment. The primacy of property entitlement rules also means that on termination of a management agreement, the owner's resource utility rights revert to the *status quo ante*, without necessarily protecting any environmental gain secured at public expense by the agreement. Similarly, in a protected area (such as an SSSI or *Natura 2000* site) land use rights, represented by notified OLDs, will be reassigned to Natural England or the Countryside Council for Wales. If the site is subsequently denotified, property rights are automatically reallocated to the owner by operation of law and the *status quo ante* reinstated. There is currently no mechanism to prevent environmentally damaging land uses being reintroduced unless they constitute development requiring planning permission, and no means to protect environmental improvements provided at public expense under management agreements in SSSIs, other than through the site notification mechanism itself.

Modifying property entitlements to include a basic stewardship duty is unlikely to infringe the prohibition on uncompensated "takings" of property in article 1 of the Protocol to the European Convention. In SSSIs the restrictions on carrying out OLDs are currently uncompensated unless a management agreement is negotiated with Natural England. The stewardship obligation suggested here would be more limited than those currently applied in most SSSIs. It would support the protected areas policy for SSSIs by ensuring a basic level of environmental management for the wider countryside, recognising the interdependence of protected ecosystems and the importance of ecosystem facilities for the migration, sustenance and genetic exchange of protected species.

The legal order for agri-environment schemes under the common agricultural policy already assumes that standards of good agricultural practice are an integral element of property rights. This may be the case in some continental legal systems, but not in English law, where property entitlements are currently unqualified by duties of stewardship or good practice. The modification of property entitlements suggested here would remedy this. Furthermore, many of the statutory management standards applied through cross compliance are based on pre-existing legal obligations – for example as to the protection of hedgerows, avoiding overgrazing and compliance with land use restrictions in notified SSSIs⁴. The cross compliance mechanism supplies an additional enforcement tool (withdrawal of subsidy) to ensure regulatory compliance. Those that are not so based require a very basic level of management, such as the requirement to keep land not in agricul-

tural production in good environmental and agricultural condition by grazing rank vegetation once every five years⁵.

The reform of property entitlements to recognise a stewardship responsibility would assist in delivering a stable and effective environmental policy for rural land use, while underpinning both agri-environmental initiatives and public policy for protected areas more effectively than the present property rights regime permits. It would effect a rebalancing of rights and interests away from the private benefit of the landowner and recognise the wider community interest in, and reliance upon, the sustainable management of land (see generally *Lucy and Mitchell, 1996*). It would also underpin improvements in environmental management secured through publicly funded agri-environment schemes more effectively than the law at present allows. And the assumption of a level of good practice would provide a basis for evaluating incentive payments under management agreements more widely than at present, where the rules are limited to rural development payments and the single farm payment under the CAP. The property entitlements that could be traded in an economic exchange would be adjusted to reflect the new stewardship obligation implicit in property entitlements.

This paper has made the case for the recognition of a responsibility of environmental stewardship as an inherent attribute of property entitlements in English Law. Clothing the new duty with enforceability as a legal control would raise further significant issues. Conferring "horizontal" enforceability on a duty of environmental stewardship, however formulated, would be relatively straightforward. It could be accomplished through changes to the administrative arrangements for the supervision of CAP support payments and the oversight of management in protected areas such as SSSIs by the conservation bodies. This would achieve many of the environmental policy goals outlined above. Imposing sanctions of a more direct nature, such as forfeiture of land for breach of the stewardship duty, would raise more difficult problems and engage significant procedural issues and human rights law. These would require further research once the case for the recognition of a duty of environmental stewardship had been accepted.

Cases

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- Aggregate Industries UK Ltd. V English Nature [2003] Env LR 3,83
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Legislation

- Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (England) Regulations 2005 SI 2005/3459

⁴ See the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (England) Regulations 2005 SI 2005/3459, reg.4 and Schedule para 6 (overgrazing), para 10 (protection of hedgerows), para 23 (observance of SSSI notifications); Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance)(Wales) Regulations 2004, SI 2004/3280, reg.4 and Schedule para 6 (overgrazing), paras 11 and 12 (protection of hedgerows), para 21 (observance of SSSI notifications).

⁵ Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (England) Regulations 2005 SI 2005/3459, reg.4 and Schedule para 7; Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (Wales) Regulations 2004, SI 2004/3280, reg.4 and Schedule para.7.

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