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## Order Decision

Inquiry held on 2 April 2019

Site visit made on 1 April 2019

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 15 May 2019**

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### Order Ref: ROW/3199173

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Lake District National Park Authority Definitive Map Modification Order 2017 Restricted Byway 348043 along the public road C3033, Mosedale and Carrhead Ford, Mungrisdale Parish.
- The Order is dated 31 October 2017 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway and upgrading part of a Footpath to Restricted Byway as shown in the Order plan and described in the Order Schedule.
- There were 3 objections outstanding at the commencement of the inquiry.

### Summary of Decision: The Order is confirmed

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#### Procedural Matters

1. This case concerns the proposed addition of a Restricted Byway (points B-C-D on the Order plan) and the upgrading to Restricted Byway of parts of Footpath 348002 (A-B and D-E-F-G) over the public road C3033 from Mosedale north-eastwards to the Berrier/Hesket Newmarket road, via Carrhead Ford.

#### The Main Issues

2. The Order, made under the Wildlife and Countryside Act 1981 ('the 1981 Act'), requires me to consider whether, on a balance of probability, a Restricted Byway subsists (Section 53(3)(c)(i)), and parts of the existing public footpath ought to be shown as a Restricted Byway (Section 53(3)(c)(ii)), and that the Definitive Map and Statement ('DMS') requires modification as a result.
3. The Lake District National Park Authority ('LDNPA'), the Green Lanes Environmental Action Movement ('GLEAM') and other interested parties, maintain that, further to the Natural Environment and Rural Communities Act 2006 ('the 2006 Act'), this is the correct status. However, those individuals opposing the Order contend the Order route should be recorded as a Byway Open to All Traffic ('Byway').
4. Accordingly, I need to examine the evidence to establish whether a public right of way for vehicles exists along the Order route. If so, I shall consider whether one or more of the exceptions set out in Section 67 of the 2006 Act applies and rights for mechanically propelled vehicles ('MPVs') have been saved, in which case, the Order route may be recorded as a Byway. If none apply, then it must be recorded as a Restricted Byway. Reliance is placed on subsection 67(2)(a), known as the 'user test', whereby public rights for motor vehicles will have been saved if the main lawful use of the way by the public during the 5 years

ending on 2 May 2006<sup>1</sup> was by MPVs. I shall consider the balance of user - use by MPVs on the one hand and use by pedestrians, cyclists, horse riders and horse and carriage or cart on the other, for the period 2001 to 2006 ('the relevant period').

5. Reference is also made to subsection 67(2)(b) which exempts ways not recorded in the DMS but which are recorded on the List of Streets ('LoS'), of highways maintainable at public expense; and subsection 67(2)(e) which preserves public rights of way for MPVs established before 1 December 1930 when it became an offence to drive a motor vehicle 'off-road'.
6. In this case, both documentary and user evidence has been adduced. Subsection 32 of the Highways Act 1980 requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.

## **Reasons**

### *Documentary evidence*

7. The earliest document available, dated 1770-71, is Thomas Donald's County Map of Cumberland. When orientated with later Ordnance Survey ('OS') mapping, it shows a route in the position of the Order route (A-F) with the pre-inclosure section east of the river taking a more northerly alignment.
8. In 1796 a public carriage road was set out to the ford at the then parish boundary (points F-G), by the Greystoke Inclosure Award. Both it and the Inclosure Map indicate this route continued to Mosedale. I find this evidence when taken together with the 1770-71 Map quite persuasive that the remainder of the route to Mosedale enjoyed the same status as the public carriage road set out. The whole route appears on Greenwood's County Map of 1823 as a 'cross road', although what was meant by this term is not clear. However, many routes so depicted correlate with today's modern road network, and it is consistent with the Inclosure evidence.
9. The Tithe Map of 1847 covering F-G shows the Order route coloured in like manner to the connecting route which is now a public road. Its annotation 'to Mosedale' again suggests a public status, although it was not the purpose of Tithe Maps to show public roads, but it is consistent with the Inclosure evidence. By contrast, the corresponding Tithe Map of 1852 depicting the remainder of the Order route shows part, west of the ford, was subject to tithe, in private ownership and described as 'Road'.
10. The route's physical features are seen in OS mapping from 1861 with the Book of Reference accompanying the 25-inch OS Map recording it as a 'Public Road'. Since the surveyors distinguished between public and occupation roads this provides evidence of its public reputation at the time it was mapped. Also, 'Guide Posts' marked at either end of the Order route suggest it enjoyed the same status as the routes to which it connected (now public roads). Finance Act (1910) mapping is incomplete with only the eastern section of the route available. It is excluded from adjoining land parcels to the ford (F-G), which often indicates a public highway, normally but not necessarily vehicular. To the west it lay within Mosedale Common, but further records here are missing.

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<sup>1</sup> The commencement date of the 2006 Act

11. Various commercial maps dating between 1818 and c1936 show the Order route's alignment to a greater or lesser degree of accuracy: some do not show it at all. Where shown, it was part of the minor highway network and in some cases the main route across the valley, pre-dating and/or more significant than the present road which crosses the valley to Low Mill to the south. Whilst these maps are not determinative of the Order route's status, they weigh in the balance with other evidence which supports a public vehicular status.
12. The LoS records it as a C-road therefore considered to have some importance as a highway although it was unsealed. During the production of the DMS, the Parish Council (in 1951) claimed a public footpath including most of the Order route's length. The Parish Survey Card referred to a footpath and bridleway, although the latter was crossed through. It was described as metalled and in fair condition with a footbridge (at the ford), the owner recorded as 'Cumbria County Council'. It appeared on the Draft and Provisional Definitive Maps with a slight change in alignment at its southern end, then subsequently on the DMS, largely as a public footpath. A 1966 OS map shows it gated. At some unknown date, possibly during the 1960s or 1970s, Highway Authority roads signs were installed at either end indicating it was unsuitable for motor vehicles, implying it was considered to enjoy public vehicular rights at that time.
13. With the exception of the Inclosure Award, the evidence is not conclusive as to status, however, when taken together, on balance I am satisfied the Order route is an ancient public vehicular highway, albeit one that seems to have declined in importance latterly. I turn next to consider whether those rights have been lost or saved as a result of the 2006 Act.

*The 2006 Act*

14. The 2006 Act extinguished existing public rights of way for MPVs over ways which immediately before 1 May 2006 were not shown in the DMS, or were shown only as a footpath, bridleway or restricted byway, unless saved by one of the exceptions.

Subsection 67(2)(a)

15. This requires more use by MPVs to be demonstrated than by non-MPVs. Evidence of use is available from members of the public and from adjoining landowners. Non-MPV reported use by individuals was on foot, with a horse, by bicycle and by horse and carriage. With periods dating back to the 1960s, frequency of use varied from once or twice a year to several times a week or month. Those providing this evidence had observed such use by others.
16. Some of these witnesses had also seen use by motorised vehicles including occasional farm/agricultural vehicles and fishermen accessing the river by car. Three people provided actual evidence of use by MPVs as a through route over periods dating back to 1996. Sometimes they had driven the route alone, sometimes with other vehicles as a group. None had encountered other types of use, although one commented on vehicles associated with the hunt and game shooting, and another, agricultural vehicles. In addition are 2 user evidence forms indicating use twice and occasionally, and 3 references to use from user group websites during the relevant period with frequency varying from 'many times', to 'regularly', or 'several times a year'.

17. Landowners and tenants had observed use mainly on foot, bicycles and occasionally on horseback, with foot and bicycle use predominant during the relevant period<sup>2</sup>. Their own use with vehicles was to access adjacent fields up to and on a daily basis, rather than of the way as a through route. There is no evidence of any easements or other references in their deeds to the existence of private rights reserved for them over the Order route. Nor is there anything to support the view that landowners had acquired an easement long before the Order route acquired public vehicular rights. Accordingly, I consider it more likely than not that their use was in a public rather than a private capacity.
18. Both the LDNPA and GLEAM provided figures for the relevant period based on their analysis of the number of reported uses and/or likely uses made by the various categories of user in the totality of the evidence adduced. However, a number of factors must be taken into account - for example, not all landowners visited their fields daily with a vehicle; use patterns differed during the relevant period compared to before or since in some cases; farming activities varied over the course of the year and the need to visit the land changed accordingly; some Bed and Breakfast clients walked only as far as the ford and back, others used the route as part of a circular walk, some may not have used it at all; occupancy and thus use by other holiday accommodation-based clients' was not year round or at full capacity throughout the season; users on horse, bicycle or with a vehicle took less time to pass along the route than those on foot so may have not have observed other types of use as often, or at all.
19. The route's surface is metalled with a central grass strip varying in extent. The surface is not overgrown, although how much maintenance takes place is not indicated, other than reputedly by one landowner. Nevertheless, its appearance suggests regular use, some undoubtedly due to use by vehicles. However, witnesses reported seeing little evidence of, for example, tyre tracks at the ford, suggesting most vehicular use was not as a through route.
20. Defra guidance<sup>3</sup> provides that the onus of proof in such cases rests with those who allege this exemption applies. It may be that some users with MPVs were discouraged from using the Order route by the signage at either end. There may be evidence of use which, for a variety of reasons, it has not been possible to adduce, by both MPV and non-MPV users. Equally, much of the evidence provided cannot be accurately quantified, so some may be a best guess. Nevertheless, I must reach my decision on the basis of the evidence before me. Taking the evidence as a whole over the relevant period I conclude that use by non-MPVs exceeds that by MPVs even allowing for the highest possible figures for MPV use and the lowest for non-MPV use. I therefore find that the main lawful use of the Order route as a whole for the period 2001 to 2006 was by non-MPVs and it follows that MPV rights are not saved by this exception.

Subsection 67(2)(b)

21. The right of the public to use sections A-B and D-G of the Order route with MPVs has been lost further to the 2006 Act, since they are already recorded in the DMS as a public footpath. The remainder of the route, points B-D, is, however, recorded on the Highway Authority's LoS and not in the DMS. Accordingly, MPV rights over this section will have been saved.

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<sup>2</sup> As supported by the oral evidence of witnesses at the Inquiry

<sup>3</sup> Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways A guide for local authorities, enforcement agencies, rights of way users and practitioners (version 5 – May 2008)

22. However, this would provide a Byway that could not be accessed by motor vehicles, since either end would be a Restricted Byway over which MPV use would be unlawful. The LDNPA cited caselaw<sup>4</sup> in support of the view that as the higher rights have been stopped up at either end as a result of the 2006 Act, this had the effect of stopping up the rights over the middle section. I agree that these cases provide that a highway cannot exist in law unless the public has a legal right to access it. It seems to me that the principle can be applied, in this case, to the status of the highway. It follows in my view that Byway rights (B-D) will have been stopped up as there is no lawful access for MPVs over the Restricted Byway sections.

#### Subsection 67(2)(e)

23. For this subsection to apply, a right of way for MPVs must have been created as a result of their use before 1 December 1930. However, it does not engage where pre-1930 use relied on an earlier creation of vehicular rights through non-MPV use. In this case the Order route has existed since the 18<sup>th</sup> Century and was therefore initially used by horse and carriage or cart, only later being used by motor vehicles following their invention.

#### The remaining exceptions

24. For completeness, I have considered subsections 67(2)(c) and (d). The former excepts ways expressly created or constructed for motor vehicles, and the latter ways that have been created by the construction of a road intended to be used by MPVs. No evidence has been adduced that either is engaged in this case. Neither is it argued that Byway rights are saved on any other grounds. It follows in my view that unrecorded public motor vehicular rights have been extinguished further to the 2006 Act.

#### **Other matters**

25. Concerns were raised about future access with MPVs to owned and tenanted land alongside the Order route for agricultural purposes, in the event the Order is confirmed. Whilst this is not a matter for me in my determination of the Order, subsection 67(5) of the 2006 Act provides a private right of way for MPVs for those persons who have a reasonable need for such access to land in which they have an interest, where (as here) a public right of way for MPVs has been extinguished under subsection 67(1).

#### **Conclusion**

26. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be confirmed.

#### **Formal Decision**

27. I confirm the Order.

*S Doran*

**Inspector**

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<sup>4</sup> *Bailey v Jamieson* 1876 and *Kotegaonkar v Secretary of State for Environment, Food and Rural Affairs* [2012] EWHC 1976 (Admin)

## **APPEARANCES**

### **Order Making Authority:**

Sue Rumfitt	Sue Rumfitt Associates, <i>representing</i> the Lake District National Park Authority
<i>who called</i> Nick Thorne	Countryside Access Adviser

### **Supporters:**

Diana Mallinson and Patricia Stubbs	<i>representing</i> GLEAM
<i>who called</i> Adam Beeston Marian Parsons Lesley Smith	

Margaret Plank

### **Objector:**

Jack Donaldson

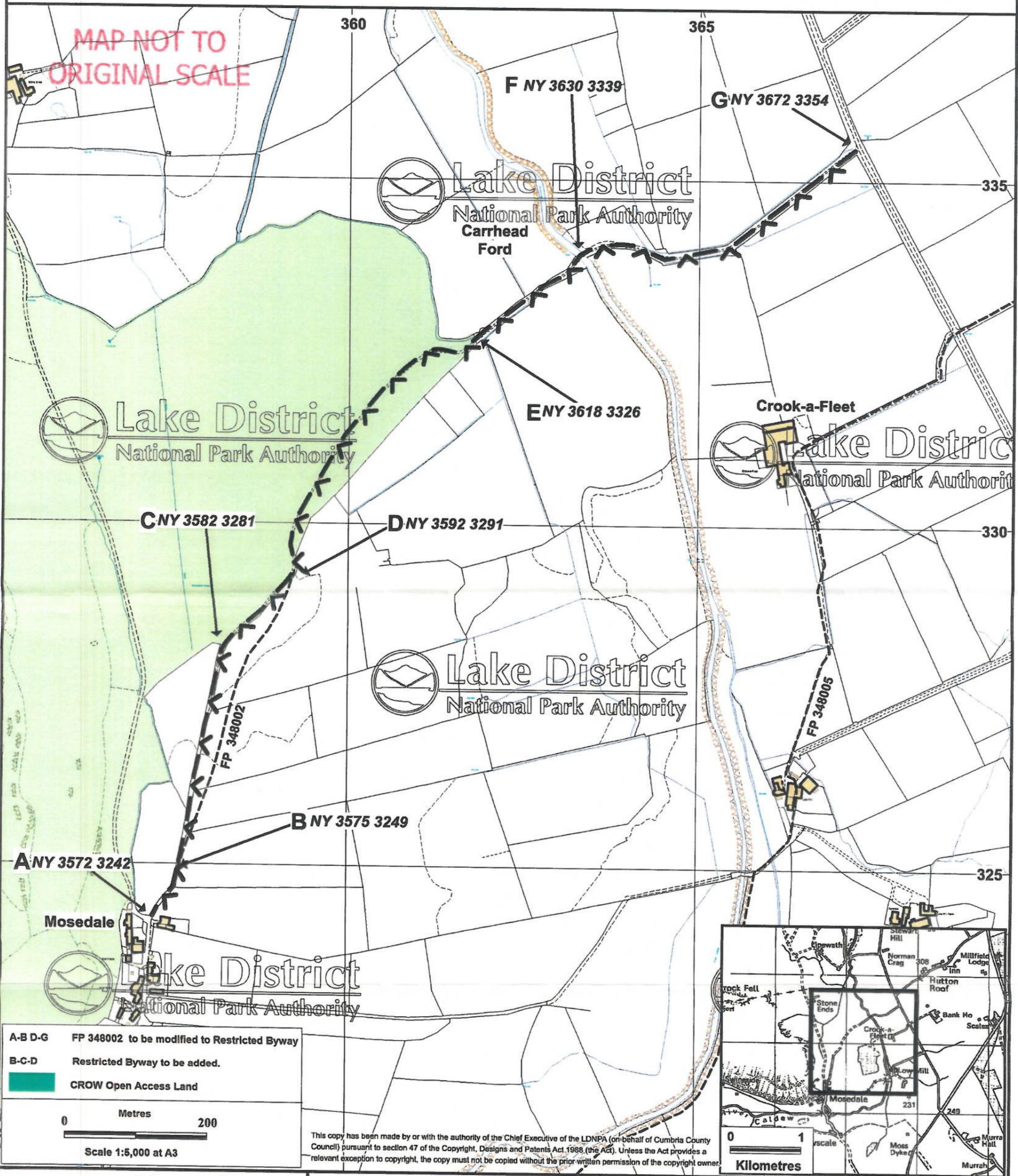
## **DOCUMENTS**

1. Signed copy of Adam Beeston's statement, submitted by the Lake District National Park Authority
2. Copy of Proof of Evidence submitted by GLEAM
3. Two photographs of the ford, submitted by Margaret Plank
4. Extract from 1966 Ordnance Survey Touring Map together with key, submitted by Jack Donaldson
5. Opening remarks on behalf of the Lake District National Park Authority, and case law, *Bailey and another v Jamieson* [1876]
6. Closing submissions on behalf of GLEAM
7. Closing submissions on behalf of the Lake District National Park Authority, and case law, *Commission for New Towns v JJ Gallagher Ltd* [2002] EWHC 2668

# RESTRICTED BYWAY MODIFICATION ORDER OVER THE C3033 MOSEDALE & CARRHEAD FORD, MUNGRISDALE PARISH

WILDLIFE & COUNTRYSIDE ACT 1981 SECTION 53A(2)

Lake District  
National Park



MAP NOT TO  
ORIGINAL SCALE

A-B D-G	FP 348002 to be modified to Restricted Byway
B-C-D	Restricted Byway to be added.
	CROW Open Access Land

0 Metres 200  
Scale 1:5,000 at A3

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Restricted Byway to be added

Unaffected Public Rights of Way

NGR for centre of map  
NY 3623 3290

September 2017

Authorised signatory:

Date: 31 October 2017