

Law Commission Consultation on Conservation Covenants

Response from the Game & Wildlife Conservation Trust

Overall

It is our view that a properly drawn framework for conservation covenants would be beneficial. Correctly established they have the potential to create and preserve habitats and species through a partnership between private landowners and conservation organisations whilst providing both capital and income payments. They may serve a particularly useful purpose in providing a better alternative to compulsory designation and consequently are likely to be more effective since the participation is voluntary and the agreement parties retain responsibility for drawing up and implementing the covenant. Such an approach is more likely to positive environmental outcomes at no cost to the public purse.

2.30 We invite views from consultees on ways in which they could use conservation covenants to conserve land for environment or heritage purposes.

We are aware of a number of instances where landowners have had areas of high nature value designated compulsorily as Sites of Special Scientific Interest (SSSI). Such designation brings with it an imposed management plan and quite often a degree of resentment from the landowner. In some instances the management plans differ from the way the land has been traditionally managed and on occasions this has led to the demise of the species or habitat the designation was supposed to conserve.

Very often sites of high nature value are such because of the actions of the landowner many of whom share an affinity for the flora and fauna of the site and are keener than any to see the legacy preserved. Likewise landowners who wish to re-create habitats or encourage particular species could use a covenant arrangement.

We also see potential for covenants to be more widely used in new and novel areas. These might include things like Community Orchards planted with heritage species. Initiatives such as these involve communities as well as preserving rare genetic resources.

Likewise water companies may wish to enter covenants with landowners whereby the use of agricultural inputs is restricted avoiding those which are impossible or expensive to remove from drinking water. Such approaches offer benefits to the water company because they can save the considerable capital expenditure required to build treatment and blending plants. However with no treatment infrastructure the water company rely on a guaranteed source of clean water. Wessex water has pioneered a partnership approach with farmers in their smaller catchments which appear to be working well. A conservation covenant would suit this situation very well.

2.54 We invite views from consultees on:

- (1) how long-term biodiversity offsetting activity can currently be secured on an offset site;*
- (2) whether existing methods for securing biodiversity offsetting activity are satisfactory;*
- (3) whether conservation covenants would be a useful addition to the methods available to deliver biodiversity offsetting activity; and*
- (4) what advantages conservation covenants might offer relative to existing methods.*

It is difficult to secure long term biodiversity off-setting for the reasons outlined in the consultation document. The planting of trees affords some long term security, as it is necessary to secure consent for felling from the Forestry Commission and there will almost always be an obligation to re-plant. However, it is more difficult to secure a long term agreement to manage land for a particular species, for example, except through a lease or management agreement. A conservation covenant would offer the advantage of long term security and be binding on future occupiers, which is perhaps the greatest shortcoming of current options.

2.72 We provisionally propose the introduction of conservation covenants into the law of England and Wales. This scheme of conservation covenants should include:

- (1) no requirement for there to be benefited land;*
- (2) the ability to impose positive as well as negative obligations; and*
- (3) provision for those obligations to bind successors in title.*

Do consultees agree?

Yes, all three are crucial components which will make conservation covenants a valuable tool for land managers.

4.22 We provisionally propose that conservation covenants should be capable of being held by any Secretary of State (for England) or the Welsh Ministers (in Wales). We further propose that in England, a single Secretary of State should have the power to nominate or exclude responsible bodies. The Welsh Ministers should have the same power in Wales.

Responsible bodies should be:

- (1) a public body whose objects include some or all of the purposes set out at paragraph 4.40;*
- (2) a registered charity whose objects include some or all of the purposes set out at paragraph 4.40; or*
- (3) a local authority.*

Do consultees agree?

Yes.

4.24 We invite views from consultees on whether there is a case for giving the Secretary of State and the Welsh Ministers the power to include for-profit companies whose objects include some or all of the purposes set out at paragraph 4.40 as responsible bodies

We suggest that they should only be offered to charities, public bodies and local authorities in the first instance.

4.26 We provisionally propose that a conservation covenant should be capable of being transferred from one responsible body to another. Do consultees agree?

Yes

4.29 We invite consultees' views on what should happen to a conservation covenant where the responsible body which holds it ceases to exist, or ceases to be a responsible body. In particular:

- (1) *should there be a holder of last resort?*
(2) *if so, who should take on this responsibility?*

We suggest that the Secretary of State for the Environment and Rural Affairs should be the holder of last resort in the event of the responsible body ceasing to exist in England, or the equivalent Minister in Wales.

4.40 We provisionally propose that the purposes for which a conservation covenant may be created are an obligation to do or not do something on land for the public benefit, to preserve, protect, restore or enhance in relation to that land:

- (1) *its natural environment, including its flora and fauna;*
(2) *its natural resources; or*
(3) *any cultural, historic or built heritage features of that land.*
Do consultees agree?

Creation of new habitat should also be included.

4.49 We invite views from consultees as to whether a scheme of conservation covenants for England and Wales should include any form of public oversight for the creation of new conservation covenants.

We do not think that any agreement entered into voluntarily by a private land owner requires any form of public oversight. Indeed to incorporate this would deter many good intentioned landowners from entering into a covenant arrangement.

5.8 We provisionally propose that conservation covenants shall be statutory burdens on land, rather than proprietary interests or contractual agreements. Do consultees agree?

Yes, it is important that conservation covenants stand wholly within the statutory scheme in order that their operation is clear and unambiguous, binding successors in title. To make them contractual agreements or proprietary interests would be to confuse matters and might lead to disputes.

5.10 We provisionally propose that a conservation covenant must be created in writing and signed by the parties. Do consultees agree?

Yes

5.14 We provisionally propose that a conservation covenant should bind land in perpetuity, unless a shorter period is expressed in the conservation covenant. Do consultees agree?

We think this unwise as it would fossilise land into agreements that might be in-appropriate for future generations. Unless a shorter period is expressed covenants should be subject to review every 50 years.

5.16 We provisionally propose that, subject to two exceptions, a statutory scheme for conservation covenants should not limit the obligations which parties may include in a conservation covenant, provided they do not go beyond the purposes for which such a covenant can be created. Do consultees agree?

We agree that such flexibility is what will be attractive to land owners and their partners.

5.18 We provisionally propose that any provisions of a conservation covenant made by a leaseholder which conflict with the provisions of his or her lease should be void. Do consultees agree?

Yes.

5.22 We provisionally propose that a statutory scheme for conservation covenants should be accompanied by non-statutory guidance for those who create and hold conservation covenants. This guidance should include model terms. Do consultees agree?

Yes

5.23 We invite consultees' views on who should formulate non-statutory guidance (for example, Government departments, advisory bodies, or conservation organisations).

Stakeholder groups are ideally placed to do this, the emphasis being that it is non-statutory guidance.

5.31 We provisionally propose that a conservation covenant should be registrable as a local land charge, and that from the date when a conservation covenant is so registered it will be enforceable against successors in title to the original covenantor. Do consultees agree?

Yes, we believe this is important.

5.32 We provisionally propose that there should not be a statutory requirement for central recording of conservation covenants; but that responsible bodies should be encouraged to publish this information voluntarily, with the agreement of the relevant landowner. Do consultees agree?

Yes

6.10 We invite consultees' views on how obligations under a conservation covenant should be managed, and in particular:

(1) what sort of management action is likely to be needed; and

(2) whether in some cases it would be useful for a management agreement to be used in addition to a conservation covenant.

All of this should be covered in the individual agreement for each covenant. A management agreement could be included in a schedule to the covenant itself, but would need to be bespoke as each agreement is likely to be unique and the requirements for management will vary depending on the aims of the covenant.

6.15 We provisionally propose that the parties should be free to agree management actions as part of a conservation covenant, but that no management powers should be provided for in the statute. Do consultees agree?

We strongly agree with this. We do not want to see statutory powers imposed.

6.40 We provisionally propose that, on proof of a breach of a conservation covenant, the court should have the power to issue a final injunction. Do consultees agree?

Yes, but the objective should be to enforce restoration rather than to seek punitive damages.

6.59 We invite consultees' views on whether Government or a statutory conservation body should have the power to enforce conservation covenants where a holder has failed or is unable to do so.

No.

6.61 We provisionally propose that, on proof of the breach of a responsible body's obligations under a conservation covenant, the court should have the power to order remedies in accordance with general principles of contract law. Do consultees agree?

Yes.

7.10 We provisionally propose that unless a conservation covenant expressly provides otherwise, its responsible body may unilaterally discharge the obligations contained in it. Do consultees agree?

No, the covenant is essentially a contract freely entered into by the parties and on which they can expect to rely. It should only be able to be discharged by agreement or on application to the Lands Tribunal.

7.11 We invite consultees' views on whether the responsible body's ability to discharge should be limited to certain circumstances, and, if so, what circumstances would be appropriate.

No

7.16 We provisionally propose that the parties to a conservation covenant for the time being may agree to modify it. Do consultees agree?

Yes, but by mutual agreement.

7.48 We provisionally propose that the Lands Chamber of the Upper Tribunal should have the power to determine applications for the modification and discharge of statutory conservation covenants. Do consultees agree?

Yes. The Lands Chamber already deals with applications to lift restrictive covenants and we consider that it has the necessary skills to deal with conservation covenants.

7.63 We provisionally propose that on the application of a landowner, the Lands Chamber of the Upper Tribunal may modify or discharge a conservation covenant where it is reasonable to do so, having regard to all of the circumstances and in particular the following matters (where relevant):

- (1) any change in circumstances since the conservation covenant was created (including changes in the character of the property or the neighbourhood);*
- (2) the extent to which the conservation covenant confers a benefit on the public;*
- (3) the extent to which the purposes for which the conservation covenant was created, or any other purposes for which a conservation covenant may be created, are served by the conservation covenant;*
- (4) the extent to which the conservation covenant prevents the landowner's enjoyment of the land;*
- (5) the extent to which is it practicable or affordable for both the landowner and future landowners to comply with the conservation covenant; and*
- (6) whether the purposes for which the covenant was created could be achieved to an equivalent extent and within the same period of time by an alternative scheme on a different site which the landowner owns, and it is possible to create a new conservation covenant on that site in substitution for the covenant to be discharged. Do consultees agree?*

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The contract is between both parties and should be discharged by agreement.

7.20 We provisionally propose that where a responsible body in respect of a conservation covenant acquires land which is subject to that covenant, the conservation covenant should cease. Do consultees agree?

Yes, but only where the contracting responsible body is the acquirer – not any other responsible body.

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- (2) the extent to which the conservation covenant confers a benefit on the public;*
- (3) the extent to which the purposes for which the conservation covenant was created, or any other purposes for which a conservation covenant may be created, are served by the conservation covenant;*
- (4) the extent to which the conservation covenant prevents the landowner's enjoyment of the land;*
- (5) the extent to which is it practicable or affordable for both the landowner and future landowners to comply with the conservation covenant; and*
- (6) whether the purposes for which the covenant was created could be achieved to an equivalent extent and within the same period of time by an alternative scheme on a different site which the landowner owns, and it is possible to create a new conservation covenant on that site in substitution for the covenant to be discharged. Do consultees agree?*

Yes.

Alastair Leake, Director of Policy, GWCT, 24th June 2013