The Planning Inspectorate

Application Decision

Site visit made on 15 October 2014

by Alan Beckett BA MSc MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 28/11/14

Application Ref: COM 563
Tregerest Common, Sancreed, Cornwall

Register Unit No.: CL313[1]

Commons Registration Authority ('CRA'): Cornwall Council

- The application, dated 18 November 2013, is made under paragraph 4 of Schedule 2 of the Commons Act 2006.
- The application is made by Mr D. Coles on behalf of Save Penwith Moors.
- The application is to register waste land of a manor in the register of common land.

Decision

1. The application is approved in part. The land outlined in red and hatched red, with the exception of that cross-hatched red, on the plan attached to this decision shall be added to the Register of Common Land.

Procedural Matters

2. I carried out an unaccompanied inspection of the application land on the morning of 15 October 2014.

The Application Land

3. The land under consideration comprises in part the eastern verge of the Old North Road ("the ONR"), an unclassified public highway running generally north-west/south-east; in part a strip of land which is to the south of an access track running east from the Air Traffic Control Station ('ATCS'); and a parcel of land situate to the west of the ONR and to the north of the B3318. The application land does not include the land occupied by the ATCS. The application land is shown edged red on the plan appended to this decision. The application land is owned by Mr L M Harvey.

4. The majority of the land subject to this application is recorded as access land under the Countryside and Rights of Way Act 2000 ('CROW'), the exception being a strip of the verge to the east of the ONR. Access land includes land mapped as open country, which is wholly or predominantly mountain, moor, heath or down. Each of these categories has a definition, which was used in determining whether or not land parcels should be included as access land, or 'open country'.

[1] Original common land register unit number

Main Issues

5. The application has been made in accordance with the provisions of paragraphs 4 (2) of Schedule 2 to the 2006 Act. There is no indication that the requirements of the regulations have not been met and the application has been accepted and submitted to the Planning Inspectorate by the CRA.

6. The main issue is whether the land is waste land of a manor and whether:

   a) the land was provisionally registered as common land under section 4 of the 1965 Act;

   b) an objection was made in relation to the provisional registration; and

   c) the provisional registration was cancelled in the circumstances specified in sub-paragraphs (3), (4) or (5).

7. The onus of proving the case in support of the correction of the register of common land rests with the person making the application, and the burden of proof is the normal, civil standard, namely, the balance of probabilities.

Reasons

Whether the land was provisionally registered as common land under section 4 of the 1965 Act

8. An application to register a right to graze cattle, sheep and horses and a right of turbary was made on 10 June 1968 by Mr W Tregear. The land to which the rights were claimed to be attached was Mr Tregear's land at Higher Tregerest Farm. The application resulted in the provisional registration of the land on 1 September 1968 under the reference CL313.

Whether an objection was made to the provisional registration

9. The register notes that three objections were made to the inclusion of CL 313 in the register. I have only been provided with a copy of objections X326 and X1068 and cannot say on what basis objection X1069 was made. Objections X326 and X1068 both claimed that the land shown as CL313 had not been common land at the time of the provisional registration. The register notes that the provisional registration was cancelled in consequence of all three objections.

Whether the provisional registration was cancelled as set out in sub-paragraphs 4 (3) (4) or (5)

10. The application states that it is made on the basis that the Commons Commissioners did not consider whether the land in question qualified as waste land of a manor. The application also states that the application is made to reinstate waste land of the manor where its registration was cancelled following an objection. The circumstances relied upon by the applicant are set out in sub-paragraph 4 (4) and (5) of Schedule 2 to the 2006 Act. The objector does not dispute that the provisional registration was cancelled in the circumstances set out in Schedule 2 to the 2006 Act.

11. Sub-paragraph 4 (4) of the 2006 Act requires that the application was referred to a Commons Commissioner who determined that the land was not subject to rights of common but who did not consider whether the land was waste land of

a manor. Sub-paragraph 4 (5) requires that the person on whose application the provisional registration was made requested or agreed to its cancellation.

12. Limited documentary evidence regarding the application and provisional registration was submitted. In the papers before me there is no indication that the matter was referred to a Commons Commissioner or that Mr Tregear had written to the CRA to withdraw his application or had consented to his application being cancelled.

13. Given that over 40 years have passed since the provisional registration was cancelled, it is not surprising that little of the documentary evidence regarding the provisional registration remains extant. I consider it to be more likely than not that the application was withdrawn by Mr Tregear, or that he consented to the cancellation of the provisional registration, as a contested but unwithdrawn application would have to have been referred to the Commons Commissioners. There is no evidence before me which suggests that such a referral was made.

14. The provisional registration was cancelled on 2 March 1973 and in the absence of evidence of a referral to the Commons Commissioners, I consider it to be more likely than not that the cancellation was made in the circumstances set out in sub-paragraph 4 (5) of schedule 2 to the 2006 Act.

Whether at the time of the application the land was waste land of a manor

15. Land '*of a manor'* has been held to mean land which is, or was formerly, connected to a manor. The definition of 'waste land of a manor' arising from the case of *Attorney-General v Hanmer* [1858] ('*Hanmer*') is '*the open, uncultivated and unoccupied lands parcel of the manor, other than the demesne lands of the manor'*. Land is '*of the manor*' if it can be shown to be land which is, or was, formerly connected to a manor[2]. '*Demesne land*' is land within a manor which is owned and occupied by the lord of the manor for his own purposes. For land to be '*occupied*' it is considered that there must be some exclusivity of physical use by a tenant or owner alone.

'*Of a manor'*

16. The applicant refers to the tithe documents for the Parish of Sancreed which refers to the application land as being part of the lands in the Manor of Gwidden and to Lyson's History & Topography of Cornwall (1814) which states that the manor of Tregonbris was partly owned by one James Buller. James Wentworth Buller was recorded in the tithe apportionment as being the owner of the application land.

17. The Tithe Commutation Act 1836 converted tithes in kind (a one tenth part of the productivity of the land) to an annual monetary payment (the rent-charge) based on the seven year average price of wheat, oats and barley. The tithe apportionment was set out in a schedule which recorded the owners and occupiers of each parcel of land assessed to identify who was responsible for paying the rent-charge and how much rent-charge was payable on an individual parcel of land.

18. In this case the tithe apportionment records that the application land was part of parcels 1898 and 1896 which were part of the land in the Manor of Gwidden. I am satisfied that the tithe apportionment provides evidence that in 1839 the

[2] Hampshire County Council v Milburn [1990]

application land had been part of the Manor of Gwidden. That this was so is not disputed by the objector.

19. I conclude that it has been demonstrated that the application land is, or was formerly, manorial land and, therefore, '*of a manor*' as required.

'*Waste land'*

20. As noted above the term '*waste land of a manor*' was defined in *Hanmer* as *"the open, uncultivated and unoccupied lands parcel of the manor other than the demesne lands of the manor*". The determination as to whether or not the application land can be described as '*waste land*' must be made in relation to the status at the time of the application, 18 November 2013. I consider that in order to reach a decision on whether the land can be regarded as '*waste land*' it is necessary to look at the evidence of historic and current use under the heads of the definition, which is referred to by the current Defra guidance[3].

21. The objector disputes the applicant's claim that at the time of the application, the land was '*waste land of a manor*' as defined by *Hanmer*.

Unoccupied

22. The earliest mapping arises from the tithe documents. Tithe would have been paid on productive land and there are many reasons why land might not have been subject to tithe, for example, if it was barren, held by the church or some other religious community, or had only recently been converted to productivity from barren heath or waste land.

23. The Sancreed tithe apportionment records that the majority of the application land formed part of parcel 1898. This was a parcel of 31 acres and 31 perches which was unfenced against the ONR or against what is now the B3318. The current line of North Road is not shown as crossing this parcel although from the north-western end of the parcel North Road is shown as running between enclosed fields to Boslow and into the Parish of St. Just. It is highly likely that access to the enclosed section of North Road was across the unenclosed common but the exact route taken at that time is unclear. The depiction of parcel 1898 on the tithe map suggests that in 1839 the application land was open in that it was unfenced.

24. The land to the east of the ONR is shown as part of parcel 1897 and the land to the south of the track leading east from the ATCS is shown as part of parcel 1896. The ONR is coloured ochre within parcel 1897 and the whole of the parcel is located between enclosed fields. The metalled road is shown to run between broad verges which are not fenced from the road. Likewise, the parcel to the east of the ATCS is shown as a wide strip of land lying between the walls of adjacent enclosed fields. The tithe map shows both parcels at issue to have been open and unfenced in 1839.

25. No description is given under 'State of Cultivation' for any of the tithe parcels relevant to this application. Each of the relevant parcels were recorded as being '*Common in Higher Tregerrast*' for which no rent-charge was payable which suggests at the time of the tithe assessment, the land was unproductive.

[3] Department for Environment, Food and Rural Affairs, Part 1 of the Commons Act 2006, Guidance to commons registration authorities and the Planning Inspectorate for the pioneer implementation (Version 1.46, January 2014)

Each of the three tithe land parcels are recorded as being in the occupation of three named individuals.

26. The tithe documents suggest that in 1839 the land at issue was assessed as being uncultivated as it did not produce a titheable crop, was not liable for rent-charge and was not exclusively occupied. On the balance of probabilities, I am satisfied that these areas would have fulfilled the *Hanmer* definition of '*waste land of the manor*' in the nineteenth century.

27. Ordnance Survey mapping dating from 1908 shows that the application land had remained in a similar manner to its depiction on the tithe map as heath or furze. The current line of North Road on the southern boundary of the application land is shown to bisect what had been parcel 1898 on the tithe documents. On all the OS maps submitted, including those used as base maps for other purposes (provisional registration of commons and the definitive map of public rights of way for example), North Road is shown as being fenced or walled from that part of tithe parcel 1898 (OS parcel 415) to the south, but not walled or fenced off from the application land to the north (OS parcel 248). Similarly, that section of ONR to the east of parcel 1898 is also shown as running over open land.

28. The application land to the east of ONR and to the south of the access track east of the ATCS is also shown as heath or furze and lying between the boundary walls of adjacent fields. The 1908 OS map shows the track leading east from the ATCS to have run much closer to the boundary wall of the field to its south than it presently does.

29. Parts of the application land have been owned by the objector's family since 1917. An indenture of that date shows that '*eleven equal and undivided twelfth parts'* of Higher Tregerras Common were purchased comprising 31 acres of '*heath and furze*'[4]. The remaining application land formed part of Tregerras Hill Common and was described as '*waste*' in the indenture schedule. The indenture also conveyed any '*commonage and commonable rights*' which existed over the application land.

30. The tithe and Ordnance Survey documents show that historically, that part of the application land to the south-west of ONR has been unfenced and open to ONR and North Road. The conveyance documents show that since 1976 the application land had been in the sole ownership of the objector's family. In 2012 as part of a Higher Level Stewardship (HLS) agreement, the objector fenced part of the land to separate it from ONR and North Road.

31. Since 2012 the objector has managed the enclosed land in accordance with the HLS agreement, through grazing and through the cutting of firebreaks and the cutting, burning and spraying of bracken and furze. The objector submits that grazing of the land commenced in 2012 prior to the application being made. Evidence of such management techniques being practiced was visible at the time of my site visit.

32. The boundary fence does not follow the ONR however and in places deviates significantly from it[5]. The application land to the east of the fence is thus separated from the enclosed land and does not show any physical sign of being

[4] The remaining twelfth undivided part of Higher Tregerras Common was purchased from the estate of Mr Tregear on 12 February 1976

[5] See the plan appended to this decision for an approximation of the position of the fence.

managed in the same way as the land enclosed by the fence. At the time of my visit, there were no signs of active management of the land to the east of the 2012 boundary fence and there was no visible sign that active management of the land to the east of ONR or to the east of the ATCS was being undertaken.

33. The objector submits that the ONR and the access track to the east of the ATCS are developed land and should not be included in any common land registration. The objector also submits that part of the land to the east of the ONR is developed as it is the site of two substantial water tanks which serve Higher Tregarest Farmhouse and seven other dwellings. It is also submitted that wayleave payments are made by both British Telecom and Western Power in respect of the cables buried in the ONR verge.

34. Whilst the ONR can be described as being 'occupied' in that a public right of access exists along it for all traffic other than motor vehicles[6] the ONR and the access track do not form part of the application land. No evidence regarding the position of the wayleave cables has been provided. Given that the masts are sited to the west of the ONR it is likely that the wayleave cables are buried in land which does not form part of this application.

35. Although the application land has been wholly owned by the objector's family since 1976 and is considered to be part of the farm, the objector acknowledges that there has been little active management of the land. There is no obvious occupation of the land to the east of the ONR (other than the site of the water tanks) or to the south of the access track. This part of the application land retains the same physical appearance as has been depicted by Ordnance Survey, by the conveyance documents and by the tithe records. It appears to me that the description of the land as '*waste*' in the 1917 conveyance remains appropriate.

36. On the issue of whether land can be described as 'unoccupied' the Defra guidance sets out at that "*Land which is otherwise eligible for registration under paragraph 4 of schedule 2 but which has been developed, improved and brought in hand, or otherwise fails to fulfil the character of waste land of the manor, cannot be registered*." The guidance also states "*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…*".

37. The erection of fencing in 2012 which enclosed the bulk of the application land and facilitated the active management of the land by the owner had the effect of bringing management of that land 'in hand'. Whilst the applicant attaches some weight to the recording of the application land as open access land under the provisions of CROW as evidence that the land is not exclusively occupied, access under CROW is subject to the owner's ability to restrict access in order to undertake certain works. The erection of fencing in 2012 was intended to facilitate works which were for the benefit of the owner of the land.

38. Access to the enclosed land under the provisions of the CROWA or access over the land via footpath 31 does not displace the lawful rights of occupancy such that this parcel of the application land could be described as 'unoccupied' in terms of the 2006 Act.

[6] Motorised access is permitted for particular purposes in accordance with the County of Cornwall (Old North Road, Sancreed) (Restrictions on Driving) Order 1998

39. In respect of the land enclosed by the 2012 fence I consider that at the time the application was made the land was occupied by the owner. With regard to the land on which the water tanks are situated I consider that this land was developed and occupied at the time of the application. In respect of the remaining application land, the documentary evidence submitted demonstrates that the land was not considered to be productive in the nineteenth century and does not appear to be productive today. The tithe apportionment shows the remaining application land to have been in multiple occupancy and until the conveyance of Mr Tregear's interests in 1976 the land had remained in multiple occupation. Although the land has been in the sole ownership of the applicant's family since that date there is no evidence of management or husbandry of the land taking place to suggest that the land is other than the '*waste*' or '*heath and furze*' described in the 1917 conveyance.

40. I am satisfied, on the balance of probabilities that at the date of application the land outwith the 2012 fence and the area of the water tanks was unoccupied land.

Uncultivated

41. Gadsden on Commons and Greens states that whether land has been cultivated is a question of the degree of cultivation. The applicant places reliance upon a definition of 'uncultivated land' provided by Natural England[7] which is as follows "*Cultivation in this instance means; physical cultivation by agricultural soil-disrupting activities such as ploughing, tine harrowing, sub-surface harrowing, discing and rotorvating; chemical cultivation by chemical enhancement of the soil through the addition of organic and inorganic fertilisers or soil improvers*." Whilst the types of activities described in Natural England's definition are examples of intrusive cultivation, the objector argues that management of the land for the purposes of the HLS scheme requires low-level non intrusive forms of cultivation for the improvement of semi-natural heathland.

42. The objector submits that in connection with the HLS scheme, the land enclosed in 2012 is managed by the burning, spraying and cutting of bracken, the establishment and grazing of firebreaks and the extensive grazing of the land. On the basis of the evidence before me and from my observations on site, I consider that the management of the land described by the applicant amounts to the cultivation of the land, albeit at a low level and for the purpose of conserving and enhancing semi-natural landscape. Although the objector acknowledges that for many years there was little active management of the land prior to 2012, I am satisfied that at the management regime instigated and practiced since 2012 is such that the land cannot be said to be uncultivated.

43. With regard to the remaining application land, no evidence has been submitted from which it could be concluded that it has been cultivated, even at a low level. The remaining application land is unfenced and is separated from other managed and cultivated areas by the boundary walls which define the adjacent fields. I am satisfied that the remaining application land is uncultivated.

[7] Environmental Impact Assessment (Agriculture) (England) (No 2) Regulations2006 Frequently Asked Questions

Open

44. The applicant seeks to rely upon the definition of access land under CROWA to demonstrate that the application land is 'open' land. For the purposes of access under the provisions of CROWA access land is defined as moor, mountain, heath and down. In relation to heath, the Natural England definition is "*land of generally open character, usually characterised by natural ericaceous dwarf shrubs*" and whilst "*individual land parcels might comprise enclosures of varying size, they will in combination form a landscape that provides open vistas*". The applicant states that this definition accurately describes the application land.

45. The objector submits that whether the land falls into the definition of '*open country*' for the purposes of CROW is irrelevant to the consideration of whether the application land falls into the *Hanmer* definition of waste land of the manor. The objector refers to Gadsden on Commons and Greens in which '*open*' in the context of commons legislation means '*unenclosed*'.

46. The applicant appears to dismiss the matter of fencing saying that Gadsden implies that fencing the land would imply that the land would be taken into the lord's demesne and that it would be fairly obvious that the land would not have been part of demesne lands. I do not agree with this interpretation of the commentary found in Gadsden; whether the land would become part of the demesne lands would depend upon who fenced the land and when any such fencing was erected.

47. In the case of the application land to the south-west of ONR, the evidence before me is such that since 2012 part of the application land has been enclosed with a stock-proof fence which connects with the Cornish banks which since at least 1839 have defined the boundaries of adjacent fields. I conclude that at the time of the application, this land was enclosed and was therefore not '*open*'.

48. The remaining application land is shown on mapping from 1839 onwards to be unenclosed and to be part of land adjacent to the ONR and the access track to the east of the ATCS. The boundaries of the adjacent fields have been erected to separate the fields from the track and road and to ensure that adjacent fields are stock-proof. There are no physical features present on the remainder of the application land (other than the water tanks) to prevent access to and from the application land from ONR or the access track. The documentary evidence shows that the adjacent field boundaries have remained unchanged for almost 200 years and that the remainder of the application land was and is '*open*' in the *Hanmer* sense.

Summary

49. I am satisfied that the documentary evidence shows on a balance of probabilities that the application land was of the manor of Gwidden.

50. I am also satisfied that the application land to the south-west of ONR was, at the time of the application, enclosed, subject to low level cultivation and occupied. As such that land does not satisfy the definition of waste land of the manor and should not be added to the register of common land.

51. I am satisfied that the area of land to the east of ONR containing the water tanks was occupied at the time of the application and should not be added to the register of common land.

52. I am satisfied that the remaining application land was open, uncultivated and unoccupied at the date of the application and that such land satisfies the definition of waste land of the manor and should be added to the register of common land.

Formal decision

53. Having regard to these and all other matters raised in the written representations, I conclude, on the balance of probabilities, that the criteria for the registration of the application land as common under paragraph 4 (2) of schedule 2 to the 2006 Act has been met for part of the land applied for.

54. The application is granted in part and the land outlined in red on the plan attached to this decision shall be added to the register of common land.

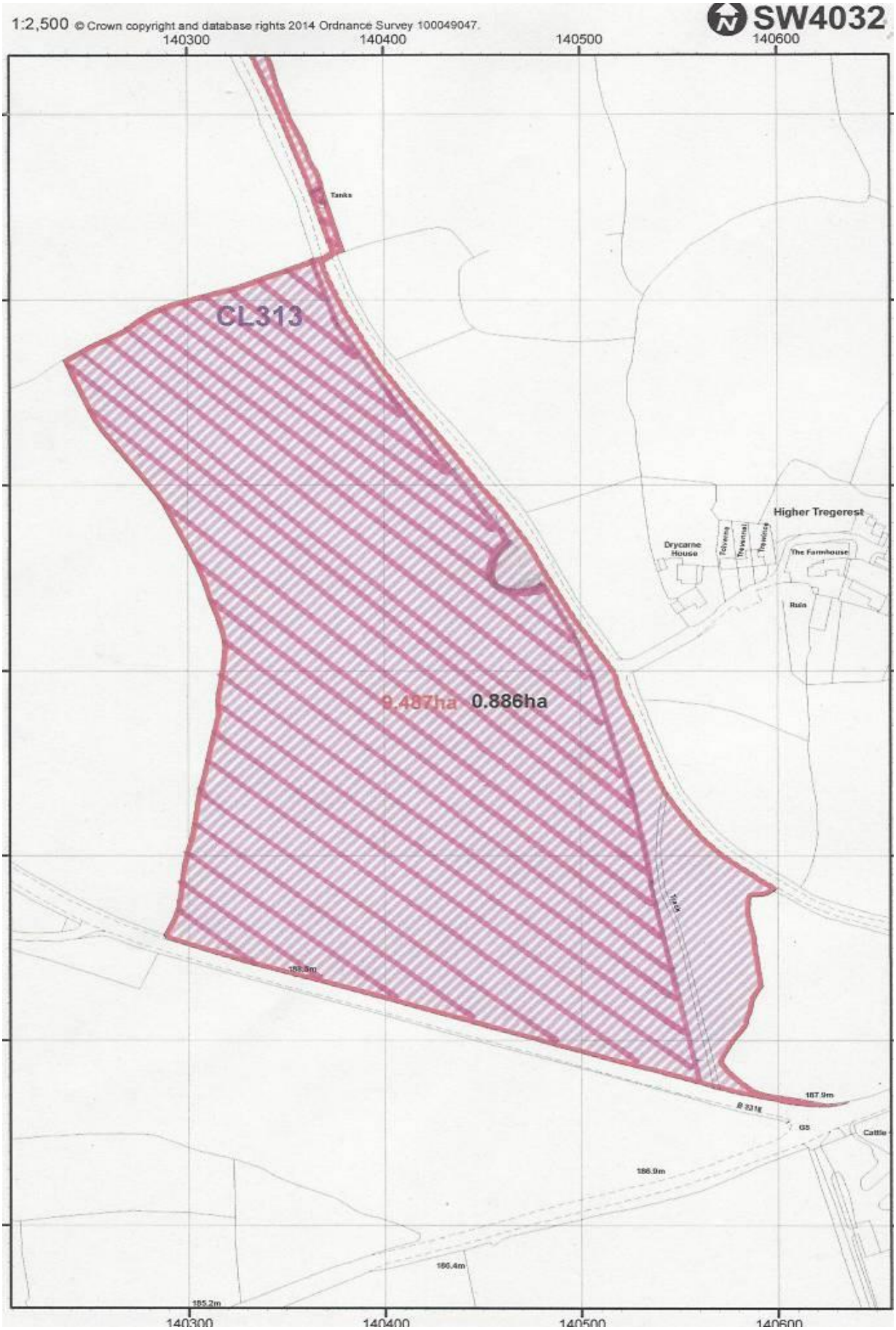
55. For the avoidance of doubt, the areas to be registered are:

- The application land to the east of the boundary fence erected in 2012;
- The application land to the east of ONR forming a corridor between the eastern edge of the metalled road and the walls which mark the boundary of adjacent fields which formed part of tithe parcel 1897 excluding the land occupied by the water tanks;
- The application land to the south of the access track which runs east from the ATCS which formed part of tithe parcel 1896.

Alan Beckett

Inspector

APPENDIX 1 land to be registered edged and hatched red (not to original scale)



APPENDIX 2: land to be registered edged and hatched red (not to original scale)