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## Order Decision

Site visit carried out on 28 June 2016

**by Peter Millman BA**

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

**Decision date: 7 July 2016**

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### **Order Ref: FPS/Q2500/7/80**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Wildlife and Countryside Act 1981, Lincolnshire County Council (Colsterworth Public Footpath Nos 14 & 1114 and Gunby & Stainby Public Footpath Nos 1 & 1114) Definitive Map Modification Order 2015.
- The Order is dated 16 April 2015 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plans and described in the Order schedules.
- There were eight statutory objections outstanding when Lincolnshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: I propose to confirm the Order with modifications that require advertisement.**

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### **Preliminary matters**

1. There was no application for the Order, the County Council having decided to make it on its own initiative.
2. The intention of the Order is to add one footpath to the County Council's Definitive Map and Statement of rights of way and to delete two footpaths from it. The path proposed to be added is shown by a continuous purple line between F, G, H and I on the second of the two plans appended below. One of the paths proposed to be deleted is shown by a dashed black line between D and E on the same plan, the other by a dashed black line between A and C on the first plan.

### **Main issues**

3. The test which must be passed if the route from F to I is to be added to the Definitive Map is whether it can be concluded from all the relevant evidence that on the balance of probabilities public footpath rights exist along it.
  4. The test for deletion of the two paths A – C and D – E is whether it can be concluded from all the relevant evidence that on the balance of probabilities no public footpath rights exist. The correct application of that test has been clarified by the courts.
  5. Of particular relevance are paragraphs 38 and 39 of the judgment of Lord Phillips M.R. in the case of *Trevelyan v Secretary of State for the Environment* [2001]. The paragraphs read as follows: [38] *When the Secretary of State... has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way*
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*existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake. [39] These considerations are reflected in guidance published by the Secretary of State for the Environment (Circular 18/90) and the Secretary of State for Wales (Circular 45/90) after the decision of the Court of Appeal in Burrows and Simms.*

6. Circular 18/90 is no longer in force, but the current Circular 1/09, which has replaced it, states: *The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with “higher” rights to a way with “lower” rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:*
  - *the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.*
  - *the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;*
  - *the evidence must be cogent.*

*While all three conditions must be met they will be assessed in the order listed. Before deciding to make an order, authorities must take into consideration all other relevant evidence available to them concerning the status of the right of way and they must be satisfied that the evidence shows on the balance of probability that the map or statement should be modified.*

7. There are two distinct sections of path proposed for deletion, to which different evidence and some different considerations apply, and I deal with them separately before considering the path proposed for addition to the Definitive Map.

## **Reasons**

### ***The eastern section of path from Water Lane in Woolsthorpe-by-Colsterworth to Skillington Road (A-C), proposed for deletion***

8. The County Council’s Definitive Map shows a public footpath, numbered 14 in the parish of Colsterworth, leaving Water Lane and running generally south and then west-south-west for a little over a mile to Skillington Road (A-C on the first plan below). For the last 600 yards or so (B-C) the path is in Gunby and Stainby Parish and numbered 1. The Order would delete A-C from the Definitive Map so that the public would no longer be entitled to use it – although it has in fact been blocked and largely unusable for many years.
9. There is no doubt that in 1936 A-C was a recognized public footpath and that it was stopped up by Order of the Sleaford Quarter Sessions at the request of the Appleby Frodingham Steel Co. Ltd. Quarrying for ironstone did not begin until the late 1940s and it is possible, as one objector argued, that the public

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- continued to use the route after 1936 until it was physically stopped up, and that as a consequence public rights of way again came into existence before the 1950s. No evidence that such use actually happened has been provided to me, and so I can give this surmise no weight.
10. Sections 27 to 32 of the *National Parks and Access to the Countryside Act 1949* ("the 1949 Act") set out the process by which definitive maps were to be prepared. Information, in the form of a Map and Schedule of alleged public rights of way, was usually (as it was in this part of Lincolnshire) put together by parish councils and provided to the relevant 'surveying authority', normally, as here, a county council. From this information a draft map was produced and publicised. There was a statutory process for dealing with objections. Then a provisional map was produced, to which objections could again be made, and finally a definitive map was published.
  11. Rights of way in the parish of Colsterworth and in the parish of Gunby and Stainby were surveyed under the 1949 Act in the early 1950s. The results of the surveys, in the form of maps and schedules, agreed after parish meetings, were sent to Lincolnshire County Council, which was the responsible surveying authority for the Definitive Map. The parish boundary between Colsterworth and Gunby and Stainby runs parallel to and immediately north of the lines D-E and B-C.
  12. The results of the survey carried out by Colsterworth Parish were set out in two written documents, one headed *Schedule of footpaths Parish of Colsterworth*, the other, untitled, in tabular form. The *Schedule* describes 22 paths in some detail, including start and end points, obstructions, and furniture such as stiles and gates, with details of their condition, and the name of the person who inspected them. The *Schedule* makes no mention of a route between A and B or B and C.
  13. The untitled table lists not 22 but 23 paths. It gives slightly less information than the *Schedule* about path conditions, but has a column giving the reason for believing each path to be public and another giving a recommendation about whether each path should be retained or closed. Most paths were recorded as having been awarded in the *Colsterworth with Woolsthorpe and Twyford Inclosure Award* of 1808.
  14. The 23<sup>rd</sup> path, the last in the table, which was not mentioned in the *Schedule*, was described as running from *Skillington Road to Parish Boundary*. The number 23 in the column headed *No. of path in Schedule* has been altered, in blue pencil, to 14. The description of the start and end points on its own is of no assistance in determining where the alleged right of way lay, but it clearly cannot have applied to a path running between Water Lane and the parish boundary (A-B), or even, if the Parish Council believed the footpath between Water Lane and Skillington Road lay entirely within the parish of Colsterworth, to a path between Water Lane and Skillington Road (A-C), as there is no parish boundary at Water Lane. The description could, however, have applied to a path within Colsterworth parish leading west from Skillington Road to the boundary with Buckminster Parish, for example on the line D-E or F-G-H-I. In the column headed *Position of obstructions* is the note *Quarries, etc.* Under *Grounds for believing path to be public* is written *awarded*, and under *Recommendations as to closure etc.* is written the single word: *Close*. An additional type-written note underneath these entries states: *Continuation to this path from Village [i.e. Woolsthorpe by Colsterworth] closed in 1936 by*

- order of Quarter Sessions – This part may already have been closed, but in order to safeguard the position it is suggested that it should be included.* This note, and the description of the start and end points of path 23, is consistent with it being on the line F to I.
15. The Colsterworth Survey map, based on an Ordnance Survey 6 inch to the mile map, showed A-C, annotated with these words: *closed in 1936*. There is no path number shown next to the line between A and C. West of Skillington Road it is impossible to see whether there was a line drawn on the Survey map to represent a path continuing to the Buckminster boundary within Colsterworth parish; there is a very thick black line indicating the parish boundary which obscures a great deal of detail. There is, however, a series of crosses, apparently in blue pencil, north of the parish boundary, roughly on the same line as F-G-H-I. The number 23 is written in 3 places next to this line of crosses, but in each case this has been crossed through and 14 written in its place. It is impossible to tell whether these crosses and numbers were placed on the map by the Parish Council or officers of the County Council to whom the map was sent.
  16. There is no available evidence of any discussions or queries about the status of path 23 (or 14) between the Parish Council and the County Council. The path within Colsterworth which was subsequently included in the Definitive Map and Statement ran only from Water Lane to the Gunby and Stainby parish boundary, i.e. A-B, although the description of the start and end points in the Definitive Statement was (and apparently still is) *Skillington Road – Skillington Parish Boundary*. A-B comes nowhere near the boundary of Skillington Parish, which is some distance to the north-west of Colsterworth.
  17. The County Council contends that the footpath from A-C was mistakenly included in the Definitive Map and Statement and should be deleted from it. A number of objections have been made to this proposal. Those that address the relevant legal issues argue that no new evidence (see paragraph 6 above) has been discovered which could lead to a re-evaluation of all the relevant evidence as to the existence or otherwise of public footpath rights.
  18. Case law in addition to that noted at paragraph 5 above is helpful in deciding whether there is any merit in this argument. In the case of *R (Norfolk County Council) v Secretary of State for Environment, Food and Rural Affairs* [2005] there was a conflict between what was shown on a definitive map and what was in the statement. Pitchford J, having quoted from paragraph 38 of Lord Phillips' judgment in the *Trevelyan* case (paragraph 5 above) stated: *The very fact that the map and statement are in conflict tends to demonstrate that an error occurred in the preparation either of the map or the statement or possibly both. It does not seem to me that in circumstances such as these the factual assumption of regularity in the preparation of the map but irregularity in the preparation of the statement can be justified... nor do I accept that in a case of conflict the Trevelyan presumption applies in favour of the map at the expense of the statement.*
  19. It seems to me that the evidence before the County Council when it was deciding whether to add the path between A and C to its Definitive Map would have consisted of the map and schedule sent in by Colsterworth Parish Council, and probably a copy of the 1936 stopping-up Order and the 1808 inclosure award. The evidence before me, however, is more than that – it now includes

- a Definitive Map and Statement which are completely inconsistent with each other.
20. The judgment in the case of *Kotarski v Secretary of State for Environment, Food and Rural Affairs* [2010] is also pertinent. Simon J noted at paragraph 24, discussing another case where there was a conflict between a definitive map and a definitive statement; *The precondition for the exercise of the statutory power of review is the discovery of evidence which (when considered with all other relevant evidence) shows that particulars contained in the map and statement require modification. The discovery that there is a divergence between the two is plainly the discovery of such evidence, and it is unnecessary that it should be characterised as 'new evidence.'* It is sufficient that there was the discovery of what the Inspector described as 'a drafting error', which was itself the result of what the Court of Appeal in *ex. p. Burrows and Simms* characterised as 'recent research.' I conclude from the evidence before me, and the case law I have mentioned above, that there has been a discovery of evidence which entitles me to assess the whole of the relevant evidence.
21. It is impossible to know now what went through the minds of those who were drafting the Definitive Map in Lincolnshire when they received the information sent in by Colsterworth Parish Council. It is possible that officers of the County Council had sight of a document which showed that rights had been re-created on the line A-C, though that seems unlikely since the land it crossed was still being quarried at the time, and no such document has subsequently been found. It seems rather more likely that, for whatever reason, they were simply careless and made a drafting error. That the work was not carried out carefully is supported, in my view, by the fact that the entry in the Definitive Statement is simply nonsensical. The description *Skillington Road – Skillington Parish Boundary* in the statement for path 14 just could not apply to the path shown as 14 on the Definitive Map – or to any other path. It seems likely that by some careless error, the County Council in the 1950s interpolated an extra *Skillington* in the description of the start and end points of the path.
22. Considering the evidence as a whole, it seems to me likely that the path referred to as no. 23 in the Colsterworth Parish Council table was intended to refer to a path running west from Skillington Road to the Buckminster boundary at The Drift, i.e. broadly similar to F-G-H-I, that path being within Colsterworth parish. However, instead of showing this path on the Definitive Map, the County Council, for a reason which is now unfathomable, added a path (A-C) which was clearly labelled *closed* and applied to it a meaningless description.
23. This evidence is, in my view, of sufficient substance (paragraph 6 above) to displace the presumption that footpath rights exist on the line A-C; it is cogent; and it points clearly to a conclusion that the route from A to C should not have been put on the Definitive map.
24. If public footpath rights did not exist over the route from A to C when it was added to the Definitive Map in the 1950s, could they have arisen since as a consequence of use by the public? The evidence provided suggests that after quarrying was finished (the available evidence suggests that this was in 1973) and the land restored, the path was used again for a time until one of the owners of the land it crossed obstructed it with barbed wire. Details are scant, however, and plainly insufficient to substantiate claims that dedication of public

rights could be deemed to have occurred as a result of use. In any event, paragraph 4.35 of Circular 1/09 makes it clear that Defra's view is that if a route is mistakenly shown on a definitive map, use of it cannot give rise to the acquisition of public rights, as: *rights that cannot be prevented cannot be acquired*. I take this to mean that since a landowner cannot legally prevent the use of a route which is shown on a definitive map, even if the route is subsequently found to have been put on the definitive map in error, it cannot be argued that the public is able, during the period when the route is shown in error, to acquire rights as a result of use.

***The western section of path from Skillington Road to The Drift in Buckminster – proposed deletion of the current line D-E***

25. A footpath is shown on the County Council's Definitive Map continuing to the west of Skillington Road for a little less than a mile and a half until it enters Buckminster Parish, where it meets a road named The Drift (D-E on the map below). This footpath is numbered 1 and is in the Parish of Gunby and Stainby. It is a continuation on the western side of Skillington Road of Gunby and Stainby footpath 1 which starts from the Colsterworth parish boundary as a continuation of footpath 14 (B-C on the map below). The County Council contends that D-E is shown on the 'wrong' alignment, and the Order proposes to 'realign' it by deleting the route currently shown on the Definitive Map, and adding, in its place, a broadly similar route immediately to its north – for most of its length just on the other side of a hedge (i.e. F-G-H-I – see below at paragraphs 37 to 42). This route would correspond, at least approximately, to a route shown on the *Colsterworth with Woolsthorpe and Twyford Inclosure Award* map (paragraph 13 above), and the route numbered 23 in the Colsterworth table of paths (paragraphs 14 and 15 above).
26. Although there is a signpost indicating a public footpath leading west from Skillington Road and a corresponding one indicating a path leading east from The Drift, neither the line shown on the Definitive Map nor the line proposed to be added appears to be in use today, although a headland path has been cleared between I and H. Apart from that, both routes are severely obstructed and extremely difficult to negotiate.
27. The test which must be passed, in order for the route between D and E to be deleted from the Definitive Map, is as set out at paragraphs 5 and 6 above.
28. The County Council's case for deleting this route from its Definitive Map is not set out at all clearly in its Statement of Reasons. It seems to believe that 'realignment' of a path is somehow easier to accomplish than the deletion of one path and the addition of another. It is not. The County Council's case appears to be based on the following facts. A footpath was awarded in the *Colsterworth with Woolsthorpe and Twyford Inclosure Award* of 1808 within, apart from a very short section (between G and H, which was in Stainby) the parish of Colsterworth. This path is annotated on the inclosure map as *footpath from Buckminster to Colsterworth*. There was no inclosure award for Stainby (Gunby and Stainby were separate parishes in the 19<sup>th</sup> century), so no path could have been awarded on the Gunby and Stainby (southern) side of the parish boundary on the line D-E.
29. The March 1953 survey of rights of way in Gunby and Stainby (see above at paragraph 10 for further details of this process) listed, and showed on the Survey map, a footpath running from Buckminster towards Woolsthorpe which

- corresponds, at least approximately, to D - E. The grounds for believing it to be public were stated as: *awarded in part – diverted for many years*. Its condition was described as *Disused and broken up for ironstone workings*, and in the *recommendations* column was typed *Already closed and disused*. The Gunby and Stainby survey map does not show the path clearly; it is largely obscured by the thick black line representing the parish boundary with Colsterworth, but what can be seen of it seems to be on the south side of the boundary, in Gunby and Stainby. The 1959 Definitive Map clearly shows a path running to the south of the parish boundary, in Gunby and Stainby.
30. An Ordnance Survey map at a scale of 1:10560 revised in 1929 shows that by then the central section of the path between Skillington Road and The Drift would have been obstructed by ironstone workings. An aerial photograph of 1973 shows the obstruction continuing.
31. It seems that the County Council believes, as a result of considering this evidence, that the 1953 Gunby and Stainby Schedule of paths must have been referring to the 1808 awarded path in Colsterworth. The implication of this is that the path should have been shown as running in Colsterworth parish, on the northern side of the hedge which marks the parish boundary, whereas the Definitive Map shows it on the southern side. The further implication (it is nowhere spelled out explicitly) seems to be that a mistake was therefore made when the footpath was recorded on the Definitive Map on the line D-E rather than F-G-H-I and that D-E should be deleted – at the same time as adding a path on the 'correct' line.
32. If I am correct in my understanding of the County Council's argument, then, in my view, it is misconceived.
33. The County Council concedes that the line it states to be shown on the Colsterworth Inclosure map to mark the awarded footpath (the copy of an extract from that map supplied with the evidence is very poor and it is not easy, even with the aid of a magnifying glass, to determine the position of the path in relation to nearby boundary features) has not been shown on any subsequent map of the area. However, the County Council states, large-scale (1:2500) Ordnance Survey plans of 1887 and 1904 show a line annotated 'F.P.' in the position of the path shown on the current Definitive Map, i.e. D-E in Gunby and Stainby. This evidence is not disputed, though again the copies provided are too poor to be able to verify this information.
34. The first Definitive Map, published in 1959, is based on a 1:10560 Ordnance Survey map which was revised in 1929 (paragraph 30 above). This does not show a footpath either on the line D-E or on F-G-H-I. It does show that by that date there was a large ironstone quarry and a railway line which would have completely obstructed either route. This seems likely to have been the situation on the ground in 1953.
35. In my view it does not follow from this evidence that Gunby and Stainby Parish Council could not have made a reasonable allegation in 1953 that there were public footpath rights on D-E. The Parish Council would have been mistaken if it had believed that the Colsterworth inclosure award could create a footpath in Gunby and Stainby, but it seems to me that it is quite possible that the Parish Council conflated the Colsterworth inclosure path with the path shown at the end of the 19<sup>th</sup> century by the Ordnance Survey on the Gunby and Stainby side of the parish boundary. It does not follow from the possibility that the Parish Council was mistaken about the historical and legal origin of what became

footpath 1 that rights did not exist along it. That possibility is supported, though with no great weight, by one of the two owners of the land crossed by D-E, whose view is that it has been used for 'many decades' by the public.

36. I conclude that, on the balance of probabilities, and whether or not any of the evidence discussed above may be characterised as 'new' (paragraph 6 above) it does not show that at the time of its first inclusion on the Definitive Map, there were no public rights on D – E.

***The western section of path from Skillington Road to The Drift in Buckminster – proposed addition of the F-G-H-I.***

37. The route which the Order proposes to add to the Definitive Map and Statement is that set out with a width of 4 feet in the *Colsterworth with Woolsthorpe and Twyford Inclosure Award* of 1808 and shown on the Inclosure Map. The County Council argues that this was the route that should have been shown on the first Definitive Map instead of what became Gunby and Stainby footpath 1.
38. The evidence that has been provided which might support a conclusion that public rights exist on that route is a short extract from the Inclosure Award together with a poor copy of part of the Inclosure Map. A route on this alignment has been shown on no subsequent maps, and no-one claims to have used it, or argues that public use of it has resulted in deemed dedication.
39. There are circumstances in which inclosure evidence could provide conclusive evidence of the existence of public rights. The minimum evidence that would be required would be, first of all, a copy of all the relevant parts of the Award and a copy of the Inclosure Act so that the powers available to the Inclosure Commissioners could be ascertained. The Award was stated to have been made in 1808, so the Act probably dates from a few years earlier. If so it may or may not incorporate the provisions of the General Inclosure Act of 1801. It would be necessary to see what the Act and Award stated about any measures which needed to be complied with before a right of way came into existence. It would be necessary to have evidence that the Inclosure Map was of sufficient accuracy to enable a path shown on it to be transposed to a modern map base. It would be particularly necessary in this case to be sure that the parish boundary was in the same position as it was in 1808, and that the Award was capable of creating a short length of path in a neighbouring parish (i.e. in Stainby between G and H.)
40. It may be argued that most of the footpaths in Colsterworth were added to the Definitive Map in the first place on the basis that they had been awarded in 1808, but it should be noted that section 27 of the 1949 Act (see paragraph 10 above) required that a survey of rights of way (and subsequently a draft map) should include rights of way which were *alleged to subsist*, and therefore, if there were no objections to their depiction, these paths would then be shown on the Definitive Map. The test 'reasonably alleged to subsist' is not so hard to satisfy as the test of whether a right of way actually does subsist. I can only confirm this part of the Order if I am satisfied that rights subsist (i.e. exist) on F-G-H-I.
41. It might be possible to interpret the information provided on the Gunby and Stainby Survey of paths in 1953 (paragraph 29 above) as referring to the line F-G-H-I. That is a possibility, but not one to which significant weight can be attached.



42. I conclude that the evidence is not sufficient to show that public rights have come into existence on the line F-G-H-I.

### **Conclusions**

43. I conclude from the evidence provided that a mistake was made when the path between Water Lane and Skillington Road was added to the Definitive Map, that no public rights existed over it then and none have accrued since.
44. I conclude that although the evidence suggests that the reason for including footpath 1 in Gunby and Stainby west of Skillington Road (i.e. D-E) on the Definitive map may have been based in part on a mistake about the Inclosure Award, it does not show that it should be deleted from the Definitive Map.
45. I conclude that it has not been shown, on the balance of probabilities, that public footpath rights subsist on F-G-H-I.
46. I have considered whether it would be sensible to refuse to confirm the Order as a whole because to modify it would leave very little of the original Order. It may well have been advisable, as noted by one objector, for the County Council to have considered making two orders, one to deal with the route stopped up in 1936 and the other to deal with the situation west of Skillington Road. However, I have concluded that it is possible to modify the Order to take out those proposals which are not justified by the evidence.
47. Finally, having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with modifications.

### **Formal Decision**

48. I propose to confirm the Order with the following modifications:

- In the title of the Order, delete 'Nos' and insert 'No'. Delete '& 1114'.
- In the preamble to the Order, delete '53(3)(c)(i) of the Act... and also Section'.
- In paragraph 2 of the Order, delete 'Schedules' and insert 'Schedule' in its place.
- In paragraph 3 of the Order, delete 'Nos' and insert 'No'. Delete '& 1114'.
- Delete the whole of Schedule 1.
- Delete the '2' in the heading 'Schedule 2'.
- In part 1 of the Schedule, in the description of Footpath No. 1, delete 'The path continues on the western side of Skillington Road... where it meets the Buckminster parish boundary at SK 8890 2318.' Delete '2568' and insert '530' in its place. Delete 'and D-E on attached drawing number 2014/015/DMMO/A4'.
- In part 2 of the Schedule, add 'delete the entry 'before 'Buckminster – Woolsthorpe', and add 'insert "Buckminster – Skillington Road"'.
- Delete the first Order plan (drawing no. 2014/015/DMMO/259/A4).

49. Since the confirmed Order would not show ways shown 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.

*Peter Millman*

**Inspector**





