



Commons Toolkit

NE285

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Foreword

Readers of this Toolkit will benefit from the shared wisdom of the main authors, based on their many years practical experience of working on common land and with commoners.

Members of the team have also been closely involved in establishing collaborative arrangements to develop a community of common interest. The Foundation for Common Land, a national umbrella organisation, links several regional commons groups such as the Dartmoor Commons Council, the Federation of Cumbria Commoners and the New Forest Commoners Defence Association. The Foundation seeks to work with all interested parties and has produced a Charter for Common Land to establish a sustainable framework for “creating tomorrow’s commons heritage together”.

The Toolkit has been produced by the Foundation for Common Land and commissioned by Natural England, as part of their shared objective to improve decision making on common land. Although the primary information has been produced by the main authors, the Foundation has drawn on a national network of experts (see Acknowledgements) to check the accuracy of information provided.

‘When the world is changing very slowly you don’t need much information. But when change is rapid there is a premium on information to guide the processes of change.’

Lester Brown

Not only is change rapid, but the diversity within common land and its use is a measure of its value and a challenge to its understanding. The guidance and information in this Toolkit are intended to raise awareness of the complexity of common land and to provide guidance in progressing the stewardship of a resource of immense value and a future that has the potential to contribute much to commoners and the public good.

Andrew Humphries

Chairman

Foundation for Common Land

Short biographies of the team members are given below:

Julia Aglionby

Julia is a chartered surveyor and agricultural valuer specialising in common land. She heads the Environment Team at H&H Bowe in Carlisle advising commoners, owners of common land and government agencies on the management of common land and entry into environmental stewardship schemes. She is regularly consulted by Defra and Natural England and was a co-author of *Trends in Pastoral Commoning*. Julia is currently undertaking PhD research at Newcastle Law School comparing the governance of common land in Cumbria and Indonesia.

Andrew Humphries

Andrew is an agriculturalist with a career that embraces practical hill farming, education, extension and voluntary sector activities. In recent years he has worked with others to establish regional federated groups of commoners. As chairman of the Foundation for Common Land he is working to establish a community of common interest that embraces stakeholders and practitioners. Andrew has published work on common land and led the production of the DVD '*Common Interests*' as well as partaking in *Trends in Pastoral Commoning* and the preparation of leaflets on Commons Councils.

Fiona Southern

Fiona is a chartered surveyor based in Cumbria specialising in the management of cultural landscapes. She has a particular interest in the uplands and common land having worked for the National Trust on their Lake District estate for many years. Fiona has also assisted the Federation of Cumbria Commoners and worked on a number of common land environmental stewardship schemes. She was a researcher on the *Trends in Pastoral Commoning* project. Fiona now provides regular advice to the Heritage Lottery Fund on landscape schemes.

Introduction

This Toolkit is a practical guide for people who manage commons, hold rights of common or who work with commoners in England. It has been written for commons practitioners who are working for the first time on commons or who need additional guidance in understanding the diversity and complexity of common grazings. These may range from landowners and their agents to commoners, planners and staff members of the various NGOs with an interest in England's commons. The Toolkit includes a selection of 20 Fact Sheets and Guidance Notes on a wide range of subjects and aims to give the practitioner a good understanding of the basics.

The aim has been to be as practical as possible.

- The Fact Sheets explain how commons practice has evolved over the ages to raise awareness of potential issues and also to demonstrate how these have been tackled and resolved in recent best practice.
- The Guidance Notes include practical tips and checklists for the reader, based on the experiences of the authors.
- All the documents have references to further reading, useful websites and signposting to other organisations where appropriate.

There are nearly 400,000ha of common land in England and these include some of the most important environmental and cultural assets in the country. By definition, their management requires collaborative working, usually with many stakeholders and often balancing several conflicting objectives. This Toolkit has been produced to help inform and enable this to happen more effectively.

All the documents have been checked by external experts. However, the Toolkit is not intended as a legal reference manual but as a practical guide. The authors do not accept any liability for any factual errors or omissions and they remind the reader that the manual does not replace the need to obtain professional advice, especially in relation to legal issues.

May 2010

Glossary

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| Animals <i>ferae naturae</i> | feral, not domesticated |
| Appendant | attached to land by privilege of law [generally linked to land that was used for arable]. |
| Approvement | the right of the owner of the soil of a common to inclose any part of the common superfluous to the needs of all the commoners. |
| Appurtenant | attached to land by express or implied acts of the parties, usually granted by the owner of the soil 'appurtenant to a particular holding. |
| Award (Inclosure) | the final and binding document controlling statutory inclosure or regulation of any, but mainly common lands. The award usually includes details of allotments, boundaries, expenses, adjustment of rights etc. |
| CL number | every common in a county is given a unique "CL" reference number under the 1965 Act. |
| Common Land | generally [nowadays] manorial waste and other land over which common rights exist. |
| Commonable | appertaining to use in common. Commonable animals are those which a right holder may lawfully turn out on to a common. In the case of an appurtenant right the range may be prescribed in the grant. |
| Contiguous | where two or more commons adjoin but have no physical dividing boundary. |
| Copyhold | a form of customary tenure abolished in 1926 whereby the tenant held his tenement by copy of the manorial court roll, having exclusive possession of their land against the lord of the manor, though the fee simple was invested in the lord. |
| Custom | custom may be described as 'local law' as distinct from general common law and is the particular law of a locality or manor which has existed from time immemorial [technically predating the start of the reign of Richard 1 in 1189, because the statute of Westminster 1275 was in his reign]. Taken pragmatically as 'time out of mind', longer than anyone can remember. |
| De facto | something that exists but is not necessarily legally recognised. |

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| De jure | something that exists by legal right. |
| Demesne | the land of a manor retained by the lord for his own use. |
| Distrain | the lawful extra-judicial seizure of goods including animals. |
| Dominant tenement | the land to which the benefit of a right is attached. |
| Drafting of ewes | the annual removal of [usually] older ewes and bringing in replacements to maintain a regular age structure in the flock. |
| Enclosure | a field which has been fenced. |
| Encroachment | the unlawful enclosure of part of a common. |
| ELS | Entry Level Scheme (part of ES) |
| ES | Environmental Stewardship Scheme – a series of funding schemes, managed by Natural England to pay farmers, mainly for environmental benefits. |
| Estovers | a right to take tree loppings or gorse, furze, bushes, underwood, heather or fern for fuel to burn in the right holders house, to provide bedding for animals or for the repair of the house, farm buildings, fences and farm implements. Estovers is a term of French origin. The early English equivalent was bote, hence house bote, fire bote, hedge bote etc. |
| Forest | land subject to Forest Law under the jurisdiction of forest court which limited hunting and certain other benefits to exploitation by the Crown. |
| Feoffment | grant of land in fee, i.e. putting a person in possession. |
| Furze | gorse |
| Gate/Gait [Alt Leaze or leg] | a fixed number of animals entitled to graze over a common or stinted pasture. The entitlement may be cattle as in cattle gate [gait], beast or sheep. |
| Grip blocking | the blocking of open moorland drains usually on peat. These were put in to provide drier conditions for grazing and are now blocked to retain water for flora and fauna. |
| Half year land | land which is occupied, and cultivated in severalty for half of a year with grazing in common for the remainder. |
| Heaf [alt. heft] | the distinct part of a waste where a hefted flock is established |

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| Heafed flock [alt. hefted] | an upland flock settled on and acclimatised to a recognised part of common grazing by custom and practice. |
| HLS | Higher Level Stewardship Scheme (part of ES) |
| Inbye land | the enclosed land of an upland farm. |
| In gross | a right existing independently of attachment to land. |
| Inclosure | the extinguishment of common and other rights by legal process, by an inclosure award, coupled usually with enclosure of the land into fenced areas. |
| Lammas land | land cropped in severalty for hay and opened for grazing in common on Lammas Day, i.e. 1 st August. Foreshare rights are related giving a right to take the first cut of grass or graze up to lammas day. |
| Learing | see Hefting. |
| Leet | see Manorial Courts. |
| Levant and couchant | the limitation of numbers of grazing animals by the requirement that they must be maintained on the dominant tenement in winter. |
| Lord of the manor | one from whom customary tenants held their tenements and to whom free tenants rendered dues and obligations. |
| Manorial court | a private court of the lord of a manor. Formerly there were three such courts, the court baron for the freeholders of the manor, the customary court for customary tenants and the court leet exercising criminal jurisdiction. |
| Manorial waste | the unenclosed and uncultivated lands of a manor on which the freehold and customary tenants <i>might</i> have rights of common. Not all manorial waste was subject to common rights. |
| Mast | the fruit of the beech oak and chestnut when fallen as food for pigs etc. |
| Mirror rights, [alt split or dual] | an entry on a commons register that is identical to one on another commons register and allows for the rights to be used on both commons. |
| Pannage | a right of common to graze pigs on acorns and beech mast in a wood. |
| Pasturage | the right to use land as pasture. |
| Piscary | a right to fish. |

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| Prescription | acquisition of profits and easements by long usage. |
| Profit a prendre | a right to take some part of, the produce or wild animals on land belonging to another. |
| Quasi rights of common | an owner may pasture his own beasts on the common provided the rights of all the commoners have been satisfied. However he may claim other rights 'pari passu' with those of other commoners and claim the right to common grazing for the rest of his own land in the manor. Since in theory he cannot be a commoner on his own land such rights are described as quasi rights. Their status is still the subject of discussion. Some have been registered and confirmed under the 1965 Commons Registration Act and became final. Other owners did not register such rights since they were not held by grant. |
| Reeve | official responsible for administration. |
| Regulated common | land controlled by the Metropolitan Commons Act 1866, the Commons Act 1876, 1899 and 1908. |
| Regulated pasture | a pasture owned in undivided shares by the graziers, usually established by an inclosure award. The use is subject to a scheme of management by the stint holders, though the minerals generally belong to the lord of the manor. |
| Royal Forests | large areas set aside especially in Norman times as royal hunting grounds, subject to forest laws. The rights of commoners were reserved to tenants within the forest subject to limitations especially relating to deer. |
| RPA | Rural Payments Agency |
| Sans nombre | a right of common of pasturage not limited by numbers. This effectively disappeared from land covered by the 1965 Commons Registration Act which required specific numbers to be registered. |
| Severalty | exclusive tenure or ownership. |
| SDA | Severely Disadvantaged Area. A specific designation under the Less Favoured Areas Directive of an area of land with severe physical limitations in relation to agricultural production. Disadvantaged Area - a category with less severe natural disadvantages. |
| Shack | a right to graze in common after the harvest of an arable crop in a common field. |
| Sheepwalk | the distinct part of a waste where a hefted flock is established. |

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| Sole pasture | the right to take a sole profit of pasturage; usually on stinted pastures. |
| Smit marks | woolmarks in varying colours and forms to allow visual identification of sheep from a distance and an aid to shepherding. |
| Stint | stints denote the number and kinds of animals that an individual right holder may graze on a common or stinted pasture. |
| Tenements | land – the term usually refers to a farm holding which may be freehold or from a superior. |
| Turbary | a right of common to take peat or turf for use in the commoners house. |
| UELS | Upland Entry Level Scheme. |
| Undivided shares: | land owned collectively by a number of persons each of whom owns a distinct but unidentified portion of the whole. |
| Verderers | a judicial officer of Royal Forest with a particular role in respect of the 'vert' or greenery. Other officers may include Agisters who supervise the livestock grazing. Haywards dealt with fencing and supervising the common meadow though the office sometimes carries other responsibilities. The New Forest and Forest of Dean still retain elements of this management and in practice the Verderers may also supervise the grazing arrangements. |



Commons Toolkit

Fact Sheet 1

Background - Definitions and significance of common land

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- 1.1 Introduction
- 1.2 General definitions
- 1.3 Statutory definitions
- 1.4 Town and village greens
- 1.5 Extent and importance of common land
- 1.6 Statistics
- 1.7 Further information and signposting

Commons Toolkit Fact Sheet 1

Background - Definitions and significance of common land

1.1 Introduction

There is considerable confusion about the nature of common land and, in particular, its ownership and the rights that the general public have over it. Many think that it is owned by the Crown or the State and that the public have the right to use the land as they wish. The importance and extent of common land is also poorly understood. This Fact Sheet provides basic definitions and statistics that address these misconceptions.

1.2 General definitions

Common land is land owned by one or more persons over which another person is entitled to exercise rights of common in common with others.

A right of common is a right which one or more persons may have, to take or use some portion of the produce of another man's soil. These cover a wide range of produce.

- **Pasturage:** the right to graze, generally grass or natural vegetation such as heather and bilberry but can extend to mast, acorns and leaves of trees.
- **Pannage:** the right to graze pigs in woods.
- **Estover:** the right to take specific timber products such as whole trees or firewood.
- **Turbary:** the right to take turf or peat for burning as fuel.
- **Piscary:** the right to take fish from ponds, lakes, rivers and streams.
- **Rights in the soil:** the right to take part of the soil or minerals from the common, strictly limited to the needs of the property.
- **Animals ferae naturae:** the right to take wild animals.

In addition to the definitions above there are other categories of land that are often, but not exclusively, regarded as common land:

- **Land subject to sole rights or stinted pasture** - this is land where rights have been granted in their entirety to one or more individuals. There is no residue for the owner of the soil and so the rights are sole rights rather than rights in common. These rights are divided into equal shares known as stints or beastgates and allocated amongst the sole right holders.
- **Common fields or regulated pasture** – this occurs when the land is owned jointly but grazed or managed communally usually, because it would be uneconomic or impractical to fence each share. Each individual's right to graze is proportionate to the share of the land owned. Some regulated pastures are the result of Inclosure Awards.

Determining which of these categories a particular common falls into is not straightforward but the first reference should be the Commons Register held by the local authority.

1.3 Statutory definitions

Common land has been subject to numerous statutes over time, but despite this there is not a simple or uniform statutory definition of common land; for example, when 19th and 20th century statutes defined common land, it was often for a specific legal purpose (for enclosure, regulation, preservation or registration), and this purpose tended to determine the classes of lands involved.

The Commons Registration Act 1965 is often regarded as the first definitive statute, and when we talk of common land today, we often mean registered common land. It defines common land as land subject to rights of common and waste land (Fact Sheet 2 section 2.3) which is not subject to rights of common. Common rights were expressed to include sole rights. Certain common lands were exempted from the 1965 Act, and the registers include lands which might not have been considered common previously – for more information refer to Fact Sheet 4 Registration. The Commons Act 2006 does not redefine common land but applies to land regarded as common under the 1965 Act. Part 1 of the Act applies to all land in England other than Epping Forest and the New Forest, and is not taken to apply to the Forest of Dean.

1.4 Town and village greens

The distinction between town and village greens and common land is primarily a consequence of the Commons Registration Act 1965 which required that they be registered separately. Prior to this the distinctions were blurred. A green was usually a small area of land set aside for sports and pastimes for local people. Such land was invariably manorial waste although not necessarily common land.

1.5 Extent and importance of common land

Most common land is manorial waste land which is predominantly unimproved pasture not suitable for division or enclosure, such as steep hills or marsh land. Areas of upland common include Bodmin Moor, much of the Lake District and Dartmoor. The nature of the vegetation and topography, together with communal usage and the need for the consent of the landowner, has meant that very little common land has been agriculturally improved by reseeded or fertilising. As a consequence the English commons are a very significant reservoir of biodiversity and archaeological remains. In addition much common land has a history of public access, predominantly on foot, but also for horse riders and other recreational users. The unenclosed and unimproved nature of the upland commons is also reflected in a high correlation between common land and statutory landscape designations.

Although most surviving common land comprises upland grazing or hill pasture, there are large areas of lowland common in Surrey, Hampshire and Buckinghamshire. There are also numerous coastal common marshes and fens, examples being Burnham and Brancaster in Norfolk and Skinburness, Calvo and Burgh Marshes on the Solway. Woodland with common rights is also significant, with large areas in the New Forest and Epping Forest. Finally there are a considerable number of urban recreational commons, particularly in and around London such as Clapham, Wimbledon, Hampstead Heath and Blackheath. The Town Moor in the centre of Newcastle is also registered common.

Commons and the customary practices associated with them have considerable cultural significance. At a local level they have been an important resource for almost a millennium, providing grazing, fuel, building materials and fish and game. They remain a reservoir of

pastoral skills, knowledge and custom. The longevity of communal agricultural practices in areas such as the Lake District is a key component of the cultural landscape which is reflected in the Lake District World Heritage Site nomination bid. The unique and endangered nature of commons and commoning were the inspiration for many artists and writers, perhaps the most notable being William Wordsworth and John Clare. The latter, writing in Northamptonshire, addressed the concerns and preoccupations of the early 19th century commoner as the Inclosure movement gathered momentum.

1.6 Statistics

- **Extent and location:** just under 400,000 hectares of land in England is common which amounts to more than 3% of the total land area. There is common land in every county but there is a concentration in the upland areas of the north and west of the country. Almost one third of common land is in Cumbria and a further fifth in North Yorkshire. The size of commons varies hugely; 89 registered commons are over 1,000 hectares whereas over half of all registered common land units are less than one hectare in area. There are 7,039 registered units of common land in England although many of these will be contiguous and managed as one common.
- **Biodiversity:** almost 57% of registered common in England is designated a Site of Special Scientific Interest.
- **Archaeology:** 11% of all Scheduled Ancient Monuments are on common land. Commons also exhibit a very high density of unscheduled archaeological features on local authorities' sites and monuments records.
- **Access:** prior to 2000 there was a high level of access on most common land in England although a large element of this was de facto. (see Fact Sheet 13 and Glossary). Since the introduction of the Countryside and Rights of Way Act in 2000 there has been a statutory right of access on foot for everyone to almost all common land in England (see Fact Sheet 13 Access).
- **Landscape:** 30% of registered common land is within Areas of Outstanding Natural Beauty and 48% lies within National Parks.

1.6 Further information and signposting

- Defra Common Land Website www.defra.gov.uk/rural/protected/commonland/about.htm
- Paul Clayden, *Our Common Land: the law and history of common land and village greens* (Henley-on-Thames: Open Spaces Society, 2003).
- Report of the Royal Commission on Common Land 1955-1958 (Cmnd 462)
- G. D. Gadsden, *The Law of Commons* (London: Sweet & Maxwell, 1988).
- Angela Sydenham, *Commons and Village Greens: The New Law* (Corsham: Lime Legal, 2006).
- Association of Commons Registration Authorities for England and Wales Website: www.acraew.org.uk
- BBC In Our Time - The Enclosures of the 18th Centuries www.bbc.co.uk/programmes/boob1m9b
- John Clare, *Major Works* (Oxford World Classics 2008)

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Commons Toolkit Fact Sheet 2

Origins and history of common land

Contents

- 2.1 Introduction
- 2.2 Former extent
- 2.3 The Manorial system
- 2.4 Loss of commons
- 2.5 Protecting commons - Legislation 1866 to 1965
- 2.6 The National Trust Acts
- 2.7 Protecting commons - The Royal Commission Report 1958
- 2.8 Further information and signposting

Commons Toolkit Fact Sheet 2

Origins and history of common land

2.1 Introduction

This sheet provides a brief account of the origin of common land and the development of the custom and law associated with its management up to the enactment of the 1965 Common Registration Act. The strength of customary practice associated with common land and the fact that much of this custom was not enshrined in 20th century statute has resulted in a great deal of legal uncertainty and complexity in many areas of common land usage. This has been compounded by the fact that commons may fall under a number of statutes or, in some instances, none at all. By necessity this Fact Sheet provides only an introduction to what is a complex legal field.

2.2 Former extent

Almost 3% of the land in England today is common land (399,040ha) but this area was once much larger. At the onset of the Parliamentary Inclosure Movement in the mid 18th century somewhere in the region of 10% of all land was manorial waste subject to rights of common. 265,000 hectares of land were enclosed under the provisions of the Inclosure Act 1845 and as much again has ceased to be regarded as common land since 1870 when legislation began to be enacted to prevent further inclosure of commons.

2.3 The Manorial system

The Norman Conquest of 1066 brought with it a manorial system of land management which governed the relationship between the lord of the manor and various tenants. Common land and rights of common are a remnant of this system although there is no doubt that land would have been used in common prior to 1066. The standard customs adopted by manorial courts were absorbed into common law over a period of more than 800 years.

Under the manorial system a manor was held by a lord on a grant of the monarch. The manor was likely to have a home farm which would be cultivated and from which the lord took all produce; this was the demesne land. Around this land would be a system of further fields cultivated in strips by tenants of the lord and workers in the manor. After harvesting, these strips would be collectively grazed by all the tenants on a common basis.

In addition there was usually poorer quality land which would not be cultivated but would be grazed by people in the manor. This was known as the waste of the manor. These people also used the waste land to gather other essential resources such as peat, firewood, materials for house repairs, animal litter, or fish. The waste of the manor was owned by the Lord of the Manor and to this day common land may generally be taken to belong to the current Lord of the Manor or his legal descendant.

The manorial system was not in place throughout England, and the balance of demesne land, open fields and wastes varied depending on the region and type of landscape. The system of open field arable cultivation was less extensive in upland areas but these areas had great tracts of manorial waste.

There were also town commons where town corporations held extensive rights over large areas of the surrounding land. The Town Moor in Newcastle is a surviving example of such a common; here stints continue to be let to farmers from surrounding areas.

The village of Laxton in Nottinghamshire continues to operate a manorial farming system with three open fields divided into strips.

2.3.1 Manorial Courts

The system of sharing the use of land led, by necessity, to the development of rules or customs by which the commoners and landowner were expected to abide. In time, the increasingly standardised manorial custom was absorbed into common law. Under the manor court system a jury of local people maintained the customary rules, appointed officers and fined those who committed offences.

The majority of manor courts had disappeared or withdrawn from common land management by the end of the 19th century, though a small number of manor courts continue to operate today. On some commons, the loss of manor courts resulted in a lack of an effective management structure; on others, the vacuum was filled by new commoners' associations, management meetings, or boards of conservators (refer to Fact Sheet 12, Governance).

Much litigation associated with commons has dealt with attempts to establish areas of customary practice as legal rights. Some of these attempts have been successful, some not.

2.4 Loss of commons

2.4.1 Approvement - The Statutes of Merton (1235) and Westminster (1285)

The Statutes of Merton and Westminster enshrined the customary entitlement of the owners of the soil to any surplus grazing on their common land. Surplus meant grazing over and above that required to satisfy the commoners' rights. The Statute of Merton gave owners a right to "inclose" or "approve" such excess land. By the same token the Statute enshrined an obligation on common owners to provide land to enable commoners' rights to be exercised. Loss of common land through approvement was a steady process throughout medieval and later times although it gradually ceased with the introduction of legislation in the 19th century particularly the Law of Commons Amendment Act 1813 which required Secretary of State consent for further approvement. Consent would only be granted if it could be shown that the proposed approvement would be of benefit to the neighbourhood.

2.4.2 Loss by agreement

Much common land was lost by agreement between the owner and commoners during the era of agricultural improvement in the 18th and early 19th centuries.

2.4.3 Inclosure

The inclosure of land to enable increased agricultural productivity was greatly facilitated by a plethora (4,000) of individual inclosure acts which gave commoners only limited rights. There was also a series of national inclosure acts most notably the Inclosure Act 1845. This provided that the lord of the manor, commoners and tithe owner (where not the owner), of a common subject to inclosure would each receive a freehold parcel of land by way of compensation for the loss of right. In addition it required that commissioners considered setting aside an area of land for communal use such as recreation, the erection of a poor house or for wood fuel.

2.4.4 Stealth

Much common land has been lost by encroachment and illegal fencing subsequent to the introduction of legislation to prevent it. Considerable areas of waste land were never registered as common land in 1965 because rights over it were treated as leased rights rather than rights in common in perpetuity.

2.5 Protecting commons - Legislation 1866 to 1965

The second half of the 19th century saw an increasing political response to the ongoing inclosure of common land in England. The Commons Preservation Society (now known as the Open Spaces Society) was founded in 1865 to fight for the preservation of important recreational open space and heath around London and in 1866 the Metropolitan Commons Act was passed which prohibited the further inclosure of common land situated in the Metropolitan Police District. This restriction has been in place ever since and it is due to it that areas such as Wimbledon Common, Hampstead Heath and Blackheath remain free from obstruction and open to the public.

The Commons Acts of 1876 and 1899 changed the emphasis of common land legislation from inclosure to firstly, regulation of the existing use by the introduction of Boards of Conservators and local authority schemes of management and, secondly, the provision of public rights of access. These rights of access were technically to benefit those in the neighbourhood but due to the lack of any policing or enforcement they effectively became de facto rights of access for all.

The Law of Property Act 1925 contained two direct changes to common land law but also had significant indirect consequences for commons management. s.194 of the act made it unlawful to erect fencing or other works that would impede access to land subject to rights of common unless Secretary of State consent had been obtained whilst s.193 introduced a right of public access on many commons in and around urban areas. However, as a result of the abolition of copy hold tenancies, the act also led to the effective redundancy of manorial courts and, as a consequence, there was no formal mechanism for enforcing ownership rights and rights of common. The result was a gradual deterioration of the management of commons for the next forty years due to the difficulty of identifying the interests and parties involved.

2.6 The National Trust Acts

The National Trust Act 1907 was introduced primarily to make the organisation a statutory corporation. Its statutorily defined purposes included the maintenance and management of lands as open spaces or places of public resort. In addition s.29 of the act required that the Trust keep common land unenclosed and unbuilt upon as open spaces for recreation and enjoyment of the public. No specific or additional rights of access were granted to the public.

The Trust was required to resist any encroachment or enclosure. However, the 1971 National Trust Act extended the Trust's powers to carry out works on its land so that they were in line with the powers of other landowners. (Refer to Fact Sheet 11 and Guidance Note 11 on works).

The National Trust Acts only apply to commons where the Trust owns the land, not those where it has only rights of common.

2.7 Protecting commons - The Royal Commission Report 1958

The forty years after the introduction of the Law of Property Act 1925 saw continued loss of common land through encroachment and abandonment of rights, caused in part by the lack of an effective management structure, but also, by the agricultural depression of the early 20th century.

Simultaneously pressure for access to all common land was increasing and in 1955 a Royal Commission was established to consider whether the law needed to be changed in order to promote and balance the needs of the owner and commoners, and the enjoyment of the general public.

The Royal Commission reported in 1958 and recommended legislation to promote the registration, public access and management of commons. The first of these recommendations was partially enacted in the Commons Registration Act 1965 but the remaining two were not dealt with until the Countryside and Rights of Way Act 2000 and the Commons Act 2006 respectively.

2.8 Further information and signposting

- Paul Clayden, *Our Common Land: the law and history of common land and village greens* (Henley-on-Thames: Open Spaces Society, 2003).
- G. D. Gadsden, *The Law of Commons* (London: Sweet & Maxwell, 1988).
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- Angus J. L. Winchester, *The Harvest of the Hills: Rural Life in Northern England and the Scottish Borders, 1400-1700* (Edinburgh: Edinburgh University Press, 2000).
- Eleanor A. Straughton, *Common Grazing in the Northern English Uplands, 1800-1965: A History of National Policy and Local Practice with Special Attention to the Case of Cumbria* (Edwin Mellen Press Ltd, 2008)

Some useful common land websites:

- Malvern Hills Conservators: www.malvern hills.org.uk
- Newcastle Town Moor: www.freemenofnewcastle.com/themoor.html
- New Forest Verderers: www.verderers.org.uk/index.html
- Wimbledon & Putney Commons: www.wpcc.org.uk
- Laxton, Nottinghamshire www.laxtonnotts.org.uk/index.htm

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Commons Toolkit

Fact Sheet 3

Rights of common

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Commons Toolkit Fact Sheet 3

Rights of common

3.1 What is a right of common?

A **right of common** is a right which one or more persons may have to take or use some portion of the produce of another man's soil.

In legal terms, a right of common is a class of right known as a **profit a prendre** - this is a right to take from the land of another person some part of the soil or mineral under it, some of its natural produce or the wild animals upon it. The right to take water is excluded from a profit.

A profit may exist **in common** when the holder of it shares the benefit of the produce with the owner of the soil or as a **sole or several profit** where the owner of the soil is excluded entirely from the benefit. A sole right or profit can be granted to a number of persons and, where it is held by more than one person, the individual share is variously described as a stint, beast gate or cattlegate. There is nothing to prevent one person from holding more than one stint, either as a result of the original grant or by subsequent purchase. Sole rights are usually held in gross (see para 3.6.1.2), although there are some inclosure awards that allot sole rights appurtenant (see Glossary) to land.

A right of common is always "fee simple absolute in possession", i.e. it cannot be granted for a fixed term, although the Commons Act 2006 allows the owner of a right of common to lease it for up to 2 years (see 3.10).

As common rights were appendant or appurtenant to a holding the benefits had to support the tenants' farm; the produce could not be sold.

The following text explains the different types of rights and the implications of the legal system that has developed around them. **It is a complex area and you are advised to take professional legal advice if any aspects of your particular situation are unclear or ambiguous.**

3.2 Owners' rights

Where an owner grazes a common to use his share of the surplus grazing, the rights he exercises have the characteristic of a right of common (see also Fact Sheet 5 section 5.3). For example, there will be a need to limit the number of grazing animals according to the area available and an assumption that adjacent land owners will fence against the common. However, owners' rights are not true rights or profits and cannot be registered under the Commons Registration Act 1965 (see also Guidance Note 4 section 4.2.6).

3.3 Regulated pasture

Rights on a regulated pasture (Fact Sheet 1 para 1.2) are not a form of **profit a prendre** because they are not rights over land owned by another. It is also said that the rights of the stint holders on a regulated pasture are not rights of common for the purposes of the Commons Registration Act 1965, because stint holders are also landowners. However, many regulated pastures have been registered under the Commons Registration Act 1965 and it is essential to analyse the legislation and the award of the Inclosure Commissioner to see exactly what has been created.

3.4 Creation of rights

Historically rights could arise:

- by statute
- by grant by deed – the grantor of a **profit a prendre** must have had the necessary competence to grant the intended interest(s).
- by prescription – at common law a user of a **profit a prendre** for a sufficiently long period of time, exceeding 20 years, may have been able to make a claim.
- by operation of law in connection with appendant rights - where the lord of the manor created a new interest in land the owner of the land may also have been given appendant rights to pasture certain animals, for example animals necessary to plough the land granted to him.
- in the case of copyhold tenements, by custom – customary rights could be acquired by those exercising the rights and became enforceable against the lord of the manor and others. Eventually, customs became enforceable in the common law courts.

Today new rights can only be created by the owner of the land. However, the rights must be attached to land. Since 2006 it is no longer possible to create a new right of common by prescription (please refer to Guidance Note 4 Updating the registers, section 4.3.1).

3.5 Quantification of rights pre-1965

What are known as rights of common of pasture were usually appendant or appurtenant to other property, i.e. attached to other land.

The number of rights attached to a property has, by custom, been dependent more on the nature and extent of the land to which they are attached than the land over which they are exercised. This is the principle of **levancy and couchancy**: literally, the animals that can “get up and lie down” on the land to which the right is attached.

In practice this meant that rights of common would be restricted to the number of cattle or sheep that the farm or land to which the rights were attached could support during the winter months. It has not been established in law whether this relates to the capacity of the holding using modern farming techniques or the capacity of the farm at the time of the original grant. Gadsden in *The Law of Commons* (see Section 3.12) supports the view that it is the capacity of the holding at the time of the grant.

Some rights were described as **sans nombre** (without number). This was not interpreted by the courts as without limit but more usually as having the same meaning as levant and couchant. Rights sans nombre are now obsolete on those commons registered under the Commons Registration Act 1965, as that Act required all rights of grazing to be limited to a maximum number. However, rights sans nombre still persist in the New Forest.

Rights in gross are usually for a specified number of stock (see 3.6.1.2).

3.6 Classifying rights of common

There are two main ways of classifying rights of common, by legal category and by subject.

3.6.1 Legal category

3.6.1.1 Rights appendant and appurtenant: both are rights attached to a farm or other

land. Appendant rights arose by privilege of law on arable feoffments (see Glossary) prior to 1290 and are consequently very rare. Appurtenant rights are attached to land by express, implied or presumed grant. Appendant rights are always levant and couchant whereas appurtenant rights could and still can be for a fixed number of animals. The only practical difference between the two is that, prior to the Commons Act 2006, rights appurtenant could be severed from the land and sold separately.

The 1958 Royal Commission on common land recommended that, on registration, appendant rights should become appurtenant as the difference between the two had no practical significance. However, this recommendation was not enacted.

3.6.1.2 In gross

Rights in gross are not attached to land and can be sold separately. There used to be very few rights in gross on the commons registers but there was a growing trend in the late 20th century to convert rights appurtenant to rights in gross which only ended with the Commons Act 2006. (See section 3.10)

3.6.2 Subject

3.6.2.1 **Pasturage**: the most widespread right is the right to graze. This is generally grass or natural vegetation such as heather and bilberry but can also extend to mast, acorns and tree leaves. It does not imply any right to cut vegetation.

3.6.2.2 **Pannage**: the right to graze pigs in woods.

3.6.2.3 **Estover**: the right to take specific timber products such as whole trees or firewood. The purpose of the estover is usually specified. For example, an estover may be for entire trees required to repair a house or for timber which can be used to repair ploughs and carts. The right is always limited by the size of the original dwelling or land to which the right is attached.

3.6.2.4 **Turbary**: the right to take turf or peat for burning as fuel. This is again limited to the requirements of the original property to which it is attached.

3.6.2.5 **Piscary**: the right to take fish from ponds, lakes, rivers and streams with a limitation on the needs of the household.

3.6.2.6 **Rights in the soil**: the right to take part of the soil or minerals from the common, strictly limited to the needs of the property. For example, only the sand required to enable house repairs could be extracted.

3.6.2.7 **Animals ferae naturae**: the right to take wild animals. Commons Commissioners have concluded over the years that this is generally not a right of common. This is partly due to the difficulty of distinguishing such a profit from sporting rights that are exercised for enjoyment.

3.6.2.8 **Pur cause de vicinage**: this is the mutual right between holders of rights of pasturage on contiguous unenclosed commons not to be sued in trespass if, and when, their animals stray onto the adjacent common. Intercommonage is the same right between owners of divided shares in a common field.

3.7 Quantification of rights under the Commons Registration Act (CRA) 1965

The CRA 1965 required that all rights of common registered for grazing must be quantified. However, the Commons Commissioners gave little regard to the carrying capacity of the common land or appurtenant land when assessing applications. The consequence is that many commons now have many more rights registered on them than they have the capacity to carry. This has been exacerbated further by multiple registration of rights across adjacent commons (see 3.8).

3.8 Dual rights

At the time of registration, farmers were often unsure which common their rights should be registered on, especially where registered CL (see Glossary) units split areas that they had formerly regarded as one common. As a consequence there was a tendency to register their rights on more than one common. Some of these **dual rights** are recorded in such a way that it makes clear that the registration is to be read along side the dual registration on the other commons and that the rights can only be exercised once. Others make no reference to the dual reference and the registration is often ambiguous for how the rights should be exercised.

There is no definitive legal argument for the treatment of dual rights as it has not been tested legally. However, in calculating Single Farm Payments, Defra took a view as to how dual or split rights should be treated (please refer to Fact Sheet 8 on SPS on commons for details).

In brief, Defra's view was that if a right is available on both common A and common B, then the rights would be shown in full in each register with no reference to the other CL unit. Where the rights are shown in the register with a reference to another CL unit (e.g. entry on Common A shows a right to graze 30 sheep across Common A and the entry also states these rights are **also to be grazed on Common B** and Common B has the reciprocal entry) then this was taken to mean the total rights available should be split across all the CL units (i.e. commons A and B) in proportion to the areas of the commons.

3.9 Appointment

It was established practice under common law that, when the property to which appurtenant rights were attached was divided, through sale or gift, the rights would be apportioned pro rata. Prior to 1965, levancy and couchancy allowed for some deviation from this rule to reflect the quality of the land.

Following the quantification of appurtenant rights under the Commons Registration Act 1965, it was argued by some that, upon division, the rights could be apportioned as the vendor of the property to which they were attached wished and this happened in many instances. However, if the register is silent then pro rata apportionment will be applied.

The Commons Act 2006 (section 9) resolved the uncertainty arising from the 1965 Act and requires that common rights must be apportioned pro rata with effect from 29 June 2005. The apportionment cannot be recorded in the rights section of the register although vendors or purchasers can make a voluntary declaration of entitlement which will be recorded in a new column in the registers (please refer to Guidance Note 4 Updating the Registers section 4.5). Such a declaration has the benefit of keeping the register up to date rather than it simply being a record of a particular point in time.

3.10 Severance

As previously mentioned, the Commons Registration Act 1965 required that all registered grazing rights should be quantified. Previously, appurtenant rights were usually quantified on the common law principle of levancy and couchancy. The move to a fixed number of animals resulted in a view that appendant rights could be severed from the land to which they were attached and thereafter be held in gross. Prior to the 1965 Act the severance of unquantified rights from the land would have resulted in their extinguishment – they would simply have disappeared from the record and from practice.

This was a significant issue at the end of the 20th century when large numbers of rights were severed from the land to which they were attached and became tradeable. The legal arguments behind this view are complex and case law was limited until 2001 when, in **Bettison v Langton**, the House of Lords held that a right to pasture a fixed number of animals was severable from the land to which it was originally attached and that, upon severance, it became a right in gross.

The Dartmoor Commons Act 1985 introduced legislation that prevented the severance of rights of common on Dartmoor but it was not until 2006 that this became the law elsewhere in the country. The prohibition on severance under the Commons Act 2006 took effect from 28 June 2005. The Commons Act does permit the temporary severance of rights of common by way of a lease or licence, provided that an order has been made by the appropriate authority or it is in accordance with the rules of a commons council. The Commons (Severance of Rights) Order 2006 (SI 2145) allows for the temporary severance of rights:

- by leasing or licensing the rights of common on its own for a period of two years or less and
- by leasing or licensing all or part of the land, to which the right of common is attached, without the right of common.

The 2006 Act also allows the permanent severance of rights where:

- the right is transferred on its own to either Natural England or a commons council or
- the appropriate national authority makes an order authorising permanent severance.

3.11 Attachment

According to common law, a right of common held in gross could not be attached to land. The Commons Act 2006 (s. 10) enables the owner of such a right and the person entitled to occupy the land (if different) to apply to register the right as attached.

3.12 Further information and signposting

- For more information on severance and attachment under the 2006 Act see Guidance Note 4 on Updating the registers.
- Commons Act 2006 Explanatory Notes ISBN-0-10-562606-6
- Paul Clayden, *Our Common Land: the law and history of common land and village greens* (Henley-on-Thames: Open Spaces Society, 2003).
- G. D. Gadsden, *The Law of Commons* (London: Sweet & Maxwell, 1988).
- Angela Sydenham, *Commons and Village Greens: The New Law* (Corsham: Lime Legal, 2006).
- To view judgement in *Bettison v Langton* [2001] visit the Defra commons web site, court judgements section www.defra.gov.uk/rural/protected/commonland/court.htm



Commons Toolkit

Fact Sheet 4

Registration of common land
and rights of common

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Commons Toolkit Fact Sheet 4

Registration of common land and rights of common

4.1 Introduction

There are two key pieces of legislation that govern the registration of common land and the rights over it. These are the Commons Registration Act 1965 and the Commons Act 2006. This Fact Sheet aims to summarise the background to these and key elements of the registration process.

4.2 The Commons Registration Act 1965

The Commons Registration Act 1965 was a direct outcome of the Report of the Royal Commission into common land published in 1958. This recommended the introduction of legislation in three key areas:

- A register of all common land
- A general public right of access to commons
- Improved management of commons.

The Act delivered the first of these recommendations; it required that all common land and town or village greens should be registered, together with the rights exercisable over the land, and a record of its ownership.

There was a three year period during which all registration had to occur. Any land which was capable of being registered but which remained unregistered at the end of the three year period was deemed no longer to be common land. Similarly, rights of common which were not registered within the three year period were deemed to have been lost. By contrast, failure to register ownership of a common during the initial registration phase did not prejudice a person's title.

There were over 15,000 objections to registrations and these were handled by Commons Commissioners. There is a large volume of papers recording Commissioners' inquiries and decisions. These documents contain useful information about specific commons, and explain why certain entries were accepted or rejected. The information is available on the Association of Commons Registration Authorities website. (see 4.8)

The Commons Registration Act defines common land as "land subject to rights of common" whether these rights are exercisable at all times or only during limited periods. The definition also covers waste land of a manor which was not subject to rights of common.

The Act did not define waste land of a manor but it was subsequently interpreted by the Commons Commissioners and courts to mean open, uncultivated and unoccupied land that is:

- physically within a manor and
- either currently in the ownership of the lord of the manor or owned by him in the past.

The Act defines rights of common as including cattle gates or beast gates (see Glossary) and sole rights (refer FS1 section 1.2) but not rights held for a term of years or from year to year.

4.3 Common land exempted from the registration process

The New Forest and Epping Forest were exempted from the need to register and these areas had their own rights registers drawn up under other legislation. The Forest of Dean was also exempted. The presence or extent of grazing rights in the Forest of Dean is disputed.

It was also possible to apply to the Minister for an exemption order for land:

- regulated under the Commons Act 1876, the Commons Act 1899, the Metropolitan Commons Acts 1866 to 1898 or under local Act, and
- over which rights of common had not been exercised for at least thirty years, and
- of which the owner was known.

Twenty one exemption orders were made, including:

- the Links at Whitley Bay, North Tyneside
- Coleshill Common, Bucks, and
- Micklegate Stray, York.

The full list of exemption orders can be viewed at

www.defra.gov.uk/rural/documents/protected/common-land/cra1965-guidance.pdf

All exempted land was required to be marked on the register maps with a yellow transparent colour drawn inside the boundary of the land, together with the word “exempted”.

4.4 The Commons Act 2006

Part I of the Commons Act 2006 replaces the registration system enacted by the 1965 Act but it continues to use the registers prepared under that Act.

Its provisions apply to all land registered under the 1965 Act together with any other land registered under the provisions of the 2006 Act. It also applies to land exempted from the 1965 Act by way of an exemption order. However, it does not apply to the New Forest, Epping Forest or the Forest of Dean.

4.5 Registration authorities

The registration authorities in England are the London borough councils, metropolitan borough councils, county councils and district councils in areas without a county council. The registration authorities’ responsibilities are to compile, maintain and amend the commons registers, provide for inspection of the registers and relevant documents and to provide copies of the registers and documents when requested to do so. There is an Association of Commons Registration Authorities which has its own website www.acraew.org.uk/

4.6 Further information and signposting

Each unit of registered common land is given its own number which is prefixed by the letters ‘CL’. It will also have its own register sheets comprising three sections:

Part 1: the land section. This has two columns, the first gives a number for the entry and the date on which that entry was made. The second column describes the land (its name, acreage and parish in which it is located), reference to the register map (sheet number) and registration particulars (application number and name and address of applicant).

Part 2: the rights section. This sets out the nature and extent of the rights of common

registered over the land. There are currently five columns; the first two give the number and date of the entry and of the application respectively. The third column gives the name, address and legal capacity of the applicant, for example, tenant or owner. The fourth column provides details on the rights of common and the land over which they are exercisable (see paragraph 4.7 below for further information on the rights column). The fifth column provides details of the land to which the rights are attached; this will usually consist of a farm name, parish and Ordnance Survey field numbers or a supplemental map showing the boundaries of the dominant tenement. If rights are held in gross this will be stipulated in the fifth column. There may be a cross reference to an entry in another register unit or another entry in the same register.

The 2006 Act introduced provisions for voluntary declarations of entitlement, whereby new owners of a dominant tenement whose details are not recorded in the register can submit a declaration of their entitlement to the rights of common attached to the land to the Commons Registration Officer. These declarations will be recorded in a new sixth column, (refer to Guidance Note 4 Updating the registers, section 4.5). Note that declarations of entitlement can only be made in areas where Part 1 of the Act has commenced roll out, (refer to the Defra website for more information on the timing of the national roll out).

Part 3: the ownership section. This provides details of any registered owner(s) of the land unless title to the land has been registered with the Land Registry. If this has happened or happens then the entries in the ownership section should have been replaced with the relevant title number, and information about ownership must be obtained from the Land Registry. In some cases the register will not have been updated and a landowner will be recorded in the commons register even though the land has been registered at the Land Registry. The ownership section consists of four columns; the first two give the number and date of entry and application respectively. The third provides the name and address of the person registered as the owner and the fourth column gives particulars of the land to which the entry applies. There will frequently be a number of owners listed, their ownership appertaining to different areas of the common. Registration as the owner of a common is not conclusive evidence of ownership although the longer such ownership is unchallenged then the more difficult it would be to make an opposing claim.

Registers must be available to the public for inspection and copies and extracts may be taken. Official copies are admissible as evidence in court. A fee will usually be charged for the provision of copies. The 2006 Act allows for regulations to be made which will permit or require registration authorities to maintain all or part of their register in an electronic form. These provisions have not commenced at the time of publication (April 2010).

It should be recognised that registers are not current or live records. They record the situation at a given point in time, usually registration of the common although there are often more recent amendments. Their practical use in the management of rights is therefore limited. For example, rights are invariably shown as being attached to the farm or dwelling to which they were appurtenant at the time of registration. Since then the land may have been split and sold to different parties, or amalgamated, for purposes of management, with other land in the vicinity. The register is unlikely to record these subsequent transactions and, consequently, following the history of ownership of a right through a commons register can be very difficult. The intention of Part 1 of the Commons Act 2006 is to allow the registers to be brought up to date.

4.7 Interpretation of the registers

As explained in Fact Sheet 3 on Rights of common, the Commons Registration Act 1965 required that all rights of pasturage be quantified. Interpreting this quantification can be difficult and some explanations are provided below:

- An entry may refer to rights for a set number of sheep, cattle or horses/ ponies, but more usually it will stipulate this set number and followers, e.g. 850 ewes and followers. Followers being offspring. The age at which a follower ceases to be such is usually interpreted according to the custom and practice on the common. Occasionally the number of followers will be stipulated, e.g. 850 ewes and 380 followers.
- In some upland areas entries will be found which specify the number of ewes, the number of shearlings and the number of hogs, e.g. 40 ewes and 12 shearlings and 17 hogs.
- Some entries refer to a number of sheep and a number of cattle and a number of horses, e.g. 200 ewes with their followers and 20 cattle with their followers and 3 horses with their followers.
- Entries may provide that not all the stock listed may be grazed but that there is some transferability between the different categories, e.g. 300 ewes and followers or 30 cattle and followers or 40 horses and followers. In this case, the owner of the right could not graze sheep and cattle at the same time.
- A similar type of entry to that shown above indicates an equivalency between different types of stock, e.g. 300 ewes and followers or an equivalent number of cattle and followers or horses and followers where 10 sheep equal 1 cow. In such cases it is usual for the register to state the exchange rate between different stock types.
- An entry may refer to a specified number of beast gates or stints (see Glossary). The register will usually stipulate the number of cattle or sheep per stint (although technically it should not as number of animals comprising a stint would originally have been set on a year to year basis to reflect the conditions and available grazing).

The rights section will state the area of the registered land over which the rights of common can be exercised. However, it must be remembered that this is a record of management at the date of registration and it is highly likely that grazing areas or hefts (see Glossary) will have shifted considerably since the original registration. The area of the heaf is not a legal right but merely reflects custom and practice.

The Rights of Common Fact Sheet (FS3) refers to the issue of multiple registrations of the same rights, usually referred to as dual registration. This is where the same registration is duplicated across a number of commons. Some of these dual rights are recorded in such a way that it is clear that the registration is to be read along side the dual registration on the other common and that the rights can only be exercised once; others make no reference to the dual reference and more often the registration is ambiguous as to how the rights should be exercised. An example may be along the lines: "to graze 50 cattle, 50 ponies or 250 sheep over the whole of this register unit and register unit no's CL123, CL124 and CL125 as set out in those register units".

4.8 Further information and signposting

- Association of Commons Registration Authorities for England and Wales Website: www.acraew.org.uk/ (including Commons Commissioners' Decisions)
- Paul Clayden, *Our Common Land: the law and history of common land and village greens* (Henley-on-Thames: Open Spaces Society, 2003).
- Defra Guidance Document: *The Commons Registration Act 1965: how the commons registers were prepared* (January 2010) - available from the Defra website: www.defra.gov.uk/rural/documents/protected/common-land/cra1965-guidance.pdf
- G. D. Gadsden, *The Law of Commons* (London: Sweet & Maxwell, 1988).
- Angela Sydenham, *Commons and Village Greens: The New Law* (Corsham: Lime Legal, 2006).



Commons Toolkit Guidance Note 4

Updating the commons registers

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4.5 Declarations of entitlement

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Commons Toolkit Guidance Note 4

Updating the commons registers

4.1 Context

The Commons Registration Act 1965 provided for the registration of common land and rights of common. Its effect was to crystallise the position as at 1970 when the registration period closed. Due to the inability to amend or add entries once finalised, the commons registers contain many errors. The Commons Act 2006 rectifies this to some degree by allowing hitherto unregistered common land and rights to be registered and some errors to be corrected. This guidance note outlines the process for updating the commons registers. The guidance given here is very brief; **this is a complex area of the law and this note should not be used as a substitute for professional advice**. Defra also have detailed guidance notes available.

4.1.1 Implementation of the Commons Act 2006

The Commons Act 2006 received Royal Assent in July 2006. Not all sections of the Act came into force in 2006, with some sections coming into force in certain counties before others. Part 1 of the Act first came into force on 1 October 2008 in seven counties in England. Part of the implementation involves a transitional period during which certain amendments are possible. However, these are not allowed or are at the registration authority's discretion thereafter.

There are three main groups of amendments;

- Amending the register due to events occurring before Part 1 commenced
- Amending the register due to events occurring after Part 1 commenced
- Correcting errors in the registers

Tip: Check on DEFRA's website whether the Commons Act 2006 has commenced in your area.

This Guidance Note only applies to areas where Part 1 of the Commons Act 2006 is in force.

4.2 Historic events

Historic events are those that occurred before Part 1 commenced. Schedule 3 of the Commons Act 2006 is the primary legislation. Amendments to the register must be made during the transitional period, the dates of which vary from county to county as the 2006 Act is rolled out. Once the transitional period for these changes has closed applications will not be accepted except in exceptional situations. Applications can only be made by the owner of the common or the owner of the rights. Detailed guidance for applicants is given on DEFRA's website, as is the guidance for the registration authorities, and is useful to show the basis on which an application will be determined. All applications for the amendment of the registers during the transitional period are made on form CA14.

4.2.1 Creation

Applications to register common rights created between 2 January 1970 and the commencement of Part 1 through grant or prescription can be made. It is a grey area as to whether the registration of new rights on existing common land will be accepted. Where the rights are created on non-registered common land the land will be registered as common land as well.

4.2.2 Variation

Applications to vary an existing right of common can be made, e.g. to vary the type of stock or extent of land over which they can be grazed, but will only be accepted in limited circumstances. This is not an invitation to reopen the registers.

4.2.3 Apportionment

Where common rights were apportioned through the disposal of the dominant tenement (the land to which they are attached) to more than one party then the rights are apportioned pro-rata across the land unless severed prior to 28th June 2005.

TIP: The www.magic.gov.uk MAGIC web site can be used to calculate the areas of the dominant tenements and, from that, the split of common rights.

4.2.4 Transfer of rights in gross

The commons register is proof of ownership for commons rights held in gross. Any changes in ownership must be notified to the registration authority during the transitional period to validate ownership.

4.2.5 Severance

After the quantification of rights as a result of the 1965 Act and prior to the 28th June 2005 the severance of common rights from the land to which they were attached was legal. The register should therefore be updated to reflect any such transactions otherwise the default position that the rights are attached to the land and must be apportioned pro-rata will apply. Clear proof that the transaction took place prior to the 28 June 2005 and that severance was explicitly intended is required.

4.2.6 Surrender and extinguishment

Prior to the commencement of Part 1, common rights could be surrendered by express deed or extinguished when bought by the owner of the common land (you cannot have a common right on your own land). If this event took place but was not recorded in the register the commons register must be updated. If not the common right will be revived at the end of the transitional period once the register is deemed conclusive.

4.2.7 Statutory disposition

Compulsory purchase schemes can acquire common land which is then deregistered in exchange for the provision of additional common land. These two applications are usually handled together. Statutory dispositions can involve common land and common rights.

4.3 New events

4.3.1 Creation

New rights of common can be created after the commencement of Part 1 by express grant i.e. a legal deed, but not by prescription. The form itself will be the express grant. The rights must be attached to land (a dominant tenement) and with common rights for grazing Natural England must be consulted as to whether the creation is sustainable. The final decision rests with the registration authority who may take account of common rights that are not exercised and are unlikely to be so. Form CA1 is used for the application which can only be made by the owner of the common or the dominant tenement to which the rights will attach.

4.3.2 Variation

Existing rights of common can be varied as in 4.2.2. As in 4.3.1 evidence that the changes are sustainable when taking account of existing rights and other legal interests is required and Natural England are to be consulted.

4.3.3 Apportionment

Since 28 June 2005, when a dominant tenement is split e.g. through sale or inheritance, then the rights attached to it must also be split as explained in 4.2.3 above. It is not a requirement to register the apportionment of the common rights unless the application is in advance of registering surrender, variation or severance of common rights. Unquantified rights e.g. piscary, turbury or estovers cannot be apportioned otherwise the burden on the common would be increased and these usually remain attached to the house. When apportionment results in a fraction of rights that would result in less than one head of stock, e.g. 0.46 sheep, then the number is rounded down and the balance is, in effect, extinguished.

4.3.4 Transfer of rights in gross

Common rights in gross that are bought must be registered with the registration authority as the conveyance does not operate at law until such time as the register has been amended. Form CA6 is to be used for the application which must be made by registered owner or the transferee.

4.3.5 Severance and transfer

Straightforward severance is prohibited under the 2006 Act but there are certain circumstances when it is possible:

- i Where the rights are to be transferred to a Commons Council
- ii Where the rights are to be transferred to Natural England
- iii Where severance takes place when a local order under Schedule 1 is in force

In case ii Natural England must have notified interested parties including local associations and have the consent of any commons council, or equivalent body, before the severance can take place. The consent of the owner of the common is also required. Once agreed a registration of apportionment may be required before the severance can be registered.

4.3.6 Surrender and extinguishment

As in 4.2.6 common rights can be surrendered and extinguished but the difference is that common law is no longer valid. For common rights to be extinguished through surrender, unity of ownership, abandonment or conversion of the dominant tenement, an application in a prescribed form is required under s13 of the 2006 Act. The model form is CA7.

4.3.7 Statutory disposition

The deregistration of land as a result of compulsory purchase is discussed above under 4.2.7. Under section 14 it is compulsory for the deregistration and cessation of rights to be notified in the prescribed form to the registration authority and they do not take effect until the requisite amendments to the register have been completed. The registration authority is under an obligation to process the application in good time so not as to delay the works. If any exchange land needs to be registered as common land that must be completed at the same time.

4.3.8 Attachment

The 2006 Act enables rights in gross to be attached to a dominant tenement on the application of the owner of the rights and the authorised user of the land. This is possible for rights that have always been held in gross or have at some point been severed.

4.3.9 Re-allocation

If part of a dominant tenement is in non-agricultural use or has planning permission for non-agricultural use, an application to make a non pro-rata apportionment can be made. This in effect concentrates the common rights on part of the dominant tenement. The application must be made while both parts of the dominant tenements are in the same ownership. The area which is to be divested of common rights must be in non-agricultural use or have planning permission for non-agricultural use.

4.3.10 Deregistration and exchange

An owner of common land may apply for part of a common to be deregistered under s16 and 17 of the 2006 Act. If the area is more than 200m² exchange land must be provided.

4.4 Errors on the register

Schedule 2 of the 2006 Act provides for the circumstances when errors on the commons register can be corrected.

4.4.1 Registration of statutory common land

Some common land created by statute was not registered prior to 2 January 1970 and therefore falls out with the 1965 Act and is not on the registers. Schedule 2 makes provision for this to be registered.

4.4.2 Re-registration of waste land of a manor

While applications for the registration of common land were being processed in the 1970s, some provisionally registered applications were cancelled or withdrawn as a result of the ruling in the **Box Hill**¹ case which was subsequently overturned. The 2006 Act gives an opportunity for these cases to be reconsidered. The decision will depend on the facts at the time of reapplication not the position when the application was withdrawn. To be reconsidered the land must have been provisionally registered and falls within sub-para. 4(3), 4(4) or 4(5) of Schedule 2 to the 2006 Act. All applications will be passed to the Planning Inspectorate for an impartial decision. A web site giving information on land that might be registered under this provision exists at www.commonregistrations.org.uk. Any rights of common over that land that existed prior to 1970 will no longer exist as they were not registered by the final deadline for such registrations.

¹ Box Parish Council v Lacy 1979

4.4.3 Deregistration of buildings

Due to the inaccuracies of the maps submitted during the registration process many buildings and dwellings were incorrectly included in common land units. Where the building and its curtilage was in existence at the date of the original provisional registration and the land has remained covered by the building and/or its curtilage (e.g. garden) for the whole period then an application to amend the commons register and map may be made. An application is made using form CA13 and will be referred to the Planning Inspectorate for an impartial decision.

4.4.4 Deregistration of land wrongly registered

In addition to buildings some land was wrongly registered and if evidence can be presented to demonstrate the land never was common land, waste of a manor or a town or village green then an application for deregistration can be made as long as any provisional application was not referred to a Commons Commissioner and the land is not a regulated pasture. Form CA13 is used for the application and the applications and proposals are determined by the Planning Inspectorate (PINS).

4.5 Declarations of entitlement

Except in the case of rights in gross the commons register is not a register of who owns the rights but of the common rights themselves and who applied to have them registered. This has resulted in column 3 of the register becoming increasingly out of date as time passes and rights have changed hands. In order for the registers to be a useful working document as to who can use the common rights an additional column can now be completed, a declaration of entitlement under reg 44 on the prescribed form.

It is not compulsory to submit a declaration but if it is not completed and column 3 is out of date then the person entitled to use the right forfeits the right to automatic consultation on various matters including changes in the register, voting on commons council, works on commons and entry into agri-environment schemes. In applying for a declaration of entitlement the applicant will have to provide evidence of the number of rights they are entitled to and evidence of the ownership or leasehold of the dominant tenement. If title is not registered at the Land Registry then an epitome of title is acceptable. No declaration is required for common rights in gross as column 3 is proof of ownership.

4.6 Corrections

Under s19 of the 2006 Act some errors in the register can be corrected so making the register more accurate. This is particularly aimed at errors made by the registration authority. If the error in a map or quantification of the rights was made by the applicant then it cannot be corrected except perhaps under Schedule 2.

Some errors that can be corrected are where:

- a duplicate entry was made and accepted e.g. by a landlord and a tenant
- the dominant tenement was incorrectly described
- the boundaries of the common have changed due to the movement of a river
- updating the name of person holding a right in gross.

Application is made on form CA10 with evidence of how the error occurred.

4.7 Further information and signposting

Defra's common land web pages, where various guidance documents are located, can be found at: www.defra.gov.uk/rural/protected/commonland/registration.htm

The Planning Inspectorate also offers significant guidance - see www.planning-inspectorate.gov.uk/pins/index.htm

The registration authority, which is usually the County Council, can provide further local information. Forms are usually customised by the authority and are often available from their respective websites. Some applications are free but most must be accompanied with a fee which is set and published by the commons registration authority.

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Commons Toolkit Fact Sheet 5

Ownership of commons

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Commons Toolkit Fact Sheet 5

Ownership of commons

5.1 Introduction

This Fact Sheet covers various aspects of ownership, not only clarifying the rights, obligations and limitations of the landowner but also indicating what happens if there is residual grazing, how quasi Rights of Common are handled and issues around confused ownership or deregistration of common land.

From a public point of view, there is some confusion over ownership of common land with a widely held view that “common” means that everyone (or no one) owns it. In reality the ownership of a common usually lies with the Lord of the Manor or his legal descendant.

5.2 Landowners’ rights, obligations and limitations

Traditionally, most commons were owned by the lord of the manor but increasingly today ownership of commons is vested in institutions, charities, corporations and trusts as well as private individuals.

The owner of a common has a right to use the land and take any of its products provided that he leaves sufficient to satisfy what has been granted away – as a right of common – and provided that he does not use the land unnecessarily or wantonly.

The main rights of a landowner of a common are outlined below:

Rights in the soil or mineral rights - the landowner may take gravel, loam, turf, coal and stone from the land provided that his actions do not infringe upon the commoners rights. For example, the owner may have traditionally quarried a small area for stone which had no impact on the graziers of the common. However, a planning application to commercially quarry the site or dramatically increase the size of the quarry could restrict the grazing area to the point that the rights of common could not be fully exercised.

Timber and woodland - the owner has a right to plant trees provided that he does not infringe the rights of the commoner. There must be sufficient grazing (or other products) remaining after the planting to satisfy the rights of common. Likewise, the owner has the right to cut down trees and take timber provided that any rights of estover (to cut wood, gorse or furze for domestic fuel) can be satisfied by what remains. In practice, the owner is likely to need to protect new planting by fencing against stock or deer and this will require Secretary of State consent under s.38 of the Commons Act 2006. (refer to Fact Sheet 11 Works on Commons). The granting of permission to fence does not in any way affect the status of the land which has been enclosed as common, and this remains subject to rights of common. A commoner retains his right to exercise these rights and could theoretically create an opening in the fence to allow his stock to enter the enclosure, although this might raise legal questions about a commoner’s right to graze a particular part of a common and whether a landlord’s surplus exists. Consequently, it is essential that the owner works with right holders and obtains their agreement to the scheme.

Sporting rights - the right to take game and ground game lies with the owner of the soil although it is possible for rights in common to take game (known as animals *ferae naturae*) to have been granted. Exercise of the owner's right must not interfere with a commoner's right to take game or any other right of common. The landowner's right to game can be assigned or leased and, in some areas of the country with large heather grouse moors, is a very valuable asset. In such areas, the objectives of the graziers and owner of the sporting rights may be in direct opposition and can be a major cause of conflict.

In addition to the legal obligations associated with the land itself, institutional common land owners, such as trusts, charities or local councils, are often governed by specific statutes or covenants which further define their interests and responsibilities in the land.

5.3 Grazing – the landowner's residual right to graze

The landowner has the right to any surplus grazing left after commoners have exercised their rights, reflecting the fact that common land is land where rights are shared by the owner and the commoners.

It has been established that an owner can use or let any surplus grazing. Traditionally this would have been done by a seasonal grazing licence as the surplus could only be calculated on a year-to-year basis. However, the quantification of rights under the Common Registration Act 1965 provided the opportunity for more precise calculation of the surplus grazing, which, together with the permanent surplus on some commons due to abandonment, has led to an increasing tendency to grant rights of grazing for fixed **periods**.

In contrast, the over registration of rights on some upland commons in 1965, when the carrying capacity of the common and the land to which they were attached was not properly assessed, has led to a complete lack of surplus on some commons.

Defra have allowed landowners and tenants, to claim Single Farm Payment on the surplus grazing on a common. See Fact Sheet 8 Single Payment Scheme on Commons.

5.4 Quasi rights of common

In many cases, the owner of the common also owns land near the common which have rights of grazing on the common. Legally these rights of common are not separate rights as you cannot have rights of common over your own land. That said, many of these rights of common were registered by the owners of common or by their tenants and the majority were finalised due to lack of objections to the registers. These rights are often called quasi rights but, once finalised, are recognised as full common rights.

5.5 Tracing ownership of commons

It is usually possible to ascertain the owner of a common by referring either to section 1, the ownership section in the Commons Register or the Land Registry.

If neither of these sources can provide details of ownership, it might still be possible to trace the owner through other sources. For more information on tracing ownership refer to Guidance Note 5 Tracing ownership.

5.6 Registration and exchange of common land

The Commons Act 2006 introduced new provisions for the deregistration and exchange of common land. Previously the appropriate mechanism for this was under the Inclosure Act 1845. The new legislation allows the owner of common land to apply to the Secretary of State for it to be released from registration. If this “release land” is more than 200 square metres in area, the applicant must provide land in exchange – “replacement land”. If less than 200 square metres, this is not necessary although may prove beneficial to the application.

The replacement land must not be registered as common or town or village green. In deciding whether to allow the exchange regard will be given to the interests of people having rights in or over, or occupying the release land, especially the commoners, the interests of the neighbourhood and the public interest.

If approved, the land will be released from the register and rights over it extinguished. The replacement land will be registered and, in most cases, the extinguished rights will be transferred to it.

5.7 Further information and signposting

For more information on severance and attachment under the 2006 Act see Guidance Note 4 on Updating the registers.

- Commons Act 2006 Explanatory Notes ISBN-0-10-562606-6
- Paul Clayden, *Our Common Land: the law and history of common land and village greens* (Henley-on-Thames: Open Spaces Society, 2003).
- G. D. Gadsden, *The Law of Commons* (London: Sweet & Maxwell, 1988).
- Angela Sydenham, *Commons and Village Greens: The New Law* (Corsham: Lime Legal, 2006).
- Defra Common Land Website: www.defra.gov.uk/rural/protected/commonland/index.htm
- Association of Commons Registration Authorities for England and Wales Website: www.acraew.org.uk



Commons Toolkit Guidance Note 5

Tracing ownership and managing
commons with unknown ownership

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Commons Toolkit Guidance Note 5

Tracing ownership and managing commons with unknown ownership

5.1 Context

Following registration of common land under the Commons Registration Act 1965, approximately 4,500 hectares of common are registered without an identified owner. This presents significant issues for management of commons. This guidance note considers the methods of addressing the management of un-owned commons.

5.2 Background

The Commons Registration Act 1965 made provision for “unclaimed” town and village greens to be vested in the local authority. It did not make a similar provision for other common land but only allowed for a local authority to take steps for the protection of unclaimed common land in its area against unlawful interference.

The Act did not impose a duty on local authorities and consequently much unclaimed land remained in a state of limbo and under constant threat of encroachment and mismanagement.

The 1965 Act did provide that unclaimed common land could “be vested as Parliament may hereafter determine” and it was anticipated that the Commons Act 2006 would legislate for this statutory vesting. However, this did not happen and the 2006 Act allowed, in s.45, for a continuation of the position post-1965.

5.3 Before you start – a checklist for tracing ownership

- Check the ownership section of the commons registry
- Check the national Land Registry
- Make enquiries locally – large estates, local history societies, archives at the local records office, commons associations, manor courts.

5.4 Management options when ownership remains unknown

There are a number of options that can be explored for improving the management of commons where ownership cannot be traced or proven:

- Commons Act 1899: This act enabled district councils, and subsequently National Park Authorities, to manage and improve commons in the public interest. This was done by adopting a scheme in a prescribed form for which Secretary of State approval was not required. The scheme could be vetoed by the owner (if subsequently identified) or by persons representing one third in value of the interests of the commoners. It enabled the local authority to make bylaws and to delegate management to a local council such as a parish council. This delegated management option is still available and was amended by the 2006 Commons Act which provided an expanded definition of the public interest to include nature conservation, the conservation of the landscape, the protection of access rights and the protection of archaeology.

- **Open Spaces Act 1906:** The Open Spaces Act 1906 enabled local authorities to acquire open spaces in their district in order to undertake the care and management of them for the enjoyment of the public. The land thus acquired is meant to be unoccupied and the process is consequently of more relevance to abandoned commons. Nonetheless it has been applied to commons with active graziers.
- **Local Government Acts:** It is possible to spend local authority funds on the promotion of the well being of an area. Areas of common offering scope for recreation and access would lend themselves to this requirement.
- **Limitation Act 1980:** A local authority might be able to claim adverse possession under the Limitation Act 1980. However, evidence of positive management throughout a 12 year period would be required and consequently this is unlikely to result in the transfer of much land into local authority ownership.

5.5 Unknown ownership and agri-environment agreements

Natural England requires the consent and signature of the owner(s) when entering common land into agri-environment agreements. However, if it can be shown by the applicants that the owner is not known and that reasonable efforts have been made to determine ownership then they will allow common land to enter an agreement without the signature of the landowner.

5.6 Further information and signposting

- Association of Commons Registration Authorities www.acraew.org.uk/
- UK Land Registry www.landsearch.net/landregistry



Commons Toolkit Fact Sheet 6

Agricultural activity on commons

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Commons Toolkit Fact Sheet 6

Agricultural activity on commons

6.1 Introduction

This Fact Sheet provides an introduction to agricultural activities on commons and is intended as a starting point for professionals to whom the peculiarities of farming on common land are unfamiliar. It also clarifies the legal position of the most frequently practised ancillary agricultural activities on common land such as vehicular use, supplementary feeding and burning.

It should be read alongside two Guidance Notes in the Commons Toolkit: Guidance Note 9 Negotiating management on common land and Guidance Note 10 on Agri-environment schemes.

6.2 Agricultural calendar

This calendar provides a general guide to the sheep farming year on common land in the uplands. Please note that seasons rather than months have been used to reflect climatic variations between the south and north of England.

- Mid autumn – ewes are gathered in off the common and held in fields near to the farm, or on the lower slopes of the common, with the rams for mating.
- Early winter – ewes are turned back onto the common where they will stay until lambing unless brought in for scanning (pregnancy diagnosis) when ewes carrying twins will be kept on the lower ground.
- Mid spring – ewes are brought in from the common for lambing.
- Late spring – ewes with single lambs are returned to the common.
- Mid summer – the common will be gathered and all ewes sheared. All ewes and lambs, probably including twin lambs, will be put back onto the common.
- Late summer – lambs are weaned and all sheep are dipped. Younger ewes will be returned to the common, older ewes “drafted” and either sold or mated with a ram of a different breed in the autumn and kept in fields off the common.
- Early autumn – male lambs (normally castrated and referred to as ‘wethers’) are sold as stores or fattened on the farm. This is the traditional season for ram sales.
- Mid autumn – female lambs are sent away to lower ground for the winter.

Commons are also grazed by cattle and ponies but the pattern of their use tends to vary from farm to farm and area to area, being governed more by the needs of the home farm than the common itself.

6.3 Hefting or learing

These are the terms used to describe the settling and acclimatising of a flock of sheep to a particular part of a common. Hefting or learing is most frequent on commons in the upland areas of northern and southwest England.

The way in which sheep become hefted is complex but probably results from a combination of factors including:

- Grazing livestock have a natural tendency to stay together, especially in family groups.
- Lambs learning from their mothers which area of the common they graze when they are turned back onto it after lambing
- Hefted flocks being bred on the farm from generation to generation, possibly creating a genetic disposition to hefting. Sheep from another area will usually only be introduced onto a common to form, or become part of, an existing hefted flock, if there has been disease or another problem with the earlier flock, or grazing is being reintroduced.
- Farmers will shepherd their flock to graze within the area traditionally regarded as the heft of their farm, often bordered by physical features such as ridges and streams. Farmers will also gather the sheep back to the farm the same way every time; part of hefting is knowing the way home.
- The pressure of sheep grazing contiguous areas at similar stocking density will hold adjacent flocks to their heft.

It is important to understand the importance of hefting/learning to the management of a common, and the impact of different actions on the equilibrium of the hefted flocks.

For example, significant stock reductions on one area of a common - resulting in a marked difference in stocking density across the common - is likely to result in a movement of hefts as sheep naturally move into areas of lower stock density with better vegetation. It is therefore important to take a global approach in order to avoid actions on one part of a common impacting on another area.

A significant reduction in stock on a common may well result in larger, healthier ewes becoming more predisposed to give birth to twins (because of improved nutrition). Twin lambs are usually turned back onto the common with their mother later than single lambs and have less time to "learn" the heft from her.

Hefting also relies in part on the shepherding of the farmer. As the number of hill farms has reduced, the amount of shepherding carried out on common land has fallen. In some areas, this has contributed to a breakdown of the hefting system.

The impact of a failure of hefts should not be underestimated. Farmers will have to devote more time to gather their disparate flock and to collect sheep that have been gathered from adjacent hefts. Whilst these hefts may be adjacent, the farms with which they are associated may well be on different sides of a watershed and many miles apart by road.

The importance of hefting is reflected in the fact that, if the enclosed land associated with a hefted flock is sold with its appurtenant rights, then the hefted flock will normally be conveyed with it. Agricultural law requires that at the end of a tenancy, tenants must be compensated for the increased value of each ewe forming part of a hefted and acclimatised flock.

Acclimatisation means that sheep are able to cope with the mineral deficiencies of the area, the weather and ticks, if they are present. They will also know where to find water and shelter.

Many landlords in upland areas own part of the hefted flock as a way of safeguarding against the loss of the entire flock in the event of bankruptcy of a tenant; such a flock is known as a landlord's flock and will typically comprise about one third of the total flock.

6.4 Sheep identification and marking

On open fells and common land, sheep identification is an important issue. Farmers need to know which sheep belong to them and which belong to their neighbours.

The most common methods of identification are fleece (smit) marks - daubs of colour applied to the fleece, horn burns, often the owner's or farm's initials and distinctive cuts to the ears (lug marks): the combination of the two providing unique identification for individual farms in local areas. These wool and earmarks are often recorded in local shepherds' guides.

6.5 Shepherd's meetings

Traditionally the business of returning stray sheep to their owners was communally organised and served an important practical purpose as well as a social occasion.

Each fell area had a shepherds' meet which was held twice a year - just before shearing and tugging times to ensure that each grazier had all his stock at this critical time. Stray sheep were gathered together to be identified and claimed by their rightful owners. Often fines were imposed before farmers could claim their sheep. Shepherds' meets still go on today and mostly take the form of an agricultural show or social occasion. Their traditional function of collaborative gathering and returning stray sheep to their owners is much reduced but still occurs.

6.6 Bracken control

In the past bracken was mown by upland farmers and then dried and used as bedding for their livestock during winter. Today, this has largely ceased as a practice due to the amount of labour required to gather and dry the bracken.

This decline in management, together with the reduction in the numbers of cattle turned out on commons, has allowed bracken to colonise large areas of common. As the bracken becomes more established, a deep layer of litter develops below it which kills other vegetation and reduces the quality and quantity of grazing on the common. Bracken can grow three metres high and has a complex rhizomous root system which is difficult to eradicate. As well as killing important vegetation and reducing the grazing available to stock, bracken is also undesirable because:

- It can be poisonous to sheep, horses and cattle if consumed in significant amounts.
- Bracken spores are carcinogenic.
- Sheep ticks colonise the litter layer and infest sheep, causing weakness and passing on diseases such as Louping ill, tick fever and tick pyaemia. Grouse are also susceptible to Louping ill and mortality is very high among those infected.
- Ticks also carry Lyme's Disease which can be fatal to humans.

It is difficult to totally eradicate bracken but it can be controlled in three main ways:

6.6.1 Stock trampling

The reintroduction of cattle to a common will help to restrict the spread of bracken due to the

trampling of buds and developing fronds during the winter months. Stock not acclimatised to bracken infested land should be removed in spring to prevent the risk of poisoning.

6.6.2 Mechanical control

Bracken can be controlled by mechanical means. It can be cut twice in a season, once in mid June and then again about 6 weeks later for a minimum period of 3 years. Alternatively it can be cut once in late July each year for a minimum of 5 years. Young bracken can be crushed with a Cambridge, flat or specially adapted bracken roller. Rolling needs to be carried out each year for at least 5 years and is a good follow up treatment to aerial spraying.

6.6.3 Chemical control

Bracken can be effectively controlled by herbicide application. Glyphosate and asulox are the only effective chemicals, although there is some question at the time of writing over the future approval of asulox.

PLEASE CONTACT THE HEALTH & SAFETY EXECUTIVE AND DEFRA TO CHECK THE LEGAL STATUS OF ANY PROPOSED CHEMICALS BEFORE USE.

Glyphosate kills all vegetation and is consequently only of use if applied by a weed wipe. Treatment should occur between mid July and the end of August. Asulox can be sprayed from tractor or quad bike-mounted spray equipment, from knapsack sprayers or aurally from a helicopter. It can also be applied with a weed-wipe applicator dragged behind a tractor or quad bike. Once the bracken has been sprayed it is essential that follow-up work is carried out where the kill has not been totally successful.

Control of bracken is an ongoing, time-consuming and expensive task. Grant aid may be available under Higher Level Stewardship schemes.

6.7 Unauthorised agricultural activity

Section 46 of the Commons Act 2006 provides powers (now with Natural England) to stop unauthorised agricultural activities on registered common land where these activities are detrimental to either the Commoners, land owners or public interest, having regard to any proceedings or other steps taken.

The public interest is defined as including nature conservation, landscape, access and archaeology. The power also enables Natural England to take action against people grazing commons with no legal right to do so where this is damaging the interests of the commoners.

6.8 Ancillary agricultural activities on commons

Rights of Common are held to extend to ancillary activities which “are reasonably necessary for the reasonable enjoyment of the principle or primary right”.

Such ancillary activities have been regarded as easements in law and can consequently be acquired by prescription, that is, by long, unchallenged use. However, not all additional management practices have been accepted in law as reasonably necessary for the enjoyment of the primary right to graze. It is possible for the owner of the common to grant permission for ancillary activities such as feeding and bracken cutting.

6.8.1 Use of vehicles

Driving vehicles on common land is likely to need authorisation by the landowner. There is no public right of vehicular access granted under the Countryside and Rights of Way Act 2000. It is also an offence to take a motor vehicle onto common land unless it is within 15 yards of a road and for the purposes of parking or with lawful authority given by the owner(s) of the common.

Where the common is owned by commoners, for example a regulated common, the commoners can grant themselves lawful authority. Permission from the owner may be for specified purposes only, such as stock management. Where the common is owned by commoners, for example some regulated commons, the commoners have lawful authority.

However, in line with the principle established in *White v Taylor* [1968], that a commoner may do anything that is incidental to the exercise of his rights, the case of *Besley v John* [2003] determined that there was an implied right for a commoner to use a quad bike for reasonable stock management purposes, although what was reasonable was not defined.

In addition it is possible to acquire a right to drive a vehicle on the common by prescription if over 20 years of such use can be proved.

6.8.2 Supplementary feeding

Commoners exercising grazing rights are increasingly likely to provide supplementary feed for stock during the winter months and it could be held that such supplementary feeding is necessary to enable the reasonable enjoyment of the principle or primary right to graze.

However, the case of *Besley v John* [2003], referred to above, held that there could be no usual implied right to put supplementary feed out on a common, as a commoners right was only for his stock to eat the grass growing on the common. Consequently the practice of supplementary feeding may be challenged by a land owner or commoner.

Agri-environment agreements designed to restore the quality of vegetation are increasingly seeking to reduce or stop the practice of supplementary feeding on commons.

6.8.3 Burning

Heather burning is a regular activity on commons, particularly those with a shooting interest, where it is used to create a mosaic of different aged heather which is an ideal habitat for grouse (refer to Fact Sheet 7 Sporting management). It is not regarded as an ancillary activity necessary for the reasonable exercise of grazing rights of common and should therefore only be carried out by graziers with the landowner's consent. Where there is sporting interest on a common the responsibility for this operation is normally retained by the shooting interest. Any heather or vegetation burning carried out by landowners must ensure that a sufficiency of grazing remains for the commoners.

All burning must comply with the Heather and Grass Burning Regulations 2007. These prohibit burning between 16 April and 30 September in upland areas (Severely Disadvantaged Areas) and between 1 April and 31 October on all other land, unless a licence has been issued by Natural England.

Those applying for a licence must inform others with an interest in the land, including those with rights of common on common land. All burns must be controlled throughout and all reasonable precautions taken to prevent injury to people or damage to adjacent land. Burning must not start between sunset and sunrise.

6.8.4 Bracken control

Bracken control by means of aerial or localised spraying, cutting, crushing or rolling, is a regular activity on common land. The rapid spread of bracken and the gradual shading out of grass and build up of litter suggest that control could be regarded as necessary to enable exercise of the primary right to graze. However, there has not been any case law to establish whether bracken control is an ancillary easement necessary for the reasonable enjoyment of the primary right to graze. As such, it is advisable for commoners to obtain landowner's agreement prior to carrying out any bracken control.

6.9 Further information and signposting

- Heather burning regulations and code available at:
www.naturalengland.gov.uk/ourwork/regulation/burning/default.aspx
- For further information on hill farming
www.cumbriahillfarming.org.uk/index.html
- For more information on bracken control
www.appliedvegetationdynamics.co.uk/web/guideline.doc
- For further information on heather management
www.moorlandassociation.org/bracken.asp
- To view judgement in *Besley v John* [2003] visit the Defra commons web site, court judgements section
www.defra.gov.uk/rural/protected/commonland/court.htm

For more information on regional and local practice the following websites may be able to help.

- The Foundation for Common Land www.common-threads.org.uk/index.html
- Federation of Cumbria Commoners www.cumbriacommoners.org.uk
- Gower Commons Group www.gowercommons.org.uk
- New Forest verderers www.verderers.org.uk/rights.html
- Dartmoor Commons Council www.dartmoorcommonerscouncil.org.uk/



Commons Toolkit Guidance Note 6

Managing under grazed commons

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6.3 Reintroducing grazing – the challenges

6.4 Reintroducing grazing – some solutions

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Commons Toolkit Guidance Note 6

Managing under grazed commons

6.1 Context

In many lowland areas, commons have become isolated from, and redundant to, the farming systems and farms around them.

This may reflect an intensification of use on the enclosed land, such as a conversion to arable from mixed farming, but is just as likely to be the consequence of non-agricultural factors.

For example, many commons are traversed by roads and the risk of injury to animals or motorists is perceived as too high to justify turning stock out on the common. The density of recreational use may be so high that farmers are no longer willing to turn stock out, particularly where uncontrolled dogs are an issue.

6.2 The impact of undergrazing

When grazing on a common is reduced or ceases, the vegetation traditionally associated with the common will change. Over a relatively short period of time, scrub will begin to encroach on formerly open areas and this will have a deleterious impact on the quality and biodiversity of ground vegetation. Typically the range of flowering plants, invertebrates and birds associated with heath and grassland will diminish.

Scrub will also affect the visual character of the common and, if allowed to increase, will reduce the level and extent of recreational use. Eventually the common will revert to woodland as has occurred on a large number of lowland commons, such as Newtown Common in Berkshire and Selbourne Common in Hampshire.

6.3 Reintroducing grazing on commons – the challenges

6.3.1 Finding a grazier

The owners of grazing rights on lowland commons may not wish to exercise these rights because their farming system no longer requires an area of rough, open grazing.

This is particularly the case with beef farming where the move to less hardy, continental breeds means that much common land can no longer provide appropriate grazing. There has also been an increasing trend towards the land and property to which grazing rights are attached, being owned by individuals with no knowledge or interest in farming.

6.3.2 Traffic

Many commons are traversed by roads and the increase in vehicle ownership and changes in driving patterns within local communities have resulted in these roads experiencing higher numbers of vehicles. The vehicles also tend to travel at much greater speeds than was the case in even the recent past. Consequently, even where there are right holders and/or farmers with a farming system that can accommodate common land, there will often be a reluctance to do so due to the dangers to stock and to motorists on unfenced roads.

6.3.3 Poor vegetation

Depending on how long the common has been ungrazed, the changes in vegetation may be such that stock cannot be introduced without preliminary works being carried out by the landowner or some other interested party. Such works may include tree felling, scrub clearance and burning, or fencing small temporary enclosures on the common.

6.3.4 Boundaries

Boundary fencing on a common may be in a very poor state of repair or no longer present. Whilst it is an accepted customary duty for adjacent owners to fence against a common (see Fact Sheet 11 Works), in practice the lack of fencing may prove too great a barrier to the reintroduction of stock. The boundary may well run against a large number of adjoining landowners and any efforts to persuade them to fence this boundary are likely to be lengthy and arduous.

6.3.5 Fencing

For practical reasons such as managing a flock or herd, or establishing a heft (leer), it may be preferable to subdivide the common. To do this it is likely that consent from the Planning Inspectorate will be required on behalf of the Secretary of State. This can be a time consuming and complex process and is likely to require professional input. For more information refer to Fact Sheet and Guidance Note 11.

6.3.6 Recreation

Many lowland commons are heavily used for recreation. Reintroducing stock into this environment will be problematic, particularly if dog walking is prevalent. Sheep worrying may well be an issue whilst mixing dogs and cattle, particularly cows with calves at foot (calves that have not been weaned), can create public safety issues.

6.3.7 Disease

Where ticks and tick borne diseases are a problem it may prove difficult to obtain acclimatised stock with some in built resistance to the diseases.

6.3.8 Water

There may not be a natural water supply on the common and the costs of piping water to a trough may prove prohibitive.

6.3.9 Labour

The labour input needed is often relatively high for the number of stock to be supervised on the common.

6.4 Reintroducing grazing – some solutions

6.4.1 Finding a grazier

While the ideal scenario is to have a common grazed by one or more individuals who hold rights of pasturage on the common, ownership of grazing rights is not essential. The landowner has the right to any surplus grazing left after commoners have exercised their rights. Consequently, where an ungrazed common is owned by a local authority or body such as a Wildlife Trust or the National Trust then they are likely to take action to let or use the surplus grazing.

For example, this has occurred at Corfe Common where the National Trust has let surplus grazing to a farmer without rights but with a farming system that lends itself to using the common.

An alternative for bodies such as the National Trust is to use the surplus grazing itself, using its own stock. Such stock invariably comprises hardy native breeds that are well adapted to dealing with the scrubby vegetation and difficult terrain typical of many ungrazed commons.

Many landowners, unable to find a grazier, will be unwilling to purchase and manage stock themselves. The Grazing Advice Partnership (GAP) was established in 1997 to tackle this issue. It provides support and advice on extensive grazing systems and carries an up-to-date database of animals available for grazing (Stock Keep).

6.4.2 Traffic

Ways to reduce traffic problems on commons traversed by unfenced roads are dealt with in detail in Guidance Note 14 - Managing livestock on commons with unfenced roads.

6.4.3 Choosing the right breed

Ungrazed common land is typically steep and exposed with coarse grasses and scrub. Consequently, it is important to use breeds appropriate to the particular site.

Tip: Breed associations will have examples of specific re-introductions and lessons learnt – establish contact early and try to speak to the people who have been directly involved as they may also be able to advise you on how they reached their decisions and other options that they considered.

6.4.4 Financial assistance for reintroducing grazing

If a common is of biological significance then there is a strong possibility that Natural England will be keen to see grazing reintroduced and that a Higher Level Stewardship Scheme may be available. This will pay an annual sum for appropriate management of the common and also grant aid capital works. These works may be as diverse as tree felling and scrub clearance and the purchase of stock and tracking collars.

6.4.5 Labour

Sharing tasks between graziers is the best option if mutual trust can be achieved.

6.5 Further information and signposting

- *Trends in Pastoral Commoning in England* – A Study for Natural England by the Pastoral Commoning Partnership with H&H Bowe Ltd. March 2008
- The Grazing Advice Partnership
www.grazinganimalsproject.org.uk/index

There are a number of case studies on reintroducing grazing. The two references above

contain many of these but there are some case-based web sites which are likely to be of additional interest:

- www.nationaltrust.org.uk/main/w-global/w-localtoyou/w-wessex/w-wessex-countryside/w-wessex-grazing-project.htm#cows
- www.wildennerdale.co.uk/managing-%20cattle.html

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Commons Toolkit Fact Sheet 7

Sporting management on commons

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Commons Toolkit Fact Sheet 7

Sporting management on commons

7.1 Context

A large proportion of common land (approximately 30% across England) is managed for red grouse. The managers are usually the owners of the common though the sporting rights may be severed from the land and belong to someone else, or the owner may have let them to a tenant.

Grouse moors are managed to enhance the wild population of red grouse (*Lagopus lagopus scoticus*) for shooting. The management of common land as a grouse moor affects grazing and conservation interests. In some areas the interests overlap, in others they can diverge. In recent years, a significant effort has been made by all interests to work together for more integrated management. This Fact Sheet provides basic information on sporting management on common land as an introduction to the topic for the various stakeholders who may have an interest.

7.2 Grouse moor management – the basics

Moors have been actively managed for grouse shooting for over 130 years. The grouse season runs from 12 August until 10 December each year and grouse are only allowed to be shot in this period.

According to the Moorland Association, an average estate of 3000 ha will be used for grouse shooting on 16 days during the season and on these days approximately nine guns will shoot grouse from permanent butts (shelters, often made of stone topped with grass) arranged in a line. The grouse will be driven towards the guns by teams of beaters and the objective is to shoot the grouse as they fly over the butts. The guns will then move on to another line of butts, or drive, and repeat the process.

Grouse are counted in pairs or brace. Success is measured by the numbers of grouse shot each year and the value of a moor will correlate with the average numbers of grouse shot over a number of years.

Gamekeepers are employed throughout the year to manage grouse moors with one keeper looking after approximately 1,500 ha of moor. Key management activities are heather burning and the control of predators and disease. Red grouse are a wild animal and management focuses on creating a mosaic of different aged heather that provides the necessary food and shelter for grouse at different stages of their life cycle. Other activities include management of drainage channels (grips), heather reseeding and bracken control as well as the maintenance of tracks and butts for the shooting. Grouse numbers correlate with the weather, parasite levels and the condition of heather. As the condition of heather is in turn affected by grazing intensity, many moor owners seek to negotiate with the farmers to manage sheep numbers to optimise the conditions for grouse.

Grouse numbers are cyclical and, to smooth this boom and bust cycle, gamekeepers count the numbers of grouse every July and decide how many can be shot that season. If the number of

grouse is estimated at less than 2 per ha then no shooting takes place.

As well as employing 200 gamekeepers in England, grouse shooting contributes to the local economy on a seasonal basis through engaging beaters and all the accommodation and catering requirements of the people shooting and their families. Furthermore, many houses, buildings and woodland areas are maintained and restored as part of managing a traditional upland estate.

7.3 Management for shooting and grazing

On common land the grouse moor owner has less control over grazing than on a private moor as common rights give commoners a secure “freehold” right to graze. This means that the owner can only change grazing levels through negotiation or the purchase of common rights.

From the Second World War until the 1990s there was a significant increase in upland sheep numbers which resulted in grouse moor owners seeking to reduce grazing levels as heather condition degraded. Many owners bought up a large number of common rights to reduce grazing pressure or entered into specific arrangements with commoners. More recently in certain areas, e.g. the North York Moors, the opposite has been true and sheep numbers have fallen below the optimal level for a grouse moor.

In some places there remains a tension between grazing interests and those of a grouse moor. In particular this arises around winter grazing, which owners view as the main cause of heather decline as grass growth stops in the winter and sheep turn to eating heather.

Common rights do not give graziers the right to supplementary feed but only to graze vegetation on the moor. However, on many commons supplementary feeding has become a custom, although this does not make it legal as ruled in the case of *Besley v John* 2003. In some areas, agreements have been reached when owners have erected sheep sheds in return for the off-wintering. Paying for off-wintering and stewardship schemes are other solutions with the latter often being a means of creating a common interest out of a previous tension though it is important that the integrity of traditional grazing systems is respected.

As well as tensions, there are common interests.

Many gamekeepers undertake vermin control on commoners’ farms and commoners on grouse moors often have good access to the common via tracks constructed for sporting purposes. From 2005, stewardship schemes require moorland managers and commoners to be joint managers of agreements which encourage graziers and grouse moors to work together for management that is in both interests. In negotiating management, the guidelines set out in Guidance Notes 9 and 10 will be helpful. By being joint signatories to an internal agreement for a stewardship scheme, the responsibilities and rights of all parties can be clearly defined to establish a functional partnership.

7.4 Management for grouse moors and conservation

Many commons run as grouse moors are designated as SSSIs, requiring moorland managers to have particular regard to conservation. In the last ten years the Moorland Association and individual owners have worked closely with Defra and Natural England to develop moorland management plans that deliver conservation benefits on commons and allow productive grouse moors.

Areas where nature conservation and sporting interests may diverge are:

- **Size and frequency of burns**
Defra's Heather and Grassland Burning Code 2007 is recommended best practice and is compulsory for commons in UELS. It is endorsed by the Moorland Association.
- **Nature of predator control**
Predators, including raptors (birds of prey), are a significant cause of grouse mortality. Where the predators are protected species they should not be killed.
- **Grip management**
Many moorland owners now recognise the benefit of wet areas on commons to encourage insects for grouse chicks. Grip blocking is now a requirement of moorland stewardship schemes to minimise run off, water discolouration and carbon loss.
- **Use of vehicles particularly on blanket bog**
Vehicles can cause significant damage to peat moors. As grouse moors have become more intensive, the use of vehicles has increased leading to rutting and erosion. Careful choice of vehicles and sensitive tracks are two solutions.
- **Construction of tracks, butts, fencing and shooting boxes**
Works on commons require consent under Part 3 the Commons Act 2006 though some exemptions for de minimus works apply, e.g. for butts under 10m². Details are on the planning inspectorate website – see also Fact Sheet and Guidance Note 11.

In many of the above cases, opinions vary as to what is “right” but usually, through listening to and understanding each other's interests, an acceptable balance can be reached. See the Guidance Notes 9 and 10 for advice on how best to generate this constructive dialogue and co-operation among stakeholders.

7.5 Further information

- Natural England Guidance on Heather Burning Code
www.naturalengland.gov.uk/ourwork/regulation/burning/default.aspx
- Moorland Association www.moorlandassociation.org.uk
This source of information is recommended for a variety of topics relating to sporting management of land.
- The Heather Trust
www.heathertrust.co.uk

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Commons Toolkit Fact Sheet 8

Single Payment Scheme (SPS)
on common land

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8.3 Specific common land SPS issues

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Commons Toolkit Fact Sheet 8

Single Payment Scheme (SPS) on common land

8.1 Introduction

From 2005 until at least 2013 the Single Payment Scheme (SPS) is the mechanism for agricultural support payments to farmers in England.

Each hectare of land successfully claimed in 2005 established an entitlement and, once activated, these are used to claim payments each year. On common land the calculations have been particularly complicated with the need for the Rural Payment Agency (RPA) to convert common rights into notional hectares. Most problems were resolved by 2008 but some remain outstanding. This Fact Sheet outlines the system used by the RPA and particular concerns relevant to common land.

8.2 The RPA method of calculating SPS entitlements on common land

8.2.1 For common rights

The RPA totalled the different types of grazing rights on the commons register and converted each total into Livestock Units (LUs). This calculation is detailed on the audit sheet for each common. The total number of LUs was then divided by the total area of the common to determine a notional area per LU. When commoners completed the SPS claim form in 2005, the number of rights claimed were converted into LUs and then into a notional area so that entitlements could be calculated.

For example,

| | |
|--|-----------|
| A. Total Area of common | 100.00ha |
| B. Total SPS Eligible Land of common grazed | 100.00ha |
| C. Total Livestock Units (LUs) entitled to be on the common | 107.50LUs |
| D. Total LUs you are claiming entitlement to graze on the common | 10.00LUs |
| E. Your COMMON LAND NOTIONAL HECTARAGE ALLOCATION (i.e. B/C x D) | 9.30ha |

Where no claim was made against common rights in 2005, no entitlements are awarded against those rights and that notional area of land became “naked” of entitlements.

8.2.2 For owners surplus

The RPA allowed owners of common land to make a claim and establish entitlements for “surplus” grazing where the total registered grazing rights expressed in LUs were less than the prescribed level of stocking for the category of land. This is defined by the RPA as 0.25LU/ha for Severely Disadvantaged Area (SDA) Moorland and Non-SDA Heathland, 0.75LU/ha for SDA

Non-Moorland and Non-SDA Grassland. If a claim for entitlements was made by the owner in 2005 the RPA determined the stocking density (LU/ha) of the registered rights and if this was less than the prescribed level the difference between the prescribed level and the register was converted into a notional area and awarded to the owner. If the stocking density of rights on the register was more than the prescribed level then there was no owner's surplus¹. For instance, if the registered rights equated to a density of 0.2 LU/ha on an SDA common of 1000 ha then there is notional surplus grazing of 20% or 200ha.

8.3 Specific common land SPS issues

8.3.1 Demonstrating title

The RPA requested commoners to prove title to their common rights where the name in column 2 on the Commons Register was different from their name. A copy of a tenancy agreement, title or a letter from a land agent or solicitor usually sufficed. Problems arose where the rights were held through an oral tenancy since these are considered unlawful (section 52 of the Law of Property Act 1925 and section 2 of the Law of Property (Miscellaneous Provisions) Act 1989).

8.3.2 Prescriptive rights

Before the introduction of SPS, commoners associations could, under previous schemes, agree live registers and forward these to the RPA in order to avoid an unclaimed area. Under SPS, the RPA only accepted common rights on the register. Therefore, rights of common acquired through prescription could not be used to claim entitlements. Initial appeals were taken to the RPA but to date (Spring 2010) there has been no change in the policy.

8.3.3 Unregistered rights let by the owner of the common to their tenant(s)

Where a tenant's landlord is the owner of the common, the rights may not have been registered in 1965 as, at the time owners were advised that they could not register rights over their own land. After initially refusing to accept these rights, the RPA subsequently accepted such rights where there was an owner's surplus on the common. They have recently accepted claims made by Dartmoor tenants where the stocking rate equivalent of the total number of registered rights exceeded the prescribed stocking density and the tenants' rights had been exercised since before 1965.

8.3.4 Owners surplus – claim by owners who only owned part of a common

Where there was more than one owner of a common and not all the owners claimed the surplus, there was a question over what happens to the balance of the surplus. Does it become naked hectares or can it be returned to the commoners? The RPA agreed that, where the second owner has agreed not to claim the surplus, then the balance can be divided proportionally among the registered common rights.

8.3.5 Common rights for limited periods

When SPS started in 2005, there was a ten month rule in force requiring land to be available for ten months in order to activate and maintain an entitlement. In 2008, this rule was abolished and the land now only has to be available on 15 May each year. However there are a large number of common rights that are still not eligible and several outstanding issues remain.

¹ $(0.25 \text{ LU/ha} - 0.2 \text{ LU/ha}) / 0.25 \text{ LU/ha} * 1000 \text{ ha} = 200\text{ha}$.

8.3.6 Dual registered rights

Many commons run contiguously with another common or a number of commons and, at the time of registration under the 1965 Act, some commoners registered identical rights on more than one common. These are referred to as mirror entries or dual registrations. This inflated the number of rights available. The RPA refer to them as split-rights

The RPA decided that, for the purpose of SPS, where dual registered rights exist, they would share the number of rights registered for one of the commons with the other commons in proportion to the areas of those commons. Consequently, some commoners did not realise they had to establish entitlements on all the commons involved and were therefore awarded a reduced number of entitlements. In other cases, some of the dual registered rights were sold and now belong to separate individuals (the severance of rights from land was permitted until 2005). The purchasers were then disappointed to find the rights they had bought were not worth as much for claiming SPS entitlement.

The RPA's current position is that, if they had included all the dual registered rights, those without dual registered rights were penalised.

Here is an example calculation:

CL0001 is 100 ha and CL0002 is 25 ha and Mr Smith has rights to graze 10 cattle on CL0001 and on CL0002.

The RPA add together the two areas of common land and allocate the 10 cattle rights proportionately across the two commons:

| CL 0001 | CL0002 |
|---|---|
| $100.00 \text{ ha} / 125.00 \text{ ha} = 0.8$ | $25.00 \text{ ha} / 125.00 \text{ ha} = 0.2$ |
| $10 \text{ cattle} \times 0.8 = 8 \text{ cattle on CL0001}$ | $10 \text{ cattle} \times 0.2 = 2 \text{ cattle on CL0002}$ |

The numbers of stock are then converted into LUs and then a notional area determined as in 8.2.1 above.

8.4 Resolving disputes

Where a dispute remains or arises with the RPA, the following steps can be followed. Detailed advice can be sought from consultants, land agents or solicitors who specialise in such work.

8.4.1 Step 1 Obtain the audit sheet for the relevant common

Every common has an Audit Sheet, which is a table put together by the RPA from the commons register. This can be requested from the RPA and checking this is an essential first step to seeing if the problem is an error in the data or calculation. It is also useful for checking how the RPA have calculated the entitlements.

8.4.2 Step 2 Contact the Scheme Management Unit (SMU)

The RPA has a unit that specialises in common land matters and this is based at Northallerton. The team there are helpful and understand how the commons registers work. Many problems can be resolved by correspondence with them.

8.4.3 Step 3 Appeal

The RPA provides a process for appealing decisions. More details can be found on their website www.rpa.gov.uk. The first stage is a complaint letter before following a more formal process if needed. As a last resort, although an unlikely approach, judicial review may be initiated.

8.5 Further information and signposting

The RPA is the main and most comprehensive source of additional information and advice. www.rpa.gov.uk

Further details are found in the Single Payment Scheme February 2005 update, available on the RPA website.

RPA Conversion into Livestock Units (NB these may be different from the conversion factors used in individual commons registers).

| Livestock Type | LU | Livestock Type | LU |
|----------------|------|-------------------------|------|
| Cattle | 1.00 | Horse | 1.00 |
| Donkeys | 0.60 | Heifers/Stirks | 0.60 |
| Ponies | 0.60 | Pigs | 0.30 |
| Goats | 0.15 | Sheep | 0.15 |
| Geese | 0.04 | Poultry (over 6 months) | 0.02 |

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Commons Toolkit Guidance Note 9

Negotiating management
on common land

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Commons Toolkit Guidance Note 9

Negotiating management on common land

9.1 Context

Common land is used by a wide range of individuals and groups with the primary uses being agriculture, recreation and sporting. It provides a wide range of benefits including open space, grazing land, grouse habitat, archaeological and historical features, energy generation and diverse ecosystems.

Due to the complex legal rights over common land, there are often multiple management objectives on commons. Meeting these simultaneously can cause tension and conflict. In other cases, commons are neglected and positive management needs to be introduced. The challenge facing effective management of common land is bringing together multiple parties with differing priorities and interests.

This Guidance Note provides guidance on the key steps and principles to bring about successful management on commons. More detailed guidance is available in *A Common Purpose: a guide to agreeing management on Common Land* (see 9.8 Further information for details).

Tip: Negotiations always take longer than expected; allow plenty of time so that all parties have time to come to their own conclusion and then reach agreement. Putting people under too much time pressure can reinforce any conflicts.

9.2 Stakeholder identification and appraisal

9.2.1 Stakeholder identification

The three types of stakeholders on common land are:

- Legal interests including commoners, owners, sporting interests and rights of way
- County, district and parish councils and National Park Authorities or equivalent
- Other relevant interests such as:
 - Those with regulatory interests e.g. Natural England, Environment Agency
 - Those with lobbying interests e.g. CPRE, NFU, Open Spaces Society
 - Those with user interests e.g. walkers, cyclists, local history groups, wind turbine companies, RSPB

The last category can be very wide and will depend on what the common is used for and its apparent significance to special interest groups (see section 9.8).

A more detailed list categorised by uses is given in **A Common Purpose** (see 9.8 for link)

Checklist: Stakeholder list

Groups and individuals to consider contacting when carrying out works or introducing new management schemes on common land

Top Priority

- Common owner (s)
- Commons Council, Association or other group
- All active commoners
- Others with a legal interest in the land
- Natural England
- Parish Council
- Local Authority including National Park Authority or AONB Conservation Board where appropriate
- Open Spaces Society

Others to consider

- English Heritage
- Wildlife Trust
- Local Access Fora
- Council for Protection of Rural England
- Ramblers Association
- Local societies
- Local user groups – riders, cyclists, paragliders
- Individual inhabitants
- National Trust solicitor if Trust owned common

It is important to identify all the interested parties as, without this knowledge, there is a risk that a management plan will leave out a key interest who will then, intentionally or otherwise, obstruct the management objectives.

Tip: Stakeholder groups such as commoners or walkers are not homogenous so ensure the range of views and interests within each group is understood. Detail is key, e.g. Where do you want to be in 10 years time? Do you have children who will take on the business from you? Where do you actually walk?

Use www.magic.gov.uk to check what designations apply to the common.

9.2.2 Stakeholders' interests and aspirations

The next stage is to assess the interests and objectives of the relevant stakeholders and then to analyse where areas of agreement and conflict arise.

The nature of this stakeholder analysis will depend on the management being addressed. Developing wind turbines on common land will require a different type of consideration to an

application for an agri-environment scheme or a recreational access plan. Be aware of inter-stakeholder complexities.

Tip: Many issues have a long history; exploring past management through constructing a time line may be useful in understanding key concerns.

- Using the list of all stakeholders, highlight those with a primary interest and those with a secondary interest. These are the most relevant stakeholders.
- For each stakeholder, explore directly through interviews, or indirectly through literature and third parties, what their specific interests are. For primary stakeholders, face-to-face interviews in a setting conducive to open discussion are recommended. Group meetings often fail to capture the complete range of views but facilitated discussions within small groups with the same or very similar interests can help to identify common priorities.
- Identify areas where interests conflict.
- Identify areas where interests are complementary.

Tip: Commoners are often related so an understanding of these family ties, local history and their implications is recommended; but remember that being related does not guarantee commonality of interest!

9.3 Agreeing objectives

In an ideal world, stakeholders agree on a way forward but this may not be possible when interests conflict. Differences of opinion should not prevent a compromise or solution being sought as in many cases talking about and working through differences enables consensus to be reached. This is particularly true when sufficient time is allowed for stakeholders to reflect on their positions both in the long and short term.

Breaking a log jam - As part of the decision process, one method might be to write down all the objectives of the stakeholders and divide them into:

- objectives that can be achieved simultaneously without modification
- objectives that could be compatible with changes to management or compensation
- objectives that are incompatible.

Such a process could be done with a representative group of stakeholders.

Categorising objectives has the advantage that it encourages discussion, allows stakeholders to consider their own objectives in the context of others and gives a clear indication of the extent of broad agreement. Common land is often extensive and this allows for the separation of activities over space as well as time.

Points to note:

1. Views may differ but people can often carry out their separate activities simultaneously, particularly when a code of practice is developed.
2. Financial compensation can enable agreement to be reached; comments such as: "I don't agree but if the price is right I'll consider it," are common, particularly in relation to grazing levels for agri-environment schemes.
3. One stakeholder may disagree but their legal interests are not sufficient to disrupt the remaining stakeholders from continuing. A risk assessment of leaving out specific stakeholders should be undertaken as the agreement may not be robust without them. Conversely, it is not appropriate that one person or group can unreasonably obstruct a plan agreed by the majority.

Respect minority views, record any threats and complaints that might be expressed by dissident parties and provide a full picture of views and objectives to those parties.

4. In some cases a public inquiry will be needed so that an independent inspector can decide where the public interest lies, e.g. for a road, fence or wind turbine. Public inquiries often arise as a result of an application for works on a common (see Fact Sheet 11 and Guidance Note 11 for specific information on works on commons).

9.4 Scoping the legal position

At an early stage, check on any legal procedures that may be required:

- do you require consent?
- will you need to consult with all those with a legal interest?
- have you a copy of the Commons Register and have you brought it up to date with local knowledge and research?

Tip: A live commons register is essential for ensuring all legal interests have been considered. The register maintained by the county council cannot be assumed to reflect the current legal position or the management in the field.

Consents and agreements may be required from the following groups:

- Commoners, owners and boards of conservators where their property rights will be affected, e.g. a turbine, road, pipeline, woodland
- DEFRA for works on commons (see Fact Sheet 11) and www.planning-inspectorate.gov.uk/pins/common_land
- Local government if planning permission is required, e.g. for a track or quarry
- Environment Agency where water quality may be affected, e.g. bracken spraying

Tip: Having planning permission does not avoid the need for consent from legal interested parties or DEFRA. Several consents are often required and, as each can take several months, apply in parallel to save time, as long as one does not depend on the other.

9.5 Negotiating with multiple parties

Commons negotiations are often complex due to the numbers of people involved. In some cases, there are over 100 commoners before account is taken of the owners, regulators and other interest groups.

How can such large numbers of people be effectively involved in implementing management?

1. A strong association can be a huge asset as a trusted Chairman will assist achieving consensus, though bear in mind association officers are unpaid and will often have a personal interest in the outcome.
2. Carefully record information and guarantee confidentiality where appropriate but ensure transparency where needed.
3. Identify early those individuals who may require additional personal contact. The 80:20 rule usually applies with commons where 80% of the time is spent on 20% of the people. Being prepared for this will avoid resentment occurring among negotiators and other stakeholders.
4. Use independent advisors who are experienced and trusted.
5. Your local Federation or the Foundation for Common Land may be able to assist or provide contacts for those who have comparable experience.
6. Be prepared to walk away from a negotiation to allow time for reflection or simply to “call their bluff”.

9.6 Practical implications of management changes

Consider what implications the proposed management agreement may have on land use activities, both on the common land unit and on adjacent land and businesses. Often stakeholders oppose changes and negotiations break down as they anticipate specific negative impacts. Being aware of these details allows the underlying cause of objections to be addressed and negotiations to be resumed. Delivering changes in vegetation is complicated and simple solutions such as decreasing or increasing stock numbers may not in themselves be sufficient. A deeper understanding of the underlying factors such as palatability, geology and soils is vital.

9.6.1 Contiguous common land units

Many upland commons are unfenced and run contiguously with other commons and private fells. Changes in stocking levels on one common will affect neighbours as sheep will take advantage of a vacuum and will move to take advantage of any “gaps”. Negotiating management simultaneously across all contiguous land is preferable. Dual grazing rights, where a flock might graze an adjacent common, might pose a difficulty. Where an individual common is not considered a separate grazing unit, bringing together two or more contiguous commons might result in a stronger arrangement (but could increase the scope for disruption by dissident graziers!). However, if not possible, acknowledge the difficulties and address through shepherding, temporary fencing or a phased approach.

9.6.2 Hefting (see also Fact Sheet 6 section 6.3)

Upland commons have traditionally been grazed by multiple flocks of sheep; each sheep has its own area or heft which ensures the sheep from different farms are not mixed up and that they can be managed and gathered easily. If the balance of sheep between these flocks alters, e.g. as a result of stock reductions, then the hefting pattern is disrupted and farmers have to spend more time managing their sheep. Another impact is that sheep from neighbouring

commons may move into the gaps and the conservation objectives that the reductions were meant to deliver may not be met.

If significant numbers of ewes are off-wintered then the incidence of twins will increase and ewes with twins will not be turned out until after clipping in late July instead of in May. As a result the lambs are less effectively hefted and acclimatised to the conditions of the common. Also, they will grow larger and be more likely to have twins themselves, thus exacerbating the problem.

9.6.3 Drainage and heather burning

Post World War II, extensive drainage or gripping of upland common land was undertaken through government subsidies to increase agricultural production. While this resulted in drier ground, there were negative impacts as the rate of water run off increased, exacerbating floods, soil erosion, loss of biodiversity and carbon release. To reverse this, grip blocking is often a compulsory component of upland agri-environment schemes but this is not always popular as it wets up the common, increasing bogs where sheep may be trapped and making travelling on commons more difficult.

For red grouse, both wet and dry heath are needed. The former provides a habitat for breeding insects on which grouse chicks feed, while dry heath is preferred to maintain a burning cycle which provides young heather tips for feeding and clear areas for access. Ecologists prefer longer burning rotations and no burn areas to improve diversity of habitat. Close consultation between stakeholder interests is needed to negotiate a suitable moorland management plan acceptable to all concerned.

9.6.4 Woodland planting and fencing

Most common land can support woodland up to 600m and historically commons were extensively wooded until cleared for firewood and grazing. With less than 10% of England wooded, the pressure to increase woodland on common land is increasing and new woods require fencing to allow tree establishment.

Apart from the obvious loss of land for grazing, woods can affect how sheep are gathered and cause difficulties if sheep get caught either in the wire or inside the enclosure, so responsibility for maintenance of the fencing needs to be agreed. Woods do bring positive benefits of shelter, increased biodiversity and, if sensitively planted, enhance the landscape but these do not always accrue to those who bear the costs.

9.6.5 Reintroduction or changes in grazing

While some common land has been heavily grazed, other common land has been abandoned and, to improve management, the reintroduction of stock is sometimes sought. A change in the type of stock may be proposed, e.g. sheep are replaced with cattle to control the growth of coarse grassland.

Finding someone willing to graze stock on the common may be a challenge due to the low economic return from the grazing; in many cases it will cost money to graze the common. Local initiatives, e.g. through Wildlife Trusts, may offer payments for grazing management and/or introduction of different kinds of stock. The Environmental Stewardship scheme offers payments for mixed grazing, cattle grazing and native breeds at risk.

Additional issues to be addressed are:

- availability of water
- where to feed the stock in the winter
- handling facilities such as pens
- risks for road users
- necessity for fencing.

Some of these commons are popular recreational areas and users may be nervous of grazing changes; a risk assessment should be undertaken and publicity and guidance provided. See Guidance Notes 13 and 14.

Tip: It is advisable to consult all key stakeholders early in the process to identify and address not only all actual, but also all perceived concerns.

9.7 Achieving consensus on management prescriptions

Once the key management objectives have been set and stakeholders identified, an implementation plan with specific actions, responsibilities, schedule and management prescriptions is required. This will require compromise if consensus and acceptance is to be achieved. The following points should be born in mind.

9.7.1 Remember the big picture

What is the overall objective? If it is the planting of new woodlands or control of invasive scrub, do these have to be in particular places or is there some flexibility? If the regeneration of a particular habitat is the objective, try to be flexible with stocking levels so they fit in with the farming calendar. Does supplementary feeding need to be prohibited or are there areas of the common where the damage would be minimal? Can controversial recreational activities take place at specific times of the year with advance warning or under licence?

Tip: Allow those who will be undertaking the work to have an input. Involvement is the key to ownership of the process and the outcome. Ensure stakeholders' views are listened to and that they have a chance to listen to others views so that they understand for themselves that there may be multiple valid but differing perspectives.

9.7.2 Avoid rushing outcomes.

One common complaint with management plans is that they try to do too much too quickly. Vegetation mosaics have built up over long periods and do not respond quickly to change. Also drastic changes in management can bring unintended consequences and be difficult to reverse. Does it matter if it takes an extra 2-5 years to achieve the intended outcome? Apply sensible targets for indicators of success.

9.7.3 Acknowledge aversion to change

Humans find change unsettling and can be threatened by change imposed from outside. Where farming and tourism businesses are affected, the financial implications will be

important. Many businesses are marginal, their staff have specific skills and cannot afford to take risks with new ventures. Objectors to change also come from the wider user community. For instance, people become used to walking their dogs in particular places - they may even have bought their house because of the proximity of the common and will not welcome scrub clearance, new fences or the introduction of cattle.

9.7.4 Money is important

Where money is to be divided among a group of commoners, encourage the individuals to look at whether the deal is good for their business rather than being too concerned about what their neighbour will receive. Most schemes have winners and losers and most individuals will favour a scheme that gives them maximum financial advantage. A trusted advisor can be key to encouraging a belief that the deal is fair.

Tip: Try to maintain flexibility particularly when the proposal involves risks to small businesses. Look at whether a pilot scheme and/or regular reviews are possible.

9.8 Further information and signposting

- *A Common Purpose: a guide to agreeing management on Common Land*
www.naturalengland.etraderstores.com/NaturalEnglandShop/HabitatManagementCP1



Commons Toolkit Guidance Note 10

Agri-environment schemes
on common land

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Commons Toolkit Guidance Note 10

Agri-environment schemes on common land

10.1 Context

Common land first came into agri-environment schemes in the early 1990s and agreements are now widespread on upland commons and an important source of income for farmers. In many circumstances the focus of these agreements has been a payment in return for reducing sheep numbers or introducing cattle.

On lowland commons agri-environment schemes are commonly used to reintroduce active management where grazing has ceased, to control the encroachment of coarse vegetation and scrub. These schemes are often initiated by Natural England and non-governmental organisations, including The National Trust and Wildlife Trusts.

It is expected agri-environment schemes will remain as the key mechanism to maintain and enhance non-marketable environmental benefits such as water quality, flood protection, biodiversity, landscape protection and carbon storage. Farmers will increasingly be required to provide these benefits in exchange for government support.

The entry of common land into agri-environment schemes is more complicated than on privately owned land due to the multiple parties and interests involved. This Guidance Note aims to provide a path through the process and should be read in conjunction with Guidance Note 9 Negotiating management on common land.

10.2 Types of schemes

Environmental Stewardship was introduced by Defra in 2004 and includes:

- Entry Level Scheme (ELS), a basic scheme suitable for most commons.
- Higher Level Scheme (HLS) where greater changes or restrictions in farming practice will be required. HLS is also the main tool for improving and maintaining the conditions of Sites of Special Scientific Interest (SSSI).
- Upland ELS (UELS), introduced in 2010 for Severely Disadvantaged Area (SDA) land in the Less Favoured Area. It replaces the Hill Farming Allowance (HFA) and exemplifies the trend for government support being moved from supporting farming to encouraging the delivery of environmental goods.

All these are managed by Natural England, the government's agency for conservation. Further information on all schemes is available from www.naturalengland.org.uk

Tip: If you need information on whether a scheme already exists or what designations there are on a specific area of land then a search through www.natureonthemap.co.uk is a good start.

Some commons remain in previous schemes including Countryside Stewardship (CSS) and Environmentally Sensitive Area (ESA) schemes but these will be finished by 2014. In the meantime, common land agreement holders under these schemes, located in the SDA will be offered a transitional payment in place of Uplands ELS until the termination of those agreements. Further information is available from Natural England's website.

Aside from the transitional payment on SDA commons, all payments for common land agreements are paid to commoners' associations which divide the money up among the participants. They authorise a person to sign application forms and agreement documents with Natural England. Underpinning this, each common will require an internal agreement binding all parties and clearly setting out their respective responsibilities and payments due. In addition, the Rural Payments Agency (RPA) is now requiring all those receiving funds from a commons agreement to be included on the Customer Registration details as a legally responsible person of the business.

Commons on SDA land can apply for ELS, or UELS or HLS or a combination. Commons on non SDA land can apply for ELS or HLS or a combined agreement.

Tip: Allow enough time for negotiations – a minimum of 6 months is advised and the process may take 18 months to 2 years

10.3 Applying for an agri-environment scheme

(Note, some steps can run concurrently)

10.3.1 Checklist: Steps in applying for a UELS or ELS

1. Register as a Business with the RPA on form CREGo1.
2. Check if common is mapped on the Rural Land Register. If not apply via RLE1 www.rpa.gov.uk . If it is mapped, check the boundaries are correct as many are inaccurate.
3. Do you have an association bank account? If not then it is strongly advised if there are more than two parties to the agreement.
4. Bring the commons register up to date, take reasonable steps to inform all known commoners and contact all active commoners.
5. Contact the owner and arrange for their consent, they may wish to be involved in the scheme.
6. Consulting the scheme handbook decide what prescriptions will be applied for and that they provide enough points. On moorland commons with hefted native sheep or acclimatised cattle there should be no difficulties reaching the points required.
7. Hold a meeting for all active commoners to explain the prescriptions.
8. Assess if there are any non graziers who may jeopardise the agreement. If there are discuss how they are to be managed, would they like to come into the agreement?
9. Decide how the money will be split between active parties.
10. Draw up an internal agreement as a deed binding all parties. **It is advisable to consult a lawyer specialising in commons.**
11. Update the customer registration details on form CREG10 from www.rpa.gov.uk to include all parties receiving money from the scheme. This requirement was introduced for the launch of Uplands ELS in February 2010 but is likely to be applied to ELS in due course, as well as underpinning HLS agreements.
12. Apply online for an ELS/UELS agreement; you will need a government gateway number and an Environmental Stewardship PIN. Alternatively fill in a paper form.
13. Complete the Commons Supplementary form and post to Natural England.

10.3.2 Checklist: Steps in applying for a HLS or combined UELS/HLS

1. Register as a business with the RPA.
2. Ensure common is mapped on the Rural Land Register, if not apply via RLE1 www.rpa.gov.uk . If it is mapped, check the boundaries are correct as many are inaccurate.
3. Do you have an association bank account? If not then it is strongly advised if there are more than two parties to the agreement.
4. Apply for an HLS Application Form and Farm Environment Plan (FEP) pack.
5. Undertake the Farm Environment Plan using a qualified FEP surveyor.
6. Consider instructing an independent negotiator such as a land agent, agricultural consultant or lawyer.
7. Bring the commons register up to date, take reasonable steps to inform all known commoners and contact all active commoners.
8. Contact owner and arrange for their consent, they may wish to be involved in the scheme.
9. Discuss possible prescriptions with Natural England project officer.
10. Submit the HLS application, FEP and the Commons Supplementary Form by post to Natural England.
11. Hold a meeting for all active commoners to consider the prescriptions.
12. Assess if there are any non graziers who may jeopardise the agreement. If there are discuss how they are to be managed, would they like to come into the agreement?
13. Meet with all commoners individually to discuss their current and future grazing.
14. Agree how the money will be split between active parties.
15. Draw up an internal agreement as a deed binding all parties. It is advisable to consult a lawyer specialising in commons.
16. All parties sign the internal agreement and CREG10 from www.rpa.gov.uk . See check list item 11 under section 10.3.1.
17. Main contact or authorised agent signs the HLS agreement.

10.4 Assessing sustainable grazing levels

Vegetation on common land has changed dramatically over the last 4,000 years from a time when most common land up to 650m above sea level was wooded. Today in the uplands almost none is wooded and, in the lowlands, scrub is invading due to the lack of interest in grazing by commoners. It can be difficult to obtain agreement on what is regarded as an appropriate level of stocking for individual commons because of a divergence of views.

It is therefore important to have an understanding of each others objectives.

- Ecologists tend to favour low grazing levels in order to encourage a wide mosaic of vegetation types.
- Farmers usually favour higher grazing levels as a common can be productive from an agricultural perspective, which can reduce the diversity of vegetation.
- Farmers wish to have some flexibility in levels of stocking in order to respond to market forces and changes in government subsidies.
- Ecologists often have a very specific focus on delivering particular vegetation types as detailed in a SSSI designation. This is the approach used for delivering HLS agreements which may involve some woodland planting and control of scrub and, possibly, the reintroduction of different types of grazing animals.
- A grouse shoot may wish for wall to wall heather burnt in short rotations while an ecologist will seek a greater diversity of vegetation that requires longer burning rotations and some no burn areas.
- On many commons the numbers of active farmers has reduced considerably. Those that remain may need to maintain a minimum number of stock for viable businesses in the longer term, compatible with available resources including labour, housing and the constraints of the physical geography.

Most farmers apply for agri-environment scheme (AE) agreements because they need the financial benefits they offer. However, tensions can arise when particular stocking levels are “imposed” by Natural England advisers with limited evidence that the recommended change in stocking will deliver the required outcome on the particular site. In the context of HLS, the data collected for the Farm Environment Plan (FEP) is key to having an accurate assessment of the common and appropriate level of grazing, as well as having an understanding of the existing systems of livestock husbandry and farming systems. The factors to consider are:

- Altitude, geology and aspect
- The vegetation types and the areas of each type
- The stock carrying capacity of each type of vegetation to achieve the desired outcomes
- Impact of wildlife, e.g. deer and rabbits, on grazing capacity
- Impact of grazing levels at different times of the year and use of supplementary feeding
- Variation across the common
- Impact on the farm businesses resulting from stock changes on the common
- Impact of changes to the types and numbers of stock, grip blocking and woodland planting on how stock use the common

- The variation in stocking systems among different commoners
- Whether the common can be regarded as a separate grazing unit (where stock numbers and their management can be controlled by existing boundaries or shepherding)
- Changes in the levels of stocking may have a knock-on effect on grazing livestock on neighbouring commons.

10.5 Legal interests and management control

10.5.1 Check property rights

All property rights over a common should be assessed before entering an agri-environment scheme. These include rights of commons, rights of landowners and those with sporting rights, mineral rights and rights of way. The assessment should:

- check that all those signing up to an agreement have management control of grazing and/or burning for the duration of the agreement
- check no one has been left out of the agreement who could disrupt it

Property rights may be in use by the owner or by a tenant or licensee. It is important to understand the type of tenancy as it may not give management control for long enough to enter an agreement without the landlord's consent. ELS/UELS agreements are for five years while HLS agreements last for ten years, with a break clause at five years. In addition, some tenancy agreements preclude entry into agri-environment agreements without the landlord's consent.

10.5.2 Common rights and live registers

The register held by the County Council is a register of all registered rights of common on each common land (CL) unit as detailed in Fact Sheet 4 Registration.

It is not a comprehensive register of who owns the common rights except for rights held in gross (these are rights not attached to a particular holding and can be traded). So, in preparing to draw up an agreement, a live register should be drawn up using the commons register combined with local knowledge and research.

Additional sources of information are:

- the Land Registry, but beware as not all dominant tenements or tenancies are registered
- electoral role when there are rights attached to cottages and
- audit sheets prepared by the Rural Payment Agency (RPA) for the Single Payment Scheme (SPS) and the HFA scheme.

Common rights of grazing relevant to agri-environment schemes include sheep, cattle and horses/ponies. Be careful not to ignore one of these just because they are not currently grazed since Natural England or the landowner may seek to reintroduce a different species in future.

Also sheep rights should be adequately defined, separated into ewes, ewes with followers and hogs since sometimes hogs are allowed in addition to ewes but, in other instances, the given number of ewes includes hogs. Similarly cattle, ponies and horses may include followers or not and a follower may require definition.

A live register should include the following:

- Name of current owner and/or tenant of the rights
- Number of each type of animal that can be grazed
- Where there are several types of stock allowed (e.g. rights for equivalent numbers of sheep/cattle/horses), it is useful to convert them to equivalent sheep grazing numbers (or the dominant type of grazing livestock on the common) using an agreed conversion formula
- Land to which the rights are attached, if any
- Are the rights dual registered on another common or commons; if so, are they already in an agri-environment agreement?
- Proof of title where needed.

10.6 Guiding principles

- In negotiations, involve all active commoners if at all possible; if not then assess the risk of non-signatories upsetting the agreement.
- Involve the owner of the common at an early stage. They will need to consent to the common entering the scheme and may wish to be involved.
- The use of an independent experienced negotiator can be useful in achieving an agreement as they have no vested interests and parties can speak in confidence to them.
- If relevant, include sheep, cattle and horses/pony rights in the calculations of present and future stocking densities.
- Be flexible – commoners have a range of farming objectives - and a flexible approach may break a stalemate.
- Look closely at the implications of the agreement on flock management, including hefting, encroachment, supplementary feeding and numbers of twin bearing ewes. See section 6 of Guidance Note 9 on Negotiating management on common land for further advice.
- Assess whether the common consists of a separate grazing unit and, if not, investigate whether neighbouring commons could be involved in the same agreement to reduce the risk of stock encroachment and movement of hefting boundaries.
- Make sure enough off-wintering is available if required.
- For tenant commoners, ensure landlord-tenant issues are discussed; ask if the landlord's flock can be reduced so the tenant's capital is maintained.
- Have a watertight internal agreement between commoners so an agreed method of resolution exists should problems arise. It is advisable this is signed as a deed with legal advice.
- Maximise benefits by approaching the owner of the common to see if they will top up payments (although the owner may wish for something in return, e.g. the graziers to participate in a tick control programme for the benefit of grouse).

10.7 Practical land management and capital works

Guidance Note 9 Negotiating management on common land discusses practical considerations that can arise in negotiating management. These are not repeated here but are also relevant to agri-environment schemes and reference should be made particularly to section 9.6.

The HLS allows for applications for capital works funding. These cover a range of activities from hedge restoration and walling to the provision of cattle handling facilities, the restoration of historic buildings and planting of new woodlands.

Some works are funded through standard rates while others are a percentage of the actual cost and quotes may be required to establish the costs for grant aid. Of those funded as a percentage of costs, some pay at 100%, others, where there is a tangible financial benefit to the farmer, are funded at a lower rate. In all cases the farmer has to pay for the works before claiming the grant on the basis of receipted invoices. This can cause a cash flow problem, particularly for commons associations although the burden can be reduced by the submission of interim claims. If there is an issue, consult your local Natural England adviser at an early stage.

With capital works it is important to consider VAT. Commons associations are not VAT registered so to minimise costs most commons associations works are paid for by a commoner who then charges the association the amount net of VAT.

10.8 Achieving consensus

To allow a robust agri-environment scheme to be created, consensus between commoners and owners is a key objective. In most cases consensus can be achieved if the tips for negotiation and guiding principles for agri-environment schemes are followed (see Guidance Note 9). The two key points are to allow enough time and to consult with all relevant parties as early as possible. This is particularly important if some parties who could disrupt an agreement are going to be left out. Advice on reaching consensus is given in Guidance Note 9 Negotiating management.

10.8.1 Who should be included in the agreement?

Environmental Stewardship schemes reward active managers of common land. Most commons associations now take the view that the majority, if not all, of the income from ES, whether ELS, UELS or HLS, should only be paid to those actively managing the common land. These include active graziers and possibly the owners where they are undertaking specific activities, e.g. woodland planting, grip blocking and burning management.

Paying active graziers only can cause disquiet where commoners have been used to receiving a payment for not grazing (as agreed under previous agreements) and feel aggrieved with the change in policy. One approach is to say that all commoners are welcome to join the scheme once they have established a hefted flock. This will take two-four years depending on the common and existing stock for the commoner. In some circumstances, new graziers are able to start by acquiring stock from existing flocks, by agreement to avoid bad feeling and disruption of hefting boundaries.

The logic behind not paying non-graziers is that most schemes have minimum stocking levels and that if all graziers stopped grazing then the prescriptions would not be adhered to. In an economic climate where sheep farming often loses money without the environmental

payments, this is a distinct possibility. A clause to maintain a minimum level of grazing also ensures that skills of commoning are maintained.

Another option is to make a nominal payment to non-graziers who then commit not to graze for the period of the scheme and the agreement is therefore secure. A variation to this option is to restrict payments to non-graziers who have the capacity to graze, although those that do not have any capacity could lease their rights to third parties. However, be aware that rights attached to land can only be leased for two years. Involving some or all of the non-graziers engages the community and helps to keep the door open to new graziers. The report on *Trends in pastoral commoning* indicated a drift away from grazing common land.

Some active graziers might not agree with the principle or detail of the scheme and refuse to sign an agreement. In that case the other graziers may be able still to enter an agreement but need to take account of all the active grazier's stock/grazing rights in the grazing calendar.

In summary, each agreement is unique and who is included will depend on the specific circumstances on the ground.

10.8.2 Dividing the money

As with any pot of money there are numerous ways of distributing it. While every common is different there are a number of general approaches that have been successful.

Which is appropriate in a specific case will depend on the circumstances and in particular, if it has just come out of a scheme, what was previously agreed.

- Pay per ewe removed from the common with extra payments for off-wintering if required.
- Allocate a notional area to each commoner depending on their rights (or pre-agreement stocking levels) and allocate the number of sheep and money pro-rata according to that area. Commoners can then trade with their neighbours to put out more or less sheep and their payments are adjusted accordingly.
- Pay per grazing animal put on the common
- Allocate the funds pro-rata per stint and then allow commoners to trade stints with the proviso that payments are only be paid to active graziers. If required, additional off-wintering payments can be made.
- Pay a nominal amount per registered common right and then the balance is paid according to A-D above
- A two tier approach, distributing a basic sum of money pro rata on registered rights (to all those who have an active interest in the management of the land) topped-up with payment pro rata to the established number of grazing livestock (that meet the requirements of the agreement).

The requirements for ELS, Uplands ELS and HLS are different and, therefore, you will need to divide the respective payments accordingly. Allowances would need to be made for those who have agreed to reduce stock numbers (often under HLS) and are undertaking specific

tasks, e.g. maintaining a minimum level of grazing and winter livestock removal. Be aware that a HLS agreement may be underpinned by an ELS or Uplands ELS agreement

10.8.3 Specific issues

Dual registration: Most commoners associations would not allow members to use or claim ES payments on neighbouring commons (as a result of having dual registered rights) even if the registers legally give you rights to graze on both commons simultaneously.

Off-wintering supplements: The HLS moorland restoration option require 50% of the ewes and all the hogs to be off-wintered as part of the basic payment. A supplement is then paid for additional off-wintering. This can usually be paid on a sliding scale so complete off-wintering is not required. Different methods are used to calculate the off-wintering payment but the difference between the average summer and winter levels is advised.

Prescriptive rights: The legal position is untested as to whether rights obtained through prescription i.e. thirty years usage, will be able to be registered under the Common Act 2006. Where the failure to register was genuine and continued usage has been allowed knowingly by the other graziers, such rights are often included in agreements.

The commons supplement: HLS agreements may offer a supplement of £10/ha in the first year (possibly more than one year depending on circumstances) and the UELS pays £5/ha per year (where SDA moorland agreements involve two or more graziers). These are for the additional costs of negotiating and running agreements on common land. Under UELS, the supplement is based on a compulsory set of requirements including the establishment of an internal agreement a live register to be maintained and all flocks to be hefted (hardy native breeds and self-maintained flocks). It may be advisable for this supplement not to be distributed to the parties initially but retained to meet the costs of the association. If, after some years, excess funds have been accumulated, they can they be distributed.

The owner's interest: In some cases owners of common land seek a proportion of the agri-environment scheme payment. Where the owner is carrying out a specific task required by a scheme then it is appropriate they receive a payment for that e.g. burning management, woodland management. In other cases where there is no active management or where the payment is targeted towards active grazing then the payments should be made to those delivering the scheme requirements, in most cases the active graziers. On a grouse moor the owner may receive long term financial gains through the increase in grouse numbers as a result of a scheme and is less interested in short term cash payments from a scheme. By not claiming scheme money they may be able to negotiate management that enhances this objective.

10.9 The internal agreement

An agreement between parties is necessary to protect all commoners and in particular the person who makes an application and/or signs an agreement on behalf of the commoners association. Circumstances can change - people die and farms are sold. A robust legal document that can deal with these situations is essential. The agreement will make clear to the commoners their responsibilities, the ground rules that will apply and what the sanctions are if they breach the terms of the agreement and how the association will divide and distribute the money.

10.9.1 Drawing up the internal agreement

There are solicitors and land agents who specialise in commons and they will be able to use an existing pro forma to reduce the costs of preparing an agreement. They will also be able to advise on the required clauses for the different strands of ES agreements. Land agents generally cost less than a solicitor but if the document is to be signed as a deed then a solicitor needs to be party to the drafting.

The document should address the following issues:

- Involvement of non-graziers
- Live register – keeping track of numbers and types of grazing livestock
- Stocking levels depending on the objectives of the ES agreement
- Adjustments to stocking levels in the event of new graziers (i.e. when a maximum level of stocking is required)
- Payment schedules for the distribution of money
- Contingencies, e.g. as a result of resignations, new graziers, breaches by those involved in the agreement
- Binding successors in title
- Dispute resolution mechanisms
- Compulsory gathers in event of breaches and disease
- Sanctions / penalties
- Appointment of officers, roles and responsibilities
- Voting system for rule changing.

10.9.2 Managing the internal agreement

Once the agreement is drawn up then it will need to be managed, as will the incoming funds. The following list provides guidance on the issues involved in the effective operation of agri-environment agreements.

- Hold AGMs and meetings to allow problems to be aired– more often if necessary
- Appoint a treasurer or use an agent to distribute payments
- Ensure there is a kitty for audit fees, agent fees and any possible contingencies.
- Monitor changes to agri-environment payment levels
- Keep track of opportunities to upgrade the agreement if circumstances change
- Note the date of any break clauses and activate if necessary
- Decide in advance what to do in the event of new graziers who have not signed-up to the agreement and implement the measures if necessary so that the agreement is not breached
- Live registers are useful for management purposes, and are a requirement for UELS and should be updated annually
- Where extra shepherding is difficult, consider clubbing together to employ a contract shepherd
- Ensure that there is a mechanism to address breaches in the agreement should they occur so that the remaining commoners are not penalised by one person's action. Deduction and withholding payments can be a useful deterrent.



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Fact Sheet 11

Fencing and other works
on common land

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Commons Toolkit Fact Sheet 11

Fencing and other works on common land

11.1 Introduction

There is a legal presumption that common land will remain unenclosed, unbuilt upon and free from fences and other works that impinge on access to the land.

This protection is valued and guarded by those who live close to commons, recreational users of commons and by organisations such as the Open Spaces Society. It is therefore very important to understand the legal position and requirements before attempting to carry out any works on common land.

This Fact Sheet should be read in conjunction with Guidance Note 11 Consent to carry out works on common land and the Planning Inspectorate (PINS) guidance notes available on their website.

11.2 Background

There has been a legal requirement to obtain Secretary of State consent to carry out fencing or other works that prevent or impede access on common land since 1925 (Law of Property Act s.194). This requirement was a response to pressure from the Commons Preservation Society (now the Open Spaces Society) to prevent the continuing loss of common land through inclosure and the extinguishment of common rights.

The Commons Preservation Society was established in 1865 and its initial work was targeted at securing continuing public benefit from commons in metropolitan areas.

11.3 Current legal position

The requirements of s.194 of the Law of Property Act were replaced and strengthened by the Commons Act 2006.

Whereas the earlier Act applied only to land subject to rights of common on the first of January 1926, s.38 of the 2006 Act applies to:

- all land registered as common under the 1965 Commons Registration Act,
- land regulated by a Provisional Order Confirmation Act under the 1876 Commons Act, and,
- land subject to a scheme of management under the Metropolitan Commons Act 1866 or the Commons Act 1899.

The consent process is now administered by the Planning Inspectorate on behalf of the Secretary of State for Environment, Food and Rural Affairs.

Works on commons owned by the National Trust are covered by separate legislation – The National Trust Act 1971 (see section 11.10 below).

Both Acts require that consent is obtained for any restricted works that will prevent or impede access. Such works include fences, buildings, ditches, forestry, banks, new solid surfaced roads, paths and car parks.

11.4 Works that do not require s.38 consent

Works not requiring s.38 consent fall into three main categories:

- Works that facilitate access, such as new stiles and gates, small signs, seats and creating or widening loosely surfaced or unsurfaced footpaths.
- Works that are so small that they do not impede access, such as water troughs, dredging ponds, planting and protecting individual trees or shrubs, shooting butts under 10sq m, and temporary sheep pens.
- Traditional management processes such as heather burning and bracken cutting

Please note that this is not a conclusive list. Refer to PINS guidance sheet 1b for more information

11.5 Works that are exempt

Exemption order SI 2587/2007 defines a number of activities that are exempt from the s.38 consent process. [Refer to PINS guidance sheet 1c.]

Most of the exempt items involve temporary fencing to facilitate nature conservation or vegetation recovery. There are specific restrictions on the area enclosed by such fencing and the length of time that it may be erected. In addition, the erection of bollards or barriers for a length not exceeding 200 metres is allowed in order to restrict vehicular access to common land.

However, prior to undertaking such works you must send a notice of exemption to the Planning Inspectorate and post a notice on the site.

11.6 Works that are not consistent with the traditional use of the common

If there is a need or wish to carry out works on a common which are not consistent with its traditional use, for example, private car parks, fencing without appropriate access or new buildings such as a hotel or supermarket, then it is possible to obtain consent if there is scope to offer land in exchange for the area affected by the works. The land offered in exchange should be of equal value and should ideally be adjacent to the common land affected.

An application to exchange common land occurs under s.16 of the Commons Act 2006. The application must be made by the owner of the land to be deregistered and, if not the same person, the owner of the land being offered in exchange.

There is a prescribed fee for a s.16 application (£4,900 in 2010). The application will always be subject to a site visit, and possibly a hearing or public inquiry.

It is possible to deregister an area of land of less than 200 square metres without offering land in exchange but only in very exceptional circumstances, such as the provision of a disabled ramp to a village hall.

More information on this process can be found in guidance note 4, Updating the commons registers and the PINS guidance sheet on the subject.

11.7 Emergency works

It is possible to obtain retrospective consent for works carried out in an emergency. It will be necessary to show that the works were proportionate to the scale of the emergency.

11.8 Maintaining existing works

No consent is required to maintain existing lawful works but it is required to extend them. [Refer to PINS guidance sheet 5.]

11.9 Taking action against unlawful works and enforcing consents

The Commons Act 2006 introduced a right for any individual to take civil action against unlawful works on a common or to enforce the conditions of a consent.

S41 allows individuals to apply to the county court for an order to rectify the situation, either by removing the works and restoring the land or ensuring that the works comply with a consent if one has been granted. This right only applies to works carried out since 1st October 2007, prior to that date only local authorities or those with an interest in the land had a right to take action against unlawful works. [Refer to PINS Guidance Note 12 – link in section 11.12]

11.10 National Trust commons

National Trust commons are not covered by s.38 of the Commons Act 2006; proposals to carry out works impeding access are covered by The National Trust Acts 1907 and 1971. The 1907 Act places an obligation on the National Trust to keep its commons unenclosed and unbuilt on as open spaces for the recreation and enjoyment of the public.

The 1971 Act confers powers on the Trust to carry out works on common land that it considers desirable for public benefit, (s.23(1)). However, if such works will prevent or impede access then s.23(2) requires that consent should be obtained from the Planning Inspectorate, although there is an agreed list of works for which it has been agreed the National Trust will not seek consent.

The process of applying for consent for works on National Trust commons differs in two respects:

- a s.23(2) application and notice is required
- the application must be accompanied by a letter from the National Trust's solicitor concluding that the works are desirable.

For more information on consent for works on National Trust owned commons refer to PINS guidance sheet 2a.

11.11 Responsibility for fencing a common

It is generally accepted that owners of land adjacent to a common have a customary duty to maintain a fence on the boundary of their land to prevent stock from straying off the common. Such a fence (or wall or hedge) should be reasonably secure and able to prevent the passage of animals that could normally be expected to be turned out on the common in question. This duty extends to property located close to a common even if not directly adjacent.

For example, the owners of houses on a road leading to an unfenced common are expected to fence their boundary so as to prevent encroachment by stock straying along the road from the common.

If the common is owned by an individual with land adjoining it, there is still a duty to fence for the benefit of other graziers.

Fencing of **fields owned in common** is the joint responsibility of the owners of the field.

The responsibility for fencing stinted and regulated pastures (FS1 para 1.2) is less clear and it is often necessary to consult the original inclosure award.

11.12 Further information and signposting

- Planning Inspectorate Guidance Sheets www.planning-inspectorate.gov.uk/pins/index.htm
- Open Spaces Society information sheet – *Encroachments and unlawful works on commons* – www.oss.org.uk
- G. D. Gadsden, *The Law of Commons* (London: Sweet & Maxwell, 1988).
- Angela Sydenham, *Commons and Village Greens: The New Law* (Corsham: Lime Legal, 2006).
- Paul Clayden, *Our Common Land: the law and history of common land and village greens* (Henley-on-Thames: Open Spaces Society, 2003)
- Friends of the Lake District - *Open Green Spaces* www.fld.org.uk/



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Guidance Note 11

Applying for consent to carry out works
on common land

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Applying for consent to carry out works on common land

11.1 Context

The Commons Act 2006 requires that consent is obtained for any works, including fencing, which may prevent or impede access to a common.

Fact Sheet 11 covers various aspects of works on commons and should be read alongside this Guidance Note. Both provide an introduction to the subject; more information can be obtained from the Planning Inspectorate (PINS) guidance notes available on their website.

11.2 Background

Organisations such as the Open Spaces Society were established in the nineteenth century as a response to the inclosure movement, with the aim of protecting remaining commons and securing long term public access to them. This and other organisations remain committed to maintaining the open nature and accessibility of our common land.

Proposals to fence or build on common land are likely to be controversial due to a widespread desire to retain an accessible, unchanged and open landscape. Practitioners should not underestimate the need for proper planning and options appraisal prior to applying for consent under the Commons Act 2006 s.38. If this is the only option, widespread public consultation and stakeholder engagement is essential.

11.3 Before you start – an initial checklist

- Determine your aims and consider the full range of options available.
- Are “works” really the best or only option?
- Do the works need planning permission? If so get this first.
- Are the works new or are you maintaining existing lawful works?
- Decide whether the works fall outside the scope of the Act, are exempt, improve or protect the common or are inconsistent with the traditional use of the common.

Tip: Rather than holding a public meeting consider a drop-in day. More people are likely to express their views and there will be less risk of one or two individuals dominating proceedings.

11.4 Obtaining consent

11.4.1 Does s.38 apply?

Check whether the proposed works fall outside the provisions of the Commons Act 2006 due to their scale or the fact that they facilitate access or because they are regarded as a traditional management process, such as heather burning. (Refer to PINS guidance sheet 1b.)

Statutory Instrument 2587/2007 defines certain works which are exempt (refer to PINS

guidance sheet 1c). For such works it is necessary to send a notice of exemption in the standard format to the Planning Inspectorate and to post the same notice at entry points to the common.

If the works are not consistent with the traditional use of the common and therefore unlikely to obtain consent under s.38 then it may be still be possible to proceed with the works if there is scope for land exchange. More information on this procedure is contained in Guidance Note 4 Updating the commons registers.

11.4.2 Prior to making an application

It is essential to consider all options before concluding that works on a common are appropriate.

Ensure that your aims and the options available to you can be clearly articulated to stakeholders and the Planning Inspectorate. You must check whether planning permission is required before applying for s.38 consent. If you obtain consent before getting planning permission and the planning authority requires you to alter your plans then you will need to make a fresh application for s.38 consent for the revised proposal.

Examine the commons register for the common held by the local Commons Registration Authority and take note of all rights, paying particular attention to those which may be affected by your proposal.

Consult widely with all stakeholders including right holders, commons associations or councils, the landowner, Natural England, parish councils, National Park Authorities, local authorities, Open Spaces Society and English Heritage. Time spent explaining your proposal at this stage, accommodating concerns expressed by others and building a consensus on the management of the common should result in a smoother application process and less likelihood of a hearing or public inquiry.

11.4.3 The application process

The s.38 application form is available from the Planning Inspectorate website together with detailed guidance notes on its completion. Having submitted the form you must, within 7 days, post notices:

- in the prescribed form in a local newspaper
- at main points of entry to the common and
- at a point of inspection referred to in the notice where the application can also be viewed.

The notice must also be sent to a number of specified organisations. You must give parties a minimum of 28 days, from the posting of the notice, to comment to the Planning Inspectorate.

11.4.4 Assessment criteria

The application will be assessed against criteria set out in s.39 of the Commons Act. These include the interests of people with rights on and to the land, the interests of the neighbourhood and the public interest, which incorporates nature conservation, landscape, rights of access and historic interest.

11.4.5 Assessment process

The Planning Inspectorate will consider comments on the application and manage correspondence between objectors and the applicant. A decision may be made on the basis of written evidence or, if the application is more complex, the Inspectorate may request a site visit, a hearing or, in extremely complex or controversial cases, a public inquiry.

11.4.6 Conditions

The Planning Inspectorate has the right to impose conditions and modifications on the proposed works. These might include upper time limits for temporary fencing, the removal of works at the end of a time limit, restrictions on the length, height and type of fencing and the area enclosed.

Tip: Consult the Local Access Forum early. They are a voluntary body and may meet only on a quarterly basis but their support for your proposal will be a great help.

11.5 Timescale

As a guide, if there are no objections, and the issues can be resolved by correspondence, the Planning Inspectorate would expect to determine your application within three months of receiving the complete application papers. This might extend to five months if an exchange of correspondence is needed, and a significantly longer period for cases involving a site visit, a public inquiry or a hearing. More complex inquiry cases, or cases where an inquiry is held alongside a related inquiry may take much longer.

You should allow a similar period of time before submitting the application to allow for adequate consideration of options and stakeholder consultation. Consequently the entire process of obtaining s.38 consent is likely to take a minimum of six months and could take well over a year depending on the complexity of the case.

11.6 Checklist

- Determine your aims and consider the full range of options available.
- Do the works need planning permission? If so get this first.
- Are the works new or are you maintaining existing lawful works?
- Decide whether the works fall outside the scope of the Act, are exempt, improve or protect the common or are inconsistent with the traditional use of the common.
- If the works are exempt post a notice at the entry points to the common and notify the Planning Inspectorate.
- If consent is required examine the Commons Register.
 - Is the land registered?
 - Who owns it?
 - Is it owned by the National Trust?

Record details of right holders and the nature of the rights held. Take a copy of the map and check for accuracy with the owner and graziers, as these can have mistakes.

- If the common is owned by the National Trust and consent is required under s23 and s29 of the National Trust Act 1971 obtain written support for the proposals from the National Trust's solicitor.
- If the land is not registered does it fall within the scope of the Commons Act 2006 by virtue of being regulated by a Provisional Order Confirmation Act under the 1876 Commons Act, or subject to a scheme of management under the Metropolitan Commons Act 1866 or the Commons Act 1899?
- Consult widely on the proposals.
- Submit an application to the Planning Inspectorate.
- Within 7 days of the submission, place the prescribed notice in a local paper, at entry points to the common, at the chosen inspection point along with the application and map and post to the key stakeholders as listed on the application form.
- Allow a minimum of 28 days from advertising for people to respond to the proposals.
- If consent is received ensure that all modifications and conditions are complied with.

11.7 Further information and signposting

- Planning Inspectorate Guidance Sheets www.planning-inspectorate.gov.uk/pins/index.htm
- G. D. Gadsden, *The Law of Commons* (London: Sweet & Maxwell, 1988).
- Angela Sydenham, *Commons and Village Greens: The New Law* (Corsham: Lime Legal, 2006).
- Paul Clayden, *Our Common Land: the law and history of common land and village greens* (Henley-on-Thames: Open Spaces Society, 2003).
- *Common Purpose: A guide to agreeing management on common land*. [Countryside and Community Research Unit; University of Gloucestershire]
www.naturalengland.etraderstores.com/NaturalEnglandShop/CP1
- Friends of the Lake District - *Open Green Spaces* www.fld.org.uk/



Commons Toolkit

Fact Sheet 12

Governance and management
of commons

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Commons Toolkit Fact Sheet 12

Governance and management of commons

12.1 Introduction

The management of commons is invariably complex due to the large number of people holding rights of common and having a legal interest in the common, the need for cooperation between these individuals and the fact that the common will often be an important public resource with a wide range of stakeholders. (Guidance Note 9 provides advice on achieving consensus amongst commoners.)

Historically in England most commons were managed through the devolved powers of manor courts. The modernising of legislation and other influences caused a decline in their apparent effectiveness that culminated in the Law of Property Act 1922 which limited their jurisdiction to matters of custom only. Post World War Two there was a renewed interest in positive management; the need to raise food production alongside the conservation of natural resources fostered tensions and identified the need for effective institutional management. The recent growth in agri-environmental agreements and redirection of funding to the delivery of public goods has also increased the need for effective and cooperative management.

There are a number of statutory governance models available which provide the power to compel dissenting individuals to comply in certain situations but until the 2006 Act these were only available on a small number of commons. The 2006 Act provided the opportunity for all commons to adopt a statutory governance model - the Commons Council. However most commons have either no management model or are managed by voluntary associations lacking the ability to bind minorities.

12.2 Statutory models of governance

12.2.1 Inclosure Awards

Regulated pasture (see FS1) created before the Inclosure Act 1845 is subject to its own individual inclosure award which may include a number of management provisions to assist the communal graziers. These provisions can only be ascertained by referring to the specific award which may be held in the local County Records Office or in the National Archives, Kew. Regulated pasture created under the Inclosure Act 1845 is subject to statutory management powers. These powers cover matters such as the times stock are allowed to be turned out, the maintenance of fences and ditches, the making of byelaws, the regulation of stints and the appointment of a reeve. They can be exercised by a majority in value, of those people attending the AGM for the pasture. The inclosure award will also specify the area covered by it and allot stints, specifying the number and type of animal and the period of the year during which the right can be exercised. This is a historical model of management still in operation on some commons but not an option for commons looking for new management models.

12.2.2 Metropolitan Commons Schemes of Management

The Metropolitan Commons Act 1866 allowed for the promotion of a scheme for local management of metropolitan commons (those within the metropolitan police district) by the

owner, commoners, local authority or 12 or more inhabitants of the parish. The scheme could allow for matters such as the expenditure of money on drainage, levelling and improvement of the common and the creation of by-laws. There are currently 33 schemes of management on commons including Clapham, Barnes, Streatham and Blackheath.

12.2.3 Boards of Conservators

The 1876 Commons Act provided for the regulation of commons through by-laws enforced by boards of locally appointed or elected conservators. An application for a provisional order could be made to the Secretary of State by parties representing one third in value of the interests in the land affected. The order could allow for a once and only adjustment of rights (not relevant since the 1965 Commons Registration Act – see Fact Sheet 4 section 4.2) and a scheme of improvement allowing for matters such as drainage and manuring, planting trees, the making of by-laws, general management and the appointment of conservators. The scheme has to “benefit the neighbourhood”.

A total of 36 such orders were adopted all with Boards of Conservators. Many of these are now obsolete although active Boards include East Stainmore in Cumbria, the Clent Hills in Worcestershire and Burrington Common in Somerset. Although still technically available as a management option the provisions of the 1876 Act have largely fallen into disuse and the last provisional order to be adopted was in 1919. The 2006 Act provides for variation or revocation of model schemes where a Commons Council has been established.

The full provisions of each order are held in the local County Records Office or in the National Archives, Kew.

12.2.4 Local Authority management under the 1899 Commons Act

The 1899 Act provided local authorities with the means to introduce model schemes of management on commons covering matters such as drainage, fencing quarries and ponds, preserving vegetation, planting trees and shrubs and conserving objects of historic interest. The schemes had no control over agricultural matters. These schemes do not require the consent of the Secretary of State and are thus a relatively simple model to adopt. The model regulations are periodically revised.

The regulations allow local authorities to make and enforce byelaws. However, the proposed schemes can be vetoed by the owner of the common or by one third of the rightholders. Commons in 1899 management schemes must allow local inhabitants free access and a right to play games. There are approximately 260 commons managed by model schemes under the 1899 Act and this remains a current option for management, although the 2006 Act provides for variation or revocation of such regulation where a Commons Council has been established. Examples of local authority managed commons include Austenwood Common in Buckinghamshire and Caldbeck Common in the Lake District.

12.2.5 Commons governed under Local Acts

Specific legislation has established management bodies for a number of areas of common land which are governed by their own statutory rules and regulations. Examples include the Dartmoor commons governed by the Dartmoor Commons Council which was established by the 1985 Dartmoor Commons Act and the New Forest commons which are managed by the Forestry Commission and Verderers of the New Forest under various New Forest Acts.

12.2.6 Commons Councils

The 2006 Commons Act provided for the establishment of statutory commons councils with powers to manage the agricultural activities, vegetation and rights of common on common land. The provision was a response to the ongoing difficulties in achieving consensus over the management of commons and the impact that this was having on biodiversity and landscape.

Commons Councils are optional; they can be established for individual commons or for large groups of commons and can run in tandem with existing voluntary associations, which may continue to have a day to day role in the management of the common.

A Council is set up by an establishment order made by a Secretary of State. It is necessary to obtain substantial support to the proposal from those with a legal interest in the common; this includes landowners, tenants and occupiers. Particular reference must be given to those entitled to exercise rights of common. It is not necessary to obtain unanimous support and a council may be established in the face of opposition from a few individuals or even classes of interest. It is not essential to have the landowners support to the proposal, although it is clearly desirable. Likewise, if the landowner is unknown this will not prevent a council from being established although it will be necessary to show that efforts have been made to contact all those with a legal interest in the common.

Each establishment order is unique to the circumstances of the common(s) to which it applies but there is a standard constitution covering matters such as membership, the keeping of records, the appointment and conduct of members, voting procedures and the preparation of accounts.

A Council has the power to make rules which are legally binding on all right holders even those who were not in favour of its establishment. These rules can cover issues such as the marking of animals on the common, times of turn out, the maintenance of a live register, the removal of unlawful encroachments or the removal of animals with no legal right to graze. The Council can also enter into agreements, employ staff, acquire or dispose of land, prepare management plans and raise money.

A Council can take action against an individual in breach of the rules either by applying for a county court order requiring that they comply or by treating it as a criminal offence whereupon the offender, if convicted, will be liable to a fine.

An establishment order for a Council can be revoked if it is clear that the council has ceased to operate or is failing to discharge its duties effectively or not paying sufficient regard to public interest when doing so.

12.3 Non-statutory models of management

Commoners and landowners who wish to establish a system of governance but do not feel that a Commons Council is appropriate have a number of non-statutory or voluntary options available.

12.3.1 Manorial Courts

Historically, manorial courts played a key role in the management of common land but their powers were eroded throughout the 19th and 20th centuries. The remaining courts have no legal jurisdiction but are able to administer the customary management of commons such as

stipulating the time of year that stock may be turned out, dealing with encroachments and fining commoners who exceed their rights. However, as they have no right to hear and determine legal proceedings, their powers are very limited. A number of such courts remain active, examples being the Danby and Fylingdale Courts Leet in North Yorkshire and the Spitchwich Courts Leet and Baron on Dartmoor.

12.3.2 Voluntary Associations

These are informal groups, usually with officers, a constitution and set of rules for the common. It is usual for a voluntary association to allow all those with a legal interest in the common to become a member, including the landowner.

A voluntary association is a low cost option of governance; it has no legal powers over commoners and relies on good will and the co-operation of commoners in the interests of all. It has no power to bind a dissenting minority. An association can become a point of contact for others with an interest in the common and for stakeholders such as recreational user groups and the local community.

A small number of voluntary associations have limited statutory powers obtained under the 1908 Commons Act. These relate only to the times and conditions for the turning out of entire animals on the common. Due to the need to apply for Secretary of State approval, very few commoners groups have adopted this procedure. This right is still available although the 2006 Act includes a right to amend or revoke such regulations where a Commons Council has been established.

12.3.3 Federation or umbrella common groups

In recent years a number of umbrella common groups have been established. These are informally constituted groups which represent the interests of commoners over a wide geographic area usually containing a considerable area of common land and CL units. Federations have largely been established to complement the day to day management work of associations. Among their main aims is to provide a collective representative voice for commoners of the area and to disseminate information to associations and other commons bodies, as well as improving public awareness and understanding of common land. Examples include the Federation of Cumbria Commoners and the Gower Commons Group.

12.3.4 Legally constituted groups

These have no statutory authority but have been legally constituted. Most have been established to administer agri-environment agreements and payments on commons. There are a number of possible models available:

12.3.4.1 Groups bound by a Legal Agreement

These groups have no statutory powers but they do have the ability to enforce rules and regulations contained in a legal agreement on those individuals who are party to it. These legally constituted groups have become more common as agri-environment agreements on common land have increased and there has been a need to legally enforce the requirements of an agreement on all participants and give clear direction as to the division of payments. In many cases the legally constituted group is a sub group of a larger Association.

12.3.4.2 Company Limited by Guarantee including a Community Interest Company

As with a group established by a legal agreement the advantage of a Company Limited by Guarantee is that it has the power to impose collective decisions on all commoners who are members of the company. Companies have been set up to administer agri-environment agreements, in most cases the agreement is with the Board of Directors. Companies can also operate beyond the limits of the agri-environment agreement by arranging for works on the common and carrying out marketing and trading on behalf of the members.

As with a group established by legal agreement, the relationship between the Company and the existing Commoners' Association can take a variety of forms. In some cases the Chair of the Board of Directors is the Chair of the Association whereas in others the two bodies work independently.

12.3.4.3 Trusts

This option has been used by Hamatethy Common on Bodmin to administer its agri-environment agreement and payments. As with a company or legally constituted group, the Trust has the power to impose collective decisions on the beneficiaries - in this case the commoners. However, it is unclear what the legal obligations of the beneficiaries are to the Trustees in terms of delivering the agreement with Defra. The main disadvantage of a Trust is that the Trustees have unlimited liability.

12.4 Further information and signposting

- *Agricultural Management of Common Land in England and Wales* - Prepared by Land Use Consultants for Defra January 2005
- Natural England has commissioned studies looking into the possible establishment of Councils in three areas; for more information on these studies visit www.naturalengland.org.uk/
- *An Introduction to Commons Councils and An Introduction to the process of establishing a Commons Council* www.naturalengland.org.uk/
- For more information on Councils refer to www.defra.gov.uk/rural/protected/commonland/councils.htm
- G. D. Gadsden, *The Law of Commons* (London: Sweet & Maxwell, 1988).
- For information on tracing and interpreting inclosure and regulation awards: www.nationalarchives.gov.uk
- Elinor Ostrom, *Governing the Commons*, CUP, 1990 p.90



Commons Toolkit

Guidance Note 12

Choosing and establishing the appropriate management model for common land

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Choosing and establishing the appropriate management model for common land

12.1 Context

Common land is subject to a great diversity of management models, some statutory with the ability to enforce adopted regulations, others voluntary with no ability to bind dissenting minorities. Many commons have no formal management model and have not felt the need to adopt one. The introduction of Uplands Entry Level Stewardship (Uplands ELS) in 2010 to replace the Hill Farm Allowance changed matters for commons in Severely Disadvantaged Areas (SDAs). In order for common land in the SDA to qualify for Uplands ELS there must be a commoners association or group. For commons outside the SDA it is usually necessary, for practical reasons, to establish some form of management or legally constituted group in order to enter agri-environment agreements.

Please refer to Fact Sheet 12 for information on the range of possible management models and governance systems.

12.2 Background

Historically, commons have been managed by a variety of bodies representing their various interests. Some of these, such as commoners' associations and manorial courts have no legal powers or ability to compel dissenting individuals to comply; others take the form of voluntary legal agreements which are binding on all parties.

There are a number of statutory governance models which have been introduced over a one hundred and thirty year period; these include Boards of Conservators (1876) and Commons Councils (2006).

12.3 Which management model suits the circumstances of our common?

It is essential to consider carefully the specific needs of the commoners, common and landowner together with the local problems that they face before choosing which management model to adopt. If large sums of money are involved, a legally binding agreement or statutory governance model is probably essential but do carry out a cost/benefit analysis before going down the route of establishing a Council – some of the other options may be just as effective.

Tip: It is advisable to obtain professional help when making a decision about which management model to adopt. Please use the following guidance in the context of that professional advice.

12.3.1 Decisions and options

This section consists of a series of questions which should assist commoners and others with an interest in common land to decide which management model is most appropriate to their circumstances.

1. Are you:

Someone with a legal interest in the common i.e. landowner, commoner(s)? – go to question 2

Or a local authority or a group of local people with local authority support? – go to question 15

2. Do you have a management body of any sort at present?

Yes – go to question 7

No – go to question 3

3. Do you require a governing body because you hope to enter an agri-environment agreement?

Yes – go to question 9

No – go to question 4

4. Is cooperation between commoners good and can disputes normally be resolved?

Yes – consider establishing a voluntary association

No – go to question 5

5. Are there a large number of commoners?

Yes – go to question 6

No – consider establishing a voluntary association

6. Might funds be available to establish a formal group and would commoners be willing to pay in order to find a way of resolving disputes?

Yes – consider establishing a commons council

No – consider establishing a voluntary association

7. Is the main purpose of your proposed new group to:

a) provide a representative voice and ensure that local commoners concerns are heard?

– go to question 8

b) enter an agri environment agreement – go to question 9

c) to have more control over agricultural activities on the commonv – go to question 12

8. Do you have a potential large membership and do you have the capacity and potential funding to establish and maintain a representative group?

Yes – consider establishing an umbrella group or Federation and make contact with the Foundation for British Commons

No – contact the Foundation for British Commons

9. Do you expect to be able to reach an agreement over the share of funds and stock numbers?

Yes – go to question 10

No – consider establishing a commons council

10. Do you wish to limit the scope of the group to the administration of the agri-environment agreement?

Yes – consider drawing up a legally enforceable agreement between all parties (i.e. an internal agreement).

No – go to question 11

11. Do you wish to limit the liability of the officers?

Yes – consider establishing a limited company

No – consider establishing a Trust

12. Do you usually cooperate and reach agreement?

Yes – consider reviewing your constitution and rules and remain as a voluntary group or establish a company or Trust

No – go to question 13

13. Are there a large number of commoners?

Yes – go to question 14

No – consider reviewing your constitution and rules and remain as a voluntary group

14. Might there be funds available to establish a formal group and would commoners be willing to pay in order to find a way of resolving disputes?

Yes – consider establishing a commons council

No – consider reviewing your constitution and rules and remain as a voluntary association.

15. Are the common rights unexercised and might there be funds available to acquire the common?

Yes – consider using the provisions of the Open Spaces Act 1906 (refer to Guidance Note 5)

No – consider introducing a model scheme of management under the 1899 Commons Act.

12.4 Summary of advantages and disadvantages of various options.

| | Commons Council | Voluntary association | Umbrella group | Legal Agreement | Limited Company | Trust | Local Authority management under the 1899 Commons Act | |
|----------------------|--|--|---|--|--|--|---|--|
| Relevance | A comparatively large number of active commoners and where there is a difficult minority preventing effective management of the common or entry into an agri-environment agreement | Essential in SDA to access Uplands ELS | Suitable when commoners feel the need for collective representation and a strong voice. | Most suited to managing agri-environment agreements | Most suited to managing agri-environment agreements. | Most suited to managing agri-environment agreements. | Where there are issues over the management of recreational use. | |
| Advantages | Legal powers to enforce rules. Applies to all right holders. If the council is a large one enforcement may be by someone at arms length from the common. Legal body. Greater respect and recognition. Power to create a live grazing register. | Cheap to set up and run. Can apply to any size of common. | Can provide a big voice for the small common. Improved communication and awareness. | Can enforce rules against all signatories | Directors' liability limited by guarantee. Ability to impose decisions on members. Disciplined approach to accounting. | Ability to impose decisions on beneficiaries | Legally enforceable bylaws. Relatively simple process. Secretary of state consent not required. | |
| Disadvantages | Costly to establish and run. Complex process to establish. Economies of scale – need a sizeable number of right-holders. Increased administration. | No authority unless it sets up a legal agreement. Relies on good will and cooperation. | Costly to establish and run. Needs to cover a large area. | Usually has a set time period. Only enforceable against signatories and their successor. Some costs setting up | Some establishment and ongoing costs. | Trustees have unlimited liability. Ongoing costs. | Will not give any control over agricultural matters. Require the support and action of the local authority. Can be vetoed by the owner or one third of rightholders | |

12.5 How to establish the chosen model

12.5.1 Local Authority management under the 1899 Commons Act

As this procedure needs to be enacted by the district council it is essential to gain their support for the proposal and this is only likely if there has been a lengthy dialogue about the issues of concern on the common. In order to make a scheme for regulation and management the district council must publish the draft scheme at least three months before it is to be enacted. The scheme must be in the prescribed form. At the end of the consultation period the council must consider any objections and suggestions and may hold an inquiry. The council may then approve the scheme which will take immediate effect. However, if the landowner, or people representing at least one third in value of the interests of the common, object to the scheme then the council cannot proceed.

12.5.2 Commons Council

Commons Councils are created by means of establishment orders. These are made by the Secretary of State but only where he/she is satisfied that there is substantial support for the proposal. In assessing the level of support particular regard must be given to persons entitled to exercise rights of common (and in particular those actually exercising such rights), persons occupying the land or having rights (other than rights of common) and persons with functions under enactments relating to the management of the land. There is consequently a need for considerable consultation prior to seeking an establishment order. Also, as the order will provide detailed arrangements specific to the council, including rules governing the agricultural activities, management of vegetation, exercise of rights of common and subscription level, it is essential to develop some draft proposals for discussion with interested parties. Unless the proposed council covers only a small area with few interested parties the consultation process is likely to require professional input.

Tip: Defra has developed a standard constitution for commons councils and this is available from their website - see 12.6.

12.5.3 Voluntary associations

The key instrument in the establishment of a voluntary association is the constitution. It is essential to involve all interested parties in an open discussion about the constitution in order to achieve as much buy-in to the proposal as possible at the outset. The constitution should be thorough and should cover most of the following aspects:

- Objectives: these must be relevant to the powers and responsibilities of the group and reflect the fact that officers are voluntary. Examples may include:
 - the promotion and protection of members' interests
 - supporting the agricultural management of the common including controlling and managing grazing
 - acting as a representative voice for the commoners
 - engendering co-operation between commoners and landowner
 - safeguarding the rights of members.
- Officers and Committee: it will be necessary for the association to have elected officers and,

depending on the number of members, a representative committee may be required. The constitution should outline the procedure for elections and state whether there is a maximum term of office.

- **Membership:** usually open to all right holders whether by ownership or tenancy and also the landowner(s). In some cases it is widened to include representation from a local authority or specific stakeholder group as an associate or co-opted non-voting member.

Tip - A decision will need to be taken as to whether all commoners or only active commoners are eligible to be members and also whether the land owner is to be a member. The benefit of allowing non grazing right holders to become members is that it will broaden the skill base of the membership and potentially provide an additional supply of professional skills.

- **Form and number of meetings:** including the AGM and the committee. Most Associations meet only once or twice a year with committees meeting more frequently. It is usual for the AGM to be advertised in advance and the agenda to include election of officers and presentation of annual accounts. It should be considered whether the finances should be independently inspected prior to the AGM.
- **Subscription:** most associations charge a small subscription to cover expenses such as room hire, advertising and postage. The constitution should refer to the subscription and also make allowance for this to be changed at an AGM.
- **Voting Procedure:** this is usually one member one vote with the extent of right ownership having no bearing. The constitution should state whether voting will be by show of hands or if requested by a secret ballot. The Chairman is usually given a deciding vote.

Tip - Costs can be reduced if you can base your constitution on that of another Association – but beware not to breach any copyright issues.

12.5.4 Umbrella groups or Federations

The key task is to establish the level of support for the proposal and the willingness, or otherwise, of individuals to contribute financially to the group. The establishment and running costs of such groups are high and consequently, there needs to be a large potential membership willing to pay an annual subscription. Umbrella groups usually employ a part-time member of staff to carry out administrative duties such as issuing newsletters to members and managing committee and members' meetings. A constitution and formal meeting structure are essential, as is the need to have properly inspected accounts. Grants may be available towards set up and establishment costs. The Foundation for Common Land and existing umbrella groups will be able to offer advice and guidance.

12.5.5 Legal agreements

Legal agreements can be drawn up by a land agent or other consultants but must be verified by a solicitor, preferably one with experience of common land law. The costs may be covered

by a common land supplement paid under agri-environment schemes.

The agreements usually bind the signatories to deliver an agri-environment agreement for an agreed share of the annual payment. They tend to last only for the lifetime of the agri-environment agreement but provide security for the individual signatory of the agreement with Natural England. This means that, should a member of the group not comply with the requirements of a scheme, then that member can be held legally responsible for his non-compliance. It is usual for each member to indemnify the other parties to the agreement against this eventuality.

Tip - Where a legally constituted group runs in parallel with a voluntary association there can be confusion as to which body is meeting and the rules which apply. It is important to distinguish between the two and to ensure that the wider membership of the association is not disenfranchised due to the establishment of the smaller legal group.

12.5.6 Limited companies and Community Interest Companies

Articles of Association need to be prepared by accountants and registered at Companies House. Company law requires that a Company holds an AGM, appoints a Board of Directors which then elects a Chairman and appoints a Company Secretary. It is possible for the Chairman also to be the Company Secretary. Accounts must be presented to the AGM where members also have the opportunity to put forward resolutions.

A decision will need to be taken as to whether all commoners or only active commoners are eligible to be members and also whether the land owner is to be a member. In some cases, such as at St Cleer and District in Cornwall non commoners have been appointed to the Board of Directors. The benefit of allowing non grazing right holders to become members is that it will broaden the skill base of the membership and potentially provide an additional supply of professional skills.

There are costs associated with the establishment of the company and ongoing expenses relating to remuneration of the Company Secretary and Board members plus professional fees associated with auditing accounts, completing a Companies House return and an annual tax return. Some or all of these costs may be covered by the common's supplement received under the agri-environment agreement. At Black and White Combe in Cumbria a limited company was established to enter the ESA and subsequently HLS. A number of commons on Bodmin have also established companies limited by guarantee to administer stewardship payments; these include Blisland Commons Limited and St Cleer and District Commons Ltd mentioned above.

The main benefit of the Limited Company approach is that the liabilities of the Directors are limited by guarantee.

A more recent option for commoners is to establish a Community Interest Company (CIC). The company can still be limited by guarantee but must also produce an annual Community Interest Statement and Report; this must state that the company will serve the community rather than operate for private profit motives. The report will explain what the CIC has done to benefit the community and how it has involved shareholders in its activities.

The other distinguishing feature of a CIC is the asset lock; under these provisions the assets and profits of the company must be permanently retained within the CIC and used solely for community benefit.

The choice between a CIC limited by guarantee and a straightforward company limited by guarantee is technical and will require professional advice. For groups considering going down the limited company route, it is worth exploring the benefits of each option.

12.7 Further information and signposting

- *Agricultural Management of Common Land in England and Wales* - Prepared by Land Use Consultants for Defra January 2005
- Natural England has commissioned studies looking into the possible establishment of Councils in three areas; for more information on these studies visit www.naturalengland.org.uk/
- For more information on councils refer to www.defra.gov.uk/rural/protected/commonland/councils.htm
- For more information on CICs refer to www.companieshouse.gov.uk/promotional/cics.shtml
- Federation of Cumbria Commoners www.cumbriacommoners.org.uk
- Gower Commons Group www.gowercommons.org.uk
- For general guidance contact the Foundation for Common Land www.common-threads.org.uk/index.html



Commons Toolkit Fact Sheet 13

Public access to common land

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Commons Toolkit Fact Sheet 13

Public access to common land

13.1 Introduction

This Fact Sheet deals with the issue of public access on common land. The scope of rights of access on commons varies according to the legislation under which the rights were granted. There has also, historically, been a considerable amount of *de facto* (not legally recognised) access to common land. This Fact Sheet should be read in conjunction with Guidance Note 13.

13.2 Background

Pressure to establish a legal right of public access on common land was precipitated by the agricultural inclosure movement which intensified in the mid 18th century. This saw the enclosure of large tracts of land and an accompanying loss of public access over them. Public and political pressure for a right of access continued until the implementation of the Countryside and Rights of Way Act 2000 (CRoW Act) which led to a right of access over almost all common land.

The second half of the 19th century and the first half of the 20th saw a gradual increase in legal access to common land as a result of vigorous campaigning from access groups such as the Commons Preservation Society (now the Open Spaces Society).

The main breakthrough was the 1925 Law of Property Act which provided for access to approximately 20% of common land in England. The second half of the 20th century saw no further extension of legal access to common land despite the findings of the 1958 Royal Commission, which recommended a general public right of access to common lands.

However, most common land in England had been subject to *de facto* access throughout the 20th century, often for a far greater variety of recreational activity than that subsequently established by *de jure* (legal) access.

13.3 The development of legal rights of access on common land

Although legislation dating to the late 16th century required that common and waste land should be left open for the recreation of Londoners, the main push for a legal right of access to common land began in the mid-19th century.

13.3.1 The Metropolitan Commons Act 1866

As well as preventing the inclosure of any common within the Metropolitan Police District – a radius of 15 miles from Charing Cross – this act also allowed the London boroughs to implement management schemes which invariably enabled the provision and management of public access on the commons.

13.3.2 The Commons Act 1876

This act allowed the regulation of any common by a provisional order confirmation act. As well as allowing the appointment of a Board of Conservators, such acts usually made provision for a right of access for “inhabitants of the neighbourhood” for the purposes of playing games and recreation. These rights generally developed into *de facto* access for all due to the difficulties of policing and enforcing any more restrictive provisions.

13.3.3 The Commons Act 1899

The 1899 act enabled district councils (and subsequently national park authorities) to manage and improve commons for the benefit of the public. The act imposes a model scheme of regulation on authorities - this requires that local inhabitants have a right of access over the whole common for the purposes of recreation and playing games.

13.3.4 The National Trust Acts

In the early 20th century, the National Trust acquired a large number of commons on which general public access was already allowed. The National Trust Acts placed a statutory duty on the Trust to keep its common lands unenclosed and un-built upon as open spaces for the recreation and enjoyment of the public. However, there is no express provision for a right of public access.

13.3.5 The Law of Property Act 1925

The most significant and wide ranging impact on access to common land prior to the CRoW Act 2000 was introduced by s.193 of the Law of Property Act 1925. This provided a right of access "for air and exercise" to any metropolitan common or common situated wholly or partly in a borough or urban district.

This had far reaching consequences as many rural areas were in fact administered by urban district councils, including large areas of the Lake District. A High Court decision in 1998 resolved that access under s.193 included horse riding [**R v Secretary of State for the Environment, Transport and the Regions ex parte Billson**]. However, no cycling or vehicles are allowed and fires may not be lit.

The act also enabled owners of rural commons to apply this section to their land by way of a deed. It was intended that this right would be repealed by the CRoW Act but it was subsequently decided that it should remain due to the additional access rights afforded by s.193.

13.3.6 The National Parks and Access to the Countryside Act 1949

This act enabled access to "open country" for the purposes of recreation either by an agreement with the owner or an access order. Open country is land consisting wholly or predominantly of mountain, moor, heath, down, cliff or foreshore and includes common land fitting this definition. Only a small number of access agreements (and probably no orders) were established on common land.

13.3.7 The Ancient Monuments and Archaeological Areas Act 1979

This act granted public access to any monument under the ownership or guardianship of the Secretary of State, or the Commission for Ancient Monuments or a local authority.

13.3.8 Local or private acts

There are large numbers of local acts which deal with the management of a single or a small group of commons. Some of these acts provide for public access, others do not.

For example, the Dartmoor Commons Act 1985 provides for public access on foot or horseback to all registered commons on Dartmoor. The Malvern Hills Act 1884 and the Epping Forest Commons Act 1878 provide public access to these areas. The Manchester Corporation Waterworks Act 1879 dealt with the creation of Thirlmere reservoir in Cumbria and the act specifically prohibits the corporation from restricting "the access heretofore actually enjoyed on the part of the public and tourists to mountains and fells surrounding Lake Thirlmere".

13.4 The Countryside and Rights of Way Act 2000

The Countryside and Rights of Way Act of 2000 (CRoW) greatly increased the extent of public access to common land and finally delivered the recommendations of the 1958 Royal Commission. It should be noted, however, that in many areas the *de facto* rights of access enjoyed by the public were far in excess of the rights granted by CRoW in 2000.

For example, on many upland commons there is access to tarns for swimming and wild camping is generally accepted.

The owner of a common can grant permission for wider recreational activities than those granted through CRoW, such as horse riding. These can be through informal arrangements or can be conferred as a legal right.

13.4.1 Land covered by the CRoW Act and notable exceptions

Access rights under CROW apply to open country and all registered common land other than that on which there is already a statutory right of access under one of the provisions mentioned above. This land is known as section 15 (s.15) land.

Open country is land that is wholly or predominately mountain, moor, heath or down and is shown coloured yellow on the CROW maps at

www.openaccess.naturalengland.org.uk/wps/portal/oasys/maps/MapSearch. These maps no longer distinguish between general open country and common land, nor do they detail s.15 land, although this can be viewed on the MAGIC website www.magic.gov.uk.

There are a number of categories of open country, including common land, to which CRoW does not apply, this is known as excepted land. These exceptions include:

- land used by the military under the Military Land Acts
- land covered by buildings
- land within 20 metres of a livestock building **unless** this land provides a way to CRoW “access land”
- land covered by temporary livestock pens
- land used as a golf course or racecourse.

13.4.2 The access afforded by CRoW

CROW provides the public with a right of access on foot only. This includes running, climbing, photography, having a picnic, and bird watching. Wheelchairs are also allowed.

It does not include cycling, horse riding, camping, or rock climbing.

13.4.3 The owner of the common’s right to extend the types of access allowed

If the owner of the common agrees, then Natural England or, where appropriate, the relevant National Park Authority may extend the type of access allowed on a common. This is done by excluding some of the restrictions that CRoW has imposed either indefinitely or for a specified period.

For example, it may be felt that the restriction on swimming in tarns in access areas is unnecessary and, with the agreement of the common owner, this may be revoked. There is no requirement for the landowner to discuss this with commoners.

13.4.4 Gaining entry to access land

The public have a right to enter open access land at any point and may climb walls or fences to do so. The local Highway Authority or National Park Authority has powers to seek agreement with the common owner to create a physical entrance onto access land by way of a stile, gate or bridge. Access points to open access land are usually publicised locally to encourage walkers and others to use the stiles etc and to avoid damage to boundaries.

The agreement may be that the landowner will carry out the work (possibly with a financial contribution from the authority) or alternatively that the authority will carry out the work itself. If an agreement cannot be reached then the authority can serve a notice on the owner informing him of its intention to carry out the work. The landowner has the right to appeal to the Secretary of State against such a notice.

13.4.5 What is expected of the public when using open access land?

There is a long list of things that the public cannot do when exercising their right of access under the CRow Act.

The following is not comprehensive but includes most common issues. Access granted under CRow does not include a right to:

- drive or ride a vehicle, bike or horse
- swim, fish, sail or boat
- bring any animal other than a dog on to the land
- camp or light fires
- hunt or shoot
- play any organised games, hang-glide or para-glide.

While these activities are not prohibited under CRow there is no right conferred by the CRow Act to undertake them. People wishing to participate in these activities need the permission of the land owner or rely on other rights which may exist.

In addition visitors are required to:

- shut and fasten gates
- not interfere with fences walls and other boundaries (although they can climb them),
- not intentionally or otherwise do something that disturbs, annoys or obstructs another person's lawful use of the access land
- not take any specimens of flora or fauna or birds' eggs.

13.4.6 Dogs

Dogs are allowed on access land but they must always be kept under close control and must be kept on a short lead from 1 March to 31 July and whenever they are in the vicinity of livestock (including horses).

13.4.7 Restricting access under CRow

It is possible to temporarily exclude or restrict access under CRow. This is dealt with in Guidance Note 13.

13.5 Public Rights of Way

In addition to access rights on common land granted by the various statutes listed above and by the CRoW Act, many commons are also crossed by public rights of way. These are linear routes. A public right of way will be either:

- Public footpath – which grants a right of way on foot only (minimum width 1 metre across a field, 1.5 metres for a field edge path)
- Public bridleway - a right of way on foot, horse or bicycle, although cyclists must give way to horse riders and pedestrians (minimum width 2 metres for a cross field path, 3 metres for any other)
- Restricted byway – a right of way on foot, bicycle, horse back or mechanically propelled vehicle
- Byway open to all traffic – a rights to all wheeled vehicles as well as pedestrians and people on horse back.

There is a legal principle that “once a highway, always a highway” and public rights of way must be kept open and available for public use at all times. It is possible, on very rare occasions, to divert, extinguish or temporarily close a public right of way but the procedure is complex and requires the support of the local Highways Authority to have any chance of success.

Public rights of way are maintained at the public expense.

13.6 Drives across commons

Prior to 2000, it was ruled impossible for owners of houses with access drives across common land to acquire a legal right of vehicular access to their property by way of prescription or long user rights. This was because vehicular access on commons is illegal unless granted by lawful authority, within 15 yards of a highway or incidental to the exercise of a commoner’s rights.

The 2000 CRoW act provided a procedure so that a vehicular easement could be acquired by compulsory purchase across land where driving was a criminal offence. This section of the act was repealed by the 2006 Commons Act, primarily because the House of Lords ruled in **Bakewell Management Ltd v Brandwood and Others (2004)** that an easement for vehicular access across a common could be acquired by prescription.

The judgement in this case was complex and there remain potential exceptions to the ruling. Consequently, it is advisable to seek professional advice on individual cases.

13.7 Further information and signposting

- Open Access Contact Centre
Natural England
Block 3 Government Buildings
Burghill Road
Westbury on Trym
Bristol
BS10 6NJTel: 0845 1003298
Email: openaccess@naturalengland

- www.naturalengland.org.uk/ourwork/enjoying/places/openaccess/restrictions.aspx
www.naturalengland.org.uk/ourwork/enjoying/places/openaccess/
- www.defra.gov.uk/rural/countryside/crow/index.htm
- Land Managers' Guidance Pack available on the Natural England website.
www.naturalengland.org.uk/ourwork/enjoying/places/openaccess/restrictions.aspx
- Angela Sydenham, *Public Rights of Way and Access to Land* (Jordans, 2007).
- Paul Clayden, *Our Common Land: the law and history of common land and village greens* (Henley-on-Thames: Open Spaces Society, 2003).
- G. D. Gadsden, *The Law of Commons* (London: Sweet & Maxwell, 1988).
- To view judgement in *R v Secretary of State for the Environment, Transport and the Regions ex parte Billson* (1998) and *Bakewell Management Ltd v Brandwood and Others* (2004) visit the Defra commons web site, court judgements section
www.defra.gov.uk/rural/protected/commonland/court.htm



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Managing public access
on common land

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Commons Toolkit Guidance Note 13

Managing public access on common land

13.1 Context

Almost all common land in England is subject to general public access on foot and a considerable area also provides unrestricted access to horse riders. Wider access rights for a variety of recreational activities have also been granted on certain commons by specific acts of Parliament or agreements with landowners. In addition, de facto access (that which has occurred in practice but which is not underwritten in statute) for activities such as climbing, swimming and wild camping has taken place on many commons for a considerable length of time.

13.2 Facilitating public access to common land

Inevitably public access to land can bring challenges for the land manager but in most instances these challenges are best managed constructively so as to enable the integration of access with conservation and farming. The key to this is to facilitate access to ensure that it is both enjoyable and responsible.

Graziers may find it proves beneficial to create desired access lines by encouraging particular routes for the public which fit in with farming practices and conservation needs. This can be done by placing gates in appropriate places, signing, and creating a visible route for people to follow. The latter might involve cutting back vegetation or placing stepping stones. Most visitors prefer to keep to paths and easier routes, particularly on rough terrain.

Sometimes a landowner, tenant or grazier may experience recurring problems when members of the public do not respect the limitations of their access rights. Similarly members of the public occasionally face difficulties trying to access land which they are legally entitled to access. In such circumstances the best initial course of action may be to raise these problems with a National Park or County Council ranger or member of staff.

They may be able to help graziers, tenants and owners manage the problem more effectively by creating new access points, erecting new signs or putting additional information on the access web site. Correspondingly they may approach the landowner and explain the legal basis of the access and his or her responsibility to users.

Tip: Try to word signs positively as they are more likely to be effective.

For example, you might use wording such as “Is your dog safe with sheep? Don’t risk it” or “Help us to reduce disturbance to lambs and nesting birds – please keep your dog on a lead.”

If there are problems with a particular user group or with local people, then it might be helpful to organise a meeting at which problems and concerns can be raised by all. Again the National Park Authority or County Council may be able to help with this.

An alternative point of contact is the Local Access Forum. These are advisory bodies set up under the CROW Act to provide independent advice on public access to land for open air recreation. Each Forum meets at least twice a year and contact information should be available on the Natural England website.

If problems continue and members of the public for example, persist in not sticking to rights of way, cycling on urban commons or not complying with the restrictions imposed by CROW, then legally they become a trespasser and may be restrained by an injunction. In the case of CROW land they will be denied a right of access to that land or any other land in the same ownership for the next 72 hours after leaving it. No criminal liability is imposed by trespass or failure to comply with the obligations of the CROW Act.

13.3 Can access be restricted?

Most of the legal access to common land created under the Law of Property Act and other legislation predating the CROW Act cannot be restricted. However, bylaws, where they are established, may offer scope for some limited restrictions. It will be necessary to examine individual bylaws to determine whether they can be of use in a particular situation.

The Ancient Monuments Act provides powers to restrict access in certain circumstances relating to the conservation of the sites.

13.3.1 Public rights of way

The Highways Act provides for the extinguishment or diversion of restricted byways, bridleways and footpaths. In order to extinguish a route the applicant must demonstrate that the way is not needed for public use. Satisfying this requirement is difficult and generally local authorities are reluctant to make the necessary orders.

In deciding whether to permit a diversion the council must consider whether “it is in the interests of the owner, lessee, or occupier of land crossed by the path or way or of the public”; it must also give regard to agriculture, forestry and nature conservation.

The procedure for both diversions and extinguishments is for an order to be made and then confirmed. If there are objections the matter must be referred to the Secretary of State for confirmation unless the council decides to withdraw the order.

Prior to making an application it is advisable to consult the appropriate officers in the local authority, the parish council, the owner and commoners as well as user groups such as the Ramblers Association and British Horse Society. If there is a local member of the Local Access Forum it will probably be helpful to gauge their views.

Temporary diversions and closures can be made to footpaths, bridleways and restricted byways for a period of up to three months for the purposes of excavation or engineering necessary for agriculture. The highway authority will make an order but this does not have to be advertised and there is no opportunity to make objections.

Further diversion powers were introduced by the CROW Act where works to be carried out on, or near to, a public footpath or bridleway are likely to cause danger to users of the right of way. The occupier cannot divert the section or any part of the same path for more than 14 days in any calendar year. The occupier must provide the highways authority with at least 14 days notice of

the proposed diversion in the prescribed form and publish the notice in the local paper at least seven days before it takes effect. Before the end of the period any damage must be made good and obstructions removed.

13.3.2 Open access under CRow

It is possible to exclude or restrict access on land mapped as access land under CRow through discretionary and directive powers.

Note: Discretionary and directive exclusions or restrictions apply only to access rights granted under CRow. The public will still have the right to use public rights of way that cross open access land, and can continue to exercise rights granted under other enactments.

13.3.2.1 Twenty eight day exclusions or restrictions (discretionary powers)

Owners and tenants may exclude or restrict access to open access land for up to 28 days in any calendar year. These days may be consecutive and can be whole or part days. They cannot be:

- Bank holidays, Christmas Day or Good Friday
- Saturdays between 1st June and 11th August
- Sundays between 1st June and 30th September
- More than 4 weekend days in any calendar year

The Open Access Contact Centre in Bristol must be given at least 5 working days notice of closure unless:

- the area affected is either 5 hectares or less and the restriction is for 5 days or less, or
- the restriction will be in place for no more than 4 hours.

In these cases only 2 hours notice is required.

They will pass the notice on to the relevant authority, namely Natural England or the local National Park Authority where the land lies within a national park. However, the onus is on the person notifying the restriction to ensure that there are notices on site informing the public that a restriction is in place.

Tip: If you think that you may need to apply for a direction to exclude or restrict access in the future it is advisable to register your details with the Open Access Centre in advance. Application forms can be obtained from their website or by post.

13.3.2.2 Land management (direction)

An application to exclude or restrict access for purposes of land management may be made by a person with an interest in the land. This can be for a specified period every calendar year or for a fixed period. Land management can include farming or sporting activities such as bracken spraying or heather burning.

A commoner can only apply for a direction to restrict access if it is necessary in order to exercise grazing (or other) rights but cannot apply for a direction to improve these rights. Thus it would not be possible for graziers to apply for a direction to exclude the public in order to carry out

bracken spraying but theoretically it could be done to allow the common to be gathered, if open access makes this difficult.

Tip: Many areas of common land with open access are indicated on signs in local villages or at access points – placing restriction notices alongside any of these is a good way of bringing the restriction to the attention of visitors.

13.3.2.3 Avoidance of fire or danger to the public (direction)

A person with an interest in the land may apply for a direction to exclude or restrict public access where there is a risk of fire due to weather conditions or where it is necessary to protect the public from danger due to something that has been done or is proposed on the land.

This may be for a specified period or for a set period every year. Again a commoner can only make a formal application if it is necessary for the exercise of rights. However, informal representations can be made by commoners and others and the National Park Authorities or Natural England may make a direction for the purposes of excluding the public, without having received a formal application, if they feel that it is necessary to do so for purposes of public safety or for the mitigation of fire risk.

13.3.2.4 Directions for other purposes

The National Park Authorities or Natural England may exclude or restrict access for the purpose of conserving flora, fauna, geology or heritage. For example, it may be felt that the public should not have access to an area of common land which is a known nesting site for black grouse. Landowners and commoners cannot formally apply for such restrictions but can make representations and suggestions concerning this.

The Secretary of State for Defence or the Home Secretary may make directions to restrict access for defence or national security reasons.

13.3.2.5 How to apply for a direction

The application for the direction must be submitted to the Open Access Centre in Bristol for consideration by Natural England or the appropriate National Park Authority. Prior to making the application you need to have registered your details with the contact centre.

The application must specify the nature of your interest in the land; if you are a common right holder submit a certified copy of the entry relating to the rights of common in the commons' register. The application should detail the location and extent of the land, the period of the exclusion or restriction to be provided by the direction, its purpose and why it is considered necessary. If the applicant is a landowner it is also necessary to indicate what use has been made of the discretionary 28 day exclusion or restriction option on the land in question.

The Open Access Centre must be given at least four months notice for any direction which would be in place for over six months, and six weeks notice for a shorter period. They will pass the notice on to Natural England or National Park Authority for a decision, and consult the relevant Local Access Forum where the direction would be for longer than six months.

Tip: If you intend to apply for a direction to close land for more than six months then it will be in your interest to inform the Local Access Forum as early as possible. Members are volunteers who meet infrequently so the more notice they have the better.

The relevant authority may vary the details of the direction and may refuse it. In such cases the applicant has the right to appeal to the Secretary of State in Defra within six weeks of the issue of the decision.

13.4 Dogs

13.4.1 CRoW land

Dogs are allowed on CRoW access land. They must be kept on a short lead when they are near livestock (including horses) and between the 1st of March and the 31st of July.

An owner or tenant, but not a commoner, may exclude people with dogs from enclosed land of less than 15 hectares (this could include commons) for up to six weeks every calendar year if the land is used for lambing. Permission is not required for this exclusion but five days notice containing the prescribed information must be provided to the Open Access Centre in Bristol.

The owner of a common used for grouse rearing or shooting can exclude people with dogs for up to five years if it is felt to be necessary for the management of the land. Permission is not required but a calendar month's notice must be given to the Access Centre.

Note: These restrictions do not apply to guide or hearing dogs or to people walking dogs across rights of way on the land.

13.4.2 Non-CRoW common land

Much common land is excluded from the provisions of CRoW because statutory access rights were already in existence in 2000. However, the Countryside Code advocates that dogs should be kept under close control including on public paths and emphasises that dogs must not disturb or scare wildlife or farm stock.

Under the Dogs (Protection of Livestock) Act 1953 it is an offence for dogs to attack or chase livestock. If a farmer comes across a dog attacking his stock he has the right to shoot the dog but he must report the shooting to the police within 48 hours.

13.5 Occupiers' liability on open access land

The CRoW Act significantly reduced the duty of care owed by occupiers to users of CRoW access land, recognising that CRoW access rights should not place an undue burden on the occupier and also the importance of not damaging the character of the countryside.

For further information refer to the Open Access and Public Liability section of the Land Manager's Guidance Pack available on the Natural England website.

13.6 Large-scale events

None of the access provisions under CRoW or earlier legislation grant a statutory right to host large-scale events on common land. An event may proceed if it is entirely on public rights of way and there are no ancillary activities such as check points or medical support located elsewhere on the common.

Even where the event is entirely on rights of way, organisers should, out of courtesy, inform commoners and landowners of their plans in advance. Large-scale events might include mountain marathons, mountain bike races or long distance horse riding events.

Some of the access provisions introduced by legislation in the late 19th century do allow for the playing of games by local people and this has been interpreted to include local events such as sports days or May Day festivals.

13.7 Travellers

It is an offence to take a motor vehicle on to common land unless it is to park within 15 yards of a road.

Where a large number of vehicles are parked on common land and it appears to be the intention of the occupiers of the vehicles to reside there then there may be scope to invoke the Public Order Act 1986. This requires the involvement of the police and, in order to use it, it is necessary for the landowner (or commoners acting on his behalf) to have taken reasonable steps to ask the occupiers of the vehicles to leave.

It is also essential that the trespassers should either have caused damage to the property, have used threatening or abusive language or behaviour towards the occupier or his family or agent, or that there should be twelve or more vehicles on the common. Under such circumstances a senior police officer can direct the trespassers to leave and, if they fail to do so, or return within three months, they will be liable to imprisonment or a fine.

13.8 Further information and signposting

- Open Access Contact Centre
Natural England
Block 3 Government Buildings
Burghill Road
Westbury on Trym
Bristol BS10 6NJ
Tel: 0845 1003298
Email: openaccess@naturalengland
www.naturalengland.org.uk/ourwork/enjoying/places/openaccess/
- Angela Sydenham, *Public Rights of Way and Access to Land* (Jordans, 2007).
- Paul Clayden, *Our Common Land: the law and history of common land and village greens* (Henley-on-Thames: Open Spaces Society, 2003).
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- For information on managing access see:
www.naturalengland.etraderstores.com/NaturalEnglandShop/CAX150-3
- *Land Managers' Guidance Pack to CRow implementation* is available on the Natural England website. In particular see Statutory Restrictions on Access Land.
www.naturalengland.org.uk/ourwork/enjoying/places/openaccess/restrictions.aspx
- Local Access Forum information
www.naturalengland.gov.uk/ourwork/enjoying/accessforums/laf/default.aspx

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Commons Toolkit Guidance Note 14

Managing livestock on commons with unfenced roads

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Commons Toolkit Guidance Note 14

Managing livestock on commons with unfenced roads

14.1 Context

Many roads cross common land that has had livestock grazing on it for generations. Over the last ten years, livestock numbers have been reduced on commons, partly as a result of agri-environment agreements. More recently, some new agreements are looking to change stocking types and levels, with cattle increasingly being introduced back on to commons to control the growth of coarse grassland and improve the diversity of the ground flora.

This Guidance Note is aimed at informing stakeholders of the main issues to consider when managing livestock on commons with unfenced roads.

14.2 Background

Animal types and numbers that are indicated in the commons register are entitled to graze the relevant common. It is possible that a local agreement may have been reached by the commoners not to fully exercise their rights for a variety of reasons, possibly as a result of the commoners entering an agri-environment agreement or concerns for the safety of grazing livestock in urban areas.

For further details see Guidance Note 10 on Agri-environment agreements.

Legal responsibility: Where roads cross a common (or land where fencing is not customary, or it is a town or village green), they are normally unfenced and, under these circumstances, the legal position is that **provided a grazier has a right to graze the animals in question then, under the 1971 Animals Act, where damage is caused as a result of these animals straying on to a highway, the person who placed them on the land shall not be regarded as having committed a breach of the duty of care by reason of only placing them there.**

14.3 A checklist to reduce accidents

This checklist highlights some broad principles, helping to reduce the chances of accidents that might cause death or injury:

- Carry out a risk assessment and implement actions to minimise risks.
- Cut back vegetation to allow maximum visibility. Consider stopping distances for typical speeds, e.g. 36 metres (118 ft) for 64km/h (40mph); 73 metres (240 ft) for 96km/h (60mph).
- Select animals with a quiet temperament and, where a particular problem, those with a light colour are more visible.
- Consider reflective collars and leg bands to improve visibility.
- Consider changing animal behaviour by feeding and watering in strategic locations where this will reduce the number and frequency of animals crossing the road.
- Consider “hefting” the animals in a location that reduces risk by herding/flocking them together away from roads and removing strays on a regular basis.

- Consider temporary fencing and cattle grids to keep animals away from particularly dangerous roads. Note that this will require consent from the Secretary of State (see Fact Sheet 11 Fencing and other works).
- Contact the Highways department to ask if they will install or upgrade road signs or other mitigating works to warn drivers and reduce vehicle speeds.
- Contact the local police to ask if they will patrol the area with speed guns or install temporary speed signs during periods of greatest risk, e.g. lambing time.

Tip: If you want to introduce stock on to a common and need new signs, a new speed limit and improvements in policing, contact the Highways Department and local police at least 24 months before you need any mitigating works to be installed.

14.4 Reducing risks

14.4.1 Risk assessments

You can either bring in an outside health and safety specialist to carry out a risk assessment for you, or produce one yourself. This process is not difficult but is certainly worthwhile and, if you keep a record on file and conduct regular reviews, it helps to record and demonstrate that you have acted responsibly in any cases where a dispute arises.

The process involves:

- Identifying the main hazard points (usually more than one), e.g. a long straight road, with cars at high speed, where animals cross regularly to get to water.
- Identify the risks (who might be harmed and how), e.g. cattle hit by cars at high speed, causing death or severe injury of passengers and animals.
- Identify the control measures you have taken to reduce the risks, where this is needed and specifying how and when. For example, by introducing a speed limit/new signs/installing new water troughs, so animals do not have to cross the road to get water/re-hefting animals (see Fact Sheet 6). See the checklist below 14.4.2 for other options.
- The risks are then re-assessed after the control measures are in place, with further regular reviews (which should be recorded) and with further control measures introduced if necessary.

Investigating possible hazards will involve observing the current situation and asking local people, shepherds and herdsmen to find out the behaviour of existing animals. In this way, you can identify if one or two animals are causing problems, where animals like to cross roads, where they shelter from the weather, flies, sun etc. Pay particular attention to animal behaviour at night when animals are most difficult to see.

Also observe driver behaviour to identify locations where vehicles are driven at high speed.

14.4.2 Checklist of common hazards

- Cars able to travel at high speeds, with many overtaking manoeuvres.
- Hidden dips and bends.

- Vegetation close to roads restricting visibility.
- Animals having regular crossing points to water, feed or shelter.
- Animals lying on the road at night in particular locations.
- Animals licking the road when rock salt has been applied.
- Water troughs and supplementary feeding sites close to the road, encouraging herding and flocking on the road, especially in periods of bad weather.
- Animals sheltering behind trees, under bridges, close to walls, in hollows etc. in periods of bad weather.
- When animals are new born, lambs, calves etc., consider implications of young animals not accustomed to traffic and animals suddenly running to each other when separated by the road.

14.4.3 Insurance

Much uncertainty exists around liability and insurance.

As clarified in section 14.2 above, under normal circumstances the livestock owner will not be liable if a driver hits an animal on an unfenced road on a common.

Most farmers take out insurance to enable them to make a claim against the value of animals if they are maimed or killed. Where animals are grazing on a common with a high accident frequency, premiums are likely to be higher than normal and/or the policy excess limit will be increased.

To make a successful claim against a driver, the farmer will need the driver's vehicle registration number as a minimum and preferably their name, address and insurance company details. In most circumstances, unless the farmer or a witness has seen the accident, the only option is to make a claim on the farmer's own insurance policy, which is why higher premiums and higher excess limits normally apply.

It is worthwhile speaking to any insurance company if you carry out a risk assessment and introduce control measures that reduce risk significantly, as there should then be grounds to reduce premiums or excess limits.

Tip: If introducing livestock on to a common for the first time, or the risks increase suddenly for some other reason, consider a publicity campaign for local people. Feedback from the police suggests that it is local people who are mostly responsible for speeding.

14.5 Further information and signposting

- Stopping distances: www.direct.gov.uk/en/TravelAndTransport/Highwaycode/DG_070304
- Risk assessments: www.hse.gov.uk/PUBNS/indg163.pdf
- Various information leaflets including Leaflet 7 *Reducing Stock Casualties on Sites with Vehicular Access* www.grazinganimalsproject.org.uk/animal_welfare.html

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Further reading

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Key contacts and information sources

Government & Agencies

| | |
|-------------------------------|--|
| Natural England | 1 East Parade, Sheffield S1 2ET 0845 600 3078 www.naturalengland.org.uk |
| Defra Common Land Team | Commons Team 3/C Nobel House, 17 Smith Square, London SW1P 3JR 020 7238 4492 www.defra.gov.uk/rural/protected/commonland commonsandgreens@defra.gsi.gov.uk |
| Rural Payments Agency | PO Box 1058, Newcastle Upon Tyne, NE99 4YQ 0845 603 7777 www.rpa.gov.uk |
| MAGIC | www.magic.gov.uk |
| Nature on the Map | www.natureonthemap.org.uk |
| Planning Inspectorate | www.planning-inspectorate.gov.uk/pins/index.htm |
| English Heritage | 1 Waterhouse Sq, 138 - 142 Holborn, London EC1N 2ST 020 7973 3000 www.english-heritage.org.uk |

National Organisations

| | |
|---|--|
| Foundation for Common Land | www.common-threads.org.uk |
| Association of Commons Registration Officers | www.acraew.org.uk |
| Open Spaces Society | 25 A Bell Street, Henley-on-Thames, RG9 2BA (01491) 573535 www.oss.org.uk |
| National Trust | PO Box 39, Warrington WA5 7WD 0844 800 1895 www.nationaltrust.org.uk |

National Trust Countryside and Environment
Heelis, Kemble Drive, Swindon, SN2 2NA
01793 817400

Moorland Association 16 Castle Park, Lancaster, LA1 1YG
(01524) 846846
www.moorlandassociation.org

Regional Organisations

Dartmoor Commoners' Council 6 Lockyer Mews, Paddons Row, Tavistock, Devon, PL19 0HF
01822 618892
www.dartmoorcommonerscouncil.org.uk

Federation of Cumbria Commoners www.cumbriacommoners.org.uk

Federation of Yorkshire Commoners www.yorkshirecommoners.org.uk

Forest of Dean Verderers www.deanverderers.co.uk

Forest of Dean, Forest Voice www.deanforestvoice.org

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