

From: Defra
Sent: 15 September 2014 15:19
To: CLA
Cc: Defra
Subject: RE: Problems at West Penwith - the definition of "waste land of the manor"

Hi [name removed] – forgive my tardiness. It made more sense to await the meeting between the delegation from Cornwall, including CLA, and the minister.

The minister agreed that Defra would consider any relevant case law submitted by [CLA] that demonstrates our advice in the guidance is wrong.

On your second suggestion, this can be done under current rules but I will bring attention to it in the soon to be revised guidance.

Thanks,

From: CLA
Sent: 11 July 2014 14:57
To: Defra
Subject: Problems at West Penwith - the definition of "waste land of the manor"

Further to our previous emails, I feel that the nub of the current problems being faced in the various applications in West Penwith is the definition of "waste land of the manor" and in particular the meaning of "open, uncultivated and unoccupied."

I feel that the Defra guidance to CRA's and PINs at paragraph 9.3.14 is unhelpful. For your convenience, I have set it out below:

9.3.14 *In Defra's view, land does not cease to be unoccupied (and therefore cease to be waste) merely because it is subject to a tenancy, lease or licence whose sole or principal purpose is to enable the land to be extensively grazed. Occupation requires some physical use of the land to the exclusion of others: such might occur if the land were occupied by a quarry, or were improved by a tenant (e.g. by cultivating and reseeding moorland) for his own exclusive use and benefit. Nor does Defra consider that shared upland grazing of manorial origin will have ceased to be waste land merely because there is provision for grazing the land contained in several tenancy agreements. In R v Doncaster Metropolitan Borough Council, ex parte Braim, the High Court thought (obiter) that mowing land did not constitute cultivation, and that a golf club which enjoyed certain rights over part of the (unregistered) common, but did not have exclusive possession, could not be said to occupy the land.*

I consider the first two sentences are wrong and give a strained interpretation to the expression "open, uncultivated and unoccupied." Land that is "extensively grazed", whether by the landowner or by someone else with his authority by way of licence or lease is not consistent with it being "unoccupied". "Unoccupied" is not intended to mean by humans! By the same token most farmland in the country is merely "occupied" by animals chomping their way through the grass. "Extensively grazed" has clear connotations of human activity and such land is incapable of being described as "unoccupied".

Referring to the second sentence, I consider it is entirely artificial to introduce a requirement for the land to be "improved" in the way described. How practical can it be to plough and re-seed boulder-

strewn land? And why should that be a pre-condition to it ceasing to be unoccupied? The two issues are entirely unconnected.

I consider the current guidance is unhelpful and misleading and needs to be revised. It would be more helpful if no guidance was given than the current guidance as it is providing false hope to prospective applicants of land such as that at West Penwith. Perhaps it would be better for the guidance to say "the land must remain at the time of application open, uncultivated and unoccupied in the ordinary sense of those words".

It is crucial that this issue is addressed now before we have full roll-out of this legislation across the country and a great deal of wasted money.

Secondly I feel there is a need for an early sieving process to be gone through with these applications. At the time an application is made there should be a requirement for either a commons registration officer (or possibly a planning inspector) to make an initial visual inspection of the site and take photographs and record what he/she finds. If he or she finds evidence to suggest that any limb of the test is not satisfied, (such as the fact that there are fences enclosing the land in question) then the application should be rejected and reasons given for this at this stage. Otherwise large amounts of public money are going to be wasted. It is wrong that landowners are faced with spending substantial sums of money in legal costs in having to fight these cases (money which in most cases they do not have) when an initial assessment of the land might very well have meant this was unnecessary.

I would welcome your thoughts on this matter.

Kind regards

[Name removed]

From: Defra

Sent: 08 August 2014 15:27

To: CLA

Subject: RE: PINS hearings COM530 (Cliff land in Zennor, Cornwall) and COM536 (Long Stone Croft, Sancreed, Cornwall) - Applications to Register as Common Land under Commons Act 2006

Dear [name removed],

PINS have passed the below e-mail exchange on to us.

I was surprised at your approach and I can only reinforce [PINS'] response – Inspectors will take account of Defra guidance and your view that the guidance is flawed is not a reason to postpone the hearings. Our guidance reflects our interpretation of the legislation based on caselaw. [Defra official] is considering [CLA's] thoughts on this issue and will get back to [] directly as soon as [] is able. In the meantime, unless or until we amend the guidance, or it is overturned by a new court judgement, the current version stands.

I was also surprised at your suggestion that registration would affect existing agri-environment scheme obligations or existing public access management. There should be no impact on either. The consequences of registration are:

- Protection as common land so that if a landowner wished to develop the land, s/he would need to apply to de-register and provide exchange land as well as obtaining planning permission and any other relevant consents;
- Requirement to seek consent for restricted works – but retrospective consent for works undertaken before any registration would not be required; and
- Public access rights – but these only apply if the land is mapped under the Countryside and Rights of Way Act 2000 and we have postponed our review of those maps for 5 years. My understanding is that most of the land in question in West Cornwall is already mapped as open access land in any case.

I recognise that registration would result in consent being required for fencing or other restricted works going forwards and I assume that this is what you mean when you talk about the “practicalities of farming management”? If you have evidence of real-world “difficulties” which result from registration beyond this, I would be interested to understand what these are. However, you should be aware that the decision about registration will be made on the basis of the tests in the legislation and such considerations are therefore not relevant for the hearings.

Best regards

[Name removed]

From: PINS

Sent: 06 August 2014 16:53

To: CLA

Cc: PINS

Subject: PINS hearings COM530 (Cliff land in Zennor, Cornwall) and COM536 (Long Stone Croft, Sancreed, Cornwall) - Applications to Register as Common Land under Commons Act 2006

[name removed]

Thank you for your email.

I note you feel that the policy guidance on applications to register waste land of a manor as common land is flawed and have raised your concerns with Defra. However, the Inspectors appointed to decide applications COM530 and COM536 must take into account Defra’s guidance as it currently stands whether or not that guidance is right or wrong. I am afraid I cannot therefore agree to a deferral of the hearings into the applications which will go ahead as planned. Of course, if Defra were to change the guidance before the applications are decided the interested parties would be given an opportunity to comment.

It may be that, as part of their case, the objectors to the applications intend to challenge the soundness of Defra’s policy guidance at the hearings. However, Inspectors stand in the shoes of the Secretary of State when deciding applications and must have the same regard to the Secretary of State’s policies as does the Secretary of State. Inspectors should never question the Secretary of State’s policies. To do so may, at best, put at risk the Inspector’s ability to show that matters have been given appropriate weight where balances need to be struck and, at worst, compromise the ability of the Inspector to be seen to conduct an impartial assessment of the parties’ cases.

[name removed]

From: CLA

Sent: 06 August 2014 13:39

To: PINS

Cc: PINS

Subject: URGENT: PINS hearings COM530 (Cliff land in Zennor, Cornwall) and COM536 (Long Stone Croft, Sancreed, Cornwall) - Applications to Register as Common Land under Commons Act 2006

We have been contacted by CLA landowner members affected by two imminent PINS hearings (to be held on 14th and 20th August 2014) into applications to register land under their ownership as common land on the basis that it is alleged to be 'waste land of the manor'. The CLA is the Country Land & Business Association, the membership organisation for owners of rural land & businesses.

Our members feel there are strong grounds for a deferral of these hearings. We agree with this. We feel there are fundamental flaws in the Defra guidance to PINS and Commons Registration Authorities (CRAs) on how to determine these kinds of cases, relating to Defra's interpretation of decisive concepts such as 'occupation' and 'waste of the manor'. We have taken this up directly with Defra and await their substantive response.

Affected landowners feel strongly on the issue because the practicalities of their farming of the affected land, their ability to meet agri-environment scheme obligations and the maintenance of conditions which maintain public access are all made much more difficult if the land is registered as common land.

After being advised separately by Defra that any deferral of cases is a local decision for the CRA, we contacted Cornwall Council to request that they consider postponing the two imminent hearings - either until after the outcome of a similar case (COM 510 Land at Carn Galver, Cornwall, currently being objected to by the National Trust with help from Burges Salmon solicitors - adjourned until December) or until some revised or supplementary guidance is issued by Defra.

However Cornwall Council state repeatedly that the matter is 'out of their hands' and it is a matter for yourselves to decide. Whilst we have argued this point with them (based on the Defra guidance) they are adamant and have refused to make any request to PINS for a deferral.

I wonder therefore would it be possible to have a short meeting at a convenient place and time with someone of appropriate seniority from PINS to discuss the matter please? This does not need to take more than an hour or so and would aim to clarify for us the process and criteria involved in determining these applications and discuss the issue of a deferral.

I appreciate the timescales are now very tight but we were advised categorically by Cornwall Council only yesterday that it was a matter for PINS to decide – despite taking the matter up with them a couple of weeks ago and being originally advised by Defra that it was a matter for the CRA.

The flaws in the Defra guidance are such that we feel these are exceptional circumstances that justify deferral. The similarity of the substantive issues on which these cases will be decided are such that affected landowners and ourselves feel a deferral of the hearings is the only sensible course of action to prevent flawed decisions being made.

As we effectively have the role of a broker in this, we assume it would be necessary for the affected landowners to write to PINS (or indeed the CRA if you contend it is indeed a decision for them) to confirm that they request a deferral?

Please could this matter be given some urgent consideration (given that the first hearing is a little over a week away). Feel free to contact [names removed] by email or on the number below should you wish to discuss.

I look forward to hearing from you

With Kind regards

[name and contact details removed]

-----Original Message-----

From: Defra

Sent: 20 June 2014 14:14

To: CLA

Subject: RE: Royal Cornwall Show - Save West Penwith Moors

Re your question that we arrange for Cornwall to park all applications, it's for Cornwall Council to decide whether to stay pending applications or not. Defra has no involvement in applications, which are a matter between the applicant and the authority.

Re fences, s.38 applies to registered common land, land regulated under the Commons Act 1876 and land subject to a scheme under either the Metropolitan Commons Act 1866 or the Commons Act 1899. If the land in question does not fall within any of those descriptions (my understanding is it does not) then section 38 could not possibly apply. Anything that happens in relation to the land prior to its registration as common land would be out of scope of s.38.

-----Original Message-----

From: CLA

Sent: 20 June 2014 11:25

To: Defra

Cc: CLA

Subject: RE: Royal Cornwall Show - Save West Penwith Moors

Many thanks for your reply.

It would help me greatly if you could let me have answers to my questions as they relate specifically to the issues affecting the farmers on the ground.

Kind regards

-----Original Message-----

From: Defra

Sent: 19 June 2014 16:18

To: CLA

Subject: RE: Royal Cornwall Show - Save West Penwith Moors

The Save Penwith Moors group has made a number of applications to register waste land as common land. In relation to some of that land (I think there's an adverse possession angle so I don't know if they are the real owners), the owners have written to ministers in relation to the effect of registration on their management of the land. Andrew George MP has met Cornwall Council and will meet Lord de Mauley in July. Defra has already received a number of letters on the matter, some of which have been answered by ministers.

-----Original Message-----

From: CLA

Sent: 16 June 2014 15:39

To: Defra

Cc: CLA

Subject: RE: Royal Cornwall Show - Save West Penwith Moors

Thanks for your reply.

I notice you say that you are up to speed on this. Would you be able to give me some background information on this so that I am reasonably informed if I need to attend a meeting?

From what I understand, the other local farmers who are on the receiving end of applications in relation to their land want their proceedings to be suspended until after the determination of these three inquiries that the NT are challenging. Similar issues are involved in relation to their applications but unfortunately they don't have the resources which the NT has to instruct Burges Salmon and they feel that the outcome in the NT cases (which may not come until the Autumn or Winter) could well have a bearing in their cases. Are you able to arrange for all the current applications in Cornwall to be stayed until after the determinations in the NT cases? It is hardly as if a further short delay is going to cause oppression to anyone.

The other issue that is of serious concern to me is the cost that these farmers are going to be involved in in making section 38 applications for fencing if a registration as common land is made. Is it anticipated that if the land is registered as common land they will be required to remove all fencing unless they make a successful section 38 application? I can see no merit in such a policy. I am told this is marginal farming land and there is the real prospect of farmers giving up grazing the land. In such an eventuality it is difficult to see how HLS objectives can be achieved and this also runs counter to the central objective of what the Commons Act was intended to achieve - the good agricultural management of common land.

I look forward to hearing from you.

Kind regards

From: Defra
Sent: 12 June 2014 18:26
To: CLA
Cc: Defra
Subject: RE: Royal Cornwall Show - Save West Penwith Moors

I'm snowed under right now on Part 1 implementation, so won't make the meeting, but it strikes me that this is essentially a CLA fact-finding mission so I doubt it'd be a good use of my time. Moreover, I'm already up to speed on what's happening. I understand Andrew George MP is meeting Cornwall sometime soon and if after that meeting he still wants to meet the minister then that's I'm sure it would happen.

Thanks,

From: CLA
Sent: 11 June 2014 16:03
To: Defra
Cc: CLA
Subject: FW: Royal Cornwall Show - Save West Penwith Moors

You will recall that I raised this issue at last Friday's meeting.

I think it would be helpful if you attended this meeting, possibly also with Andrew George, MP. There seem to be important issues being raised and a vast amount of public (and private) money being consumed and I think lessons need to be learnt before the provisions continue to be rolled-out nationally.

I am particularly concerned about the issue of future fencing for the land and the proposal for application fees for making a section 38 application. It will be nigh on impossible to achieve HLF

objectives without livestock fencing. It is going to add insult to injury for land to be pointlessly registered as common land only for farmers to have to pay thousands of pounds to seek consent to fencing (which is no doubt going to be opposed by the same people who are orchestrating these applications.)

Kind regards

From: CLA
Sent: 09 June 2014 15:01
To: CLA
Cc: CLA
Subject: Royal Cornwall Show - Save West Penwith Moors

Dear

We have just returned from the Royal Cornwall Show during which we had numerous members come and talk to us about the registration of common rights at West Penwith. It very quickly became apparent that we need to hold a meeting in West Penwith with affected members/landowners as it is an area of great concern for a number of our Cornish members.

As such, [name removed] has asked if I can establish when you would be available to come to a meeting, ideally before the end of July as one CLA members case is due to be heard in August.

[Out of scope information removed]

In addition, I thought you might be interested to see the latest information I have received from [CLA member]. I hasten to add, I will politely confirm that we will arrange/host the meeting etc for our members!

I hope to see you on Wednesday after the surveyors meeting and I am sorry to have to drop a meeting of this nature on you, but would like to have a date agreed in advance of the Cornwall committee meeting on Tuesday 24th June. (N.B. Please let me know if you think anyone else from London should attend)

I look forward to hearing from you.

Kind regards

From: CLA member
Sent: 09 June 2014 13:56
To: CLA
Subject: RE: Royal Cornwall Show

Dear [name removed]

Many thanks for giving me the opportunity to discuss the Commons registration problem in Penwith. To date there have been 20 applications and 14 are pending. It is worth viewing Save Penwith Moors website <http://www.savepenwithmoors.com/>

I have been given details from the National Trusts legal defence of Carn Galva, White downs, Bosporhennis and Bosigran carns. All of this detail is in the public domain - attachments

Let me know when you intend to come down and I will arrange a meeting, we have had many meetings over the past few months some attended by Andrew George MP. He also arranged a meeting with Cornwall Council [names removed] Farmer meetings have been attended by 16-49 farmers which too gives an indication of feelings

Kind regards

From: CLA
Sent: 09 June 2014 12:14
To: CLA member
Subject: Royal Cornwall Show

Dear [name removed],

I apologise that I did not get the opportunity to discuss the commons registration in West Penwith Moors with you in more detail, but it was a very useful conversation none the less and the CLA will endeavour to hold a meeting in the area with our legal advisers to discuss the matter with local landowners. I will keep you informed as matters progress and thank you again for taking the time to come and speak to us at the Royal Cornwall Show.

Kind regards

From: Defra
Sent: 03 January 2014 16:00
To: CLA
Cc: Defra
Subject: RE:

[name and out of scope information removed]

The RIA for the Commons Bill assumes (page 11) "a minimum of 7,400 ha and a maximum of 37,000 ha is likely to be eligible for registration" as waste land of a manor, which is considerably less than the commons reregistration website suggests. There are some detailed analyses in pages 83-94. The RIA can be found here:

<http://archive.defra.gov.uk/rural/documents/protected/common-land/bill-ria.pdf>.

The extent of Defra's advice on waste land, including interpretation is set out in the guidance to commons registration authorities and PINS, which can be found here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245693/pb13659-cra-pins-guidance.pdf.

Thanks,

[name removed]

From: CLA
Sent: 04 December 2013 16:33
To: Defra
Cc: Defra
Subject: RE:

[name and out of scope information removed]

On Schedule 2 my main worry is this:

<http://www.commonsreregistration.org.uk/>

The producers of this website have compiled a list of all areas where a commons inquiry of one sort or another was carried out in the 1960's which indicates that the total area of land in England

and Wales that could be investigated for “re-registration” as common land amounts to a phenomenal 1,900 square kilometres, a very scary figure! The conversion table I have used specifies that 1,900 sq kilometres equates to 190,000 hectares or 469,500 acres! Or, to put it another way, more than a third of the area in England and Wales that is currently registered as common land!

In the past when I raised this with [name removed] said to me, “don’t worry, in reality only a small percentage of this figure is likely to be challenged.” However the trouble is that some of these action groups are fanatical and even if the fraction was only 1% it still amounts to a large chunk of land and a huge amount of time and money being consumed in dealing with the process.

I should be interested to know whether Defra was aware of the extent of land that could be subject to re-assessment following the implementation of the Act? Were any figures provided at the time of the passage of the Bill? I don’t recall seeing any but then my memory isn’t brilliant.

Secondly, could you please supply me with a copy of the guidance supplied to CRO’s and PINs as to what constitutes “open, uncultivated and unoccupied”? In particular I should be interested to have Defra’s opinion as to the kind and extent of agricultural activity being carried on by a farmer which would mean that the land failed to fall within that definition.

Regards

[name removed]

From: Defra
Sent: 04 December 2013 15:25
To: CLA
Cc: Defra
Subject: RE:

[name and out of scope information removed]

On Schedule 2, OSS opinion does not change anything as you and I agree that registration under Sch2 confers no rights. We have enshrined in primary legislation a Schedule (yes, 2) which allows for the correction of long-standing anomalies related to the detail in the registers. The Schedule was widely debated in both Houses and thought to have the right balance. It is right that we allow land that shouldn’t have been registered to be removed from the register. It is similarly correct that we allow for the registration of land that should have been registered to be finally registered now. In the case of waste land, the only reason it is not existing registered common land is due to flawed interpretation the definition of waste land, which was later overturned in 1991 by the Lords in *Hamps CC v Milburn*.

Schedule 2 does not open up the possibility of registering **any** land, it only applies to land for which an application was made but the land was not finally registered. The criteria specified in each paragraph provide a robust test to ensure that only land which falls into the appropriate category (i.e. it is waste land which even today is open, uncultivated and unoccupied) is registered.

We’ve received correspondence re Penwith which claims that there is a legal loophole. As we both know, a ‘loophole’ cannot exist when statute law specifically allows for that thing to happen (in this case the registration of waste land), and let’s not forget that statute law represents the will of Parliament. That someone does not like the fact that a piece of legislation is being used does not constitute evidence that the legislation is broken. The suggestion that registration of waste land is wrong is itself misguided because it is actually correcting a long-standing wrong (the pre-Milburn interpretation). The fact that legislation is being used demonstrates it’s doing the job it was intended to do.

Thanks,

[name removed]

-----Original Message-----

From: CLA

Sent: 04 December 2013 13:31

To: Defra

Subject: FW:

[name and out of scope information removed]

I am starting to get seriously worried about what is going to happen on the updating of the registers once the system is extended beyond the 'pioneer areas'. I am beginning to think the Schedule 2 provisions may be a big mistake. It is completely disingenuous of the Open Spaces Society to be saying the registers need to be corrected to ensure subsidy payments can be correctly paid. That is fat-all to do with them and in any event, as the registration of new land as common land will not correspondingly lead to the creation of new common rights, I cannot see how existing subsidy payments will be affected.

I have been receiving reports from some very irritated landowners in Cornwall in relation to some contested applications in respect of Penwith Moor and I wonder if you could spare me some time to discuss this?

Kind regards

[name and contact details removed]

-----Original Message-----

From: Dods Monitoring

Sent: Tue 03/12/2013 14:02

To: CLA

Subject:

Press Releases

* Open Spaces Society - Environment committee tells government it must update the common-land registers

* CLA - Efra committee's CAP findings 'supportive of farmers'

Environment committee tells government it must update the common-land registers

Organisation: Open Spaces Society

Source: Press Releases

Date: 03.12.13

The Open Spaces Society,(1) Britain's leading pressure-group for common land,(2) is delighted that the influential Environment, Food and Rural Affairs (Efra) Committee has told the government that it must update the common-land registers or implement legislation to ensure that there are accurate registers of common land for making payments under the Common Agricultural Policy (CAP).

The committee's report, Implementation of the Common Agricultural Policy in England 2014-2020, was published today (3 December).

The committee has endorsed the society's submission that the registers are out of date and inaccurate. The society called on the committee to recommend that government urgently implement part 1 of the Commons Act 2006 to enable the registers to be updated.

After quoting the Open Spaces Society's evidence, the Efra Committee has concluded: The government must update the commons registers or implement part 1 of the Commons Act 2006 to ensure accurate registers of common land are available for the purposes of mapping and payment. We acknowledge the benefit in the Rural Payments Agency (RPA) mapping common land ahead of the implementation of the new deal but we are concerned that it may be doing so based on registers known to be inaccurate. In response to this report we expect the RPA to set out how it will deal with this potential problem.

The Commons Act was passed with cross-party and cross-sectoral support in 2006 and part 1 enables the registers to be updated. Yet seven years on, part 1 has only been implemented in seven 'pioneer' areas(3) and ministers have deferred further implementation until at least 2016.

Common land is suffering because there is no definitive, up-to-date record of the land and rights. It is one of the finest assets of England and Wales, covering nearly 600,000 hectares. Commons are nationally and internationally important for their wildlife, landscape and archaeology, and virtually all the land is available for public access. Commons are the last remnant of unenclosed land from the medieval period and cover all types of landscape and habitat.

But without an up-to-date record, it is difficult for commons to benefit from proper management to protect their value for nature conservation and public access, and the livelihoods of those who depend on them as grazing land.

Says Kate Ashbrook, general secretary of the Open Spaces Society: 'We are keen for the registers to be reopened so that we can claim "lost" commons for public access, once they are registered we shall have the right to walk, and possibly to ride, on them. But it is in everyone's interest that this part of the Act should be fully implemented-and the matter takes on a new urgency with the mapping for the new round of CAP payments.

'It is time-wasting and unnecessary to base the CAP payments on out-of-date registers. By implementing legislation which is already on the statute book, ministers could ensure that the mapping process is accurate and correct.

'It is extremely encouraging that the Efra Committee has endorsed our call for urgent implementation of part 1 of the Commons Act and we trust that ministers will take heed.'

Notes:

1. The Open Spaces Society is Britain's oldest national conservation body, founded in 1865. It campaigns for the protection of common land, town and village greens, other open spaces and public paths, in town and country, in England and Wales.

2. Common land exists throughout England and Wales. It is land subject to rights of common, to graze animals or collect wood for instance, or waste land of the manor not subject to rights. Under the Commons Registration Act 1965 all commons had to be registered during a three-year period and any that failed to be registered then ceased to be common. Commons are protected from development because any works on commons require the consent of the Secretary of State for Environment, Food and Rural Affairs (in England). There is a public right to walk on all commons, and a right to ride on some, in particular those in former urban districts and those where the landowner has granted a deed of access which includes horse-riders.

3. Part 1 of the Commons Act 2006 has only been implemented in Blackburn with Darwen, Cornwall, Devon, Hereford, Hertfordshire, Kent and Lancashire. It has not yet been implemented at all in Wales.

[CLA press release and other out of scope information removed]