

11th October 2013

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Your ref:



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Dear Mrs Maureen Comber

Broxhead Common, Bordon

Thank you again for your letter of 28th August 2013 to Natural England's Chief Executive Dave Webster and your email of 17th September to Katherine Stearne, which you marked for the attention of Dave Webster and the Executive Directors. I am writing on behalf of Dave Webster to respond to your points and questions relating to commons and specifically to Broxhead Common, in the 28th August letter and 17th September email, as well as subsequent and related emails. To aid clarity in providing our responses, I have grouped your questions into themes.

However, before I start, I must point out that some of your questions relate to duties and responsibilities of other organisations and over which Natural England has no role. As a number of the points relate to actions that others will need to undertake, we will point out where we can take action and where we need to raise this with others. We'll forward a copy of your letter and email and our replies to Lord Neuberger, Hampshire County Council, and the Highways Agency.

Natural England's duties and responsibilities on common land can be divided into those that we have as a result of commons legislation e.g. Commons Act 2006, and those that we have because the common land is, or is adjacent to, another designation e.g. a Site of Special Scientific Interest (SSSI), and / or Public Rights of Way. Natural England also has wider responsibilities e.g. to consider all eligible land against the Agri-Environment Scheme priorities – nature conservation, landscape, access, historic environment and resource protection. Some of Natural England's roles are advisory only and are to support others in taking their decisions, and in others we have a regulatory role and have a duty to take the decisions ourselves.

Hampshire County Council (HCC), as the Highway Authority is responsible for the design, wording, location, installation and the maintenance of signage on Public Rights Of Way. In addition, HCC are responsible for the maintenance of the surface of the PROW and for ensuring the removal of any obstructions. It is the landowner's responsibility to ensure that it is clear of encroaching vegetation.

Natural England does not have any Highways Authority duties for Public Rights of Way signage or maintenance on or off common land. Our responsibilities are limited to complying with highways legislation ourselves.

Theme 1: Signage on Public Rights of Way at Broxhead Common

Your questions:

Q1 *"....the now many signs around and on the common, - which actually obstructs BW46 near the top of the hill. (photo attached). Please may I ask you to explain why*

Q2 *Natural England may ignore sec. 130, HA1980 and deliberately obstruct BW46 with yet another sign? (17th Sept 2013)*

Q3 *Why the bridleway is not maintained and available to use for its whole width, because of dense vegetation which has been allowed to grow on it? (17th Sept 2013)*

Q4 *...the sign is physically intrusive in the sense that it is not required and an imposition on an otherwise natural space. It is also placed to be read as one exits the common rather than where one might have expected, which is near to the C102. (28th August 2013)*

Q5 *The sign in the photo is actually obstructing the line of the bridleway. If a horse bolted for some reason, it could run into the half hidden sign and hurt itself or its rider. (28th August 2013)*

In response to Q1, Q2 and statements 4 and 5. The signage on BW46 was erected by Hampshire County Council and not by Natural England. The Council did consult us under the Wildlife and Countryside Act 1981 (as amended). The legal basis of this consultation was to ensure that the erection of the signage would not potentially damage the interest features on the Site of Special Scientific Interest. If there are signs placed such that they impede the use of the highway, and/or are misleading, then these would probably represent an obstruction under S137 of the Highways Act 1980 and should be reported to the local highways authority for them to take action.

Q3. This question is better directed to Hampshire County Council to answer as they are responsible for ensuring that the bridleway is unobstructed. The public are entitled to enjoy the full recorded width of the highway but, it may sometimes be the case that if the Local Highway Authority consider that there is sufficient width for its recorded use, then they may decide (perhaps in the light of limited resources) to maintain only part of it. If a user feels however that their use of the highway is being compromised by the limited width then this may constitute the highway being 'out of repair'. If this were the case the user could then potentially look to institute a Highways Act 1980 Section 56 notice which could require the authority, if so decided via the courts, to repair it i.e. restore it to the full width.

Theme 2: Fencing and other restricted works on common land under Commons Act 2006

7. *'...the illegal fencing of 80 acres has obstructed many of the paths horse riders customarily used on the common since time immemorial, as well as the gorse, bramble and ferns, which have been allowed to compromise the heathland itself.*

Q7. Natural England does not have any **powers** in relation to fencing on common land. As the fencing was apparently erected before 28 June 2005, you may wish to see Guidance note 12a on the PINS website.

http://www.planningportal.gov.uk/uploads/pins/common_land/guidance/unlawful_works_line_to_take12a.pdf

Theme 3: Recent fencing applications on Common land

8. *.... the wholesale fencing of our common lands on application by Wildlife Trusts, encouraged it seems by Natural England. (28th Aug 2013)*

9. *At the last count earlier this year it appears at least 50 applications to fence common land have been approved by the Planning Inspectorate at Public Inquiry, even in the face of the change of character to the landscape, the obstruction to rights of access from any point and the removal of the traditional protection by the balance occasioned because the owner cannot fence the common,*

owing to the rights of the commoners, and the commoners cannot fence it because they do not own it; and most importantly the application for HLS funding in order to do so.

Q8. Promoting public access and understanding of the countryside is one of the objectives of Higher Level Stewardship Scheme (HLS) (the grant scheme administered by Natural England on this site) alongside conserving wildlife, maintaining/enhancing landscape quality, protecting the Historic Environment and protecting natural resources. Advisers consider the benefits our schemes can offer across all these objectives and aim to find a balance in their delivery.

HLS agreements must not contravene the requirements of any designations and other legislation that apply to the land within the agreement. It is the applicant's responsibility to check and ensure that they are aware of all the designations and legislation relating to their land, and understand the implications. Natural England requires applicants to sign a declaration to say that they have done this.

The access rights on common land will necessitate that when common land is put forward for HLS, the applicant will need to carefully consider any potential impact of his/her proposals on access in consultation with the commons rights holders and other interested parties/ stakeholders. Proposals should follow the principle of causing the least negative impact on other people and their interests while reasonably achieving the desired outcomes. There is a balance to be struck and the aim should be to find a 'win-win' situation as far as possible. Please see the following link to 'A Common Purpose'
<http://publications.naturalengland.org.uk/publication/730889?category=40026>

Natural England offers advice to HLS applicants on the land management requirements of different designations and management options to achieve objectives. This includes general advice on common land and the implications for access as well as other objectives such as landscape and biodiversity etc.

Q9. Natural England does not have any **powers** in relation to fencing on common land. These rest with the Planning Inspectorate (PINS) based in Bristol, who is responsible, on behalf of the Secretary of State, for considering applications for consent made under section 38 of the Commons Act 2006 for carrying out "restricted works" including the erection of fencing.
<http://www.planningportal.gov.uk/planning/countryside/commonland/guidance>.

Theme 4: Eligibility for agri-environment payments

You say that it is your understanding that:

Q10 ***"Measures under the EC Rural Development Policy are only available for applicants engaged in 'farming', and are therefore inapplicable if a common is not put to an agricultural use. The determining factor here is the economic use to which commoners put their rights, rather than the nature of the rights themselves - only common rights holders who are registered as farmers for the receipt of European Community subsidies can claim agri-environment payments under schemes such as ESA, ELS or HLS. It follows that agri-environment schemes such as HLS have no potential application for the management of 'recreational' commons or those whose primary feature is (paradoxically) their high nature value rather than their value as an agricultural resource." (Rodgers)***

Q10: The Council of the European Union Regulation 1698/2005 of 20th September 2005 (which is the regulation on support for rural development by the European Agricultural Fund for Rural Development) states that:

"Agri-environment payments shall be granted to farmers who make on a voluntary basis agri-environmental commitments. Where duly justified to achieve environmental objectives, agri-environment payments may be granted to other land managers"

Also, the Environmental Stewardship (England) Regulations 2005 which establish the environmental stewardship scheme (including Organic Entry Level Stewardship and Higher Level Stewardship) in England states:

Power to make grants

Article 3 (1) says

”The Secretary of State may make a grant in accordance with these Regulations to a person who undertakes to do anything in relation to land in which that person has an interest which in the Secretary of State’s opinion is conducive to any of the specified purposes.”

The same regulation defines ‘specified purposes’ as

- (a) the conservation or enhancement of the natural beauty or amenity of the countryside (including its flora and fauna and geological and physiographical features) or of any features of archaeological interest there,
- (b) the promotion of the enjoyment of the countryside by the public, or
- (c) the upkeep of the landscape and historical features on agricultural land;”

An interest in relation to the land is defined in the Regulations (regulation 2) as:

- a. a freehold interest;
- b. a leasehold interest;
- c. a licence to occupy; or
- d. in relation to common land, a right to graze or to represent a person with such right.

The HLS Handbook reflects these regulations. The key is that the person to whom an agri-environment grant is made has to have an interest in the land as defined in the Regulations.

It is clear from the Regulations that “an interest in land” goes beyond the freehold or leasehold interest and includes those who simply have a licence to occupy; or in relation to common land those who have a right to graze or their representative.

In addition, it is made clear that agri-environment payments may be made to land managers other than farmers.

Theme 5: Consultation on Common Land

Q11. Why the commoners of Broxhead were not consulted before any signage was considered, as interference with the soil would require consent under sec.38 CA 2006 for restricted works and at least the agreement of the commoners, as I have already pointed out in a number of emails to HCC countryside's Andrew Smith? (17th Sept 2013)

Q11. Natural England recommends that commons owners and managers consult fully when proposing any changes to the management of a common, as set out in ‘A Common Purpose’ at the link [A common purpose](#), which has been endorsed by the National Common Land Stakeholder Group.

We are aware that the managers of Broxhead Common, i.e. Hampshire County Council, Hampshire and Isle of Wight Wildlife Trust and Amphibian and Reptile Conservation, have been seeking views on how best to look after the site to benefit the people who use it and the wildlife that lives there, and they have been doing so in line with the approach embedded in ‘A common purpose’. They provided information and consultation documents at the link. <http://www3.hants.gov.uk/countryside/broxhead-common/broxhead-consultation.htm>

Theme 6: Commons Legislation that relates to Broxhead Common, Bordon

12. Why the signs also instruct horse riders to keep to the bridleways when they have a right to ride where they are able to? (17th Sept 2013)

13. Broxhead Common as you must also realise is protected by sec.30 CA 1876 and sec 194 of the Law of Property Act 1925 now replaced by sec.41 CA 2006. This gives the right of 'air and exercise'

to the public which includes horse riders.

I also found that Broxhead Common is awarded as common land with no owner and used by a number of people, under the Tithe Apportionment Act 1847. It is a sec.193 LPA common protected by sec.194 LPA and sec.30 1876. Horse riders therefore have the rights to 'air and exercise' over the whole common. (28th August)

Q12 and 13: Natural England's database of information about commons indicates that Broxhead Common is not covered under Section 15 of the Countryside and Rights of Way Act 2006, and so is not a section 193 common under the Law of Property Act (1925). This is because the information we hold indicates that Broxhead Common it is not within the Pre-74 Urban Districts boundary. From the information available to us Broxhead is not covered by a right for horse riders to take 'air and exercise' over the whole common.

We will contact the Commons Registration Authority to check if our database needs to be updated. If you have evidence that indicates that Broxhead Common is a Section 15 common please could you send it to us and to the Commons Registration Authority so that we can update our records accordingly?

Theme 7: Local Nature Reserve at Broxhead Common, Bordon

Q14 Please also explain why, when and how this part of Broxhead Common has been brought under a management scheme as a 'Local Nature Reserve' which I understand is land managed where the primary focus is on nature conservation and the study of flora and fauna and recreational activities that are compatible with these objectives?

Q15 As it has been consistently shown by first the Nature Conservancy Council, then English Nature and now Natural England at a local level, that horse riding is not considered to be compatible, it seems strange that not only were local people not advised of the proposal but that the proposal itself does not sit comfortably with the common land or the neighbourhood and public interests of access to it?

Q14 The Local Nature Reserve called Broxhead Common, Bordon, was declared by Hampshire County Council on 25th July 1979. Section 21 of the National Parks and Access to the Countryside Act 1949 gives local authorities the power to acquire, declare and manage nature reserves.

The responsibility for selecting, acquiring and making arrangements for management of these reserves lies with local authorities. Section 21(6) of the Act says that a local authority can only declare an LNR after consultation with Natural England. It should be noted that comments about site selection and management are simply our advice. Natural England has no mandatory powers over selection or declaration, but local authorities must consult us in exercising their powers under Section 21.

For information, you may find it useful to view Natural England's guidance on LNRs ([Local Nature Reserves in England: A guide to their selection and declaration](#)) which contains a range of related information including details on LNRs and planning (page 23).

Q15 The above Guidance also confirms the purpose of Local Nature Reserves and states:

'At Natural England, we work to conserve and enhance England's natural environment and its rich biodiversity. We believe contact with nature is vital for wellbeing and quality of life, and that everyone should be able to benefit.

As accessible green spaces close to where people live, Local Nature Reserves (LNRs) can help achieve that. Not only do they support and protect habitats and species, they allow people to get close to nature and appreciate the contribution it makes to their quality of life. LNRs are places to play, learn and explore that can also deliver significant physical and mental health benefits. They are typically close to where people live ...'

Broxhead Common is a Site of Special Scientific Interest, under the Wildlife and Countryside Act 1981, as amended by subsequent legislation, and is also a Special Protection Area under the Conservation of Habitats and Species Regulations 2010. These designations give Broxhead Common strong legal protection for its habitats and protected species (and any geodiversity) interest. Indeed these protections

are much stronger than that accorded to Broxhead by its Local Nature Reserve status.

Natural England does not consider horse riding per se to be incompatible with nature conservation.

Theme 8: The registration of Broxhead Common as common land

In your letter of 28th August, to Dave Webster, Natural England's Chief Executive, you raise the issues surrounding the registration of Broxhead Common as common land as follows:

Q 16 *In brief, since the autumn of 2011 I was advised by my barrister to look more closely if possible, at the strange circumstances surrounding the registration of Broxhead Common as common land. I have found the following:*

- 1. Hampshire County Council as the registration authority for common land have illegally removed 80 acres from the register of common land.*
- 2. An out of court settlement at the Court of Appeal meant that they would have to support an application to the Secretary of State for the unauthorised fencing. They had accepted the decision of the Chief Commons Commissioner 1974. They did not support an application because no application has ever been made. They seemed to have turned a blind eye to the fact that the fences remain unauthorised. This is probably because documents show that local people would not have supported such application mainly due to the alteration to the landscape which at that time was rare and valuable heathland.*
- 3. The rights of the commoners were obstructed and denied even though many questions were asked.*
- 4. HCC got away with it by removing page 3 from the Consent Order of the Court of Appeal. It therefore could not be seen that the matter had been withdrawn from the Court, no evidence heard, no judgement given. And yet HCC maintain the Court or the Commons Commissioner instructed them to leave the fences in situ. Unbelievable!!*
- 5. They have subsequently misled the nine Public Inquiries which followed, by not revealing the true state of affairs and covering up their collusion with the purported landowner, Mr Peter Whitfield of Headley Wood Farm.*

Q16 Natural England does not have any powers in relation to adding or removing land from the Commons Registers. These are the responsibilities of the commons registration authorities under The Commons Act 2006. This Act states that

'The High Court may order a commons registration authority to amend its register of common land or town or village greens if the High Court is satisfied that—

(a) any entry in the register, or any information in an entry, was at any time included in the register as a result of fraud; and

(b) it would be just to amend the register.'

I noted that you copied your correspondence to Dave Webster, to Lord Neuberger of Abbotsbury who is the new President of the Supreme Court of the United Kingdom, the most senior judge in the UK.

Theme 9: Referring Issues to the High Court of Justice

Q17 *I do hope you are able to take these issues where they belong in the High Court of Justice. I realise that there are too many legal questions involved for even the Chief Executive of Natural England to resolve.*

Q17 We note that you have raised the issues in your letter directly with Lord Neuberger, and we will copy him into our reply to you.

Natural England's role on Sites of Special Scientific Interest

Broxhead Common is a Site of Special Scientific Interest. As the Government's adviser for nature conservation, one of Natural England's primary roles is to support the maintenance and enhancement of SSSIs. We do this through our network of Land Management Advisers who undertake site visits, provide owners and occupiers with advice on management practices and sources of funding, and explain the legislative measures designed to prevent damage to sites. Our responsibilities in relation to SSSIs are set

out in the Wildlife and Countryside Act 1981 as amended by subsequent legislation. This legislation also sets out the responsibilities of owners and occupiers of SSSIs (see page 15 of [Sites of Special Scientific Interest: A brief guide for land owners and occupiers \(NE322\)](#)).

In conclusion, I hope that you find these responses informative and helpful. We will also copy our response to you to Lord Neuberger and Hampshire County Council and will offer to discuss this with them should they have any questions.

I will write again regarding Shortheath and Yateley commons.

Yours sincerely

Francis Davies
Area Manager