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*Additional information, particularly on the recent history of common land management in the case study area, would be welcomed by the team. Contact: e.straighton@lancaster.ac.uk*

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## **Eskdale: Historical Briefing Paper**

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### **1. Property Rights**

#### 1.1 Boundaries

The case study area comprises the surviving commons and wastes of the manor of Eskdale, Miterdale and Wasdalehead, a manor which had its origins in the partition of the private forest of Copeland between three heiresses in 1338. Eskdale, Miterdale and Wasdalehead formed the southern third, allotted to Margaret, wife of Thomas de Lucy, through whose descendants it passed to the Percy family, earls of Northumberland.<sup>1</sup>

The boundaries of the manor are clearly defined by physical features: the River Esk on the south; the watershed across the high fells from Esk Hause via Great Gable to Pillar, Steeple, Red Pike and Yewbarrow; the shore of Wastwater; and minor streams from the foot of Wastwater to the River Esk near Eskdale Green.

The vast majority of the land surface within these boundaries remained as unenclosed waste until the nineteenth century, but the wastes comprised three separate categories of land:

- the southern sections flanking Eskdale and Miterdale, which remain as registered common land (Eskdale common, CL 58) and form the subject of this case study (see map);
- the northern sections around Wasdalehead, which were enclosed in 1808;

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<sup>1</sup> W H Liddell, 'The private forests of south-west Cumberland', *Transactions of the Cumberland & Westmorland Antiquarian & Archaeological Society*, new ser. 66 (1966), [page ref]

- a section of the high fells in the centre of the manor (covering Sca Fell, Kettle Cove and Slightside), which had the status of lord's freehold. Though never physically separated from the rest of the wastes, this area was reserved for game in the late-medieval period as the lord's 'deer fence' or 'frith'.<sup>2</sup>

The case study is quintessential Lake District sheep country. The Tithe Commissioner, who visited the area in 1839, wrote: 'The small fell sheep of the district [*Eskdale, Miterdale, Wasdalehead and Netherwasdale*] constitute nearly the only titheable produce of the district. There are probably 20 thousand of them kept within it. On the lower fells 2 acres would probably summer 3 sheep, but on the debris by the side of Wastwater called "the Screes" & on the higher parts of Scawfell there are many hundred acres on which the strongest wether would scarcely & seldom venture to find its way.'<sup>3</sup>

## 1.2 Ownership

Manorial lordship was vested from 1398 in the earls of Northumberland and their successors, the Wyndham family (latterly barons Leconfield and Egremont), until 1979 when the ownership of the commons was transferred to the National Trust. Ownership of the central high fells had already been vested in the National Trust as a memorial to those who fell in the First World War. The summit of Sca Fell had been given to the nation by Lord Leconfield in 1919 (the plaque on the summit recording that the gift was 'subject to any commoners rights'), while the Fell & Rock Climbing Club purchased the fells above Wasdale, including Great Gable, as a memorial to their members killed in the War and donated them to the Trust in 1923.<sup>4</sup>

## 1.3 Common Rights

The unity of manorial lordship masks a striking contrast in the history of settlement and the evolution of common rights between Wasdalehead and Eskdale/Miterdale. Both lay within the medieval private forest (or, more correctly, free chase) of Copeland barony but, whereas Wasdalehead was the location of four demesne stock farms, Eskdale and Miterdale were open to peasant colonisation.<sup>5</sup> These contrasting histories in the medieval period appear to lie behind significant differences in the management of the commons in the post-medieval centuries. Whereas the Wasdalehead commons (enclosed by private agreement in 1808) were stinted, the surviving commons of the case study area remained unstinted. Eskdale and Miterdale had been open to peasant colonisation in the medieval period; there is no evidence of

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<sup>2</sup> Recorded from the mid-15th century (e.g. as 'le frith & le fenc in Wacedale' in 1478: Cumbria Record Office [CRO], D/Lec/29/6), its identity is confirmed by the Percy Survey of 1578 (CRO, D/Lec/301). This unenclosed 'frith' is to be distinguished from the 'newe frithe' on the slopes of Lingmell, enclosed in the mid 16th century (now represented by Wasdale Head Hall Farm).

<sup>3</sup> The National Archives [TNA], IR 18/716, question 11.

<sup>4</sup> E Batterick [ref needed]; J Murdoch, *The Discovery of the Lake District* (Victoria & Albert Museum, 1984), 148.

<sup>5</sup> For the contrasts between 'closed' and 'open' upland forests in northern England, see A J L Winchester, 'Hill farming landscapes of medieval northern England', pp. 75-84 in Della Hooke (ed.), *Landscape: the richest historical record*, Society for Landscape Studies, 2000.

demesne farming in these valleys and the commons surrounding them were treated as normal manorial waste. With one exception, no separate payment was made for common rights and the commons remained unstinted and governed by the rule of levancy and couchancy. The exception was a payment totalling 20s paid by a group of farms at the head of the valley (Birdhow and Taw House) for their pasture rights on ‘Green Cove’, probably that part of the lord’s ‘frith’ or deer fence on the south-eastern slopes of Slightside and Sca Fell.<sup>6</sup>

The tenants of Eskdale and Miterdale had no rights on the commons attached to Wasdalehead, whereas the tenants of Wasdalehead had rights on all the commons in the manor.<sup>7</sup> Their grazing rights on the commons of Eskdale and Miterdale appear to have been restricted (see below, 3.1.1.) but they appear to have exercised turbary rights alongside other tenants in the manor.<sup>8</sup>

In addition to the rights appurtenant to the tenements within the manor, there existed rights in gross on the wastes of Copeland Forest, held by people from lowland communities in west Cumberland. Two were recorded in the later 16th century in the manor of Eskdale, Miterdale and Wasdalehead: a ‘grassland for eight beasts’ on Burnmoor, for which William Robinson paid 8d. rent in 1578; and a general right of pasture within the commons and deer fences, held by Thomas Senhouse of Seascales.<sup>9</sup>

Throughout the commons in the manor the principal common rights exercised by the tenants were common of pasture, common of turbary and common of estovers. Pasture rights were – and remain – an integral part of the local farming system, both for ‘great goods’ (cattle and horses) and for sheep. Common of turbary was of vital importance as peat was the principal fuel until the 20th century: turbary rights continued to be exercised until the 1940s.<sup>10</sup> The most significant aspect of the common right of estovers was the cutting of bracken (*Pteridium aquilinum*), as thatch (until slate replaced it, probably largely in the 18th century), for winter bedding for livestock (a use which continued into the mid 20th century), and as a ‘cash crop’ for burning into potash for sale (a use which had its heyday in the 17th and 18th centuries).<sup>11</sup>

## **2. Local Governance Institutions**

### **2.1 Manorial Courts**

The grouping of Eskdale, Miterdale and Wasdalehead for the purposes of manorial administration can be traced back to the 15th century (a single reeve

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<sup>6</sup> The minor place-name Greencove Wyke survives at NY 211 060

<sup>7</sup> CRO, D/Lec, box 94, draft case, Robert Grave agt. Isaac Fletcher [c. 1800]

<sup>8</sup> The location of the ‘peat scales’ of the tenants of Wasdalehead (at NY 182 063) suggests that they cut peat around Burnmoor Tarn.

<sup>9</sup> CRO, D/Lec, box 301, Percy Survey, f. 134; D/Lec, box 94, Senhouse verdict, 1579.

<sup>10</sup> see A J L Winchester, ‘Peat storage huts in Eskdale’, *Transactions of the Cumberland & Westmorland Antiquarian & Archaeological Society*, new ser. 84 (1984), 103-15.

<sup>11</sup> see A J L Winchester, ‘Village byelaws and the management of a contested common resource: bracken (*Pteridium aquilinum*) in highland Britain, 1500-1800’, *Digital Library of the Commons* at <http://dlc.dlib.indiana.edu/archive/00001772/> (2006)

accounted for rents in ‘Eskdale and Wasdale’ in 1470)<sup>12</sup> but they were sometimes treated separately, as in the great Percy Survey of 1578, when the holdings in each of the three valleys were described under separate headings.<sup>13</sup> A single manor court was generally held for the whole manor.

Court records survive in the Leconfield archive at Cockermouth Castle for two years in the 1520s and, apparently continuously, from the later 17th century.<sup>14</sup> The sequence of manor court verdicts running from 1678 to 1859 shows that the court generally met once a year, usually in April or May. On rare occasions the court would deviate from this pattern, missing a year, or meeting twice. Jury numbers appear to have been relatively stable throughout this period: usually a jury of 12, 13 or 14 men is listed. Manorial officers were also appointed regularly at these court sittings – typically constables, pounders (responsible for impounding stray livestock), hedge-lookers (responsible for ensuring that field boundaries were maintained), assessors, and a grieve (i.e. ‘grave’ or reeve, the lord’s rent collector for the manor). In its heyday, court business was varied, dealing with stocking issues, access to drifts and heafs, repairs to fences and water courses, and so on (see 3.1.1-3.1.4, below).<sup>15</sup>

However, the two sets of manorial byelaws which laid out the framework for management of the commons (the ‘Eskdale Twenty-four Book’ of 1587 - see below, 3.1.1 - and an award of 1664 for Wasdalehead<sup>16</sup>) treated the stinted commons of Wasdalehead separately from the unstinted commons of Eskdale and Miterdale. Although the ‘Twenty-four Book’ is described as the award of *‘the foure and twenty sworn men of the lord’s tenants in Eskdale Mitredale and Wasdalehead elected and chosen throughout the said lordship for the right commodoty profit and benefit of common and perpetual order and stay amongst all the lord’s tenants’*, all but the first paragraph of the award concerns only Miterdale and Eskdale.

## 2.2 Transition from Manorial to Post-Manorial Institutions

The transition from manorial to post-manorial governance and management in Eskdale exhibits at a local level many of the issues relating to common land in the modern period: enclosure (the private enclosure agreement for the Wasdalehead commons); collapses in traditional management, the use of alternative strategies (such as lawsuits), the problem of distant and uninterested lords of manors, the struggle to create new valid and sustainable management bodies; and modern themes of landscape preservation and access, with important links to the amenity campaigns of the 1930s and 1940s. But there are still significant gaps in our knowledge. In Eskdale, a new formal management body did not appear until 1945 – roughly 100 years after the last major manor court order relating to common land, in 1841. There is little

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<sup>12</sup> Alnwick Castle muniments, X.II.3.3.a

<sup>13</sup> CRO, D/Lec, box 301, Percy Survey, ff. 130-8.

<sup>14</sup> CRO, D/Lec, box 299/18, 20; D/Lec, box 94, manor of Eskdale, Miterdale & Wasdalehead; estreats of fines, 1668-93; jury verdicts, 1678-1859.

<sup>15</sup> CRO D/Lec Box 94, Eskdale Jury Verdicts, 1678-1859.

<sup>16</sup> CRO, D/Ben, box 310. Text printed in Winchester, *Harvest of the Hills*, 167-71.

documentary evidence of how the use of common land in Eskdale was regulated in the intervening period.

### *2.2.1 Demise of the manor court*

The eighteenth and early nineteenth century saw the manor court's increasing withdrawal from common land management. The last written application of the rule of levancy and couchancy was made in an order against 'wintering out' of stock in 1778; the court also recorded disputes over heafs and grazing rights in 1785. But such intervention in common land matters was now rare, and it is apparent from these records that suitors and jurymen were failing to attend, and some were looking for higher or external legal arenas in which to resolve their disputes, as, for example, in the Sharpe-Tyson lawsuit of 1795, which involved a claim that an individual had made a large intake on the common, thereby infringing on a neighbour's sheep drift and encouraging the encloser to overstock the common.<sup>17</sup> The last significant order relating to management of stock in surviving court verdicts was made in 1841 to prevent scabbed sheep from being depastured on the common. It should, however, be noted that the manor court continued to meet on an almost annual basis up to 1859 (the end-date in this run of verdicts), and was continuing to appoint constables, pounders, hedge-lookers, peat-moss lookers, and a grieve, at these sittings. Thus it is possible that officers continued to operate some form of policing on the common, though seemingly reluctant to bring offenders before the court and steward. It is also possible that courts were still called from time to time after 1859, as a handful of precepts and jury lists survive for the late nineteenth century (e.g. for the years 1860, 1895, 1896, 1900). No verdict sheets survive for these later courts.<sup>18</sup>

Though court papers dwindle in the late nineteenth century, other estate records sometimes provide a glimpse into activity on the commons. For example, the Leconfield archive includes a document which lists all tenants having rights of stray on Eskdale Moor in 1865 – perhaps drawn up by Lord Leconfield's steward or agent, for the purpose of regulation or calculating customary dues.<sup>19</sup> The Leconfield archive also includes a file of papers relating to a case of heather-burning on Eskdale Moor in 1870-1871, which reveals an acrimonious dispute between those exercising pasture rights (the commoners) and sporting rights (leased by Lord Leconfield to Thomas Brocklebank, shipping magnate of West Cumberland and Liverpool). The case raised questions as to whether burning of heather was an identifiable commons 'custom'; who had a greater claim to the heather – the lord or commoners; and whether commoners could defend their burning of heather as an improvement of their pasture rights and heafs.<sup>20</sup>

### *2.2.2 New management institutions*

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<sup>17</sup> CRO D/Ben/3/752.

<sup>18</sup> CRO D/Lec Box 94, Eskdale Jury Verdicts, 1678-1859; CRO D/Ben/3/752; D/Lec Box 94, Precepts and Jury Lists, 1678-1896.

<sup>19</sup> CRO D/Lec Box 94, Eskdale Commoners List, 1865. It includes the name of the tenement, owner and occupier.

<sup>20</sup> CRO D/Lec, SL 14/7, Saul and Lightfoot papers related to common rights, 1870-1871.

The nineteenth-century demise in the manor court system was compounded in the early twentieth century by the Law of Property Act 1922, which was seen to remove any residual incentive for the lord of the manor to call regular courts. Quite how the commons were regulated in this period is therefore unclear. The new statutory Parish Council for Eskdale and Wasdale, formed in 1895, was largely silent on the subject of common land until the 1930s and 1940s, when questions arose over footpaths and rights of way – unsurprising given the increasing importance of Eskdale and Wasdale as a tourist and recreational area. But during the Second World War, the Parish Council was also concerned by the compulsory purchase of a piece of common land by the Ministry of Supply and by trespasses on the common by a grazier without right. These cases prompted the Parish Council into exploring the feasibility of setting up a commoners' committee for Eskdale.<sup>21</sup> The Leconfield archive also includes a 'provisional list' of all commoners in 1943, probably drawn up as part of these proceedings.<sup>22</sup>

The process leading to the formation of a commoners' committee in Eskdale in 1945 is of especial interest because of the lead role taken by the clerk to the parish council, the Reverend H. H. Symonds, who was also an officer of the Friends of the Lake District – one of the foremost preservation 'pressure groups' in the region – and closely connected to amenity bodies such as The Ramblers' Association and the Standing Committee on National Parks.<sup>23</sup> In the creation of a commoners' committee for Eskdale, Symonds was the lynchpin, corresponding with relevant bodies, negotiating terms with Lord Leconfield's agent, and drafting the constitution; Symonds also became the Committee's first secretary. But the Committee seems to have suffered something of a collapse by the later 1950s: in their evidence to the Royal Commission on Common Land 1955-58, which included a copy of the Eskdale constitution, The Ramblers' Association suggested that the Committee had fallen into disuse after the first secretary (Symonds) had moved away.<sup>24</sup> There is therefore a question-mark over the effectiveness and sustainability of the new structure, and the long-term commitment of the lord of the manor and commoners to it.

Although Symonds's organisation lapsed, this void would later be filled by a new and more successful body, the Eskdale Commoners Association, which is still active today. The Association was founded by a group of Eskdale commoners in 1967, primarily as preparation for registration of rights under the Commons Registration Act 1965. Membership was open to anyone claiming rights 'on the Fells and other land' in Eskdale, Miterdale and Wasdalehead, within the Parish of Eskdale.<sup>25</sup> Observers with interests in the land or farms in the valley were also in attendance from time to time, such as

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<sup>21</sup> CRO YSPC 7/2, Eskdale and Wasdale Parish Council minute book 1895-1963.

<sup>22</sup> CRO D/Lec 94, Eskdale Commoners List, 1943.

<sup>23</sup> CRO WDSO/117/B/vi/6/1/2: FLD Files; H.H. Symonds, *Walking in the Lake District* (Edinburgh and London, W. and R. Chambers, 1962 edn., first published in 1933); H.H. Symonds, *Afforestation in the Lake District* (London, Dent, 1936); The Ramblers' Association, *Save Our Commons: Evidence Submitted to the Royal Commission on Common Land by The Ramblers' Association* (Undated, circa 1956).

<sup>24</sup> The Ramblers' Association, *Save Our Commons*, p.30-32.

<sup>25</sup> Eskdale Commoners Association Papers (private): minute book, 1967-1980, 14 February 1967.

representatives of the Leconfield Estates (which still owned the soil at this time), The National Trust, Forestry Commission, and NFU.

The process of registering rights formed the main task of the organisation in its first months, and was well documented in the Association minute book. The Eskdale case provides compelling evidence of the problems afflicting implementation of the 1965 Act, particularly as regards registering a ‘definite number’ of animals. On a common with a tradition of levancy and couchancy and heafing, determining and agreeing definite numbers was deeply problematic. The Leconfield Estates informed the Association that ‘so long as the Commoners could agree amongst themselves the numbers of sheep and cattle to graze this common there would be no objection raised by the Estates.’<sup>26</sup> But there was great uncertainty over rights: for example, members were advised to check their title deeds to verify whether ‘there were any restrictions or limitations as to their use of the Common’.<sup>27</sup> The Association concluded that its members should use the carrying capacity of the common (determined at 2 sheep per acre) as the basis of their calculations, rather than the variable capacity of their inbye, thereby making a final break with levancy and couchancy. But perhaps the greatest challenge was balancing collective and individual interests in maximising grazing numbers: the Association was voluntary, with no legal powers over individuals, and no influence over non-members, making it profoundly difficult to agree an upper limit. Although participants emphasised the need to register a ‘true basis of what the Common would hold’, it was apparent that this could be unbalanced by any non-compliant individuals who chose to register disproportionate numbers for themselves. As with many commons in England and Wales, registration of rights in Eskdale resulted in a sort of brinkmanship, and a legacy of problematic registrations.

In the wake of registration the Association continued to be the main management institution for the common, and a vehicle for collective action into the present day, dealing with issues as varied as heather loss, protection of heafs, unlawful fencing and vehicles, trespasses by animals from neighbouring commons, and implementation of ESA agreements. A new set of management rules was adopted in 1980 regarding heafing and the pasturing of fell-bred/purchased animals, shepherding, marking of sheep, and the banning of letting rights. The Association’s constitution was also revised in 1982.<sup>28</sup> The impression is therefore of a local management body which has evolved since 1967, being regularly refined and adapted by its members to improve its function and accommodate change.

### **3. Local Governance Mechanisms and Regimes**

#### **3.1 Manorial Byelaws**

The management regime for the exercise of pasture and turbary rights was laid out in the award of 1587, known as the ‘Eskdale Twenty-Four Book’, which

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<sup>26</sup> Ibid., 12 April 1967.

<sup>27</sup> Ibid., 10 January 1968.

<sup>28</sup> Ibid., minute book, 1980-1995, 3 June 1980, and 23 March 1982.

conceived of the common as comprising three different categories of land, reflecting relief and topography and hence grazing capacity. The steep slopes of the lower fellsides behind the farmsteads were assigned as cow pastures for milk cows; the low saddle in the fells surrounding Burnmoor Tarn in the centre of the manor (referred to as ‘the moor’) was dedicated to ‘geld goods’ (heifers, bullocks etc); and the high fells were divided into ‘heafs’ for sheep.

### 3.1.1 *‘The Eskdale Twenty-four Book’ 1587.*<sup>29</sup>

The 24 sworn men drew up a detailed award ‘for the usage of the common within this lordship with the tenants’ goods therein habiting’, which continued to provide the framework for the management of the commons until well into the 20th century. In summary, it laid out the following governance rules:

- *Burnmoor* (‘Burnmer Moor’ or simply, ‘the moor’): the boundaries of this area surrounding Burnmoor Tarn were defined and it was allocated as the common pasture for the manor’s ‘geld goods’, cattle and horses in the summer. Separate regulations governed the use of the moor by the tenants of Wasdalehead and those of Eskdale and Miterdale. The number of livestock that the tenants of Wasdalehead could graze was as many as they could overwinter (i.e. it was governed by the rule of levancy and couchancy) and they were to put them on to the moor at a specific location (Maiden Castle NY 186 054). They could also put one work horse on the moor for one month. If the tenants of Wasdalehead had fewer livestock ‘amongst themselves’ than the maximum their stints would allow, they could make up the number (presumably by agistment) but these animals were to be put on ‘their own proper fell’, rather than on Burnmoor. The tenants of Eskdale and Miterdale (except those at the head of the valley, ‘above Blea Beck’) were to put all their geld goods, cattle and horses to the moor in the spring and to take them off within a fortnight of Michaelmas (29 September).
- *Sheep heafs*. The award then specified the ‘sheep drifts’, the routes along which sheep were to be driven to their heaf for each holding or group of holdings. Groups of farms were to send their stock to particular heafs: for example, three heafs on the western slopes of Sca Fell were assigned as follows: Hardrigg was assigned to Spout House, Hollinhead and Borrowdale Place; Broad Tongue to Gillbank, Hows and Paddockwray; Quagrigg (‘Cookrigg’ in the award) to the tenants in Boot.
- *Cow pastures*. Each holding was assigned a pasture for milk cows, usually on the lower fellsides immediately behind the farmstead. The codicil of 1701 makes it clear that, by assigning exclusive rights to a section of the lower fells as a cow pasture, the 1587 award had led many tenants to enclose their cow pastures. Some continued to put the same number of cattle on the common, putting pressure on grazing reserves.

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<sup>29</sup> No contemporary copy is known; photocopy of copy by John Nicholson, 1692, with additional verdict dated 1701, was in CRO searchroom, Carlisle [late 18th-cent copy of this in CRO, D/Ben/3/761].



- *Grazing rights above Blea Beck.* Separate arrangements were made to settle a dispute between the tenants at the head of the valley (Wha House, Birdhow and Taw House), probably reflecting the separate sum paid for grazing rights in ‘Green Cove.’ Their ‘geld goods’ were to be put ‘above Eskhowfoot’ and the tenants of Wha House were granted a stint of 120 sheep to graze ‘above Eskcow foote’ alongside those of the tenants of Taw House.<sup>30</sup>

### 3.1.2 *Later Orders and Byelaws*

Regulations established in the Eskdale Twenty-Four Book were upheld and supplemented by orders made in the manor court, regulating the use of drifts and heafs, re-affirming the rule of levancy and couchancy, and controlling access to peat and bracken. Thus, for example, an order of 1705 dictated the terms of access to brackens in the Wasdalehead ‘fences’; orders of 1727 and 1769 made instruction on cutting peat. Significantly, the court made a number of orders against ‘wintering out’ of animals or putting more animals on the common than had been maintained through the winter (e.g. orders of 1693, 1736, 1749, 1778) and also ordered the pounders to count each man’s stock in the winter time (see 3.1.3, below). The rule of levancy and couchancy extended to a prohibition against buying in winter fodder (or ‘vestures’), since feeding stock on hay grown elsewhere broke the principle that animals grazed on the common should be wintered on the produce of the dominant tenement. In 1736, the court ordered that ‘no tennant nor ocupier shal put on no Catel nether great nor smal upon the Common but those that the[y] winter upon there own Estate Neither Take any Vesters to feed them with in Winter Upon the pain of Twenty one Shilling’, adding as an afterthought, ‘Excepting five shiling worth’, suggesting that some flexibility was allowed. Similarly, in 1778, the order stated that graziers would be fined for ‘wintering out any goods above the Sum of five Shillings per year’.<sup>31</sup>

### 3.1.3 *Enforcement and Penalties*

As noted above, the manor court appointed a number of officers to enforce the court’s authority between court sittings, including pounders and hedge-lookers. From 1842, a ‘peat-moss looker’ was included in the list, perhaps a sign of pressure on the resource (this was a period when the number of households was increasing, as new villas and industrial dwellings caused the hamlets of Boot and Eskdale Green to expand from the mid nineteenth century). It is difficult to assess how effective the officers were, as their day-to-day activities went unrecorded, and they were certainly presenting few offenders to the court by the later eighteenth century. Nevertheless, the fact that they were still being appointed up to 1859 would suggest that they had an active role to play.

There is evidence that the pounders counted the number of animals on each holding in the winter time – vital information for enforcing the rule of levancy

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<sup>30</sup> ‘Eskhow’/‘Eskcow’ foot has not been identified: the heaf for the Wha House stint is described as ‘at doucragg [Dow Crag, NY 221 065] to the ffould at threaptongue foot’. The size of the stint of sheep is given as ‘three score sheep’ for each of the two tenants of Wha House; subsequent references to ‘those hundred sheep’ use the number in the sense of the ‘long hundred’ of 120.

<sup>31</sup> CRO D/Lec Box 94, Eskdale Jury Verdicts, 1678-1859.

and couchancy in the spring and summer months. The count is mentioned infrequently in the manorial records (for example, an order of 1679 named the pounders who would check the stock twice in winter; an order of 1694 stated that the pounders of Eskdale would ‘from hence forth’ be sworn to view every man’s beasts on the 24 January (or within two days) and on the 1 March; an order of 1701 instructed the pounders to view each man’s cattle and horses within six days either side of Candlemas (2 February); an order of 1749 repeated the general terms of 1694, stating that the pounders would ‘be Sworn yearly’.). It would seem likely that it was a long-standing practice and a key element of the pounders’ role, but we could ask why it did not receive annual mention in the records? Perhaps in the years noted above, there had been a lapse or dispute, and so the practice needed to be reaffirmed.

Enforcement can also be seen in the ‘ameracements’ or financial penalties exacted from those who committed offences on the commons. In its more active years, individuals were regularly presented to the court for offences such as overstocking, hounding, driving sheep on or off the common at the wrong time of year, and so on. Penalties of between 1s. and 6s. 8d. seem to have been the norm for most offences across this period, with 6s. 8d. being a standard rate throughout: fines were generally fixed according to traditional rates (as laid down in the ‘Twenty-Four Book’, for example) or thresholds rather than reflecting changing monetary value.<sup>32</sup> However, certain orders – particularly those made in relation to stocking numbers – set the penalty noticeably higher and can be seen to rise over time, presumably as the rule-breaking became more serious, or as the monetary value of the orders needed to be brought up-to-date. Thus, the order of 1736 preventing graziers from stocking more animals on the common in summer than kept in winter carried a fine of 21s.; when a similar order was made in 1749, it carried a higher fine of £1 19s. 10d.; wintering-out of stock in 1778 could have earned the offender a similarly high fine of 39s. 10<sup>1</sup>/<sub>2</sub>d. The fact that these penalties fell just below the customary upper limit for ameracements in manor courts (40s.) underlines the importance of the orders. However, the custom of mitigating (‘affearing’) the penalties imposed by the court meant that offenders were sometimes spared the full rate. For example, in 1750 one grazier putting animals on the common that had been wintered outside the manor was charged the standard fine of 6s. 8d., which was then ‘affeaed’ to 3s. 4d. Failure to attend the manor court tended to attract a lower fine, but this too rose over time: in 1778, one man was amerced 1s. for not answering court; in 1826, two men were amerced 5s. each for not appearing as jurymen.<sup>33</sup>

Whilst the fines tell us something of the court’s intentions in regard to enforcement and punishment, we cannot be sure from verdict sheets alone that the offenders complied in paying them. It is likely that the court was sometime unable to force a payment, particularly in its later years.

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<sup>32</sup> For example, in 1713, one man was ordered not to drive his stock to Longhow on paine of 6s. 8d.; in 1740, commoners were instructed to make their head garth fences before 28 May or be fined 6s. 8d.; hounding of sheep earned one man a fine of 6s. 8d. in 1749; in 1769, commoners were instructed that if they did not cut their peats in a ‘husbandlike’ manner they would be fined 6s. 8d.

<sup>33</sup> CRO D/Lec Box 94, Eskdale Jury Verdicts, 1678-1859.

### 3.1.4 *Post-manorial governance mechanisms*

Systematic post-manorial governance is exceedingly hard to trace, due to the fading of the manor court and subsequent hiatus in recording of activities on the commons, but evidence does provides some insights.

It is apparent that the Eskdale Twenty-Four Book remained a reference point for regulating access to the common long after the manor court had begun to fade. A copy was made for the 1795 Sharp-Tyson lawsuit, suggesting that it was still considered an important source of authority on access to drifts and heafs,<sup>34</sup> and the 1794 version was copied into the back of the Eskdale Vestry Book in 1840, another sign of its status.<sup>35</sup> It was still in use as a reference for the community in the mid twentieth century, and one of the first instructions given to the Secretary of the new Commoners Association in 1967 was to obtain a copy of the 1587 award, showing its continuing relevance to common land management.<sup>36</sup>

The process leading to the founding of the Commoners Committee in 1945 also gives some insight into problems of governance and management in the post-manorial era. A letter to H.H. Symonds from J. Armstrong of The Woolpack Inn, Boot, shows that there was uncertainty over whether the traditional rule of levancy and couchany still applied, and hints at the breaches that must have been going on. One of Armstrong's questions was, 'Can a Commoner or tenant take in cattle from outside the parish, to summer [?]'<sup>37</sup> The constitution of the 1945 Commoners' Committee did not tackle levancy and couchancy, but rather focussed on keeping graziers to their allotted heafs, or designated areas of grazing: the Committee was perhaps more interested in protecting the 'private' nature of the heafs and preventing flocks impinging on each other than they were in controlling actual stocking numbers. The constitution gives us some idea of the priorities for governance and management at this time. Among the matters that the committee was expected to oversee were: the condition of walls, fences and gates; 'proper observance of traditional heafs'; proper observance of the limiting dates for the putting out of stock; illegal exercise of grazing rights and other rights by non-commoners; encroachments; and 'general maintenance of the custom of the common.'<sup>38</sup> Similarly, the Commoners Association founded in 1967 seeks to look after both the fabric and use of the common, ensuring that boundary walls, fences or gates are in good repair, dealing with unlawful activities on the common, and designing and enforcing rules regarding the proper stocking and maintenance of heafs (see 2.2.2 above).<sup>39</sup>

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<sup>34</sup> CRO D/Ben/3/752.

<sup>35</sup> CRO YPR 4/18, Eskdale Select Vestry Book 1826-1903.

<sup>36</sup> Eskdale Commoners Association Papers (private): minute book, 1967-1980, 8 March 1967.

<sup>37</sup> CRO WDSO/117/B/vi/6/4: FLD Files, legal papers, letter from Armstrong to Symonds, 7 June 1944.

<sup>38</sup> CRO WDSO/117/B/vi/6/4: FLD Files, legal papers, Eskdale Commoners' Committee constitution, 1945.

<sup>39</sup> See, for example, the rules agreed on 3 June 1980, Eskdale Commoners Association minute book, 1980-1995.

## **4. Historical Concepts of Sustainability**

### **4.1 *Ecological sustainability***

Ecological sustainability, in the sense of maintaining the species composition of grazing grounds or preserving particular flora or fauna, is rarely made explicit in the historical record from Eskdale. One exception lay in the regulations surrounding the exercise of common of turbary, which sought to preserve the surface vegetation where peat was dug. In an order of 1769, the manor court jury instructed commoners to carry out their peat-cutting in a ‘Husbandlike’ manner and to set the top on again. The close management of bracken cutting on Lake District commons (for an example, see below, 4.2) may also have had ecological sustainability in mind, at least in part. Regular cutting is known to reduce both the vigour of the plant and the yield of fronds, and the context of the numerous byelaws from the 17th century may, in part, be concern to preserve yields.

The notion of the carrying capacity of the common was clearly alive by the early 19th century. In a dispute over grazing rights at Wasdalehead in 1807, it was claimed that the recent shift away from cattle rearing towards sheep breeding had resulted in overstocking. Each cattlegate entitled a commoner to put a bull, ox or cow or 15 sheep on the common: the common could bear a mixture of stock but when all stints were exercised by sheep, overstocking was a problem. The rate of 15 sheep to a stint ‘is very unproportion’d and by far too great a Number for a Stint, so that the Number of Sheep now kept in that Proportion is more than the Common can Support or Carry.’<sup>40</sup> Overstocking was a major concern throughout Eskdale and Wasdale in the eyes of the Tithe Commissioner, writing in 1839: ‘Far more sheep are kept in the district than the lands will keep in condition’, he reported, linking this to the fact that ‘a very great number of lamb hogs are sent to winter on inclosed grounds in distant parts of the country.’ In his view Eskdale was one of the few places where commutation of tithes would have negative consequences: ‘the dread of having the tithe of their fleeces and lambs to pay’ acted as a constraint. Once that was removed, he suggested, ‘the cupidity of each occupier to get as much benefit as he can off the common will lead to an increase in the numbers of the sheep of the district, & as the pastures are insufficient to maintain the present stock of sheep, such increase must necessarily deteriorate the quality & value of the flocks.’<sup>41</sup>

### **4.2 *Equitable access to resources***

Whether discussing pasture rights, peat-cutting or bracken harvesting, the local management institutions ultimately sought to control competition between members of the local community over finite resources. Ensuring that all tenants had equitable access to the resources to which their rights of common gave them an entitlement was a central concern of many byelaws. Behind all common rights (and particularly the rights of turbary and estovers)

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<sup>40</sup> CRO, D/Lec, box 94, draft case, Grave agt Fletcher [1807]

<sup>41</sup> TNA, IR 18/716, question 11.

lay the concept of access for ‘necessary use’ to support a holding of land and property in the manor. Local management attempted to negotiate a route through the tension between ensuring that all with rights had the level of access to which they were entitled and the perennial tendency of commoners to take more of a resource than was required for their ‘necessary use’.

Thus, the problem of overstocking, or ‘overcharging’, is not described directly in terms of protecting the productivity of the grassland or the quality of the livestock, although these must have been ‘given’ objectives. Rather, overstocking tends to be labelled in the court records as a ‘wrong’ done to the common, an offence ‘contrary to custom’, or an offence against fellow commoners – matters relating to equitable access and competition. An offender might be amerced ‘for puttinge Beass to our Moore more than he ought to doe by our Antient Custome’ (29 September 1679); an order of 1694, instructing the pounders to count each man’s stock in winter, was made so that ‘our Comon moore be not wronged and our Customes not abused’; a similar order of 1701 was made so that ‘our Comon be not overcharged.’ In an amercement of 1720 (that was subsequently crossed out, so perhaps never enacted) one grazier was fined for buying hay in Birkby and bringing it into Eskdale ‘to oppresse his neighbours’ – the implication being that by supplementing his in-bye capacity he gained an unfair advantage over other commoners by boosting the number of stock he could over-winter and thus graze on the common in summer, thus damaging their interests.<sup>42</sup>

In Wasdalehead, where pasture rights were stinted, equity was sought from year to year through the informal custom of a notional money transfer from those who exceeded their stint to those who had not put on the common the full number of livestock to which they were entitled. The customary rate was 6d. per stint or cattlegate of one cow or 15 sheep. By the early 19th century it was claimed that the sum was wholly inadequate and tended to perpetuate inequalities. A cattlegate was ‘worth ten times the money’ and the custom was described by an injured party as ‘a perpetual Power to Enjoy whatever the Man who has the Strongest Stock can take from his Weaker Neighbour- and to give the Possession of the Common to those who are most anxious to Encroach on their neighbour without making a Sufficient Satisfaction.’<sup>43</sup>

In the case of rights to turbary and estovers, the allocation of particular peat ‘pots’ and beds of bracken to individuals sought to ensure that all with rights had access to these resources. Peat cover was neither extensive nor deep on the Eskdale commons: most was found on the ill-drained plateau between Eskdale and Miterdale. The exhaustion of individual peat pots probably became an increasingly frequent occurrence and may lie behind an order of 1727 which appears to imply that individuals could prospect for peat across the common. It dictated the circumstance when a commoner could lawfully cut peat in another man’s cow pasture – when two years had elapsed since its ‘owner’ had last dug peat there.<sup>44</sup> In the case of bracken, the rules attempting to prevent unfair advantage encountered elsewhere in the Lake District (limits

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<sup>42</sup> CRO D/Lec Box 94, Eskdale Jury Verdicts, 1678-1859.

<sup>43</sup> CRO, D/Lec, box 94, draft case, Grave agt Fletcher [1807]

<sup>44</sup> CRO D/Lec Box 94, Eskdale Jury Verdicts, 1678-1859.

on the numbers of scythes or sickles per holding; outlawing cutting before daylight on the appointed day; distinguishing between the rights of landed tenants and cottagers) were attempts to negotiate a framework of exploitation within which to manage competition.<sup>45</sup>

#### 4.3 *Conflicting demands*

A third aspect of sustainability was the need to ensure the survival of a resource when it was threatened by exploitation for a competing need. The breaking of the soil implicit in the exercise of turbary rights placed peat-cutting in competition with grazing, for example. The harvesting of bracken within the umbrella of the common right of estovers illustrates competition between different demands on the same plant species. This was particularly sharp in the competition between wholesale harvesting of bracken for commercial potash production and the traditional uses to which it was put in the domestic economy. Priority was generally given to necessary domestic uses, particularly the need for bracken thatch for roofing, as illustrated in an order of 1705, concerning bracken cutting in the Wasdalehead ‘fences,’ which gave the tenants three days’ time in which to cut bracken for thatch before wholesale cutting commenced.<sup>46</sup>

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<sup>45</sup> A J L Winchester, ‘Village byelaws and the management of a contested common resource: bracken (*Pteridium aquilinum*) in highland Britain, 1500-1800’, *Digital Library of the Commons* at <http://dlc.dlib.indiana.edu/archive/00001772/> (2006)

<sup>46</sup> CRO D/Lec Box 94, Eskdale Jury Verdicts, 1678-1859: verdict of 13 April 1705. The order reads: ‘Likewise Wee dorder and award that no maneer of persons shall cut any brakins in Wasdel head fensis til the morne after michelmass day except the debety balife and the farmor there and the rest of the tenants shal have three days time to giet thake brakens there bef[or]e the tops upon pain of three Shilings four pens every defalt.’ The meaning of ‘the tops’ is unclear, but a similar distinction was made in the Wasdalehead award of 1664, which allowed ‘thatch brackens’ to be got from 8 September, one week before ‘topp brackens’ could be cut (Winchester, *Harvest of the Hills*, 170).