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## Order Decision

Site visit made on 5 October 2020

**by K R Seward Solicitor**

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

**Decision date: 20 October 2020**

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### **Order Ref: ROW/3231744**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as The Northamptonshire County Council (Public Footpath MY11 Elton Lock to Warmington Lock – Parish of Fotheringhay) Definitive Map Modification Order 2017.
- The Order is dated 6 July 2017 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There were two objections outstanding when Northamptonshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

### **Summary of Decision: The Order is confirmed.**

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#### **Procedural Matters**

1. The original application was made by the Elton Women's Institute in January 2011. It was subsequently taken over by Elton Parish Council who progressed the application and have been treated as the applicant.
2. As I have found it convenient to refer to points along the claimed route, a copy of the Order map prepared by the County Council, as Order Making Authority ('OMA'), is attached for reference purposes.
3. The claimed route affects three separate landholdings. During the statutory consultation period two objections were made to the Order. One objection is from the landowners of the section of route from points E-I. Another objection was made by the landowners of the fields between B-E. The section of route from A-B falls within the same ownership as Elton Hall. This owner acknowledged the application but did not wish to make submissions. An objection made by the Environment Agency (who have access over the bridge at point A for an annual inspection of the weir) was subsequently withdrawn.
4. During my site visit I was able to walk the vast majority of the route although a short section was inaccessible due to fencing. I could see nevertheless where the claimed path runs.

#### **Main Issue**

5. The Order was made under section 53(2)(b) of the 1981 Act in consequence of an event specified in section 53(3)(c)(i).
6. Therefore, the main issue is whether the discovery by the OMA of evidence which (when considered with all other relevant evidence available) is sufficient

to show 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.

## Reasons

### **Legal framework**

7. Whilst it suffices for a public right of way to be *reasonably alleged* to subsist to justify an Order being made, the standard of proof is higher for the Order to be confirmed. At this stage, evidence is required on the balance of probabilities that a right of way subsists along the Order route. The burden of proof lies with those who assert the existence of a public path.
8. In essence, I must consider whether the evidence shows that in the past the Order route has been used in such a way that a public footpath has been established.
9. The Order was made on the basis of claimed use by the public. Therefore, it is necessary for me to consider whether dedication of the way as a public footpath has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in section 31 of the Highways Act 1980 ('the 1980 Act'), or by implied dedication at common law.
10. For a presumption to be raised that the route had been dedicated as a public footpath under section 31 of the 1980 Act it must be "other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication". In addition, there must have been use of the claimed route by the public as a footpath 'as of right'<sup>1</sup> and without interruption, over a period of 20 years immediately prior to its status being brought into question. The presumption may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner/s during the 20-year period to dedicate the way for use by the public.
11. Should the test for statutory dedication fail under section 31, then it may be appropriate to consider the dedication of the way at common law. This requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the landowners and (iii) whether there is acceptance of the highway by the public. There is no fixed period of use at common law and depending on the facts of the case it may range from a few years to several decades. There is no particular date from which use must be calculated.

### **Background**

12. The claimed route commences near to Elton Lock at the junction with existing public footpath No. MY8, Fotheringhay. The route follows the former towpath beside the River Nene in a southerly and then south-westerly direction to meet public footpath No. MY5, Fotheringhay, at Warmington Lock.
13. The presence of the route as a physical feature is apparent on Ordnance Survey mapping dating back to 1886 and 1900 where it is annotated as a 'Towing Path' with a footbridge at point A. According to the Parish Council it remains shown as a towpath in the 1952 and 1958 County OS Series.

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<sup>1</sup> Meaning without secrecy, force or permission.

Witnesses in support of the claimed route also identify the existence of stiles at places along the route.

14. Given that the route formed part of the towpath for the River Nene Navigation it would have been used by those exercising navigation rights. The OMA submits that the various Acts of Parliament enabling the river to be navigable gave rights of towing and hauling along the designated way but it did not confer rights to pass and repass on foot to establish a public footpath. Therefore, the presence of a well-worn track, stiles and footbridges does not signify a public right of way.

### ***Statutory dedication – section 31 of the Highways Act 1980***

#### *Bringing into question*

15. The first matter to be established in relation to section 31 is when the public's rights were brought into question.
16. Several witnesses mention a locked gate across the route with a prohibitive notice in the latter part of 2010 which appears to have prompted the application. A photograph is produced of the metal gate at one end of the footbridge at point A with a sign affixed saying "PRIVATE Keep out" which was taken in October 2010. The earliest date identified by one user for the gate is September 2010.
17. However, under section 31(6) of the 1980 Act an owner of land may at any time deposit with the appropriate council a map of the land and a statement indicating what ways (if any) over the land he admits to have been dedicated as highways. The deposit must be supported by a declaration. In the absence of proof of a contrary intention, the effect of such a deposit is sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway. For ongoing protection, the owner or successors in title need to have made statutory declarations at the requisite intervals.
18. In this case, the landowner of the stretch of claimed footpath from E-I deposited a map with the County Council under section 31(6) in May 2004. There followed a statutory declaration in October 2004. A further deposit was made in January 2015.
19. Such a deposit can be taken as a date that the public use was called into question. Nevertheless, it remains possible that deemed dedication of the route as a public right of way could have occurred through public use prior to that date. Also, the deposit protects only the land covered by it and not other land affected by the remainder of the claimed path.
20. A deposit under section 31(6) had also been made in June 2009 by the Elton Estate for the land surrounding A-B. It excluded the former towpath along which the claimed route runs and so the deposit is of no effect with regard to the application for a public footpath between these points.
21. Therefore, I take May 2004 as the date the right of the public to use the path as a whole was brought into question giving a requisite 20-year period for the purposes of section 31 as May 1984 to May 2004. Should that evidence not suffice to confirm the Order then a different 20 year period may be considered

for the part of the route from A-E only ending in 2010 to correspond with the locked gate.

*User evidence*

22. Evidence is provided by a total of 30 witnesses claiming use of the path. Nine witnesses were interviewed by the OMA and supplementary submissions made. The OMA discounted the evidence of some witnesses. This was on the basis that one may have been exercising an easement to access his land. The use by a further three witnesses predominantly fell outside the relevant period of 1984-2004. Of those remaining, the earliest claimed use was in 1958. Eleven<sup>2</sup> of those witnesses claimed a full 20 years or more use throughout the relevant period. A further two witnesses claimed use over that period but only used the route occasionally. Around 14 claimed use for part of the period ranging from between about 5-19 years. All use was on foot for recreational purposes. Only one user also rode on horseback for part of the period.
23. Upon analysis there is a reasonable amount of consistent evidence demonstrating regular public use on foot throughout the requisite 20 year period.
24. In the original objection to the OMA, the agent for one statutory objector stated that information had been received from someone who works on behalf of Anglian Water in respect of dredging in the region including the River Nene. The agent goes on to say that his clients confirm that there were fences present on the land in question which were dismantled by the dredging team for Anglian Water. The fencing was not re-erected due to the arable nature of the fields. It is suggested that the fencing would have interrupted the 20 year period and prevented use until 1986. It is submitted that if there was a fence, it would have been clear to a user that access was not permissible otherwise there would be a stile or gate. The inference is that witnesses either did not use the route before 1986 or they did so by force.
25. The OMA does not accept that fencing would have prevented physical access for walkers to what was a towpath for the River Nene Navigation and which required access to the riverbank for anglers with permits to fish this section of river. As it is, no direct evidence has been forthcoming from the Anglian Water worker to confirm the position of the removed fencing nor has this been explicitly identified by the landowners.
26. The presence of fencing across the path is contradicted by the users who say they were able to use the route unobstructed. The landowners suggest that 1986 was memorable because a valuable pot was discovered during dredging that year which was sold at auction. The Parish Council challenges whether the find occurred in 1986 rather than some years earlier. Having trawled the National Archaeological Inventory they say that the only vessel dredged from the River Nene recorded over this period in Fotheringhay parish was a bowl acquired by the British Museum in 1982. The British Museum online catalogue records that the bowl (purchased through Sotheby's) was "Found by Mr Wiggins in dredging operations in 1981" which were taking place in the River Nene "near" Fotheringhay.

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<sup>2</sup> The OMA included a twelfth witness whose form indicates that their use commenced in 1985 rather than 1984.

27. Whether the location of the find was along the stretch of river adjacent to the claimed path cannot be gleaned from the description and it does not assist in pinpointing where any fencing was located. However, there is striking similarity between the memorable event as described by the landowners and the details of the bowl held by the British Museum which was recovered from the River Nene in 1981. The probability is that they are the same event. The landowners' submission is lacking in detail and clarity on whether the route itself was ever fenced to prevent physical access by walkers. Even if there was fencing in situ up until the river was dredged, the evidence points firmly to those works taking place in 1981 and so it cannot have interrupted the 20-year period.
28. The objecting landowners maintain that they were unaware of any public use of the claimed route. That may be so, but there is no suggestion that the use was undertaken other than openly during daytime when walkers could be observed. Indeed, many users refer to seeing other walkers, people fishing and swimming in the river and farmers on the land. The picture emerging is of a well-used route walked by members of the public as well as those exercising other rights. Given the level and frequency of claimed use over a prolonged period it seems implausible that an occupier in regular attendance would have been unaware of the use.
29. The OMA surmises that signs mentioned by four witnesses probably related to the Countryside Stewardship Scheme in which the Elton Hall Estate participated for a 10 year period from 1991. The OMA confirms that no part of the claimed route appears to have been included in that Scheme and so the signage was unlikely to be for a permissive path open to the public. In any event I note that the signage mentioned by those witnesses in their completed forms seems to refer to the ones displayed on the gate which appeared in 2010 i.e. after the relevant period.
30. Having regard to the above, I find that the Order route has been used by the public as of right and without interruption for the full period of 20 years between 1984-2004. The use is sufficient to raise the presumption that the way has been dedicated as a public footpath.

*Lack of intention to dedicate*

31. The objecting landowners suggest that had they known of the public use, then walkers would be advised that no public right of way exists and asked to vacate the land. There does not need to be evidence that the owners knew and accepted the public use. The question is whether the landowners did in actual fact take steps to demonstrate a lack of intention to dedicate during the relevant period. There must be evidence of some overt act or acts on the part of the landowner, being the person entitled to dispose of the fee simple estate, to show the public at large who used the path that they had no intention to dedicate. The test is whether a reasonable user would have understood that the owner of the land over which the route passes, was intending to disabuse the user of the notion that the way was public.
32. One witness says they were challenged after the path became blocked in 2010. Another witness says they were challenged by a farmer since having a dog but does not elaborate further to ascertain if this was during or after the relevant period or indeed the basis of challenge. One witness recalls meeting the landowner of A-B with his family who made comment to the effect of how lucky they were to have this on their doorstep. Quite when this occurred is unclear.

33. The fact remains that there is no substantive evidence of the landowners taking measures to challenge or prevent public access until 2004 when the section 31(6) deposit was made for the southern part of the route. By that time there had already been public use of the path in excess of 20 years.
34. As prudent landowners, the statutory objectors say that they always take appropriate action to prohibit unlawful access onto and across their land. They emphasise that the section 31(6) deposit was not prompted by any particular concern but as a matter of prudence for their whole landholding. Clearly, the deposit could only be effective from the date it was made and does not defeat the claimed use over the preceding 20 year period.
35. The statutory objectors further say they are in the habit of erecting signage where necessary. They are no more specific than that and do not explicitly identify the presence and content of any signs between 1984-2004. No users mention seeing any prohibitive signage until those erected on the gate further along the route at point A in 2010. Prior to the emergence of that signage there is no evidence of any signs aimed at deterring public access to the route.
36. All things considered, I find the evidence of the landowners to be too generic and lacking in detail of any specific overt measures taken over the 20 year period before May 2004 to demonstrate a lack of intention to dedicate.
37. Bearing in mind my findings above, the test for statutory dedication has been met under section 31 of the 1980 Act and it is unnecessary for me to consider the dedication of the way at common law.

### **Conclusion**

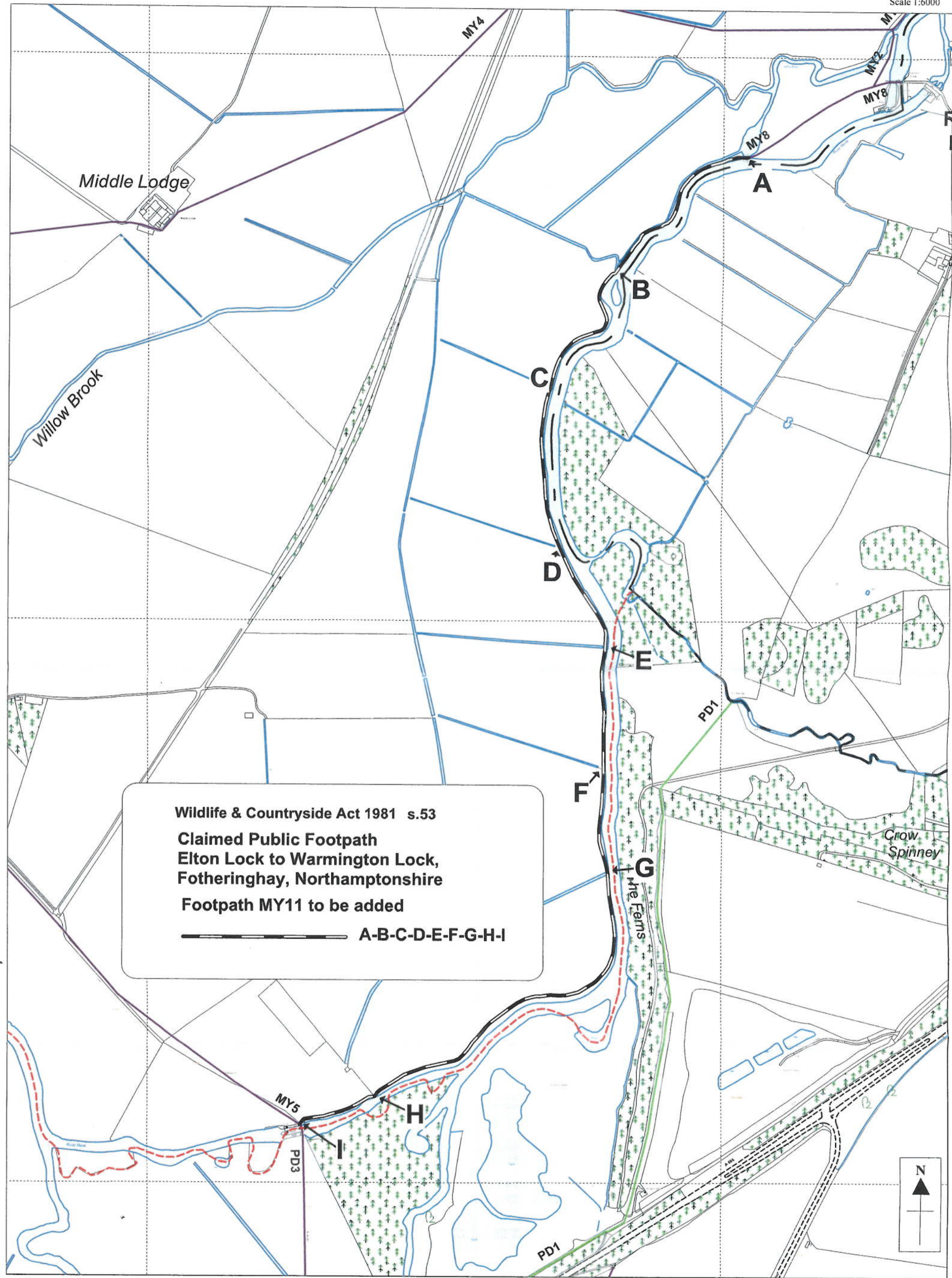
38. On the balance of probabilities, I am satisfied on the evidence before me that a footpath subsists along the entirety of the route and that the DMS should be modified accordingly.

### **Formal Decision**

39. I confirm the Order.

*KR Seward*

INSPECTOR



**Wildlife & Countryside Act 1981 s.53**  
**Claimed Public Footpath**  
**Elton Lock to Warmington Lock,**  
**Fotheringhay, Northamptonshire**  
**Footpath MY11 to be added**  
 ——— A-B-C-D-E-F-G-H-I

*Michael...*