



Application Decision

Site visits made on 26 November and 2 December 2020

by Alan Beckett BA MSc MIPROW

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

Decision date: 14 January 2021

Application Ref: COM/3251944

Dunnerdale, Seathwaite and Torver Common

Register Unit: CL 29

Commons Registration Authority: Cumbria County Council

- The application, dated 30 April 2020, is made under section 38 of the Commons Act 2006 ('the 2006 Act') for consent to carry out restricted works on common land.
 - The application is made by Mr Anthony Hartley on behalf of the Dunnerdale, Seathwaite and Torver Commoners.
 - The works comprise 11935 metres of post and wire fence for 10 years over 6 sites covering 629Ha to include access gates, stiles and a cattle grid.
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Decision

1. Consent is granted for the works above in accordance with the application dated 30 April 2020 and the revised plans submitted with it subject to the following conditions:
 - (i) the works shall begin no later than 3 years from the date of this decision;
 - (ii) the works shall be removed no later than 31 December 2030;
 - (iii) the access gates and stiles provided within the fence lines shall comply with BS 5709 (currently 2018).

Procedural Matters

2. I carried out an unaccompanied site inspection of proposed enclosures 4, 5, 6 and 7 on 26 November 2020. Given the limited daylight available at the end of November, it was not possible to inspect the remaining enclosures on that day. I therefore made a second unaccompanied site inspection of proposed enclosures 2 and 3 on Wednesday 2 December 2020. My decision has been made on the basis of my observations on these visits, taking account of the application and representations received in response to the advertisement of the application.
3. The initial application proposed the creation of 7 enclosures on the commons. In response to concerns expressed by some parties with regard to the proposals for Dunnerdale Fells, the Cumbria Wildlife Trust ('CWT'), the Agent for the applicants, has confirmed that these proposals have been withdrawn. CWT has also confirmed that the projected life span of the fence will accord with the life of the stewardship agreement with Natural England; that is, 10 years.

4. In the light of the removal of the proposed enclosure on Dunnerdale Fell, CWT has also clarified the length of the fencing required for the remaining scheme along with correction of the extent of each remaining enclosure. The application suggested that 1105Ha of Yewdale Fell and 290Ha of Bleaberry Haws was to be enclosed when the actual areas at issue were respectively 183Ha and 190Ha. The total length of fencing proposed for the amended application was 11935 metres which would enclose a total of 629Ha.
5. The concerns expressed by some parties regarding public consultation on the scheme coinciding with the general restrictions imposed in response to the coronavirus pandemic are noted. However, the proposed scheme is associated with an application for Countryside Stewardship and the application requirements have dictated the timing of the section 38 application and consultation. CWT submits that significant pre-application consultation had been carried out with stakeholders between August 2019 and February 2020 such that interested parties are unlikely to have been prejudiced by the restrictions imposed by the response to coronavirus. Responses have been received from a variety of individuals and organisations with an interest in this part of the Lake District which in my view demonstrates that the approach to consultation has been reasonable and appropriate in the prevailing circumstances. Despite the impact of the restrictions imposed since March 2020, I do not consider that anyone's interests in this matter would have been prejudiced.
6. I have had regard to the Department for the Environment, Food and Rural Affairs Common Land Consents Policy Guidance, published in November 2015, which sets out the benefits which common land should deliver, and the outcomes that it considers must be ensured by the consents process. This document has been published for the guidance of both the Planning Inspectorate and applicants. However, the application will be considered on its merits and a determination will depart from the published policy if it appears appropriate to do so. In such cases, the decision will explain why it has departed from the policy.

The Main Issues

7. Section 38 of the 2006 Act provides that a person may apply for consent to carry out restricted works on land registered as common land. Restricted works are any that prevent or impede access over the land, including the erection of fencing. In considering such an application I am required by section 39 of the 2006 Act to have regard to the following:
 - (a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
 - (b) the interests of the neighbourhood;
 - (c) the public interest which includes the interest in nature conservation, the conservation of the landscape, the protection of public rights of access and the protection of archaeological remains and features of historic interest;
 - (d) any other matters considered to be relevant.

Assessment

The interests of those occupying or having rights over the land

8. The application has been made on behalf of the Dunnerdale, Seathwaite and Torver Commoners ('the Commoners') which represents the interests of those with rights over the common. CWT has acted as the Commoners' agent and it is CWT which has responded to the points raised by those who made objections or representations. There are fourteen commoners who currently exercise their right to graze the common; although there are rights of estovers, turbary and pinnel registered, no information has been provided as to whether these rights are exercised or to what extent the exercise of those rights would be affected by the proposals. Those who currently exercise grazing rights over the common have entered into a Countryside Stewardship agreement with Natural England in relation to the management of the common.
9. The works proposed by the Commoners are aimed at reducing grazing pressure on the common through the creation of temporary enclosures from which grazing animals will be excluded in order to promote natural regeneration of moorland fringe trees, flowers and scrub and to allow newly planted trees and shrubs to establish. Entering into a Stewardship agreement will also assist in maintaining a viable agricultural income for the Commoners. It is recognised that communal grazing of the upland fells is of cultural, economic and landscape significance within the Lake District. Given that the active graziers have entered into a scheme which aims to maintain the historic management of the common for the benefit of nature conservation which is dependent upon the creation of fenced enclosures, I consider that the proposed works would not have any adverse effect upon their interests.

Interest of the neighbourhood

10. The 2015 guidance indicates that the issues to be considered in this context include whether or not the proposal will offer a positive benefit to the neighbourhood, whether or not the works would prevent local people from using the common in the way they are used to, and whether or not there would be an interference with the future use and enjoyment of the common, whether by commoners, the public or others. For example, would any fencing sterilise part of the land rendering it inaccessible.

Positive benefit

11. The proposed works seek to facilitate the establishment of wood pasture in six areas of the common to create a mosaic of habitats to encourage invertebrate and bird life on the common and thereby increase biodiversity. As I saw on my site visits, bracken is widespread within the proposed enclosures, and it is within these areas that the commoners seek to re-establish an open mosaic of heath, flowering scrub and mature trees. The scrub woodland is also intended to mitigate flood risk in downstream settlements by slowing the rate of flow from streams and water courses on the common.
12. It is submitted that the deep root structures of woody species would provide greater infiltration of the ground and reduce surface run off in heavy rainfall events in comparison with the dense root pan structures formed by stands of bracken. The canopy of trees and other woody scrub would also intercept rainfall and increase transpiration rates back into the atmosphere.

13. I consider it likely that the proposed planting scheme will, in the fullness of time, help to reduce water run-off from the common into surrounding watercourses and contribute towards flood protection of properties in the immediate area. Although the magnitude of that contribution is not yet known and is likely to require further research and study, I consider this aspect of the scheme is likely to have a positive benefit for both for the neighbourhood and the public.
14. The Stewardship scheme between the Commoners and Natural England is designed to maintain a viable agricultural income for those graziers participating in it. The creation of enclosures by fencing is required to protect the trees and scrub to be planted from stock damage. The current application is for the works to receive consent for a period of 10 years; at the end of that period the works would be removed, unless it was considered necessary to retain the fence for a greater period. In such circumstances, a further application for s38 consent would be required.
15. Although a number of comments were received about the practicalities and feasibility of bracken management on upland sites, vegetation management of this nature is not a restricted activity which requires s38 consent. The control and reduction of the area of the common covered by bracken within the proposed enclosures is likely to be in the interests of the Commoners as it would facilitate the establishment of the trees and shrubs to be planted in addition to extending the quantity of grazable land which would be available at the end of the 10 year life of the scheme.
16. Consideration has been given to whether the desired outcomes could be achieved without the creation of extensive enclosures within the common. The scheme has been designed to create significant areas of scrub woodland and wood pasture whilst using the minimum fencing possible. Although each of the proposed fences is of a substantial length with the shortest being 1500 metres, the enclosures created would retain large areas of open space amongst the low-density planting. The alternative would be to create numerous small enclosures which are likely to be more visually invasive.
17. The Commoners submit that the fence is required to protect new planting from grazing livestock. The removal of grazing stock or a severe reduction in livestock numbers is not considered a viable option as a means of protecting newly planted trees as a balance has to be struck between environmental improvements and sustaining agricultural businesses which rely upon raising livestock on the fells. Grazing could not be removed wholly from the common as it is a traditional means of managing non-woodland habitats and is an important part of the cultural heritage of the Lake District.
18. Consideration has also been given to whether the trees to be planted could be protected solely by tree tubes; however, this would leave them vulnerable to damage from livestock through rubbing, trampling and browsing. The Commoners point out that any planting failures which arose would represent a financial loss to the scheme (in terms of the initial cost of the rootstock and its replacement) and the loss of a growing season before any failed planting can be replaced. It is submitted that delays in the establishment of new tree cover from rubbing, trampling or browsing would render the 10-year projected timescale of the scheme unviable.

19. Given that grazing stock are likely to browse and feed on any new growth which may appear from tree tubes if not otherwise protected, I am satisfied that there is a need to prevent grazing by excluding livestock from those areas to be planted and that the alternative methods considered would not provide the level of protection provided by the proposed fencing.
20. As noted above, the proposed fencing would have a life span of 10 years. CWT submits that the maintenance and eventual removal of the fence will be the responsibility of the Commoners and that internal agreements between them as part of the overall Stewardship agreement provide for the establishment of funds these purposes. It is submitted that the earliest date at which the fence would be removed would be 31 December 2030 as the Stewardship agreement is due to terminate at that date, although it may be that a further s38 application may be considered if continued protection for the trees planted as part of the scheme is considered necessary.
21. Although details of the proposed maintenance and 'sink' funds are sparse, I consider that as the agri-environment payments under the Stewardship scheme would lapse on the expiry of the scheme, it would be in the commoner's interests to expeditiously remove the fencing in order to maximise the grazing available to their livestock. Concerns were also expressed about the removal of tree tubes used to protect new stock from predation by rabbits and other mammals as such tubes had the potential to blight the landscape for many years. Although not part of the s38 consent scheme, CWT submits that removal of tree tubes will be part of an internal agreement between the commoners in the same vein as that for the removal of the fencing at the end of the Stewardship scheme.
22. I consider that the proposed works are unlikely to have any adverse impact upon how the common is used by those persons resident in the neighbourhood. The common is predominantly moorland comprising upland acid grassland, scrub, mires and open water. The common is open access land and is also crossed by numerous public rights of way. It is proposed to maintain access for pedestrians and equestrians by the erection of gates where the fences would cross definitive public rights of way and on evident desire line routes with stiles being placed at 200 metre intervals in otherwise unbroken sections of fence to ensure continued access to all parts of the common.
23. The Commoners have consulted with parish councils, the Lake District National Park Authority ('LDNPA'), Natural England, Historic England, the Open Spaces Society, the Cumbria & Lake District Local Access Forum and other national bodies with regard to the most appropriate locations for access points into the enclosures which will be created by the fencing scheme. In the light of comments made in response to the formal consultation on the application, the applicant has accepted that any gates and stiles erected should be to BS5709 and has agreed to the substitution of a stile with a gate on the ridge walk between Raven's Crag and Fox Haw at SD 22382 93391¹.
24. I consider it unlikely that the proposed works would have a significant adverse effect upon the ability of residents in the neighbourhood to enjoy the area for informal outdoor recreation or that the interests of the neighbourhood would be unduly harmed by the proposals.

¹ See the appended revised plans

The public interest

The protection of public rights of access

25. In relation to public rights of way, the preferred means of access through any boundary is a gap. In the absence of the possibility of a gap (because of the need for stock control) a gate is preferable to a stile in the light of the requirements of the Equality Act 2010.
26. As noted above, the proposed works include the provision of gates at all points where the proposed fence lines will cross public footpaths and bridleways. The gates to be provided will comply with the current British Standard (BS5709:2018) and are the least restrictive option given the requirement to exclude livestock from those parts of the common in which tree and shrub planting is proposed. Access into and through the proposed enclosures along existing public rights of way would be maintained; I consider that the proposed works would not unduly restrict access to the common on foot or on horseback.
27. There was a lack of clarity in the application as to what 'a 10m buffer' meant in relation to tree planting near public rights of way, scheduled and non-scheduled ancient monuments and water abstraction points. CWT has clarified that this means that trees will not be planted within 10m of either side of a public right of way or within a 10m radius of any scheduled or non-scheduled ancient monuments or water abstraction point. CWT has also stated that advice will be taken from the LDNPA Archaeological Officer regarding tree planting on or around archaeological sites. Although tree planting is not a matter which requires s38 consent, the proposals would not appear to present any adverse impact upon the public's ability to access the common.
28. The common is also registered as Open Access Land under the Countryside and Rights of Way Act 2000 and the proposed fences will run through that access land. As noted above, provision has been made for access into the proposed enclosures along public rights of way. It was evident from my site visits that in addition to the definitive footpaths and bridleways over the common, there were a number of 'desire line' routes which gave access to those areas proposed to be enclosed. Whilst some of these routes may have been created by human traffic, equally some routes may have been created, and primarily used, by grazing livestock.
29. Where there are visible informal footpaths leading into the proposed enclosures, the Commoners propose to erect pedestrian gates to BS5709. Gates will also be erected at 11 other locations which were identified by respondents as being on well used informal access paths. The Commoners also propose to install stiles at 200 metre spacings on all other unbroken fence lines to maintain access, with the option to install further gates or stiles if additional access points are identified during the construction phase.
30. Taking all these matters into account, I consider that the proposed works would not unduly restrict the public's ability to exercise access rights over the common on foot.

Nature conservation

31. In responding to the proposal, Natural England submits that high intensity grazing of upland sites has prevented natural regeneration of trees and scrub over the common with a resultant loss of invertebrate and bird species, an

increase in bracken coverage and poor water management affecting the Coniston and Crake catchments. Natural England is of the view that the exclusion of sheep from the proposed enclosures will allow the restoration and regeneration of wood pasture previously found on the fell slopes.

32. The creation of scrub and wood pasture has the potential to extend the habitat available to those invertebrate and avian species which inhabit woodland edge and scrub habitats. It is noted that in some of the more inaccessible gills on the common there are existing stands of trees and there are isolated trees and small areas of scrub located on other parts of the common. The proposals for low-density planting of trees and scrub regeneration will assist in providing a suitable habitat for those species already present on the common which utilise its existing woodland and scrub edges. Reduced grazing pressure is also likely to assist those plants already present within the proposed enclosures to expand their existing cover.
33. I consider that there will be an increase in the nature conservation value of the common as an indirect result of the proposed works. The fencing of the proposed enclosures and the resulting temporary exclusion of grazing will allow for the establishment of trees and scrub on the common, which will lead to the wider environmental and conservation benefits described by Natural England and supported by the Commoners.

Conservation of the landscape

34. The proposed enclosures lie within the Lake District National Park which was inscribed as an evolved and continuing cultural landscape World Heritage Site ('WHS') in July 2017. The attributes of the Lake District which are of Outstanding Universal Value ('OUV') are its landscape shaped by its persistent agro-pastoral traditions which give it special character; a landscape which has inspired artistic and literary movements and generated ideas about landscape which have been of global influence; and a landscape which has been a catalyst for key developments in the national and international protection of landscapes.
35. A Heritage Impact Assessment ('HIA') has been submitted which considers the scale of change introduced into the landscape by the proposed works and the significance of the effect of that change on the three attributes of OUV which gave rise to the designation of the Lake District as a WHS. The HIA notes that the proposed fencing would represent a minor change to the agro-pastoral landscape in that there would be a temporary loss of some grazing land, but that the proposal would not impact upon the hefting instinct of livestock or the sustainable farming tradition practiced on the common. The HIA concludes that the impact of the proposed scheme on the agro-pastoral attribute of OUV of the WHS would be negligible and the overall impact would be slight.
36. As regards the landscape which has influenced artists and writers such as Wordsworth, Ruskin and Ransome, the HIA notes that care will be required to ensure that the proposed fencing does not destroy or obstruct views currently celebrated in literature which assist walkers in the appreciation of the landscape. Although the proposed fencing would cause some loss of amenity, it is temporary and the planting it is designed to give temporary protection to is on the lower slopes of the fell and would not therefore obscure the rocky outcrops of the higher peaks noted in past literature. The HIA concludes that

- the proposed works would represent a negligible change with a slight significance on the landscape in terms of its artistic and literary associations.
37. The HIA recognises that the Stewardship scheme being entered into by the Commoners supports the actively grazed landscape of the common by retaining year round grazing albeit with temporary restrictions on parts of the common and contributes towards the continuing conservation of the agro-pastoral landscape for which the Lake District is noted. The HIA also notes that the proposed fencing has been designed to avoid the fell tops and ridges where the experience of openness and wildness described in past literature would be retained. Overall, the scale of change upon the landscape as a catalyst for landscape protection would be negligible to minor of only slight to moderate significance.
38. The immediate visual impact of the fences may be greater in some parts of the common than others, for example adjacent to the footpath leading north from Walna Scar Road toward Stubthwaite Moss or adjacent to the road running parallel to Yewdale Beck. However, the visual impact on the landscape of the proposed fencing will be minimised by using post and wire and the fencing will be positioned where it is least visually intrusive. Clearly there will be a greater visual impact when close to the fences although the height should generally mean that people will have a view over the top of them.
39. Whilst the introduction of fencing may result in adverse impacts upon the landscape of the lower part of the common, these impacts would be temporary and limited to 10 years. The smallest of the proposed enclosures (Levers Moss) would be 30Ha with the largest (Bleaberry Haws) being 190Ha. Consequently, the generally 'open' character of these parts of the common would be retained for anyone accessing these enclosures through any of the proposed access points and the experience of openness and wildness described in past literature would be retained. The fencing will be positioned in natural gullies and depressions to avoid skylines and ridge tops following the contours of the land to minimise the visual impact.
40. Taking account of the overall purpose of the works and the intended outcomes which would flow from the erection of a temporary fences I consider that whilst there will be a visual impact arising from the fences and gates, this will be for a limited period in landscape terms. I am satisfied that the short-term visual impact is outweighed by the long-term conservation and flood risk management objectives of the scheme, which will deliver landscape improvements over a much longer period and assist in maintaining and enhancing the agro-pastoral landscape for which the Lake District WHS is celebrated.

Protection of archaeological remains and features of historic interest

41. The Dyke, Cairns and Circle on Bleaberry Haws is the only Scheduled Ancient Monument ('SAM') within the proposed enclosures. CWT submits that the proposed fencing at Bleaberry Haws has been aligned to avoid interference with the SAM.
42. The HIA notes that there are 70 other recorded heritage assets that lie within the proposed enclosures and considers that there is a risk of harm from tree planting to archaeological remains at Penny Rigg Mill and Tilberthwaite Mine (enclosure 7 on Coniston Moor) and suggests appropriate mitigation. As noted

above, tree planting will not take place within a 10m radius of any SAM or any non-scheduled monument. The proposed fence around enclosure 7 does not appear to directly impact upon these features although appropriate mitigation should be taken to prevent any potential disturbance or unnecessary damage.

43. I am satisfied that the proposed works would not harm any archaeological remains or features of historic interest.

Other matters

44. One objector raised concerns about the impact of the works upon the future viability of Herwick sheep hefting on the common and on the ability of graziers to manage their flocks. Whilst this may be a valid concern, the Stewardship scheme entered into by the Commoners has been devised to work alongside their existing hefting practice. Once the fence is removed, existing flocks will once more be able to graze the proposed enclosures. I am not persuaded that granting consent to this application will have an adverse impact upon the hefting of Herwick sheep on the common.

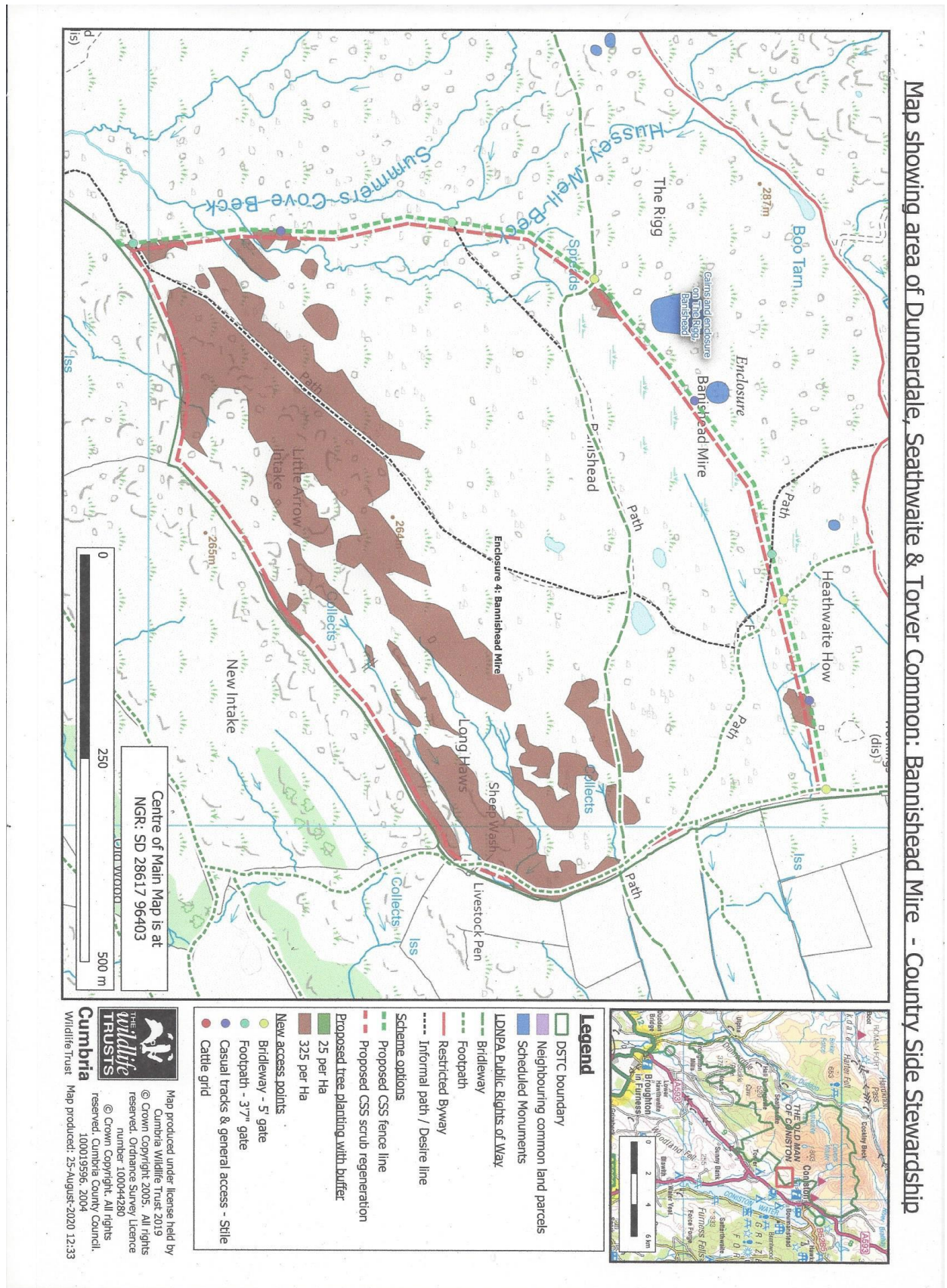
Conclusions

45. Having regard to the interests set out in paragraph 7 above, I find that the works would not adversely affect those interests and that it is expedient that consent for the works should be given.
46. For the purposes of identification only, the locations of the works are shown on the appended plans.

Alan Beckett

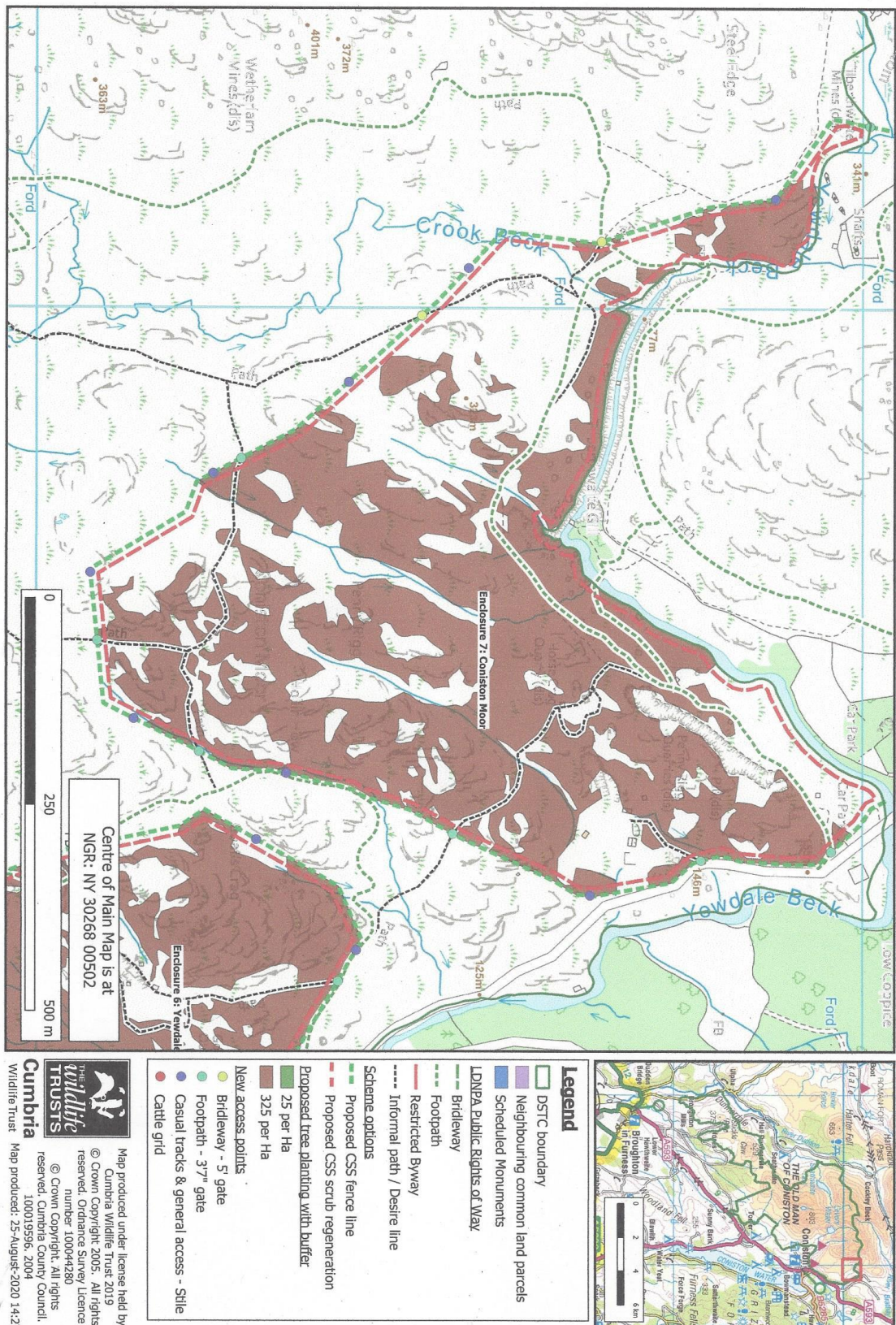
Inspector

APPENDIX – revised application plans

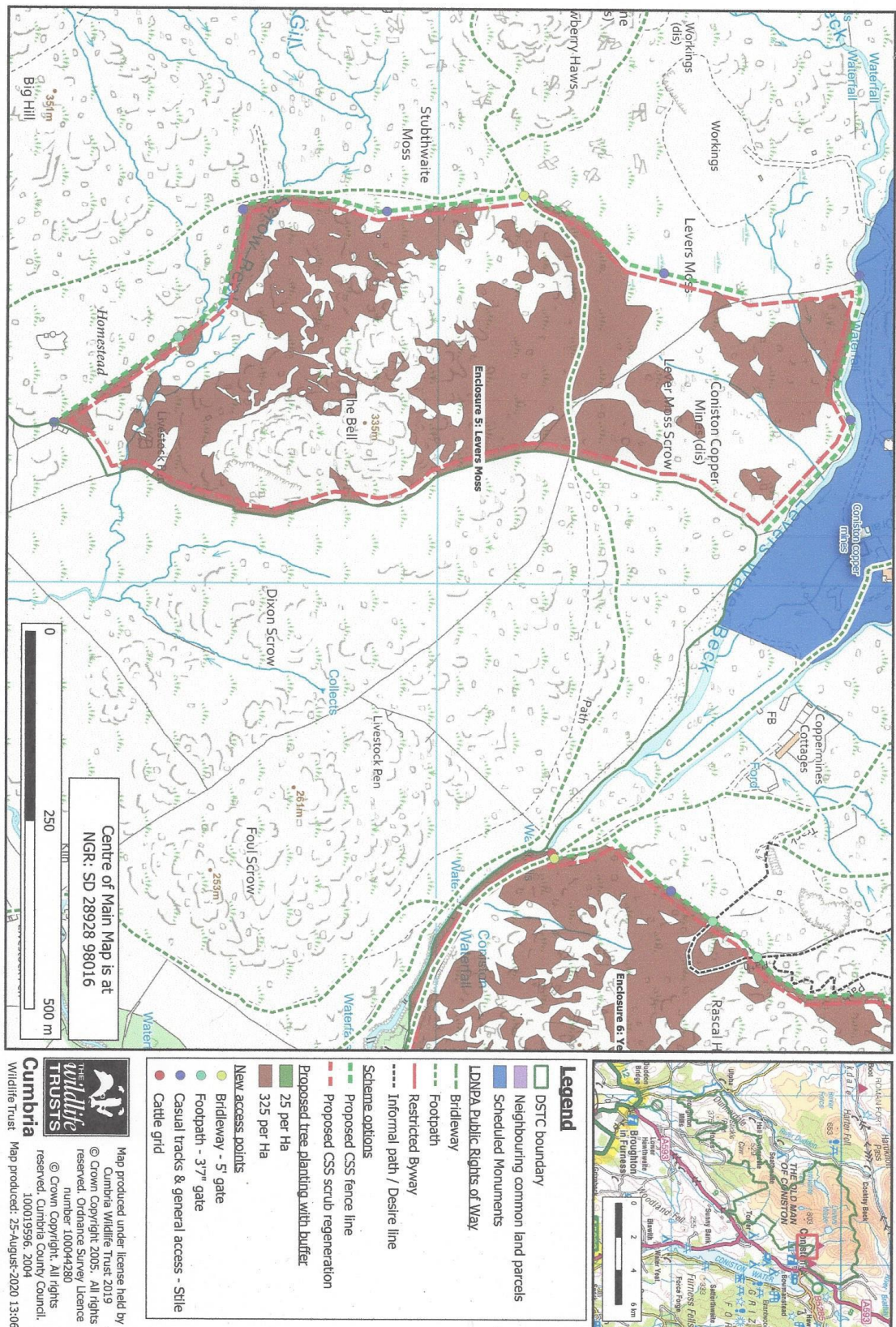




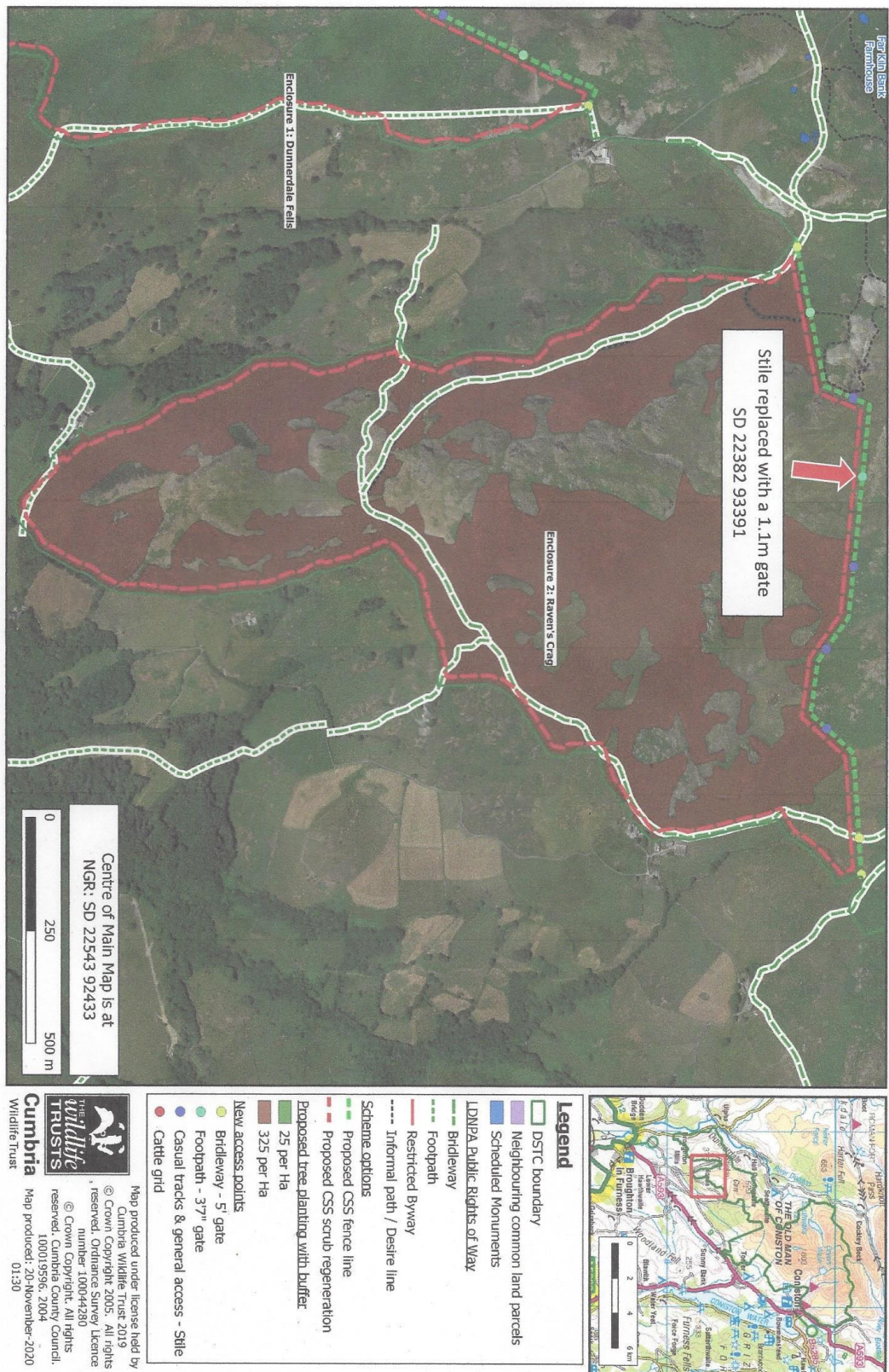
Map showing area of Dinnerdale, Seathwaite & Torver Common: Coniston Moor - Country Side Stewardship Proposals.



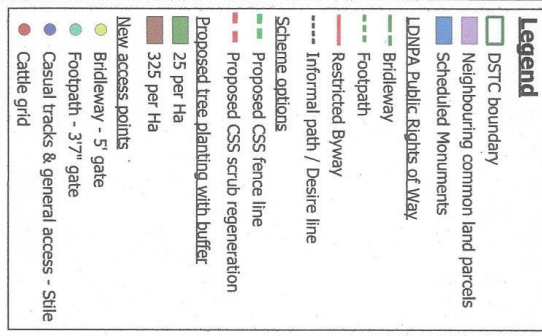
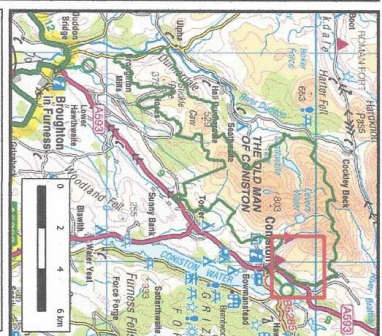
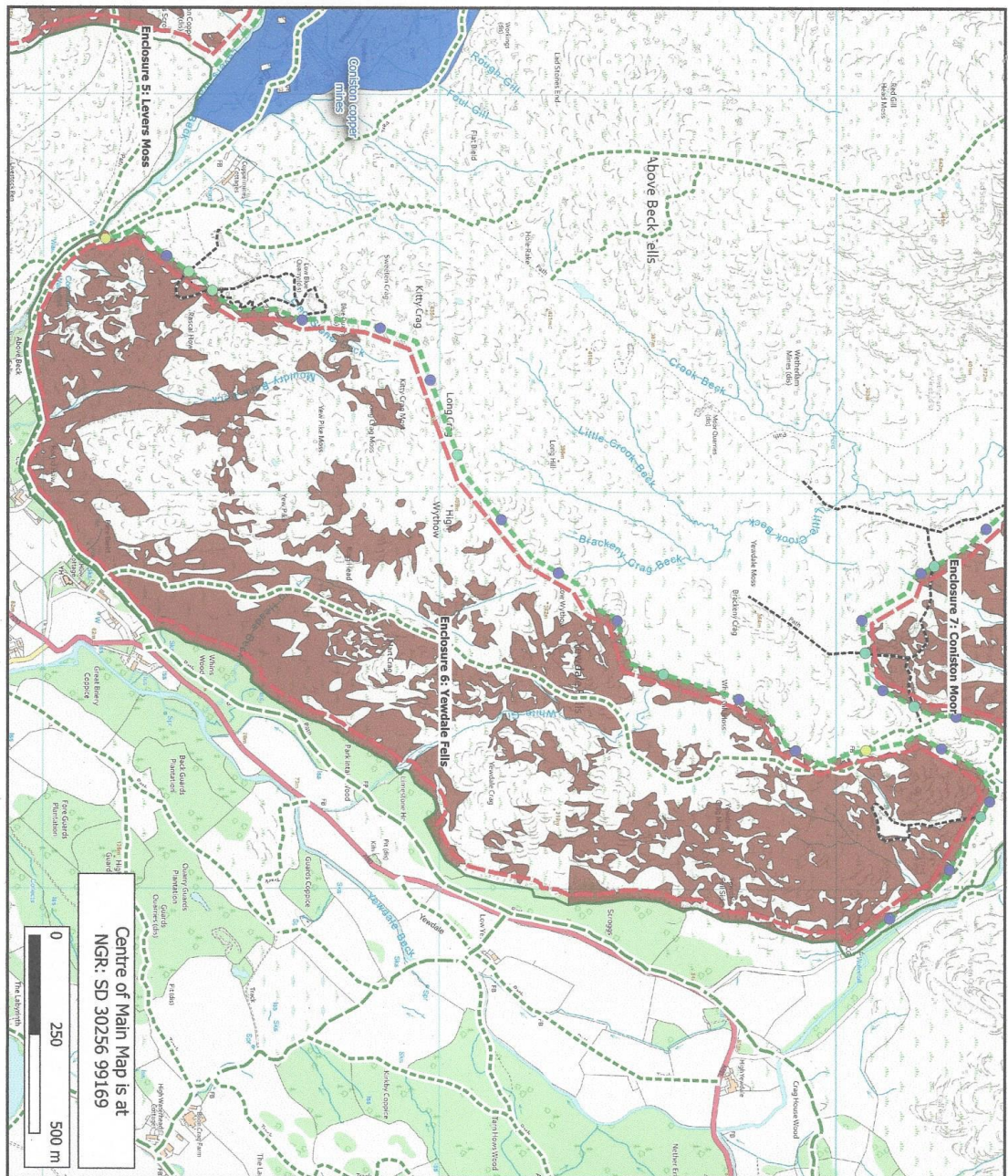
Map showing area of Dunnerdale, Seathwaite & Torver Common: Levers Moss - Country Side Stewardship Proposals.



Map showing area of Dunnerdale, Seathwaite & Torver Common: Ravens Crag - Country Side Stewardship Proposals.



Map showing area of Dunnerdale, Seathwaite & Torver Common: Yewdale Fells - Country Side Stewardship Proposals.



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