

TOWARDS A “NEW” AGRICULTURAL LAW? SECURING “PUBLIC GOODS” FROM AGRICULTURE

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I. INTRODUCTION

Farming is about more than simply producing food. It also produces ecosystem services of great economic and practical benefit to society, and to future generations.¹ The United Nations (UN) grouped these services under four headings: provisioning services, regulating services, cultural services, and supporting services.² *Provisioning services* include the products we obtain from ecosystems—for example timber, cereals, dairy produce, meat and other foodstuffs.³ *Regulating services* include benefits derived from ecosystem processes, such as water purification and climate regulation.⁴ The ability of agricultural land drainage systems to purify water supplies for use in agriculture or for drinking water supply after treatment is a case in point. *Cultural services* include non-material benefits we derive from our interaction with the natural environment.⁵ Agricultural land management practices are important here to preserve and shape precious landscapes, and to preserve land in a suitable

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1. SEC’Y OF STATE FOR ENV’T, FOOD & RURAL AFFAIRS, THE NATURAL CHOICE: SECURING THE VALUE OF NATURE 8 (2011), <https://perma.cc/GLL9-Z5Y6> (“Ecosystem Services are the products of natural systems from which people derive benefits, including goods and services, some of which can be valued economically, and others which have a noneconomic value.”).

2. CONCEPTUAL FRAMEWORK WORKING GRP., ECOSYSTEMS AND HUMAN WELL-BEING 3 (2003), <https://perma.cc/H2NP-E5K9>.

3. *See id.* at 57.

4. *Id.*

5. *Id.*

condition for open-air recreation, where provided. Finally, *supporting services* are necessary for the production of all the other ecosystem services from which we benefit.⁶ Examples here would include soil formation through suitable land management as well as natural nutrient cycling, such as soil breaking down animal or vegetative waste.⁷

The idea of paying land managers for the provision of ecosystem services (PES) is not new. The UN Convention on Biological Diversity (CBD), beginning in 1992, promotes PES as an important mechanism for protecting biodiversity.⁸ Linked to this, the CBD endorsed the adoption of an “ecosystem approach” to the management of land, water, and living resources.⁹ This aims to provide for “the integrated management of land, water[,] and living resources that promotes conservation and sustainable use in an equitable way.”¹⁰ The ecosystem approach recognizes that natural resources and well-functioning natural systems (such as clean water and healthy soils) are vital to our well-being and are themselves dependent upon a healthy biodiversity. Many of these natural resources and systems are shaped, supported, or dependent upon the adoption of sympathetic agricultural land management.

II. PAYING FARMERS FOR PROVIDING “PUBLIC GOODS”

In the United Kingdom (UK) policy context, PES took centre stage in 2018 in the governmental policy statement, *Health and Harmony: The Future for Food, Farming and The Environment in a Green Brexit*.¹¹ The governmental policy statement posited that in the future, the key policy driver for farm support from public funds is the principle of “public money for public goods.”¹² This represents a radical realignment of public policy and is closely connected and complementary

6. *Id.*

7. *See id.* at 59.

8. Press Release, Secretariat of the Convention on Biological Diversity, Regional Progress Towards Global Environmental Targets Assessed on International Day for Biodiversity (May 22, 2016) (on file at <https://perma.cc/R77H-D76J>); *see generally* UNITED NATIONS ENVTL. PROGRAMME, LIVING IN HARMONY WITH NATURE: CONVENTION ON BIOLOGICAL DIVERSITY (2016), <https://perma.cc/FK2X-T8M5> (outlining the three main goals of a United Nations (UN) Convention on Biological Diversity legally-binding treat).

9. U.N. Conference of the Parties to the Convention on Biological Diversity, *Ecosystem Approach*, U.N. Doc. UNEP/CBD/COP/5/23, annex III, 103-04 (June 22, 2000), <https://perma.cc/U7RN-PM59>.

10. *Id.*

11. DEP’T FOR ENV’T, FOOD & RURAL AFFAIRS, HEALTH AND HARMONY: THE FUTURE FOR FOOD, FARMING AND THE ENVIRONMENT IN A GREEN BREXIT (2018), <https://perma.cc/MRE6-NZKR> [hereinafter HEALTH AND HARMONY].

12. *See id.* at 45-54.

to the policies outlined in the twenty-five year Environment Plan published by Her Majesty’s (HM) Government in 2018.¹³ It raises the question of whether the UK is about to enter a new phase in the development of agricultural law, one in which an emphasis on productionist policies will be replaced by a more dominant environmental focus on the wider benefits of farming for ecosystems and sustainable land tenure. These are issues which have been central to Neil Hamilton’s work in the context of American agricultural law, and from which the UK has learned many lessons of great value towards developing policy.¹⁴

Under the European Union’s (EU) Common Agricultural Policy (CAP), public financial support for the agriculture industry is currently organized under two “pillars.”¹⁵ Under Pillar 1 direct payments are paid to farm producers based on the area of land they farm;¹⁶ Pillar 2 supports rural development measures, such as agri-environment schemes, in each of the member states.¹⁷ The principal criticism of Pillar 1 payments is that they provide a public subsidy for the private production of a private good—food, for which the public pays twice (once as tax payers and again as food purchasers).¹⁸ It is also inequitable in that much of the public financial support goes to a minority of large landowners: 2% of beneficiaries each receive more than 50,000 Euros annually, over 30% of the total direct payments envelope.¹⁹ The environmental impacts have been damaging. Farmland bird

13. See generally HM GOV’T, A GREEN FUTURE: OUR 25 YEAR PLAN TO IMPROVE THE ENVIRONMENT (2018), <https://perma.cc/H4N6-4FEV>. The Environment Bill 2019, currently before Parliament, confers the powers on the Secretary of State for the Environment needed to implement many of these policy initiatives.

14. See Neil D. Hamilton, Keynote Address, *Farms, Food, and the Future: Legal Issues and Fifteen Years of the “New Agriculture”*, 26 J. ENVTL. L. & LITIG. (2011); see also Neil D. Hamilton, *Harvesting the Law: Personal Reflections on Thirty Years of Change in Agricultural Legislation*, 46 CREIGHTON L. REV. 563 (2013).

15. Common Agricultural Policy, INST. GOV’T, <https://perma.cc/84LH-G3VM> (archived Sept. 25, 2019).

16. Albert Massot, *First pillar of the common agricultural policy (CAP): II – Direct payments to farmers*, FACT SHEETS ON THE EUR. UNION (May 2019), <https://perma.cc/4B2S-LCUD>.

17. François Nègre, *Second pillar of the CAP: rural development policy*, FACT SHEETS ON THE EUR. UNION (May 2019), <https://perma.cc/97AU-JXP5>.

18. See Ian J. Bateman & Ben Balmford, *Public Funding for Public Goods: A Post-Brexit Perspective on Principles for Agricultural Policy*, 79 LAND USE POL’Y 293, 294-300 (2018).

19. See Alan Matthews, *More on capping direct payments*, CAP REFORM (Aug. 28, 2018), <https://perma.cc/2S54-Y6Y2>; see also Bateman & Balmford, *supra* note 18, 294 fig.1.

populations in the UK have declined sharply, with spectacular collapses in the breeding populations of some iconic bird species, such as corn bunting.²⁰

Brexit presents an opportunity to develop a new approach to the “farmed” environment, and the comparative experience of United States conservation schemes could be useful for informing some of the policy choices the UK is going to have to make. Accordingly, some *Health and Harmony* policy proposals require a future agricultural support re-modelling around payment for the ecosystem services supplied by farmers.²¹ Current CAP policy instruments offer little transparency as to the public goods being rewarded or purchased from land managers. Many ecosystem services they currently provide are funded through Pillar 2 payments under area-based management agreements entered into under agri-environment schemes (AES), examples of these in England include the Higher-Level Stewardship and Countryside Stewardship.²² This approach lacks transparency, as there is no direct link in area-based payments between an ecosystem services “seller” and a “buyer” or “user” of those services and deliver uncertain future benefits.²³

Moving to PES as the basis for future agricultural support could offer many benefits. It would require placement of a value (or price) on ecosystem services and link land managers as service “suppliers” with end-users or purchasers.²⁴ The latter could include (i) private purchasers, for example water utility companies purchasing “slow clean water” or (ii) public bodies purchasing ecosystem services of wider societal benefit, such as the protection of natural habitats or public recreational access to private land.²⁵ An interesting mixed funding model is, for example, the Natural Infrastructure Scheme (NIS) proposed by the National Trust and Green Alliance.²⁶ This seeks to fix the price for ecosystem services based on the *avoided cost* delivered to the “purchaser”.²⁷ This would allow for such actions as the payment calculation in capturing the costs saving to a water utility of slow

20. DEP’T FOR ENV’T, FOOD & RURAL AFFAIRS, WILD BIRD POPULATIONS IN THE UK, 1970 TO 2017 at 4 (2018), <https://perma.cc/9QYP-3HMQ> (showing a 56% decline in farmland bird populations since 1970).

21. See HEALTH AND HARMONY, *supra* note 11, at 15.

22. See *id.*

23. See *id.*

24. See ADAM P. HEJNOWICZ & SUE E. HARTLEY, NEW DIRECTIONS: A PUBLIC GOODS APPROACH TO AGRICULTURAL POLICY POST-BREXIT 22-23, 27, <https://perma.cc/D5V8-AMYV> (archived May 17, 2019).

25. See ANGELA FRANCIS ET AL., NEW MARKETS FOR LAND AND NATURE 13-14 (2016), <https://perma.cc/L8VN-P5MH>.

26. *Id.* at 2.

27. *Id.* at 29.

clean water provided through changes in catchment land management by farmers working with the purchaser utility.²⁸

This represents a variation on the PES “payment range” model suggested as a best practice option.²⁹ It would cover net profits foregone by farmers in changing their land management to provide the service, allowing a variable upper ceiling and represent the external benefits of the ecosystem provided.³⁰ In the case of uplands grazing management this could be flood risk management, water quality improvements, or habitat protection, as the case may be.³¹ The scheme would provide a means to bring “groups of land managers together to sell environmental services to groups of beneficiaries” facilitated by a new area-based market in avoided costs.³²

A well designed PES scheme could, therefore, offer a mixture of private and public funding delivering multiple benefits.³³ There are, however, challenges to replacing direct, area-based payments with PES schemes linking public money to the provision of public goods.³⁴ Some challenges relate to problems of scheme design.³⁵ Others relate to the problems of finding legal mechanisms that can clothe the new PES arrangements with enforceability and capture the more sophisticated and multi-faceted legal relationships a PES based approach will entail.

III. CORE LEGAL ISSUES FOR A SUCCESSFUL PES SCHEME

Creating a new market for the provision of ecosystem services will require us to reflect on three issues. Who can sell ecosystem services? What exactly can they sell? How may the transaction be captured in a way that prioritizes the policy intentions?

A successful PES scheme must clearly identify the service to be provided and purchased, or alternatively, define the land management that will produce or

28. *Id.* at 13.

29. DEP’T FOR ENV’T, FOOD & RURAL AFFAIRS, PAYMENTS FOR ECOSYSTEM SERVICES: A BEST PRACTICE GUIDE 9, <https://perma.cc/M974-JMTX> (archived May 17, 2019).

30. FRANCIS ET AL., *supra* note 25, at 10.

31. *Id.* at 11.

32. *Id.* at 26.

33. See generally Walter Nsoh & Colin T. Reid, *Privatisation of Biodiversity: Who Can Sell Ecosystem Services?*, 25 ENVTL. L. & MGMT. 12 (2013).

34. FRANCIS ET AL., *supra* note 25, at 9.

35. For example, how can one design a program that pays farmers by results rather than on an area basis? See generally Mark S. Reed et al., *Improving the Link Between Payments and the Provision of Ecosystem Services in Agri-Environment Schemes*, 9 ECOSYSTEM SERVICES 44 (2014); see also Bateman & Balmford, *supra* note 18, at 296-300.

deliver that service.³⁶ It will need to identify the supplier and purchaser of the service in question and will need to clearly articulate how delivery of the service is to be measured and paid for. For example, is payment to be conditional upon delivery of the service (an “output-based” approach) or on carrying out land management delivering the service in question (“input-based”)? Is payment to be by results, and if so, how are the “results” to be measured and assessed?

A well-functioning PES scheme will depend upon a clearly defined system for identifying legal entitlements to resources and land tenure. The law generally recognises ownership entitlements to land, but wild fauna is not usually capable of ownership. Therefore, wild animals, insects, and birds are not capable of absolute ownership under English Law.³⁷ This means a landowner would not be able to charge for pollination services provided by wild insects crossing onto adjacent land, even if their abundance in the locality is attributable to the way that a farmer has managed the land in order to create a sympathetic environment for them.³⁸ What they *can* charge for is the management of the land that has (or will) create and maintain the habitat necessary for pollinators to thrive. This explains, in large measure, why many PES schemes adopt the “input” model, i.e., they pay landowners for adopting specific and defined land management measures creating or maintaining the ecosystem service to be provided.

What the purchaser is buying in a PES scheme, therefore, is the service, the environmental benefits and processes generated by agricultural land management, and not identified entitlements in which the seller has property rights that can be traded.³⁹ This brings into focus the long time frame required to provide or maintain many types of ecosystem service—changes to biodiversity and the ecosystems supporting it develop slowly. The objectives of many PES schemes will also require planning at a landscape scale and will need to be sufficiently flexible to facilitate the changes in management obligations needed to meet changing environmental conditions over a long time-span. There will be complex issues of contract design; a PES contract will require a multi-party focus, capable of capturing both private and public actors in a legal instrument creating multiple obligations on both the buyer and seller of ecosystem services. Contracts will also

36. FRANCIS ET AL., *supra* note 25, at 29.

37. 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 430 (1753); *see also* *Blades v. Higgs* (1865) 11 Eng. Rep. (HL) 1474; *The Case of Swans* (1572) 77 Eng. Rep. 435, 7 Co. Rep. 15b, 7b.

38. *See, e.g.,* Nsoh & Reid, *supra* note 33, at 99. The same point applies, of course, to a wide range of pollinating insects and animals, not solely bees.

39. FRANCIS ET AL., *supra* note 25, at 29.

need to incorporate arrangements for the review and adaptation of performance by ecosystem service suppliers.

IV. PROPERTY RIGHTS AND PROVISION—WHO CAN SELL ECOSYSTEM SERVICES?

Who can “sell” the ecosystem services produced by the land and its management? A farmer will need sufficient long-term control over the land to provide the integrated management needed to deliver most ecosystem services. Lack of tenure clarity and security among ecosystem providers is in practice a major barrier to creating a functional PES based approach to land management.⁴⁰ A system of property rights facilitating stable land tenure will therefore be important for land managers entering into contracts delivering ecosystem services. Long term planning and implementation requires a stable tenure structure within which the ecosystem “provider” can develop land management systems to deliver the public goods incentivised by the chosen scheme model.

Paying farmers for providing ecosystem services using an input model modifies their property rights in order to internalize environmental costs. The efficacy of the reallocation or property entitlement modifications will depend upon the pre-existing property rights distribution and the institutional framework on which those rights rest.⁴¹ If there is a lack of clarity in the pre-existing allocation of property rights—of who can access and manage the land in the desired manner to deliver the ecosystem services in question—then this may provide the conditions for elites to appropriate traditional access rights.⁴² The tenorial basis by which ecosystem providers hold land is in direct relevance to robust PES schemes development.

Many land tenure systems will, in practice, envisage land use exclusively focused on agricultural production. This creates an impediment to delivering the ecosystem services sought by PES schemes, e.g., conservation management to promote biodiversity or providing cultural ecosystem services such as public recreational access to private land or ecotourism.⁴³

This is seen in the farmland tenancy structures in England and Wales. A large proportion of agricultural land is held under one of two forms of tenancy:

40. Nsoh & Reid, *supra* note 33, at 13.

41. Stewart Lockie, *Market Instruments, Ecosystem Services, and Property Rights: Assumptions and Conditions for Sustained Social and Ecological Benefits*, 31 LAND USE POL’Y 90, 96 (2013).

42. *Id.*

43. *Id.* at 90-98.

agricultural holding⁴⁴ or a farm business tenancy (FBT).⁴⁵ For example, in 2016 1,407,000 hectares of farmland was held as agricultural holdings⁴⁶ amounting to approximately 17% of the total area of farmed land in England.⁴⁷ Agricultural holdings enjoy extensive security, giving the farm tenant lifetime tenure security with two generation succession rights in some instances.⁴⁸ The farmer will therefore have a stable position from which to plan long-term land management strategies targeted to ecosystem service provision. The problem here, however, is most tenancies of agricultural holdings will only envisage agricultural land management. The agricultural holdings legislation is premised on tenanted land used solely for agriculture and implies obligations of “good husbandry” into tenancy contracts aimed at ensuring the maximization of food production.⁴⁹ If they were expressly incorporated into the contract itself, then diversification away from optimal agricultural production may also constitute breaching the tenancy agreement.⁵⁰ This will be a strong disincentive to the farmer entering into a long-term PES scheme arrangement.

Any tenancy entered into on or after September 1, 1995, will be a FBT. In 2016, 1,193,000 hectares of land in England and Wales was held under FBTs.⁵¹ FBTs are a more flexible form of land tenure, intended to facilitate farm business diversification away from traditional agriculture, however, it offers little security of tenure beyond the contractually agreed period of the tenancy.⁵² Most FBTs are relatively short, typically four years duration.⁵³ The farmer’s ability with land held

44. Agricultural Holdings Act 1986, c. 5, §§ 1-5.

45. Agricultural Tenancies Act 1995, c. 8, §§ 1-8.

46. See DEP’T FOR ENV’T, FOOD & RURAL AFFAIRS, FARM RENTS 2016/17 – ENGLAND 3 tbl.2 (2018), <https://perma.cc/C5PD-3W5M> [hereinafter FARM RENTS 2016/17].

47. PETER R. WILLIAMS, SCAMMELL, DENSHAM AND WILLIAMS’ LAW OF AGRICULTURAL HOLDINGS at 1.92 (10th ed. 2018).

48. See Agricultural Holdings Act § 34(1) (stating succession rights apply to tenancies granted before 12th July 1984); CHRISTOPHER RODGERS, AGRICULTURAL LAW at 8.02 et seq. (4th ed. 2016).

49. Agricultural Holdings Act sch. 3 pt. 1; Agriculture Act 1947, 10 & 11 Geo. 6 c. 48, § 10.

50. See e.g. Christopher P. Rodgers, *Diversifying the Farm Enterprise: Alternate Land Use and Land Tenure Law in the UK*, 45 DRAKE L. REV. 471 (1997) (discussing the wider implications of this for the possible diversification of farm businesses into non-agricultural business activities).

51. See FARM RENTS 2016/17, *supra* note 46, at 6 tbl.6.

52. See RODGERS, *supra* note 48, at ch. 3, 4.

53. See *Short-term nature of agricultural tenancies has ‘held back progression’*, FARMINGUK (July 20, 2018), <https://perma.cc/5TH5-HGKU> (discussing the annual Agricultural Land Occupation Survey 2017, conducted by the Central Association of

under an FBT to enter into a long-term PES arrangement will therefore be extremely limited, as it confers an insecure form of property right in the provider. The Tenant Farmers Association has stressed the impact of short-term agreements on farmers’ ability to participate in agri-environment schemes and their negative impact on investment.⁵⁴

The new policy development grounded in PES will require a tenancy law reform consideration, especially the need for a stable property rights basis for long-term land management for ecosystem service provision. The government’s advisory body, the Tenancy Reform Industry Group, has recognised this.⁵⁵ They recommended legislative changes to facilitate the variation of the tenancy terms by arbitration where the tenant wished to pursue an “environmental advantage.”⁵⁶ A more radical solution would be the introduction of an environmental land tenancy structure used where a long-term management scheme for providing public goods was envisaged. This might be a fixed term of ten years or more, with flexibility built into the agreement using periodic break clauses for the review of performance targets for the public goods provisions. This tenure structure could accommodate both an output driven approach (“results” based) and a more traditional input approach based on payment for delivering land management prescriptions on a defined acreage of land.

V. CONTRACTUAL MODELS FOR DELIVERING ECOSYSTEM SERVICES

The successful adoption of a PES approach will need an ambitious and innovatory approach facilitating the creation of multiparty, binding obligations as to large land management areas at the landscape scale. PES is currently captured in a variety of legal arrangements in English Law, most are binary—i.e., they impose legal rights and obligations on two parties, typically a public body exercising statutory powers and a private landowner.

Agricultural Valuers, which showed a decrease in the average length of all FBTs from 4.5 years in 2016 to under 4 years in 2017).

54. Press Release, Tenant Farmers Ass’n, Government Must Not Leave Tenant Farming as the “Cinderella Sector” (Apr. 18, 2018) (on file at <https://perma.cc/G4GE-ZUD8>).

55. The Tenancy Reform Industry Group is an advisory panel set up in 2002 to advise the Department of the Environment Food and Rural Affairs. It comprises representatives of all sectors of the farming industry in England and Wales, plus professional organisations such as the Central Association of Agricultural Valuers, Agricultural Law Association, Royal Institution of Chartered Surveyors.

56. JEREMY MOODY, TENANT REFORM INDUS. GRP., WORKING GROUP ON THE AGRICULTURAL HOLDINGS ACT 1986: FINAL REPORT at 14 (2017), <https://perma.cc/YT35-KFS4> (suggesting the introduction of a new section 14A to the Agricultural Holdings Act 1986).

Many public bodies have power to enter into management agreements with landowners and occupiers. AES implemented using a contractual model—management agreements with Natural England, typically for ten years in duration with publicly funded payments for agreed management prescriptions.⁵⁷ But the modification of the landowner's property rights in this arrangement type is time-limited.⁵⁸ At the end of the contract, any property rights exchanged will revert to the landowner.⁵⁹ Environmental “gains” developed at public expense during the agreement are not “locked in” or preserved—the land manager is free to manage the land in the future as they wish, even if doing so destroys or diminishes the environmental improvements previously purchased at cost under the agreement.⁶⁰ This operates at the level of the farm or producer, not at a landscape level. Landscape Enterprise Networks (LENS) offer a wider frame of reference to develop landscape level environmental management.⁶¹ However, a LENS approach would require a new legal framework to underpin performance, monitoring, and dispute resolution. Similar challenges would arise from new initiatives such as the Natural Infrastructure Scheme.⁶²

Regulatory instruments in environmental law provide ecosystem services. Therefore, in protected areas, such as Sites of Special Scientific Interest, the statutory conservation bodies have power to specify operations likely to damage the land's conservation interest.⁶³ It is a criminal offense to carry out such an operation without prior agreement or under a management agreement with the conservation body.⁶⁴ Similar powers apply in other protected areas.⁶⁵ These are all binary in effect, creating legal obligations between a public body and a landowner whose property rights are modified in order to prevent damaging land use activities and secure conservation features. Another example is planning law, where planning agreements between a planning authority and developer can provide planning gain for the community, including the provision of ecosystem services

57. Cf. *Conservation Reserve Program*, FARM SERV. AGENCY, <https://perma.cc/7YXS-45H6> (archived Apr. 23, 2019) (showing that Conservation Reserve Programme schemes are also implemented using ten to fifteen year contracts with farmers).

58. See CHRISTOPHER P. RODGERS, *THE LAW OF NATURE CONSERVATION* 112-22 (2013).

59. See *id.*

60. See Christopher Rodgers, *Property Rights, Land Use and the Rural Environment: A Case for Reform*, 26S LAND USE POL'Y S134, S136 (2009).

61. See HM GOV'T, *supra* note 13, at 140.

62. See FRANCIS ET AL., *supra* note 25, at 9.

63. Wildlife and Countryside Act 1981, c. 69, § 28.

64. *Id.*

65. See, e.g., The Conservation of Habitats and Species Regulations 2017, SI 2017/1012, art. 2, ¶¶ 23, 24.

such as land for public recreation or for biodiversity offsets and wildlife sanctuaries.⁶⁶ Planning agreements can have a wider focus as well, but are primarily constitutive of obligations between the developer and planning body.

None of these binary models can adequately address PES at a landscape level. The landscape implementation level management will require collaborative arrangements captured in a legal form both flexible enough to allow for changed targets and land management prescriptions, but also provide for robust monitoring and enforcement.⁶⁷ Any new legal model will also need to be more widely based. A legal model will potentially need to capture the obligations, aims, and objectives of multiple participants, including both public and private bodies, farmers, and landowners, in a collaborative agreement structure, which delivers landscape level ecosystem services and benefits over a long-time scale.

One potential option might be to create long-term obligations in a PES scheme creating conservation covenants. The conservation experience schemes in the United States, Australia, New Zealand, and elsewhere could provide important context for legal strategies development to underpin PES in this regard.⁶⁸ Conservation covenants are rarely utilized in England and Wales, where the National Trust is currently the only body with formal covenanting powers.⁶⁹ The Law Commission has recommended a new, much wider, statutory scheme for conservation covenants in English Law.⁷⁰ Their proposals would require a covenant agreed on by two parties, one of whom would be a landowner⁷¹ and the other a “beneficiary” holding the covenant on behalf of the public. This would be a “responsible body” empowered to monitor and enforce the obligations in the covenant.⁷² There would be no need for the beneficiary to hold adjoining land benefiting from the covenant and it could be perpetual in effect. Therefore, this

66. Town and Country Planning Act 1990, c. 8, § 106.

67. The Conservation of Habitats and Species Regulations art. 2, ¶ 23, 24.

68. *See, e.g.*, UNIFORM CONSERVATION EASEMENT ACT (UNIF. LAW COMM’N 2007); Conservation Act 1987, s 11 (N.Z.); Reserves Act 1977, s 77 (N.Z.). The New Zealand acts provide for conservation covenants to be negotiated and entered into between the Crown and private landowners or Crown lessees. *See also* Queen Elizabeth the Second National Trust Act 1977, s 29 (N.Z.) (providing for “open space covenants” to be entered into between the Trust and landowners/Crown lessees to achieve the objectives of that Act).

69. *See* National Trust Act 1937, 6 Geo. c. 1, § 8.

70. LAW COMM’N, CONSERVATION COVENANTS, PARA 2.82 et seq. (2014).

71. *Id.* (requiring someone with a freehold interest in the land burdened with the covenant, or someone with a lease of at least seven years duration).

72. *Cf.* Title Conditions (Scotland) Act 2003, (ASP 9) § 38 (describing a similar model used in Scotland, where only designated conservation bodies can hold the benefit of a conservation covenant).

could be a model for an arrangement binding land indefinitely into a collaborative landscape scale scheme, with multiple landowners, farmers, or beneficiaries participating in each covenant.⁷³ If conservation covenants were to capture the provision of ecosystem services, however, then the possible beneficiaries range would need to be wider than currently proposed by the Law Commission. For instance, in the earlier example of the water utilities covenant, the water utilities may wish to enter into a covenant where land management for clean slow water is to be established in a water catchment.

Another option is to remodel land management agreements and make them a more flexible mechanism for capturing ecosystem services provision. Most management agreement powers are currently focused on enabling public bodies to secure agreements with landowners in protected areas, such as Site of Special Scientific Interest (SSSIs) or European wildlife sites.⁷⁴ Natural England does, however, also have wide powers to enter into an agreement with any person “who has an interest in land about the management . . . of the land.”⁷⁵ This power is not limited to securing management in protected areas and used to underpin an arrangement for the provision of ecosystem services. It could be used to provide long term, or even perpetual, obligations to provide public goods. Nevertheless, the legislative basis for this agreement type would need to be much wider if it were to capture the diverse obligations in a PES arrangement. It would have to facilitate the inclusion of all the potential participants in a PES agreement, as well as bind the successors of both the land managers providing the service and of the recipients paying for the ecosystem service.

VI. CONCLUSION

Freed from the EU common agricultural policy constraints, the UK has the opportunity to develop a new approach to public support for the agriculture industry. This will require us to carefully consider the interrelationship between food production, the maintenance of natural resources, environmental protection, and the provision of wider cultural ecosystem services for our communities. At its broadest, adopting a PES based approach to how we support farm management and food production will require a consideration of all the economic and non-

73. See HM GOV'T, *supra* note 13, at 62 (highlighting introduction of legislation to facilitate the wider use of conservation covenants).

74. See generally The Conservation of Habitats and Species Regulations art. 2, ¶ 20-22 (for focus on European sites); Countryside Act 1968, c. 41, § 15 (for focus on SSSIs); see also Wildlife and Countryside Act § 39 (providing government bodies wider powers to secure agreements covering, for example, local nature reserves).

75. Natural Environment and Rural Communities Act 2006, c. 16, § 7.

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economic benefits these services provide. This approach enables policy-makers and farmers to make judgements about land management based on the widest relevant evidence range as to the impacts, cost and benefits of their actions. Notwithstanding the impending changes in public support arrangements for agriculture, it is important to remember agriculture is still centrally about producing food. Food production, may not in itself, be a “public good” production, but food security undoubtedly is. Establishing a policy balance between the competing demands on land use will be challenging. The task for lawyers will then be to find suitable legal instruments to give effect to a new policy towards agricultural support based on PES—an equally challenging endeavor.