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## Order Decision

Inquiry opened on 10 October 2016

Site visit made on 12 October 2016

**by Martin Elliott BSc FIPROW**

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

**Decision date: 15 November 2016**

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### **Order Ref: FPS/U1050/7/102**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Derbyshire County Council (Footpath from Public Footpath No. 9 in Intake Field to Public Footpath No. 10 above the Green Gate – Parish of Curbar) Modification Order 2012.
- The Order is dated 30 August 2012 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were six objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is proposed for confirmation subject to modifications set out below in the Formal Decision.**

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### **Procedural Matters**

1. I opened a public local inquiry at County Hall, Matlock on 10 October 2016. The inquiry sat for four consecutive days. I carried out an unaccompanied inspection of the Order route and surrounding area on the afternoon of 8 October. I carried out a further unaccompanied inspection on the afternoon of 12 October.
2. The Council adopted a neutral stance in respect of the Order. The case in support of the Order was made by Mr Adamyk, of counsel, on behalf of the applicant.
3. Only one of the objectors appeared at the inquiry, Mrs D Askey and Mr G Askey (on behalf of Mr R Askey (deceased)). They were assisted by Ms R Allum who did not give evidence. In this decision I shall refer to Mr and Mrs Askey as the objectors unless specifically referring to an individual.
4. The objectors contended that the map attached to the Order was incorrectly annotated and showed the footpaths incorrectly. In my view the Order map complies with the Regulations<sup>1</sup>. As regards the depiction of footpath 10 on the map, whilst there is some dispute as to the location of this footpath, its depiction accords with the route shown on the definitive map. The definitive map and statement is conclusive as to the particulars contained therein. Although I note the submissions as to the recording of footpath 10, and its depiction on various Ordnance Survey maps, the recording of footpath 10 on the definitive map is not a matter for my consideration. Overall the Order map

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<sup>1</sup> Wildlife and Countryside Act (Definitive Maps and Statements) Regulations 1993

is not misleading and the intentions of the Order are clear. As such, subject to the relevant criteria being met, the Order is capable of confirmation.

5. My decision refers to a number of features. The green gate which is located at point B<sup>2</sup> and the pipe track which proceeds northwards from point B through C and beyond. For the purposes of this decision the Intake Field is the land crossed by the Order route A to B which was purchased by Mr R and Mrs D Askey in 2004. The Intake Wall is the wall in which the green gate is positioned. My decision also refers to a number of walked routes and additional points. These are identified on Map 1 submitted by the applicant.

### **The Main Issue**

6. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(i) of the 1981 Act. The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show, on the balance of probabilities that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
7. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
8. Should the test for statutory dedication fail under section 31 of the 1980 Act then it may be appropriate to consider the dedication of the way at common law in consequence of use by the public. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. There is no evidence of any express dedication. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public. For a dedication at common law the burden of proof rests on those claiming the public right of way.
9. Section 32 of the Highways Act 1980 provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

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<sup>2</sup> Letters A to C refer to points identified on the Order plan

10. The applicant contended that there had been a statutory dedication of the Order route under section 31 of the Highways Act 1980. In the alternative the dedication at common law could be inferred.

## **Reasons**

### ***Background issues***

11. Severn Trent Water (STW) state that the Intake Field is registered to Mr R and Mrs D Askey and that the deeds to the land do not permit any act which might interfere with or prejudicially affect any water supply system or any easement enjoyed by STW. STW consider that the adding of a footpath over the easement may create issues of access to buried water supply assets.
12. I have not been provided with any evidence that confirmation of the Order will have any detrimental effects on the water supply assets or access thereto. The water supply is a buried asset and inaccessible by members of the public; access to the supply by STW, or its agents, will not be prevented. It should be noted that the water supply is already crossed by footpaths 9 and 10 and the land is subject to rights of public access under the Countryside and Rights of Way Act 2000 (CROW). There is nothing to suggest that existing rights of access have any effect on STW's asset.

### ***When the right to use the way was brought into question***

13. The twenty year period to be considered in respect of a statutory dedication under section 31 of the 1980 Act is calculated retrospectively from the date when the right of the public to use the way is brought into question. The applicant contended that there were five events which brought the right to use the way into question. I shall consider those events in chronological order. If I find that one of the events brought the right to use the way into question then it will not be necessary the remaining subsequent events.
14. I shall consider the first two events together as they relate to challenges made by Mr R Askey between April and September 2004. The remaining three events are the date on which access rights under the CROW came into effect, the deposit by Mr and Mrs Askey of a statement under section 31 (6) of the 1980 Act and when the green gate at point B was locked in November 2004.
15. In April 2004 Mr R and Mrs D Askey took ownership of the section of the Intake Field crossed by the section of Order route A to B. The applicant contends that during this time Mr R Askey challenged various walkers using paths across the Intake Field which Mr R Askey did not consider to be public rights of way.
16. The statement of Deborah Birch identifies that in about 2003 Mr Askey told her not to run across the Intake Field. In evidence Deborah Birch could not be certain about the date but said that she used to run more in the winter. She said that she met Mr Askey on the pipe track having just used the route identified as mid route 1. Although Deborah Birch is unclear about the date she was later questioned about her presence in the intake field by Mr Askey; this was after the green gate had been locked. It is most likely therefore that, given she used to run more in winter, the initial challenge took place between April 2004 and November 2004 and most likely at the beginning of this period.

17. The Statement of Mr Coulthard recalls an occasion when he was approached by the 'new owner of the land' but that he continued along the route intended. In evidence to the inquiry he thought that he was approached months or a year at most before the green gate had been locked and that it was the locking of the gate which prevented him from using the path. Mr R Askey advised him that he should not be using the path as it was not a public right of way. In cross examination Mr Coulthard explained that he was returning from the Longshaw Sheepdog Trials with a Mr Hayes and that this was in 2005. However, given that the challenge was before the green gate had been locked, and the locking of the gate prevented his use of the way, it is more likely than not that he was returning from the trials in 2004 which took place on 2, 3 and 4 September of that year. Mr Coulthard also identifies that the challenge was by the new owner and therefore this will be after April 2004 when Mr Askey took ownership of the land.
18. Mr Hayes was challenged by Mr R Askey when he and Mr Coulthard were returning from the Longshaw Sheepdog Trials via the green gate and was told that he should not be using the path. He thought this was in the early 2000s possibly 2003 or 2004. Bearing in mind the evidence of Mr Coulthard it is more likely than not that the challenge to Mr Hayes was in September 2004.
19. The applicant referred me to the original letter of objection which states that Mr and Mrs Askey have at all times disputed the use of the green gate. In cross examination the objectors accepted this statement. Mr G Askey confirmed that his father would question those not using footpaths 9 and 10, the view being taken that footpath 10 did not pass through the intake field but was to the north east of the boundary wall. Mr G Askey was aware that his father had spoken to people and advised them that the route across the Intake Field, to and from the green gate, was not a public footpath. Although some had described Mr R Askey as stern and intimidating Mr G Askey disputed this and made the point that he was direct; he accepted that his father would have been clear in his views.
20. Having regard to all of the above, whilst the evidence of actual challenge to use is not substantial, I conclude that, on balance, after April 2004 the use of the green gate would have been challenged. The view expressed by the objector, that from April 2004 the use of the green gate was disputed, is consistent with the evidence of Deborah Birch. The evidence of challenges to Messrs Coulthard and Hayes, although identified by the applicant as a separate event which brought the right to use the way into question, are also relevant in demonstrating the attitude of the landowner to the use of the land.
21. Looking at the evidence as a whole it is more likely than not that from April 2004 Mr R Askey challenged use of his land and the green gate. These challenges would have brought it home to at least some of the users that their right to use the way was being brought into question. This would therefore set a relevant twenty year period of 1984 to 2004. In view of this I have not considered further the other events which the applicant contended brought the right to use the way into question.

### ***Evidence of use 1984 to 2004***

22. The applicant made the point that there was extensive use of most of the Order route with the exception of the section shown A1 to B1 on Map 1. However, there was, in the applicant's view, extensive use of a parallel route A1-A2-B2. It was the Southerly Route 1, which includes A1-A2-B2, that the applicant had intended to claim and intended to be the Order route. The applicant stated that only one individual had used the Order route in its entirety and this, in my view, is insufficient to raise a presumption of dedication. The case of the applicant was based on a statutory dedication of the Order route with the substitution of the section A1 to B1 with the section A1-A2-B2 referred to as the substituted route. It is on this basis that I consider the evidence of use. If I am minded to confirm the Order I will need to consider the submissions of the applicant as to whether or not it is necessary for the Order to be modified.
23. The applicant has submitted user evidence forms (UEFs) for 44 individuals which relate to a variety of routes between the village playing field and the green gate. Whilst the forms are accompanied by maps it is clear from my examination that not all of the routes identified follow the Order route or the substituted route. Some maps show a route crossing the Intake Field directly from the playing field to the green gate. Others show a route which more closely resembles the Order/substituted route. Some identify the walked route as the route of footpath 10 as shown on the definitive map and shown on the base map used by those completing UEFs. I can appreciate that those marking footpath 10 might have mistaken the route as a route through the green gate and I note the submissions of Dr Owens as to the skills required to accurately draw the route on a 1:2500 scale map.
24. Given the variations in the depiction of the route it is difficult to give any significant weight to the maps as regards the route used. Nevertheless it is likely that some of those completing UEFs did indeed walk the Order/substituted route. It is of note that a number of UEFs are accompanied by additional statements which clearly describe the use of the Order/substituted route. Whilst the routes used are not particularly clear from the maps the UEFs do show regular use of a route/s by the public as of right and without interruption from the playing field through the green gate. Use as of right is use without force, secrecy or permission as confirmed in the case of *R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 AC 335*.
25. The applicant submitted a 61 signature petition compiled in support of the original application in March 2005 under section 53(5) of the 1981 Act. Whilst the petition has been completed in connection with the application which includes a map of the claimed route, it is not clear that those signing the petition did so by reference to the map. Again it is difficult to give the petition significant weight as to the route used but the petition does again demonstrate unrestricted access through the green gate in excess of the twenty year period. It should also be noted that whilst 61 individuals have signed the petition some of those signatories have completed UEFs. There is therefore an element of duplication and it is not the case that an additional 61 individuals have used a route through the green gate.
26. The applicant filed 42 witness statements in support of the Order, 26 of these witnesses had previously completed UEFs. The objectors have raised concerns

- as to how the statements were obtained, noting that witnesses had been provided with two maps and photographs and that the applicant had assisted each witness with their evidence.
27. The applicant outlined that the plan accompanying the original UEFs was far from clear and that difficulties arose from the fact that the plan was of small scale and that the area in question was a large open field. It was also submitted that there was some confusion as to the location and depiction of footpath 10 which some witnesses confused with the claimed footpath. In view of this the applicant obtained fresh proofs from 42 witnesses. In order to give witnesses points of reference the witnesses were provided with the maps and aerial photographs. Map 1 which shows a number of routes and features was prepared by a chartered surveyor who also verified that the relevant points from Map 1 were accurately plotted on the aerial photographs (Photo 1 and Photo 2). Map 2 is a 1:25000 map of the area used for reference purposes. Both Mr Lambert and Ms McLaughlin gave evidence as to how the statements were obtained.
28. Whilst I note, and can appreciate the concerns of the objectors, the applicant has been open as to how the additional statements have been gathered. As noted above I have been unable to give much weight to the plans attached to the UEFs but it is clear from those UEFs that a route was used from the playing field to the green gate. The additional statements provide clarification as to the routes used over the Intake Field and in the circumstances the gathering of additional evidence is necessary. There is nothing to indicate that witnesses have been led in producing their statements. Witnesses were free to mark on Map 1 the routes which they have used. It is significant that not all the witnesses show use of the Order/ substituted route with the exception of part of the route in the vicinity of point B which is common to all witnesses. This suggests that witnesses were not led into identifying the Order/substituted route but were free to identify other routes which they used.
29. The applicant called 19 witnesses and that evidence was open to cross examination. The evidence to the inquiry was largely consistent with the evidence contained in the various witness statements. The objectors in closing made reference to a number of witnesses and I address these particular witnesses below.
30. Mrs North described, and identified on a plan (inquiry document 3), poles which were erected by Mr R Askey which she said were to direct people onto the correct path. I accept that the location of the poles does not correspond with the location of the poles identified by the objectors (inquiry document 8). Whilst there is some discrepancy, Mrs North was clear as to the routes used and there is nothing to indicate that her evidence should not be accepted.
31. Mr Dearing referred to using several gates although did say that he used the gate at point B. However, Mr Dearing used other routes through the intake field including a short section of the 'Northerly Route'. He did not use the Order/substituted route with the exception of the section northwards through the green gate. In my view the evidence of Mr Dearing is limited in support of use of the Order/substituted route and I give it little weight.
32. Marita Wilson used four routes, three through the Intake Field. Her preferred route was the 'Northern Route'. Whilst the fact that she used four different

- routes diminishes the frequency that she would have used the Order/substituted route she nevertheless used the Order/substituted route. She said that she used all the routes a fair amount depending on the weather.
33. Whilst Virginia Buck said that children used to play all over the field she used three routes through the Intake Field including the Order/substituted route on a regular basis. Her use was from 1996 until 2004.
34. Mr Hayes described seeing adders basking on boulder 3 (Map 1) although the route he used was 'Mid Route 1' which is some distance from boulder 3. However, in cross examination Mr Hayes said that he did use other routes in the Intake Field but that Mid Route 1 was the one he used most frequently. It is possible that Mr Hayes observed the adders when using a different route. I do not consider that his observation of adders on boulder 3 diminishes the value of his evidence as it seems that he may have walked the route adjacent to boulder 3. In any event his use of the Order/substituted route is limited as the only part of the Order route he used was through the green gate northwards. As such I give little weight to his evidence in respect of the Order/substituted route other than his use of the green gate northwards.
35. It is noted that Mr Allen lived in New Zealand from 1974 to 2012. He said that he came back to the United Kingdom, on average every three years, for 6 to 8 weeks at a time. He always called to visit Mr North and go and watch his son climb. Whilst Mr Allen did use the Order/substituted route his use would nevertheless have been very limited.
36. In evidence in chief Mrs Gorvett said that the tree planting occurred in 1995, the point being made by the objectors that the leaflet, which I consider below, inviting villagers to the tree planting event was published in 1998. In cross examination Mrs Gorvett said she had been confused and clarified that the first work on the project took place at the end of 1997. Whilst Mrs Gorvett was unclear as to dates I do not consider that this devalues her evidence. Given the passage of time it not surprising that dates of events are more difficult to recall. I also note that Mrs Gorvett could not recall the time and meeting place when a party of villagers walked through the Intake Field but again I do not consider that this devalues her evidence. It is not disputed that tree planting events took place and that access was gained over the Intake Field and through the green gate. The evidence from Dr Owens is that villagers went through the Intake Field on the Order/substituted route and through the green gate. The fact that Mrs Gorvett could not remember the time and meeting place does not displace the fact that the tree planting programme took place during the twenty year period and that the route taken was through the Intake Field and the green gate.
37. Having regard to the above comments, the 19 witnesses provided evidence of use by the public, as of right and without interruption, in respect of a number of routes including the Order/substituted route throughout the relevant twenty year period.
38. In addition to those who gave evidence to the inquiry there are another 23 witness statements attesting to use of ways across the Intake Field. The statements indicate use of the Order/substituted route, and other routes, by the public as of right and without interruption throughout the relevant period. As regards the weight which should be attributed to this evidence, some weight

should be given to the statements which have been carefully prepared. It is accepted that the evidence has not been subject to cross examination and this will lessen the weight which can be given thereto. In my view the statements support and corroborate the live evidence to the inquiry.

39. The applicant made the point that there were significant practical reasons for wanting to use the claimed path rather than footpaths 9 and 10. Specifically the ease of the claimed route and the difficult ladder stiles at point H (Map 1) now replaced by gates. It may also be the case that a neighbouring landowner, a Mr Adlington, wanted to direct people away from his land resulting in people using the green gate. However, the issue to be considered is whether the route has been used by the public as of right and without interruption. Whilst these factors may have resulted in use of the claimed route I give this no weight in evaluating the use of the claimed route.
40. The applicant drew my attention to the evidence in opposition which it is argued supports the long use of the claimed route and the fact that the green gate at B was not locked. I consider the locking of the green gate below at paragraphs 46 to 58.
41. A Dr M Collins, in Email correspondence with the Council dated 3 April 2011, refers to the people cutting across to the green gate which had been left open by the water board for several years. Mr G Bell, a statutory objector, refers in their objection to a footpath being created by the lack of attention of the water authority in maintaining their gate. Mr Bell admits that he and his wife used the short cut rather than using the stile in the corner of the Intake Field. J L Askey, another statutory objector, refers in the objection to people using various routes across the Intake Field and using the green gate which was unlocked.
42. The applicant highlights observations in Email correspondence, 30 June 2011, with the Council from the Peak and Northern Footpaths Society passing on the observations of the Society's Inspector for the Curbar area. The applicant refers to Mr R Askey advising the Inspector that after the water company sealed their inspection chambers they lost interest in keeping the gates locked and that they remained open for a number of years. Whilst reference is made to the gates along the aquifer the correspondence provides no information as to the use of the Order/substituted route by the public. It should be noted in any event that the correspondence is reporting on discussions with Mr R Askey and it is not necessarily the case that it reports all comments made by Mr Askey. In terms of supporting the confirmation of the Order I give it very little weight.
43. Mr G and Mrs D Askey did give evidence to the inquiry as to their use of the Intake Field. Mrs Askey acknowledged that she walked the Order/substituted route up through the green gate since moving to The Croft some 35 years ago. This was on rare occasions and she acknowledged that others used the way. Mr Askey walked to the green gate both before and after the family purchased the Intake Field. He did not dispute that people walked the Order/substituted route. Nevertheless, Mr and Mrs Askey object to the Order and take a view that there is insufficient evidence to show that a public footpath subsists.
44. In support of the Order Dr Owens, who completed a UEF, did not identify the route which he walked over the Intake Field but said that he used the path



from May 1984 when he moved to Curbar. Dr Owens described the path as well used and clear on the ground. He did not plot the route of the path himself because he was aware of limitations of the exercise and the limitations in his own skill. Nevertheless he believed the claimed route to be correct so far as reasonably possible. He never sought permission to use the route, never found the green gate locked and was never challenged in his use. He made the point that the claimed route had been endorsed by 'many honest people who walked the clear trodden path to and through the Green Gate for many years'.

45. The objection from a Kelli Allen states that they have never seen anyone attempting to use a different footpath other than the one already used by everyone on a regular basis. It is presumed that the footpath identified is number 9 as the objection relates to a path through the green gate. However, the objection, submitted on 17 October 2012, indicates that the objector has only lived in Curbar for the previous four years. There is no indication that the objector had any knowledge of the area prior to moving to Curbar and, given that the gate has been locked since 2004, it is not surprising that the objector had not observed use of other routes including the Order route.

*Use without interruption*

46. For a statutory dedication to be made out use must be without interruption. The objectors contend that the green gate has been locked on occasions prior to 2004.
47. STW have an easement through the green gate in connection with a water pipeline. The objectors refer to Email correspondence from STW, 26 September 2016, identifying two conveyances, one dated 1910 specifically referring to the erection of gates and the ability to lock them. The view is taken by STW that the 1910 document provides sufficient evidence of the right/obligation of STW to lock the gates.
48. The 1910 document is a grant dated 22 April 1910 between the Duke of Rutland as vendor and the Derwent Valley Water Board (STWs predecessor in title). It conveys the freehold of certain parcels of land and grants easements over other land. Plan C to the deed shows the route of the aqueduct through point B on the Order plan continuing through the Intake Field. The deed requires the Board to re-instate and make good all fences which may be crossed by the aqueduct and to erect unclimbable gates or stiles as may be required by the vendor at all points where fences or gates cross the line of the aqueduct. It further states that, if desired by the vendor, the gates shall be kept locked.
49. I do not accept that the 1910 grant provides an obligation on the Derwent Valley Water Board to lock the gates along the route of the aqueduct. The obligation was for the gates to be locked if requested by the vendor.
50. As regards the locking of the gate, evidence to the inquiry is that up to 1970 the gate was locked although it was possible around 1970 to release the locking bolt by hand so that the latch could be slid across thereby allowing the gate to be opened. Around 1971 the locking bolt rotted away and it was possible to slide the latch so as to open the gate. There is nothing to indicate that after 1971 the gate was locked by any means. Many witnesses referred to a 'slider' which could be drawn to one side so as to allow the gate to be

opened. Closing the gate was achieved by reversing the process. I note that Mr Coulthard referred to a latch which lifted, however, given the overwhelming evidence that the gate was closed using a sliding bolt I consider that his recollection is incorrect. I noted on my site visits that the green gate and other gates along the pipe track had a sliding bolt mechanism which accords with the majority of the evidence.

51. None of the witnesses or witness statements of those who were not called to give evidence refer to the gate being locked in the twenty year period. Additionally none of the UEFs or the petition give any indication that the green gate has been locked during the twenty year period. Indeed neither Mr G nor Mrs D Askey could recall the gate being locked. The gate was locked by STW on 25 November 2004 and this falls outside the relevant period.
52. The objectors refer to discussions with officers from the Council to the effect that the gate had been locked. Reference is also made to STW stating that historically the gate, as with other easement gates, had in the past been locked.
53. Correspondence, in connection with the inquiry, from Capita, appointed as property advisors to STW, indicates that the green gate was installed to be kept locked and used by the water authority for access to their assets only. Capita state that STW have always kept the gate locked. The objection from STW also states that the gate was always locked following the routine inspection of the pipe. No evidence has been submitted in support of these contentions.
54. In an exchange of Email correspondence, 3 January 2012, between STW and the Council, STW is asked to provide clear evidence to show that the green gate had been locked prior to 2004. Whilst advising that it is custom and practice to ensure their premises are secure STW confirm that they are unable to provide documentary evidence to substantiate the evidence that the Council requests.
55. The objectors also referred to a telephone conversation with a Philip Berry, public rights of way officer for the Council, in which he confirmed that he could remember the green gate being locked in the past prior to 2002. Mrs Askey has taken notes of telephone conversations and, in respect of the call from Mr Berry on 6 April 2011, the notes record that Mr Berry could recall when all easement gates were locked and could also remember the green gate at the top of the Intake Field being locked.
56. Email correspondence from 6 April 2011 between a Rebecca Cairns (Corporate Resources) and Mr Berry refers to the telephone conversation with Mrs Askey. Mr Berry recalls being informed in the early 1990s by a Tony Hood, a retired National Park Area Ranger, that the gate in question was not the public right of way. The Email also states that the gate was locked 'at the time'; the 'time' is not identified. The correspondence in my view is unclear as to when the gate was reputedly locked. Nevertheless the Email correspondence and the telephone records of Mrs Askey do suggest that the gate has been locked.
57. Taking all the evidence into account, the correspondence dated 6 April 2011 and the evidence from Mrs Askey in respect of the telephone conversation with Mr Berry suggest that the gate was locked. However, I have no evidence

before me that the gate was locked between 1971 and 2004. Evidence from those witnesses for the applicant was clear that the gate was not locked during the relevant period.

58. I conclude, on the balance of probabilities, that the green gate was not locked during the twenty year period and therefore use was not interrupted.

*Other evidence submitted in support of the Order*

59. The applicant submitted a number of historic aerial photographs. The photographs show to varying degrees a number of well-defined tracks on the ground. The Order/substituted route is particularly clear on the 1995 and 1999 photographs and is also visible on the 1972 photographs. The 1984 and 1989 photographs are not particularly clear and it is not possible to identify the Order/substituted route.
60. Whilst the aerial photographs do not provide evidence as to the existence of public rights they show worn tracks on the ground, during the relevant period, which correspond with the Order/substituted route. This is entirely consistent with the evidence of use which suggests that the route was well defined and clear on the ground. I note the suggestion of the objector that the worn lines are sheep tracks. However, bearing in mind the evidence of use and the fact that the tracks converge on the green gate it is more likely than not that the tracks are the result of use of the routes on foot.
61. Photographs taken by Mrs Gorvett fall outside the relevant period as they were taken in October 2004. Nevertheless the photographs do show a clear worn route on the ground which corresponds with the Order/substituted route and again the photographs are consistent with the evidence of use.
62. Correspondence from a Patricia Peters to the Council, dated 8 March 2010, was written in support of the application by Mr North to add the claimed route to the definitive map. The letter indicates that she inherited, with other relatives, the Intake Field from her Aunt, Doris Hallam. Although it appears that Patricia Peters and her co-owners only owned the land for around three weeks, from 15 October 2002, it is clear from the Registered Title DY356612 which refers to a conveyance by Doris Hallam of 18 April 1957 that the land had been in the ownership of Doris Hallam for a considerable period.
63. The letter refers to use of the claimed footpath by the general public including residents of Curbar and ramblers from outside the village and the fact that no steps had been taken to prevent use of the footpath. The letter also states that the family had not given permission to use the route.
64. The correspondence clearly acknowledges use of the claimed route, now the Order/substituted route, by the public without any objection during the twenty year period.
65. A copy of 'The Edge' magazine dated August 1996 announces a parish walk to be held on 22 September 1996. The walk was initiated by Dr Owens and used the green gate. The walk was attended by Mr K Adlington the tenant of the land crossed by the Order/substituted route. No permissions were sought to use the route or the green gate. The use of the route for the walk indicates unfettered access through the green gate at that time.

66. Dr Owens submitted a copy of a leaflet produced by the Peak District National Park Authority relating to a woodland planting scheme. The map in the leaflet showing the areas of possible planting sites also depicts the route of the pipe track leading to the Intake Wall. The route passes through the wall at a point which corresponds, given the constraints of scale, with the green gate. Whilst the map provides no information as to the route over the Intake Field the leaflet indicates that there was an access through the green gate. Had there been no access then it is unlikely that the Authority would have shown the route on the leaflet. Both Jill Gorvett and Virginia Buck recalled the tree planting project. Jill Gorvett was Parish Clerk at the time and organised groups of villagers who wanted to help. She outlined that the groups would walk through the playing field along the Order/substituted route and through the green gate.
67. An interpretation panel is located close to point B. The board contains a similar, but not identical, version of the plan contained in the leaflet and shows the route of the pipe track leading to the green gate. However, the panel gives no indication as to whether the route passed through the green gate.

*Conclusions as to use during the relevant twenty year period*

68. The evidence as a whole demonstrates use of the Order/substituted route by the public for a full twenty year period. That use was on a regular basis and was as of right and without interruption throughout the twenty year period. In my view the level of use was sufficient to bring it home to a reasonable landowner that a right was being asserted against them. Such use was clearly acquiesced in by the Hallam family who owned the land crossed by the route for the majority of the twenty year period and acknowledged the use of the route. As such the evidence is sufficient to raise a presumption that the Order/substituted route has been dedicated as a public footpath.
69. The objectors suggest that users have been wandering and roaming over the land. I was referred by the applicant to the passage in *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 which identifies that user must be over a more or less defined route.
70. The evidence before me indicates the use of a number of defined routes over the Intake Field including the Order/substituted route. Those routes are shown on Map 1 and are visible on some of the aerial photographs. Although other routes were used through the intake field there is evidence of use of the Order/substituted route which is sufficient to raise a presumption of the dedication of a public footpath. Whilst there may have been some uncertainty as to the precise location of the Order/substituted route in the original UEFs this has been addressed in the subsequent witness statements produced by the applicant.
71. I also note the observations of the objectors that the UEFs were not drawn from the public at large and that the UEFs show that only a very small percentage of the walking population have used the route. However, use by local people may be regarded as use by the public, there is no requirement that there should be use by the walking population as a whole. It may be the case that UEFs were distributed to a select number of people but there is nothing to indicate that these individuals cannot be regarded as members of the public. It should be noted that Patricia Preece acknowledged use by the general public,

both residents of Curbar and ramblers from outside the village. A number of UEFs refer to use by others and those giving evidence to the inquiry also referred to use by others. This suggests a wider use by the public other than those completing UEFs.

***Whether any landowner demonstrated a lack of intention to dedicate***

72. In view of my findings it is necessary to consider whether any landowner demonstrated a lack of intention to dedicate the way. For there to be sufficient evidence that there was no intention to dedicate the way there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the path, that they had no intention to dedicate. The test is whether a reasonable user would have understood that the landowner, that is the owner of the land over which the route passes, was intending to disabuse the user of the notion that the way was public. This is confirmed in the case of *R (Godmanchester Town Council) v Secretary of State for the Environment Food and Rural Affairs* [2007] UKHL 28, [2008] 1 AC 221 1094.
73. The Intake Field was purchased by Mr and Mrs Askey in April 2004 at the end of the twenty year period. Prior to this the land was owned by a Mr Thompson, from 2002 to 2004 and before that by the Hallam family. The land to the north east of the intake wall over which the Order route B to C passes is owned by the Peak District National Park Authority and is leased jointly by the RSPB and the National Trust. Although STW have an easement to gain access to the aqueduct which passes through the green gate there is no evidence that they are the freehold owners of any of the land crossed by the Order route.
74. On 15 October 2004 Mr and Mrs Askey deposited a statement under section 31(6) of the Highways Act 1980 this was followed, on 29 January 2010, by a statutory declaration under the same provisions. Whilst such a deposit and statutory declaration demonstrates a lack of intention to dedicate a right of way it has no retrospective effect and therefore cannot demonstrate a lack of intention to dedicate during the relevant period.
75. I have already considered whether or not the green gate was locked such as to interrupt the use of the way during the relevant twenty year period. I have concluded that the gate was not locked and that there was no interruption. In the absence of any interruption there would be nothing to indicate a lack of intention to dedicate.
76. Mr and Mrs Askey contend by writing to STW they had shown a lack of intention to dedicate a public right of way. However, those using the way would not have been aware of any correspondence with STW such as to have been disabused of the notion that the way was a public footpath. Further, Mr and Mrs Askey did not own the land during the relevant twenty year period. It was the challenges by Mr R Askey that brought the right to use the way into question. I note the assertion that there was no intention to dedicate a public footpath. However section 31 of the 1980 Act requires consideration as to whether a landowner demonstrated a lack of intention to dedicate. An intention to dedicate a route is deemed to have occurred in consequence of qualifying use.

77. The correspondence from Capita, on behalf of STW, states that STW have always kept the green gate securely locked and that the gate was never intended for use by the general public. I also note other evidence which suggests that STW did not intend to dedicate a right of way through the green gate. However, STW do not own the land crossed by the Order route. For the purposes of section 31 of the 1980 Act an owner is defined as a person who is entitled to dispose of the fee simple in the land. Consequently the actions of STW are not relevant. In any event I have concluded that the gate was not locked during the twenty year period such as to demonstrate a lack of intention to dedicate. Further, there is no evidence that STW disabused the public of the notion that the route was a public footpath. As regards there being no intention to dedicate a right of way I revert to my comments at paragraph 76 above.
78. No other events have been put before me of the landowner demonstrating a lack of intention to dedicate. Having regard to the above I do not consider that there is any evidence which is sufficient to demonstrate a lack of intention to dedicate a public footpath. Consequently the statutory dedication is made out. In view of this conclusion it is not necessary to consider an inference of dedication at common law.

### ***Whether the Order requires modification***

79. It is submitted by the applicant that given the trivial distance between the substituted route and the Order route there is no need to modify the Order map. It is argued that the difference is very slight particularly when the route is transcribed onto the definitive map at a scale of 1:25000. To all intents and purposes southerly route 1 is the Order route.
80. I was referred to the case of *R (Norfolk County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 119 (Admin), [2006] 1 WLR 1103. This case deals with the issue of a conflict between the definitive map and statement I do not accept that it provides a proposition that in the circumstances pertaining to the Order no modification is needed. From my reading of paragraph 41 of the judgment it is the definitive statement which does not require the precision of a slide rule. Whilst the schedule to the Order will be used to inform the definitive statement, the definitive map will be based on the route shown on the Order map. I accept that when transferred to the definitive map the difference between the Order route and the substituted route will be vaguely discernible. Nevertheless the substituted route is different to the route shown on the Order map.
81. I acknowledge that a modification order is published to allow the public to consider the effect of the order and to enable them to decide whether or not to raise objections. It is also the case that the objectors had an opportunity at the inquiry to adduce evidence and make submissions in respect of the Order route and substituted route and that they accepted that the difference between the two routes is not an issue. However, as noted above the substituted route is clearly on a different alignment to the Order route when marked on the Order plan and in effect constitutes a different proposal.
82. It is within my powers to modify the Order under Schedule 15 of paragraph 7(3) of the 1981 Act subject to restrictions set out in paragraph 8 of the Schedule. As the applicant points out this is summarised by Lord Phillips in

*Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 266, [2001] 1 WLR 1264.*

83. I note the contention of the applicant that paragraph 8(1) of Schedule 15 is not triggered because the proposed modification to show the substituted route does not 'affect land not affected by the order'. However, 'land' is not qualified but there is nothing before me to indicate that this should reasonably be understood as land in different ownership. Paragraph 8(1) only refers to land. The applicant submitted, in the alternative, that Paragraph 8(1) is to be read as requiring that the land must be 'materially' affected by the order. In this respect paragraph 8(1) simply requires that where a modification affects land not affected by the order as submitted the order should not be confirmed without complying with the requirements of paragraph 8(2).
84. Bearing in mind the above, and my conclusions in respect of the route subject to a statutory dedication, I consider that the Order should be modified to show the substituted route and that notice of the modification should be given in accordance with paragraph 8(2) of Schedule 15.

### **Other Matters**

85. Mr and Mrs Askey and other objectors raise a number of matters in respect of suitability, desirability and need. Whilst I note these issues and concerns they are not matters which I can take into account in determining the Order. Similarly the effect on wildlife is not a consideration. My determination must be made on the basis of the evidence before me measured against the relevant criteria set out above at paragraphs 6 to 9.
86. The objectors understood that CROW provides that a new public footpath cannot be created if there is already adequate access and egress within 200 metres of an existing right of way. The point is made that the Order route is less than 200 metres from footpaths 9 and 10. I am unaware of any provisions which restrict the creation of public footpaths on access land. However, an order under section 53(3)(c)(i) of the 1981 Act relates to the recording of existing public rights, it does not provide for the creation of new public rights of way. In terms of the Order before me a public footpath has been dedicated in consequence of qualifying use in the period 1984 to 2004. Any rights will pre-date the CROW provisions coming into force which, in respect of the land crossed by the Order route, came into effect on 19 September 2004.

### **Conclusions**

87. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order be confirmed subject to modification.

### **Formal Decision**

88. I propose to confirm the Order subject to the following modifications:

- Insert on the Order plan new points A1 and B1, delete the section of footpath to be added between A1 and B1 and add a new section of footpath between these points.

89. Since the confirmed Order would affect land not affected by the Order and not show a way in the Order as submitted I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*Martin Elliott*

Inspector



## APPEARANCES

### **For Derbyshire County Council:**

Ms S Boyle

Solicitor, Derbyshire County Council

### **The applicant in support of the Order:**

Mr S Adamyk

Of Counsel, instructed by Mr N Lambert, Wake  
Smith Solicitors

who called  
Mr N Lambert  
Mr D North  
Ms D Birch  
Ms S McLaughlin  
Mrs M North  
Mr Eshelby  
Mrs K Bacon  
Mrs J Gorvett  
Mr P Gorvett  
Mr H Dearing  
Mr M Allen  
Mr P Coulthard  
Ms M Wilson  
Ms V Buck  
Mr I Hayes  
Mr S Allen  
Mr M Jackson  
Mr G Key  
Ms S James  
Mr F McMain  
Mrs A Cooke

The applicant

### **Also in support of the Order:**

Dr P Owens

### **In opposition to the Order:**

Mrs D Askey  
Mr G Askey  
Ms R Allum

## Documents handed in at the inquiry

- 1 Supplementary material from the Applicant
- 2 Schedule of witnesses
- 3 Map 1 of poles marked by Mrs M North
- 4 Additional statement of Dr P Owens
- 5 Map 1 of ditch marked by Mrs J Gorvett.
- 6 Colour copies of photographs submitted by Mrs J Gorvett
- 7 2<sup>nd</sup> witness statement of Mr N Lambert (Longshaw Sheepdog Trials)
- 8 Map 1 of poles placed by Mr R Askey and pond marked by Mr G Askey
- 9 Order map showing modified route
- 10 Notes of telephone conversations taken by Mrs D Askey
- 11 Closing submissions of Mr and Mrs Askey
- 12 Closing submissions of the applicant

