

Can Biodiversity, a public good, be delivered on Common Land through management organisations founded on optimising private property rights?

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Abstract

In Cumbria with over 30% of England's Common Land many voluntary commoners associations exist to manage common rights for grazing. In the last 20 years the increasing demand for public goods has lead Natural England to work with commoners associations to deliver the favourable condition of vegetation on designated land.

Favourable condition is demanded by UK and European legislation and in many cases constrains the optimal agricultural use of private property rights on common land. This has resulted in Natural England and paying commoners associations to reduce grazing for a period of time with the objective of achieving a recovery in the vegetation condition. In many cases the agreement is complied with but success can be limited if some commoners refuse to participate, or sign up and then fail to comply with the terms. Rarely is action taken by commoners in the association against other commoners. Why is this and what can be done?

If one commoner infringes rules on grazing he often had a negative impact on other commoners to enjoy their rights; hence there was an incentive to enforce the rules. The over-riding of national legislation has proved a challenge for associations who have limited incentive and powers to enforce agreements. It is argued that this is primarily because commoners are concerned with private property rights and the delivery or otherwise of public goods has no impact on their private rights. Equally the impact of national legislation and government support to agriculture has also led to a weakening of some local associations' capacity to enforce any rules.

Options will be explored to enhance the capacity of commoners associations both through statutory councils and the improved governance of existing structures.

Key Words

governance, private property rights, public good, protected area

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Introduction

The last fifteen years has seen a shift in the relationship between state and owners of common land and common rights with regard to expectations for the delivery of public benefits from common land. In particular the introduction of the Environmentally Sensitive Areas and Countryside Stewardship schemes gave the government the opportunity to offer positive management agreements in areas of high conservation value whereby farmers are paid to reduce grazing pressure.

Significant sums are paid each year to commoners to effect a change in vegetation and wildlife. Commoners have to follow a set of prescriptions regarding the number of sheep that can be grazed and the time of year they are on the fell. After ten years of the scheme it was found that many commons continue to be in unfavourable condition, in some cases this is because the prescriptions were wrong but in other cases it is due to some commoners refuse to participate or fail to comply with the prescriptions.

This paper looks at the latter situation, why it occurs and can it be remedied using Cumbrian experiences as case studies. First a hypothesis is proposed followed by background information on common land and its management. The hypothesis is explored with data from a number of Cumbrian commons the author has worked on and ideas are given for strengthening governance. This paper is the author's initial exploration of these ideas that form a key strand of her PhD research that starts in September 2008 at the University of Newcastle's School of Law.

Hypothesis

Private property rights on common land are concerned with agricultural production while the public benefits of biodiversity that flow from commons are correlated to the ecological condition of the vegetation. The optimal grazing level to maximize agricultural productivity (K_a) is higher than the optimal grazing level to maximize biodiversity benefits (K_b). The result is that a breach of optimal ecological grazing levels by one commoner does not impact on the other commoners' capacity to maximise their agricultural output so there is no incentive to impose sanctions.

Background

- **Common Land in England – what is it?**

Common Land in England is private land where the use of the land by the owner is limited by the rights of other individuals to take produce from that land. These

common rights include the right to graze animals, take stone, collect wood, cut peat etc. and are usually held in common, i.e. with others². The only right that continues to be of economic significance is the right to graze animals and the discussion below will be limited to this. The area of common land in England used to be much higher but over time these common areas; often wastes of the manor; were enclosed sometimes through laws and sometimes by stealth. Common Land now extends to just 500,000 ha or 3% of England's land area.

Common rights are classified as "land" by English property law and were quantified following the Commons Registration Act 1965. The rights are specific to a particular common land unit (CL) and may be attached to land that is not common land e.g. a farm near the Common, or they may be held separately; "in gross".

The owner can only use his common land such that he does not interfere with the rights of those who own common rights, the commoners. In practice this means he can only graze the common if there is surplus grazing after the commoners have grazed the animals they have the rights to. If there are a large number of common rights there may be no surplus. Due to the way the registration of rights occurred many commons are over registered; i.e. the number of common rights exceeds the carrying agricultural and ecological capacity of the common. While the 1965 Act crystallised this problem the over grazing of commons had been a known problem for at least four hundred years before then. Evidence from manor courts provides an insight into how these lands were governed and managed.

- **Common Land Management** – Manorial Courts to voluntary associations graziers associations and internal agreements

In England there is a large body of written records documenting the management of common land, the manorial court records dating back hundreds of years. The manorial court existed to protect the interests of the lord or the manor and to resolve disputes between the lord's tenants. As the Statute of Merton in 1236 vested the ownership of common land, or waste of the manor, to the Lord of the Manor manorial courts had jurisdiction over its management. This was mostly through the customary courts where the Lord of the Manor (usually through his steward) decided on any disputes.

The manorial courts main business concerned tenancy agreements. When copyhold tenancies were abolished by the Law of Property Act 1925 manorial courts became obsolete. Parallel to this their powers to enforce sanctions were gradually transferred to the County and High Courts until in 1977 their jurisdiction was reduced to dealing with customary matters with no legal powers to hear and determine disputes or enforce sanctions.

² In England 12% of the area registered as common land has no registered rights of common and was registered being waste of the manor (Defra)

Prior to this there was a movement to increase the regulation and agricultural management of commons e.g. through the 1876 Act allowing the inclosure of common land and the regulation of Commons through a Board of Conservators and scheme of regulation. 36 commons are regulated by that Act and others have their own local Acts of parliament e.g. Dartmoor and Malvern.

The position today though is that the majority of commons either have no management structure or have a non-statutory association where the majority cannot enforce decisions against a dissenting minority. If commoners wish to take action against someone in breach of their rights they can only do this through personal action in the courts by an injunction or claim for damages. This is unheard of in modern times. For instance if a common is overstocked or “surcharged” a case of wrongful grazing could be taken but would have to be in excess of the legally entitled number of sheep not any reduced number agreed by an agri-environment scheme.

Owners can also take action through the courts against those who wrongfully graze their common but the incentive to take the course is limited as the outcome is uncertain, and the burden of proof difficult, while the costs are almost always likely to exceed the benefit to the owner. Recently an owner did take a case against a commoner for supplementary feeding which went to the Court of Appeal (*Beasley v John 2003*) and the finding was that a commoner’s rights do not extend to supplementary feeding even if that is customary and even if it would cause animal welfare problems if they were not fed as there is not enough grazing at certain times the animals should be removed.

Commoners associations currently have an important role in managing commons in enabling commoners to access agri-environment payments. Natural England requires one point of contact for schemes on common land not only for practical administration but also to ensure the scheme prescriptions are complied with. Associations therefore make applications and negotiate between commoners how a scheme will be delivered. An internal agreement, usually a deed, is drawn up that sets out the liabilities, obligations and benefits a member of the scheme is entitled to if a member fails to comply then monies can be withheld or reclaimed. There is no legal mechanism for enforcing the rules of a non-statutory association.

- **Cumbrian Commons** – location, geography, number of commons and area of common land

There are 630 Common Land Units in Cumbria extending to 112,786³ ha over 30% of the Common Land in England. Over 47% of the commons have rights of

³ Biological Survey (2000) The area of common land in Cumbria is probably slightly more at about 116,000 ha as now common land can be more accurately measured digitally. The Rural Land Register has not though completed measuring Common Land

common with the number of final and provisional entries on the registers exceeding 3,500. There are rights for over 440,000 sheep, 31,000 cattle and 2,400 ponies and horses as well as poultry and pigs⁴.

Cumbria is in the north west of England and is the most mountainous area of England with two main upland areas; the Lake District in the centre and the North Pennines on the East. The former comprises craggy, steep mountains while the latter is more rounded moorland. The majority of Cumbrian commons are upland commons used for the grazing of sheep.

In Cumbria common land remains a significant economic asset for agriculture⁵ as well as providing a large range of public benefits to society (e.g. recreation, biodiversity, water catchment, landscape and carbon storage). 39.1% of the area of common land in Cumbria is designated as a Site of Special Scientific Interest. This land is on 112 separate common land units. Not all of every common land unit may be designated but commons have to be managed as a unit and often with contiguous units so the total area affected by protected area designation is significantly higher. Conversely if your aim is to ensure protected area management it is this higher area that must be managed in order to deliver appropriate grazing on the SSSI land.

In 2003 the Federation of Cumbria Commoners was established to ensure commoning was understood and to protect the interests of hill farming on commons as well as the environment. This self-financing organisation has over 600 members which illustrates the importance of commons to farmers in the county.

Fig 1 Common Land in Cumbria - shown in green

- **Protected Area legislation and targets**

The laws in England protecting areas of high environmental value is complex and multi-layered. Site of Special Scientific Interest (SSSI) is the UK designation for particular sites of biological or geological importance and many of these sites also have European designation as Special Areas of Conservation (SAC) or Special Areas of Protection (SPA).

Additionally in Cumbria many of these sites are in either the Lake District or Yorkshire Dales National Parks, or in the North Pennines or Solway Areas of Outstanding Natural Beauty.

This paper focuses on SSSIs designated for their biodiversity. They are managed by Natural England the government's executive agency which works to conserve

⁴ Unpublished raw data from the Rural Payments Agency (2008)

⁵ Farm Business Survey Report from Newcastle University for Federation of Cumbria Commoners 2008

and enhance biodiversity, landscapes and wildlife in England. Under national legislation; Wildlife and Countryside Act 1981 and Countryside and Rights of Way Act 2000; those who own or manage SSSIs can only carry out operations that do not damage the sites unless they have consent for the operations. The system of consents recognises that SSSIs were imposed on private land where management practices were often well established and focused on economic activities not the delivery of biodiversity and habitat management. Consents can be revoked but Natural England has to compensate those with property rights.

Natural England has a government Public Service Agreement (PSA) target to ensure 95% of SSSIs are in favourable or unfavourable recovering condition by 2010. This has prompted a sustained programme of targeting of SSSIs that are in unfavourable no change, or unfavourable declining condition to alter management to achieve their targets.

Favourable condition in this context is a technical term used by Natural England that describes a site where the special features that the site has been designated for are present and in good health. A series of targets has been developed for each site and assessment will depend on whether these targets have been met.

- **Agri-environment Schemes: history, purpose and payment structure**

Agri-environment schemes pay farmers to deliver environmental goods and services. Entry to the “classic” schemes: Environmentally Sensitive Area and Countryside Stewardship schemes is now closed and all new applicants apply to the Environmental Stewardship scheme. Farmers pick from a menu of options and apply to Natural England. Natural England decides if the land is appropriate for that option and whether the land falls into a target area. The higher level of Environmental Stewardship (HLS) is a competitive scheme and due to the PSA target for SSSI applications that will improve a SSSI are prioritised.

Under the classic schemes participants only had to meet set stocking prescriptions and if they did that they were compliant. Environmental Stewardship takes a different approach under the Higher Level scheme, indicators of success are agreed with the land manager and these are monitored. If the indicators of success are not achieved there is Natural England is entitled to alter the prescriptions.

The payments for the classic and current schemes are based on the income foregone by farmers in reducing stocking levels to the levels required to deliver ecological change. The difference in optimum grazing levels for agricultural productivity and ecological goods and services stated in the hypothesis is enshrined in the economic paradigm used to pay farmers. From the commoners point of view two questions arise. Firstly does the payment fully compensate them for the loss of earning from maximising their agricultural productivity and

secondly what is the risk of not complying? Can they have their cake and eat it i.e. take the payment money but not fully comply, or is it worth signing up at all?

Case Studies

Birkbeck

Birkbeck has been in an ESA scheme since 1999. The scheme has failed to deliver favourable condition across all the SSSI due to the over grazing of ponies by one or two commoners. One after much negotiation was persuaded to participate but the other remains resilient to offers for a settlement. This grazier is not party to the ESA and therefore the stick of withholding funds is not available. Natural England have considered withdrawing his other payments from Defra but the money at stake is not sufficient for him to change his management.

Furthermore all except two of the commoners are related to him and while they disapprove behind doors they are not prepared to take action. Large areas of the common are not over grazed so the problem is one of localised over-grazing that does not impact on the other graziers' ability to graze their own stock.

The owner of the common is concerned about the breach, he has taken legal advance regarding his legal options but has not been persuaded that action would be guaranteed of success and is concerned about the costs of any legal action. While the moor is grouse moor it is not shot very intensely and the localised nature of the overgrazing means the benefits to the owner even if he is successful probably are outweighed by the costs.

Caldbeck

Caldbeck Common joined up in 2002 to an ESA scheme with a Wildlife Enhancement Scheme on top to provide extra funding for shepherding and off-wintering. The commoners were paid to re-establish hefts after losing flocks during foot and mouth. A particular sensitive areas were identified by Natural England and the commoners were required to address the problem of localised over-grazing to ensure the delivery of favourable condition. Natural England identified that localised overgrazing was continuing in one particular place and in 2006 the commoners were asked to address the matter. No action was taken and the problem continued.

The ESA and WES scheme reduced sheep numbers to such a low level that there was plenty of grass for all the sheep so no commoner was suffering as a result of the localised over-grazing. There was no incentive for the farmers to remove their sheep from the convenient location where they were grazing and no incentive for those grazing to take any action.

Natural England decided in 2008 to take action and withheld the ESA payment from the commoners. This spurred the commoners to take action and they all agreed to a stocking reduction to prevent the problem. The monies withheld have since been released.

Derwent Common

In 2005 the Derwent Commoners Graziers Association's ESA agreement ran out and they were offered a HLS agreement. There was concern that stocking and managing the common was costly and some commoners might conclude it was more cost effective to take the HLS payment and not turn out any sheep due to the low prices for hill lambs and the time required managing the fell. This would leave the remaining graziers with two problems, they would have to spend more time gathering the fell, or would have to pay shepherds and that the total number of sheep on the fell would fall below the minimum required by Natural England. In the latter case the remaining graziers would then have to increase their flocks (at a cost) to compensate for those who had stopped farming. This risk of undergrazing is a new threat to the uplands and results from the change in agricultural support from a headage to area based, the ever declining real financial returns from hill livestock enterprises and the increasing age of the commoners for whom working the fell is no longer physically practical and for whom an HLS "pension pot" is attractive.

The problem was resolved through the drafting of the internal agreement. Every grazier was allocated a maximum and minimum stocking number. If a grazier's number fell below the minimum level then they would lose 75% of their payment and if their level fell below 25% of their summer maximum they would lose all their payment. This very clear penalty had to be used as soon as the agreement began as one grazier did not put any sheep on the fell. The monies were divided up amongst the remaining graziers.

Winterton and Kaber

This common has a local scheme of regulation under the 1876 Act and entered the Countryside Stewardship Scheme in 1999. It is not a SSSI but is in the North Pennines Area of Outstanding Beauty. It provides an example of a productive common with easy vehicular access. A vegetation study commissioned by the owners in 2007 showed that there are numerous areas of localised over grazing, mostly relating due to winter foddering practices in breach of the scheme. The stock levels on the common as a whole are not a problem it is their location. It is an area where the commoners are independent successful farmers who are keen to protect their own hefts and maximise the quality of their livestock. Friction between graziers has resulted in intensified supplementary feeding in order to protect hefts. This has resulted in localised damage.

While the common is under the regulation of a Board of Conservators the Board is controlled by graziers who are supplementary feeding and therefore no action

is being taken. The chairman knows that the situation is unsatisfactory but is nervous of upsetting the local balance by forcing a change in hefting patterns. The current situation while not ideal does not prevent the farmers from exercising their own common rights so there is little personal incentive to take action. The current scheme runs out in 2009 and negotiations are beginning as to the new HLS. The new scheme will have a further dimension as the owner of the common, which is a driven grouse moor, is keen to be party to the agreement and seeks a lower stocking level and limited supplementary feeding. As the new schemes require the consent of the owner of the common they cannot be excluded but need to be aware that if the commoners' priority is agricultural productivity and a new scheme restricts farming practices further without adequate compensation a scheme is unlikely to be agreed.

Issues

Local Imposition of Sanctions

Neighbours do not like taking action against their neighbours particularly those they have to work together with on the fell. Often commoners are related to each other or have had working relations over several generations. If action is taken then it can result in lingering resentment that affects the day to day management of the common.

Manorial Courts avoided this problem by having a steward who acting on behalf of the Lord of the Manor made the decisions and decided on any sanctions. Natural England, as an external party, can to some extent fulfil this role, they can be the "hate" figure and be blamed and take action without upsetting the delicate balance of local relations.

Requirements for Consensus and Transaction Costs

Non-statutory Commoners Associations cannot bind a dissenting minority so achieving consensus for significant changes in management as required by agri-environment schemes can be time consuming and can reach a brick wall. For instance if one party is not co-operating then considerable time has to be spent persuading them and adjusting the agreement to meet their concerns. On one common in Cumbria a commoner was in breach of his legal entitlement but insisted on being compensated for removing these cattle even if though they were illegal. The Association had to pay him an extra £4,000 a year in order to achieve consensus. Even if everyone is being sensible due to the complexity of negotiating with several people who have different interests takes time and is costly.

Legal Remedies

The options available to owners and commoners to take action against those who breach their legal rights or against strangers who unlawfully occupy the common are limited. There is a body of case law but little from the last 200 years,

which means individuals are wary about taking a case as there are no recent precedents that support their action.

Under common law a commoner may take action through the courts for an injunction and damages if another commoner or stranger is overstocking; surcharging; the common. They simply have to state there has been wrongful grazing. Under the Commons Act 1908 action may be taken against those who turn out uncastrated (entire) animals and under the Animals Act 1971 action may be taken against for damages against those who unlawfully occupy land. As occupiers commoners can take action as can the owner. Animals can be detained and sold by the detainers after due procedure. Once up and running the costs of enforcing an agreement through the courts considered prohibitive particularly when the outcome is uncertain. The paucity of case law over the last three hundred years means there is inertia amongst owners and commoners in seeking an injunction or damages through the courts.

The only remedy available to commoners associations for management agreements negotiated through consensus is to withhold payments and enforce liability for any financial losses incurred by the association as a result of their actions. Such remedies are through the deed signed by all members of the agreements. The commoner cannot though be forced to comply with the prescriptions. Court action to change stocking levels can only be taken if the individual is in breach of their legal rights of common.

If a breach of the agreement is persistent Natural England may terminate the agri-environment agreement and so all the remaining commoners lose out. Aside from mediation there is no legal procedure to remedy the situation. Natural England also have legal powers through the Countryside and Rights of Way Act 2000 but in practice is reluctant to use these powers as they are untested and legal action is costly.

Analysis

The hypothesis proposed was simple; commons are not so the conclusion is that while the hypothesis holds true to a certain extent it is not an adequate model as there is no effective mechanism for enforcing property rights by commoners or owners. Furthermore:

- The over registration of commons following the Commons Registration Act 1965 means commons are rarely legally overstocked and only in a few cases is there an owner's surplus. Except in cases where the owner has bought back many of the common rights and has a beneficial interest in good management the owner will have little interest in taking legal action.

- Legal action against those who overstock the common or occupy it unlawfully is almost never taken due to the uncertainties of achieving a success and the legal costs involved.
- Commoners do not take action against their neighbours unless the breach is having a significant impact on their individual enterprises. Manorial Courts provided a forum for dispute resolutions that took the decision out of the hands of the commoners.
- Agri-environment schemes on commons are between the association and Natural England. If Natural England does not monitor compliance and take action most associations will turn a blind eye to a breach as there is no benefit to forcing an issue particularly when sanctions, aside from the withholding of funds, are not enforceable.
- When Natural England do force compliance through withholding payments commoners associations can deliver compliance.
- If internal agreements between commoners are carefully drafted and sanctions built in it is easier for commoners to enforce sanctions.

Options for the future

1) **Commoners Associations improve internal agreements to make the action following compliance more effective.**

The central difficulty is enabling an isolated often tight knit community to take action against each other. The internal agreement for an agri-environment scheme needs to be clearly drafted so that there are easy penalties to enforce that do not require any subjective judgement. This was shown to work well in the Derwent Common agreement. It is almost a matter of pre-empting the breaches that are most likely and building in a scale of penalties in advance. As all members have signed up to them any person in breach was aware of the implications of his actions.

The administration of the agreement is another area for thought. The majority of agreements are run through associations which appoint officers who are invariably commoners. These officers may then delegate the administration to a land agent but they can only act on instructions from the officers. Another model is not to form a group but for the commoners as separate parties to an agreement to appoint an Independent Administrator who is empowered through a deed between the parties to take decisions in the event of reported breaches. In two cases where this has recently occurred the owner originally held the agreement but that was unacceptable to the commoners who also were at odds with each other. The decision making is therefore one step removed from the day to day management on the ground.

2) Ensure agreements encompass contiguous commons so there is a requirement to work together.

Several SSSIs comprise more than one common and may be abutted by other common land. An agreement on one common will not therefore be sufficient and a jigsaw puzzle needs to be completed bringing together all the pieces. Natural England has implemented such a scheme on the Helvellyn and Fairfield SSSI. In this case separate agreements were drawn up for each piece of the jigsaw. While an improvement in the ecological condition has been delivered in first five years it is hampered by the inability to achieve the desired stocking level on two of the seven pieces. An alternative approach would be to demand one agreement that covered all the land. This would be a much more complex agreement to negotiate but would force parties to work through their differences if an agreement was to be achieved. The risk is that one party refuses to co-operate and then no improvement in vegetation is achieved.

3) Clarify the law through test cases

An examination of the common law on remedies undertaken by Gadsden (1988) describes legal action that may be followed by individuals when legal rights are exceeded on common land. The reality is that with the exception of xxx case on supplementary feeding there have been no cases regarding the management of livestock on upland commons taken through the courts in the last 30 years whether using common law or the provisions of the various acts such as the Animals Act 1971 or the Commons Act 1908.

In many cases the legal routes have to be followed by the owner or the commoner but the benefit of the action is a public benefit, i.e. to achieve favourable conditions and not private benefit. Furthermore the potential benefit to the owners of resolving the situation is not usually of significant financial value to justify the risk of incurring legal costs for uncertain gains.

4) Natural England enforce their agreements and legal powers

Natural England can with justification withhold funds if the indicators of success of an agri-environment scheme are not met due to a persistent breach in the prescriptions of the scheme. Withholding is a very different matter to terminating a scheme or requiring repayments. Any such action makes Natural England unpopular but as the "bad guy" is not a commoner it does provide the association with an incentive to work together to find an agreement.

5) Establish statutory councils

The Commons Act 2006 enabled the establishment of Commons Councils on Common Land. These can have statutory powers over agricultural management, vegetation and rights of common, the constitution would be specific to each area requesting a Council. Importantly Councils could have the power to bind a minority of dissenters to enter and comply with management prescriptions

agreed by the majority. The method for imposing sanctions will need to be well thought through to ensure action is taken.

While the idea of Commons Councils is welcomed the practicalities and costs to establish and administer a council are currently off-putting. The majority of commons work well and they have yet to be convinced of the benefits. Those that do not operate well are often too dysfunctional to initiate such a scheme. It is hoped the pilot projects proposed by Natural England will provide reassurance and a practical demonstration.

Summary

The hypothesis is right in theory, unless individual commoners incur costs as a result of other commoners' non-compliance with rules it is difficult to encourage compliance. It is though flawed in practice as good agricultural management is not currently enforced as the current mechanisms are not fit for purpose so management remains dependant on goodwill and consensus.

Agri-environment schemes reduce agricultural productivity of a common in exchange for financial compensation but this very reduction in grazing pressure makes more grazing available. There is very little incentive for commoners to enforce an agreement unless it impacts on them personally. Successful delivery of favourable condition is it is concluded dependant on a well designed scheme, a clearly structured internal agreement and the effective monitoring and enforcement of the scheme by Natural England.

To deliver biodiversity on designated common land two relationships should be fostered.

- 1) An active relationship between the parties to the agreement; Natural England and the association / group
- 2) An effective contractual relationship (agreement) in place between the members of the association with enforceable sanctions.

In order for compliance to be enforced it is in the first instance the responsibility of Natural England to monitor the situation and provide warnings if necessary. If non-compliance is formally notified the association is then in a stronger position to address the matter for, as they have no means to enforce compliance they need the threat and in some cases the actual withdrawal of funds to address the issue.

Commons Councils offer a significant advantage in enabling a minority to be bound by the majority so could be a key part of the jigsaw in developing an effective management for some commons. They will though be of no significant benefit unless sanctions in the case of rules being breached are clear, an

independent arbitrator is available and the costs of taking enforcement action are proportionate to the likely success and value of the damages. In many cases other solutions will be more appropriate and cost-effective.

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