



Lough Neagh's future ownership

Legal and Policy Considerations

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BRIEFING**

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At one hundred and fifty square miles, Lough Neagh is larger than any other freshwater lake in Britain or Ireland and holds enormous cultural and economic significance for the communities who live and work in and around it. However, the management of the Lough has been problematic, and controversies stretching back decades have surrounded the environmental damage caused by poorly regulated sand extraction, the deterioration of the Lough's hinterland habitats such as peatlands, the decline in fish populations, the dramatic loss in breeding waders and serious water pollution. Recent media reports and observations about the condition of the lough have prompted calls for 'public ownership.' This briefing aims to provide some clarification around the current ownership of the lough, outlining why this is problematic, and offers some suggestions for alternative ownership models that could produce better environmental and social outcomes.

Summary

1. The most significant landowner of Lough Neagh is the Shaftesbury estate, although there are numerous other owners of the lough and the foreshore (including private owners and public bodies, such as NI Water) with less extensive territorial claims.
2. Underpinning significant regulatory failure are clear deficiencies in the lough's management, which have contributed to the steady decline in environmental quality. These management deficiencies are conditioned by the way in which the lough is owned.
3. Problems with the current ownership include: the current owner is entitled to any benefits that may be derived from the lough, including those related to mineral rights (sand, gas, lignite and oil exploration), and any income generated from lease and licensing arrangements for activities on the lough; potential harmful impacts of activities on the lough are felt only by the communities who live and work in the surrounding area; decision-making relating to the lough has been based on economic interests; and that the future of the lough remains uncertain because it could be sold to other third parties.
4. Earlier analyses of the benefits of public ownership must now be viewed in light of the decline in environmental quality over the last decade and the costs (environmental, social and economic) to the public of failure to improve its current management structures. Resolving these problems will require a change to some form of public ownership.
5. State acquisition of land is inherently complex from a legal perspective, but the environmental, social, cultural and economic benefits are highly likely to outweigh the effort/cost as well as the potential costs of doing nothing.
6. Public ownership would facilitate better governance arrangements for Lough Neagh and there are several options through which this can be delivered, including models based on community ownership, the public trust doctrine and rights of nature.
7. Current management of Lough Neagh is unsustainable, and has led to significant damage to this culturally, socially, environmentally and economically significant resource. The question of ownership should be at the forefront of discussions about the lough's future because ownership ultimately dictates governance and management arrangements. A rights of nature approach may be used to inform the design of governance frameworks that are capable of producing better outcomes for the environment and communities.

1. Who Owns Lough Neagh?

- The water in Lough Neagh is not 'owned'. In law, water can be owned only in small quantities and for specific purposes (e.g. for agricultural use).
- The 'bed and soil' of Lough Neagh (the land over which the water passes) and the hunting/fishing rights are owned by a registered company called the Shaftesbury Estate of Lough Neagh Ltd. The company forms part of the Shaftesbury estate, which Nicholas Ashley-Cooper, the 12th Earl of Shaftesbury, inherited in 2005.
- The Shaftesbury claim to the title of Lough Neagh and its fisheries (the right to fish in the lough) was confirmed by the House of Lords in *Johnston v O'Neill*.¹ This 1911 case was the culmination of generations of controversy and disagreement over the ownership of the lough and its fisheries.² Interestingly, judicial opinion in the case was sharply divided, with one dissenting opinion describing the alleged Shaftesbury title as, 'a territorial claim of stupendous magnitude.'
- In the 1920s, the fishing rights were sold by the Shaftesbury estate to a Dutch company. The shares in that company were gradually acquired and, by the 1960s, were completely owned by the Lough Neagh Fishermen's Co-operative Society.
- By far the most significant landowner remains the Shaftesbury estate, although there are numerous other owners of the lough and the foreshore (including private owners and public bodies, such as NI Water)³ with less extensive territorial claims.

2. Why is there a need for debate about the ownership of the lough?

- The poor environmental condition of the lough has been a concern for many years, but this concern has [escalated](#) over the past few months in light of the appearance of alarming indicators of severely compromised water quality, e.g. widespread blue-green algae. In addition to the implications for the ecological integrity of what is an internationally significant nature conservation area, the degraded water quality of Lough Neagh is now creating serious economic and social justice problems, as well as potential for economic costs to Northern Ireland as a whole. Ongoing and potential issues include impacts on the quality of water used for drinking water provision, fishing (both commercial and recreational), as well as other cultural, tourist and recreational activities and all the jobs associated with these industries.
- The current crisis is, to a large extent, a consequence of weak regulation. This is not a Lough Neagh-specific issue, and in Northern Ireland numerous scrutiny and research reports published over the last three decades have highlighted significant problems with how the environment more generally is managed and protected, both in terms of the laws which exist to protect our environment and the structures designed to deliver or oversee this protection.⁴

¹ *Johnston v O'Neill* [1911] UKHL 638.

² This case was concerned primarily with fishing rights in the lough. Specifically, it dealt with the ownership of fishing rights in the Bann fishery and whether there was, or ever had been, a public right to fish in the lough. It was concluded that there is no public right to fish.

³ See Lough Neagh Cross Departmental Working Group, *Potential for Bringing Lough Neagh into Public Ownership - A Scoping Study* (February 2014). Available [here](#).

⁴ For example, see Ciara Brennan, Ray Purdy and Peter Hjerp, 'Political, Economic and Environmental Crisis in Northern Ireland: The True Cost of Environmental Governance Failures and Opportunities for Reform' (2017) *Northern Ireland Legal Quarterly* 68(2) 123-157. A peer-reviewed academic article documenting in detail the history of environmental governance in Northern Ireland: available [here](#).

Within this very problematic context Lough Neagh is [considered](#) by many campaigners and researchers to be case study in environmental governance failure.

- However, underpinning this failure are [clear deficiencies in the lough's management](#), which have contributed significantly to the steady decline in environmental quality. These management deficiencies are conditioned by the way in which the lough is owned.
- Fundamentally, the ownership of the lough matters because different ownership structures can lead to quite different governance arrangements, with ownership dictating:
 - Who is entitled to benefit from the lough;
 - The potential scope for stopping or preventing damaging activity;
 - The degree to which communities can meaningfully participate in decision-making that relates to the lough;
 - The ways in which the public can engage with the lough and access the physical, cultural and educational benefits that this provides;
 - Whether or not the lough can be sold or transferred in the future – in other words, the degree of permanence attached to any governance arrangements.

3. What are the problems with the current ownership status?

- The current owner is entitled to any benefits that may be derived from the lough, including those related to mineral rights (sand dredging, fossil fuels), and any income generated from lease and licensing arrangements for activities on the lough. On the other hand, potential harmful impacts of activities on the lough are felt only by the communities who live and work in the surrounding area.
- The activities of landowners are constrained, to an extent, by a range of regulatory frameworks, including environmental regulation, but also criminal law and planning law. However, the implementation and enforcement of these frameworks has been incomplete and inadequate in Northern Ireland and this has undermined how effective they have been in preventing harmful activities in the context of Lough Neagh. Despite potential regulatory constraints, the power created by property rights is the most significant factor in decision-making relating to the lough. 'Ownership' has been described as 'a position of agenda-setting authority,'⁵ and the owner of the lough ultimately holds the power to control the decision-making that relates to activities taking place on the lough. Inevitably, if the lough is considered purely as a business asset, then these decisions will be animated by economic concerns.
- In addition, the lough, as the private asset of an individual, could be sold to another individual or corporation at the current owner's discretion. In this way, any local governance structures that have been developed to provide some strategic management of the lough⁶ may be subject to fluctuations and instability in future.

4. Does Public Ownership Provide a Solution?

- There has been much previous discussion about bringing the lough into public ownership, or in other words for the state to acquire the lough on behalf of the public. Under this type of arrangement, the ownership of the lough would be vested in a government department as a representative of the State, and the lough would be managed as an asset for the benefit

⁵ Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 University of Toronto Law Journal 275. Available [here](#).

⁶ Such as the Lough Neagh Partnership, established in 2003 to help manage and protect the lough. See website [here](#).

of the public. The department would have certain duties, underpinned by the requirement that the lough is used and managed in the public interest.

- In 2012, the Department of Agriculture and Rural Development (DARD)⁷ commissioned scoping research to look at this possibility, and the final report of the Cross-Departmental Working Group was published in 2014.⁸ Ultimately, the group did not endorse pursuing public ownership at that time. A number of reasons were put forth to support this position: the potential for escalating costs linked to the management and administration of the lough that would be drawn from the public purse; the complexity in negotiating a sale with the third party owners of the lough and foreshore; and the potential for rising costs for recreational and commercial operators who are engaged in lease or licensing arrangements with the Shaftesbury estate (due to the requirement for government departments to obtain best market value for publicly owned assets). The report also noted that drinking water supply would not be impacted by any change in ownership, as NI Water owned enough of the bed and soil of the lough to discharge its duties effectively, however declining water quality in the last decade would raise questions about whether this remains the case.⁹ The report went on to observe that even public ownership carried with it an inherent risk that the lough could still change hands in the future.¹⁰
- It is important to observe that the context within which the 2014 report was produced was heavily orientated towards economic concerns and premised on a cost-benefit analysis which did not consider the potential impacts of continued private ownership on social or environmental justice issues. It should also be clarified that public (or state) acquisition does not necessarily or inevitably lead to state management (and the costs associated with this), and that there are a range of different options and legal mechanisms that could be used – following state acquisition – to facilitate better governance frameworks and, ultimately, produce better environmental and social outcomes for the lough (see below). Even in a purely economic analysis, however, it should be noted that the continued degradation of the lough will itself generate increased costs for the public purse if the declining trend is not reversed. In other words, the parameters of the debate around the lough’s ownership have shifted in the decade since the publication of the Cross-Departmental Working Group’s report, ratcheting up the urgency with which these issues must be confronted.

5. What legal complexities might arise during the process of transfer to public ownership?

- While the primary transactional process would entail negotiation with the Shaftesbury Estate, there would inevitably be some complexity and legal wrangling to negotiate in relation to the third-party owners of some small parts of the lough and the foreshore, but this is common in relation to state acquisition of land for a range of different development or infrastructure public interest reasons.
- In relation to recreational and commercial operators: in law, a lease is a property right and would pass with the land if it were to be transferred to a new owner. A licence, on the other hand, is a contractual arrangement between two parties and would not automatically continue if the ownership of the land changed. The precise way in which future commercial and recreational licences would be granted would be determined by the ownership and

⁷ DARD’s functions were incorporated into the new Department of Agriculture, Environment and Rural Affairs (DAERA) in 2016 following the reduction in the number of government departments under the Fresh Start Agreement.

⁸ *Potential for Bringing Lough Neagh into Public Ownership* (n 3).

⁹ *Ibid.*

¹⁰ *Ibid.*

governance structures put in place (see below), but this would certainly confer greater power on local decision-making to control the kinds of (and extent of) activities that can be supported by the lough.

6. Are there ownership options or legal mechanisms that would facilitate better governance arrangements for Lough Neagh?

The short answer is yes. Work has already been done to explore the possibility of community ownership (see below) for Lough Neagh, but this is not the only option. There are other mechanisms that falls within the concept of 'public ownership' that would convey specific benefits for the specific context of the lough. In addition, there is a growing body of research around challenging more conventional ownership arrangements, and a recognition that there are a range of other options that may be more attuned to environmental and social realities than 'traditional' property models. **These options all require a change in who holds legal title to the lough.**

a) Community Ownership

- This is sometimes called collective ownership. Under this model, the ownership of the lough would be vested in 'the community' in the form of a body that represents the local community, which would be responsible for the management and governance of the lough. Under a community ownership model, the community would be the ultimate decision-maker in relation to the lough and would be entitled to any benefit derived from its ownership.
- Between 2015 - 2016, Development Trusts NI (DTNI) led a 7-month consultation exercise on the possibility of pursuing community acquisition and management of Lough Neagh. Their report¹¹ was published in 2016 and concluded that ownership of the lough by a **Community Development Trust** would be a viable option for securing the future health of the lough. On the back of this recommendation, 'Lough Neagh Development Trust' was registered with Companies House.¹²
- It may be noted that a development trust is just one option under the 'community ownership' heading. Another option might be to establish a **Community Land Trust** (most often used to provide affordable housing, but increasingly being used to support community-based businesses or to secure environmental protection),¹³ which is a flexible tool used to meet a local objective.
- It should be noted that other jurisdictions, such as Scotland, have a well-developed legislative framework for facilitating the Community Right to Buy.¹⁴ Critically, both Scotland and England and Wales have enacted legislation enabling assets to be transferred to communities from public authorities at less than market value, but this is not the case in NI. In this jurisdiction, the Department of Finance would need to grant express permission for a transfer of this kind.¹⁵ There has been growing interest around community ownership in NI over the past few years¹⁶ and this could be an area for future research.

b) The Public Trust Doctrine

¹¹ Paul Donaldson and Charlie Fisher, *The Future of Lough Neagh* (DTNI, 2017). Available [here](#).

¹² Company information available [here](#).

¹³ See Community Land Trust Network website [here](#).

¹⁴ See information from the Scottish Government [here](#).

¹⁵ DTNI, *Considering Legislation to Introduce General Disposal Consent in Northern Ireland*. Available [here](#).

¹⁶ For example, Social Farms and Gardens, A Community Land Advisory Service for Northern Ireland (2018). Available [here](#).

- The **public trust** is a sub-category of public or state ownership, used widely in the USA to protect waterways and navigable waters. Under the public trust doctrine, notable public assets are formally held by the government on trust for the public, and the government has a duty of environmental stewardship to look after the asset for current and future generations. The public trust doctrine establishes certain public rights to use the asset or resource, and also limits the State's ability to alienate, or transfer, the asset. The doctrine has not been widely invoked in the UK or Ireland, but there have been recent calls for a revived interest in this legal mechanism.¹⁷

c) Rights of Nature

- There is growing interest in the concept of 'Rights of Nature' and the legal possibilities it offers as a means of protecting the natural world when regulatory efforts fail. The concept has informed a wide range of novel approaches to how, in a legal sense, we understand the relationship between humans and nature. Rights of nature has been operationalised in multiple jurisdictions through a range of legal innovations (e.g. constitutional change, legislative reform), often alongside community ownership models – many of these could be explored as potential future options for Lough Neagh.
- One possibility is that a rights of nature approach could be used to facilitate **self-ownership** for Lough Neagh. Under this arrangement, fee simple ownership would be vested in the lough. In other words, the lough owns itself. In this way, decision-making focusses on what is of most benefit to the lough, rather than using metrics that prioritise economic development.
- The model for this kind of approach has been demonstrated at Te Urewera¹⁸, a former national park in New Zealand. The Te Urewera Act¹⁹ radically altered the ownership of this national park, declaring that Te Urewera is a legal entity, and that the land is inalienable (cannot be sold or transferred). The legislation itself is detailed, setting out the governance arrangements, the intricacies in terms of how the land is to be registered, and provisions relating to existing easements and covenants, and how this is to interact with the needs of communities and commercial or recreational activities.

7. Future Directions

The current management of Lough Neagh is unsustainable and has led to significant damage to this culturally, socially, environmentally and economically significant resource. The lough itself and the surrounding communities are now suffering the consequences of this failed management system. Aside from issues around poor regulation, the question of ownership should be at the forefront of discussions about the lough's future because ownership ultimately dictates governance and management arrangements. Previous analysis of whether public ownership of the Lough would be beneficial is now outdated and there are a range of possible ownership options and legal mechanisms or approaches that may be implemented in this context. The form of public ownership should be the subject of extensive public consultation and engagement with stakeholders. Examples from across the world indicate that a rights of nature approach may be used to inform the design of governance frameworks that are capable of producing better outcomes for the environment and communities.

¹⁷ See information on the Good Law Project [here](#).

¹⁸ For more background information, see website of the Te Urewera Board [here](#).

¹⁹ Te Urewera Act 2014, available [here](#).

Environmental Justice Network Ireland

The Environmental Justice Network Ireland was established in June 2019. EJNI is an all-island network which seeks to build collaboration between groups and individuals involved in the delivery or pursuit of environmental justice. Its goal is to connect academics, lawyers, NGOs, decisionmakers and community activists and in doing so help equip people with the knowledge and tools they need to enhance the quality of environmental justice on the island of Ireland, in the UK and across the EU. Dr Bróna McNeill is a Lecturer in Land and Property Law at Queens University Belfast. Dr Ciara Brennan is the Director of EJNI and a Visiting Research Fellow at Newcastle University Law School.

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