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

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1 A “Tragedy” of the Commons?

The central tenet of Garrett Hardin’s influential paper on the “tragedy of the commons”² was that the temptation 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”³. Hardin was not explicitly concerned with sustainable land use, a concept focussed on the different impacts of land use (economic, social and ecological) and their contribution to achieving sustainable development.

Implicit in his analysis, however is an assumption that common pool resources are never subject to incentives to encourage (or rules to enforce) sustainable management in two senses: (i) that they are not subject to restrictions on the exploitation of the resource in the sense of quantitative limits on its use and (ii) that they are not subjected to rules for determining the share of the resource to be used by each commoner or resource user. Both assumptions are open to question in the case of common land in England and Wales.

The ability of legal rules governing the use of common land to promote its “sustainable” management can be assessed by reference to their ability to promote either social sustainability, economic sustainability or ecological sustainability. The

¹ Professor of Law, Newcastle University. I am grateful to Angus Winchester for the historical references in footnote references 13-17, and for his and Julia Aglionby’s comments on earlier drafts of this paper.

² See G.Hardin, “The Tragedy of the Commons”, *Science*, 162 (1968) pp1243-8

³ *Ibid* at 1244.

notion of sustainable management captured in the first limb of Hardin's thesis ((i) above) might reflect ecological sustainability, in that quantitative controls on land use are important to preserve vegetation and prevent degradation of wildlife habitats – for example to prevent the destruction of wildlife habitats by overgrazing. And it might capture notions of economic sustainability and intergenerational equity, in that the degradation of the resource by excessive exploitation will render it economically valueless to future users of the resource. That captured in (ii) might equate to ideas of social sustainability, and notions of equity in terms of access to the resource between competing users.

This paper will argue that, far from suffering a “tragedy of the commons” in Hardin's sense, common land in England and Wales was historically subject to common law principles that fulfilled functions promoting sustainable management in all three senses, albeit imperfectly. The true “tragedy” of the commons was the application of a flawed registration system for common rights by the Commons Registration Act 1965. As will appear from the discussion below, this legislation not only created a deficient and incomplete system of rights registration, it severed the link between property rights in the commons and management principles that could deliver their sustainable management. It not only abolished a number of inherently flexibility common law principles that could be adapted to ensure the sustainable management of common land, but also made it more difficult for environmental protection schemes targeted to ecological problems to be introduced on common land. These problems are now being addressed by the implementation of the Commons Act 2006. The 2006 Act will, when fully implemented, introduce a number of reforms to both the property rights regime for common land and the management structures applied to common resource governance that will significantly strengthen the sustainable ecological management of common land and provide a more equitable basis for access to the land resource.

2 Property Rights and the Conundrum of Sustainability

The concepts of sustainable development and of “sustainable” management are of recent provenance. The manorial court records contain few references to what we would now term “sustainable” management of the commons they administered in the

early modern period, and when they did concern themselves with issues touching the quality of the land they tended to think in terms of social sustainability – guaranteeing equitable access to a resource (grazing, peat etc) – rather than what we might today term “ecological” sustainability⁴.

Clearly, in upland areas the density and type of grazing stock allowed onto the commons was a key factor both for the economic sustainability of rural communities and for the condition of the vegetation (and by implication wildlife) 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 qualified⁵. Two mechanisms were used to limit grazing numbers: the principle of levancy and couchancy (grazing *sans nombre*), which tied the number of stock to the needs of the dominant land to which the rights attached; and the practice of stinting, where the number of grazing animals was fixed.

2.1 Levancy and Couchancy

Rights of common in pasturage were usually attached (“appurtenant”)⁶ to the “dominant tenement” which they benefit. The common law principle of couchancy and levancy dictated that the number of animals permitted summer grazing on the common was determined by the ability of the dominant land to which the rights were appurtenant (typically an adjoining farm) to sustain them from its own produce (i.e. fodder) over the winter when they were not turned out on the common itself. 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 Wales.

⁴ E. Straughton and A. Winchester, *Ingleton: Historical Overview* (2007, Working Paper, AHRC Contested Commons Project), available at <http://commons.ncl.ac.uk>

⁵ See working papers on the Eskdale, Ingleton, and the Elan Valley case studies generated by the AHRC Contested Common Land research project and available at <http://www.commonsncl.ac.uk>.

⁶ 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.

Eskdale common in Cumbria is unique in that documentary evidence of the customary land usage practised within the manor exists in the *Eskdale Twenty Four Book*, which 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 1587⁷. Several copies of the *Eskdale Twenty Four Book* are extant, although the original 1587 award does not itself survive. The award was confirmed by a codicil sworn by a further “jury of xxiii” in 1701, and the surviving manuscript copies are of a copy made in 1692 to which the 1701 award has been appended. The principle of levancy and couchancy is referred to as a guiding principle for regulating the pasturage rights on Eskdale common in several passages in the award⁸.

As a mechanism for protecting either the agronomic or environmental quality of the commons, levancy and couchancy had obvious drawbacks. By focussing on the size and productivity of the dominant land (not the common – the servient land) it encouraged overgrazing of the commons. It also failed to reflect the realities of agricultural practice in the uplands: for example it would prevent the practice of agistment⁹ or the overwintering of stock on lowland farms away from the manor, both of which were widespread practices in many areas by the eighteenth century¹⁰. Indeed, Gadsden points out¹¹ that this principle alone may be largely to blame for the fact that most commons registered under the Commons Registration Act 1965 are now burdened with excessive registrations of grazing rights. The focus of the principle was primarily to establish an equitable method of establishing the

⁷ The text is available on the AHRC Contested Common Land website: <http://www.commonsncl.ac.uk/casestudies/eskdale>.

⁸ 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 perhaps more explicitly “And we judge that no Tenant or Tenants 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)..

⁹ i.e. the grazing of another person’s stock on the common in return for payment. Stock grazed on the common in summer might also be overwintered on lowland farms elsewhere under an agistment contract – also a breach of the rule if the stock were returned to the common the following summer.

¹⁰ See further A. Winchester, *Harvest of the Hills* (Edinburgh University Press Ltd., 2000) at 79-82.

¹¹ G.D.Gadsden, *The Law of Commons*, (Sweet & Maxwell 1988) at para 4.22, p.115.

comparative rights of different commoners having rights of pasturage over the common, not to preserve the pasturage on the common itself.

Its weaknesses – both as a principle and as to its enforcement (or otherwise) – are amply demonstrated in the case of Eskdale. On Eskdale common, 12330 rights of pasturage for sheep and followers were registered in the rights section of the Common Land Register under the Commons Registration Act 1965¹². Historical evidence of grazing numbers on Eskdale common demonstrates that at certain period's livestock grazing was intensive and may have exceeded this figure, while at other times it was not. In 1839 a Tithe Commissioner's Report claimed that there were "probably twenty thousand" sheep in the tithe district, which covered Wasdalehead and Netherwasdale, in addition to Eskdale itself and Miterdale¹³. More accurate figures are given in the parish summaries of the Agricultural Statistics published in the late nineteenth and early twentieth century, which record substantial numbers in the late Victorian period. There were 12500 sheep and lambs grazing in Eskdale in 1877, and a further 5740 recorded in Netherwasdale¹⁴. In 1897 the figure recorded in Eskdale, Miterdale, Wasdale and Netherwasdale was 17443 sheep and followers¹⁵, and by 1907 it had increased to 18746¹⁶.

The principle of levancy and couchancy should, in theory, have provided a check on the level of grazing permitted on the common by limiting it to the number of stock that graziers in Eskdale could over winter on the holdings to which their rights attached. There is little direct evidence, but the volume of stock recorded on the

¹² Register of Common Land, Register Unit CL 58 (Cumberland County Council). And see the analysis of the commons register available at http://www.comms.ncl.ac.uk/case_studies/eskdale

¹³ 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). Netherwasdale is outside the case study area for the AHRC project, and 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, but even allowing for this, the figure would probably have been considerably in excess of the 12300 rights for sheep and followers registered under the Commons Registration Act 1965 on CL 58.

¹⁴ Public Record Office, Agricultural Statistics, Parish Summaries MAF 68/520 Cumberland 1877, sheet 7.

¹⁵ Public Record Office, Agricultural Statistics, Parish Summaries MAF 68/1660 Cumberland 1897, sheet 1. The figures for Netherwasdale and Eskdale are aggregated in the 1897 and 1907 returns. The total grazing figures for Eskdale and Wasdalehead given separately in 1877 (above, note 41) produce a similar aggregate total figure for the two parishes, however, which would indicate a relatively stable level of grazing on Eskdale common itself between 1877 and 1897.

¹⁶ Public Record Office, Agricultural Statistics, Parish Summaries MAF 68/2230 Cumberland 1907, sheet 8.

common would indicate that the principle had ceased to have any practical limiting effect by the mid-nineteenth century. The Tithe Commissioners report in 1839 commented that “far more sheep are kept in the district 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*”¹⁷ - if correct this would clearly breach the rules of levancy and couchancy set out in the *Eskdale Twenty Four Book*¹⁸. There is no suggestion that the manorial court took steps to enforce the principle at this stage, however.

2.2 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 (“stint” or “beastgate”) allowed on the common from each farm. 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. Although the stint had a fixed number of animals attached to it, these were variable by agreement between the stint holders and could be varied to take account of decreases or increases in the amount of grazing available. As a mechanism it therefore accommodated not only notions of social sustainability (maintaining an equitable basis for access to important resources for the various stint holders), but was also potentially responsive to ecological conditions that affected the common and reduced the amount of grazing available. It was arguably a more effective practice for maintaining sustainable management than couchancy and levancy, and had greater relevance and application to the agronomic sustainability of the common itself. Indeed, there is evidence that in some parts of England stinting was imposed as a response to a perceived need to control and reduce grazing pressures on common land¹⁹. In other areas it was closely associated with the forest status of manorial wastes²⁰, and in some with the practice of renting additional grazing for specific numbers of stock on manorial wastes.

¹⁷ Public Record Office/R18/716, Tithe File: Netherwasdale, Eskdale and Wasdale, Report on the Agreement for the Commutation of Tithes (above note 40) - answer to question 11, emphasis added.

¹⁸ Above, note 7.

¹⁹ See A. Winchester and E. Straughton, “Stints and Sustainability: managing stock levels on common land in England c 1600-2006”: working paper available at <http://commons.ncl.ac.uk/resources>

²⁰ For example the Forest of Bowland in the Central Pennines.

The Ingleton area of the central Pennines contains several examples of stinted commons, and presents a different case study of sustainable management than that in Eskdale. The property rights regime applicable to stinted commons is both special and, perhaps, idiosyncratic. Although they were registrable as common land under the Commons Registration Act 1965, there is a question whether most pasturage rights over stinted and regulated pastures should have fallen into the registration system at all, as they are not strictly “common” rights but rights governed and granted by individual Inclosure awards²¹. Not all stinted and regulated pastures were, however, governed by Inclosure Awards. In the Ingleton case study, for example, some of the stinted pastures originated in shared pasture closes separated from the common in the medieval period or sixteenth and seventeenth centuries, while others (for example Scales Moor in North Yorkshire²²) appear to have been manorial waste that was converted from an unstinted pasture to a stinted pasture with fixed “beastgates” in the nineteenth century. Nevertheless, and whatever their origin, sole rights of pasturage were registrable under the 1965 Act, and where they consisted of rights to graze they had to be quantified as a maximum exercisable number²³. Registration in this form effectively destroyed the rationale of stinting, and in particular destroyed its effectiveness as a mechanism for varying the intensity of land usage, by removing the ability of stint holders to vary stints according to changes in natural conditions²⁴.

2.3 Registration- the Commons Registration Act 1965

The Commons Registration Act 1965 required the registration of both land which is common land, and the registration of rights over common land²⁵. In the case of common rights, it required the registration of rights whether they were exercisable at all times or only during limited periods²⁶ and defined the rights that had to be so registered in wide terms to include “cattlegates or beastgates (by whatever name known) and rights of sole or several pasture or herbage or of sole or several

²¹ See Gadsden G.D., *The Law of Commons* (Sweet & Maxwell, 1988) at 1.59 and 1.75.

²² Register of Common Land, Register Unit CL 272 (North Yorkshire County Council)

²³ i.e. under section 15 Commons Registration Act 1965

²⁴ For this criticism see Gadsden, op.cit. at para 3.103, p.93.

²⁵ Section 1(1) Commons Registration Act 1965.

²⁶ 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.

pasture²⁷. All rights that were not registered during the relevant application period²⁸ ceased to be exercisable over common land registered under the Act²⁹. 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 number³⁰. The broad impact was to require the registration of fixed numbers of grazing rights in the case of both commons where rights had existed *sans nombre* under the rule of levancy and couchancy, and where rights had previously been stinted. Some categories of land that were technically not “common” land at all – for example regulated pastures – were also in many cases registered under the Act.

One important side effect of the registration process initiated by the Commons Registration Act 1965, and particularly of the requirement for each grazier to register a 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. The courts have subsequently held that the requirement to register fixed grazing numbers effectively abolished couchancy and levancy³¹. And it destroyed the inherent ability of stinting to act as a reflexive mechanism to adjust grazing pressures in response to environmental factors. The 1965 Act made no provision, moreover, for the assessment of registrations against sustainability criteria in terms of either the carrying capacity of the common against which the rights were to be registered, or their environmental impact. The link between property rights in the commons and principles of “sustainable” management was therefore broken.

3 “Ecological” Sustainability – the Modern Law

The principal legal mechanism for promoting and protecting biodiversity is the designation of geographically distinct high nature value areas for protection, the primary wildlife designations in England and Wales being Sites of Special Scientific

²⁷ Section 22(1) Commons Registration Act 1965.

²⁸ See SI 1966/1471 reg 5. The application period closed on 2nd January 1970.

²⁹ Section 1(2) *ibid*.

³⁰ See section 15 *ibid*. This provision has implications for ascertaining the maximum sustainable grazing on the common, to which we return below: see n.

³¹ See *Bettison v Langton* [2001] 3 All ER 417.

Interest (“SSSIs”)³², Special Protection Areas and Special Areas of Conservation³³. A large proportion of the common land in England and Wales has wildlife designations subsisting over it - in England 180,000 hectares of common land, just short of 50% of the total area, is in notified SSSIs, and 67% of this area in wildlife sites has been assessed by Natural England as being in unfavourable condition³⁴. A further 48% of common land is in National Parks and 31% is in Areas of Outstanding Natural Beauty. These designations often intersect and overlap. There are, for example, four SSSIs within the boundaries of Eskdale common³⁵, the whole common is within the Lake District National Park, and much of it is also within the Lake District High Fells SAC.

The interaction of the legal mechanisms for designating sites with the property rights regime applicable to common land causes numerous problems. The legal provisions in the Wildlife and Countryside Act 1981 for the notification and protection of SSSIs take no account of the fact they may include common land. Where a potential SSSI includes common land this may cause problems both in applying the initial procedures for notifying the site, and subsequently in securing a management agreement to regulate the land use for nature conservation. Similarly, the Commons Registration Act 1965 was drafted without reference to the particular requirements of environmental management.

The Commons Act 2006 requires the commons registration authorities to maintain the registers established under the 1965 Act³⁶, and does not reopen the

³² Notified under Part 2 Wildlife and Countryside Act 1981, as amended by Sched. 9 Countryside and Rights of Way Act 2000. This is the principal wildlife habitat designation in England and Wales.

³³ These are designated under the Conservation (Natural Habitat) Regulations 1994 SI 1994/2176 as “European Sites”. As a matter of policy, all European Sites are also designated as SSSIs under the Wildlife and Countryside Act 1981.

³⁴ *Agricultural Use and Management of Common Land: Report of the Stakeholder Working Group*, (DEFRA 2003) Appendix A.

³⁵ Beckfoot Quarry SSSI, Nab Gill Mine SSSI, Scafell Pikes SSSI, and Wasdale Screes SSSI. The environmental management issues for Eskdale common are primarily concerned with the Scafell Pikes and Wasdale Screes SSSIs. Some of the Scafell Pikes SSSI is not, strictly speaking, common land. The top of the Scafell Pike range is lord’s freehold land, and not included in Register Unit 58 of the Register of Common Land (Eskdale common), although the environmental management issues are the same. Its peculiar status derives from its forest status in the medieval period – Scafell and Slightside were recognised by the sixteenth centuries as the lord’s deer fences or “friths” which, although not physically enclosed, were nevertheless separate from the common land on the adjacent Eskdale common.

³⁶ Commons Act 2006, ss1,2. They are to be updated under Part 1 of the 2006 Act.

registration of either the common land or common rights registered under the 1965 Act³⁷. The Commons Registers are often inaccurate, however, and frequently unrepresentative of the current land use on the common. The problems of tracing the current holders of registered rights may be considerable - for example where a holding with common rights has been transferred or divided and sold, or where the commoner is "inactive" i.e. not currently exercising his/her entitlement. The Commons Registration Act 1965 permitted the amendment of the Commons Register following a transfer of common rights³⁸. There was no duty to notify changes in ownership or tenure. Although the 2006 Act has introduced provisions for the assessment of requirements for the sustainable management of new commons and exchange land registered after its commencement, many of the problems caused by 1965 Act registrations will retain their potency.

The inaccuracy of the Commons Registers established under the 1965 Act makes the notification of SSSIs on common land unnecessarily complex and time consuming. In Eskdale, for example, English Nature served notification of the Scafell Pikes SSSI on 30 commoners with registered rights in 1988 – notwithstanding that there are now only 8 active graziers. The owner of the soil must also be notified, and where there is no known owner Natural England must notify the “relevant local authority”, a body it is not always easy to identify³⁹. The problems have in the past sometimes been aggravated by the practice of leasing or licensing rights for the use of others⁴⁰ and by the existence of rights enjoyed by virtue of a landlord/tenant relationship with the owner of the soil, which are not strictly registrable⁴¹. Where grazing has historically been controlled by stinting, however, the transfer of rights is more commonly encountered and commoners have always viewed their stints as a freely transferable. There is some evidence that fixing grazing numbers through the

³⁷ 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.

³⁸ See section 13 Commons Registration Act 1965, and the Commons Registration (General) Regulations 1966, SI 1966/1471.

³⁹ Natural England, pers. comm. 13th December 2007.

⁴⁰ This practice was widespread, although of questionable legality: see Gadsden, GD *The Law of Commons* (1988) 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) as permitted by regulations made by DEFRA and the Welsh Assembly Government

⁴¹ See Gadsden at 4.10, 4.11, and Aitchison, J and Gadsden, GD in (Howarth W and Rodgers CP (Eds.)) *Agriculture Conservation and Land Use* Univ. of Wales Press 1992 at p.174.

practice of stinting produces a different perception of grazing rights - as commodified elements of resource utility and freely transferable rights in land⁴².

These problems may be compounded where the SSSI includes land over which common rights exist "in gross", as these can be transferred by the holder independently of the dominant land for the benefit of which the rights are exercised. Rights held in gross are comparatively rare, but not unknown⁴³. And many rights in gross are, in any event, inaccurately registered in the Commons Registers⁴⁴ - as are rights over stinted and regulated pastures, which, not being strictly common land but governed by individual Inclosure awards, should not have fallen into the registration system at all⁴⁵.

3 Commons Registration and Sustainable Management

The deficiencies of the registration process under the Commons Registration Act 1965 are well known⁴⁶. The fact that grazing rights registered on the Commons Register under the 1965 Act are often inaccurate - both as to the historical number of animals grazed and the identity of the rights holder – causes problems not only in notifying sites for protection (above) but also for the implementation of environmental management schemes on common land. A key problem is the relationship between the quantification of grazing rights reflected in property rights and in the Commons Registers, and the levels of grazing and other land uses dictated by the application of principles of sustainable management.

3.1 Quantification of Rights: Existing Registrations

The grazing rights registered under the 1965 Act bear no necessary relation to either the carrying capacity of the land itself, or to the "optimum" level of stocking

⁴² This was the case in Ingleton, where stints had historically always been regarded as transferable without land, and were not infrequently traded between landowners and farmers.

⁴³ In the case of Eskdale, for example, two entries in the Commons Register record rights in gross, numbering in total 873 sheep grazing rights: Register of Common Land, Register Unit CL 58, Rights Section, Entry nos. 62 and 65. Both are held by the National Trust through Countryside Commons Ltd..

⁴⁴ See Gadsden at 3.43, 3.44 and Aitchison and Gadsden (ibid.) p.174.

⁴⁵ See Gadsden at 1.59 and 1.75.

⁴⁶ See generally *Common Land: The Report of the Common Land Forum* (Countryside Commission, 1986).

needed to prevent overgrazing. The 1965 Act contained no provision restricting the registration of rights by reference to agronomic or environmental criteria⁴⁷. The net effect of the 1965 Act was that the grazing rights registered in the commons registers simply reflected what commoners claimed when registering within the time scale laid down in the Act. They are theoretically based on the historic turn out on the common concerned, although in practice numbers were sometimes inflated⁴⁸. And many of the rights registered may not have been exercised at all, may only have been exercised in part, or may have been exercised at certain periods and not others.

Given the potential mismatch between registered grazing rights and the carrying capacity of the commons, 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? Put another way, are X’s property rights as a grazier definitively reflected in the number of grazing rights registered under the 1965 Act in the Commons Register? Or can they be subject to qualification by reference to sustainability criteria? And if so, what criteria would be applied at common law?

As far as existing registrations are concerned⁴⁹, this turned 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*” (emphasis added)⁵⁰. Once the registration became

⁴⁷This 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.

⁴⁸ An example is provided by Register of Common Land, Register Unit CL Unit 6 (Cwmystwyth) (Ceredigion County Council) on the edge of the Contested Common Land project’s Elan Valley case study area. 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 HLCA payments during the 1990s. The current grazier regarded the registered total as wholly unsustainable (pers.comm. Semi structured interview 3rd March 2009).

⁴⁹ I.e. those made under the Commons Registration Act 1965, prior to the coming into force of Part 1 Commons Act 2006.

⁵⁰ Section 15(1) Commons Registration Act 1965.

final, the right became exercisable “in relation to animals *not exceeding the number registered*” (emphasis added)⁵¹. Once the registration became final it became conclusive proof of the matters registered⁵². The legal effect of this provision on the property rights reflected in the register was considered by the commons commissioner in *Re The Black Mountain, Dinefwr, Dyfed*⁵³. In his view the registered number provided only an upper limit on the number of grazing stock permissible. It followed that if, at any time, the grazing numbers on the common were felt to be excessive then legal redress could be sought by interested parties, even though the number of animals put to the common by the grazier alleged to be causing the damage was less than his full registered entitlement.

This decision, if followed in the courts, could have major implications for property rights in the commons. It potentially reopens the question of linking grazing numbers⁵⁴ to principles of sustainable land management in order to establish a legal limit on land use below that reflected in the registers. Whether this would assist with issues of ecological management must, however, be questionable. If the principle were accepted, the better view is that reference would have to be made to the common law principle of levancy and couchancy in order to fix the maximum grazing limit for a common⁵⁵. And, 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 would therefore have the potential to contribute to the economic sustainability of grazing, but reference to ecological factors – for example the management required to achieve favourable conservation status on SSSI land – would not be relevant. The Common Land Forum recommended that the rectification of the commons registers should be allowed where this was necessary to reflect the carrying capacity of a common land unit, and that agricultural land tribunals should

⁵¹ Section 15(3) *ibid.*

⁵² section 10 *ibid.*

⁵³ [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.

⁵⁴ And possibly other land uses, such as turbarry (peat extraction) and estovers (gathering bracken for animal bedding, or wood for fencing etc.).

⁵⁵ 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 *Bettinson 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*.

undertake the task of quantifying rights reflected in appropriate carrying capacity⁵⁶. This suggestion was not taken up in the Commons Act 2006⁵⁷, and there remains no mechanism for re-evaluating the link between *existing* registered rights and either the ecological management or agronomic carrying capacity of common land.

3.2 Quantification of 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 statute⁵⁸. The registration and amendment of new rights will in future be potentially subject to a sustainability appraisal. The Act provides⁵⁹ 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”. The same principle will apply to an application to vary⁶⁰ common rights after Part 1 of the 2006 Act comes into force. 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 right⁶¹. In both cases the application of sustainability principles is linked to the impact on the continued exercise of grazing rights. This might indicate that an economic sustainability model was intended, focussing on the preservation of the vegetation as a grazing resource. Significantly, however, the commons registration authority is required to consult Natural England in every case before approving a registration or variation of rights⁶², suggesting that the impact of changes in grazing pressure on the ecology of the common will be an important consideration in many cases.

⁵⁶ Common Land Forum Report, op. cit. Appendix C paras 028 and 114-121.

⁵⁷ 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.

⁵⁸ Commons Act 2006 section 6(3).

⁵⁹ Ibid section 6(6)

⁶⁰ 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.

⁶¹ Ibid section 7(5).

⁶² Reg.36 Commons Registration (England) Regulations 2008, SI 2008/1961.

The Act also provides for the registration of “replacement land” and the release in exchange of registered common land. The 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 importance⁶³. Although these reforms will, in time, lead to a strengthening of the link between concepts of sustainable management and the commons registers, the 2006 Act will not reopen existing registrations, and leaves many of the problems created by the 1965 legislation untouched.

4 Implementing Sustainable management

4.1 Ecological management objectives

The management sought by Natural England in order to address problems such as overgrazing may not be reflected in the rights registered in the commons register. Eskdale presents many issues that are typical of upland commons with high nature value. The two principal SSSIs on the common are the Scafell Pikes SSSI and the Wasdale Screes SSSI, both of which are highly sensitive to sheep grazing pressures⁶⁴. The whole of both sites have been assessed by Natural England to be in an unfavourable condition but recovering⁶⁵.

A primary conservation objective is the introduction of a mixed grazing regime with cattle to re-establish heather on the fell, accompanied by a reduction in sheep grazing pressures and the removal of overwintering livestock⁶⁶. The whole common was

⁶³ Ibid section 16(6) and 16(8).

⁶⁴ The Scafell Pike SSSI hosts upland and montane heaths, and the summit boulder field hosts rare assemblages of lichen heath. and the site was assessed by Natural England in October 2004 as “unfavourable recovering”. 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 rich montane and lowland flora with a number of nationally rare plant species present, plus heather and bilberry heath.

⁶⁵ See the SSSI condition summaries at www.naturalengland.org.uk/special/sssi/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.

⁶⁶ These sites are within English Nature’s *Sustainable Grazing Initiative in Cumbria*, and the ESA and SWES agreements on Eskdale common described above are integral to the overall approach set out therein. For the methodology and application of the Sustainable Grazing Initiative see further: *English*

entered into Tier 1 (Heather fell) of the ESA programme in 1995, under a management agreement negotiated on behalf of the commoners by the Eskdale commoners association. This resulted in a reduction of the summer grazing by sheep to 5139, and to 3852 in winter. Further reductions in sheep grazing pressures were introduced in 2003 under Sheep and Wildlife Enhancement Scheme (“SWES”) agreements with the 10 active commoners. This provided a further 40% reduction in sheep grazing numbers on the SSSI land within the common, with two commoners removing their entire flock. The target annual average grazing density across the common under SWES is 0.8 ewes per hectare. Achieving these outcomes was complicated by the status of the land as common land, and introducing further management reforms will also be complicated by the nature of the rights registered over the common and the large number of inactive commoners.

4.2 Commons Registers: the Problems

The problems for establishing environmental management schemes to which the commons registration system gives rise fall under the following heads:

4.2.1 Identifying Common Rights Holders

Environmental schemes for the management of commons can at worst be thwarted, and at best made more difficult to establish, by the practical difficulties of identifying the current holders of grazing rights with whom to enter into management agreements⁶⁷. Although satisfactory ESA and SWES agreements were concluded on Eskdale common, considerable difficulties were caused by the need to identify all commoners and owners, problems caused by inadequate rights of access to identify conservation features, and the need to notify everyone with a registered interest in the common⁶⁸.

4.2.2 Unused Common Rights

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).

⁶⁷ See generally C.P. Rodgers, “Environmental Management of Common Land: Towards a new Legal Framework?” (1999) 11 JEL 231-255.

⁶⁸ Natural England, pers.comm.. 13th December 2007.

In practice many commoners with registered rights will not be exercising their full registered entitlement, and some may not be exercising their registered rights at all. It clearly makes sense for Natural England to target those producers actively utilising their rights, as it is conservation management by these graziers that will deliver the objectives of ESA and SWES. Management agreement payments will in practice, however, only be paid on the basis of registered rights. 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 can lead to tensions between commoners, and arguably to 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 in 1995⁶⁹ according to Natural England, and the active graziers were only using a proportion of their registered grazing entitlement⁷⁰. 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, including Cwmdauddwr common in Powys. Negotiating the Cwmdauddwr ESA agreement took more than two years and required visits by representatives of the Cwmdauddwr commoners association to London to negotiate with inactive graziers who had never grazed the common⁷¹.

The problem of the “inactive grazer” also impacts upon the farm subsidy entitlements of those graziers actively grazing the common. The entitlements to payments under the CAP single farm payment scheme have been calculated by reference to all the rights registered for each common, as reflected by the commons

⁶⁹ The register for CL 58 records 12300 grazing rights for livestock

⁷⁰ 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 n.14 and n.15. The commons register for CL 58 also discloses 14 rights of turbary 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.

⁷¹ Pers.comm. in Semi structured interview, 3rd March 2009.

registers themselves, irrespective of whether they are being exercised. Each commoner's single farm payment entitlement is therefore calculated as a proportion of the total of registered grazing rights for the common, by reference to the number of rights that producer holds relative to the total number of registered rights⁷². The effect of this calculation is to "dilute" the single farm payment entitlement of active commoners, and this in turn makes them economically more dependant on agri-environment payments under ESA and the SWES scheme.

4.2.3 Securing Appropriate Modes of Management

The commons register may not entitle commoners to implement the *type* of livestock management required to implement the management objects required to return SSSIs to favourable conservation status. In Eskdale, for example, Natural England's strategic priorities to return the Scafell Pikes and Wasdale Screes SSSIs to favourable condition are the encouragement of heather regeneration on the common, the restoration of selected areas of woodland and the re-establishment of juniper shrub. This will require the reintroduction of mixed grazing with cattle, in addition to the maintenance of reduced sheep grazing pressures. When the current SWES and ESA agreements expire in 2013 the sustainable management of the common will depend upon it being accepted into the Higher Level Stewardship (HLS) scheme with a mixed grazing regime. The grazing regime required for HLS may, however, conflict with the register of common rights.

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 the mixed grazing regime sought by Natural England. Similar issues arise elsewhere – for example on Cwmdauddwr common in Wales, where entry into Tir Gofal following conclusion of the current ESA will probably require mixed grazing. A possible

⁷² See DEFRA Policy update February 2005, in *Single Payment Scheme: information for farmers and growers* (DEFRA, 2005 update) at p.3 (Common Land).

solution may be to use 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 might be licensed to graziers without appropriate registered rights in order to enable them to stock cattle under HLS. Many commons do not have a surplus of grazing over and above the registered pasturage rights⁷³, however, and in any event this device would be dependent on a landowner being willing to licence rights to graziers⁷⁴. The power granted by Commons Act 2006⁷⁵ to create new rights of common might also be used, but where there is no surplus grazing the application of the sustainability criteria discussed above may prevent this⁷⁶. This is another example of an undesirable impact of the over registration of rights under the 1965 Act that will live on under the 2006 legislation.

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 rights in the registers as property rights. The register reflects a static system of property rights in the commons that captures historic claims to land use made on registration in the late 1960s, and not the contemporary use of the common’s resources. Achieving sustainable management objectives will usually require a flexible approach under which property rights can be adapted to meet the needs of conservation management.

⁷³ 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 legislative foundation in common law, the Commons Registration Act 1965 or the Commons Act 2006.

⁷⁴ Some of whom may not, for example, be his tenants whereas others are..

⁷⁵ Section 6(3) Commons Act 2006.

⁷⁶ 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.

5 Sustainable Management: The Role of Commons Councils

The Commons Act 2006 could facilitate a move towards a more dynamic model of property rights in the commons that focuses on sustainable management as a key objective for our commons. Part 2 of the 2006 Act 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.

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 bodies⁷⁷ with power to enter into legal agreements and to initiate legal action in tier own name⁷⁸. When exercising their statutory functions, they must have regard to the “public interest”, which for these purposes includes nature conservation and the conservation of landscape, and the protection of archaeological remains and historic features of common land⁷⁹. 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 common⁸⁰. The rule making power can also be used to make rules governing the leasing or licensing of grazing rights⁸¹. A commons council will also have power to remove animals illegally grazing the common and to remove unlawful boundaries and other encroachments⁸². Regulations made using these powers will be subject to confirmation by the Secretary of State⁸³. There is, also provision for commons councils to establish live registers of ownership and usage of common rights⁸⁴ i.e. a “living” register similar to that regulating grazing on Dartmoor under the

⁷⁷ Section 28(1) Commons Act 2006.

⁷⁸ Section 32 (1)(2) *ibid.*

⁷⁹ Section 31(6), 31(7) *ibid.*

⁸⁰ Section 31(3)(a) and 31(4) Commons Act 2006

⁸¹ See Section 31(3)(b) – (f) *ibid.*

⁸² Section 31(3)(f) *ibid.* And see *Consultation on Agricultural Use and Management of Common Land* (DEFRA 2003), Proposals 1 - 7

⁸³ See section 33 Commons Act 2006

⁸⁴ See section 31((3)(b) and (c) Commons Act 2006.

Dartmoor Commons Act 1985⁸⁵. Establishing a “living” 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 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 agricultural 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 able to introduce management rules binding inactive graziers and preventing them from exercising previously unused common rights⁸⁶. 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 land⁸⁷. 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 Act⁸⁸ offers a management tool that can avoid some of the problems arising from the mismatch between registered commons rights and the *type* of 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

⁸⁵ 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.

⁸⁶ See section 31(4)(a) Commons Act 2006. *ibid.*

⁸⁷ For example as in the ESA agreement currently in place on both Eskdale common and Cwmdaiddwr common: above n.70 and n.71.

⁸⁸ 6(3) Commons Act 2006

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.

6 Conclusion

It is clearly the case that the categorisation of fixed property rights reflected in the commons registers complicates the environmental management of common land, distorts the management choices available to commoners and the statutory agencies, and impacts upon the economic viability of farming in marginal upland areas by reducing commoners' single farm payment entitlements. Hardin's "Tragedy of the Commons" is founded on the notion that individual property rights are essential to provide an incentive for the stewardship of common pool resources. The legal regime for managing common land, when viewed in the context of the supposed "Tragedy of the Commons", provides equivocal evidence of its ability to deliver sustainable management. The practice of stinting common pastures may be seen as supporting Hardin's thesis. Stints were (and still are) considered to be individual property rights by their owners, and prior to the Commons Registration Act 1965 the commodification of rights in this form arguably encouraged more effective collaborative management of the common resource than the rule of levancy and couchancy. The role of levancy and couchancy was 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 undoubtedly less effective as a mechanism for conserving agricultural resources, it is nevertheless the case that common land subject to this rule clearly did not fit Hardin's stereotype of a "common" pool resource entirely divorced from property ownership structures.

The reforms in the Commons Act 2006 should lead to more sustainable management of our commons, taking account of ecological as well as economic

sustainability criteria. Much will depend upon the extent and manner in which the new power to establish commons councils is used by stakeholders. If the impact of the new self regulatory powers in the Commons Act 2006 is to be fully realised, we must also move towards a dynamic model of property rights that defines property by reference to its' ability to unlock either a stream of benefits or access to a resource. If a "paper" (i.e. registered) right is not able to unlock economic benefits for its owner, because its exercise is prohibited by the management rules introduced by a commons council, then it will cease to be a property "right" in this fuller sense. Where a Commons Council has passed agricultural management rules, the result will be that the commons register will no longer accurately reflect the distribution of elements of land-based utility in the common. In practice the commons registers have rarely done so, in any event, and this may not be as radical a conclusion as it may at first appear.