

WARCOP TRAINING AREA

Restructuring of Common Land Undertakings

Consultation Report

April 2012



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Prepared by

RPS

20 Milton Park
Abingdon
Oxfordshire
OX14 4SH

Tel 01235 821888

Fax 01235 820351

Email rpsox@rpsgroup.com

Richard Paddock

9 Wykeham Close
Canford Heath
Poole
Dorset BH17 8PZ

Tel 01202 567959

Fax 01202 567959

Email richardpaddock@hotmail.com

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Glossary

(Note: A number of terms used in this document are explained in the Glossary)

Annexes

Annex 1: Secretary of State Decision Letters 3 July 2002 and 20 Sept 2002

Annex 2: Existing Undertakings

Annex 3: Proposed Re-structured Undertakings

Annex 4: Annex 8 to I/MOD/1A38

1 Introduction and Structure of the Report

Introduction

- 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. As Defra states in its Guidance to Applicants in the pioneer implementation areas, (Sept 2011)¹, at paragraph 1.1.1, the Act "radically changes the landscape for the registration, management and protection of common land". As a result 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 Available on the internet at <http://archive.defra.gov.uk/rural/documents/protected/common-land/pilot-appguide.pdf>

- 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 (this document) and a 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 its 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 this document.
- 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

Structure of the Consultation Report

1.9 This Consultation Report is structured in the following way:

- (a) Chapter 1 contains this introduction;
- (b) Chapter 2 explains in some detail the basis of the Common Land Undertakings and the potential difficulties which the MOD now faces as a result of the new legislative framework contained in the Commons Act 2006;
- (c) Chapter 3 explains the MOD's proposals for restructuring the Common Land Undertakings to achieve the same result, so far as is possible, as was intended at the time of the Warcop public inquiry and the decision of the Secretary of State to extinguish the rights of common; the chapter ends with a comparison between three different sets of circumstances that the MOD faces, or might face, at Warcop Training Area. The three situations compared are:
 - (i) The position prior to the Commons Act 2006
 - (ii) The position after the Commons Act 2006 with the existing Common Land Undertakings and
 - (iii) The position after the Commons Act 2006 with the proposed restructured arrangements.
- (d) Chapter 4 describes the public consultation process.
- (e) At the end of the Consultation Report there is a Glossary where a number of terms used in this document are explained.
- (f) Following the Glossary there are various annexes (as listed in the Contents).

2 Current Undertakings & the Commons Act 2006

- 2.1 This chapter explains the basis of the Common Land Undertakings and the potential difficulties which the MOD now faces as a result of the new legislative framework contained in the Commons Act 2006, which "radically changes the landscape for the registration, management and protection of common land" (Defra's Guidance to Applicants in the pioneer implementation areas, (Sept 2011)² at paragraph 1.1.1).

Current Undertakings

- 2.2 At the Warcop public inquiry the MOD agreed to two undertakings which dealt specifically with the effects of the extinguishment of the rights of common on the status of land at Warcop Training Area as common land (referred to as 'the Common Land Undertakings'). The Countryside Agency was concerned that once the rights were extinguished it would be possible for MOD, or any subsequent owner of the former common land, to de-register the land as common land. To allay those fears, the MOD undertook not to apply to Cumbria County Council (the registration authority under the 1965 Act) to de-register the land as common land. 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 personal right not attached to any land) to a national amenity society.
- 2.3 The full text of these undertakings is included at Annex 2.
- 2.4 MOD was content to give the Common Land Undertakings at the time because the continued registration of the land as common land would not affect the fact that the land would no longer be common land (i.e. registration as common land under the 1965 Act was not determinative of the status of the land). Furthermore, the new rights which MOD undertook to create would not change anything. This was because, while MOD continued to own Warcop Training Area and the land continued to be recorded in the commons registers as common land (in accordance with the Secretary of State's undertaking), they could not actually be exercised. The reason for this was that while the land

² Available on the internet at <http://archive.defra.gov.uk/rural/documents/protected/common-land/pilot-appguide.pdf>

remained registered in the commons registers as common land the law did not allow the new rights of common to be registered and, while they remained unregistered, they could not be exercised.

- 2.5 The reasons for giving the Common Land Undertakings, and their broad effect, were explained to the Warcop public inquiry in some detail. A summary is contained in Annex 8 to I/MOD/1A (the text of that Inquiry document is included at Annex 4). Paragraph 12 of that document explained to the Inquiry why the new rights of common could not be exercised and how it was intended that they should in fact merely be a protection mechanism rather than actual exercisable rights. This was noted by the Secretary of State in his decision letter of 3 July 2002 (Annex 1) at paragraphs 7.9.1 and 7.9.2:

“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...”

- 2.6 As stated above, it did not give the MOD any difficulty to sign up to the commitment not to apply for de-registration of the land as common land because the commons registers maintained for the purposes of the 1965 Act are not conclusive. (This is explained in paragraph 136 of Defra’s Explanatory Notes on the 2006 Act - the Notes can be found on the internet at <http://www.legislation.gov.uk/ukpga/2006/26/notes>). When the MOD entered into the Vesting Deeds on 31 March 2003 the rights of common were immediately extinguished (following extinguishment it came to light that the MOD did not own a very small piece of land (approximately 100 m² in area) at

Hilton. The land has since been acquired by the MOD). The extinguishment was not, for example, delayed until the commons registers were amended to record the extinguishment. (This contrasts with the position under the 2006 Act, as explained below (paras. 2.13 and 2.14).

- 2.7 The extinguishment meant that the land was no longer common land within the definition of the 1965 Act (contained in section 22(1)): the land was not subject to any rights of common; and the land was not waste of the manor.

Commons Act 2006

- 2.8 The Commons Act 2006 seeks to make fundamental changes to the nature of commons registers. It contains new provisions making the commons registers conclusive evidence as to the matters contained in them on an on-going basis, and there are other provisions which could involve the transfer of the management of land registered as common land to statutory commons councils. The 2006 Act fundamentally alters the framework within which MOD had been willing to give the two Common Land Undertakings and is a potential threat to the outcome of the Warcop public inquiry.
- 2.9 Part 1 of the Commons Act 2006 is intended to replace and improve the registration system under the 1965 Act. It is a fundamental aim of the Commons Act 2006 to bring the commons registers up to date and to keep them up to date. The new registers are to be registers that can be relied on.
- 2.10 Further detail on the measures being introduced by the Commons Act 2006 is set out below with an indication of the implications of the changes for Warcop.

New Registers

- 2.11 The registers maintained by the registration authorities under the 1965 Act will become the registers under the Commons Act 2006 (section 1). The rights of common to be registered in the new commons registers are to include the same rights as were registered in the existing commons registers under the 1965 Act (section 3(3)).
- 2.12 The Commons Act 2006 (section 3(6)) provides that no land and no right of common that has been registered is to be removed from the commons registers, except as provided by or under Part 1 of the 2006 Act or any other enactment. One of the ways that rights may be removed from the commons

register is where there is compulsory extinguishment of the rights. This is dealt with by section 14 of the 2006 Act.

- 2.13 It is expected that regulations under section 14 will place a duty on the persons extinguishing rights under compulsory powers to notify the appropriate commons registration authority of the amendments that need to be made in the commons registers as a result of the compulsory extinguishment (see, for example, regulations made under Part 1 of the 2006 Act for the pilot areas: the Commons Registration (England) Regulations 2008 SI 2008 No 1961 (available at <http://www.legislation.gov.uk/ukSI/2008/1961/contents/made> on the internet).
- 2.14 Furthermore, Defra's Explanatory Notes on the 2006 Act draw attention to the fact that regulations under the Act may provide that the means by which the compulsory extinguishment took place (for example, by way of a deed) is not to have effect until the extinguishment is registered in the commons registers (see, for example, in relation to the pilot areas, Regulation 45(2) of The Commons Registration (England) Regulations 2008).
- 2.15 Both of these measures (the duty to apply to amend the commons registers to record a compulsory extinguishment and the fact that the extinguishment is ineffective until registered) are in keeping with one of the aims of the Commons Act 2006 which is to ensure that the commons registers are kept up to date and can be relied on.
- 2.16 The rights of common on the land that formerly made up Murton, Hilton and Warcop commons have been extinguished and the land is no longer common land. On this basis, it would be consistent with the letter and the spirit of the Commons Act 2006 for the MOD to take action to ensure that the commons registers at Warcop Training Area accurately reflect the position as it exists today.

Revival of Extinguished Rights of Common

- 2.17 Section 18 of the 2006 Act provides for the commons registers to be conclusive. Defra's Explanatory Notes on the 2006 Act comment on this at paragraphs 103 to 107.
- 2.18 As the Notes explain, section 18 sets out a number of assumptions that may be made. The aim is to set out certain key information which may be relied on. In relation to rights of common, there is this passage at the beginning of paragraph 104:

“Under subsection (2), where land is registered as subject to a right, it is deemed to have become subject to the right on its registration if it would not otherwise have been so subject. It can therefore be assumed that, in law, the land is subject to the right”.

- 2.19 The rights of common at Warcop Training Area have been extinguished and they have been removed from the commons registers. If they had remained on the commons registers after Part 1 of the Commons Act 2006 is brought into force then, although the land is not subject to the rights, the land would have been deemed conclusively to be subject to them (in accordance with section 18(2) of the 2006 Act). The rights were therefore removed from the commons registers.
- 2.20 However, the land remains land registered as common land in the commons registers (even though it is not actually common land, and would not be so under the law at the time the Common Land Undertakings were given).

Revival of land as common land

- 2.21 As mentioned above (paragraph 2.11), the commons registers maintained by the registration authorities under the 1965 Act will become the registers under the Commons Act 2006. The land to be registered in the new commons registers is to be the same land as was registered in the existing commons registers under the 1965 Act.
- 2.22 If the land at Warcop Training Area remains on the commons registers after Part 1 of the Commons Act 2006 is brought into force then, although the land is not common land, and not subject to any rights of common, the land will become land registered as common land for the purposes of the Commons Act 2006. This will have certain consequences under the 2006 Act but there will also be uncertainty in terms of the status of the land and what that might mean for the attainment of training objectives

Updating the Registers

- 2.23 Section 23 and Schedule 3 of the Commons Act 2006 enable regulations to be made to update the commons registers. Defra’s Explanatory Notes comment on this at paragraphs 135 to 148.
- 2.24 The regulations will specify a transitional period during which time applications will be possible to update the commons registers.

- 2.25 The aim of these provisions is to ensure that the new commons registers accurately reflect the true position in relation to commons. It is consistent with these provisions, and consistent with the position intended at the time the Common Land Undertakings were made, that the MOD should apply to remove the land from the commons registers. It is important that the registers record the true position because the registers will be conclusive as to the matters contained in them. The registers are to be documents that can be relied on.
- 2.26 The primary way in which the commons registers can be updated is by an application being made to the commons registration authorities. At the same time, the importance of the commons registers being up to date is reflected in the provisions in the 2006 Act (Schedule 3, paragraph 2(2)) enabling regulations to be made requiring the commons registration authorities to undertake a formal review of their registers. The aim of this review is to assist in identifying qualifying events and to bring home to other persons the need to notify qualifying events (see paragraph 140 of Defra's Explanatory Notes). There is also provision within the Commons Act 2006 for the registration authority to amend the commons registers on its own initiative (Commons Act 2006, Schedule 3, paragraph 1(5)(b)). This is likely to be of particular relevance in relation to updating the registers to reflect public interest events. In relation to the pilot areas where Part 1 of the 2006 Act is being implemented Defra have issued Guidance to the commons registration authorities for the pilot implementation of Part 1 of the 2006 Act (available on the internet on Defra's website at <http://archive.defra.gov.uk/rural/documents/protected/common-land/craguide.pdf>) which highlights the need for the commons registration authorities to consider bringing forward proposals for amendment of the commons registers where (inter alia) the amendment is consequential to a public interest proposal such as the compulsory acquisition of common land (see paragraph 6.2.1).
- 2.27 It is likely that such a review by Cumbria County Council as the commons registration authority for Warcop Training Area (i.e. to identify events that should be considered for an amendment of the commons registers) would include the extinguishment of common rights at Warcop Training Area which, following the lengthy public inquiry and the Inspector's recommendation to this effect, was found by the Secretary of State to be in the national interest. However, the MOD's proposal on which it is consulting is that, because of the importance to the MOD, it should itself apply to remove the land from the

commons registers and not that the County Council should act on its own initiative to amend the registers.

2.28 As is pointed out in paragraph 136 of Defra's Explanatory Notes:

"Many instruments, and other events affecting entries in the registers (or calling for new entries in the registers), have had effect since the registers were compiled under section 4 of the 1965 Act, but many of these have not been captured in consequential amendments to the registers."

2.29 The extinguishment of the rights of common at Warcop Training Area has taken effect. The rights of common no longer exist. When the MOD undertook not to apply to de-register the land as common land it could make that commitment because de-registration of land as common land was not required in order to give effect to the extinguishment. In addition there was no duty imposed on the MOD to apply for the commons registers to be amended.

2.30 In contrast, the position under the Commons Act 2006 is that regulations may be made requiring an application to be made to amend the commons registers after a statutory extinguishment (section 14(4)). Furthermore, regulations may provide that a statutory extinguishment of rights of common will be ineffective until any requirement for amendment of the registers has been complied with (See section 14(5) of the 2006 Act and paragraph 104 of Defra's Explanatory Notes). As mentioned above (see paragraphs 2.13 and 2.14) this is the position in relation to the pilot areas where Part 1 of the 2006 Act is being implemented: there is a duty to make the application to amend the commons registers and the statutory extinguishment is ineffective until the commons registers have been amended.

2.31 If the Commons Act 2006 had been in force at the time of the Warcop public inquiry the MOD could not have given the undertakings that it did concerning the status of the land because there would have been a requirement to notify the registration authority of the extinguishment and because the effect of the extinguishment would have been delayed until the commons registers had been amended. Under the Commons Act 2006, registration of the extinguishment is a necessary part of the process: without registration, there is no extinguishment.

New Rights of Common on Existing Registered Common Land

- 2.32 Section 6 of the Commons Act 2006 sets out how rights of common may be created. The land must not be registered as a town or village green and the right must be attached to land (section 6(3)).
- 2.33 Unlike the position under the 1965 Act, the creation and registration of a new right of common is not prevented by the land being already registered as common land.
- 2.34 As mentioned above (paragraphs 2.4 and 2.5) when MOD gave the undertaking to create new rights of common, the creation of the new rights would not change anything. This was because, while the MOD continued to own Warcop Training Area and the land remained registered in the commons registers as common land (in accordance with the Secretary of State's undertaking not to de-register), the new rights of common could not be registered and, while they remained unregistered, they could not be exercised.
- 2.35 In contrast, under the 2006 Act new rights of common could be created and registered at Warcop Training Area. Since all old rights have been extinguished the qualification in section 6(6) (that the commons registration authority must refuse registration if the land cannot sustain the new rights of common and any other rights exercisable over the land) would not be of any practical significance. The new rights of common the Secretary of State has undertaken to create could now be created (except the right in gross: see further below, paragraphs 2.40 and 2.41), they could be registered as new rights and they could be exercised. This is contrary to what was envisaged at the Warcop public inquiry.
- 2.36 Although the new rights are limited they could lead to difficulty for the MOD. Commoners are entitled to exercise their rights without interference or obstruction. The law protects commoners against interference with their rights. An actionable interference with commoners' rights could lead to an award of damages and/or the granting of an injunction.
- 2.37 The Secretary of State in his decision letter dated 3 July 2002 (Appendix 1) accepted the Inspector's view that there was an inevitable conflict between two essentially incompatible activities – military training on the one hand and grazing of animals by a relatively large number of independent graziers on the other (paragraph 7.3.7). The Inspector also made the point, in rejecting voluntary acquisition as a way of MOD achieving its objectives, that “a small

number of remaining commoners would have very considerable financial and other bargaining power in negotiations with the MOD ..." (Inspector's Report, paragraph 6.4.14 – Appendix 1).

- 2.38 Whilst the new rights of common to be granted by the MOD could be limited and could seek as far as possible to give primacy to military activity there would be uncertainty about the extent to which military activity could override the commoners' rights. Ultimately, the uncertainty could only be resolved by the Courts. The uncertainty would itself be contrary to the MOD's interests in the successful attainment of training objectives.
- 2.39 MOD's use of Warcop Training Area (both in terms of military training and the management of grazing as agreed with Natural England) could amount to interference with the new commoners' rights. The creation of the new rights could lead to a conflict with the overriding military requirement, jeopardising the attainment of training objectives found by the Inspector to be in the national interest and wasting the significant financial investment made by the MOD to secure the long-term future of Warcop Training Area.

Rights in Gross

- 2.40 As mentioned above (paragraph 2.32), section 6 of the Commons Act 2006 sets out how rights of common may be created. A right must be attached to land (section 6(3)(b)). This is a change in the law: it will not in future be possible to create a right in gross (that is, a right not attached to land).
- 2.41 Accordingly it will not be possible for the MOD to grant the right in gross to the national amenity body as envisaged by the Secretary of State's undertaking (it would however be possible to grant the national amenity society a right of common attached to land owned by the amenity society and this is explained in Chapter 3 setting out MOD's proposals for restructuring the Common Land Undertakings).

Statutory Commons Councils

- 2.42 The 2006 Act introduces a new mechanism for the management of land registered as common land. The Act allows for the establishment of commons councils.
- 2.43 A commons council can be formed where the land is registered as common land (section 26(1) and (2) of the 2006 Act). However, the land registered as common land does not need to be subject to any rights of common. The

commons council is created by an order made by the appropriate national authority (the Secretary of State in relation to England). Commons councils have the power to affect all aspects of management of the land within their governance.

- 2.44 In accordance with the Common Land Undertaking made by the MOD, new rights of common were in the process of being granted (prior to the publication of the Commons Bill). There were to be 7 new rights which were to be very limited but were designed to protect the status of the land as common land in the long term. It was not intended that the new rights would actually be exercisable during MOD's ownership of the land but the new law in the Commons Act 2006 will mean that if the new rights are granted now they will be capable of being registered and will be capable of being exercised. As explained above (paragraphs 2.37 and 2.38), there is an inevitable conflict between military use on the one hand and the grazing of animals on the other, and with the granting of new rights there would be uncertainty about the extent to which military activity could override commoners' rights.
- 2.45 The Commons Act 2006 appears to have the potential to shift the balance away from military use of the fells. A commons council at Warcop Training Area for (or including) the land that used to be Murton, Hilton and Warcop commons might interfere with the MOD's management of the fells by, for example, making rules relating to agricultural activities, the management of vegetation and the exercise of rights of common on the land for which the council is established, and/or making rules limiting or imposing conditions on the exercise of the grazing rights MOD has granted to farmers by grazing licences.
- 2.46 The majority of the land covered by what used to be Murton, Hilton and Warcop commons is within the danger area and it is vital that the MOD has the certainty of being able to keep people out of the area in order to allow live firing training exercises to take place.
- 2.47 The establishment of a commons council at Warcop Training Area for (or including) the land that used to be Murton, Hilton and Warcop commons could result in disruption of military training since the ability of the statutory commons council to make rules might involve the requirement to enter the land, with the possibility that the MOD could not control the entry. It is not clear that MOD byelaws (under the Military Lands Act 1892) would be effective to prevent entry.

- 2.48 Since the establishment of a commons council could have a damaging effect on training it is important that the MOD will be able to take steps to stop a commons council from being formed. However, it is not clear that this can be guaranteed. For example, whilst the Secretary of State (Defra) must pay particular regard to the representations of the MOD as owner, the Secretary of State must equally pay special regard to the representations of others including MOD's graziers (as occupiers) and commoners (in particular commoners exercising their rights).
- 2.49 If the MOD created the new rights of common in accordance with the Secretary of State's Common Land Undertaking, the new commoners would have a significant say in whether a council should be created, the more so if they were exercising their rights.
- 2.50 If there is substantial support for the creation of a statutory commons council the order creating it could be made even if MOD objects but is in the minority.
- 2.51 With the MOD having only recently established the need to extinguish rights of common in an open and transparent process by making the case at the Warcop public inquiry, it is right to ask whether it is appropriate or in the national interest that the MOD should potentially have to fight its case again at public inquiry if an inquiry is held on the creation of a statutory commons council as envisaged under the provisions of the 2006 Act.
- 2.52 The MOD holds land to enable the armed forces to deliver defence capabilities but at the same time the MOD is committed to the proper management of the land. With the rights being extinguished over Warcop Training Area and the land no longer being common land, grazing is let to a small number of farmers by way of grazing licences under a strict management prescription agreed with Natural England. The grazing on the fells is divided into a specific number of hefts (defined grazable areas).
- 2.53 MOD's commitment is set out in The Strategy for the Defence Estate 2006: In Trust & On Trust:
- "The defence estate is a unique asset encompassing sites of significant environmental value and a rich cultural heritage that is recognised to be of national and international importance. We need to manage the estate sensitively and also highlight the opportunities we have to contribute to the Government's wider sustainable development priorities. Our strategic aim is to manage and develop the defence estate in a manner that proactively integrates*

the Government's overarching objectives for sustainable development whilst ensuring the delivery of defence capability in support of the Defence Vision.

We will continue to develop our position as an exemplar in the sustainable management of the Government estate and to work openly and transparently with our stakeholders.” (at page 24)

“6.3 We are committed to continuing our work on improving the stewardship of the estate and to do our part in promoting an economically vibrant and socially inclusive countryside. We have adopted national targets for biodiversity and to improve the condition of our SSSIs across our varied inland and coastal sites. To achieve our aims we will continue to develop our partnership approach with the relevant statutory bodies and agencies in order to produce cost-effective plans for delivering improvements.” (at page 25)

“6.5 We will continue to manage our estate in a sustainable way, noting this is particularly important where we make use of land of high landscape or environmental quality, such as in National Parks. We seek to safeguard and improve valued landscapes on our estate through careful design of facilities and the removal of redundant structures. The estate contains important wildlife habitats, species and geological features that are often present because of the low environmental impact of our activities, the long history of occupation and benign agricultural practices. We will maintain and, where possible, enhance this natural heritage.” (at page 26)

“Defence and the Environment

The development, occupation and use of the defence estate can have a significant impact on the natural and social environment. However, we have built on our reputation as a good steward by developing strategic approaches, procedures and processes to identify and manage our full range of sustainable development impacts in support of Government policies and targets. These management approaches are being integrated into the contractual arrangements for our private partners to ensure that the Department's best practice requirements are supported through our procurement activities.

We have fully supported the development and implementation of the ‘Framework for Sustainable Development on the Government Estate’, the main vehicle for improving, assessing and managing the performance of the Government estate, which covers all the key environmental and social impacts and sets challenging targets. This includes the production of seven strategies –

water, energy, biodiversity, estate management, procurement, climate change and the Department's wider impact on society (which includes access and recreation).

Integrated Land Management Plans / Integrated Rural Management Plans

Integrated Land Management Plans are used to assess and manage impacts at all principal training areas. These 5-year rolling plans ensure that defence-related activities at the site take account of the requirement for nature conservation, woodland management, landscape and heritage management and public access. Smaller sites are adopting less detailed plans known as Integrated Rural Management Plans.” (at page 27)

- 2.54 At Warcop the MOD is committed to the proper management of the land and significant progress has been achieved to date in implementing the various undertakings for the management of Warcop Training Area with virtually all the undertakings having been implemented including the establishment of an Environmental Steering Group to advise the MOD on environmental issues, the preparation of an Integrated Land Management Plan which was launched in 2003, and the commencement of a new live firing programme. In addition a number of public access initiatives have been implemented 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. In 2004 Natural England gave Warcop a National award in recognition of its work in connection with the grazing on the land that used to form Murton, Hilton and Warcop commons.
- 2.55 The MOD has the proper management arrangements in place at Warcop to ensure that the land has proper stewardship whilst at the same time ensuring that military training objectives are achieved. The Secretary of State in his decision letter of 3 July 2002 accepted the Inspector's recommendation that the status of the Commons as common land would be protected and the commons would be managed in the interests of nature conservation and to meet other aspirations (paragraphs 9(1)(e) and 10).
- 2.56 It is not appropriate that these management systems (including in particular the Environmental Steering Group and the Integrated Land Management Plan) should be put at risk by the possibility of the creation of a statutory commons council.

Works on Registered Common Land

- 2.57 Section 38 of the Commons Act 2006 prohibits the carrying out of ‘restricted works’ on land registered as common land without the consent of the appropriate authority. The prohibition applies whether or not the land is actually common land and whether or not the land is subject to any rights of common.
- 2.58 The ‘restricted works’ which must not be carried out without consent are described in section 38(2) of the 2006 Act. They are works which have the effect of preventing or impeding access to or over the land registered as common land (section 38(2)(a)) and works for the resurfacing of land (section 38(2)(b)). The Act provides that the reference to works in section 38(2)(a) includes the erection of fencing, the construction of buildings and other structures, the digging of ditches and trenches and the building of embankments (section 38(3)).
- 2.59 The prohibition on carrying out certain works on land registered as common land in section 38 of the Commons Act 2006 (in Part 3 of the Act) replaces section 194 of the Law of Property Act 1925. The prohibition in section 194 of the 1925 Act applied where land was subject to rights of common as at 1 January 1926 but ceased to apply where the rights of common were extinguished under any statutory provision (section 194(3)(a) of the Law of Property Act 1925).
- 2.60 In relation to Warcop Training Area, by virtue of section 194(3)(a) of the 1925 Act, the control of works under section 194 ceased to apply to the land that was formerly Murton, Hilton and Warcop commons when the rights of common were extinguished in March 2003. Neither the continued registration of the rights (since removed) nor the continued registration of the land as common land (under the 1965 Act) prevented the cessation of the control of works under section 194.
- 2.61 Under the 2006 Act the control of works on land registered as common land is re-imposed through section 38. Section 43(5) of the 2006 Act makes provision for the Secretary of State (as ‘the appropriate authority’ in relation to land in England) to make an Order to give exemption from the prohibition on works on land registered as common land. Where the control of works under section 194 of the 1925 Act ceased to apply to land by virtue of section 194(3)(a) (extinguishment of rights of common under any statutory provision) then an order may be made by the Secretary of State to provide that section 38 is not to

apply to the carrying out of works, either generally or in relation to works of a particular description as specified in the order.

- 2.62 The MOD does not have any plans to carry out any major works on the land that was common land but there may be a requirement to carry out some minor works. Most of the land falls within the Warcop Training Area Danger Area and, for example, there may be a need to control grazing by erecting fencing. The need for fencing would depend on the particular type of weapons being used and where the weapons were being fired from. In some situations it might be appropriate to fence an area to exclude sheep where there was considered to be a high risk that a significant number of sheep could be injured or killed during live firing exercises.
- 2.63 Any proposals to carry out works of a kind covered by section 38 would be discussed by the MOD in the Environmental Steering Group (see paragraph 2.54 above).
- 2.64 As mentioned above (see paragraph 2.52 and following) the MOD has the proper management arrangements in place at Warcop to ensure that the land has proper stewardship whilst at the same time ensuring that military training objectives are achieved. The Secretary of State in his decision letter of 3 July 2002 accepted the Inspector's recommendation that the status of the Commons as common land would be protected and the commons would be managed in the interests of nature conservation and to meet other aspirations (paragraphs 9(1)(e) and 10).
- 2.65 It is not appropriate that the control of works on common land should be re-imposed through section 38 of the Commons Act 2006. The possibility of exemption by order pursuant to section 43(5) is not sufficient at Warcop Training Area since such an order would not provide any protection against claims by the new commoners for actionable interference with their rights (see paragraphs 2.38 and 2.39 above), and would not address the threat to the achievement of military objectives posed by statutory commons councils. Furthermore, an exemption order might add to the uncertainty about the situation at Warcop Training Area and as regards the status of the land which is itself a potential threat to the outcome of the Warcop public inquiry where the Inspector recommended approval of MOD's proposals in the public interest to secure the long-term future of Warcop Training Area.

Summary of Effects of Commons Act 2006 for the MOD at Warcop

2.66 Broadly, the effects for the MOD at Warcop Training Area are as follows:

- The extinguished rights of common have been removed from the commons registers so they will not revive when Part 1 of the 2006 Act comes into force (see paragraphs 2.17 to 2.19 above above); but
- It would be possible for some of the new rights which the MOD have undertaken to create (but not the right in gross, which cannot now be created) to be registered under the 2006 Act and they would be capable of being exercised immediately;
- If the land remains registered in the commons registers as common land (even though not subject to any rights of common and not actually common land) provisions for the creation of Statutory Commons Councils, and the functions to be conferred upon them, would apply,
- If the land remains registered in the commons registers as common land (even though not subject to any rights of common and not actually common land) provisions in the 2006 Act for controlling works on land registered as common land would apply (but subject to the possibility of exemption by Order);
- If the land remains land registered in the commons registers as common land (even though not subject to any rights of common and not actually common land) there would be uncertainty about the status of the land and what that might mean for the successful attainment of training objectives.

2.67 The issues above, i.e. the creation of new rights of common which can be exercised immediately, the possibility of control being exercised through the creation of a Statutory Commons Council, and the control of works under section 38 of the 2006 Act, all lead to a potential conflict with the overriding military requirement, thereby jeopardising the attainment of training objectives found by the Inspector to be in the national interest and wasting the significant financial investment made by the MOD to secure the long-term future of Warcop Training Area. The potential for that conflict is not acceptable to MOD given the importance of the training objectives, and the findings of the Warcop public inquiry.

2.68 A further element of risk arises from uncertainty. The MOD has gone through a process to extinguish compulsorily all rights of common at Warcop Training

Area. The land is not subject to any rights of common and is not actually common land. However, if nothing is done, the land will become land registered as common land under the 2006 Act. How the Courts might interpret this situation is uncertain, as is what that might mean for the status of the land at Warcop Training Area. This uncertainty is itself a potential threat to the outcome of the Warcop public inquiry where the Inspector recommended approval of MOD's proposals in the public interest to secure the long-term future of Warcop Training Area.

3 Re-structuring Proposals

Aim of Re-Structuring

- 3.1 In view of the difficulties now presented by the new commons legislation, it is proposed that the undertakings should be re-structured. The purpose of the re-structuring is to achieve the same result, so far as is possible, as was intended at the time of the Warcop public inquiry and the decision of the Secretary of State to extinguish the rights of common.

MOD's Proposals

- 3.2 The MOD therefore proposes that
- (a) The commons registers should be updated to reflect the statutory extinguishment which has already occurred, and application will 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.
- 3.3 The proposal is for an application to be made to de-register the land as common land pursuant to the provisions of section 13(a) of the 1965 Act. Section 13(a) allows the commons registers to be amended where land ceases to be common land³. The rights of common at Warcop Training Area were extinguished on 31 March 2003 when the Secretary of State entered into 3 Vesting Deeds (one for each common) and those Vesting Deeds were made pursuant to the statutory procedure 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.
- 3.4 The terms of the proposed new undertaking are included at Annex 3, and are almost identical to the existing undertaking. There are two principal differences:
- (a) The new rights of common will not be created now but are to be created if, at some time in the future, Warcop Training Area becomes

³ This section has been repealed with savings by The Commons Act 2006 (Commencement No. 1, Transitional Provisions and Savings) (England) Order 2006 (SI 2006/2504) with Article 2(h)(i) repealing the section but with Article 3(3) providing for section 13(a) to continue to have effect (until section 14 of the 2006 Act is brought into force) insofar as the section relates to land which ceases to be common land by virtue of any instrument made under or pursuant to an enactment.

surplus; such new rights are to be created immediately prior to the disposal;

- (b) It will not be possible to create a right of common in gross under the provisions in the Commons Act 2006 (see section 6(1) and (2)). The right for the amenity society will, instead of being a right in gross, be a right attached to a token piece of Warcop Training Area which, immediately prior to any disposal of Warcop Training Area, will be transferred to the society at nil cost so that the new right can be attached to it (the token piece of land at Warcop Training Area to which the right will be attached will be outside the area of land (the common) over which the right will be granted and take effect).

- 3.5 The MOD's proposals ensure that the status of the land as common land will be protected in the long-term and the same result will be achieved, so far as is possible, as was envisaged at the Warcop public inquiry. It will just be achieved by using a different mechanism that takes account of the changed legislative framework contained in the new Commons Act 2006.
- 3.6 The final version of the proposed restructured Undertakings will depend on what decision the MOD makes after considering consultation responses. The precise form of the undertakings will also take account of any representations made in response to consultation on the wording of the undertakings.

Access under the Countryside and Rights of Way Act 2000 (CRoW)

- 3.7 There is one area where it is appropriate to say a little more about MOD's proposals for re-structuring the Common Land Undertakings. This concerns the public right of access to 'Access Land' under the Countryside and Rights of Way Act 2000 (CRoW).
- 3.8 One significant reason why it was important at the time of the Warcop public inquiry to protect the status of the land as common land was because the right of access under CRoW applied to land registered as common land (as well as other land). How this right of access would apply at Warcop Training Area after extinguishment of the rights of common was explained in some detail to the Inquiry in Inquiry Document I/MOD/1A, Annex 8 (see Annex 4).
- 3.9 Paragraph 10 of Inquiry Document I/MOD/1A, Annex 8, summarises the right of access under CRoW at Warcop Training Area in this way:

“In relation to Warcop Training Area, the three commons, Murton, Hilton and Warcop, are registered commons and therefore the area of the three commons is registered common land. The area of the commons within the byelawed area is excepted land and is not therefore access land. The new right of access cannot be exercised over that area. The area of the commons outside the byelawed area is not excepted land and is access land over which the new right of access can be exercised, subject to any restrictions as permitted or authorised under CRow 2000”

- 3.10 Public access under CRow at Warcop Training Area will continue in the same way and will not be affected by the MOD's proposed restructuring of the Common Land Undertakings.
- 3.11 The area of the former commons within the byelawed area is excepted land and it will continue to be excepted land. It is not access land and while it continues to be byelawed land it will not be access land. The right of access under CRow cannot be exercised over that area.
- 3.12 Outside the byelawed area the land is shown on the access map prepared by the Countryside Agency as registered common land. Once the land is de-registered as common land it will no longer be within the part of the definition of access land that includes registered common land (i.e. section 1(1)(b) of CRow) but the land will be access land within the part of the definition that includes land which is open country, defined as land which appears to the appropriate countryside body (in England now Natural England) to consist wholly or predominantly of mountain, moor, heath or down (CRow, sections 1(1)(a) and 1(2)).
- 3.13 There will not be any break in the ability to exercise the right of access under CRow at Warcop Training Area immediately following de-registration of the land as common land. Natural England will have a duty to review the statutory access map for the area including Warcop Training Area (section 10 of CRow). When the review takes place Natural England will be able to amend the statutory map to change the land shown as registered common land so that it is shown as open country (the byelawed area will continue to be excepted land and not access land). Until that review takes place the current statutory map will continue to apply as being a map in conclusive form (section 9 of CRow).

Existing and Proposed Arrangements Compared

3.14 Table 3.1 below summarises the situation at Warcop Training Area under three different scenarios, namely:

- (a) Scenario 1 The position prior to the Commons Act 2006, i.e. the position as it was envisaged at the Warcop public inquiry: there is no Commons Act 2006; the position is governed by the Commons Registration Act 1965;
- (b) Scenario 2 The position after the Commons Act 2006 with the existing Common Land Undertakings i.e. on the basis that the Commons Act 2006 is in force. It assumes that there is no restructuring of the Common Land Undertakings and that no application is made to de-register the land as common land. The MOD cannot comply with the undertaking to grant new rights because this includes the creation of a right in gross, which the 2006 Act prohibits. For the purposes of this scenario it is assumed that the other rights of common are granted; and
- (c) Scenario 3 The position after the Commons Act 2006 with the proposed restructured arrangements i.e. on the basis that the Commons Act 2006 is in force but the Common Land Undertakings are restructured in accordance with the proposals set out in this Report. Application is made to de-register the land as common land. It is assumed that no new rights of common are created but the undertaking is made to create them in the future immediately prior to any disposal if the land ever becomes surplus.

Table 3.1 – Summary Comparison

	Pre-Commons Act 2006 (i.e. the 1965 Act applies)	Commons Act 2006 with existing Undertakings	Commons Act 2006 with restructured arrangements
Status of Land Initially	Not common land New rights cannot be registered or exercised	Land registered as common land subject to exercisable rights of common	Not common land Not subject to rights of common Not registered as common land
Status of Land in the future (following disposal)	Reinstated as common land subject to exercisable rights of common	Continues as common land subject to exercisable rights of common	Reinstated as common land subject to exercisable rights of common
Military Use	Long term military use secured	Military use potentially at risk	Long term military use secured
Non-military Use	Improved through implementation of Undertakings	Potentially at risk	Improved through implementation of Undertakings
Public Access (CRoW)	No change	No change	No change

Summary

- 3.15 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 the 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.
- 3.16 It will be seen from the above comparison that the proposed re-structuring achieves the same result, so far as is possible, as was intended at the time of the Warcop public inquiry and the decision of the Secretary of State to extinguish the rights of common. This will be in keeping with the purpose behind the undertakings and will ensure that the purpose is given effect notwithstanding the new legislation.

4 Consultation Process

- 4.1 The MOD is carrying out a consultation programme to inform all parties to the Warcop public inquiry and other stakeholders of their proposals to re-structure the undertakings in order to safeguard military training capabilities on Warcop Training Area and the status of the land as common land in the long-term.
- 4.2 In addition to this Consultation report, the MOD has sent a public information leaflet to all those who attended the public inquiry (as far as is possible). In addition, copies of both documents and a Summary document are available to view at local libraries and at Warcop Camp (please telephone 017683 43229). MOD has also arranged a series of local meetings in Hilton/Murton and Warcop to outline its proposals. The consultation documents are also available on the Defence Infrastructure Organisation website at <http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/>
- 4.3 The specific dates and times of these meetings are as follows. Details will also be posted in local post offices and village notice boards.
- Warcop Methodist Church (School Room): 31 May 2012 at 7pm
 - Hilton/Murton Village Hall: 12 June 2012 at 7pm
- 4.4 The MOD welcomes comments on all aspects of its proposals. However, it would be helpful if consultees addressed the following issues:
- (a) Whether it is agreed that the effect of the Commons Act 2006 on the existing undertakings will be to produce a result that is contrary to what was intended at the Warcop public inquiry;
 - (b) Whether it is considered that the proposed undertakings will not carry out the intention of the existing undertakings as explained to the Warcop public inquiry, and, if it is considered that they will not, in what respect they will not;
 - (c) Whether it is considered that there are any problems with the proposed undertakings which would not arise under the existing undertakings;
 - (d) Whether there are any comments on the wording of a specific undertaking or its content and any changes which should be made.

- 4.5 These are areas where the MOD would find it helpful to have comments but consultees should not feel restricted to commenting only on these points. Comments are welcome on any aspect.
- 4.6 Anyone interested can submit written comments on the proposals and request a copy of MOD's decision. They should be addressed to RPS, P O Box 607, Abingdon, Oxon OX14 9GR, marked "Warcop Consultation" or emailed to Warcopconsultation@rpsgroup.com. All comments and requests must be received by 31 July 2012.
- 4.7 Following this consultation MOD will consider all written responses and make a final decision –
- (a) on whether to proceed with updating the commons registers to reflect the statutory extinguishment that has already taken place by the removal of the land from the registers,
 - (b) on whether to postpone granting any new rights of common until (if it should occur) the land becomes surplus, and,
 - (c) if so, on 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.
- 4.8 The MOD's decision including (if it is decided to proceed with the restructuring of the Undertakings) the final terms of the re-structured undertakings will be published (in a form to be decided) as well as sent to those who request a copy of the decision.

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	The area at Warcop Training Area subject to byelaws made by the MOD under the Military Lands Act 1892
Common	An area of common land (q.v.)
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 http://www.legislation.gov.uk/ukpga/2006/26/notes</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>
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Annex 1: Secretary of State Decision Letters 3 July 2002 and 20 September 2002



SECRETARY OF STATE

MINISTRY OF DEFENCE
ROOM 205, OLD WAR OFFICE BUILDING
WHITEHALL LONDON SW1A 2EU

Telephone 020 721 82111/2/3
Fax: 020 721 87140
E-mail: sofs-registry1@mod.gsi.gov.uk

MO 10K

3 July 2002

Dear Mr Baillie,

DEFENCE ACT 1854
LANDS CLAUSES CONSOLIDATION ACT 1845

WARCOP TRAINING AREA

**EXTINGUISHMENT OF RIGHTS OF COMMON OVER HILTON, MURTON
AND WARCOP COMMONS**

1. I am directed by the Secretary of State for Defence to say that consideration has been given to the report of the Inspector, Mr C J Tipping, MA(Cantab), who held a non-statutory public inquiry into proposals by the Secretary of State to extinguish compulsorily rights of common over Hilton, Murton and Warcop Commons in the Warcop Training Area. The Inquiry was held from 24 April 2001 to 25 July 2001.

2. WARCOP TRAINING AREA

2.1 Warcop Training Area (WTA) consists of 9550 hectares of land in Cumbria. The MOD has freehold ownership of 6350 hectares, including the ranges and the impact areas, and the whole of the three Commons, which have a total area of some 4200 hectares. There are 23 main ranges currently laid out at WTA offering facilities for different weapons and tactical exercises. Use by the Army dates back to 1942; since 1995 the priority user has been the Infantry Training Centre at Catterick.

Mr A R Baillie
Estates Director
Head Office
Defence Estates
Blakemore Drive
Sutton Coldfield
B75 7RL



2.2 There are some 18000 identified rights over the three Commons, over 13000 of which are owned by parties other than MOD, allowing grazing rights, resulting in the grazing of more than 12000 sheep. Military use of WTA was initially sanctioned by emergency legislation. Following its repeal in 1959 the conflict between the needs of the MOD to live-fire at WTA and the rights of access of the Commoners has been resolved by the parties entering into Firing Licence Agreements (FLAs). Under the FLAs the Commoners agree to restrict their access to the Commons in return for a fee. The MOD is permitted to fire between 0900 and 1700 each day except Mondays and five annual non-firing periods agreed with the Commoners. No live firing at night can take place, except on two ranges designed so that their safety templates do not cross the Commons.

3. THE PROPOSAL

3.1 The Infantry Training Centre at Catterick produces about 5000 newly-trained infantrymen every year. The Combat Infantryman's Course lasts 14 weeks and there are between 28 and 34 courses each year. The Course consists of five stages, the first four of which are conducted at Catterick or nearby training areas. Stage 5, which requires range facilities, aims to teach recruits in a realistic tactical setting with live firing all the skills and procedures needed for operations. It takes place at WTA and takes five consecutive days of cumulative and progressive training around the different ranges. All exercises carried out by day also need to be practised at night.

3.2 Currently, under the FLAs with the Commoners, there can be no live firing before 0900, after 1700, on Mondays, or during the five annual non-firing periods agreed with the Commoners. No live firing at night can take place, except on two ranges, C7A and E25. These ranges were designed so that their safety templates do not cross the Commons but they have very restricted arcs of fire. They are equipped only with fire trenches and can only accommodate Section in Defence exercises.

3.3 These restrictions mean that training on Monday (Individual and advance-to-contact exercises) cannot involve live firing. Trainees cannot achieve any of the night-firing objectives apart from the partial achievement of the Section in Defence exercise; cannot achieve the individual close quarter battle exercise with live firing, and cannot follow the required logical progression through the sequence of increasingly complex and collective Stage 5 exercises, the night exercises following the day exercises.

3.4 Under procedures agreed with the Health and Safety Executive, a 'Safe System' of training has been established, which requires trainees to reach a sufficient standard of competence at each stage before moving on. To the extent that trainees are failing to reach a satisfactory standard before passing on to the next stage they are breaching the Safe System.

3.5 The proposal is to extinguish compulsorily, pursuant to Section 1 of the Defence Act 1854, rights of common over Hilton, Murton and Warcop Commons. The restrictions imposed by the exercise of the rights of common

currently result in a serious and unacceptable shortfall in military training, especially of infantry soldiers. It is only by extinguishment that this shortfall can reliably be addressed.

4. THE INQUIRY

4.1 The Secretary of State for Defence caused a non-statutory public inquiry to be held so that all objections and representations relating to his proposal might be heard and considered. Since the inquiry was non-statutory there were no applicable procedure rules. As the proposal was analogous to compulsory purchase proposals by ministers the Inspector applied, as far as practical, the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1994 (SI 3264 of 1994).

4.2 The objections and representations made concerned the following matters:

- (a) legal submissions concerning the Human Rights Act 1998 and other matters;
- (b) the military need for extinguishment;
- (c) nature conservation;
- (d) public access;
- (e) noise and vibration;
- (f) the impact on agriculture and the local economy;
- (g) the adequacy of compensation;
- (h) post-extinguishment land status and management; and
- (i) other grounds of objection.

5. INSPECTOR'S RECOMMENDATION

5.1 Copies of the Inspector's report are enclosed. For the reasons given at paragraphs 15.18 to 15.21 of his report, the Inspector concluded that, on a balance of probabilities, the national need for the compulsory extinguishment on military training grounds is established and that there was nothing of sufficient adverse weight in his conclusions as to the other issues to displace his conclusion as to national need or to render the impact of intensified use of the Warcop Training Area post extinguishment unreasonable or disproportionate to the identified national need.

5.2 The Inspector's conclusion was subject to two further undertakings concerning noise, which he proposed that the Ministry of Defence should give, in addition to those already proposed by the Ministry.

6. POST-INQUIRY CORRESPONDENCE

6.1 Subsequent to the Inquiry the Secretary of State received no further correspondence for consideration in reaching a conclusion.

7. CONSIDERATION OF THE OBJECTIONS

7.1. The Secretary of State has taken note of the objections presented to the Inquiry and the Inspector's conclusions.

7.2 Legal submissions and human rights

7.2.1 The Secretary of State has carefully considered the claims made by the objectors based on Articles 6, 8 and Article 1 of Protocol 1 of the European Convention on Human Rights. In relation to Article 6, he is satisfied that the procedure established to decide whether to proceed with the proposal is fair. In relation to the Article 8 and Article 1 of Protocol 1 claims, the Secretary of State is satisfied that a fair balance has been struck between the national need for intensified use of WTA and the rights of the individuals affected. In addition, he considers that the undertakings to be given by the MOD will reduce any interference with the Article 8 right and, turning to the Article 1 of Protocol 1 claim, he notes and agrees with the Inspector's conclusion that the compensation payable for the loss of the rights will be fair and adequate.

7.3 The military need for extinguishment

7.3.1 The Secretary of State noted the military need, as summarised at paragraphs 3.1 to 3.5 above. He also noted the MOD's proposals for meeting these needs, post extinguishment, as being limited by paragraphs 7.3.2 to 7.3.4 below.

7.3.2 Small arms. Day time firing would be restricted to 0800 to 1800 hours in summer and 0730 to 1800 in winter. Night firing would be limited to four hours per night starting as soon as possible after dark and ending not later than 2200. In the case of ranges A1 and A2 (the western-most ranges nearest to the villages of Hilton and Murton) night firing would be limited to two hours a night ending not later than midnight.

7.3.3 30mm Rarden cannon. Firing would be limited to 12 weeks a year. Day-time firing hours would be as for small arms. Night firing would be limited to three hours a night on three nights a week. MOD would use its best endeavours, however, to ensure that, typically, firing would be restricted to a total of four hours a week on two nights. Firing would end not later than 0045.

7.3.4 Other weapons. Firing of the 120mm tank gun is not affected by the extinguishment proposals. There would be no night firing. Day-time firing would be restricted to 0900 to 1700 and there would be no firing on Mondays. MOD further undertakes to restrict its firing to no more than 14 days a year.

The use of other high calibre weapons, such as the 105mm light gun, would similarly be unaffected.

7.3.5 The Secretary of State notes that all of the objectors who attended or were represented at the Inquiry accepted that the training of infantry soldiers to the highest possible standard of competence was paramount. Many of the objections that were raised related to issues such as the effect on the environment and public access and are described in the appropriate sections below. He also noted that the objections on grounds of military need included arguments that alternatives should be considered, including the greater use of simulator-based training and that some objectors argued against the evidence that such training or intensified usage was required.

7.3.6 The Secretary of State has had regard to the assessment of the alternatives made by the MOD.

7.3.6.1 Transfer of Stage 5 training to another Training Area. Other Training Areas (eg Kirkcudbright) could only be used if other uses were displaced. The ITC at Catterick, moreover, is only 60 kilometres from WTA; far closer than the alternatives.

7.3.6.2 Purchase of land for a new Training Area. It was unlikely in the extreme that an area of 10000 hectares could be found or that the funding could be made available.

7.3.6.3 Renegotiation of the FLAs. MOD first raised with the Commoners in 1972 the need for night-firing and repeated requests have been made since, without success. In other respects too the FLAs have proved difficult almost to the point of impossibility to alter, so as to take account of the changing demands of military training.

7.3.6.4 Voluntary acquisition of rights. Not all Commoners were willing to sell and nor was it possible reliably to identify all those who own rights, although strenuous efforts have been made to do so. If voluntary acquisition left only one right unidentified and unextinguished, the ability of the MOD to live-fire across the Commons would be called into question. By contrast, the compulsory route would extinguish all rights, identified or not.

7.3.7 The Secretary of State notes that the Inspector found the evidence of Army witnesses on the subject of the military need compelling. He also took into account the alternative training schemes put forward by objectors, and why the Inspector was unable to accept that they should carry much weight, especially in the light of the manifest failure of the proposals to address the more important shortcomings in infantry training. He agrees with the Inspector's conclusions that renegotiation of the Firing Licence Agreements was not a practical way of accommodating the MOD's modern training needs because there was an inevitable conflict between two essentially incompatible activities - military training on the one hand and grazing of animals by a relatively large number of independent graziers on the other. He also accepted the Inspector's view that voluntary acquisition of the Commoners'

rights was not a satisfactory alternative to compulsory extinguishment; there could be no certainty of identifying all the Commoners and their rights and partial extinguishment would not meet the case. On balance, the Secretary of State, having considered the points raised by the objectors and the MOD, is satisfied that the case for compulsory extinguishment on grounds of military need is made out.

7.4 Nature conservation

7.4.1 The Secretary of State notes that the WTA is situated in an area of great nature conservation importance and that the MOD published a full Environmental Statement with the Statement of Case in January 2001. He further notes that although the case for extinguishment is made on military and not nature conservation grounds, the MOD has argued that if extinguishment goes ahead this would better enable it to manage the important wildlife habitats, which would be a significant beneficial consequence. The Secretary of State accepts the Inspector's view that the Commons are over-grazed, that agricultural subsidy levels have encouraged stock levels that are too high for the available grazing and that extinguishment would allow the balance between grazing and the conservation of habitats to be restored. He notes that English Nature supports this argument and that MOD considers that the intensification of military training is unlikely to have any material conservation disbenefit.

7.4.2 The Secretary of State has considered objections that criticised MOD's past land management; that grazing, on MOD's proposals, would be insufficient to conserve habitats, and that the proposals were draconian and could affect wildlife.

7.4.3 The Secretary of State notes that the Inspector found that in the light of the scope and authority of the evidence and expert opinion presented by MOD and English Nature he could attach little weight to the evidence given by objectors on this issue. He agrees with the Inspector that the MOD's Integrated Land Management Plan could, as necessary, deal with the various concerns relating to wildlife and landscape improvements. He is satisfied that subject to the effectiveness of the proposed post-extinguishment grazing regime and resolution of the conflict between conservation and public access (see later), extinguishment would make a significant contribution to meeting the objectives of national and international nature conservation policy as they relate to WTA.

7.5 Public access

7.5.1 The Secretary of State notes that MOD policy is to provide public access to MOD land as fully as is consistent with operational, safety and security considerations, and with the interests of nature conservation. He further notes that at WTA there is no general right of public access to the Danger Area, only to the public rights of way that cross it and that access to these is restricted by Bye-Laws made under the Military Lands Act 1892, which prohibit access on live-firing days.

7.5.2 The Secretary of State has noted that the proposals would reduce the number of days of guaranteed public access to the Danger Area. He has had regard to the mitigating measures proposed by MOD, including: that the quality of public access would be enhanced by concentrating access at weekends and holidays; new public rights of way would be provided, especially outside the Danger Area where the public would be free to use them at all times; existing public rights of way would be improved; MOD would also review its Bye-Laws, introduce a pass system to allow access to local people in the period between the close of day-time firing and the start of night-firing; arrange a programme of guided walks, install a Freephone service with information on access; and improve signage.

7.5.3 The Secretary of State has considered the objections that there would be a significant loss of access and that the mitigating measures were inadequate; that the ancient privileges and enjoyment of local people would be diminished; that there would be a particular loss of valuable access in the summer, and inconvenient restrictions. He has noted that the Countryside Agency, while expressing itself satisfied that the overall quality and utility of public access would not be diminished, enjoined rigorous examination of the MOD's proposals at the inquiry to ensure that the access package was the best achievable.

7.5.4 The Secretary of State notes that the Inspector found that MOD generally seeks to reserve use of WTA to itself only so far as is necessary to achieve its training objectives. He agrees with the Inspector that the MOD's willingness to provide weekend access was within both the letter and the spirit of government policy, as were the other improvement measures it proposes. He also accepted the Inspector's view that some of the objectors' proposals for greater public access were impracticable and that weight should be attached to the MOD's offer of a guarantee of public access on Sundays and to the establishment of new rights of way. The Secretary of State is satisfied, on balance, that MOD's proposals were compatible with government policy in providing the public with access that is as full as is consistent with the needs of military training, and that although it was arguable that there would be some marginal overall loss of public access, if that is so, it is not of sufficient weight.

7.6 Noise and vibration

7.6.1 The Secretary of State notes that the intensified use of the ranges would give rise to additional noise, especially at night, and that night firing of small arms would more than double. He further notes that some impact from noise was predicted at five locations where there are dwellings; at two (Hilton and Haybergill) the noise would on occasions be above the standard set in government guidance (Policy Planning Guidance 24). He has had regard to the MOD's proposals to use best endeavours to limit night firing at ranges A1 and A2 (the ranges closest to Hilton) to no more than two nights a week, finishing by midnight; to limit use of range H12, close to Haybergill, typically to two nights a week, but as the noise level is predicted to be lower than at Hilton only the general restriction proposed for small arms, with firing ending by

0200, would apply. The Secretary of State further notes that no additional sources of vibration were identified.

7.6.2 The Secretary of State notes that MOD proposes that the 30mm Rarden cannon would be fired on three ranges and that on two, no adverse impact is predicted. He notes that at the third range, D16, it is predicted that noise would exceed the guidance limit and be sufficient to cause sleep disturbance and that MOD therefore proposes that D16 would not normally be used for 30mm firing at night. The Secretary of State has also had regard to the MOD's proposal to limit night-firing to 12 weeks a year, and three hours a night on three days in the week and that it would also use best endeavours to use only four hours of firing spread over two nights, with firing always completing by 0045.

7.6.3 The Secretary of State has considered the objections to MOD's method of calculations, arguments that 30mm night firing should be done elsewhere and complaints that the proposed mitigation measures were inadequate.

7.6.4 The Secretary of State has taken into account the Inspector's observation that the issue of noise had given rise to more concern than any other issue. He notes that the Inspector had some sympathy with the objectors' argument that for 30mm firing a noise metric appropriate to single noise events should be used rather than the averaged metric used by MOD. He further notes that the Inspector thought that noise events that would occur after 2300 should be accorded very careful scrutiny and accordingly that 30mm firing should cease by 2300 and as to small arms firing, that the proposed MOD undertakings for Hilton should also be applied to Haybergill. The Secretary of State is minded to agree with the Inspector that subject to these additional undertakings, the additional impact of noise would be reasonable and proportionate to the identified need for military training.

7.7 The Impact on agriculture and the local economy

7.7.1 The Secretary of State notes that MOD commissioned a study by an independent local agricultural valuer, and a farmer in his own right, which found that the Commoners use the high land mainly to graze flocks of Swaledale ewes, in conjunction with holdings on lower land; most farms operate on a small scale and that if the right to graze were lost, most farmers would be forced to reduce the size of their flocks, some might switch activities and some might leave farming altogether. The Secretary of State further notes that the effect would be to expedite changes that are inevitable on other grounds; the farmers would be fully compensated.

7.7.2 The Secretary of State has taken into account that the effects on the local and national farming industry would be insignificant and that in the course of the inquiry MOD reached agreement, conditional on the extinguishment proceeding, for voluntary acquisition of the rights of all but six of the Commoners, including the rights of all but one of the Commoners who farm, and their objections were accordingly withdrawn.

7.7.3 The Secretary of State notes the Inspector's view that the MOD's evidence was cogent and persuasive. The Secretary of State is satisfied that there would be no material impact on the local or national farming industry, or on the local economy generally, that should cause him to decide that the compulsory extinguishment should not proceed.

7.8 The adequacy of compensation

7.8.1 The Secretary of State notes that compensation for the six Commoners who have not reached agreement with MOD would be assessed according to the principle established in case law that the owner shall be paid neither less nor more than his loss, and that the most appropriate valuation would be based on the capitalised loss of profits the individual would suffer.

7.8.2 The Secretary of State has taken into account the representations from two objectors that the compensation payable would not be sufficient to enable them to buy land elsewhere and that they would be unable to continue farming.

7.8.3 The Secretary of State notes that the Inspector recognised the objectors' genuine concerns at what they saw as the loss of their way of life but had concluded that MOD's compensation proposals sought to apply the statutory rules fairly and flexibly. The Secretary of State further notes that this was unchallenged by any party to the inquiry, save for these two objectors, and the Inspector's comment that the Lands Tribunal provided a forum for resolving any dispute. The Secretary of State is satisfied that there was no evidence on which he could conclude that the compensation payable would not be fair and adequate to meet all identifiable financial losses resulting from the extinguishment.

7.9 Post extinguishment land status and management

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. Such new rights would be exercisable only on the afternoon of Christmas Day for the purpose of grazing one sheep and were not intended to be exercised. The Secretary of State notes that the aim is to protect the status of the Commons as common land in perpetuity and that

these arrangements have been designed in consultation with the Countryside Agency.

7.9.3 The Secretary of State has also had regard to the MOD proposals, to meet the objectives of nature conservation, to establish five new grazing areas, which would be offered to local farmers through 12 month licences, on the upland section of the training areas. He notes that there would be a maximum of five graziers, who could receive safety briefings and whose activities could be co-ordinated with military training; flocks would be located more accessibly on the areas of the Commons closest to the farms to the south and west of the ranges. This aspiration is to be compared with the current situation where a large number of independent graziers have rights over the whole area of the Commons.

7.9.4 The Secretary of State has considered objections that the proposed grazing regime would be impracticable or that the proposed new rights were insufficient to protect the Commons; and that more new rights should be granted.

7.9.5 The Secretary of State notes that the Inspector observed that the legal sufficiency of the mechanism that the MOD proposes to employ to ensure that the Commons remain common land in perpetuity was not for him, but there was nothing before him to challenge the MOD's case in this respect. The Secretary of State further notes that the Inspector saw no need for additional new rights; that the proposals had the approval of the Countryside Agency, which was the body responsible for commons registration matters; and that the Inspector could attach little weight to the assertions of the objectors. The Secretary of State agrees with the Inspector that the detailed objections to the grazing proposals could be addressed by the Integrated Land Management Plan and that MOD's proposals for ensuring that the Commons status of the land is retained, and the land properly managed, were sufficient.

7.10 Other grounds of objection

7.10.1 The Secretary of State notes that other grounds advanced by objectors were: possible pollution; range safety; effect on tourism; effect on property values; additional traffic; and lack of consultation.

7.10.2 The Secretary of State, having considered the objections and the MOD's responses, agrees with the Inspector's conclusions as follows:

Pollution. There was no evidence of any significant risk.

Range safety. The ranges are laid out in accordance with the requirements of the Army Range Development board. The MOD has taken all reasonable steps to prevent rounds fired on the ranges landing outside the Danger Area.

Tourism. There was evidence that MOD's proposals would militate against tourism.

Property values. There was no evidence that properties were difficult to sell and the limited effects of the additional night-firing, with the undertakings proposed, were unlikely to influence purchasers.

Traffic. There would be little effect.

Consultation. Objections about lack of consultation were not well founded.

8. FURTHER UNDERTAKINGS PROPOSED BY THE INSPECTOR

8.1 The Secretary of State notes that the Inspector proposes that two undertakings be sought from MOD in addition to those already given. Both concern the mitigation of noise from night-firing:

8.2 Small arms

8.2.1 MOD identified two locations predicted to suffer noise levels at night above the maximum level that government guidance recommends in Planning Policy Guidance 24: at properties in Hilton nearest to ranges A1 and A2; and at Haybergill, near range H12. MOD therefore proposes to limit firing on ranges A1 and A2 to two nights a week normally, and no firing would take place after midnight. At Haybergill the noise predicted is slightly less: MOD proposes here to limit firing normally to two nights a week, with firing ceasing by 0045 hours.

8.2.2 The Secretary of State is minded to agree with the Inspector that Haybergill should also benefit from the same mitigation proposed for Hilton, that is, firing ceasing at midnight rather than 45 minutes later.

8.3 30mm Rarden cannon

8.3.1 MOD proposes to night-fire 30mm Rarden cannon on three ranges. At ranges C8 and C10 predicted noise would be within the PPG24 maximums and of a level insufficient to cause serious intrusion or sleep disturbance. At D16, noise levels at three properties, Turk's Head, Toddygill Hall and Haybergill, would exceed the PPG24 limit and MOD accordingly proposes that D16 would not normally be used for 30mm firing at night: exceptions might arise with urgent pre-operational training if no alternatives existed. To mitigate annoyance, MOD further proposes that as a general rule firing would only take place on 24 nights a year and typically would complete by 2300 on 16 nights and never extend beyond 0045.

8.3.2 The Secretary of State notes that the Inspector, in examining the MOD's noise predictions and the views of expert witnesses, came to the conclusion that applying the average noise metric, which was clearly appropriate to relatively continuous noise, to 30mm firing was to some extent

misleading and that the metric for single noise events might be more appropriate. He further notes that on that basis, the predicted noise levels for the properties worst affected were close to the maximum levels laid down in PPG24. The Secretary of State has taken into account that the eight hours when MOD proposed to fire up to 0045 coincided with high summer when the expedient of reducing noise by closing windows might be expected to be irksome.

8.3.3 The Secretary of State, noting that MOD's undertakings were all subject to the needs of urgent pre-operational training which would allow any urgent pre-deployment gunner shortfall to be addressed, is minded to agree with the Inspector that the firing of 30mm Rarden cannon should cease at 2300 hours.

9. SECRETARY OF STATE'S DECISION

9.1 The Secretary of State has taken note of the Inspector's main conclusions:

- (a) the national need for extinguishment on military training grounds has been established;
- (b) there would be a clear benefit from the extinguishment for nature conservation aims;
- (c) the impact upon the farming industry and the local economy would be at worst neutral;
- (d) full financial compensation is available to meet all the identified losses, not only of those Commoners with whom no settlement has been reached, but other local people and businesses;
- (e) the status of the Commons as common land would be protected and the Commons would be managed in the interests of nature conservation and to meet other aspirations;
- (f) it was arguable that there would be some marginal overall loss of public access but, if that is so, it is not of sufficient weight;
- (g) the impact of the increased noise arising from intensified use of the ranges, as limited by the Ministry of Defence's undertakings and the two further undertakings that he recommends, is acceptable.

9.2 The Secretary of State agrees with the Inspector's main conclusions and is therefore minded to proceed with the proposed extinguishment, subject to the two additional undertakings recommended by the Inspector, namely:

- (a) that night-firing of the 30mm Rarden cannon should be restricted to a last firing time of 2300; and

- (b) that small-arms firing on Range H12 should be limited to two hours per night ending not later than midnight.

10. CONDITIONS AND UNDERTAKINGS

10.1 Confirmation that these conditions are acceptable should be forwarded to this office no later than six weeks from the date of this letter. The Secretary of State will then give further consideration to whether or not the undertakings are satisfactory and whether extinguishment may proceed. The Secretary of State will also consider any representations concerning the proposed additional undertakings from any interested party to the Inquiry (to whom I am sending a copy of this letter together with the Inspector's Report), provided these also are submitted within six weeks of the date of this letter.

Yours sincerely
Peter Watkins

P D WATKINS
Private Secretary



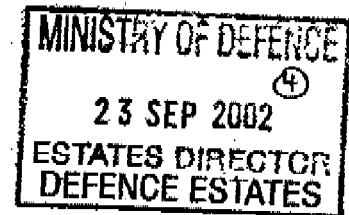
SECRETARY OF STATE

MINISTRY OF DEFENCE
ROOM 205, OLD WAR OFFICE BUILDING
WHITEHALL LONDON SW1A 2EU

Telephone 020 721 82111/2/3
Fax: 020 721 87140
E-mail: sofs-registry1@mod.gsi.gov.uk

MO 10C

20 September 2002



Dear Mr Baillie,

DEFENCE ACT 1854
LAND CLAUSES CONSOLIDATION ACT 1845
WARCOP TRAINING AREA
EXTINGUISHMENT OF THE RIGHTS OF COMMON OVER HILTON,
MURTON AND WARCOP COMMONS

I am directed by the Secretary of State for Defence to refer to his interim letter of 3 July 2002, in relation to the Ministry of Defence proposal to extinguish compulsorily the rights of common over Warcop Training Area. In his letter, with which this letter should be read, the Secretary of State indicated that he was minded to approve the proposal subject to undertakings offered by the Ministry of Defence and two additional undertakings proposed by the Inspector. The additional undertakings proposed were:

- a. that night firing of the 30mm Rarden cannon should be restricted to a last firing time of 2300 hours; and
- b. that small-arms firing on range H12 should be limited to two hours per night ending not later than midnight.

The Secretary of State has now received your letter of 13 August 2002. You confirmed that the MOD accepts the conditions and agrees to give the undertakings. You proposed consequential amendments to the Schedule of Undertakings presented to the Inquiry, and certain other changes for the purposes of clarification. You also took the opportunity to draw attention to minor inaccuracies in the Inspector's report or the letter of 3 July.

A R Baillie Esq
Estates Director
Defence Estates
Blackmore Drive
Sutton Coldfield
B75 7RL



Recycled Paper

... The Secretary of State also received five other letters following his letter of 3 July, copies of which are attached.

The Secretary of State has noted that none of the respondents objected specifically to the proposed additional undertakings.

Some of the respondents re-iterated their objections in general to the proposal or referred to issues that had been raised at the inquiry and in the Inspector's report. A number of these included specific proposals, as follows:

- a. a bund to be built alongside range A1. The MOD's response to the inquiry was that the bund would have to be six metres high and 350 metres long in order to provide significant noise attenuation. Its construction would take 8-10 weeks, involving about 1,300 20-tonne vehicle movements. The resulting disturbance, and the cost, estimated at about £170,000 would both be wholly disproportionate. The Inspector agreed (Report, paragraph 9.4.23).
- b. additional Common Rights to be created. To the proposal that one or two additional Common Rights be allocated to responsible organisations, which could be used to re-register the land in the event of a successor in title to the MOD seeking to de-register, MOD responded that the additional rights would merely add complexity. The Inspector could see no advantage in granting more than the seven rights proposed; he added that the grant of one of these rights to a national amenity society would in his view provide a clear additional safeguard (Report, paragraph 12.4.2).
- c. a range telephone system to be installed. It had already been proposed to the inquiry that MOD should provide telephones, linked to the Range Office, at all public access points to the Danger Area. The MOD had responded that it was not practical, because there was no available source of power and radio links were poor because of the terrain. The Inspector did not comment directly. He said that the Integrated Land Management Plan was the appropriate forum for the detailed discussion and decision-taking which would be required in relation to proposals to enhance existing rights of way, construct bridges, improve signage, etc. He added that the degree of detailed consideration was not, in his view, a matter either for him or for the Secretary of State (Report, paragraph 8.6.10).

The Secretary of State has considered the general comments of respondents, and the specific points raised. He has found no justifiable grounds on which he could come to different conclusions from those reached by the Inspector. As the Inspector has observed, however, a number of these detailed matters are best discussed and decided as part of the process envisaged for land management, review of bye-laws, enhancement of rights of way and related matters.

The Secretary of State has noted the amended Schedule of Undertakings attached to your letter, incorporating changes made in order to incorporate the additional undertakings proposed by the Inspector, and other changes for the purposes of clarification.

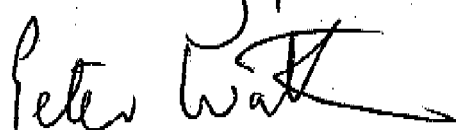
The Secretary of State has asked for one further amendment to the Schedule of Undertakings to be made. In its response to the evidence to the inquiry on behalf of the Kendal Fellwalkers and the Friends of the Settle-Carlisle Line (MOD/R/6/5), MOD undertook to provide a freephone information number to promote access opportunities. Although, as you say, the MOD's published undertaking was for an answerphone service, in view of the response given to the inquiry, the Secretary of State has asked for an undertaking from the MOD to provide a freephone information number. You have signalled your agreement to this in your further letter of 6 September, and this is reflected in the attached undertakings.

Final Decision

In view of the above considerations and for the reasons expressed in the Interim letter of 3 July, the Secretary of State hereby approves the compulsory extinguishment of the Rights of Common over Hilton, Murton and Warcop Commons subject to the Undertakings set out in the Schedule to this letter, and this letter conveys his decision to that effect. In the event that it is desired in future to alter or vary the Schedule to any substantive degree the Secretary of State would consult interested parties before reaching a decision.

Any person who wishes to question the validity of or challenge the Secretary of State's decision may do so by way of a judicial review (Claim Form N461 - entitled Judicial Review Claim Form) and such claim must be issued as soon as possible and, in any event, within three months of the decision. A person who thinks he may have grounds for challenging the decision is advised to seek legal advice before taking any action.

A copy of this letter, together with copies of the responses to the letter of 3 July 2002, is being sent to interested parties to the inquiry.

Yours sincerely,


P D WATKINS
Private Secretary

Annex 2: Existing Undertakings

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 right.
- 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 3: Proposed Re-structured Undertakings

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.

Annex 4: Annex 8 to I/MOD/1A

ANNEX 8

THE RIGHT TO ROAM – COUNTRYSIDE AND RIGHTS OF WAY ACT 2000

1. The Countryside and Rights of Way Act 2000 (CRoW 2000) has introduced a new right of access to the countryside. The right of access is contained in section 2 of the Act

“2.(1) Any person is entitled by virtue of this subsection to enter and remain on any access land for the purposes of open-air recreation, if and so long as-

(a) he does so without breaking or damaging any wall, fence, hedge, stile or gate, and

(b) he observes the general restrictions in Schedule 2 and any other restrictions imposed in relation to the land under Chapter II.”

2. The new right applies to “access land” and this is defined in section 1 of CRoW 2000:

“(1) In this Part "access land" means any land which-

(a) is shown as open country on a map in conclusive form issued by the appropriate countryside body for the purposes of this Part,

(b) is shown on such a map as registered common land,

(c) is registered common land in any area outside Inner London for which no such map relating to registered common land has been issued,

(d) is situated more than 600 metres above sea level in any area for which no such map relating to open country has been issued, or

(e) is dedicated for the purposes of this Part under section 16,

but does not (in any of those cases) include excepted land or land which is treated by section 15(1) as being accessible to the public apart from this Act”

3. The definition of “excepted land” is important because any land that falls within the definition of excepted land is not access land and therefore there is no right of access over excepted land.
4. The definition of "excepted land" is set out in section 1 of CRoW 2000:

““excepted land” means land which is for the time being of any of the descriptions specified in Part I of Schedule 1, those descriptions having effect subject to Part II of that Schedule”

5. Paragraph 13 of Schedule 1 brings byelawed land within the definition of excepted land:

“13. Land the use of which is regulated by byelaws under section 14 of the Military Lands Act 1892 or section 2 of the Military Lands Act 1900”

6. There is a somewhat complex definition of “registered common land” in section 1. It is in these terms:

“(3) In this Part "registered common land" means-

(a) land which is registered as common land under the Commons Registration Act 1965 (in this section referred to as "the 1965 Act") and whose registration under that Act has become final, or

(b) subject to subsection (4), land which fell within paragraph (a) on the day on which this Act is passed or at any time after that day but has subsequently ceased to be registered as common land under the 1965 Act on the register of common land in which it was included being amended by reason of the land having ceased to be common land within the meaning of that Act.

(4) Subsection (3)(b) does not apply where-

(a) the amendment of the register of common land was made in pursuance of an application made before the day on which this Act is passed, or

(b) the land ceased to be common land by reason of the exercise of-

(i) any power of compulsory purchase, of appropriation or of sale which is conferred by an enactment,

(ii) any power so conferred under which land may be made common land within the meaning of the 1965 Act in substitution for other land.”

7. In essence, registered common land is access land (subject to the land not being access land because it is excepted land) if the land is registered as common land under the Commons Registration Act 1965 and the land has not ceased to be registered as a result of the land ceasing to be common land by reason of the exercise of statutory powers of compulsory purchase.
8. The new right of access under CRow 2000 is subject to a number of restrictions. For example, a landowner can exclude or restrict access for up to a maximum of 28 days a year: section 22 of CRow 2000. A landowner can apply to the Countryside Agency for a direction to exclude or restrict access for land management reasons: section 24. The Countryside Agency may direct that the right of access is excluded or restricted during any period if they are satisfied, having regard to any advice given to them by English Nature, that the exclusion or restriction is necessary for the purpose of nature conservation: section 26. There is provision for the Secretary of State to direct that the right of access is to be excluded or restricted for the purposes of defence or national security: section 28.
9. Section 21(3) of CRow 2000 explains how references to restrictions of access are to be interpreted. Thus:

“(3) A person restricts access by virtue of subsection (1) of section 2 to any land where he provides that the right conferred by that subsection-

(a) is exercisable only along specified routes or ways,

(b) is exercisable only after entering the land at a specified place or places,

(c) is exercisable only by persons who do not take dogs on the land, or

(d) is exercisable only by persons who satisfy any other specified conditions.”

10. In relation to Warcop Training Area, the three commons, Murton, Hilton and Warcop, are registered commons and therefore the area of the three commons is registered common land. The area of the commons within the byelawed area is excepted land and is not therefore access land. The new right of access cannot be exercised over that area. The area of the commons outside the byelawed area is not excepted land and is access land over which the new right of access can be exercised, subject to any restrictions as permitted or authorised under CRow 2000.
11. The MOD has given a commitment not to deregister the land as common land if the proposal to acquire Commoners' Rights compulsorily is proceeded with. The effect of this is that the land will remain registered common land for the purposes of CRow 2000; the land within the byelawed area will remain excepted land and the area outside the byelawed area will remain access land.
12. Following discussion with the Countryside Agency, in order further to protect the status of the land as common land, the MOD has also given a commitment to create new rights of common. Having regard to section 13 of the Commons Registration Act 1965 and regulation 3 of the Commons Registration (New Land) Regulations 1969, while the land at Warcop remains common land following the initial registration under the 1965 Act, it is not possible to register new rights of common, and while this remains the position any new rights of common are unexercisable. It is not intended that the new rights should in fact be exercised. The commitment to create new rights reinforces the commitment not to deregister. The status of the land as common land is protected, and this is achieved because the new rights would be capable of registration if the existing registration is cancelled in consequence of the compulsory acquisition (and, having regard to MOD's commitment not to deregister, this could only be by a purchaser from the MOD if MOD ever sold the land). On re-registration of the land as common land the land will again be registered common land for the purposes of CRow 2000.
13. It will thus be seen that the commitment by the MOD not to deregister and to create new rights of common guarantees the status of the land as common land.