

IUCN Peatland Code Development

Task 3 – Legal Ownership of Carbon Units

IUCN

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1. Introduction

This document is designed to be used as a reference document by IUCN UK PP staff to answer questions from land managers and owners. It has been written as concise advice on what we think the current understanding is of legal ownership of carbon units generated from peat - or more accurately, the ownership of rights to exploit the ability of land to sequester carbon / avoid greenhouse gas emissions¹.

It states where the position is settled / agreed and also where it is not, which is labelled as 'certainty'. It highlights (in underlining) where we think that more advice or research is needed, and also includes key references and contacts.

It has been written based on the following understanding of peatland units, which is that they are generated based on avoid emissions of greenhouse gases and not due to the existence of the peat². Emissions from peat can start quickly if it becomes eroded or vegetation on it is removed, so it is significantly affected by the actions of the land manager; conversely, positive actions, such as rewetting, can stop emissions quickly.

It has been assumed that peatland can be restored or maintained in good non-emitting condition and be grazed by sheep and / or cattle at an appropriate intensity.

Results are discussed for each UK Country, in turn (England and Wales, Scotland and Northern Ireland), against the following sub-headings, where relevant:

- In-hand land / Vacant possession
- Let land – long-term tenancies
- Clauses and concepts relevant to tenancies
- Let land –short-term tenancies
- Crofting
- Common land
- Sporting leases / licences
- Commercial leases

A number of areas could potentially be simplified by drafting standard terms, but this would be technically complex and require involvement of a range of parties (e.g. (S)TFA, SLE/CLA, CAAV etc). However, some standard guidance and/or text on what should be included in an agreement for landlord to exploit/ agreement for tenant to exploit/ agreement for both to exploit together would be useful.

¹ This document only deals with legal ownership issues relating to peat. It is recommended that all parties that are considering entering into an agreement relating to peat should also get accounting advice on the potential tax implications that may arise from a change in land use with regard to capital gains and inheritance tax, notably on Agricultural Property Relief and Business Property Relief.

² Carbon is the key component of peat. Plants accumulate it through photosynthesis. Its release, through decay, is slowed or stopped by the (anaerobic) waterlogged conditions. This accumulation (sequestration) and limited release (storage) is significant in action against climate change because of the huge amounts of carbon stored in UK peat. Good regulation for 'peatland' protection and restoration would recognise not just the organic content of the underlying soil, but the height of the water table and the amount of peat-forming vegetation growing. Source: GWCT. What are peatlands? December 2020.

2. England and Wales

England and Wales	
<p>In-hand land / Vacant possession</p>	<p>The peatland and the carbon stored within it are owned by the freeholder, as he is entitled to remove peat and the topsoil from the land, and so also owns the carbon stored within these components³.</p> <p>This is also likely to be the case where a freeholder has sold the mineral rights to the land (for sand or gravel for example), as the carbon is in peat, soil and vegetation in the main, so above the minerals. Minerals are assumed to be substances ‘exceptional in use, in value and in character’ and <u>are not</u> the ordinary soil⁴. The position will be more complicated where the minerals are being extracted, which is likely to lead to the peat, soil and vegetation being removed from above the minerals; it is unlikely that the land owner will be able to satisfy either a peatland restoration contract or contract for sale of peatland units in this situation.</p> <p>Certainty: High</p>
<p>Let land – long-term tenancies</p>	<p>The landlord is highly likely to own the peatland carbon units however, due to a tenant’s rights to use the land under the terms of a typical tenancy agreement, which could affect carbon sequestration and / or emissions, the landlord is unlikely to be able to fully exploit the carbon without running into legal challenges of derogation from grant⁵. Therefore an agreement between the landlord and tenant to work together is likely to be needed to be able to safely sell or exploit the carbon⁶.</p>

³ Michelmores. Natural capital landlords, tenants & carbon ownership. April 2021.

⁴ See the case of Coleman v Ibstock Brick Limited (2008).

⁵ Derogation from grant is a common law concept requiring a grantor (the person who grants the benefit, such as a landlord) not to do anything that substantially deprives the grantee (the person who has the benefit of the grant, such as a tenant) from the enjoyment of the benefit granted (such as the right to farm under a tenancy agreement).

⁶ The Scottish Land Commissioner concluded that tenants ‘cannot generally proceed with peatland restoration (or woodland creation) without the agreement of the landlord, and that landlords are limited in their ability to resume land without the agreement of the tenant’. Therefore there is ‘incentive for the parties to get together to explore the possibility of entering into a contractual agreement that enables a project to proceed in a way that benefits both parties’. Discussions should include:

- what type and scale of project would be appropriate and acceptable to both parties;
- who is taking the lead in delivering the project;
- how responsibilities, costs, and incomes are to be shared;
- how to make an agreement that is robust enough to meet the Peatland Code;
- how to deal with future changes in landlord or tenant
- what happens if the project doesn’t deliver the anticipated carbon benefits.

England and Wales	
	<p>The tenant cannot enter a peatland restoration scheme that will generate peatland carbon units on the land they rent without written consent from the landowner, including agreement that the obligation for delivery of the project shall be transferred to the landowner should the tenancy end before conclusion of the project⁷.</p> <p>Many agreements are not 'standard' and will have been amended when drawn up, so <u>it is recommended that all parties check the terms of any tenancy agreement.</u></p>
<p>Clauses and concepts likely to be relevant to tenancies</p>	<p>A number of clauses and concepts are likely to be relevant to tenancies and peat, including:</p> <ol style="list-style-type: none"> 1. Reservation of rights in a tenancy agreement 2. User clauses and prohibition clauses 3. The Rules of Good Husbandry and Rules of Good Estate Management 4. The tenant's length of leasehold interest <p>1. <u>Reservation of rights in a tenancy agreement</u></p> <p>In many tenancies, the landlord will have a number of reservations of rights for themselves in the tenancy agreement. They usually include the following:</p> <ul style="list-style-type: none"> • All mines minerals quarries stones sand gravel chalk brickearth clay marl and soil all peat turves and turf all petroleum Natural gas and their relative hydrocarbons <p>However, while the Landlord may have reserved the 'peat', the tenant's actions can affect its ability to store carbon and emissions.</p> <p>Further, in terms of reservations, <u>we recommend that there is a legal clarification of whether a typical reservation clause in a tenancy agreement covers soil used to deliver natural capital benefits or whether the landowner must reserve it expressly and in very clear terms.</u></p>

⁷ Source: Scottish Land Commission. An Interim Guide to Securing Tradeable Carbon Credits in an Agricultural Holdings Situation. Version 1. February 2022.

England and Wales

Therefore, the situation for peatland carbon is more complex than for, say, carbon stored in trees on the land which, in existing leases, the reservation of trees to the landlord clearly prevents a tenant from using those assets to sequester carbon or provide biodiversity.

2. User clauses and prohibition clauses

Tenancy agreements include a number of prohibitions for tenants, which are actions or activities that the tenant is not allowed to carry out, and obligations that they are required to fulfil throughout their tenancy.

Prohibitions usually include *'not without consent to apply for or enter the holding or any part of the holding into any agri-environment scheme or any other scheme'* and not to alter the land or the way that it is being farmed. This appears to prevent a tenant from entering into an agreement to sell peatland credits without having consent from the landlord. Many schemes, in England and Scotland, also require the consent of the landlord (or heritable owner) prior to a tenant entering into a scheme that would alter the land or the way that it is being farmed.

However, the provisions of the Agriculture Act 2020 have changed this situation for Agricultural Holdings Act tenants⁸. The provisions aim to prevent tenants from being excluded from publicly financed environmental schemes, by allowing a tenant to legally challenge a landlord's refusal to give consent to enter an environmental scheme. It is not clear whether peatland restoration agreements and agreements with 'private' carbon buyers are covered by these provisions and so it is recommended that there is a legal clarification of this, including how the government's intention for these provisions may affect the position in the future.

3. Rules of Good Husbandry and Rules of Good Estate Management

Tenants are also required to comply with the Rules of Good Husbandry. These rules are aimed at maximising agricultural production and not the provision of environmental benefits. They require a tenant to keep *'permanent pasture properly mown or grazed and maintained in a good state of cultivation and fertility and in good condition'* and *'properly stocked'*.

We do not know whether peatland which is grazed by a tenant so that plants on it are removed or are so low that soil erosion occurs, which could lead to carbon being emitted, is in breach of the Rules of Good Husbandry. We recommend that a review

⁸ These tenancies are commonly known as 1986 Act tenancies, 'full agricultural tenancies' or Agricultural Holdings Act tenancies.

England and Wales	
	<p><u>of case law on poaching and soil erosion, including on non-peat soils, is carried out to understand whether this has been considered.</u></p> <p>4. <u>The tenant's length of leasehold interest</u></p> <p>Tenants are not usually able to enter into long-term agreements that restrict how the land can be managed if a long fixed term is required, such as a 30 or more year peatland restoration agreement, as many have fixed tenancy lengths that are shorter than this or tenancies that run from year-to-year (such as Agricultural Holdings Act tenancies). Therefore, they would only be able to do so with their landlord's consent or jointly with the landlord.</p> <p>As stated above, the provisions of the Agriculture Act 2020 amend this position, and <u>we recommend that that there is a legal clarification of whether peatland restoration agreements and agreements with 'private' carbon buyers are covered by these provisions.</u></p> <p>Certainty: Medium but legal clarifications required.</p>
<p>Let land – short-term tenancies</p>	<p>The same points as made for long-term tenancies, and particularly in relation to sufficiency of leasehold interests.</p> <p>A tenant with a short-term agreement, or an agreement that runs from year-to-year in the case of an Agricultural Holdings Act tenancy, will not be able to enter into any long-term natural capital agreement unless he has landlord's consent or is doing so jointly with the landlord.</p> <p>The tenant, due to rights relating to derogation of grant and the Rules of Good Husbandry, which could affect carbon sequestration and / or emissions on the land, may prevent the landlord from being able to fully exploit the carbon. Therefore an agreement between the landlord and tenant to work together is likely to be needed to be able to safely sell or exploit the carbon.</p> <p>The situation may be further complicated by deer numbers, whose grazing can affect the ability of the soil and vegetation to store carbon or reduce emissions. Deer control may be an obligation of the landowner, tenant, sporting tenant or deer management group, and it will interact with sheep and / or cattle grazing, and deer management on neighbouring properties.</p> <p>Certainty: Medium but legal clarifications required.</p>

England and Wales	
Crofting	N/a as crofting is a farming and social system in Scotland only.
Common land ⁹	<p>The same points as made for long-term tenancies, and particularly in relation to sufficiency of leasehold interests.</p> <p>Commoners are unlikely to be able to enter into any long-term natural capital agreement unless they have landlord's consent or are doing so jointly with the landlord.</p> <p>The commoners, due to rights relating to grazing, which could affect carbon sequestration and / or emissions on the land, may prevent the land owner from being able to fully exploit the carbon. Therefore an agreement between the land owner and commoners (through the commons council or association) to work together is likely to be needed to be able to safely sell or exploit the carbon.</p> <p>Certainty: Medium but legal clarifications required. The laws relating to common land are complex and rules can differ between commons.</p>
Sporting leases / licences	<p>Licences and leases are granted to sporting tenants to shoot, hunt or fish over land. These agreements usually give the sporting licensee or tenant a very limited range of rights, mostly related to what they can shoot and when and how. They can also include clauses on how the land can or should be managed, including heather burning, and often state that the licensee or tenant should not damage the land.</p> <p>Most agreements reserve all rights to the landlord to carry out normal agricultural and forestry operations, including rights to minerals.</p> <p>Therefore, the peatland and the carbon stored within it remain owned by the freeholder but, as for tenancies, the sporting licensee or tenant's rights may affect the landowners' degree of control over the management of the land, and so affect the certainty to prevent emissions and generate carbon units.</p>

⁹ Common land is land owned by one or more persons where other people, known as 'commoners', are entitled to use the land or take resources from it. Source: Managing common land. The right of a commoner to take resources from a piece of common land is called a right of common, and can include pasturage (to graze livestock), pannage (to graze pigs in woods), estover (to take firewood), turbary (to take peat to burn as fuel), piscary (to take fish), rights in the soil (to take soil or minerals from the common) and animals ferae naturae (to take wild animals). Some rights are attached to the land and others not. GOV.UK. Last updated 4th June 2015.

England and Wales	
	<p>The situation may be further complicated by deer numbers, whose grazing can affect the ability of the soil and vegetation to store carbon or reduce emissions. Deer control may be an obligation of the landowner, tenant, sporting tenant or deer management group, and it will interact with sheep and / or cattle grazing, and deer management on neighbouring properties.</p> <p>The extent to which burning of heather damages peat is still contested and subject to debate¹⁰. In Scotland, land restored using funding through Peatland ACTION cannot be burned for 10 years; however mulching, which is another form of heather management, is allowed.</p> <p>Certainty: High, except point on impact of heather burning on peatland.</p>
Commercial leases	<p>Who has the rights to peat and peatland carbon units depends on the terms of the commercial lease. Many existing agreements for wind turbines or farms and telecom masts do not state who owns the peat covered by the lease. However, some new wind turbine agreements are being written so that the situation is clearer and that the ownership of any peat units are specifically reserved to the landlord.</p> <p>It is therefore recommended that all parties check the terms of any tenancy agreement.</p> <p>NB The area covered by these agreements, especially telecom masts, are small and likewise the number of peatland carbon units generated.</p> <p>NB Restoration work cannot be registered under the Peatland Code, and units generated, if it is a legal requirement, such as restoration of land linked to a planning permission.</p> <p>Certainty: High.</p>

¹⁰ Scientists from the UK Centre for Ecology & Hydrology made the following statement in evidence to an inquiry on the state of peatland in England by the House of Commons' Environment, Food and Rural Affairs Committee: "Natural, Sphagnum-dominated peatlands are intrinsically resistant to wildfire. There is no reliable evidence to indicate that natural bogs benefit from managed burning with regard to either their carbon balance or their resilience to wildfire. The high vulnerability of Pennine blanket bogs to wildfire can be attributed to their historic degradation by land-use and air pollution (which reduce protective Sphagnum cover), as well as the active management of grouse moors to increase cover of woody heather biomass". EFRA inquiry: State of peatland in England. Written evidence submitted by the Centre for Ecology and Hydrology. September 2019.

3. Scotland

Scotland	
In-hand land / Vacant possession	The same as for England.
Let land – long-term tenancies Agricultural Holdings (Scotland) 1991 Act tenancy or 1991 Act tenancy ¹¹ Limited Duration Tenancy or LDT (5-10 years in length) Modern Limited Duration Tenancy or MLDT (10 year minimum, with no upper limited but a set end date. Replaced LDTs in 2017)	<p>The landlord is highly likely to own the peatland carbon units however, due to a tenant's rights to use the land under the terms of a typical tenancy agreement, which could affect carbon sequestration and / or emissions, the landlord is unlikely to be able to fully exploit the carbon without running into legal challenges of derogation from grant¹². Therefore an agreement between the landlord and tenant to work together is likely to be needed to be able to safely sell or exploit the carbon¹³.</p> <p>The tenant cannot enter a peatland restoration scheme that will generate carbon credits under the Peatland Code on the land they rent without written consent from the landowner, including agreement that the obligation for delivery of the project shall be transferred to the landowner should the tenancy end before conclusion of the project¹⁴.</p> <p>Many agreements are not 'standard' and will have been amended when drawn up, so it is <u>recommended that all parties check the terms of any tenancy agreement.</u></p>

¹¹ Tenancies under this Act are referred to as a 'secure' tenancy and they grant tenants rights in perpetuity, which means that the tenancy has no end date and is heritable to their successor or whoever they wish it to be assigned to. Tenants also have a right to purchase the land from the landlord if the tenant registers an interest. They could therefore last for several generations and so are the most likely type of tenants to engage with the Peatland Carbon Code. NB the Act also replaced all secure tenancies pre 1991.

¹² Derogation from grant is a common law concept requiring a grantor (the person who grants the benefit, such as a landlord) not to do anything that substantially deprives the grantee (the person who has the benefit of the grant, such as a tenant) from the enjoyment of the benefit granted (such as the right to farm under a tenancy agreement).

¹³ The Scottish Land Commissioner concluded that tenants 'cannot generally proceed with peatland restoration (or woodland creation) without the agreement of the landlord, and that landlords are limited in their ability to resume land without the agreement of the tenant'. Therefore there is 'incentive for the parties to get together to explore the possibility of entering into a contractual agreement that enables a project to proceed in a way that benefits both parties'. Discussions should include:

- what type and scale of project would be appropriate and acceptable to both parties;
- who is taking the lead in delivering the project;
- how responsibilities, costs, and incomes are to be shared;
- how to make an agreement that is robust enough to meet the Peatland Code;
- how to deal with future changes in landlord or tenant
- what happens if the project doesn't deliver the anticipated carbon benefits.

¹⁴ Source: Scottish Land Commission. An Interim Guide to Securing Tradeable Carbon Credits in an Agricultural Holdings Situation. Version 1. February 2022.

Scotland	
<p>Clauses and concepts likely to be relevant to tenancies</p>	<p>A number of clauses and concepts are likely to be relevant to tenancies and peat, including:</p> <ol style="list-style-type: none"> i. Reservation of rights in a tenancy agreement ii. User clauses and prohibition clauses iii. The Rules of Good Husbandry and Rules of Good Estate Management iv. The tenant's length of leasehold interest v. Diversification / resumption of the holding <p>1. <u>Reservation of rights and compensation in a tenancy agreement</u>¹⁵</p> <p>In many tenancies, the Landlord will have a number of reservations in the tenancy agreement. They usually include the following in :</p> <ul style="list-style-type: none"> • “All mines minerals including stone of every kind, clay, slate, marl, gravel, sand, fossils and quarries of every description and others mosses, as also all peats not required for consumption of the holding itself; with the power to search for, work, win, manufacture and carry away the same” (Agricultural Holdings (Scotland) Act 1991) • “Reserving always to the landlord (but in all cases only in so far as belonging to them) all peats not require for consumption on the holding itself” (Agricultural Holdings (Scotland) Act 2003) <p>However, while the Landlord may have reserved the ‘peat’, the tenant’s actions can affect its ability to store carbon and emissions, including for peat cutting for burning.</p> <p>Further, in terms of reservations, <u>we recommend that there is a legal clarification of whether a typical reservation clause in a tenancy agreement covers soil used to deliver natural capital benefits or whether the landowner must reserve it expressly and in very clear terms.</u></p> <p>Therefore, the situation for peatland carbon is more complex than for, say, carbon stored in trees on the land which, in existing leases, the reservation of trees to the landlord clearly prevents a tenant from using those assets to sequester carbon or provide biodiversity.</p>

¹⁵ The relevant acts are the Agricultural Holdings (Scotland) Act 1991 and the Agricultural Holdings (Scotland) Act 2003.

2. User clauses, prohibition and obligations

Tenancy agreements include a number of prohibitions for tenants, which are actions or activities that the tenant is not allowed to carry out, and obligations that they are required to fulfil throughout their tenancy.

Prohibitions usually include *'not without consent to apply for or enter the holding or any part of the holding into any agri-environment scheme or any other scheme'* and not to alter the land or the way that it is being farmed. This appears to prevent a tenant from entering into an agreement to sell peatland credits without having consent from the landlord. Many schemes, in England and Scotland, also require the consent of the landlord (or heritable owner) prior to a tenant entering into a scheme that would alter the land or the way that it is being farmed.

However, the provisions of the Agriculture Act 2020 have changed this situation for Agricultural Holdings Act tenants in England¹⁶. The provisions aim to prevent tenants from being excluded from publicly financed environmental schemes, by allowing a tenant to legally challenge a landlord's refusal to give consent to enter an environmental scheme. It is not clear whether peatland restoration agreements and agreements with 'private' carbon buyers are covered by these provisions and so it is recommended that there is a legal clarification of this, including how the government's intention for these provisions may affect the position in the future.

3. Rules of Good Husbandry

Tenants are also required to comply with the Rules of Good Husbandry. These rules are aimed at maximising agricultural production and not the provision of environmental benefits. They require a tenant to keep *'insofar as the extent to which and the manner in which the unit is being farmed...are such that, having regard to the character and situation of the unit...While keeping the unit in a condition to enable such a standard to be maintained in the future'* and to keep *'the maintenance of permanent grassland (whether meadow or pasture) properly mown or grazed and in a good state of cultivation or fertility'*.

Conservation activities are to be treated as being in accordance with the Rules of Good Husbandry if they are carried out in accordance with:

- *An agreement entered into under any enactment by the tenant; or*
- *The conditions of:*
 - *Any grant for the purpose of such activities paid out of the Scottish Consolidated Fund; or,*
 - *Such other grant of a public nature as the Scottish Ministers may by regulation specify.*

Scotland

Therefore, it would appear that the conservation of peatland falls under the rules of good husbandry for Scotland if the tenant has entered into an agreement with the landlord, or has entered into a public fund paid for by the Scottish Government.

4. The tenant's length of leasehold interest

The lease type, whether that be a 1991 Act tenancy, MLDT or LDT would determine the length of any project that a tenant can enter into. They would only be able to do so with their landlord's consent or jointly with the landlord.

5. Diversification / resumption of the holding

If grazing can continue on peatland, at an appropriately low intensity so as not to cause erosion and emissions, then the tenant's use of the holding is likely to be considered 'agriculture', and so continue to fall under agricultural law, and not another legal regime, such as commercial property law.

The Agricultural Act (Scotland) 2003 allows a tenant of a 1991 Act tenancy, MLDT or LDT to enter the land into a non-agricultural diversification project, for part of a holding, assuming that it does not change the whole character of the farm. The tenant must serve a diversification notice on the landlord in advance. The landlord can object to a diversification project on certain grounds or impose reasonable conditions.

Leases can also contain statutory rights of resumption. In 1991 Act tenancies, if there is a written agreement and a clause allowing the landlord to resume the land, he can do so subject to challenge by the tenant if the resumption is contrary to the good faith of the lease and is of such a scale or nature that it will affect the likelihood that the farm can continue to be tenanted as an agricultural subject.

In the case of 2003 Act tenancies (SLDTs, LDTs and MLDTs), a landlord can only resume possession of land if they obtain planning consent and give 12 months' notice (under section 17 of that Act)¹⁷.

¹⁶ These tenancies are commonly known as 1986 Act tenancies, 'full agricultural tenancies' or Agricultural Holdings Act tenancies.

¹⁷ The Scottish Land Commission has said that, under the Town and Country Planning (Scotland) Act 1997 (as amended), works relating to peatland restoration may require planning permission, and if that is granted, may allow a landlord to resume the area affected from a 2003 Act tenancy. It also noted that most peatland schemes are unlikely to require planning permission. Source: Scottish Land Commission. An Interim Guide to Securing Tradeable Carbon Credits in an Agricultural Holdings Situation. Version 1. February 2022.

Scotland	
	<p><u>Scottish legislation</u></p> <p>As Scotland is devolved, only some of the Agricultural Act 2020 is applicable to Scotland. The Scottish Government introduced the Agriculture (Retained EU Law and Data) (Scotland) Bill in November 2019.</p>
<p>Let Land – short-term tenancies</p> <p>Short Limited Duration Tenancy or SLDT (1-5 years in length)</p> <p>Seasonal grazing agreements (364 days)</p>	<p>The same as for Let land – short-term tenancies in England.</p>
<p>Crofting</p>	<p>Crofting is a farming and social system in Scotland only.</p> <p>Most of the issues and concepts relevant to tenancies are also likely to apply to crofting but it is recommended that legal clarification is sought on the following points:</p> <ul style="list-style-type: none"> • If it is a landlord-led peatland restoration project, would consent be needed from the grazing committee¹⁸ or the grazing shareholders? If so, would this be a majority vote or have to be unanimous? <p>It also needs to be clarified whether the position is any different for community-owned land, as several crofting estates are.</p>

¹⁸ A grazing committee sits separately to the landowner or the board of directors / trustees (if it is a community-owned crofting estate). The committee manages the common grazings and pays a rent to the landowner for the grazings and they manage the shareholdings of the crofters. Each crofter has a shareholding in the common grazings which allows them to graze a certain amount of livestock on it.

Scotland			
	<p>Due to the likely reduction in the amount of livestock that can be grazed on the land, the graziers rights are likely to be negatively affected. Where this is the case, the current industry practise is to agree to share any proceeds from a restoration project 50:50 between landlord and graziers, but this is subject to negotiation.</p> <ul style="list-style-type: none"> • Do the crofters, like other agricultural tenants, need landlord’s consent if they want to carry out a project? <p>Certainty: Medium but legal clarifications required. A specialist crofting solicitor has been contacted and feedback is awaited.</p> <p>Gillespie MacAndrew has published an article on crofting which states¹⁹:</p> <p>Shareholders in a common grazing are permitted to use common grazings for managed conservation, which would include peatland restoration provided there is no detriment to the landlord’s interests. The interested shareholders must act together and make decisions via meetings and votes to agree to the proposed scheme.</p> <p>It is also open to the landlord to apply to the Land Court to resume land from a common grazing to establish a peatland restoration scheme. There are certain standards which need to be met for a resumption application to be approved, and the view is that it would be a stretch to successfully resume land for peatland restoration (unless there was the full support of the shareholders).</p> <p><u>Crofting Law Specialists</u></p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>Gary Webster Ledingham Chalmers LLP Kintail House Beechwood Business park Inverness IV2 3BW Gary.webster@ledinghamchalmers.com 07788 740756</p> </td> <td style="width: 50%; vertical-align: top;"> <p>Eilidh Ross Camus Consulting Auction Mart Bailechaul Road Dingwall IV15 9TP eilidh@camus.scot 07876 513404</p> </td> </tr> </table>	<p>Gary Webster Ledingham Chalmers LLP Kintail House Beechwood Business park Inverness IV2 3BW Gary.webster@ledinghamchalmers.com 07788 740756</p>	<p>Eilidh Ross Camus Consulting Auction Mart Bailechaul Road Dingwall IV15 9TP eilidh@camus.scot 07876 513404</p>
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¹⁹ Natural Capital and Existing Leases, 31st March 2022. <https://www.gillespiemacandrew.co.uk/news-insights/2022/natural-capital-and-existing-leases/>

Scotland	
Sporting leases / licences	The same as for England.
Commercial leases	The same as for England.

4. Northern Ireland

Northern Ireland	
In-hand land / Vacant possession	The same as for England.
Let land – long-term tenancies	<p>Most of the land let out in Northern Ireland is let under conacre agreements, which are typically for 11 months or less and provide no security to the tenant. It is estimated that 28.5% of Northern Ireland's farmland is rented under a conacre agreement.²⁰</p> <p>Longer agreements are rare and agricultural tenancies operate under common law and 'there is no statutory backcloth beyond the Landlord and Tenant Amendment (Ireland) Act 1860, which is also known as Deasy's Act, to limit the parties or offer default or overriding provisions'.²¹</p> <p>It is almost universal practice for written agricultural tenancies to reserve certain rights to the landlord, commonly for timber, minerals, water etc.</p> <p>The landlord is highly likely to own the peatland carbon units however, due to a tenant's rights to use the land under the terms of a typical tenancy agreement, which could affect carbon sequestration and / or emissions, the landlord is unlikely to be able to fully exploit the carbon without running into legal challenges of derogation from grant²². Therefore an agreement between the landlord and tenant to work together is likely to be needed to be able to safely sell or exploit the carbon²³.</p>

²⁰ Source:

Moody, J. (2016) *Longer Tenancies Key to Agricultural Growth*. Retrieved from AGRI Hub: <https://www.agri-hub.co.uk/2016/11/longer-tenancies-key-to-agricultural-growth-says-caav>

²¹ Source: Central Association of Agricultural Valuers. *Tenancies, Conacre and Licences: Arrangements for Occupying Agricultural Land in Northern Ireland*. CAAV publication 225. September 2015

²² Derogation from grant is a common law concept requiring a grantor (the person who grants the benefit, such as a landlord) not to do anything that substantially deprives the grantee (the person who has the benefit of the grant, such as a tenant) from the enjoyment of the benefit granted (such as the right to farm under a tenancy agreement).

²³ The Scottish Land Commissioner concluded that tenants 'cannot generally proceed with peatland restoration (or woodland creation) without the agreement of the landlord, and that landlords are limited in their ability to resume land without the agreement of the tenant'. Therefore there is 'incentive for the parties to get together to explore the possibility of entering into a contractual agreement that enables a project to proceed in a way that benefits both parties'. Discussions should include:

- what type and scale of project would be appropriate and acceptable to both parties;
- who is taking the lead in delivering the project;
- how responsibilities, costs, and incomes are to be shared;
- how to make an agreement that is robust enough to meet the Peatland Code;
- how to deal with future changes in landlord or tenant

Northern Ireland	
	<p>The tenant cannot enter a peatland restoration scheme that will generate carbon credits under the Peatland Code on the land they rent without written consent from the landowner, including agreement that the obligation for delivery of the project shall be transferred to the landowner should the tenancy end before conclusion of the project²⁴.</p> <p>Many agreements are not 'standard' and will have been amended when drawn up, so it is recommended that all parties check the terms of any tenancy agreement.</p> <p>We do not know whether peatland which is grazed by a tenant so that plants on it are removed or are so low that soil erosion occurs, which could lead to carbon being emitted, is in breach of the Rules of Good Husbandry. <u>We recommend that a review of case law on poaching and soil erosion, including on non-peat soils, is carried out to understand whether this has been considered.</u></p> <p>Certainty: Low, due to information coming from only two sources.</p>
<p>Let land – short-term tenancies</p> <p>Conacre agreements</p> <p>Agistment agreements</p>	<p>The same points as made for long-term tenancies, and particularly in relation to sufficiency of leasehold interests.</p> <p>A tenant with a short-term agreement, such as a conacre agreement which is typically 11 months term, made under the Agricultural Act (Northern Ireland) 1949, or an agistment agreement, which grants a short-term right to graze the land and few other rights, will not be able to enter into any long-term natural capital agreement unless he has landlord's consent or is doing so jointly with the landlord.</p> <p>The tenant, due to rights relating to derogation of grant and the Rules of Good Husbandry, which could affect carbon sequestration and / or emissions on the land, may prevent the landlord from being able to fully exploit the carbon. Therefore an agreement between the landlord and tenant to work together is likely to be needed to be able to safely sell or exploit the carbon.</p> <p>The situation may be further complicated by deer numbers, whose grazing can affect the ability of the soil and vegetation to store carbon or reduce emissions. Deer control may be an obligation of the landowner, tenant, sporting tenant or deer management group and it will interact with sheep and / or cattle grazing.</p>

- what happens if the project doesn't deliver the anticipated carbon benefits.

²⁴ Source: Scottish Land Commission. An Interim Guide to Securing Tradeable Carbon Credits in an Agricultural Holdings Situation. Version 1. February 2022.

Northern Ireland	
	Certainty: High.
Crofting	N/a as crofting is a farming and social system in Scotland only.
Common ground	The same as for England.
Sporting leases / licences	The same as for England.
Commercial leases	<p>The same as for England.</p> <p>NB Commercial leases granted under the Business Tenancies (Northern Ireland) Order 1996 have security of tenure for any lease granted for nine months or more and this cannot be 'contracted out of'. <u>It is recommended that the practical effect of this on leases that could affect peat is assessed, although it may only affect a small area of peat.</u></p> <p>Certainty: Medium to low, due to legal clarifications required.</p>

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