

Ancient Lands Cast Long Shadows. The case for reconnection with English Commons for sustainable management and use

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“to eat the grass with the mouths of his cattle or to take such other produce of the soil as he may be entitled to”
[from *Halsbury’s Laws of England*]²³

This paper attempts to bring into context historical and contemporary aspects of the institutional framework of English commons with particular reference to the upland grazing areas of the North and West which are of particular significance for sheep grazing. The context for a system based on ancient customary practice in the 21st century will be addressed together with proposals for modernising legislation based on statute. The contemporary response of commoners will be outlined with particular reference to Cumbria which embraces 30% of the English common land area. The principle characteristics discussed are relevant to England and Wales. Scotland has a different history and legal framework.

Introduction

Sustainable management of commons has been a concern of upland communities from time immemorial. The family has always been the unit of social unit of primary importance, followed closely by the community of commoners. Their relationship with each other and with the Lord of the manor came from recognition of the critical importance of neighbourliness and expressed itself through local custom, creating a sense of place and community of remarkable diversity.

“there is a law of neighbourhood which does not leave a man perfect master on his own ground” ... “ancient custom is always reckoned as law”. [Edmund Burke 1796]

Custom sits at the interface between the law and agrarian practice:- Carter in *Lex Custumaria* [1696] identifies four pillars namely antiquity, continuance certainty and reason.²⁴ The infinite local interactions between customary arrangements and the environment have played a vital role in creating the diversity and quality of landscape flora and fauna which are now formally recognised as public goods of high value.

The revival of interest in the English commons post World War 2 coincided with a regeneration of the sheep economy and the emergence of special interest groups concerned with conservation access and recreation.

In this context we can identify some of the core issues surrounding contemporary perceptions relating to common lands. *The framework of public perception and the grain of agricultural policy are critical in the development of an institutional framework.* The distribution of commons numerically is widespread but spatially the uplands of the N&W are of greater significance. The area of urban commons comprises about 10% in both England and Wales.

Distribution of Common Land in England and Wales

Britain is perhaps well described as the first industrial nation. The country is heavily urbanised yet has a higher % of land in agriculture than most EU States. The contemporary relevance of

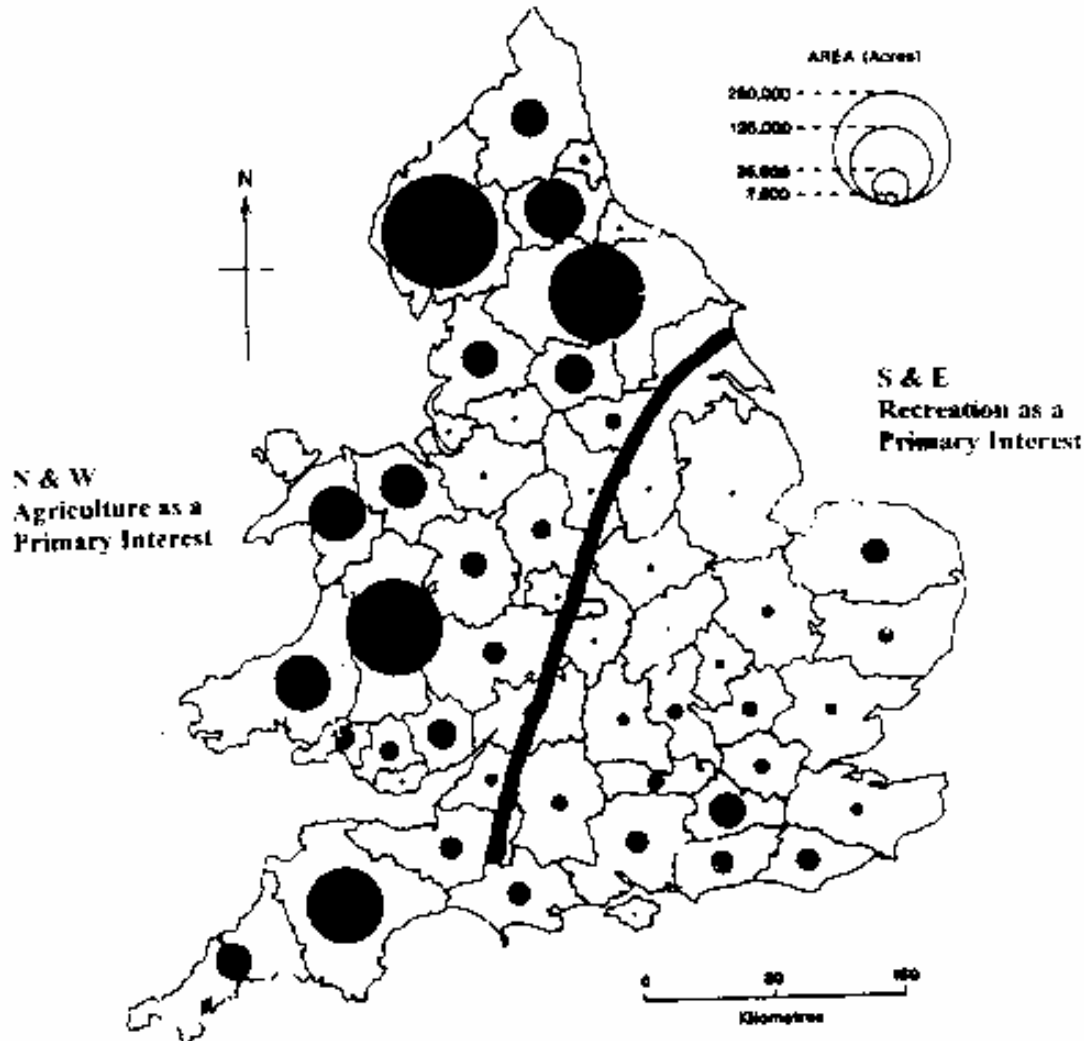
²³ Halsbury’s Laws of England Being a Complete Statement of the Whole Law of England [2nd edn.ed.Viscount Hailsham, 1932]

²⁴ Quoted in Thompson EP Customs in Common, Studies in Popular Culture, New York 1993, p97.

commons is characterised in terms of access, recreation and conservation. However whilst legal access to specific areas of common land began as early as 1593 in the metropolis and characterises the commons of the South and East, they comprise only 10% of the area.²⁵



TERRITORIAL DIVISION OF COMMONS



In the North and West upland agriculture remains a primary consideration, yet these areas are open spaces of inspirational value to walkers and others from urban centres that have little understanding of the commoners' needs and aspirations. The case for commons and commoners has not been made in modern times. Society perceives commons as peripheral to modern agrarian practice and that their functions are limited to recreation and conservation [presumably guided by some invisible hand] Suggestions that they retain important utilitarian values which provide the means to deliver a wider public agenda may seem anachronistic to many. The public value the outcome of commons management but do not recognise the process. The dynamics of change in policy and practice are reshaping what is meant by the term agriculture, embracing objectives

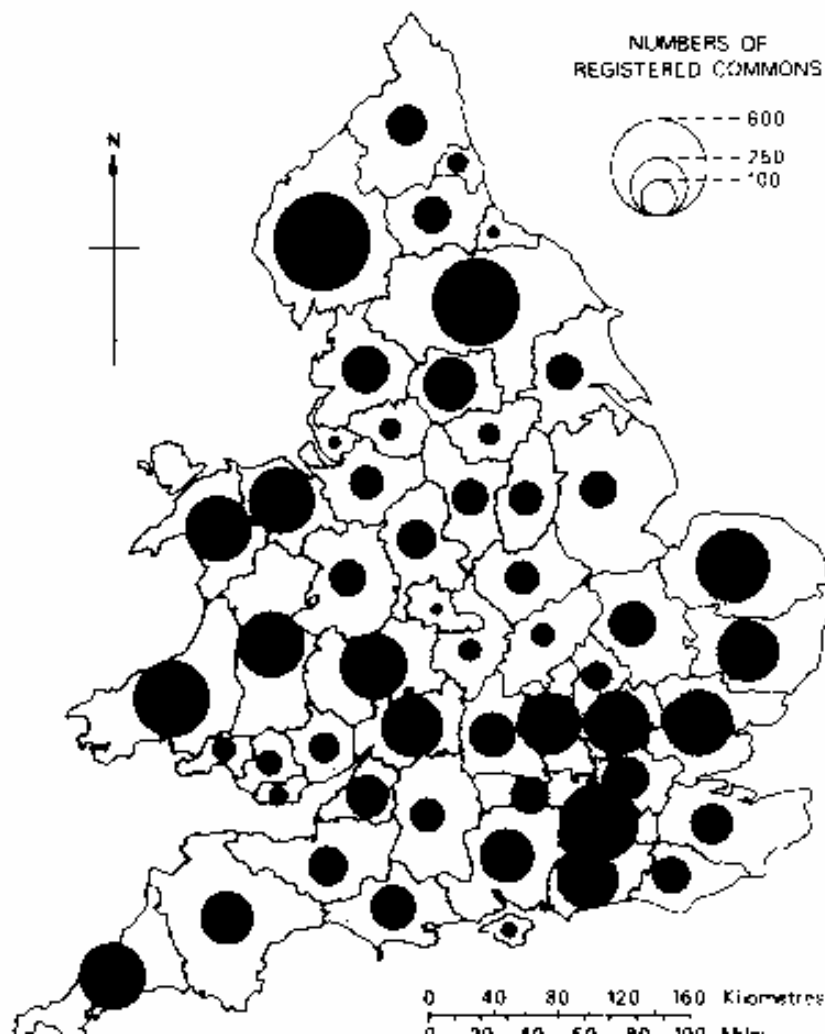
²⁵ Data from cmd.462 Royal Commission on Common Land 1955-1958, London 1958 pp 266-7.

which clearly aim to deliver a wide range of public benefits alongside a sustainable agrarian economy.²⁶

The clear difference between the relict commons of the South and East and the continuing economic and subtractive use for grazing in the N & W marks a clear differential which is not well understood in a society which is predominantly urban. EU policy is changing the primary objectives for agriculture to combine market and non market goods, arguably bringing the opportunity to recognise and foster the range of benefits that may arise from communally managed upland areas.

Commons in England are in danger of being seen as Open Access Resources rather than Common Property Regimes, by an urban majority which has become disconnected with rural culture.

Number of commons in each county



²⁶ See Defra [2002] England's Rural Future, [www.defra.gov.uk/corporate/pubcat/rural.htm].

The Context of Management for the 21st Century

Traditional management institutions in the main reflected a response to the needs of local communities including users and owners based on custom and practice. Today the significant differences include the emergence of external influences as strong considerations alongside local community needs. The impact of policy at National and EU levels and the proposals for modernisation through statute are key concerns of commoners in a dynamic change process. The potential for policy and legislation to further marginalise the community of commoners and their rights is a real risk unless mutual understanding is established.

Policy implications for English Commoners

The objectives for commoners must include sustainable economics alongside the biological sustainability of the resource. Within the EU framework of CAP the changes in the support system are critical.

The model of farming support and business structure illustrates the movement of funds from pillar 1 to pillar 2. For sheep farmers this means an opportunity and encouragement to optimise rather than maximise stock numbers; to emphasise husbandry rather than production; to seek to secure a share of income from the delivery of environmental goods. Adding value to the primary product and enhancing access and recreation may become specific aims rather than accidental or incidental by products of farming practice.

Such changes will also support the retention of more traditional breeds and systems of husbandry emphasising the diversity of cultural landscape and sense of place. In principle the policy change to a multi functional role will assist rather than damage common land systems since the ability to produce primary produce is limited, yet the capacity as an environmentally favoured area to deliver the public goods for which the market cannot pay is enhanced.

Key Legal Characteristics

Normally the ownership of the land is vested in the Lord of the Manor [or their legal descendant]. The owner in practice has entitled to the sporting timber and mineral rights and can allocate grazing surplus to the needs of the commoners.

The commoners have secure legal rights to defined benefits. These were many but today are largely confined to grazing but may include peat and stone for use but not for sale.

Issues of overgrazing pervade contemporary debate on sustainable upland management. Historically principles of sustainability were administered by the manorial courts and similar bodies.

Ohp rights

Rights could be subject to a quota based on the estimated grazing capacity of the area. Such commons are “stinted” [or rights in gross] but account for only about 20% of English commons.

The majority of rights were rights “*sans nombre*”: – without number. However this principle of unlimited rights could only be exercised for the number of stock that the farm could support in winter “*from its own resources*” following the principle of levancy and couchancy.²⁷ These rights were also inseparable from the land whereas rights in gross could be sold and separated from the dominant tenement.

²⁷ Gadsden GD. The Law of Commons, London 1998, pp 20-21.

The regulation was implemented in the manorial courts; the lowest and most devolved level of court with legal jurisdiction. Their function included the means of local discipline and sanction, a process undertaken by a jury of fellow commoners under the administration of the Steward of the Lord of the Manor.

Decline of the management framework

The development of county courts, the role of magistrates and the abolition of copyhold tenure in 1925 combined to effect the virtual disappearance of all but a minute number of the manorial courts. This effectively destroyed the capacity to implement discipline and created a complex of vulnerability.

The agricultural depression which more or less ran from 1878 to 1939 in practice limited the dangers of overuse. However the recovery of the sheep economy after World War Two, together with a growing consciousness of environmental fragility led to concerns being expressed by a variety of interests including farmers. Government in response established a Royal Commission [1955-1958] with a clear purpose “*to recommend what changes in the law if any are desirable to*

- Promote the benefit of those holding manorial rights
- The enjoyment of the public
- Where little or no use is currently made – to recommend other desirable purposes.

The outcome included a proposal to establish a database of facts about common land, its extent, location, ownership together with a register of right holders and their rights. This was to be followed by management legislation as a second stage.

In 1965 the Commons Registration Act came into being and unfortunately had serious defects; reflecting at least in part the failure of government to understand the culture of common land grazing. One of the more serious defects was a strict requirement that commoners should register specific numbers in spite of the fact that their rights in the main were “*sans nombre*” i.e. without number. Numbers were registered but with little evidence required apart from the land to which the rights related. In addition the registration authorities had no power to object to registrations which seemed inappropriate. The result was somewhat chaotic and in spite of 20 years work by the commons commissioners is still a major impediment to sustainable management since the confirmed register entry is secure as a legal entitlement even where it was inappropriate – few amendments are possible.

The recent situation has therefore been one in which

- Numbers registered may or may not have a reasonable relationship with sustainable use.
- The registers were constructed 30 years ago with no proper arrangements for updating.
- Little evidence was required
- The mechanisms for regulation and management are largely non existent or at best fragile and vulnerable to dissenting minorities.

Not surprisingly in many cases the EU based livestock support regime based on payments per sheep encouraged and pressured farmers to graze higher numbers with negative environmental consequences, and little capacity to bring discipline and sanction to bear.

What is required?

- Commoners need to be re empowered to enable them to be accountable for sustainable management
- Democratic decision making and the ability to bind a dissident minority are crucial,
- A proper relationship with the wider range of stakeholders
- Live registers to provide commoners associations with reliable data.

- Capacity to link grazing levels to sustainable use.
- Capacity to allocate grazing equitably
- Flexibility to apply local solutions under national guidelines.

Proposals for legislation

Following requests by farmers and a number of organisations and pressure groups, the intention to consult on legislation was announced at a common land conference organised by commoners in Cumbria in February 2000.

The consultation document was circulated to over 120 consultees of whom perhaps 10% were directly involved in agriculture. The proposals [20] included only on specific to agriculture and that was of minor significance. Views on other aspects of agricultural management were sought.

Commoners in Cumbria and elsewhere concerned that agricultural management issues were not at the centre of the proposals and that commoners themselves did not feature strongly in the consultations began to consider their situation. They argued the need to actively move the focus of the debate and to clearly differentiate between those holding secure legal rights to benefits and a range of third party interests, articulate persuasive and with a relevant agenda, but with insufficient focus on the underlying causes of the problem. The need to recognise that a study of the culture and history of commons could offer at least as much to the achievement of sustainable use as the expertise of biologists remains a central issue.

Progress towards legislation

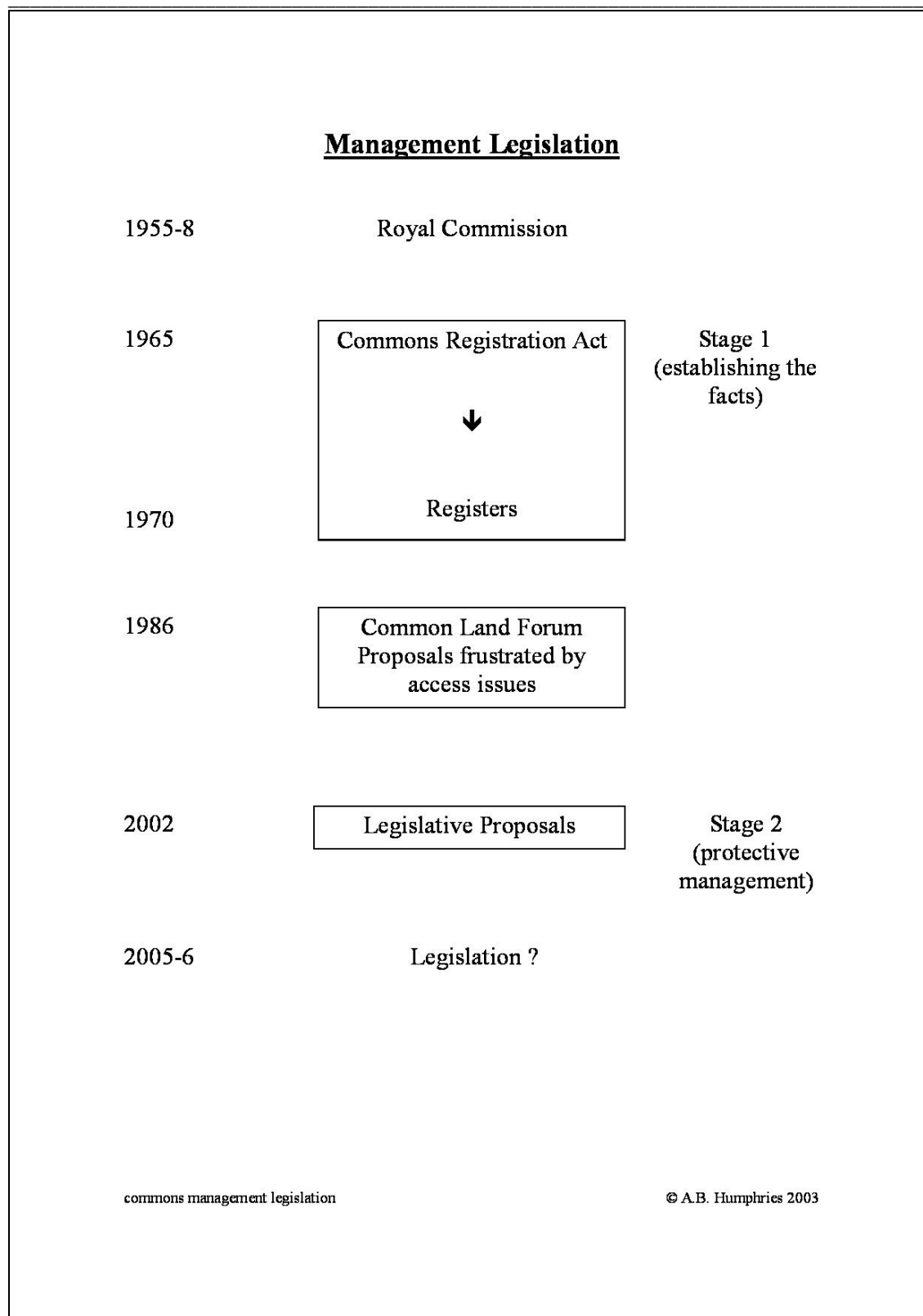
Government have made a commitment in principle to legislate, but no precise date has been declared and which is unlikely to be before 2005\6.

With respect to agricultural management and sustainable use there has been a special working group who have developed a set of recommendations with the Parliamentary Bill Team for government to consider and from which a final consultation paper will emerge in the near future.

Current arrangements reflect an uncoordinated approach to use by a range of interests. There is a clear need to restructure a management framework to reflect in principle the capacity previously integrated into manorial court proceedings to issue bye laws and to bind a dissenting minority.

General principles on Commoners Associations

- Commons vary in size and complexity - a flexible model therefore essential
- Establishing associations not too difficult – issues are really empowerment and accountability.
- New arrangements should not presume to prejudice existing ones which are successful.
- New or existing associations should be free to acquire statutory powers to resolve grazing and related issues.
- Any powers granted should be for the purpose of assuring sustainable agricultural management of the common
- The minority should not be able to frustrate the will of the majority but some protection for a sizeable or otherwise important minority needs to be secured.
- There should be balanced representation across all groups that would be directly affected by the introduction of new statutory powers.



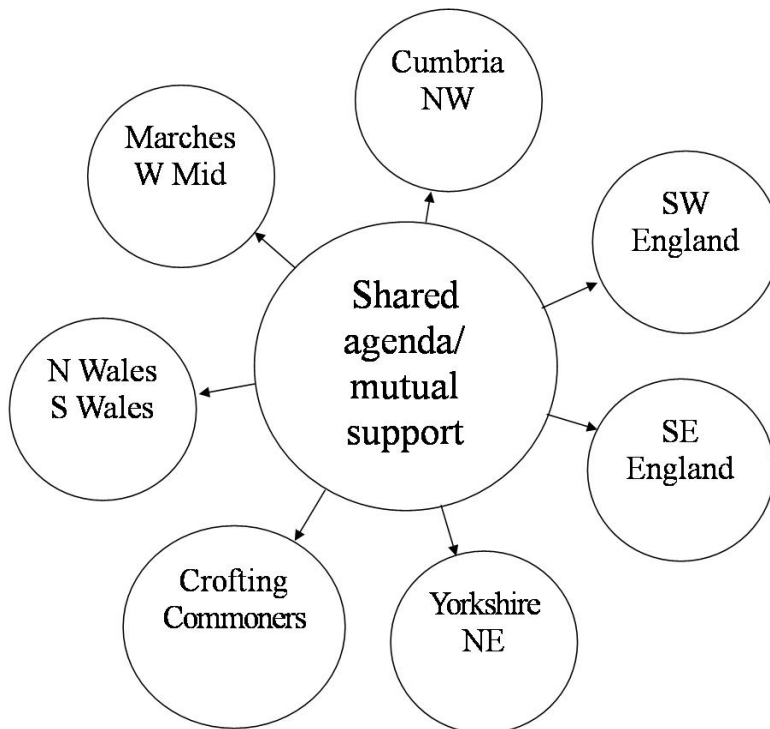
There are also recommendations for advisory bodies perhaps on a regional basis representing the wider public interest in commons. These would advise and consult with commoners associations and also advise government ministers on matters including the use of statutory powers by commoners and on other matters. There is also a recommendation in the report in respect of powers of last resort for the Secretary of state.

Commoners Federations

Commoners in recent times have frequently found themselves under pressure by a variety of Government and non Government organisations. As individual associations of small numbers of graziers perhaps typically 6 – 20 they feel somewhat vulnerable to the agendas of the more powerful and articulate pressure groups and organisations.

In Cumbria commoners and related interests began to think of ways in which Commoners could be supported and safeguarded in the radical adjustment which is affecting so many sectors of the farming community. The idea of a federation of Commoners Associations began to develop.

Medium to Long Term Strategy Options



Based on strong regional federations
Clear ownership by local commoners associations
Working locally, regionally as the main support function

Aims

To establish an organisation that will support graziers of common land in Cumbria, resulting in increased collaboration between graziers, more land managed in an environmentally positive manner and increased economic returns.

By establishing Federations rooted to the culture and practice of each area, local distinctiveness will be better conserved and local ownership established. The potential to link Federations to provide a network of mutual support can then be envisaged without removing the grassroots strength of individual regional Federations.

Commons are significant in the English uplands to a wide and increasing group of stakeholders. Their relevance to perceived public needs is growing. The mutual understanding necessary for sustainability to become a reality is critical and needs to focus on the capacity, empowerment and accountability of commoners as the key to progress. The degenerate state of the management framework, lack of accurate data and disregard for the cultural values and practice are a major issue in modernising this particular common property regime which has much to contribute to the achievement of multi functional land management on a remarkable resource in a highly urbanised society.