

Modern commons: a protected open space? By Kate Ashbrook, general secretary, Open Spaces Society

On the night of 6 March 1866, under the aegis of the newly-formed Commons Preservation Society (now the Open Spaces Society), 120 navvies took a special train to Tring Station and trudged in the moonlight the three miles from Berkhamsted Common (30 miles NW of London), armed with hammers, chisels and crowbars. They felled to the ground two miles of iron railings.

Berkhamsted Common originally belonged to Crown but then was leased to owners of the adjoining Ashridge estate, with reservation of commoners' rights.

Ashridge came into possession of Lord Brownlow whose trustees wanted the common as an addition to Ashridge Park. His trustees tried to buy out the commoners. The inhabitants of nearby Berkhamsted had for centuries enjoyed rights to gather fern and gorse. The trustees offered them exchange land near the town, but people objected and, before this could be agreed (if it was ever going to be), the trustees erected five-foot-high iron fences with seven horizontal rails in two lines across the common, inclosing 434 acres, with no openings.



Berkhamsted Common

There were remonstrations in the columns of *The Times*, Brownlow's solicitors arguing in response that 'the public has no more right to pass over the common than a stranger has to pass through a commoner's private garden.'

Advice was sought from the Commons Preservation Society (CPS). To resolve this it needed a person with common rights and a long purse. Augustus Smith, known as Lord of Scilly and an MP in Cornwall, was a suitable candidate. In the House of Commons he had distinguished himself by annually asserting the rights of the public against the claims of the crown and Duchy to ownership of foreshore of the sea coasts.

Lord Eversley, chairman of the CPS, induced him to take up the cause and to employ Mr P H Lawrence, solicitor to the society. And so the counter assault on the common was arranged.



Lord Eversley, president of the Commons Preservation Society

The aforementioned navvies took the train to Tring. The plan nearly miscarried because the contractor had sublet the job to another; the two met at Euston station and drank too much. Fortunately, Mr Lawrence's confidential clerk took the lead though this was clearly outside his normal duties.

By 6am the whole of the two-mile-long fence had been levelled to the ground. The navvies were careful to avoid being accused of criminal damage. At 7am the alarm was given and when Lord Brownlow's agent arrived he found the fencing was felled. Soon after, local people flocked in. Lord Brownlow took action against Augustus Smith and the court case lasted until 1870 when it ended with the complete vindication of Smith.

This was the first piece of direct action undertaken by the Commons Preservation Society in defence of common land and rights there. The event shows that the society in its earliest years was concerned about the rights of the public as well as those of the commoners. It demonstrates the need to be vigilant, and that these battles need determination and usually money too.

Agriculture and survival

In England and Wales commons were originally used for agricultural purposes, and people depended on them for survival. Although we lost millions of acres of common during the inclosures, we are lucky that our remaining commons are now defined on maps and have laws to protect them, although both are imperfect. Other countries are not so fortunate. The term 'common' in an international context means 'shared resource' and is much wider than our commons, though ours are recognised as the first. So commons globally include land, the seas, the air, the internet and information (Wikipedia is a common).

In many nations, commons in the broad sense are crucial for the survival of populations—India, Mongolia, Nepal, Uganda, Kenya, Japan, for instance.

The [Foundation for Ecological Security](#) in India has provided the following information.

- The commons are estimated to cover from 48.69 to 84.2 million hectares, constituting 15% to more than 25% of the total area of country.

- 84-100% of rural poor depend on commons for fuel, fodder and food.
- In arid, semi-arid and sub-humid regions, contribution of commons to household incomes ranges from 20 to 40% of the household's annual incomes.
- Commons are a safety net and the base for agricultural and livestock production systems.

This sounds like the commons of England and Wales before the inclosures. Many countries are facing now the effects of the inclosure movement which we suffered two to three hundred years ago: the theft of the commons by governments, developers and modernisers, with loss of the traditional way of life, loss of the gene pools which enable the animals to withstand disease, loss of native dialects. All these are commons.



Pastoralism in India

A great debate in commons theory was started in 1968 by Garrett Hardin in his *Tragedy of the Commons* (using the metaphor of a grazing common when writing about population growth) in which he argued that resources which are jointly owned are over exploited. [Lin Ostrom](#) countered that this was not necessarily so and that people work together for the common good. Collective action and community involvement are essential to the survival of commons, a view the [Open Spaces Society](#) among many others, subscribes to today.

End of the inclosures

Our commons were largely agricultural until the end of the inclosures. The repeal of Corn Laws enabled corn to be imported which led to reduced pressure on the commons for agriculture. This broadly coincided with migration to the industrialised towns, use of open spaces for recreation, and the threat of development.

And so the CPS was born and its early victories included saving Wimbledon Common and Hampstead Heath from development. [Robert Hunter](#), the centenary of whose death we mark this year, was our solicitor (as well as founder of the National Trust) and he fought resolutely for the common and for commoners.

For example, the Willingale family insisted on exercising their rights to lop firewood in parts of Epping forest which had been illegally enclosed in 1865 by the Lord of Manor of Loughton, the Rev William Whitaker Maitland. Thomas Willingale was wrongly imprisoned. The CPS brought a lawsuit and in 1874 Maitland was ordered to remove the fences.



Thomas Willingale

From the mid-nineteenth century onwards, commons legislation was increasingly focused on the public and recreation.

The **Metropolitan Commons Act 1866** prevented inclosure within Metropolitan Police District (a radius of 24 km from Charing Cross).

The **Commons Act 1876** was to facilitate management, often with public rights of access. It defined the benefit of neighbourhood as *the health, comfort and convenience of the inhabitants of any cities, towns or villages or populous places in or near any parish in which the land ... may be situate*.

The **Commons Act 1899** allowed local authorities to make schemes and give local people rights to enjoy the commons.

The **Law of Property Act 1925, section 193** gave rights to the public to walk and ride on commons in urban districts, and those with deeds of access.

Section 194 of that act set out the process for obtaining consent for works on commons, and it repeated the term 'benefit of neighbourhood' as something which must be taken into account. Still though, there was no right to walk on all commons, and commons were not defined on maps.

The **Royal Commission on Common Land** in 1958 recommended registration of all commons, with regimes for access and management.

There are many fine quotes in that document. Here is one: *The recognition of a universal right of public access on common land is a guarantee of the continued inviolability of the land.*

This report led to the **Commons Registration Act 1965** but it only allowed three years for registration after which it was too late. In the scramble to get land registered some was

recorded which was not common and much was not recorded which should have been. We still suffer from the errors which were made then.



Carn Galva Common, Penwith, Cornwall, omitted from original registration and only recently registered

There was a long hiatus during which the Open Spaces Society, [Ramblers](#) and others lobbied for action. At last this led to the [Common Land Forum](#), a gathering of all the interests in commons under the stately and intelligent chairmanship of Maurice Mendoza. Its 1986 report recommended access and management for all commons, with a distinction between agricultural and recreational commons, and sorting out the registration mess. The Conservative government had said that if the forum reached agreement it would seriously consider legislation. Ministers probably thought we wouldn't agree—we did, and then they did nothing. There followed a decade of broken promises.

In fact, it wasn't until we got a Labour government that we did at last get the right to walk on all commons which did not already have access: the [Countryside and Rights of Way Act 2000](#).

Milestone

This was a magnificent milestone in the long history of commons. They are of immense public interest, for their landscape, archaeology, wildlife and recreational opportunities, it is only right that we should have the right to enjoy them.

The [Commons Act 2006](#) included further measures reflecting the public interest in commons. Its [section 38](#) clarifies the law on works, making it clear what can and can't be done. It makes it a legal requirement to notify the Open Spaces Society of applications for works.

[Part 1](#) of the act provides for a limited reopening of the registers, to correct errors, giving certainty about common-land boundaries and, where land is added, giving the public the right to walk and perhaps to ride there. Part 1 has only been implemented in seven registration authority areas. Six years on we are still waiting for government to implement this fully.

Despite the wealth of protective legislation on commons, there are still many threats, mostly from contemporary ways of life.

Commons suffer from encroachments, neighbours filch bits into their gardens or dump rubbish or grass cuttings there. We have examples of buildings, car-parks, builders' yard, Christmas trees, pub seating, all unlawfully on common land. Many are littered with old fencing.



Unlawful encroachments at Shortheath Common, Hampshire

No one has a duty to deal with encroachments. During the passage of the Commons Act 2006 the Open Spaces Society argued, unsuccessfully, that local authorities should have such a duty, just as they have a duty to prevent the obstruction of public paths.

In the absence of legislation, the society suggests a number of remedies.

County and unitary authorities should appoint a **commons enforcement officer** who will be responsible for taking action against unlawful works or encroachments on common land. Where there is two-tier government, there should be an **agreement between authorities** as to which will be responsible—it is too easy to pass the buck. **Planning authorities** should check if land is registered as a common before they consider the application and, if they do give permission, they should inform the applicant of his responsibility to obtain common-land consent under section 38 of the Commons Act 2006 before proceeding. Communities should regularly **check the boundaries of their local commons**—they could revive the tradition of beating the bounds on Rogation Sunday for instance—and report any encroachments to the authority. **Publicity** for encroachments—naming and shaming often has results.



Beating the bounds, Penketh, Cheshire

While we have the right to walk on all commons and to ride on many, we can't always exercise it, because the land is submerged in scrub or there are no access points.



Scrub hides the defences of the castle at Totterhoe Knolls, Bedfordshire

Unfortunately land managers can be too ready to introduce grazing on the land, for good biodiversity reasons, but then they want to fence it. The Open Spaces Society is unhappy about fencing for many reasons: the inclosures scar the history of commons, they lurk in our collective memory, fencing symbolises the struggle between oppressed locals and powerful landowners, it divorces commons from their communities, it's a physical and psychological barrier and impinges on the landscape. We see fencing as a last resort.

Stock and speeding traffic do not mix of course, but we should not sacrifice our commons to the car. It would be much better to have a universal 40-mph speed limit on all unfenced roads across commons.



Cattle grids and slowed traffic at Litcham Common, Norfolk, have enabled the fences to be removed. Photo: Tim Angell

When managing a common, it is crucial to bring people together genuinely to find out what is important to them, how they use the common. Community involvement is essential.

Managers should follow the step-by-step guidance in [A Common Purpose](#) and the Open Spaces Society's [Finding Common Ground](#). Start with a blank sheet of paper and genuinely find out what people value about the common.

People's memories are important too. It's good that the Contested Commons project included this (see [here](#)). The Japanese *kikigaki* project which I wrote about [here](#) is impressive. I wish our schools had a programme whereby students talk to old people and gather their memories.

Land managers would do well to start with an open day where all this information can be gleaned and people swap stories.

So this is what we'd like to see happen, to improve the lot of our unique commons.

- The English and Welsh governments fully to implement part 1 of the Commons Act 2006, to give certainty about the boundaries, and restore access rights on lost commons. All interests want this to happen.
- Local authorities to have a legal duty to deal with unlawful encroachments
- A 40-mph speed limit on all unfenced roads across commons.
- The governments in England and Wales truly to recognise the multi-value of commons, so that all policies take account of them.
- All land managers to embrace the community in plans for the commons.

Unless our unique commons are treasured and protected we may need to summon the navvies to march again.