Presentation on behalf of the Foundation for Common Land on 13th September 2018 to the Inquiry to Consider:

Applications to Cumbria County Council to amend the register to record an historic event - CL26 Murton Fell, CL27 Hilton Fell and CL122 Burton Fell and Warcop Fell

Sir, please bear with me if I give some personal background before my submission on behalf of the Foundation for Common Land. This is potentially material depending on how the inquiry progresses with regard Issue 2 and I would like these facts to be in the open at the start of this submission.

My name is Julia Aglionby. I am today here as Executive Director for England for the Foundation for Common Land. By profession I am a Chartered Surveyor and Agricultural Valuer practicing in matters of Common Land and the Uplands. I am also a Board Member of Natural England, though am not here in that capacity. I hold among other qualifications a PhD in Law from Newcastle University where my research focused on the governance of common land in protected areas.

I declare that the firm I worked for until 2012 (H&H Bowe Ltd) was instructed by RPS, on behalf of the Ministry of Defence, from 1999 to 2005 and I was involved assisting the Defence Estates negotiate the purchase of the Common Rights on the commons in question. I assisted with the drafting of the Proof of Evidence of Mr Alan Bowe that has now been presented to this Inquiry. I also prepared the 2003 grazing licences that have been presented to this Inquiry. Later in 2010 H&H was instructed by the graziers on these three commons with regard their Stewardship Agreements. I know this land and these communities well. As well as an extensive professional practice negotiating multi-partite agreements on Common Land I in 2008 and 2011 acted for Natural England to explore the potential for a Commons Council in Cumbria so am familiar with that issue the applicant has repeatedly referred to.

The Inquiry has a copy of the Skeleton Argument that the Foundation for Common Land submitted and its response to the Skeleton Argument of the Ministry of Defence.

I appreciate that as Inspector you are charged with making a recommendation to Cumbria County Council based on whether the application for deregistration is in accordance with the Commons Act 2006, and its associated regulations. I will come to these points but it is useful for the Inquiry and the public to understand the context in which this application has been made. I therefore request the opportunity to rehearse these arguments as they are material to the public interest in this matter and the public interest is something Mr Elvin refers to. And in fact these matters demonstrate that there is another possible outcome; the Secretary of State can safely withdraw their application without prejudicing the Army's training objectives and we can all go home saving tax payers funds.

The Ministry of Defence knows full well the intrinsic importance of common land as an asset of immense cultural heritage value and as a provider of public benefits. This was dealt with in depth at the 2001 Public Inquiry and if common land wasn't so important the MoD would not have been at such pains to provide the original undertakings to avoid any risk of deregistration being an issue at the 2001 Inquiry. They very much wanted deregistration to be a non issue as it was not relevant to securing their training objectives. It is therefore somewhat disingenuous to now suggest that it makes no difference whether this land is common land or not. The recent press coverage in the national press, the radio and the TV demonstrate the huge public interest in this case; we as a nation care deeply about common land. This decision matters and the granting of this application would be a massively retrograde step sending the wrong signals to the nation as to the value of common land. It was never the intent of the Ministry of Defence as detailed in the Inspector's report in 2001. Paragraph 12.3.2 of Mr Tipping's report notes the Ministry of Defence's response to the Friends of the Lake District's concerns regarding the status of the land. It says;

> *"The arrangements proposed by the MoD provide a guarantee that the commons will not be de-registered and will remain common land in perpetuity"*

This indicates there was never any intention by the MoD for the land to cease to be common land pro-tem while in the ownership of the MoD and then be

reinstated as common land in the unlikely event of it being sold. In perpetuity means the intention was for the land to continuously remain as common land, but as agreed, without rights of common that interfered with training.

I appreciate that there are a variety of national interests and sometimes one may have to be balanced against another. In this case the Ministry of Defence purports that their training objectives are at risk due the enactment of the Commons Act 2006. I am sure they genuinely believe this but it simply isn't true. I turn to their three concerns in turn:

1) There is a risk that these three commons will become part of a Commons Council. If the Ministry of Defence believes this then they have misunderstood the process for establishment. Before the Secretary of State for Defra establishes a Commons Council he has to be sure that there is substantial support for a Council from those with legal rights over the common land subject to the application. There are no common rights on these commons and the Ministry of Defence as owner will not be applying so while technically there are enabling powers in the Act to allow for the establishment of Commons Council on all registered common land in the case of these three commons they couldn't be given effect to.
2) The status of the land would be uncertain. This is not the case, if this application fails then the status of the land is as registered common land as all land that was common land when the 2006 Act came into force remains as common land except for exchange cases. This would be a good outcome, common land provides public benefits and as we have already mentioned is high valued by the public particularly for its open access for recreation.
3) If the land is confirmed as common land then the Ministry of Defence is concerned that it will be required to apply under s38 of the Commons Act 2006 for any works on the Commons and that this could compromise training objectives. Again this is a false concern as the Commons Act contains provision for granting an order that would exempt the Ministry of Defence from applying for s38 consents. This section 43(5) was

explicitly included as an amendment to the Act to deal with the situation at Warcop. See Hansard records for 29th June 2006:

Barry Gardiner MP:…. Generally, section 194 of the 1925 Act applies to land that was subject to rights of common in 1926. Where all rights of common have since been acquired under any statutory power, such as a power of compulsory purchase, section 194 will cease to apply to that land. It is in those circumstances that we would have the discretion to make an order under this amendment. ….. It will not surprise Members to learn that we have in mind a particular case: Warcop military training area, which is a firing range in Cumbria. …. The rights of common there were acquired in 2003 following a public inquiry, and the controls on works under section 194 therefore ceased to apply at the same time. There is uncertainty about Warcop's status, and I share the concern of the Under-Secretary of State for Defence, my hon. Friend the Member for West Bromwich, East (Mr. Watson), that clause 38 could re-impose those controls. Government amendment No. 76 will enable us to address the issue at Warcop.

If the Ministry of Defence perceive the s38 process as a barrier to effective military training all they need to do is apply for an order under s43 of the Commons Act 2006 designed explicitly for the situation at Warcop.

Turning now to our legal objections to the application: We have two separate but connected points but will today limit ourselves to Issue 1: The Power Issue as you Sir (the Inspector) call it. I will not rehearse the case of the Open Spaces Society on the details of the regulations.

The question in dispute before the Inquiry is: "Is there a historic event to register?" Mr Elvin suggests that the earlier application made to extinguish the common rights and delete them from the Common Register as a result of the 2003 Vesting Deeds was only a job half done and that it is in the public interest to complete the job, particularly now that they have changed their undertakings as a result of their fear that the Commons Act 2006 compromises training (an unfounded fear as we have already described).

Our view is that while there was an event in 2003; purchase and hence extinguishment of the rights of common; the recording of this event was dealt with by Cumbria County Council at the time and before the Commons Act came into force. The 2003 vesting deed was to compulsorily acquire right of common not to deliver any change in status of the land and therefore cannot, we contend, be considered a historical event to be recorded.

Common Rights are classified by the Law of Property Act 1925 as "land" and so any references to land do not necessarily refer to the soil, but can equally be to the rights, that we all agree have been extinguished.

We therefore request Sir that you look behind the Vesting Deed to consider what was the intent of the 2001 Public Inquiry and the consequential Vesting Deed. With commons issues as the case of *Dance v Savery* told us we often need to look behind the face of the documents. I was present throughout that period of the 2001 Inquiry and have refreshed my memory by referring to the documents kindly provided by the Ministry of Defence and would comment as follows:

It is a matter of fact that the Ministry of Defence had no desire, need or intent to change the status of the land. They now appear to be seeking to reinterpret the 2003 Vesting Deed in the light of what would be convenient to their current interests. Their interests might well have changed but that is not what we are here to discuss, they have applied to register a historical event and there is no evidence that the historical event was intended to remove the status of common land. In fact the MoD's evidence at the Inquiry was quite the opposite, and I apologise for my repetition but it is important: they said, *"The MoD provide a guarantee that the commons will not be deregistered and will remain common land in perpetuity."*

In summary the Secretary of State for Defence has provided no adequate reasons as to why deregistration of CL 26, CL27 and CL122 is required to secure their training objectives. The Foundation for Common Land retains its position that

1. Deregistration is <u>not</u> required to secure the public interest for military training
2. Deregistration would diminish the public asset of common land, and
3. And critical to this Inquiry granting this application would be a breach of the Commons Act 2006, the Commons Registration Act 1965 and the regulations deriving from both Acts. This is because the historic event was not intended to and did not change the status of the land,

The historical event that occurred was fully given effect by the application to

CCC to extinguish the register as reflected in the changes marked in the respective commons registers in 2006. These commons were and remain common land and the Foundation for Common Land looks forward to providing future submissions on Issue 2: Waste of the Manor when the Inquiry reconvenes.

Thank you

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