



## Order Decision

Inquiry held on 15 January 2019, 30 April 2019 & 1 May 2019

**by Sue M Arnott FIPROW**

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

**Decision date: 11 July 2019**

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### **Order Ref: ROW/3196947**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Cumbria County Council (Parishes of Old Hutton & Holmescales and New Hutton: District of South Lakeland) Definitive Map Modification Order (No 2) 2017.
- The Order is dated 21 November 2017. It proposes to modify the definitive map and statement for the area by adding a restricted byway between Lane Cottage and Old Croft Farm, Millholme, as shown on the Order map and described in the Order schedule.
- There were two objections outstanding when Cumbria County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

**Summary of Decision: Confirmation of the Order is proposed, subject to the modifications set out in the Formal Decision below.**

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### **Procedural matters**

1. On 14 January 2019 I opened a public inquiry at South Lakeland House in Kendal, having visited the site of the claimed public right of way, unaccompanied, during the previous afternoon. Since matters could not be completed in one day as planned, I adjourned the proceedings, resuming the inquiry on 30 April and closing on the following day.
  2. A further reason for the adjournment was to avoid any risk of prejudice to objectors who argued that they had been unable to gain access to any of the original historical documents called in evidence by supporters of the Order because the local archive office was closed for refurbishment. Although one of the applicants, Mr Wilson, submitted that the main objector had been notified well in advance of evidence in support of the claim and could have seen the relevant documents before the archives closed, I considered it prudent to allow sufficient time for these documents to be inspected before addressing the historical evidence at the inquiry. After hearing evidence on 15 January centred on recent claimed use of the Order route, I adjourned until the end of April, thereby enabling adequate time for further research into the historical evidence after the archives reopened in March.
  3. Before resuming the inquiry, on 29 April I took the opportunity to re-visit the site, this time accompanied by representatives of the supporters and the objectors including Mr Sims (representing the order-making authority, Cumbria County Council), Mr Wilson (applicant), Mrs Airey (objector), Mr Pickthall (adjacent landowner) and Mr Staton (for the Ramblers' Association).
  4. For ease of reference in this decision, I shall refer to the Parish of Old Hutton and Homescales briefly as 'Old Hutton Parish'. I shall also refer to the nearby settlement of 'Ewbank' although I note it is sometimes written as 'Ewebank'.
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## **The Main Issues**

5. The main issue here is whether the evidence discovered in this case is sufficient to show, on a balance of probability, that the public rights of way claimed over the Order route subsist.
6. Cumbria County Council (CCC) made the Order under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) mainly on the basis of historical evidence supporting events specified in sub-section 53(3)(c)(i) and (ii). Therefore if I am to confirm it I must be satisfied, on a balance of probability, that the evidence shows a restricted byway subsists along the route described in the Order between the points labelled A and B, and that the route presently recorded on the definitive map as Footpath 559001 should be upgraded to restricted byway status.
7. If the evidence is not sufficient to meet that test, then I would need to consider whether the evidence of recent pedestrian use of A-B by the public is sufficient to show, again on a balance of probability, that a public footpath has been established in which case I may need to propose modifications to the Order.

### *Legal framework*

8. In relation to the claimed restricted byway, the case in support of this status relies on the legal maxim '*once a highway, always a highway*'. A range of historical evidence has been submitted to demonstrate, on a balance of probability, that long ago the Order route was regarded as a vehicular highway.
9. In this case, following enactment of the Natural Environment and Rural Communities Act 2006, any public rights that may once have existed for motorised vehicles will now have been extinguished. It is not disputed that if the evidence does show that the Order route was once a public carriageway, then 'restricted byway' is now the appropriate status to be recorded.
10. In the alternative, a case is made that the Order route has been used in more recent times in such a way that a public footpath has been established between points A and B. This relies on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980. For this to have occurred, there must have been use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question. This would raise a presumption that the route had been dedicated as a public footpath which may then be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner during this period to dedicate the way for use by the public. If the presumption is not rebutted, a public footpath will be deemed to subsist.

## **Reasons**

### ***Background***

11. In 2012 an application was submitted to CCC by Mr Robins on behalf of the Ramblers' Association seeking to record part of the present Order route (A-B) as a public footpath. More specifically this requested the addition of a 60 metre length of public footpath through the yard at Old Croft Farm, effectively connecting Bridleway 560022 in Old Hutton parish with Footpath 559011 in New Hutton parish.

12. The case advanced by the Ramblers' Association was based on user evidence and included 8 evidence forms completed by people who had used the route on foot in the past plus a variety of guided walks leaflets.
13. Being unaware of this submission, and after being directly challenged by landowner Mrs Airey in December 2012, Mr G Wilson made an application in 2014 to record a public bridleway along the Order route (A-B-C). This included a package of historical evidence on which his claim was based.
14. Both applications were subsequently reported to the Development Control and Regulation Committee of CCC in August 2017 and again in September 2017, following which the Council concluded that the evidence showed that a restricted byway had been reasonably alleged to subsist between points A and B; that on a balance of probability Footpath 559011 should be upgraded to a restricted byway, and that an Order should be made accordingly<sup>1</sup>.
15. The standard of proof required to justify confirmation of this Order (in relation to both the addition and upgrading elements) is the balance of probability. At the inquiry CCC submitted that the available evidence is sufficient to meet the relevant test.
16. In fact an even earlier application had been proposed several years before the Ramblers' Association claim. In 1998 Cumbria Bridleways Association (CBA) sought the recording of the Order route as a bridleway but this application was never completed and did not proceed.

### ***Historical evidence***

#### *Early mapping*

17. At the inquiry, objector Mrs Hodgson stated that it was commonly known that the narrow bridge over St Sunday's Beck (at point B) and the adjacent ford had been used by packhorses and carts since the 1600s. Whilst CCC submitted that the historical evidence in this case supports her statement, I have seen no documents which date back that far or that confirm the antiquity of the bridge. Whilst I do not rule it out, I find no actual evidence to substantiate the claim.
18. In fact the earliest map tendered in evidence is Hodgson's map of Westmorland dated 1823. This clearly shows the Order route extending from Ewbank north-westwards to a point adjacent to Lane Cottage now referred to as point C. This is drawn as a road that is enclosed for the most part (shown in the key as 'Other Public Carriage Roads' (being neither a Principle Road or Turnpike). The curved section through Helm Close is shown with dotted lines, suggesting it may be depicting a 'Public Bridle Road not used as Carriage Road' although a change of status at this point would make little sense.
19. This map is not conclusive but it does offer good evidence that the way existed in the early nineteenth century and was reputed to be a public carriageway.
20. Although no copy has been submitted, I have also noted a reference to a map of Westmorland by Greenwood in 1823/5<sup>2</sup>. This map was reported to show the Order route in the category 'carriageways'. Whilst I have not been able to

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<sup>1</sup> The August report recommended an order be made to record A-B-C as a bridleway whereas the later report changed the recommendation to restricted byway.

<sup>2</sup> In document 11 of the 'provisional list of documents' submitted on behalf of Mrs Airey (an undated report relating to the 1998 claim by Cumbria Bridleways Society).

- verify this, if correct it would appear to echo the information provided by the Hodgson map.
21. The tithe records for the parishes of Old Hutton and New Hutton (both dated 1835-6) are similar in that each illustrates the whole length of the Order route and beyond as a separate entity, uncoloured, through the farmyard and completely excluded from adjacent fields. Although this is not proof of the existence of a highway, it is entirely consistent with that conclusion.
  22. In a report<sup>3</sup> from 1895 there is a reference to an enclosure award in 1848 for the parishes of Mansergh, Lupton, Old Hutton and New Hutton. However copies of this award are not available. Whilst its contents remain unknown, the effect (if any) on the Order route and its extension eastwards to Ewbank cannot be established. All that may be deduced is that such an award *could* have had the capacity to change the status of all or part of the way and/or liability for its maintenance. That might provide an explanation for some apparent inconsistencies but, without further details, this is simply conjecture.
  23. Ten years after this enclosure in 1858 the Ordnance Survey (OS) published its First Edition 25": 1 mile map for this area together with a 'Book of Reference'. In Old Hutton parish the OS surveyors recorded the whole length of the Order route from St Sunday's Beck, through the farmyard and Helm Close up to Ewbank as a single land parcel and noted this as "*Public Road, part of stream, etc*". However, in New Hutton parish the route was identified as "*Occupation Road*". In later guidance issued in 1905 to its surveyors, the OS provided a definition of an occupation road. Although Mr Wilson submitted that 'occupation' does not mean 'private', the definition suggests to me that it was not intended to apply to a public road.
  24. If that is correct, this is the earliest evidence that points towards a part of the Order route (B-C) being other than a public way.
  25. The objectors submit that this First Edition OS map depicts a gate at point C adjacent to Lane Cottage, thus supporting their case that the lane was a wholly private one. Although the line on the map may represent a gate, in my view it could equally be interpreted as the extent of land parcel 244 (the occupation road). Consequently I hesitate to place any significant weight on this one way or the other. However I do recognise that on the Second Edition map a gate is shown across the lane much closer to point B but that does not necessarily preclude the way from being a public one.
  26. On Wednesday 15 June 1870 four estates in the Hutton area were offered for sale by auction. The plan showing the relevant land shows the Order route from Lane Cottage through to Ewbank as a continuous road although there is no indication of its status. Old Croft was not for sale and was noted as being in the ownership of Mansergh Church. A separate undated sketch plan of the Old Croft land (stated to be based on the OS map of 1864) shows in more detail the crossing at St Sunday's Beck.
  27. This same detail later appears on the OS Second Edition 25": 1 mile map of 1896/8. This very clearly identifies a ford and footbridge through and over the river. Again, the OS regarded the whole of the route from the beck through the farmyard with its continuation eastwards (162) as one land parcel and likewise the whole section west of the beck (389).

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<sup>3</sup> Mr Bintley's Report dated 4 June 1895 (discussed below)

28. These nineteenth century OS maps and the 1870 sale map do not provide evidence of the existence of a right of way – either public or private – but they show that the route then formed a continuous, mostly enclosed, road between Ewbank and Lane Cottage. The OS Book of Reference offers some evidence of the reputation of the way at that time, but introduces an element of conflict between the public status implied by Hodgson’s map (and supported in Old Hutton Parish by the OS) and the OS reference to B-C as an ‘occupation road’.
29. Yet in the early twentieth century, the records compiled under the Finance Act 1910 strongly infer that the whole of the Order route and its continuation eastwards was considered a public road. These records were usually compiled by local surveyors on the basis of information provided by landowners. Exclusion of the route from adjacent hereditaments (as occurs here) generally indicated a highway, normally but not necessarily a vehicular one<sup>4</sup>, although other explanations are possible.

*The Bintley Report and other highway records*

30. Before examining other records from the twentieth century, I need to consider the implications of the document referred to as ‘The Bintley Report’. This document, dated 4 June 1895, consisted of a report to South Westmorland Rural District Council (SWRDC) by Mr Bintley on “*the Condition of Highways within the Council’s District, lately under the Management of the Surveyors of Highways*”.
31. Prior to 1894 when the Local Government Act transferred responsibility for the maintenance of public highways to rural district councils, such responsibility generally belonged to the parish. In February 1895 a committee of SWRDC appointed Mr Bintley “*to examine and report on the condition of all Parish Highways in the Districts*” so as to establish the scope (and cost) of the new highway authority’s responsibilities<sup>5</sup>.
32. Mr Bintley inspected “the Roads” within the area and classified them in 3 categories. Class 1 were main arterial roads, Class 2 were “*through Roads and Lanes*” and Class 3 consisted of “*narrow Lanes and those having more the character of occupation Roads*”.
33. In New Hutton, Lane Cottage Lane was listed in Class 3, as were all roads in this township. In Old Hutton Helm Close Lane likewise fell into Class 3 as did all but 2 of the 12 roads listed.
34. Helm Close Lane was described as a continuation of Lane Cottage Lane, commencing at St Sunday’s Beck and proceeding to the Ewbank Road. Despite it being “*a mere track through the field, badly rutted and undefined*”, and “*a narrow lane which was little better than a mud track*”, it was measured as 4 furlongs in length and the cost of repairs were quantified. However Lane Cottage Lane was “*a very bad lane*” leading to Old Hutton at St Sunday’s Beck. Whilst its length was measured as 200 yards and the necessary repairs were identified, neither of these items were included in the overall totals. This is explained when Mr Bintley reports: “*Mr Thexton says that the surveyors of New Hutton have never repaired this lane, whereas the surveyor of Old Hutton*

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<sup>4</sup> I have noted the case of *Robinson Webster (Holdings) Ltd v Agombar* [2001] to which I was referred

<sup>5</sup> Although no copy of the committee report has been submitted, it is reported that the Committee also made suggestions for classifying the roads and fixing a standard of repair for each class. Further it asked for an estimate of the cost of putting into repair any road in a Parish the condition of which was below the proper standard.

*informs me that the continuation of it in that Township to Ewbank has always been repaired by the surveyor, though I can see no evidence of it".*

35. It therefore seems that Lane Cottage Lane was not regarded as being repairable at the public expense and was consequently not included in Mr Bintley's calculations. Nevertheless, the repairs necessary were noted.
36. There is a related document, the origins of which could not be fully explained. This is a typed schedule entitled "Extract from Mr Bintley's Report on Roads in South Westmorland". The heading on the copy provided is "Roads in County Council "SOUTHERN" Division". It lists the roads from each township as identified by Mr Bintley but with different page references; it then proceeds to allocate each road a "C.C. No." (although the exact meaning of those specified has not been explained). It seems to me that this is most probably a document prepared by the Westmorland County Council (WCC) post-1929 after which responsibility for highways was transferred to the county councils.
37. Given Mr Bintley's *actual* comments on Lane Cottage Lane, it is perhaps not surprising to find that in the later document it was noted simply as "PRIVATE". Yet, whilst the 1895 Report was clearly centred on maintenance liability, there is at least an inference that the later report was aimed at classifying the roads listed, for example identifying some as A684, B5282, 'Non Sch' (presumably non-scheduled) and others listed under various schedule numbers (which have not been deciphered). Helm Close Lane was noted as "Non-Sch".
38. It seems to me that the label 'private' in the later document potentially misconstrues the information presented by Mr Bintley. He did not report that either Mr Thexton or the surveyors for New Hutton considered Lane Cottage Lane to be a wholly private access rather than a highway; rather he had been told the lane had not been maintained by the surveyors. That leaves open the possibility that it was either a privately maintainable highway<sup>6</sup> or that it was maintained at the public expense but no such maintenance could be recalled.
39. I attribute far less weight to what I consider to be a later WCC document based on the 1895 Report since there is no reference to any other evidence which might have informed the conclusion the lane was wholly private. As regards the Report itself, it clearly highlights the contradiction that is found in the OS Book of Reference: it confirms that east of St Sunday's Beck the way was a publicly maintainable highway whereas to the west its status was somewhat questionable but most probably maintained privately. Nevertheless, I find the argument that Mr Bintley would not have included Lane Cottage Lane in his Report had it not been regarded as a highway to be very persuasive.
40. However what is clear from Mr Bintley's Report, and from the records which pre-date it, is that the highway from Ewbank continued to St Sunday's Beck; it did not end in the yard at Old Croft. Similarly, it is apparent that, whatever its status, Lane Cottage Lane did extend eastwards to join the road from Ewbank<sup>7</sup>.
41. That conclusion is difficult to reconcile with the copy of the County Council's plan which forms the 'Publicly Maintained Highway Record' showing the route from Ewbank to the Old Croft farmyard (but no further) as U5641. Despite

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<sup>6</sup> The term 'highway' means a way over which the public has a right to pass and repass. Thus a 'privately maintainable highway' is a way open to the public for use in accordance with its status as a footpath, bridleway or carriageway but which is not maintained at the public expense.

<sup>7</sup> A cycling map produced around 1920 by Gall and Inglis shows the road as a through-route although its status is not clear from this other than that its lack of colouring indicated the road was "bad".

previously being noted as 'private' in the WCC list and as 'occupation lane' by the OS, Lane Cottage Lane is recorded as Public Footpath 10 continuing to the parish boundary, thus leaving a significant gap between the two routes.

42. In my view the most plausible explanation for this gap is provided in the text of the report prepared by CBS to accompany its application in 1998. In this document the author refers to a 1929 book of maps compiled by WCC showing "maintained roads". He comments that the notation used to depict a minor road was "a line of dashes alternatively very pale purple and red – the last red dash appears to end in the middle of the yard at Old Croft and the pale purple is difficult to see without a magnifying glass". He further suggests that this gave rise to the idea that the road did not extend to St Sunday's Beck and speculates that it was this map that was later copied when the route was shown on the definitive map.
43. Although the WCC Road and Bridges Department Footbridges Register is dated 1954–1974, some considerable time after Mr Bintley's work, it is relevant to note that the footbridge over St Sunday's Beck is recorded here. This is important for two reasons: firstly, the bridge spans the parish boundary<sup>8</sup> but there is no mention of only half being maintainable at public expense; secondly, there would be no need for a bridge<sup>9</sup> if there was no public right of way extending in both directions. The record notes that the bridge was checked in March 1972. There is also evidence that urgent repairs were carried out to the structure in 2000 by South Lakeland District Council.
44. I give considerable weight to the detailed survey carried out by Mr Bintley and reported in 1895 which clearly indicated that Helm Close Lane and Lane Cottage Lane met at St Sunday's Beck. In the absence of any evidence or logical reason for the gap shown on the highway authority's plan recording its maintenance liability, it appears to me that this was probably drafted in error.
45. From the evidence I have examined so far, I am in little doubt that historically a narrow public road ran down from Ewbank to the parish boundary at point B. All the evidence points to that conclusion.
46. Although a cul-de-sac highway to the parish boundary seems to me an unlikely explanation, the situation is not as clear cut for the route B-C. Yet, aside from the OS reference to this being an occupation road in the mid-nineteenth century, there is no other evidence which would not be explained by Lane Cottage Lane being a privately maintainable highway. On a balance of probability, I am satisfied that the continuation of Helm Close Lane to Lane Cottage was once also a narrow vehicular highway but, for reasons that have not come to light, this seems to have been regarded as privately maintainable.

#### *Other twentieth century changes*

47. Before considering the recording of public rights of way on the definitive map I will note as briefly as possible the changes that were occurring at Old Croft Farm from the 1950s onwards.
48. Old Croft Farm had been in the ownership of Mansergh Church until 1959 when it was sold. Initially the property was bought at auction by Mr Wilson's

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<sup>8</sup> The OS Perambulation of boundaries of the Parish of Old Hutton in 1855 shows the parish boundary to be in the centre of the bridge.

<sup>9</sup> On my second site visit I was shown other bridges over the beck; however, the bridge at point B is the only one which appears in the public record as being maintained by the highway authority.

- grandfather on 12 January 1959. After a change of mind, he offered the sale to Mrs Airey's parents, Mr & Mrs Casson who took ownership on 17 April 1959. Correspondence prior to the conveyance refers to "the existing roadway" (Lane Cottage Lane) being "impassable" and to there being a "proposed Deed of Grant providing for an alternative right of way through Millholme Farm".
49. Prior to the 1959 auction a signed deed dated 31 December 1958 signified the agreement between the then owners of Old Croft (Mansergh Church) and the Underley Estate to a right of way for Old Croft through Millholme to the public road at Millholme Bridge. A plan accompanying this agreement showed the Order route and its continuation eastwards coloured green which was to denote a "Council Road". Lane Cottage Lane was marked "Original access to Old Croft (impassable)" while the newly agreed route was labelled "Access through Underley Property". The map base (which appeared to have been traced from an OS map) also indicated a footbridge and ford, although by 1959 the original ford was most probably as impassable as Lane Cottage Lane (B-C).
  50. The 1959 conveyance acknowledged the access provided by the 1958 agreement and included "all rights of way and water and other easements (if any)" as standard. It did not make any reference to any easement along either Helm Close Lane or Lane Cottage Lane as might be expected for a private road.
  51. It appears that from the late 1940s (at least) there had been an informal arrangement to allow vehicular access to Old Croft via the yard at Millholme. This access track can be seen clearly on the OS 1": 1 mile map of 1952-1961 which gives the impression that the road from Ewbank turns towards Millholme rather than continuing to point C. This is similar on the OS 1965 revision and is later shown on the 1:2500 scale OS map of 1972.
  52. In fact the evidence suggests that by the mid-twentieth century the old ford had ceased to exist and any use once made of it by Old Croft had transferred to the alternative private crossing.
  53. Prior to the formal agreement it is suggested that any traffic other than pedestrians using the narrow Lane Cottage Lane would have, before reaching the old ford and footbridge, turned (through an area referred to by Mrs Airey as 'the waste') onto this access road which then forded the beck at a point slightly upstream. Later a simple wooden sleeper bridge provided access over the beck but this was narrow and larger vehicles were unable to use it.
  54. Mr Casson and his family did not live at Old Croft but visited on a daily basis to tend to stock on the farm<sup>10</sup>. According to both Mrs Airey and Mrs Hodgson, they would approach via Lane Cottage Lane<sup>11</sup>, turn across the waste onto the access road and cross the beck via the sleeper bridge to get to Old Croft. Both cattle and sheep were walked along this route, and sometimes a small tractor was driven down there or a horse and cart. This was used in preference to the access through Millholme Farm which was only used when really necessary.
  55. In 1974 when Mr Casson's solicitor approached the highway authority to seek help in dealing with overgrown hedges, he reported that information given to his client suggested that Lane Cottage Lane was owned by the highway authority, Westmorland CC<sup>12</sup>. However the reply from the Council stated it was

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<sup>10</sup> Until Mr and Mrs Airey moved to Old Croft Farm in 1976

<sup>11</sup> Having come from Low Garths Farm, approximately two miles away.

<sup>12</sup> Ownership of Lane Cottage Lane is not recorded by The Land Registry.



a private access road over which the authority maintained a public right of way on foot only.

56. When Millholme was sold for development in 1993, planning permission was granted for an alternative access road leading from a point near Lane Cottage. By agreement, the right for Old Croft to use the alternative route via Millholme was transferred to the new road broadly parallel to Lane Cottage Lane.

*The definitive map records*

57. These changes are particularly relevant since this was the period in which the first definitive map for the area was being compiled.
58. Following the National Parks and Access to the Countryside Act in 1949, work began on compiling a record of all public rights of way. Although in general this process anticipated that parish clerks would mark up maps for their parishes with routes believed to be public rights of way, it seems to be the case here that the maps were provisionally marked up by the county council for the approval of the parishes. This may or may not have been influenced by the fact that at that time neither Old or New Hutton had a parish council, parish business being conducted instead through an annual parish meeting. However there is no evidence to indicate whether the draft map was prepared by council staff as a desk exercise or from ground survey.
59. In Old Hutton parish, Helm Close Lane was represented on the parish survey map as a 'road used as a public path' (RUPP), denoted by Westmorland County Council in the map key as "a public road used mainly as footpath or bridleway"<sup>13</sup>. This extends from Ewbank to the Old Croft farm yard, mirroring the extent of the public road (U5641) shown on the 'Publicly Maintained Highway Record'.
60. In New Hutton Parish the schedule accompanying the survey map for Footpath 11 is dated 22 November 1951. It recorded the route starting on the unclassified road near Lane Cottage and leading to the parish boundary at Old Croft. The 'grounds for believing the path to be public' were stated to be "usage". Under 'any other relevant information' on the form is written "*The Parish Clerk was visited ... and agreed this was a Public Path*", effectively confirming that the initial research had been done by the County Council.
61. Little can be ascertained from the form about the current state of the route in 1951. In answer to the question "What is the present condition of the path, stiles, etc" is written the word "None". Although it was described as 'impassable' in 1958, this may have referred to access by vehicle leaving use on foot unaffected. Indeed, a decade or so later, an aerial photograph taken between 1968 and 1972 gives the impression that by then the lane was accessible and not restricted at all (although by 1974 Mr Casson sought assistance to cut back hedges).
62. Whilst it might be reasonable to deduce that the lane was usable by the public in the 1950s at least on foot, the word 'usage' is not overly helpful in explaining the origins of the definitive public footpath that came to be recorded. It was not noted as having any public status by the OS in its Book of Reference in 1858. Mr Bintley considered it alongside other vehicular highways

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<sup>1313</sup> The word 'public' is omitted from the statutory definition, thus leaving open the question of whether the public had a public right with a vehicle.

in 1895, considering it to be privately maintained but making no reference whatsoever to it carrying only a public right of way on foot.

63. Mr Wilson suggested that since the alternative private access road was so noticeable at that time, it may have been regarded as the legitimate continuation of Helm Close Lane and therefore may be the reason Lane Cottage Lane was identified only as a footpath.
64. It seems to me there are several possible theories to answer this question but I am not convinced by that particular argument and there is no other evidence from which to establish how this route came to be put forward as a public footpath. Since the demise of the ford would have precluded any use by the public other than that which could cross the beck via the footbridge, it seems quite likely that the only use in recent times would have been on foot. Perhaps a public footpath was simply a pragmatic solution to the anomaly presented by the presence of a WCC registered footbridge over St Sunday's Beck<sup>14</sup>. Again, that is speculation in the absence of reliable evidence.
65. As required by the Countryside Act 1968, and following local government re-organisation in 1974, Cumbria County Council embarked upon a special review of its definitive map. This legislation required all RUPPs to be reclassified; where a route was acknowledged to have a public vehicular right of way, its status was to be recorded as a bridleway if it was unsuitable for use with vehicles. That seems to have been the case with the RUPP between Ewbank and Old Croft<sup>15</sup>. The 'gap' between the end of this newly reclassified bridleway and Footpath 11 was not addressed in the process.
66. However reclassification did not extinguish any pre-existing higher public rights. Following use by motor cycles and conversion of a barn adjacent to the route at Ewbank to a dwelling in the late 1970s, an extinguishment order under Section 116 of the Highways Act 1980 was obtained through the Courts by CCC. This removed any vehicular right of way for the public to use that part of the U5641 between Ewbank and the Old Croft farmyard, this being the extent of the public road as shown on the 'Publicly Maintained Highway Record'.
67. Yet Mr Bintley clearly identified this road as continuing to St Sunday's Beck. In my view that is a conclusion entirely supported by logic as well as evidence.
68. The consequence of this is that Bridleway 560022 is now just that – a public bridleway – but any vehicular rights historically enjoyed by the public between points A and B will still exist today, as will any along Lane Cottage Lane.

*Conclusions drawn from the historical evidence*

69. I fully accept the objectors' submission that in determining the status of the Order route, the starting point is the definitive map and what is recorded there. The presumption should be that its details are correct unless there is cogent evidence to show otherwise.

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<sup>14</sup> I also note that on the New Hutton survey map, Footpath 11 was drawn as continuing across the beck to meet the RUPP which was shown (again) as finishing in the Old croft farmyard though this clearly lay outside the parish.

<sup>15</sup> It was noted: "the path is not suitable for vehicles of any description – the main section being narrow and having a very soft surface".

70. But here, at Old Croft, there is an anomaly insofar as there is a significant gap between a definitive public footpath and a public bridleway that, in my view, cannot be adequately explained simply as two cul-de-sac routes<sup>16</sup>.
71. In evaluating the evidence I have examined above, I accord a considerable amount of weight to the report produced for the highway authority of the day by Mr Bintley in 1895. Whilst I recognise that his focus was on maintenance of the highways listed, it seems to me that subsequent highway records may have misrepresented his findings.
72. He was satisfied that from St Sunday's Beck eastwards the road was a publicly maintainable highway albeit in a poor state. West of the beck he found no evidence of maintenance at the public expense and, in my view, he concluded it was a privately maintained highway. Had it not been a highway of any kind, he would have had no remit to form a view on what repairs were needed, even if the public was not required to fund them.
73. Subsequent to his report, the 1910 Finance Act is entirely in accord with the conclusion that, both east and west of point B, the Order route was a public road. It also tallies with its reputation (from an unknown source) of this being a 'Council Road' as depicted on the 1958 agreement plan.
74. Looking backwards, Mr Bintley's conclusions also concur with evidence found on the nineteenth century sale documents, the tithe maps for both parishes, the OS Book of Reference (in Old Hutton Township only) and the early commercial map(s). However it does not sit easily with the OS description of B-C as 'occupation road' in 1858.
75. Whilst I cannot rely on a document I have not seen, the explanation provided by CBS in 1998 of the faded notation used to depict the road from Ewbank to St Sunday's Beck on the 1929 handover map seems to me the only plausible reasoning for the section that is missing from all subsequent records of the U5641, including the RUPP shown on the definitive map (later Bridleway 560022).
76. As I have noted above, it is easy to understand how describing a highway as 'privately maintained' could be translated misguidedly simply as 'private' and thus mask its status as a public road.
77. In my view the evidence weighs against Lane Cottage Lane being a wholly private one: ownership is not known (though reputed to be a Council Road in 1958); if its original purpose had been to serve as a private means of accessing Old Croft<sup>17</sup>, there is no express mention of any such easement in the conveyance of 1959 (albeit an alternative was negotiated in 1958); and further this is not an example of a cul-de-sac occupation road leading to a farm as it undoubtedly joined the public road to Ewbank via a ford at St Sunday's Beck .
78. I recognise that the evidence suggests the condition of this road has, since the late nineteenth century at least, been noted as poor, that the narrowness of the enclosed sections will have undoubtedly restricted the width of any vehicles able to use it, and that after the demise of the ford sometime in the first half of the twentieth century any traffic other than pedestrians would have been

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<sup>16</sup> In *Kotarski v SSEFRA & Devon CC [2010] EWHC 1036 (Admin)* it was accepted that an apparent drafting error could constitute the 'discovery of evidence' sufficient to trigger consideration of evidence to correct it.

<sup>17</sup> The 1870 sale map suggests that land at either side of Lane Cottage Lane could be accessible from adjacent property without reliance on the lane.

unable to cross the beck. However I am nevertheless satisfied that the evidence before me is sufficient to show that historically the Order route A-B-C formed part of a vehicular public road.

79. Whilst there is unchallenged evidence that vehicular rights over the part to the east of point A were stopped up in 1981 by Court Order, no record has been found of any other legal instrument which may have downgraded the status of the Order route or extinguished the historical right of way for the public.
80. This leads me to conclude that the evidence is sufficient to show that the Order route was once, and still is, a public carriageway (albeit one limited in width) but the effect of the Natural Environment and Rural Communities Act 2006 in extinguishing any rights for mechanically propelled vehicles means that its current status should be recorded as a restricted byway.

*The requested modification*

81. At the inquiry CCC requested that I consider modifying the Order to include reference to the old ford at point B and to record the increased width of the way at this point (6 metres). This was based on a scaled measurement taken from the OS 25": 1 mile map of 1898.
82. As the objectors rightly point out, this is crucial since without the ford there could be no vehicular or equestrian rights across St Sunday's Beck.
83. The most detailed evidence to support the existence of a ford is provided by the OS on its 1898 map. The ford is not specifically labelled on the earlier (1858) map but this was not the convention for First Edition maps and it would be unsafe to conclude the ford did not exist at that time. Both tithe maps indicate that the road was a through-route, as does the Hodgson map; I therefore consider it reasonable to deduce that a ford had existed at point B since the early nineteenth century at least.
84. There is now no trace of the ford that can be discerned on site so that actual measurement cannot be undertaken. Whilst the 6 metre measurement may be a reasonable assessment of the dimensions of the ford, in line with published guidance<sup>18</sup>, I propose to modify the Order Schedule to make reference to the OS map which most accurately depicts its extent.

***Evidence of recent usage***

85. Since I have concluded that the historical evidence discovered in this case is sufficient to show that the Order route was a highway open to all types of traffic through the nineteenth and into the early twentieth centuries (and possibly earlier), there is no necessity for me to analyse the claimed use in recent times to determine whether dedication of the way to the public can be presumed or is implied on the basis of long usage on foot. All the use claimed by individuals and groups, whether challenged by the objector or not, will be attributable to its status as a publicly maintainable vehicular highway, even though actual use by horses and vehicles ceased long ago.
86. It is intended as no disrespect to the considerable time and effort that has been invested by witnesses at the inquiry, other supporters of, and objectors to, this

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<sup>18</sup> A letter (dated 12 February 2007) sent by Defra to all order-making authorities in England providing "Non Statutory Guidance on the recording of widths on public path, rail crossing and definitive map modification orders".

Order that, in these circumstances, I decline to examine in detail the evidence relating to recent use.

87. The alternative case put forward by CCC and the Ramblers' Association was based on the status of the way being brought into question some time in 2011 when a notice was placed on the Order route (between B and C) by Mrs Airey challenging use of the route through her farm yard. Around the same time evidence shows that people attempting to walk between points A and B were directly challenged by the Aireys potentially setting a 20 year period for consideration of 1991-2011.
88. I acknowledge the evidence forms and statements supplied by the 8 original claimants together with the additional witnesses who attended the inquiry to offer their recollections of walking all or part of the Order route in the past.
89. Although it is no longer at issue, I record here that I accept the objectors' submission that claimed use on foot alone cannot provide evidence to support a claim for higher rights. I also agree that, unless there is a direct link, modern usage is not necessarily evidence of historic reputation. In this case I have not judged it as such, but have regarded it as a separate matter for consideration if the historical basis for the route was not substantiated.
90. Further, I have noted the objectors' recollections of actions they have taken over the years, together with their comprehensive supporting records of documents sent and received.
91. It is perhaps understandable that Mrs Airey and her family have held the firm conviction that there has never been a public right of way through the farmyard at Old Croft. Ever since her father bought the farm in 1959, they have been led to believe that Lane Cottage Lane (B-C) is a *private* road carrying a public footpath only, and that the public road from Ewbank (later downgraded to bridleway) stops at the yard and does not reach St Sunday's Beck. Whilst some letters from the highway authority have alluded to the possibility of unrecorded rights, others merely relay the information held on the definitive map and the 'Publicly Maintained Highway Record'. For the reasons I have explained above, it seems to me that the evidence discovered in relation to this Order shows that a mistake in interpretation was probably made when WCC first compiled its highway records from the previous authority, post 1929. That this has been carried forward for decades is regrettable for all concerned.

### **Other Matters**

92. At the inquiry, the 2012 applicant Mr Robin (for the Ramblers' Association) submitted that the substance of his evidence has been prejudiced due to the significant delay in processing his application. Many witnesses were no longer available to attend the event to give evidence and therefore his case was not as strong as it might otherwise have been. Whilst I have some sympathy with his point, in practice the case for confirmation of the Order has rested on the historical rather than user evidence.
93. I noted above (in Footnote 1) that the officer's recommendation to CCC changed between reports in August and September 2017. In relation to this, the objectors challenged the basis on which the authority could alter its view when the evidence remained essentially the same. Further, the motives of the 2014 applicant were questioned with the suggestion that his interpretation of the evidence was one-sided. In response I make clear that I have considered

the submissions made by all parties, each offering their own interpretations, but it is the evidence itself which attracts the substantive weight in the determination of a case such as this.

### **Conclusion**

94. I am satisfied, on a balance of probability, that the evidence shows a restricted byway subsists along the route described in the Order between the points labelled A and B, and that the route presently recorded on the definitive map as Footpath 559001 should be upgraded to restricted byway status.
95. Having regard to the above and all other matters raised at the inquiry and in the written representations, I propose to confirm the Order with modifications to the Order to record the ford at point B as referred to in paragraph 84 above.

### **Formal Decision**

96. I propose to confirm the Order subject to the following modifications intended to include reference to a ford at St Sunday's Beck:

In the Order schedule

#### **In Part 1: Modification of the Definitive Map**

- For section A-B in 'Description of length of right of way to be added', delete "centreline of bridge ..." and substitute "bridge and adjacent ford ...";
- For section B-C in 'Description of length of right of way to be upgraded to restricted byway', delete "centreline of bridge ..." and substitute "bridge and adjacent ford ...";

#### **In Part 2: Modification of Definitive Statement**

- Amend 'Width' for Path Numbers 560027 and 559011 by deleting "0.7 metres at bridge" and substitute in both cases: "widening (to a maximum of 6 metres) at bridge and ford as shown on the Ordnance Survey Second Edition 25":1 mile map published in 1898".
97. Since the confirmed Order would (if modified) affect land not affected by the Order as made, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of my 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.

*Sue Arnott*

**Inspector**

## **APPEARANCES**

### **In support of the Order**

*For the Order-Making Authority:*

Ms P Christie                Solicitor, Cumbria County Council

*Who called:*

Mr A Sims                    Countryside Access Officer; Cumbria County Council

*Also supporting the Order:*

Mr G Wilson                Applicant (2014)

Mr A Kind                    (*Assisting Mr Wilson on 19 January*)

Mr P E Robin                Applicant (2012), Ramblers' Association

Mr D Staton                 (*Assisting Mr Robin*) Ramblers' Association

Mr D Bennett

Mr J Shorrocks

Mrs C Bowness

Mr R Wilson

Mr M Jackson

Mr S Hinchcliffe

### **Opposing the Order**

Mr N Westerway            Of Counsel, instructed by Mr J Pavey, Solicitor, Irwin Mitchell  
LLP representing Mrs Airey

*Who called:*

Mrs J Airey                    Objector

Cllr Mrs H Hodgson        Objector

## **DOCUMENTS**

1. Copy of the statutory objections
2. CCC's statement of grounds for seeking confirmation
3. CCC's statement of case submitted with Appendices A-G
4. Statement of case of Geoff Wilson with appendices
5. Statement of case submitted on behalf of Mrs J A Airey with appendices
6. Email to the Planning Inspectorate from Old Hutton & Holmescales Parish Council dated 20 October 2018
7. Email to the Planning Inspectorate from New Hutton Parish Council dated 23 October 2018
8. Letter to the Planning Inspectorate from Mrs B Casson dated 14 November 2018
9. CCC's Proof of evidence
10. Proof of evidence of Mr G Wilson and summary proof
11. Witness statement of Mrs J A Airey
12. Witness statement of Mr M Airey
13. Witness statement of Mrs B Casson
14. Witness statement of Mrs H Hodgson
15. Witness statement of Mr M Stott
16. Witness statement of Mr A Sims
17. Copies of the user evidence forms
18. Witness statements of Mr D Bennett, Mr J Shorrocks, Mrs C Bowness, Mr R Wilson and Mr J Bispham
19. Copies of Old Hutton village walk sheets (submitted by Mrs Bowness)
20. Digital photographs of diary presented at inquiry by Mr M Jackson
21. Email to the Planning inspectorate dated 12 April 2019 from Irwin Mitchell LLP summarising additional evidence and submissions on behalf of Mrs Airey and enclosing evidence from archives compiled by researcher
22. Second witness statement of Mrs J A Airey with enclosures
23. Copy of CCC Development Control and Regulation Committee dated 20 September 2017
24. Submission from CCC requesting modification of the Order
25. Further submission of Mr G Wilson dated 24 April 2019
26. Witness statement of Mr S Hinchcliffe
27. Documents referred to by Mr Hinchcliffe including (a) 1996 Parish Paths Partnership leaflet showing work done in 1995/6 and (b) extracts from pictorial Millenium Map
28. Witness statement of Mr R Harris
29. Letter to the Planning inspectorate from Mrs B Casson dated 21 April 2019
30. Photograph taken in 2019 showing Mrs Airey beside an old waymarker post
31. Copies of correspondence from 1959 in relation to the purchase of Old Croft
32. Copy of survey sheet dated 22 November 1951 for "FP 11"
33. Extract from the record of publicly maintained highways and the list of streets compiled under Section 36(6) of the Highways Act 1980



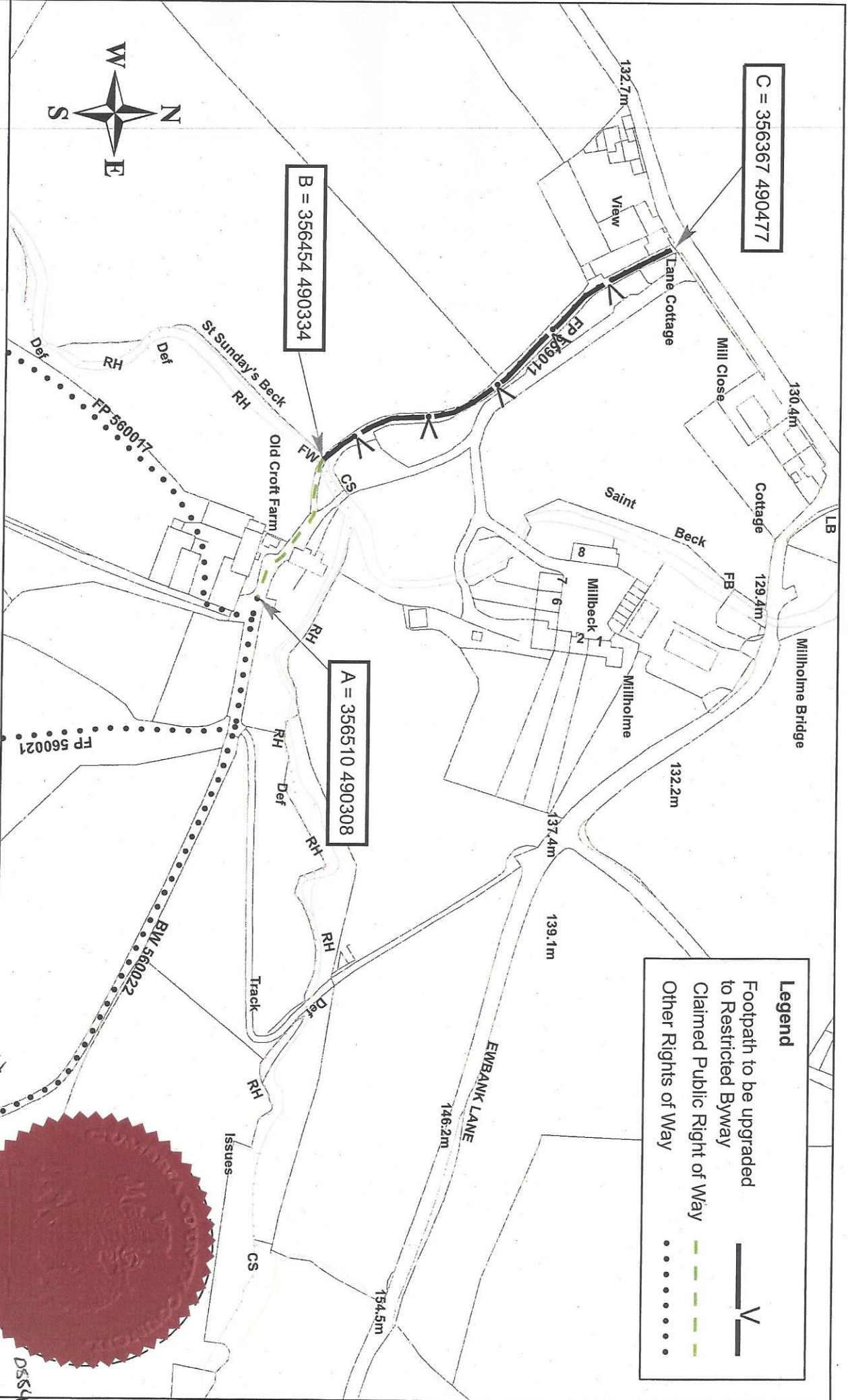
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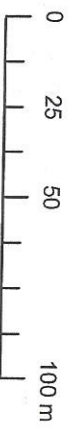
- Footpath to be upgraded to Restricted Byway
- Claimed Public Right of Way
- Other Rights of Way



Wildlife and Countryside Act 1981 Section 53  
 Definitive Map Modification Order  
 Old Croft Farm, New Hutton

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MAP NOT TO ORIGINAL SCALE



Scale 1:2000 @ A4



*P. Smith*

DSS4G