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REVERSING THE “TRAGEDY” OF THE COMMONS? SUSTAINABLE MANAGEMENT AND THE COMMONS ACT 2006

Christopher Rodgers¹

ABSTRACT

The Commons Act 2006 is the first statute since the Commons Registration Act 1965 to address the problems associated with the management of common land in England and Wales. A key focus for the 2006 Act is the introduction of mechanisms for the sustainable management of common land, including self regulatory commons councils. This article examines the ‘sustainable’ management of common land in historical and contemporary perspective. It sets the 2006 Act, and the sustainable management of common land, in the wider context of the ongoing debate triggered by Hardin’s ‘Tragedy of the Commons’ and subsequent institutional and post-institutional scholarship on common pool resource management. It uses historical and qualitative research data drawn from three case studies to demonstrate the irrelevance of Hardin’s thesis in an English context, and identifies the Commons Registration Act of 1965 as the true ‘tragedy’ of the English and Welsh commons. The case studies also illustrate the challenges posed by the introduction of legal mechanisms to promote the ecologically sustainable management of the modern commons, and inform the critique of the Commons Act 2006 developed in the article.

INTRODUCTION

The Commons Act 2006 is the first statute to address the management of common land in England and Wales since the Commons Registration Act 1965. It seeks to provide a regulatory framework for the sustainable management of the commons, through reforms to the registers established under the 1965 Act, and the establishment

¹ Professor of Law, Newcastle University. This paper draws on research funded by the AHRC under project AH/E510310/1, ‘Contested Common Land: environmental governance, law and sustainable land management c.1600-2006’, part of the AHRC *Landscape and Environment* programme. I am grateful to Angus Winchester for the historical references in footnotes 31-34: and for his, Eleanor Straughton’s, Ole Pedersen’s and Julia Aglionby’s comments on earlier drafts of this paper.

of self regulatory commons councils². This article has two objectives. It will set the management of common land in historical perspective, and consider in particular the impact of the Commons Registration Act 1965 on principles capturing ‘sustainable’ commons management that were formerly expressed through common law rules. Secondly, it will consider how sustainable management objectives are expressed in modern public policy, and how the reforms in the Commons Act 2006 will assist their successful implementation. It will conclude by contextualising the English Law on commons governance within the wider debate on the institutional governance of common pool resources. These themes will be illustrated by historical and contemporary research data drawn from three case studies of upland commons in England and Wales: Eskdale (Cumbria), Ingleborough (North Yorkshire) and Cwmdeuddwr common (Powys)³.

COMONS MANAGEMENT IN CONTEXT

The ‘tragedy’ thesis and commons governance

Garrett Hardin’s influential thesis on the ‘tragedy of the commons’⁴ argued that the incentive to put private gain before the common good meant that common pool resources are inherently subject to a tendency to degradation leading to ‘ruin to all’⁵. As this paper will demonstrate, Hardin’s thesis has no application to common land in England and Wales. It is based on a false premise, namely that there is unrestricted access to common pasture and other common land resources. Access to the resources supplied by common land in England and Wales, and the manner in which they are used, have both been the subject of extensive regulation since the medieval period.

² Implementation of Part 1 of the Act (Registration) is currently the subject of a pilot exercise in seven local authority registration districts: Devon, Kent, Cornwall, Hertfordshire, Herefordshire, Lancashire (excluding Blackpool) and Blackburn with Darwen (see the Commons Registration (England) Regulations 2008, SI 2008/1961). If successful, Part 1 will be implemented on a rolling basis from October 2010, with all commons registration authorities covered by October 31st 2013. Part 2 of the 2006 Act (commons councils) will be implemented in stages to be determined from 2010.

³ AHRC project AH/E510310/1 used four case studies to examine the sustainable governance of common land in historical context, from the early modern period to the passing of the Commons Act 2006. The fourth was the North Norfolk grazing marshes at Brancaster and Thornham. For further information, historical working papers and qualitative research data generated by the project, see the project website: <http://commons.ncl.ac.uk/casestudies>.

⁴ G.Hardin, “The Tragedy of the Commons”, *Science*, 162 (1968) pp1243-8

⁵ *Ibid* at 1244.

Hardin's thesis has also been challenged by institutional writers, who have stressed the wider effectiveness of self-regulating common pool resource institutions⁶. Ostrom's influential work, for example, posited eight 'design principles' that are displayed by successful common pool resource institutions,⁷ and new-institutional writers have also stressed the inherent reflexivity of institutions for the management of common pool resources⁸. Reflexive institutionalism stresses the interdependence of institutionally-mediated ideas and interests on the one hand, and those originating from individual appropriators on the other, and thereby emphasises the robustness of collective management institutions and their capacity to influence actors' behaviour⁹. New-institutionalist scholars have also stressed the importance of property rights for the success of common pool resource management i.e. property institutions conceptualised as a set of rules defining access to a common resource and exclusion from its management and use, while also monitoring, sanctioning and arbitrating the behaviour of individual users¹⁰. They have stressed the inherent reflexivity of property rights institutions, which are shaped by individual actors, while at the same time contributing to the managerial behaviour of resource appropriators.

Far from suffering a 'tragedy of the commons' in Hardin's sense, common land in England and Wales was, prior to the Commons Registration Act 1965, subject to

⁶ See generally Elinor Ostrom, *Governing the Commons: the evolution of institutions for collective action* (Cambridge University Press 1990).

⁷ For example, the ability of individuals affected by operational rules to participate in their modification, the application of monitoring by appropriators, of graduated sanctions for violation of appropriation rules, and the application of low cost dispute resolution mechanisms to resolve conflicts between resource appropriators. See Ostrom, *Governing the Commons* ibid at pp.90-91.

⁸ For further elaboration of the institutional approach see: Agrawal, A. and Ostrom, E.. "Collective Action, Property Rights, and Decentralization in Resource Use in India and Nepal" in (2001) 29 *Politics and Society* 485-514; Agrawal, A. "Sustainable Governance of Common-Pool Resources: Context, Methods, and Politics" in (2003) 32 *Annual Review of Anthropology* 243-262; Dietz, T., Dolsak, N., Ostrom, E. and Stern, P. "The Drama of the Commons" in Ostrom, E., Dietz, T, Dolsak, N., Stern, P.C., Stonich, S. and Weber, E. U. (Eds) *The Drama of the Commons: Committee on the Human Dimensions of Global Change*. (2002 Washington: National Academy Press) Pp. 3-35 ; Gibbs, C.J.N. and Bromley, D.W. "Institutional Arrangements for Management of Rural Resources: Common-Property Regimes" in Berkes, F. (Ed) *Common Property Resources: Ecology and community-based sustainable development*. (1989 London: Belhaven Press) Pp. 22-32; Ostrom, E. "Coping with tragedies of the commons" in (1999) 2 *Annual Review of Political Science* 493-535; Ostrom, E., Dietz, T, Dolsak, N., Stern, P.C., Stonich, S. and Weber, E. U. (Eds). *The Drama of the Commons: Committee on the Human Dimensions of Global Change* (2002 Washington: National Academy Press).

⁹ See for example: Dedeuwaerdere, T. 2002. "Biological diversity protection and self-regulation of local communities. Some implications of a reflexive institutionalist approach". at: http://dlc.dlib.indiana.edu/archive/00000635/00/biodiv_and_refl_self-reg.PDF

¹⁰ See Schlager, E. & Ostrom, E. "Property Rights Regimes and Natural Resources: a conceptual analysis" in (1992) 68 *Land Economics* 249-262.

common law principles of customary origin that promoted ‘sustainable’ management¹¹. These were expressed through property rights, in the form of qualifications on the resource use conferred by property entitlements, and were administered by local manor courts in a manner that met, in most material respects, Ostrom’s design principles for the successful management of common pool resources¹². Moreover, the administration of customary rules by the manor courts represented a wholly different means for organising the management of common resources than the model posited by Hardin, which stresses the need for exclusive ownership by either individuals or government in order to promote the effective management of the resource¹³.

The management principles applied by manorial institutions were not expressed in terms of the ‘sustainable’ management of the common land resource. This reflects the fact that the focus of common law discourse is on rights and remedies, with which the notions of intergenerational equity and futurity implicit in sustainable development sit uneasily¹⁴. There is ample evidence, however, that until their demise in the eighteenth and nineteenth centuries, the manor courts administered a sophisticated system of land use regulation that fulfilled many, but not all, of the objectives that modern environment policy now seeks for the sustainable management of common land. Sustainable management is primarily concerned with balancing the different impacts of land use (economic, social and ecological) in a manner that is targeted towards achieving sustainable development¹⁵. A key focus for sustainable management is therefore on balancing the needs of current and future users of the resource, and this raises issues of intergenerational equity and the need to preserve essential economic

¹¹ Section 128 and Schedule 12 Law of Property Act 1922 abolished copyhold tenure, and in so doing also abolished the last remaining means of acquiring common rights by custom. The impact of the Commons Registration Act 1965 on the management principles derived from customary practice are discussed below.

¹² See generally De Moor, Shaw-Taylor and Warde, “Conclusion” in (De Moor, Shaw-Taylor and Warde eds.) *The Management of Common Land in North West Europe c.1500-1850* (Comparative Rural History of the North Sea Area Publication No.8, Brepols, Belgium, 2002).

¹³ See Carol Rose, “The Comedy of the Commons: Custom, Commerce and Inherently Public Property”, (1986) 53 *University of Chicago Law Review* 711 at 742-743.

¹⁴ See M. Stallworthy, *Sustainability, Land Use and the Environment: a legal analysis* (Cavendish Publishing, 2002) paras. 1.2 and 2.4.

¹⁵ See, for example, the 2002 Johannesburg Declaration: *From our Origins to the Future*, the Johannesburg Declaration on Sustainable Development, Johannesburg 2002, esp. Para 5.

resources for future exploitation¹⁶. The social dimension to sustainable management is, on the other hand, closely linked with notions of distributive justice and with balancing access to contested resources equitably between competing appropriators. The distributive function can be performed through the allocation and qualification of property rights giving a right of access to the resource, or through the application of legally sanctioned management rules governing resource use. The promotion of ecological sustainability, on the other hand, is a policy imperative of more recent provenance, focussed to ensuring ‘the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of future generations’.¹⁷

The distributive and resource preservation functions inherent in promoting the sustainable management of common land were both addressed – albeit imperfectly - by the management principles developed at common law prior to the 1965 Act. In upland areas the density and type of grazing livestock permitted on common land was a key factor for the economic sustainability of rural communities, and for the condition of the vegetation (and by implication wildlife habitats) on the commons. It might be possible, for example, to argue that the nascent concept of sustainable management was immanent in the principles used by the manor courts to quantify and limit the number of stock grazed on upland commons – although recent interdisciplinary research indicates that this hypothesis must be heavily qualified¹⁸. Two mechanisms were used to limit grazing numbers prior to the Commons Registration Act 1965: the principle of levancy and couchancy (sometimes referred to as grazing *sans nombre*), which tied the number of permitted livestock to the needs of the dominant land to which the rights attached;¹⁹ and the practice of ‘stinting’, where

¹⁶ This is essentially what the well known definition of sustainable development given in the Brundtland Report is concerned with i.e. “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (World Commission on Environment and Development, *Our Common Future*, pp 8 and 43 (Oxford University Press 1997)).

¹⁷ Art.2 UN Convention on Biological Diversity 1992, (1992) 31 ILM 818.

¹⁸ See working papers on the Eskdale, Ingleton, and Elan Valley case studies generated by the AHRC Contested Common Land research project and available at <http://www.commonsncl.ac.uk/casestudies>.

¹⁹ The phrase “sans nombre” was used to describe some pasturage rights when annexed to dominant land. The assumption has always been that the phrase was used to describe rights quantified under the rule of levancy and couchancy (where the number of animals allowed on the common was numerically uncertain), in contrast to those governed by stinting where a certain number was fixed by the right itself. See *Chichly's Case* [1658] 145 ER 409. Its customary origins may, however, be more obscure.

the number of grazing animals permitted on the common from each dominant tenement was numerically fixed.

Levancy and Couchancy

Common pasturage rights were usually attached (appurtenant)²⁰ to the dominant tenement which they benefitted. The right is a *profit a prendre*, literally expressed as the right to take grass by the mouth of cattle, sheep, horses or other livestock, depending on the nature of the right²¹. The common law principle of couchancy and levancy dictated that the number of animals permitted summer grazing on a common was determined by the ability of the dominant land to which the rights were appurtenant (typically a farm adjoining the common) to sustain them from its own produce²² over the winter when they were not turned out on the common itself²³. This principle was most commonly applied to regulate grazing on large and open unenclosed pastures in the uplands, such as those in the Lake District, North Pennines and central Wales²⁴.

As a mechanism for protecting the agronomic or environmental condition of common land, levancy and couchancy had obvious drawbacks. The focus of the principle was primarily to establish an equitable method for determining **the comparative access to the grazing resources of different commoners having rights of pasturage over the common**, not to preserve the common pasture on the common itself. By focussing on the size and productivity of the dominant land (not the common – the servient land) it

For an erudite discussion of the origins and legal status of rights *sans nombre* prior to the Commons Registration Act 1965 see G.D. Gadsden, *The Law of Commons* (Sweet & Maxwell 1988) at para. 3.137-3.139. And see A.J.L. Winchester, *Harvest of the Hills* (Edinburgh University Press Ltd., 2000) at 79-81 and Figure 4.1.

²⁰ Rights can also be “appendant”. Appendant rights originate in the customary right of someone who was granted feudal tenure of arable land to graze his cattle – the animals necessary to plough and manure the lord’s arable land – on the wasteland of the manor. See generally *Tyrringham’s case* [1584] 4 Co.Rep. 36a (76 ER 973). They are very rarely encountered today.

²¹ *Samborne v Harilo* [1621] 123 ER 1162 at 163 (Bridgman J.); *Earl de law Warr v Miles* [1881] LR ChD 535 at 577 (Bacon V-C); *Besley v John* [2003] EWCA Civ 1737 (where it was held *inter alia* that the right does not include a right to supplementarily feed animals on the common).

²² Including fodder produced on the dominant holding, such as hay and root crops used for feeding livestock.

²³ See *Cole v Foxman* [1618] 74 ER 1000

²⁴ See A.J.L. Winchester, “Upland Commons in Northern England”, Chapter 2 in (De Moor, Shaw-Taylor and Warde eds.) *The Management of Common Land in North West Europe c.1500-1850*, (above, note 12) esp. 45-46 and Figure 2.3.

encouraged overgrazing of the commons. It also failed to reflect the realities of agricultural practice in the uplands: for example, a strict application of the rule would prevent the practice of agistment²⁵ or the overwintering of commoners' stock on lowland farms away from the manor, both of which were widespread and recorded practices by the sixteenth century²⁶.

The impact of the principle on sustainable commons management can be illustrated by evidence from Eskdale common. Documentary evidence of the customary land use in the manor survives in the *Eskdale Twenty Four Book*,²⁷ several copies of which are extant.²⁸ Levancy and couchancy is referred to as a guiding principle for regulating the pasturage rights on Eskdale common in several passages in the award.²⁹ The weaknesses of the principle as a resource management tool are, however, amply demonstrated by historical evidence of actual grazing practice on Eskdale common. Pasturage rights for 12300 sheep and followers were registered under the Commons Registration Act 1965.³⁰ During the nineteenth century livestock grazing was often intensive., and at other times less so. A tithe commissioner reported in 1839 that there were 'probably twenty thousand' sheep in the district and that 'far more sheep are kept... than the lands will keep in condition, and a very great number of lamb hogs *are sent to winter on inclosed grounds in distant parts of the country*' - a clear breach the rules of levancy and couchancy recorded in the *Eskdale Twenty Four Book*..³¹

²⁵ i.e. the grazing of another person's stock on the common in return for payment (often referred to as "tack"). See G.D. Gadsden, *The Law of Commons* (Sweet & Maxwell 1988) at paras. 3.109 and 7.12

²⁶ See further A. Winchester, *Harvest of the Hills* (Edinburgh University Press Ltd., 2000) at 93-97.

²⁷ This records the award of "four and twenty sworn men" chosen by the consent of the steward of the manor to ensure "the right Commodity, Profit and benefit of Common and perpetual Order and Stay" among the tenants of the manor in 1587. A copy of the text is available on the AHRC Contested Common Land website: <http://www.commonsncl.ac.uk/casestudies/eskdale>.

²⁸ The original 1587 award does not itself survive. The award was confirmed by a codicil sworn by a further "jury of xxiiii" in 1701, and the surviving manuscript copies are of a copy made in 1692 to which the 1701 award has been appended.

²⁹ The terms "levancy" and "couchancy" are not themselves used. The principle is nevertheless referred to, for example, in terms that record (i) that "every one [of the tenants is] to have their sheep lying in their own cow pasture in Winter time at their own discretion" (ii) "And ...no Tenant shall take any Cattle to Grassing within the said Lordship upon paine of vis viiid every beast so taken *but such like as the[y] Winter...*" (emphasis added) : *A copy respecting the Common etc. belonging to the Lordship of Eskdaile, Miterdaile and Wasdailehead dated 18th March 1587* respectively at page 9 and a later passage headed "Against taking of Cattle or Horses in Summer" (copy obtained courtesy of the Eskdale commoners association).

³⁰ Register of Common Land, Register Unit Cumberland CL 58. And see the analysis of the commons register available at <http://www.commonsncl.ac.uk/casestudies/eskdale>

³¹ Public Record Office/R18/716, Tithe File: Netherwasdale, Eskdale and Wasdale, Report on the Agreement for the Commutation of Tithes. Visited 11 July 1839 by John Job Rawlinson, Assistant Tithe Commissioner (answer to question 11) (emphasis added). The Report covered Wasdalehead and

The Agricultural Statistics for the late nineteenth and early twentieth century also record substantial numbers. There were 12500 sheep and lambs grazing in Eskdale in 1877, and a further 5740 recorded in Netherwasdale³². In 1897 the figure recorded in Eskdale, Miterdale, Wasdale and Netherwasdale was 17443 sheep and followers³³, and by 1907 it had increased to 18746³⁴.

The volume of livestock grazing Eskdale common suggests that the principle of levancy and couchancy had ceased to be enforced by the mid-nineteenth century³⁵. This experience is likely to have been repeated on many open upland commons. Indeed, the ineffectiveness of the principle of levancy and couchancy as a tool for regulating grazing pressure may itself be largely to blame for the fact that many of the upland commons subsequently registered under the Commons Registration Act 1965 are now burdened with excessive registrations of grazing rights³⁶.

Stinted pastures

Less prevalent was the practice of stinting i.e. determining the number of animals to be grazed by reference to a fixed number allowed on the common from each farm having common rights of pasturage (expressed as a 'stint' or 'beastgate'). Although the stint fixed a number of animals to be grazed, in theory each stint over a sole pasture was identical to any other and represented a fixed proportion of the whole of the right of pasturage on the common. While the stint had a fixed number of animals attached to it, these were variable by agreement between the stint holders and could be adjusted to take account of decreases or increases in the amount of grazing available. As a mechanism it therefore accommodated not only notions of social

Netherwasdale, in addition to Eskdale itself and Miterdale. Netherwasdale is outside CL 58 (Eskdale common). The figures given in the report would therefore require discounting to give a figure for sheep grazing on Eskdale common itself - but even allowing for this, the figure grazing what is now CL 58 (Eskdale common) must have been considerably in excess of the 12300 rights for sheep and followers subsequently registered under the Commons Registration Act 1965.

³² Public Record Office, Agricultural Statistics, Parish Summaries MAF 68/520 Cumberland 1877, sheet 7. Both parishes encompass parts of Eskdale common.

³³ Public Record Office, Agricultural Statistics, Parish Summaries MAF 68/1660 Cumberland 1897, sheet 1.

³⁴ Public Record Office, Agricultural Statistics, Parish Summaries MAF 68/2230 Cumberland 1907, sheet 8.

³⁵ See Eleanor Straughton, *Common Grazing in the Northern English Uplands 1800-1965* (The Edwin Mellen Press 2008) at 134-142 for an account of the gradual withdrawal of the Eskdale manor court from the regulation of grazing practices. The last order enforcing the rule of couchancy and levancy – in this case by prohibiting the out-wintering of sheep - appears to have been made in 1778 (ibid at 138).

³⁶ G.D.Gadsden, *The Law of Commons*, (Sweet & Maxwell 1988) at para 4.22, p.115.

sustainability (maintaining an equitable basis for access to the land resource for the various stint holders), but was also potentially responsive to ecological conditions that affected the common and reduced the amount of available grazing. It was arguably, therefore, a more effective practice for implementing sustainable management than the rule of couchancy and levancy.

There is evidence that in some parts of upland Northern England stinting was imposed as a response to a perceived need to control and reduce grazing pressures on common land.³⁷ In the Midlands and Southern England stinting appears to have become widespread on lowland commons by the end of the sixteenth century in response to increased population pressures on the available grazing land.³⁸ In other areas it was closely associated with the forest status of manorial wastes,³⁹ and in some with the practice of renting additional grazing for specific numbers of stock on manorial wastes. The formal legal mechanism for the imposition of stints varied. In some cases it was imposed by Inclosure awards, and in others by the mutual agreement of stint holders and the owner of the soil.⁴⁰

The property rights regime applicable to stinted commons is idiosyncratic. Stinted pastures were registrable as common land under the Commons Registration Act 1965, but there is a question whether regulated pastures created by Inclosure awards should have fallen into the registration system at all, as they are not strictly common rights⁴¹. Not all stinted and regulated pastures were, however, governed by Inclosure awards. Ingleborough in North Yorkshire presents evidence of several commons where stinting had become prevalent before the passage of the 1965 Act, but not under

³⁷ See A.Winchester and E.Straughton , “Stints and Sustainability: managing stock levels on common land in England c 1600-2006” (2010) *Agricultural History Review* (forthcoming) ; A.J.L.Winchester, “Upland Commons in Northern England”, Chapter 2 in (De Moor, Shaw-Taylor and Warde eds.) *The Management of Common Land in North West Europe c.1500-1850* (above, note 12) at p.45.

Winchester cites the example of an Exchequer decree of 1584 imposing stints to resolve a long running dispute over the size of pasture rights at Sadgill in Longsleddale (Westmorland), implicit in which is pressure on the grazing resource available to the farming community.

³⁸ L.Shaw-Taylor, “The Management of common land in the lowlands of southern England c.1500 to c. 1850”, Chapter 3 in (De Moor, Shaw-Taylor and Warde eds.) *The Management of Common Land in North West Europe c.1500-1850* (above, note 12) at p.71. And see passim. WG. Hoskins and LD. Stamp, *The Common Lands of England and Wales* (London 1963) at p 50ff.

³⁹ For example the Lancashire forests of Bowland, Wyresdale and Quernmore in the Central Pennines: See A.J.L.Winchester, *The Harvest of the Hills* (Edinburgh University Press Ltd., 2000) at pp.83-84.

⁴⁰ Stints could also be created under the Commons Act 1876, as to which see E.Straughton, *Common Grazing in the Northern English Uplands 1800-1965* (The Edwin Mellen Press 2008) esp.pp204-217..

⁴¹ See Gadsden G.D., *The Law of Commons* (Sweet & Maxwell, 1988) at 1.59 and 1.75.

Inclosure awards. In the Ingleborough area some stinted pastures appear to have been separated from the higher moorland by the seventeenth century and appropriated as stinted pastures by groups of farms, leaving the higher moorland as unenclosed waste. Ingleborough common itself⁴² appears to have remained unstinted until twenty or thirty years ago, when stints were introduced by the Ministry of Agriculture to reduce grazing pressures.⁴³ Another area of former manorial waste in the Ingleborough area - Scales Moor⁴⁴ - was stinted by agreement of the stint holders in 1810. This agreement was replaced in 1842 by a formal agreement between the stint holders and the lord of the manor, aimed at resolving 'disputes and differences' that had arisen under the 1810 arrangement. The 1842 agreement recorded that the 1000 acre common could support 800 sheep and that the number of cattle gates available to graziers should be adjusted to 160 in total. Each cattle gate would give a right to graze five black faced Scotch sheep or four white faced lowland sheep.⁴⁵ The 1842 agreement is therefore a good example of (i) the sensitivity of stinting as a mechanism both for managing grazing pressures in order to preserve the value of the agricultural resource that the common grazing represents, and (ii) its use as a mechanism for arranging equitable access to that resource.

COMMONS REGISTRATION: THE TRUE 'TRAGEDY' OF THE COMMONS?

The Commons Registration Act 1965 required the registration of both common land and of rights over common land⁴⁶. There is currently 369,394 hectares of registered common land in England, a figure which rises to 399,040 hectares if common land that is exempt from registration (such as the New Forest, the Forest of Dean and

⁴² Ingleborough common is comprised of two separate blocks of registered common land: CL 134 (Ingleton common) and CL 208 (Clapham common). This arrangement is derivative from manorial boundaries in the early modern period between the manors of Clapham, Newby and Ingleton : see "Ingleton Case Study Map 1: Manorial Boundaries and Common Land " (available at <http://commons.ncl.ac.uk/resources>).

⁴³ See A.Winchester and E.Straughton, "Ingleton Commons", p.2ff. (working paper available at <http://commons.ncl.ac.uk/resources>);

⁴⁴ Register of Common Land, Register Unit North Yorkshire CL 272.

⁴⁵ see A.Winchester and E.Straughton , "Stints and Sustainability: managing stock levels on common land in England c 1600-2006" (2009) *Agricultural History Review* (forthcoming).

⁴⁶ Section 1(1) Commons Registration Act 1965.

Epping Forest) is included⁴⁷. In the case of common rights, it required the registration of rights whether they were exercisable at all times or only during limited periods⁴⁸ and defined the rights to be registered very widely to include ‘cattlegates or beastgates (by whatever name known) and rights of sole or several pasture or herbage or of sole or several pasture’.⁴⁹ All rights that were not registered during the relevant application period⁵⁰ ceased to be exercisable over common land registered under the Act.⁵¹ In the case of pasturage rights for animals, the Act stipulated that a definite number of grazing animals be stated and that the right should be exercisable in relation to animals not exceeding that number.⁵² The broad impact was to require the registration of fixed numbers of common grazing rights irrespective of whether they had existed *sans nombre* under the rule of levancy and couchancy, or had previously been stinted. Most rights registered under the 1965 Act were appurtenant to the dominant land that they benefitted. Some common rights can subsist ‘in gross’ i.e. as personal rights unattached to a dominant tenement.⁵³ Many rights in gross were inaccurately registered in the Commons Registers⁵⁴.

The impact of commons registration on the sustainable management of the commons was almost wholly negative. The grazing rights registered against each common bore no necessary relation to the ability of the common to support the number of animals for which rights were registered, or to the ‘optimum’ level of stocking needed to prevent overgrazing.⁵⁵ The 1965 Act made no provision for the appraisal of

⁴⁷ See *Trends in Pastoral Commoning in England: a study for Natural England* (March 2008, The Pastoral Commoning Partnership with H&H Bowes) at p.26.

⁴⁸ Rights to pasture animals on the common during fixed periods in the summer months (for example from Lady Day, 25th March, annually) were therefore registrable.

⁴⁹ Section 22(1) Commons Registration Act 1965.

⁵⁰ Two periods for application for registration were prescribed by reg. 5 of the Commons Registration (General) Regulations 1966 (SI 1966/1471), each with a subsequent period for objections to provisional registrations. The relevant application periods were (i) January 2 1967 to June 30 1968 (objections to provisional registrations to be made by September 30 1970) and (ii) July 1 1968 to January 2 1970 (objections to provisional registrations to be made by July 31 1972).

⁵¹ Section 1(2) *ibid.*

⁵² See section 15 *ibid.* This provision has implications for ascertaining the maximum sustainable grazing on the common, to which we return below: see note 104 below.

⁵³ In the case of Eskdale, for example, two entries in the Commons Register record rights in gross, numbering in total 873 sheep grazing rights: Cumberland CL 58, Rights Section, Entry nos. 62 and 65.

⁵⁴ See Gadsden at 3.43, 3.44 and Aitchison and Gadsden in (Howarth W and Rodgers CP (Eds.)) *Agriculture Conservation and Land Use* (University of Wales Press, 1992) (*ibid.*) at p.174.

⁵⁵ See generally *Common Land: The Report of the Common Land Forum* (Countryside Commission, 1986). An interesting account of the deficiencies of the registration process in East Anglia is given in S. Birtles, “The Impact of Commons Registration: a Norfolk Study” (1998) 20 *Landscape History* 83-97.

applications for the registration of common rights against sustainability criteria – either in terms of the capacity of each common to provide adequate pasture for the number of grazing rights claimed, or in terms of the potential environmental impact of their exercise on wildlife habitats present on the common.⁵⁶ The registration of common rights should, moreover, have been based on the historic grazing practice on each common, but this was rarely checked by commons registration authorities. Consequently, grazing numbers were sometimes inflated. In some cases the rights registered under the 1965 Act may never have been exercised at all (or only exercised in part), or they may have been exercised at certain periods and not others.⁵⁷

Commons registration severed such links as had previously existed between common property rights and principles of ‘sustainable’ management. An ancillary effect of the requirement for each grazier to register a fixed maximum number of grazing livestock was the removal of any potential for the common law principles of levancy and couchancy and stinting to perform a meaningful function in relation to sustainable management. Following their registration, common property rights ceased to be inherently reflexive, and were rendered incapable of variation to meet changing ecological conditions. The courts have subsequently held that the requirement to register fixed grazing numbers effectively abolished couchancy and levancy.⁵⁸ And it destroyed the inherent ability of stinting to act as a reflexive mechanism to adjust grazing pressures in response to environmental factors.

In cases where a common is burdened with excessive registrations of pasturage rights, the property rights reflected in the register will have also ceased to capture the former distributive functions of couchancy and levancy, and of stinting, in allocating land use rights equitably between competing users. If each commoner has more than sufficient

⁵⁶This was one of the principal deficiencies of the 1965 Act identified by the Common Land Forum, and undoubtedly led to inflated numbers of rights being registered for some commons : *Report of the Common Land Forum* ibid. Appendix Cat paras 015 - 018.

⁵⁷ Gadsden op.cit.at 4.22.An example is provided by the Register of Common Land, Register Unit Ceredigion CL 6 (Cwmystwyth), adjoining the Elan Valley. This relatively small common has registered grazing rights for 2800 sheep, 45 cattle and 30 ponies, and is divided into several discrete blocks of land, each with sole grazing rights. The maximum number of sheep grazed over the common in recent years was approximately 1600 in summer, during the currency of the headage payment system for Hill Livestock Compensatory Allowances, which incentivised increased grazing numbers of sheep in the 1990s. The registered total was clearly unsustainable; <http://commons.ncl.ac.uk/casestudies/elanvalley/qualitativeveresearch>data (Semi structured interview 3rd March 2009).

⁵⁸ See *Bettison v Langton* [2001] 3 All ER 417.

registered rights for all foreseeable purposes, and cumulatively with others more than the grazing can sustain without serious damage to the common, then the property rights reflected in the register will cease to have any meaningful allocative function in terms of regulating access to the land resource. The allocative function formerly performed through property rights must therefore be exercised by alternative means, such as through publicly funded environmental management schemes. This is what has, in large measure, subsequently happened on many commons with high nature value⁵⁹.

ENVIRONMENTAL MANAGEMENT OF THE MODERN COMMONS

An important focus of modern public policy is on improving the environmental management of common land in order to benefit wildlife and habitats. Ecologically focussed management presents a dilemma, however: the legal protection of common land has always been premised upon rights to use and to take resources from the land, as we have seen, and not on preserving any nature conservation value that it may possess⁶⁰. The common law did not capture “ecological” sustainability principles and the property rights now reflected in the commons registers are therefore ill suited for promoting modern environmental policy. These objectives have instead been pursued through environmental legislation that regulates and/or prohibits potentially harmful land use practices, and by publicly funded rural development initiatives that promote the environmentally beneficial management of wildlife habitats and landscapes.

The Commons as Environmental Resource

The principal legal mechanism for nature conservation is the designation of geographically distinct **high nature value protected areas** for protection, the primary

⁵⁹ The register for Ceredigion CL 6 (Cwmystwyth) (above footnote 57) is an example. The rights registered on CL 6 far exceed those capable of exercise, or actually exercised, by successive graziers. The only mechanism for controlling access to the resource, in this case, would therefore be through limits on grazing numbers fixed in a management agreement under an agri-environment scheme such as Tir Gofal, which is designed to encourage heather regeneration and sustainable grazing in upland areas of Wales. Or controls on overgrazing introduced through the agricultural support measures of the common agricultural policy: see the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance)(Wales) Regulations 2004, SI 2004/3280, reg.4 and Schedule para.6.

⁶⁰ See D.McGillivray and J.Holder, “Locality, Environment and Law: the case of town and village greens” (2007) 3 *International Journal of Law in Context* 1-17, at 12.

wildlife designations in England and Wales being Sites of Special Scientific Interest (SSSIs),⁶¹ with Special Protection Areas (SPAs) and Special Areas of Conservation (SACs) forming part of the European *Natura 2000* programme.⁶² A large proportion of the registered common land in England and Wales is designated for protection under the relevant European or national environmental legislation. In England 210,806 hectares, approximately 57% of the total area of common land, is in SSSIs notified under the Wildlife and Countryside Act 1981.⁶³

The poor condition of many natural habitats found on common land is a major problem for the implementation of public policy. In 2003, 67% of the common land in SSSIs, by area, was assessed by Natural England as being in unfavourable condition.⁶⁴ Contemporary research shows that in 2008 only 19% was in favourable conservation condition; 48% was in unfavourable but recovering condition; 27% in unfavourable condition with no change and 6% in an unfavourable declining position.⁶⁵ The poor environmental condition of common land continues to be problematic relative to improvements seen elsewhere in the national suite of protected wildlife sites. The habitats found in 80% of the total area of the national SSSI network had, for example, improved to “favourable” conservation status by 2008⁶⁶. The government has set itself a Public Service Agreement target to have 95 % of SSSIs in favourable conservation condition by the end of 2010. Clearly, improving the environmental management of protected habitats on common land is a key priority if this is to be achieved.

⁶¹ Notified under Part 2 Wildlife and Countryside Act 1981, as amended by Sched. 9 Countryside and Rights of Way Act 2000. Notification is by the “Conservation Body” i.e. Natural England or the Countryside Council for Wales: Natural Environment and Rural Communities Act 2006, section 32.

⁶² Special Protection Areas are designated under Council Directive 79/404/EEC on the conservation of wild birds [1979] OJ L103/1. Special Areas of Conservation are designated under Council Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna, [1992] OJ L206/7. Both designations are transposed in English Law by the Conservation (Natural Habitats & C.) Regulations 1994 SI 1994/2176 as amended by SI 2007/1843, SI 2008/2172, and SI 2009/6. All European Sites are, as a matter of policy, also designated as SSSIs under the Wildlife and Countryside Act 1981.

⁶³ See *Trends in Pastoral Commoning in England: a study for Natural England* (March 2008, The Pastoral Commoning Partnership with H&H Bowes), Tables 3.1, 3.2

⁶⁴ *Agricultural Use and Management of Common Land: Report of the Stakeholder Working Group*, (DEFRA 2003) Appendix A. For the criteria used by the conservation bodies when undertaking condition assessments of SSSIs, SACs and SPAs see guidance from the Joint Nature Conservation Committee: *JNCC Guidance on Common Standards Monitoring* available at <http://www.jncc.gov.uk/page-2272>.

⁶⁵ Natural England, *The State of the Natural Environment 2008* (Natural England research report NE85), para 3.2.4.2 and Figure 3.1.

⁶⁶ *Ibid.* para 3.2.4.2

Common land is also an important component in environmental policy for landscape protection. In England 48% of common land is in National Parks and 30% is in Areas of Outstanding Natural Beauty. The overall importance of common land to the national mosaic of designated wildlife and landscape areas is clear: 88% of the common land in England is to be found within one or more of the principal sites designated either for landscape or habitat protection.⁶⁷ These designations often intersect and overlap. There are, for example, four SSSIs within the boundaries of Eskdale common,⁶⁸ the whole common is within the Lake District National Park, and much of it is also within the Lake District High Fells SAC.

Property Rights – The Implications for Habitat Protection

The property rights regime for common land, captured in the registers established under the Commons Registration Act 1965, is inadequately integrated with the policy objectives represented in modern environmental legislation. As we have seen, the 1965 Act failed to subject prospective registrations of common rights to a sustainability appraisal - either of their potential impact on the preservation of the common grazing resource or of their impact on the ecology of the common. The legislation for the notification and protection of SSSIs, SPAs and SACs, similarly, takes no account of the fact that protected sites may include common land. Where a SSSI includes common land, the dislocation between property rights and the environmental legislation causes problems both in applying the initial procedures for notifying the site, and in subsequently securing an agreement or management scheme to promote the conservation and improvement of its natural features.⁶⁹

The Wildlife and Countryside Act 1981 requires the conservation body to notify an SSSI to ‘every owner and occupier’ of land within the site.⁷⁰ The inaccuracy of the Commons Registers established under the 1965 Act makes the process of notifying sites that include common land problematic. Identifying the owners of common rights

⁶⁷ see *Trends in Pastoral Commoning in England* (2008) above n.63 at Table 3.2.

⁶⁸ Beckfoot Quarry SSSI, Nab Gill Mine SSSI, Scafell Pikes SSSI, and the Wasdale Screes SSSI.

⁶⁹ See C.P.Rodgers, "Environmental Management of Common Land: Towards a New Legal Framework?" (1999) 11 JEL 231

⁷⁰ Section 28(1)(b) Wildlife and Countryside Act 1981, amended by Countryside and Rights of Way Act 2000 Sched. 9.

may be difficult, especially where a holding with appurtenant common rights has been transferred or divided and sold, or where the rights are not currently being exercised. The 1965 Act did not impose a duty to notify changes in the ownership or tenure of either the dominant tenement or of the rights themselves⁷¹. The requirement for the conservation bodies to notify *every* occupier when notifying an SSSI is often impracticable, especially where a large number of commoners hold rights that they do not exercise. In Eskdale, for example, English Nature served the Scafell Pikes SSSI notification on 30 commoners with registered rights in 1988 – notwithstanding that there were only 10 active graziers on the common⁷². They encountered considerable difficulties caused by the need to identify all commoners and owners, by inadequate rights of access to identify conservation features, and by the need to notify everyone with a registered interest in the common.⁷³

Accurately identifying those currently exercising common rights is often further complicated by the practice of leasing or licensing common grazing rights for the use of others,⁷⁴ and by the exercise of rights enjoyed by virtue of a landlord/tenant relationship with the owner of the soil.⁷⁵ On commons where grazing was formerly controlled by stinting the transfer of rights is frequently encountered. Fixing livestock grazing numbers through the practice of stinting produced a different perception of grazing rights - as commodified elements of resource utility and freely transferable rights in land⁷⁶. These problems may be compounded where an SSSI includes land over which common rights exist 'in gross', as they can legitimately be transferred independently of the dominant land for the benefit of which they are exercised. The owner of the soil must also be notified, and where there is no known owner **Natural England** must notify the local planning authority in whose area the land is situated - a

⁷¹ See section 13 Commons Registration Act 1965, and the Commons Registration (General) Regulations 1966, SI 1966/1471.

⁷² See <http://commons.ncl.ac.uk/casestudies/eskdale/qualitativeresearchdata>. The assistance of Natural England in providing access to notification data is gratefully acknowledged.

⁷³ <http://commons.ncl.ac.uk/casestudies/eskdale/qualitativeresearchdata> (semi structured interview, 13th December 2007).

⁷⁴ This practice was widespread, although of questionable legality: see Gadsden, GD op.cit. at 6.23 – 6.30. It is now impermissible by virtue of section 9 Commons Act 2006, except for short terms of 2 years (in England) and 3 years (in Wales): see the Common (Severance of Rights) (England) Order 2006 SI 2006/2145, and the Commons (Severance of Rights) (Wales) Order 2007 SI 2007/583 (W55).

⁷⁵ See Gadsden GD op.cit. at 4.10, 4.11, and Aitchison, J and Gadsden, GD op.cit. in (Howarth W and Rodgers CP (Eds.)) *Agriculture Conservation and Land Use* (University of Wales Press, 1992) at p.174.

⁷⁶ See <http://commons.ncl.ac.uk/casestudies/Ingleton/qualitative-researchdata> on perceptions of property in stints, in this case on commons in the Ingleborough area of North Yorkshire.

process that can be difficult if a common straddles the boundaries of several local authority areas and ownership of the soil is fragmented and uncertain⁷⁷.

The Commons Act 2006 makes provision for the amendment and correction of the registers established under the 1965 Act, but is unlikely to resolve all of these problems. It requires the commons registration authorities to maintain the registers established under the 1965 Act,⁷⁸ which will be rolled over and become registers under the 2006 Act. It does not, however, reopen the registration of either common land or common rights - save for making provision for the correction of incorrect entries or omissions from the register of common land, and for the registration of new common land and new rights of common created after it comes into force⁷⁹. Any changes to registered rights that have occurred since 2nd January 1970 must be registered in the updated register during the transitional period for revising the registers in each registration area. In the case of the 'pilot' registration areas this will have to be done by 30th September 2010⁸⁰. This will apply to any variation or surrender **of a right of common that** has occurred since 1970, to any transfer of a right held in gross, or any severance or apportionment of a right attached to land that has occurred since initial registration.⁸¹

Any right of common to which these provisions apply, but which has not been registered by the end of the transitional period, will be extinguished.⁸² An amendment of the commons register is not required, however, where rights of common are attached to land that has been sold or transferred (without severance of the rights) between 2nd January 1970 and the end of the transitional period.⁸³ The 2006 Act also prevents the severance of appurtenant rights from the dominant land, thereby

⁷⁷ Natural England, pers. comm. 13th December 2007. These difficulties have now been eased by section 57 Natural Environment and Rural Communities Act 2006, which preserves the efficacy of an SSSI notification where an owner or occupier cannot be found and served with relevant notices, provided Natural England have taken "all reasonable steps" to ensure notice has been served on every owner or occupier of land to which the notice relates (section 70B Wildlife and Countryside Act 1981, inserted by section 57 of the 2006 Act)..

⁷⁸ Commons Act 2006, ss1,2. They are to be updated under Part 1 of the 2006 Act.

⁷⁹ Ibid s.3(1), 3(3). There are provisions in Schedule 2 for the amendment of the registers to amend incorrect registrations of common land.

⁸⁰ Commons Registration (England) Regulations 2008, SI 2008/1961, reg. 39 (2). For the seven pilot areas see footnote 2 above.

⁸¹ Commons Act 2006 Schedule 3 para 2 ((3) (definition of "relevant disposition")

⁸² Ibid. Schedule 3 para 3

⁸³ Ibid.Schedule 3 para 2(3).

precluding the creation of new rights in gross and securing the attachment of appurtenant common rights pro rata to the land they are intended to benefit.⁸⁴ Rights in gross created prior to the introduction of the 2006 Act are unaffected, but the transfer of such rights will in future only be legally effective when entered in the registers established by the 2006 Act. In principle these changes will make it easier to identify the owner of common rights, but substantial difficulties will remain if title to the dominant land to which they are attached is not itself registered at HM Land Registry

Environmental Management Objectives

To what extent can the protection of ecosystems, habitats and species be balanced against the impacts of common resource use, and how? Theories of ‘weak’ sustainability attribute limited weight to protecting natural capital when balancing the needs of development and environmental protection.⁸⁵ This approach underpins most land management instruments applied to promote nature conservation in modern English law,⁸⁶ and involves a balancing function in which the needs of the environment are often traded off against economic development⁸⁷. The principal ecological management objectives for *Natura 2000* sites are set out in the EC Habitats Directive of 1992⁸⁸ i.e. to maintain and, where appropriate, restore the ‘favourable conservation status’ of natural habitats and species for the protection of which Special

⁸⁴ Ibid. section 9; Commons (Severance of Rights) (England) Order 2006 SI 2006/2145. Section 9 reverses the effect of the House of Lords ruling in *Bettison v Langton* [2001] 3 All ER 417.

⁸⁵ See D.Pearce, *Blueprint 3 – Measuring Sustainable Development* (Earthscan 1993) at 13-16

⁸⁶ For example the statutory consultation mechanisms for potentially damaging operations in SSSIs used under section 28 Wildlife and Countryside Act 1981, as amended; and in the development control principles applied in protected areas through planning law (see PPS 9 “Biodiversity and Geological Conservation”, ODPM 2005). The balance is more tightly drawn against development in “European sites” designated by the Conservation (Natural Habitats & C) Regulations 1994.

⁸⁷ K.Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate,2008) at 52. “Strong” sustainability, on the other hand, attributes much greater weight to the protection of the natural environment when balancing the needs of development and environmental protection, including in some cases an argument that natural capital must be regarded as inviolable: see D.Pearce (above note 85), Andrew Dobson, *Green Political Thought* (Routledge, 2000) at 62ff..

⁸⁸ Directive 92/43/EC on the Conservation of Natural Habitats and of Wild Fauna and Flora, [1992] OJ L 206/7. Article 6.1 requires the member states to adopt “necessary conservation measures” such as management plans in SACs (article 4 of the Wild Birds Directive contains similar obligations for SPAs); article 6.2 requires them to take appropriate steps to avoid the deterioration of the sites and significant disturbance of the species for which the site has been designated (this applies to both SPAs and SACs).

Areas of Conservation and Special Protection Areas are designated.⁸⁹ This concept also underpins the objectives for the management of SSSIs notified under the Wildlife and Countryside Act 1981⁹⁰. The methodology underpinning the implementation of management plans for protected sites is based upon the scientific monitoring and appraisal of vegetation and wildlife, and of land use impacts. The formulation of these objectives will take no account of the land tenure to which the land in question is subject. This can be problematic where protected sites include large areas of common land, as the management required to achieve favourable conservation status may be incompatible with the framework of property rights reflected in the commons registers. The difficulties to which this can give rise are clearly illustrated by the experience in the three upland case studies - Cwmdeuddwr common (Powys), Eskdale common (Cumbria) and Ingleborough and Scales Moor (North Yorkshire). The case studies also demonstrate how the Commons Act 2006 can contribute to their successful resolution, and its potential limitations. **ADD SOMETHING HERE**

Cwmdeuddwr common is partly within the Elenydd SAC and Elenydd-Mallaen SPA, a large upland area⁹¹ that contains seven natural habitats of European-level importance⁹² and three bird species (red kites, peregrines and merlin) requiring protection under the EC Wild Birds Directive⁹³. A large part of the common is also within the Elenydd SSSI. Two of its most important habitat features are the presence of extensive blanket bogs and large areas of European dry heath land. The conservation status of the blanket bog in the Elenydd SAC and SSSI was assessed as

⁸⁹ Article 1 (e) of the Habitats Directive defines the conservation status of a natural *habitat* as “the sum of influences acting on it and its typical species that may affect its long-term natural distribution, structure and functions as well as the long term survival of its typical species”. The conservation status of the habitat will be “favourable” when “its natural range and areas it covers within that range are stable or increasing; the specific structure and functions which are necessary for its long term maintenance exist and are likely to continue to exist for the foreseeable future and the conservation status of its typical species is favourable”. Article 1 (e) further defines the favourable conservation status of protected *species* by reference to population dynamics data indicating that the species is maintaining itself on a long term basis as a viable component of natural habitats, with a natural range that is stable upland and where there is a sufficiently large habitat to maintain its populations on a long term basis.

⁹⁰ See the guidance from the Joint Nature Conservation Committee applied to monitoring the condition of SSSIs, SPAs and SACs: *JNCC Guidance on Common Standards Monitoring* available at <http://www.jncc.gov.uk/page-2272>

⁹¹ The Elenydd-Mallaen SPA was designated in 1986 and extends to 30022.14 hectares. The Elenydd SAC was designated in 2004 and covers 8609.42 hectares.

⁹² i.e. habitats listed in Annex 1 of Directive 92/43/EC on Habitats and Species .

⁹³ i.e. under article 4.1 and Annex 1 of Directive 79/409/EEC on the conservation of wild birds, [1979] OJ L103/1

unfavourable by the Countryside Council for Wales in 2006, with unauthorised burning and heavy grazing by sheep leading to excessive peat losses and damage to dwarf shrub populations⁹⁴. Similarly, the unfavourable condition of the heath land habitat on the Elenydd SSSI was attributed to heavy grazing pressure, leading to losses of dwarf shrub populations and their replacement by grassy sward⁹⁵. Purple moor grass, *molinia caerulea*, has become dominant in large areas of the site due to the effects of intensive sheep grazing over a long period.

The Countryside Council for Wales' management objectives for habitat restoration require that grazing in winter and autumn, particularly by sheep, be avoided, and that cattle be reintroduced under a mixed grazing regime to reduce molinia encroachment, encourage dwarf shrub regeneration and promote heather⁹⁶. The common is within the Cambrian Mountains Environmentally Sensitive Area ("ESA")⁹⁷. A collective ESA management agreement was concluded with the Cwmdeuddwr commoners association in 2001, under which the graziers are paid to implement environmentally beneficial land management. This requires them to restrict grazing to an average annual stocking rate of 0.375 livestock units per hectare⁹⁸ on unenclosed semi natural rough grazing and 0.22 lu/ha in areas of unenclosed semi natural grazing where heather is present⁹⁹. Individual arrangements were concluded with each grazier by which they restricted their livestock to a fixed number reflected in sheep "grazing days" per annum. This flexible arrangement permitted some to reduce their stocking level to an agreed number throughout the year, while others remove their stock completely for certain 'closed' days to meet their grazing day target – the overall

⁹⁴ Countryside Council for Wales, *Core Management Plan (including conservation objectives) incorporating: Elenydd-Mallaen SPA, Elenydd SAC, Elan Valley Woodlands SAC, Cwm Doethie – Mynydd-Mallaen SAC* (17th April 2008). See Para 5.1 "Conservation Status and Management Requirements for Feature 1 : 7130 Blanket Bogs".

⁹⁵ Ibid Para 5.2 "Conservation Status and Management Requirements for Feature 2 : 4030 European Dry heaths"

⁹⁶ Ibid. Para 5.1 (Management Requirements of Feature 1) and Para 5.2 (Management Requirements of Feature 2)

⁹⁷ Designated by the Environmentally Sensitive Area (Cambrian Mountains – Extension) Designation Order 1987, SI 1987/2026 (made under Agriculture Act 1986 section 18).

⁹⁸ A "livestock unit" is calculated by reference to the following formula for these purposes: bulls, cows and other bovine animals over 2 years old constitute 1 livestock unit each; bovine animals over 6 months but less than 2 years old are 0.6 livestock units; and sheep and goats constitute 0.15 of a livestock unit each (Environmentally Sensitive Area (Cambrian Mountains – Extension) Designation Order 1987, SI 1987/2026, Schedule) .

⁹⁹ These are Tier 1A obligations in the Cambrian Mountains ESA. The assistance of the Cwmdeuddwr Commoners Association in providing a copy of the ESA agreement for Cwmdeuddwr common, made on 20 June 2001, is gratefully acknowledged.

impact being to reduce grazing pressures to the ‘global’ density reflected in the ESA agreement. The agreement also prevents increases in livestock grazing, ploughing, reseedling and the supplementary feeding of livestock without the permission of the Welsh Assembly Government.¹⁰⁰

Eskdale common presents similar problems of ecological management and habitat regeneration. The Scafell Pike SSSI hosts montane heaths, and the summit boulder field hosts rare assemblages of lichen heath. The Wasdale Screes SSSI runs along the southern shore of Wast Water and forms a classic geomorphological example of one of the best screes in Britain, with cliffs in the higher areas and unstable screes below. The gullies sustain a number of nationally rare plant species, heather and bilberry heath. Both SSSIs are highly sensitive to sheep grazing pressures, and both are in unfavourable (but recovering) conservation condition.¹⁰¹

An important conservation objective for Eskdale is the introduction of a mixed grazing regime with cattle to reduce bracken encroachment and re-establish heather, accompanied by a reduction in sheep grazing pressures and the removal of overwintering livestock.¹⁰² The common was entered into a Tier 1 (Heather fell) ESA management agreement negotiated by the Eskdale commoners association in 1995.¹⁰³ This resulted in a reduction of summer grazing by sheep to 5139, and to 3852 in winter. Further reductions in sheep grazing were introduced in 2003 under Sheep and Wildlife Enhancement Scheme (“SWES”) agreements with the 10 active commoners.

¹⁰⁰ The ESA agreement also illustrates the poor integration between the common property rights regime and environmental legislation. The terms of the ESA agreement conflict with the property rights in the common, in as much as the common right of pasturage is a *profit a prendre* and gives no right to plough, reseed or supplementarily feed livestock on the common. Carrying out any of these operations would, in any event, also contravene the list of operations likely to damage the conservation interest (“OLDS”) for the Elenydd SSSI and constitute a criminal offence unless consented by the Countryside Council for Wales under section 28E(3) Wildlife and Countryside Act 1981.

¹⁰¹ See Natural England’s SSSI condition summaries at www.naturalengland.org.uk/special/ssi/report (compiled February 2009). The sites’ “recovering” status is attributable to the existence of the ESA and SWES management agreements that will in time bring the sites back into favourable conservation status, if the management specified in the site management statements for each SSSI are adhered to.

¹⁰² These sites are within English Nature’s *Sustainable Grazing Initiative in Cumbria*, and the ESA and SWES agreements on Eskdale common described here are integral to the overall approach set out therein. For the methodology and application of the Sustainable Grazing Initiative see further: *English Nature’s Sustainable Grazing Initiative in Cumbria – a review of the success of grazing agreements for upland SSSIs*, by Webb, Johnston, Hunt, Stainer and Milnes (English Nature, 2006).

¹⁰³ The Lake District ESA was originally designated in 1993 under Agriculture Act 1986, section 18. It is currently one of a number of Stage 3 ESAs designated by the Environmentally Sensitive Areas (Stage III) Designation Order 2000, SI 2000/3051.

These provided a further 40% reduction in sheep grazing numbers on the two SSSIs. The annual average grazing density sought for the common under the SWES is 0.8 ewes per hectare. The further adaptation of land management on Eskdale common - including the introduction of mixed grazing with cattle and sheep – will, however, be complicated by the nature of the registered common rights and the large number of inactive commoners.

IMPLEMENTING SUSTAINABLE MANAGEMENT

The implementation of environmental management objectives for common land is complicated by the poor integration between common property rights and modern environmental legislation. A key problem is the relationship between the quantification of grazing rights reflected in the Commons Registers, and the levels of grazing and other land uses required to implement environmental management objectives. The property rights regime can also restrict the *types* of land management that can be introduced, whether sustainable or otherwise.

Quantification of Grazing Rights: Existing Registrations

Given the potential mismatch between registered grazing rights and the carrying capacity of the common land over which they are exercisable, the legal status of the registered number of rights assumes considerable importance. If X has registered rights on Blackacre Common to graze 1000 sheep and followers, does he have a legal entitlement to graze 1000 sheep even if this causes damage to the common or its environmental features? And what if he is grazing less than 1000 sheep – say 300 – but this level of grazing still has detrimental effects? Are X's property rights as a grazier definitively reflected in the number of grazing rights registered under the 1965 Act? Or are they potentially qualified by reference to sustainability criteria? And if so, what criteria would be applied at common law?

For existing registrations,¹⁰⁴ this turns on the interpretation of section 15 of the Commons Registration Act 1965. This provided that ‘where a right consists of or includes a right, not limited by number, to graze animals of any class, it shall...be treated as exercisable in relation to *no more animals...than a definite number*’.¹⁰⁵ Once the registration became final, the right became exercisable ‘in relation to animals *not exceeding the number registered*,¹⁰⁶ and registration furnished conclusive proof of the matters registered.¹⁰⁷ The property rights implications of this provision were considered in *Re The Black Mountain, Dinefwr, Dyfed*.¹⁰⁸ The commons commissioner’s view was that the registered number merely provided an upper limit on the number of grazing stock permissible. It followed that legal redress could be sought if, at any time, the number of animals grazing the common was considered to be excessive, and even if a grazier alleged to be causing damage was grazing fewer livestock than his full registered entitlement.

This decision (if followed) could potentially reopen the question of linking permissible grazing numbers¹⁰⁹ to principles of sustainable land management. Whether this would assist with issues of ecological management must, however, be questionable. If the principle were accepted, the better view suggests that reference be made to the common law principle of levancy and couchancy in order to fix the maximum grazing limit for a common.¹¹⁰ But, as we have already seen, the levancy and couchancy rule is largely to blame for the excessive registrations reflected in the commons registers established under the 1965 Act. It may capture notions of economic sustainability, but takes no explicit account of ecological factors – for example the management required to achieve favourable conservation status on SSSI land. The Common Land Forum recommended in 1986 that the rectification of the

¹⁰⁴ I.e. those made under the Commons Registration Act 1965, prior to the coming into force of Part 1 Commons Act 2006.

¹⁰⁵ Section 15(1) Commons Registration Act 1965 (emphasis added).

¹⁰⁶ Section 15(3) *ibid.* (emphasis added)

¹⁰⁷ I.e. once the registration had become final: section 10 *ibid.*

¹⁰⁸ [1985] 272/D/441, 16 D.C.C. 219 (Commissioner Baden Fuller). This is the only case in which the question has been judicially considered.

¹⁰⁹ And possibly other land uses, such as turbarry (peat extraction) and estovers (gathering bracken for animal bedding, or wood for fencing etc.).

¹¹⁰ This is the view put forward by Gadsden, *op.cit.* at para 4.23, p.115. If this is correct it would mean that the 1965 Act did not, in fact, abolish couchancy and levancy – contrary to the assumption to this effect by the House of Lords in *Bettison v Langton* [2001] 3 All.ER 417. It is also difficult to see how a quantification different to that stated in the register could be arrived at in the case of a stinted pasture, where rights will have been fixed numerically *ab initio*.

commons registers should be allowed, where it was necessary to reflect the carrying capacity of a common land unit, and that agricultural land tribunals should undertake the task of quantifying rights reflected in appropriate carrying capacity.¹¹¹ This suggestion was not taken up in the Commons Act 2006,¹¹² and there remains no mechanism for re-evaluating the link between *pre-existing* registered rights and the ecological management of common land.

Creating New Common Rights: the Commons Act 2006

The Commons Act 2006 provides for the amendment and updating of the registers, and in some circumstances for the creation of new rights of common by express grant or under statute.¹¹³ The registration and amendment of new rights will be subject to a sustainability appraisal. The Act provides that an application to register the creation of a right of common pasturage must be refused ‘if in the opinion of the commons registration authority the land over which it is created would be unable to sustain the exercise of the right and ...any other rights of common exercisable over the land.’¹¹⁴ The same principle will apply to an application to vary¹¹⁵ common rights after Part 1 of the 2006 Act comes into force.¹¹⁶ An application to register a variation of a grazing right must be refused if the land over which it is to subsist would be unable to sustain the exercise of the right.¹¹⁷ In both cases the application of sustainability principles is linked to the *cumulative* impact of the new rights on the ability of the common to support the continued exercise of the total number of registered grazing rights. This might indicate that an economic sustainability model was intended, focussing on the preservation of vegetation as a grazing resource. Significantly, however, the commons registration authority is required, in every case, to consult Natural England before

¹¹¹ Common Land Forum Report, op. cit. Appendix C paras 028 and 114-121.

¹¹² The 2006 Act does, however, introduce a link between rights and sustainable land management (including quantification of rights) for the registration of new rights registered after Part 1 of that Act comes into force. This is discussed below.

¹¹³ Commons Act 2006 section 6(3).

¹¹⁴ Ibid section 6(6)

¹¹⁵ Rights can be varied either by becoming attached to new common land, or by virtue of changes made to the rights themselves e.g. a change in the number of animals that can be grazed on a common land unit.

¹¹⁶ Part 1 of the Commons Act 2006 was brought into force in seven “pilot” local authorities on October 1st 2008: see note 2 above and the Commons Registration (England) Regulations 2008, SI 2008/1961. Following review of the pilot, it is expected that Part 1 will be rolled out to other areas of England in stages from October 2010 to October 2013.

¹¹⁷ Ibid section 7(5).

approving a new registration or variation of rights.¹¹⁸ This would suggest that impacts on the ecology of the common will in practice be an important consideration.

The 2006 Act also provides for the registration of “replacement land” and the release in exchange of registered common land. The commons registration authority must have regard to the “public interest” when deciding whether to register replacement land, and this is expressly defined to include nature conservation, the conservation of landscape, the protection of public rights of way and of features of archaeological or historic importance¹¹⁹. These reforms will, in time, lead to a strengthening of the link between concepts of sustainable management and the property rights reflected in the commons registers.

Unused Common Rights

Many commoners fail to exercise their full registered entitlement, and some fail to exercise them at all. It is clearly preferable for the conservation bodies to offer management agreements to active commoners, as it is conservation management by these graziers that will deliver the objectives of schemes such as ESA and SWES. Management payments will, however, only be made to commoners on the basis of registered rights. The problem of the ‘inactive grazier’ also impacts upon the economic sustainability of farming on common land, as it reduces the farm subsidy entitlements of those graziers actively grazing the common – these are calculated by reference to the number of rights that each producer holds as a proportion of the total number of registered common rights, whether exercised or not.¹²⁰

The potential for inactive commoners to upset the environmental management of the common by subsequently exercising commons rights is considerable, and dictates that their interest must also be accommodated if a workable scheme is to be established. This arguably results in an inappropriate use of public funds to ‘buy out’ common rights that are not (and may never have been) exercised. In Eskdale only 8565 sheep were grazing the common immediately prior to the conclusion of the ESA agreement

¹¹⁸ Reg.36 Commons Registration (England) Regulations 2008, SI 2008/1961.

¹¹⁹ Ibid section 16(6) and 16(8).

¹²⁰ See DEFRA Policy Update February 2005, in *Single Payment Scheme: information for farmers and growers* (DEFRA, 2005) at p.3 (Common Land).

in 1995, according to Natural England,¹²¹ and the active graziers were themselves only using a proportion of their registered grazing entitlement.¹²² Securing the Eskdale ESA agreement required payments to eleven commoners for 1275 sheep grazing rights that remained unused. Similar problems have arisen elsewhere. Only four commons entered the ESA scheme in Wales, of which Cwmdeuddwr common was one.¹²³ Negotiating the Cwmdeuddwr ESA agreement took more than two years and required visits by representatives of the Cwmdeuddwr commoners association to London to negotiate with inactive graziers who had never grazed the common.¹²⁴

Securing Flexible Management

The commons register may not entitle commoners to implement the *type* of livestock management sought by the conservation bodies. Natural England's strategic priorities in Eskdale, for example, are the encouragement of heather regeneration on the common, the restoration of selected areas of woodland and the re-establishment of juniper shrub. When the current SWES and ESA agreements expire in 2013, continuing sustainable management will depend upon the common being accepted into the Higher Level Stewardship (HLS) scheme with a mixed grazing regime for both sheep and cattle. Similar strategic objectives have been adopted by the Countryside Council for Wales for Cwmdeuddwr common, in order to control molinia vegetation, encourage heather regeneration and stabilise peat bog mires. In both cases this will conflict with the resource allocation currently reflected in the commons registers.

¹²¹ <http://commons.ncl.ac.uk/casestudies/eskdale/qualitative-research-data> (semi structured interview 13th December 2007. The register for Register Unit Cumberland CL 58 (Eskdale Common) records 12300 grazing rights for livestock (see above, note 30).

¹²² It is perhaps noteworthy that at this time the headage payment regime of the common agricultural policy encouraged farmers to maximise sheep numbers on the fell. Despite this the numbers of grazing stock was clearly substantially lower than that recorded in the nineteenth century – see above notes 32-34. The commons register for CL 58 also discloses 14 rights of turbarry and 5 registered rights of estovers - although peat cutting and gathering bracken for animal bedding has not been practiced on the common for many years.

¹²³ See Countryside Council for Wales, *Report of the Pori Natur a Threftadaeth (PONT) Conference to discuss the implications of the new provisions within part 2 of the Commons Act 2006 to facilitate the sustainable grazing management of Wales 'commons* (2007), esp. para 3.5. The other commons to enter ESA in Wales were Mynydd mallaen (2088 ha. with 47 graziers), Ysbyty Ystwyth (310 ha. with 2 graziers) and Ireland Moor (2785 ha. with 100 graziers).

¹²⁴ <http://commons.ncl.ac.uk/casestudies/elanvalley/qualitative-research-data> (Semi structured interview, 3rd March 2009).

Historically, cattle were grazed on Eskdale common. Twenty-eight of the registered pasturage rights have cattle grazing rights as an alternative to sheep - 14 at a conversion rate of 10-ewes/one cow, and a further 14 at a conversion rate of 20-ewes/one cow. If a prospective entrant to HLS does not have registered rights for cattle grazing, or does not have sufficient rights calculated by reference to the registered conversion rate for his rights, he will not be able to implement a mixed grazing regime. On Cwmdeuddwr common there are no registered rights to graze cattle at all. Nevertheless, prospective entry of the common into the Tir Gofal agri environment scheme (or its successors) will probably be dependent upon the introduction of a mixed grazing regime.

A possible solution to these problems may involve the use of the ‘surplus’ grazing rights possessed by the owner of the soil. The owner is entitled to any surplus grazing over and above that held by registered commoners, and this could be licensed to graziers to enable them to stock cattle under HLS or Tir Gofal. Many commons do not have a surplus of grazing over and above the registered pasturage rights,¹²⁵ however, and in any event this device would be dependent on a landowner being willing to licence appropriate rights to graziers.¹²⁶ The power to create new rights of common granted by Commons Act 2006 might also be useful.¹²⁷ But where there is no surplus grazing the sustainability appraisal required before the registration of new rights may prevent its use, as it requires an appraisal of the cumulative impact of exercising both existing registered rights and the new rights sought.¹²⁸ This is another example of an

¹²⁵ The rural payments agency calculate the extent or otherwise of surplus grazing available to the owner of a common by reference to a formula based upon a stocking rate of 0.25 LU/ha for SDA moorland, 0.75 LU/ha for SDA non-moorland and non-SDA grassland, and 0.25 LU/ha for non-SDA heath land. This will be multiplied by the area of the common to arrive at a notional maximum stocking figure for the common. Comparison with the number of registered grazing rights registered in the commons register for that CL unit will then disclose whether there is any surplus grazing (“headroom”) available to the owner, and if so single farm payment entitlements can be claimed accordingly. See DEFRA Policy update February 2005, in *Single Payment Scheme: information for farmers and growers* (DEFRA, 2005 update) at p.4 (Owners of Common Land). This is an administrative mechanism, and has no common law or legislative foundation under the Commons Registration Act 1965 or the Commons Act 2006.

¹²⁶ Some of whom may not, for example, be his tenants whereas others are.

¹²⁷ Section 6(3) Commons Act 2006.

¹²⁸ See section 6(6) *ibid.* The sustainability criteria require the commons registration authority to consider the impact of the new rights in addition to “any other rights of common registered as exercisable over the land” (section 6(6)(b) *ibid.*). It must refuse to register a new right if the land cannot sustain the exercise of both: this will be the case even if some or all of the currently registered rights are not being exercised.

undesirable impact of the over registration of rights under the 1965 Act that will live on under the 2006 legislation.

Finally, some wildlife habitats require a flexible approach to the management of grazing, including the variation of grazing density at different times of the year. Where an SSSI contains limestone pavements, for example as at Scales Moor in North Yorkshire, their conservation requires low levels of grazing in the winter months when vegetation is dormant, and higher levels of grazing in the summer months when there are higher levels of vegetation growth.¹²⁹ It may also be desirable to concentrate grazing animals on different parts of the site at different times, depending on the habitat's conservation management requirements. This is difficult to achieve on sites that incorporate common land, as the registers reflect a static management model that takes no account of the need to vary grazing pressures at different times and on different parts of the common. Although the customary rules administered by the manorial courts often regulated the movement of animals to and from the commons at specific times of the year, the rights registered under the 1965 Act do not reflect these nuances and often give numerically fixed grazing rights without qualification by reference to when in the annual agricultural calendar the rights are to be exercised.¹³⁰

These problems reflect the failure of the Commons Registration Act 1965 to take account of the sustainable management of the commons when enshrining fixed numbers and types of grazing as property rights in the commons registers. The register reflects a static system of property rights in the commons that captures claims to land use made on registration in the late 1960s, many of which obscured historic land uses, and did not reflect the contemporary needs and use of the common's natural resources.

¹²⁹ This is also a problem on Ingleborough common in North Yorkshire, for example: see <http://commons.ncl.ac.uk/casestudies/ingleton/qualitative-research-data>

¹³⁰ But not always. In the case of Ingleborough common and Scales moor (North Yorkshire), some registered rights provide for a "closed period" between 5th November and 9th December annually, when no grazing is permitted. This probably reflects historic practice on the common but is not consistently recorded in the registers however, with some rights entries failing to record the close period while others do so: see for example Register Unit North Yorkshire CL 134, rights section entries 3,5-13, 27-29 (closed periods recorded), as compared to entries 18-22 and 31-41 (no closed period for grazing).

SUSTAINABLE MANAGEMENT: THE ROLE OF COMMONS COUNCILS

For sustainable management to be effective, it requires a flexible approach in which property rights can be adapted to meet the needs of conservation management. Part 2 of the Commons Act 2006 could facilitate a move towards a more dynamic model of property rights in the commons. It will enable commoners and other stakeholders to establish statutory commons councils, and this will facilitate collaborative self regulation and management that could rectify many of the problems caused by the 1965 legislation.¹³¹

The promotion of sustainable management is central to the role of commons councils, and is closely focussed to both economic and ecological sustainability criteria. Commons councils will be corporate bodies¹³² with power to enter into legal agreements and to initiate legal action in their own name.¹³³ When exercising their statutory functions, they must have regard to the public interest, including nature conservation and the conservation of landscape.¹³⁴ The powers conferred on commons councils are extensive, but not unlimited. The 2006 Act provides that a commons council can make binding regulations to regulate agricultural activities, the management of vegetation and the exercise of common rights on the common.¹³⁵ The rule making power can also be used to make rules governing the leasing or licensing of grazing rights.¹³⁶ A commons council will also have power to remove animals illegally grazing the common and to remove unlawful boundaries and other encroachments.¹³⁷ Regulations made using these powers will be subject to confirmation by the Secretary of State.¹³⁸ There is also provision for commons

¹³¹ DEFRA sponsored three pilot “shadow” commons council projects in 2008 to assess the feasibility of establishing self regulating commons councils in England : in Bodmin (Cornwall), Minchampton (Gloucestershire) and Cumbria. Of the three, Cumbria is the only pilot study which may lead to the establishment of a statutory commons council by stakeholders. The Federation of Cumbria Commoners has proposed adopting a county wide commons council model with representation from individual common land units on the management committee of the statutory council: see further <http://www.defra.gov.uk/wildlife-countryside/pdf/protected-areas/common-land/ccouncil-flyer.pdf>

¹³² Section 28(1) Commons Act 2006.

¹³³ Section 32 (1)(2) *ibid.*

¹³⁴ Section 31(6), 31(7) *ibid.* Cf. the definition in section 16(6) and 16(8) (registration of replacement land) (above, note 118).

¹³⁵ Section 31(3)(a) and 31(4) Commons Act 2006

¹³⁶ See Section 31(3)(b) – (f) *ibid.*

¹³⁷ Section 31(3)(f) *ibid.* And see *Consultation on Agricultural Use and Management of Common Land* (DEFRA 2003), Proposals 1 - 7

¹³⁸ See section 33 Commons Act 2006

councils to establish 'living' registers of the ownership and usage of common rights.¹³⁹ Such a register A "live" register would give an accurate picture of the entitlements affecting the common, the current holders of entitlements, and the manner in which they are being exercised (e.g. the number of animals stocked on the common by each commoner). This would require compulsory registration to the commons council of all formal and informal transfers of grazing entitlements, and the supply of information as to stocking numbers by adjoining landowners turning stock out onto the common.

The introduction of binding rules governing grazing on the common will have a number of benefits. Principally, it will facilitate the conclusion of agri-environmental agreements over a common by enabling the commons council to enter into agreements in its own right, and by enabling it to guarantee performance of land management obligations using its powers to regulate the agricultural management of the common. It would, for example, be possible to introduce management rules binding inactive graziers and preventing them from exercising previously unused common rights.¹⁴⁰ This will facilitate sustainable management by removing the necessity to accommodate the property rights represented by registered (but unused) rights in environmental management agreements on common land.¹⁴¹ The introduction by commons councils of agricultural management rules of this kind would result in some commoners having registered rights that they are not legally entitled to exercise. The rights will be 'sterilised' for the period of the restriction, although the rights themselves – being registered on the commons register – will still subsist at law.

Finally, the power to create new common rights following the implementation of Part 1 of the 2006 Act¹⁴² offers a management tool that can avoid some of the problems arising from the mismatch between registered commons rights and the *type* of

¹³⁹ See section 31((3)(b) and (c) Commons Act 2006. i.e. a "living" register similar to that regulating grazing on Dartmoor under the Dartmoor Commons Act 1985. Grazing rights on Dartmoor are governed by a separate system of registration in the Dartmoor Commons Act 1985. This operates quite differently to the Commons Registration Act 1965, most notably in requiring changes in the ownership and use of common rights to be notified and entered in the public registers established by the Act.

¹⁴⁰ See section 31(4)(a) Commons Act 2006. *ibid.*

¹⁴¹ For example as in the ESA agreements currently in place on both Eskdale common and Cwmdeuddwr common: above note 98 and note 102.

¹⁴² 6(3) Commons Act 2006

sustainable management sought by the conservation bodies for common land. Where mixed grazing regimes with cattle and sheep are sought, for example, it will be possible to create new common rights to graze cattle in appropriate numbers. It will also be advantageous where a common is currently under-grazed, or is wholly unused with no management (sustainable or otherwise) being applied. Moreover, new common rights can be vested in a commons council itself. The creation of additional rights vested in a statutory commons council will enable the council to deliver a flexible form of environmental management and to conclude agri-environmental agreements in ways that the current registration system makes difficult or impossible.

CONCLUSION

The true ‘tragedy’ of the commons in an English context was the application of a flawed registration system for common rights by the Commons Registration Act 1965. The deleterious impacts of the 1965 Act were many and far reaching. It not only created a deficient and incomplete system of rights registration; it also severed the link between property rights in the commons and long-established management principles that could deliver their sustainable management. The property rights reflected in the commons registers complicate the environmental management of common land, distort the management choices available to commoners and the conservation agencies, and adversely impact upon the economic viability of farming in marginal upland areas by reducing commoners’ farm support entitlements. As well as destroying the inherently flexible common law principles of couchancy and levancy and stinting, the 1965 Act created an inflexible system of property rights that continues to hamper and complicate the introduction of sustainable management of the modern commons. The failure to subject registrations to a sustainability appraisal, and the registration of excessive numbers of grazing rights on many commons, also destroyed the former function of property rights as an allocative tool of resource distribution, and will continue to impact upon sustainability appraisals for the registration of new common rights created under Part 1 of the Commons Act 2006. It also destroyed the ability of property rights to deliver economic sustainability on commons subject to the over registration of rights.

Hardin's 'Tragedy of the Commons' was not explicitly concerned with the 'sustainability' of common resource use. Neither has this been the central focus of Ostrom's work or that of other scholars of collective institutional action. Implicit in Hardin's analysis, however is the notion that individual property rights are essential to provide an incentive for the stewardship of common pool resources. Viewed in historical context, the legal regime for managing common land provides very little evidence for Hardin's thesis. The practice of stinting common pastures may, perhaps, support Hardin's argument. Stints were regarded as a separate species of property by their owners, and prior to the Commons Registration Act 1965 the commodification of rights in this form arguably encouraged better collaborative management of the common resource than the rule of levancy and couchancy. The role of levancy and couchancy in relation to the 'tragedy' thesis is less clear. The principle required the attachment of rights to land – but to a dominant tenement outside the common which it was intended to benefit, not to the common land itself. While it was arguably responsible for over exploitation, commons formerly governed by levancy and couchancy do not fit Hardin's stereotype of a 'common' pool resource entirely divorced from property ownership structures. Historically, the failure to control over-exploitation in many cases was more likely to have been caused by a failure of collective management through the local manor courts.

The history of the 'sustainable' management of common land shows a clear development from a position where the economic and social components of sustainable development were addressed through property rights, albeit imperfectly in some cases, to a position where ecological sustainability is today the dominant public policy paradigm.¹⁴³ Exponents of ecological sustainability have argued that it is the only component of sustainable development that has the ability to meet the criteria of a legal principle, and is essential to underpin both sustainable economic and social development.¹⁴⁴ Others have argued that the best way to protect other fundamental legal principles (such as the polluter pays and precautionary principles) is to operate

¹⁴³ To this extent, therefore, the sustainable management of the modern commons provides an interesting case study supporting the principles advocated by Bosselmann and others, and illustrating their practical application: see note 87 above.

¹⁴⁴ Bosselmann op cit at 53.

within a system based upon ecological sustainability that seeks to preserve the earth's natural resources.¹⁴⁵

The contemporary development of new principles for the sustainable management of common land reflect and illustrate this change of emphasis, and arguably provide a case study of the emergence of ecological sustainability as the dominant paradigm for 'sustainable' land management. The resource distribution and preservation functions formerly performed by common property rights have been superseded by land management mechanisms introduced by state sponsored environmental policy initiatives, such as the notification of SSSIs and the use of publicly funded environmental management agreements. Ironically, the result has been that locally derived and administered principles of sustainable management have been replaced, in the modern law, by the use of legal and policy instruments external to the local community, and targeted to the delivery of 'sustainable' management in terms defined in national and EU environmental law and policy. Although the Commons Act 2006 seeks a return to the collective local management of the commons, this will take place (if at all) within a property rights framework that has ceased to have any meaningful role in delivering sustainable management. One of the primary functions of commons councils will be to promote the ecologically sustainable management of the commons, based on principles derived externally to the local community and driven largely by the imperatives of European Union nature conservation law.

¹⁴⁵ See Andrea Ross, *Modern Interpretations of Sustainable Development*, (2009) 36 *Journal of Law and Society* 32, at 39.