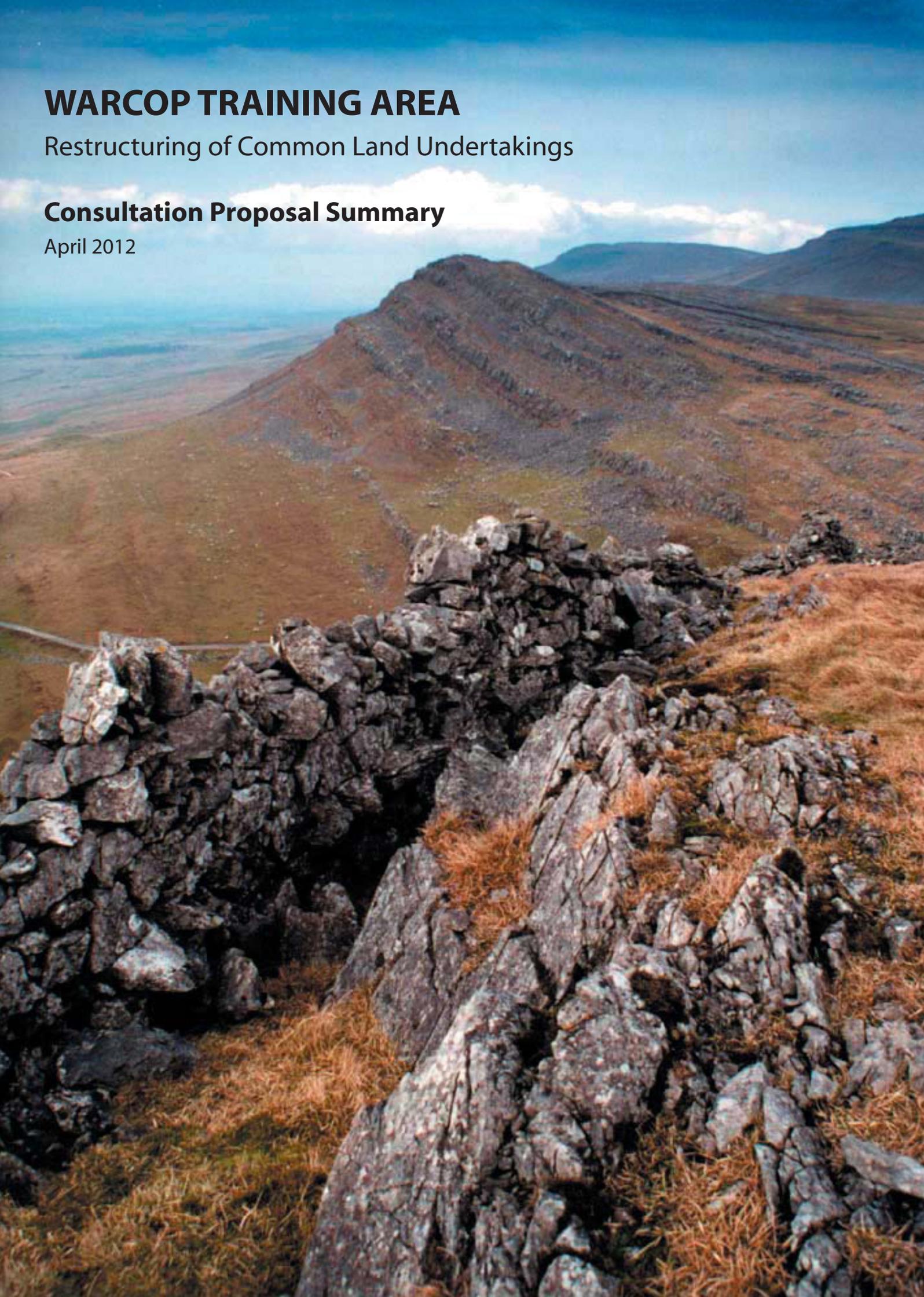


# **WARCOP TRAINING AREA**

Restructuring of Common Land Undertakings

## **Consultation Proposal Summary**

April 2012



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# 1 Introduction

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1.1 Warcop Training Area is a Ministry of Defence (MOD) live firing area situated in Cumbria in the North Pennines Area of Outstanding Natural Beauty, 40 miles south of the Scottish border. It covers approximately 9,715 hectares (24,000 acres) of land. Two-thirds of it is owned by the MOD. The balance is private land which is used as part of the danger area for live firing under arrangements agreed with the land owners.

1.2 Part of the land owned by the MOD was common land consisting of three commons (Murton, Hilton and Warcop commons). However, in 2003 the MOD extinguished all rights of common using its compulsory powers, having established the need to do so in the national interest to secure the long-term future of Warcop Training Area at a local public inquiry. The land ceased to be common land. The extinguished rights have been removed from the commons registers.

1.3 As part of the extinguishment process the Secretary of State for Defence gave two undertakings ('the Common Land Undertakings'), namely,

(1) not to apply to de-register the land as common land, and

(2) to grant a small number of new, limited rights of common to local farmers, together with a right in gross (i.e. a right not attached to any land) to a national amenity society.

The Common Land Undertakings were given in the context of the law then applicable to secure the status of the land in the long term as common land. However, since those undertakings were given, the law of commons has been fundamentally changed by the Commons Act 2006 and it has become necessary for the MOD to re-assess the undertakings in the light of the new law and to consider the implications of the new law for giving effect to the purpose behind the undertakings.

1.4 MOD proposes to re-structure the Common Land Undertakings, not to alter the substance of the protection which they provide or their purpose, but simply to provide, so far as is possible, an equivalent degree of protection whilst taking

account of the new legislative framework for commons introduced by the Commons Act 2006.

1.5 The MOD is commencing a consultation programme to inform all interested parties of its proposals to re-structure the undertakings in order to remove any uncertainty regarding –

- a) the military training capabilities on Warcop Training Area and
- b) the status of the land which formerly made up Murton, Hilton and Warcop commons in the long-term.

Consultation documents have been prepared. There is a Consultation Report and this document which provides a summary of the main Report and the Glossary. In addition a public information leaflet has been published which is being sent to all interested parties and the MOD will hold a series of public local meetings to present their proposals.

1.6 Once comments have been received and considered, a final decision will be made by the MOD on –

- (a) whether to cancel the first of the Common Land Undertakings and to proceed with updating the commons registers to reflect the statutory extinguishment by the removal of the land from the commons registers,
- (b) whether to postpone granting any new rights of common until (if it should occur) the land becomes surplus, and, if so,
- (c) the precise form of the new undertakings (taking account of any representations made during the public consultation) to secure as close as possible the position originally intended at the Warcop public inquiry.

1.7 The MOD's decision including the final terms of the re-structured undertakings will be published. Further details of the consultation process are provided in Chapter 4 of the Consultation Report.

1.8 All the consultation documents are available to view at local libraries and at Warcop Camp (please telephone 017683 43229). The consultation documents are also available on the Defence Infrastructure Organisation website at

<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/>.

## 2 Summary of the Main Report

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- 2.1 In 2001 a public inquiry was held to consider whether the MOD should compulsorily extinguish the rights of common at Warcop Training Area on Murton, Hilton and Warcop commons. The MOD's proposals were examined through an open and transparent process where all the issues were scrutinised very carefully. In his decision letters dated 3 July 2002 and 20 September 2002 (copies are included at Annex 1 to the Consultation Report) the Secretary of State accepted the Inspector's main recommendation that the national need for the compulsory extinguishment on military training grounds was established (letter of 3/07/2002, paragraphs 5.2 and 9).
- 2.2 At the Warcop public inquiry the MOD agreed that following extinguishment of the existing rights, a wide range of undertakings (over 100 in total) would be implemented. These were agreed by the Inspector and confirmed by the Secretary of State for Defence.
- 2.3 Following that public inquiry and the Secretary of State's decisions:
- (a) all rights of common over Murton, Hilton and Warcop commons were extinguished. The extinguishment took place pursuant to a statutory procedure<sup>1</sup>. The rights were extinguished on 31 March 2003 when the Secretary of State entered into 3 Vesting Deeds (one for each common). The extinguishment took place following payment of the agreed compensation sums to the commoners;
  - (b) the land that was formerly Murton, Hilton and Warcop commons is now not subject to any rights of common and is not common land. The rights have been removed from the commons registers;
  - (c) significant progress has been made in that MOD has implemented virtually all the undertakings given at the inquiry. The only undertakings that have not been implemented are: the undertakings to dedicate new public footpaths and bridleways (they have been physically created, and dedication as public ways is in process but not yet completed); the

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<sup>1</sup> The statutory procedure is contained in the Lands Clauses Consolidation Act, 1845 as applied to the MOD by the Defence Acts, 1842 to 1935, and the Defence (Transfer of Functions) Act 1964

undertakings to review the byelaws at Warcop Training Area as part of the national review over the whole of the Defence Estate (the national review of byelaws has not yet addressed Warcop); and the undertaking to grant new rights of common;

- (d) as required by the undertakings the MOD has established an Environmental Steering Group to advise the MOD on environmental issues and on the preparation of an Integrated Land Management Plan ('ILMP') which details all the management obligations and aspirations on the training area and which was launched in 2003;
- (e) a number of projects have been implemented through the Environmental Steering Group and Integrated Land Management Plan process, such as, habitat creation for Black Grouse and the Geyer's Snail, the recording of the Scordale Mines Scheduled Monument and the implementation of a new range and moorland grazing regime; and
- (f) implementation of the Undertakings has also included a number of public access initiatives including guaranteed public access days to the Danger Area, the provision of new access routes outside the Danger Area, guided walks, a freephone answer machine service for walkers and a waymarking programme.

2.4 Turning to the main issue for the consultation, the MOD also gave two undertakings in connection with the extinguishment of rights of common concerning the status of the land as common land (referred to as "the Common Land Undertakings").

2.5 The MOD undertook that following extinguishment of the rights of common no application would be made to Cumbria County Council (the commons registration authority) to de-register the land as common land and in addition that the MOD would grant a small number of new, limited rights of common to local farmers, together with a right "in gross" (i.e. a right not attached to any land) to a national amenity society.

2.6 The Secretary of State noted these two Common Land Undertakings in his decision letter of 20 July 2002:

*“7.9.1 The Secretary of State notes that the MOD undertakes that the Commons will not be de-registered. He has had regard to MOD’s proposal, that since an undertaking may not bind a successor in title to the freehold common land, and in the unlikely event that MOD should decide at some future date to sell it, if the rights of common are duly extinguished, seven new rights of common should be created. Two new rights in respect of each Common would be granted in favour of six farmers who are existing Commoners. The seventh would be granted in gross, that is, not attached to any landholding, to a national amenity society.*

*7.9.2 The Secretary of State further notes that the Commons Registration Act 1965 would prevent registration of these new rights while the Commons remained registered but that if a future owner applied for de-registration the new rights would become capable of registration, thus ensuring reinstatement of the land as common land...”*

- 2.7 Progress has been made in the process to create the new rights of common, but the new rights have not been granted and the process has been put on hold due to the changes in the law contained in the Commons Act 2006.
- 2.8 Up until the publication of the Commons Bill the MOD had not sought to update the commons registers to reflect the extinguishment which had already taken place and as agreed had not applied to de-register the land as common land, nor applied to remove the extinguished rights from the commons registers. This was not done since, under the old law, this did not affect the extinguishment of the rights of common or the fact that the land has ceased to be common land.
- 2.9 The publication of the Bill, which became the Commons Act 2006, made it clear that there was to be a significant change to the law relating to commons. As a result of this, MOD considered it was no longer able to leave the registers unaltered.
- 2.10 If nothing was done, the application of the 2006 Act would mean that:
- (a) the extinguished rights (for which compensation has already been paid) would automatically appear on the new commons registers under the 2006 Act and would revive;

- (b) if the land remains on the commons register (although not subject to any rights of common and not actually common land) it will become land registered as common land;
- (c) there would be uncertainty over the status of the land at Warcop Training Area since it would be unclear how the courts might interpret the situation at Warcop Training Area if the land was registered as common land but was not actually common land; and
- (d) further uncertainty is created by the provisions of the Commons Act 2006, particularly the new land management mechanism involving the creation of statutory commons councils, and those allowing new rights to be created over existing registered common land, and Part 3 of the Act controlling works on land registered as common land.

2.11 As a result of these uncertainties, MOD's ability to train on Warcop Training Area in the manner agreed at the Warcop public inquiry would be put at risk and there would therefore be a risk that military capability was jeopardised along with much that has been achieved since extinguishment. These are consequences which were not intended, and could not have been foreseen, at the time the Common Land Undertakings were given.

2.12 In order to prevent the extinguished rights of common from reviving (which they would have done if left on the commons register) the MOD applied to Cumbria County Council to remove the rights of common from the commons registers. This has now been achieved. However, as a result of the Secretary of State's undertaking, no application has yet been made to de-register the land as common land. The position at present is that the land is recorded as registered common land in its own right even though there are no rights of common affecting it and it is not common land.

2.13 As a consequence the MOD needs to re-structure the two Common Land Undertakings in order to safeguard its ability to train on Warcop Training Area in the manner agreed at the Warcop public inquiry and so MOD can proceed without breaching them. The Common Land Undertakings would not have been offered in their current form, nor could they have been offered in that form, if the new legislation had been in place at the time of the public inquiry. The other undertakings, including those relating to public access, are not affected by the Commons Act 2006 (although there is potential for the new Act to impact on the

operation of some of the undertakings, such as the management of Warcop Training Area through the Environmental Steering Group and Integrated Land Management Plan process).

2.14 The undertakings made by the MOD are serious commitments. The Inspector accepted this view in reaching his decision and noted that the undertakings would in practice have a weight equivalent to that of conditions attached to planning permissions (Report, paragraph 4.10). The MOD recognises that the undertakings relating to the status of the land as common land are important and would not contemplate changing them unless there was good reason to do so.

2.15 The Inspector in his Report following the Warcop public inquiry and the Secretary of State found that the national need for the compulsory extinguishment of the rights of common on military training grounds was established. The aim of any re-structuring of Common Land Undertakings is to ensure that MOD remains free to meet military training objectives whilst ensuring that the status of the land as common land is secured if MOD disposes of the land. The proposed re-structuring achieves the same result, so far as is possible, as was intended at the time of the inquiry and the Secretary of State's decision to extinguish the rights of common. The proposals will give effect to the purpose of the undertakings notwithstanding the new legislation.

2.16 The MOD therefore proposes that :

- (a) The commons registers should be updated to reflect the statutory extinguishment of the rights of common, which has already occurred, and an application should be made to de-register the land as common land; and
- (b) MOD will not create any new rights of common now; but instead
- (c) MOD will give a new Undertaking to create the seven new rights of common immediately prior to any disposal of the land.

2.17 A copy of the terms of the proposed new undertaking is found at the end of this document. The terms are very similar to the existing undertaking with two principal differences:

- the 7 new rights of common will be created in the future (but as originally intended only if Warcop Training Area should ever become surplus and be disposed of by the MOD); and
- the right of common for the amenity society will not be in gross but attached to land (since the Commons Act 2006 does not now permit the creation of rights in gross – i.e. rights not attached to land).

2.18 The proposals will ensure that the status of the land as common land in the long term will be protected and the same result will be achieved, so far as is now possible under the Commons Act 2006, as was envisaged at the public inquiry but by means of a new mechanism.

2.19 The removal of the land at Warcop Training Area from the commons registers would not affect public access opportunities. Access under the Countryside and Rights of Way Act 2000 will stay the same.

## Glossary

Term	Meaning
Attachment (of rights)	<p><i>“Rights of common are sometimes described as being ‘attached’ to land. The land to which they are attached is known as the ‘dominant tenement’ (the common over which the rights may be exercised is sometimes referred to as the ‘servient tenement’). Such rights belong to (and may be exercised by) the owner of the dominant tenement. Historically, rights which are attached to land were known as either ‘appurtenant’ or ‘appendant’ to land, but the distinction is for most purposes obsolete. Rights which are not attached to land are ‘in gross’ (q.v.).”</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>
Byelawed area/ Byelawed land	<p>The area at Warcop Training Area subject to byelaws made by the MOD under the Military Lands Act 1892</p>
Common	<p>An area of common land (q.v.)</p>
Common land	<p><i>“In general terms, common land is land owned by one person over which another person is entitled to exercise rights of common (such as grazing his animals), and these rights are generally exercisable in common with others. However, in legal terms, the situation is inevitably more complex. There is no single definition of the term ‘common land’, or indeed of ‘common’ or ‘common rights’. The 1965 Act introduced a statutory definition of ‘common land’, but this is strictly relevant only for the purpose of deciding whether land was or was not eligible for registration under that Act. The 1965 Act stated that common land was “land subject to rights of common (as defined in that Act) whether those rights are exercisable at all times or only during limited periods; and waste land of a manor not subject to rights of common”. Definitions of ‘common’ can also be found in various nineteenth century Acts of Parliament, such as section 3 of the Metropolitan Commons Act 1866, section 37 of the Commons Act 1876, and section 15 of the Commons Act 1899, but each of these was drawn up with a particular purpose in mind, and the definitions must be treated with caution when applied in a different context”.</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>

Common Land Undertakings	<p>The two undertakings agreed by the MOD at the Warcop public inquiry which dealt specifically with the effects of the extinguishment of commoners' rights of common on the status of land at Warcop Training Area as common land. The first undertaking is that following extinguishment of the rights of common over Murton, Hilton and Warcop commons the MOD would not apply to Cumbria County Council (the commons registration authority) to de-register the land as common land. Secondly, as back-up protection, in the unlikely event that the MOD were ever to sell the land, a further undertaking was given to create a small number of limited rights of common, including a right in gross (i.e. a right not attached to any land) to a national amenity society.</p> <p>The full text of these undertakings is included at Annex 2.</p>
Commoners	<p><i>"Persons with the benefit of a right of common, because they own land to which a right of common is attached, because they are the owner of a right of common held in gross, or because they have acquired entitlement to such rights through a lease or letting."</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>
Commons registers	<p>The registers of common land and rights of common established under the 1965 Act and which are to become the commons registers under the 2006 Act. The commons registers are held by the commons registration authorities which in England are county councils, district councils in areas without county councils and London Borough Councils. The registers are made up of a number of sections including the land section which contains the registration of the common land with reference to the register map, and a rights section which sets out the nature and extent of the rights of common registered over the land comprised in the land section.</p>
CRoW	<p>The Countryside and Rights of Way Act 2000. Part 1 of the Act confers a public right of access to open country and registered common land. The right of access is not available over excepted land. The byelawed area (q.v.) at Warcop Training Area is excepted land.</p>
Danger area	<p>This is the area beyond which specific ammunition may not be expected to travel, ricochet or fragment.</p>
Defra's Explanatory Notes	<p>Explanatory Notes on the Commons Act 2006 prepared by Defra. The Notes can be found on the internet at <a href="http://www.legislation.gov.uk/ukpga/2006/26/notes">http://www.legislation.gov.uk/ukpga/2006/26/notes</a></p>
Dominant tenement	<p><i>"The land to which rights of common may be attached (q.v.). The owner of the dominant tenement is the commoner and is entitled to exercise the rights."</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>
Extinguishment (of a right of common)	<p>The bringing to an end of a right of common so that it no longer exists.</p>

In gross	<p><i>“A right which is held personally and is not attached (q.v.) to land”.</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>
Live firing	Firing of weapons with live ammunition (as opposed to dry training where blank ammunition is used)
Right of common	<p><i>“A right usually shared with an owner of land to take certain produce of the land. There are many such rights of which pasturage (the right to put animals onto the land to graze) is the most important today. Other rights include pannage (right to put pigs onto the land to eat acorns and beechmast), turbary (the right to cut peat or turf for fuel), estovers (the right to take wood or bracken for fuel, animal bedding and so on) and piscary (the right to fish). Most rights are attached (q.v.) to land but see ‘in gross’”.</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>
Soil (right of common in the)	<p><i>“To take sand, gravel, stone and minerals. For example, marl is a lime-rich clay used to fertilise land; it was also used for building. The right was to dig marl from common pits. It is not now exercised: modern fertilisers have made the practice unnecessary and exercise of the right generally died out in the last century.”</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>
Surplus/ Surplus grazing	The surplus is what is left to the owner of the common subject to the rights of common. The surplus grazing is the balance of grazing on the common left to the owner of the common subject to the rights of common.
The 1965 Act	<p><i>“The Commons Registration Act 1965 which (generally) required common land, town or village greens, and rights of common over such land, to be registered by commons registration authorities.”</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>
The 2006 Act	The Commons Act 2006
Turbary (right of)	<p><i>“To cut turf or peat for fuel. The turf must be burned in the hearth of the dwelling to which the right is attached (not sold for profit).”</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>
Undertakings	Formal commitments. At the Warcop public inquiry, the Inspector, in reaching his decision, accepted that MOD’s undertakings were serious commitments and noted that the undertakings would in practice have a weight equivalent to that of conditions attached to planning permissions (Report, paragraph 4.10).

Warcop public inquiry	The local public inquiry held In 2001 on the question of whether the MOD should compulsorily extinguish the rights of common at Warcop Training Area on Murton, Hilton and Warcop commons.
Waste land of the manor	<p><i>“In the case of <u>Attorney General v. Hanmer</u> (1858) 2 LJ Ch 837, waste land of the manor was defined as “the open, uncultivated and unoccupied lands parcel of the manor...other than the demesne lands of the manor”. ‘Of the manor’ was held by the court in the <u>Hazeley Heath</u> case to mean land which is or was formerly connected to the manor”.</i></p> <p>(See: The Glossary, Annex A at the end of the Explanatory Notes on the Commons Act 2006 prepared by Defra)</p>

## **Annex 1: Existing Undertakings**

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### **A NOT TO APPLY TO DE-REGISTER THE LAND AS COMMON LAND -**

Following the extinguishment of Rights of Common affecting the land at Warcop Training Area the MOD will not apply to Cumbria County Council, the registration authority for the purposes of the Commons Registration Act 1965, to de-register that land as common land.

### **B CREATION OF NEW RIGHTS OF COMMON**

1 The creation of new rights of common involves two steps. Step A is a commitment which is set out below. Step B would be taken if and when the decision is taken by the Secretary of State to extinguish the Commoners' Rights.

#### ***Step A***

2 The MOD will grant new rights conditional on:

- a) Extinguishment of the existing Rights of Common; and
- b) No successful challenge being made to the validity of the extinguishment.

3 Accordingly, MOD will not grant the new rights of common:

- a) Until at least 6 months after the Secretary of State has signed the Vesting Deed extinguishing the Rights of Common; but
- b) If a challenge is made to the validity of the extinguishment, then MOD will not grant the new Rights of Common until the challenge has been successfully disposed of, namely, a decision is given upholding the extinguishment and all time limits for the making of any appeal, or any further appeal, in relation to the challenge have expired.

4 The new Rights of Common will be granted to 6 farmers who are Commoners today, 2 from each of the 3 existing commons. In addition a new right, not attached to any land, will be granted to a national amenity society (which would be most unlikely ever to agree to sell the Right).

- 5 The new Rights will be granted for the benefit of (as appurtenant to) farms owned by the farmers, and the grant of the new Rights be granted expressly on the basis that the new Rights are appurtenant and (to the extent that the law allows) are not to be capable of being dealt with separately from the farms.
- 6 The new Right of Common will be a right for each farmer to graze 1 sheep on the land on Christmas day in every year.
- 7 The new Right of Common will be the only right created and the deed creating the new right will expressly negative the creation of any ancillary or other implied rights.
- 8 The grant of the new Rights will expressly provide:
  - 8.1 that the new Rights of Common will not in any way interfere with MOD's right to make whatever use of the land it wishes throughout the year, with the sole exception of Christmas Day when the new rights are exercisable, and
  - 8.2 that, accordingly, throughout the year (except only Christmas day) MOD will, for example (and not by way of limitation of MOD's rights), have the right to carry out training activities making use of the land over which the new rights of common are granted and will be entitled to arrange for that land to be grazed and even though the exercise of these reserved rights by the MOD interfere (to whatever extent) with the quality of the grazing for the new commoners;
  - 8.3 that, further, the right is reserved to the MOD to create paths and to grant rights over the land and to dedicate public paths and bridleways.
- 9 The new Right of Common will extend over the whole of the area in respect of which the old rights have been extinguished excluding areas, such as that required for construction of the proposed car park at Murton.
- 10 Access to the new common land will be solely by the existing public right of way up Hayber Lane; there will be no private right of access over MOD land.

**Step B**

*(After a decision by the Secretary of State to extinguish the Rights of Common)*

- 11 The new Rights will be granted in accordance with paragraphs 2 to 10 inclusive.
- 12 The grant will be subject to the condition that if at any time within 80 years (which will be the perpetuity period for the purpose of the grant) the extinguishment of the Rights of Common is held by any court to be void or invalid then the rights granted will be void and of no effect.

## **Annex 2: Proposed Re-structured Undertakings**

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### **A UNDERTAKING NOT TO APPLY TO DE-REGISTER THE LAND AS COMMON LAND**

*To be cancelled.*

### **B NEW UNDERTAKING TO GRANT NEW RIGHTS**

If Warcop Training Area becomes surplus, the MOD will, immediately prior to the disposal of Warcop Training Area, create a small number of limited Common Rights in accordance with the terms set out below.

#### ***Terms of Grant of New Rights:***

1. The new Rights of Common will be granted to 6 farmers who were Commoners immediately prior to extinguishment (or the persons who might be regarded as their successors), 2 from each of the 3 extinguished commons. In addition a new right will be granted to a national amenity society (which would be most unlikely ever to agree to sell the Right).
2. The new Rights will be granted for the benefit of (as appurtenant to) farms owned by the farmers, and the grant of the new Rights will be granted expressly on the basis that the new Rights are attached to, and (to the extent that the law allows) are not to be capable of being dealt with separately from, the farms.
3. In relation to the Right for the national amenity society, a token piece of land within Warcop Training Area will, immediately prior to disposal of Warcop Training Area, be transferred to the society at no cost and the new right will be granted for the benefit of (as appurtenant to) that land, and the grant of the new Right will be granted expressly on the basis that the new Right is attached to, and (to the extent that the law allows) is not to be capable of being dealt with separately from, that land.
4. The new Right of Common will be a right for each farmer/society to graze 1 sheep on the land on Christmas day in every year. The new Right of Common will be the only right created and the deed creating the new right will expressly negative the creation of any ancillary or other implied rights.

5. The new Right of Common will extend over the whole of the area in respect of which the old rights have been extinguished excluding areas, such as that used for construction of the new car park at Murton. Access to the new common land will be solely by the existing public right of way up Hayber Lane; there will be no private right of access over MOD land.