



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: 03 December 2020

Order Ref: ROW/3196947M

- 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 recording 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.
- In accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 I have given notice of my proposal to confirm the Order with modifications. Four objections have been submitted in response.

Summary of Decision: The Order is confirmed with the modifications previously proposed.

Preliminary matters

1. If confirmed with the modifications set out in paragraph 96 of my interim Order Decision issued on 11 July 2019, the Order would record on the definitive map and statement a restricted byway as originally proposed but with the addition of a ford adjacent to a footbridge at St Sunday's Beck on the parish boundary. Further, the Order route A-B-C would be recorded as being 3m (metres) wide throughout but "*widening (to a maximum of 6m) at bridge and ford as shown on the Ordnance Survey Second Edition 25":1 mile map published in 1898*".
 2. Following advertisement of my proposal to confirm the Order with these modifications, four objections were received: from Mrs J Airey, Tim Farron MP (on behalf of Mrs Airey), Cllr Hodgson and Mrs Casson.
 3. These objections contained some submissions which were relevant to my proposed modifications, some which related to the unmodified parts of the Order and some representations which were not relevant to matters I can take into account.
 4. Following circulation of the objections I received comments from Mr Wilson and Cumbria County Council (CCC), a detailed statement of case submitted on behalf of Mrs Airey, and (subsequently) responses to this submission from CCC and Mr Wilson. All these documents were again circulated for comment with an invitation to all parties to address certain points.
 5. No new evidence was submitted by the objectors. The only evidence that was not previously before me was provided by Mr Wilson in relation to the proposed
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modifications and relating specifically to the ford. This would normally limit the scope of any further consideration to (only) the modifications proposed under Paragraph 8 of Schedule 15 to the Wildlife and Countryside Act 1981 (the 1981 Act).

6. However, legal submissions in the documents I have noted above included references to caselaw that was not put before me at the inquiry. These raise new arguments that relate to the Order as a whole as well as to the proposed modifications, either in support of or against confirmation. Therefore, before reaching a final conclusion on the Order and the modifications, I invited further comment, specifically on:

(a) the new evidence provided by Mr Wilson, and

(b) any relevant points raised by the cases of *Whitworth v SSEFRA [2010] EWCA Civ 1468 (Whitworth)*, *R (Gloucester CC) v SSETR [2001] 82 P & CR 15 (a case known as 'Maisemore')*, *Croydon RDC v Moorsom-Roberts [1908] 72 JP 123* and *Caton v Hamilton [1889] 53 JP 504*.

7. In short, I allowed further consideration of the Order as a whole as provided under Paragraph 7 of Schedule 15 to the 1981 Act in addition to matters relating specifically to the proposed modifications to be considered under Paragraph 8 so as to ensure all relevant material was addressed.
8. Responses were received from CCC, Mr Wilson and from Solicitors acting on behalf of Mrs Airey, all of which were circulated for information. A further submission from Mr Wilson was also circulated although it contained no new material.
9. I have taken into consideration all the responses to my invitation to comment alongside all other relevant evidence previously examined and analysed in my interim Order Decision.
10. For clarity, I have interpreted references to the route as a 'byway' in the objector's statement of case as meaning the restricted byway proposed by the Order.

The Main Issues

11. The main issue remains whether the evidence is sufficient to show, on a balance of probability, that the public rights of way claimed over the Order route subsist. In the light of the conclusions I previously reached, and the modifications I proposed as a result, a secondary issue concerns the nature of the crossing at St Sunday's Beck and the width of the public right of way at that point.

Reasons

12. The additional material now before me falls into two broad categories: (a) new evidence and (b) relevant case law that may influence my interpretation of the evidence as a whole. The new evidence relates primarily to the ford that is the focus of my proposed modifications so I will deal firstly this before considering the submissions relating to the Order as a whole.

Matters relating to the proposed modifications

13. At paragraph 84 of my interim Order Decision I proposed to modify the Order Schedule to make reference to the OS map which most accurately depicts the extent of the ford. More specifically, the modifications to the width of the Order route would delete the description "0.7 metres at bridge" (being the width of the stone footbridge) and substitute "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".
14. Mrs Airey has argued that the volatility of the water course resulted in the location of the crossing varying over time to the extent that there is no sufficiently precise line for any ford capable of being included in the Order. I will deal with this wider point in relation to the legal submissions addressed below. However she submits further that the ford was not shown on the 1858 First Edition OS map, or the 1834 tithe map, and therefore cannot be relied upon to have been in existence since that date.
15. The additional documentary evidence now before me comprises of extracts from Ordnance Survey First and Second Edition 25": 1 mile maps showing crossings of similar watercourses in the locality.
16. In relation to these examples, Mr Wilson makes the point that it was not common practice for the OS to annotate fords and footbridges on First Edition maps whereas this was the norm on the second series. That is demonstrated by the examples now provided.
17. He submits that the absence of the word "ford" from the 1858 edition does not indicate that no ford was present at that time; the markings on the map clearly show the feature widening as it crosses the beck. The same is true for the tithe records: the existence of a ford had no effect on the payment of tithes and therefore there would have been no need to label it on the map. Consequently the absence of any annotation does not confirm that no ford existed at that time. The 1858 OS map tends to confirm with reliable accuracy that it did, albeit not annotated as such. I previously accepted this point and I am not persuaded to alter my view.
18. I remain of the opinion that, on a balance of probability, the extent of the ford as drawn on the 1898 OS map represents the historical limits of the right of passage for the public crossing St Sunday's Beck.

Matters to be considered in relation to the order as a whole

19. I will state again that (other than the map extracts which relate to the ford) no additional evidence has been submitted which might cause me to reach a different conclusion to that set out in my interim Order Decision.
20. Although Mrs Airey's agents have argued that I should have allocated more or less weight to various items of the evidence, I am largely content with my previous analysis as it stands and given the information before me at that time.
21. Since then, the objector has submitted that two overarching legal principles should be borne in mind, the first arising from the *Whitworth* case and the second relating to *Maisemore*.
22. The first principle is that where evidence of a right of way is consistent with a number of outcomes, the appropriate inference is that which interferes least

- with private property rights. Mrs Airey argues that in the present case, the greater majority of the evidence relied upon is equally consistent with the Order route being "a footpath over a road (ie a road used as a public path on foot) rather than necessarily an ancient byway"¹
23. I fully acknowledge the point established in *Whitworth*. However, I do not interpret that case to be suggesting that where there is documentary evidence of a full public road that it should instead be recorded as a footpath on account of the potential effects on the landowner.
24. The conclusions I have reached rest on the interpretation of historical evidence which shows, on a balance of probability, that the route in question was established as a full vehicular highway long before living memory. It does not rely on a period of public user to demonstrate a presumed or implied dedication of the way to the public by the owner whereby use (in particular by cyclists) might be attributable to one type of highway rather than another. Indeed no part of this case rests on the presumed dedication of the way by the objector or her family who have farmed at Old Croft since 1959.
25. As regards the second principle, established in the *Maisemore* case, it is widely accepted that "*the route of a highway can and should be defined with some precision*". Mrs Airey submits this is particularly important when considering the route over the volatile stream that is St Sunday's Beck since the case confirmed that a right of way could not be established over a "*moving right of way*". I do not disagree with that general point at all but the facts in *Maisemore* were significantly different to those here.
26. CCC points out that historic plans clearly and consistently show the extent of the ford and Mr Wilson highlights the value of OS maps in demonstrating the unchanging position of the crossing in relation to Lane Cottage Lane. He submits that the cases of *Croydon RDC v Moorsom-Roberts [1908]* and *Caton v Hamilton [1889]* confirm that "*an OS map may be used to show the position of a feature at the time a survey was taken*". Other cases make the same point².
27. It is Mrs Airey's contention that the nature and position of the ford was never fixed and changed over the years as St Sunday's Beck varied; therefore any right of way would have moved over time.
28. There is little doubt over the fact that at some stage during the first half of the twentieth century an alternative ford crossing came into use upstream of the ford in question. At paragraph 51 of my interim decision I noted 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.*"³ Further (at paragraph 52) I concluded that "*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 crossing.*"
29. No evidence has been forthcoming to alter those conclusions on matters of fact. Whilst I have considered above the extent of the ford in relation to my proposed modifications, suffice it to say here that prior to the 'new' 20th century ford and subsequent (private) vehicular bridges, access across St Sunday's Beck was confined to the crossing at point B and that this would have

¹ To be clear, the Order relates to restricted byway status.

² In particular the better known case of *AG v Antrobus [1905] 2 Ch 188*

³ In her submissions, Cllr Hodgson again referred to the recollection of a local resident that 75 years ago, the only bridge over the beck was the stone footbridge and that carts and cattle crossed at the upstream ford.

been constrained on the western side by the splayed walls of Lane Cottage Lane. That must be true whether one considers private access to and from Old Croft Farm or public use continuing to or coming from Ewbank via Helm Close Lane. It has not at any time been suggested that the public used the upstream ford or the later bridges.

30. Therefore any scope for 'moving the right of way' would have been inevitably restricted by the physical features that have remained unchanged, that is the walls at the end of the lane. These features appear in the same position on every OS map that is before me. It is true that definition of the ford is less clear on the eastern side but it's width is nevertheless limited by markings shown on the OS 25" maps supplied. In my view this is not the type of situation to which the *Maisemore* principle applies; instead, it simply constitutes an informal ford crossing with defined boundaries within which variations in the lines taken through it were possible, dependent on ground conditions and water levels pertaining at the time.
31. I conclude that neither the *Whitworth* nor *Maisemore* cases raise principles which cause me to re-interpret the evidence before me, or to reach any conclusions other than those set out in my interim decision.
32. That being the case, there is no need for me to re-state my reasoning. Mrs Airey's submissions generally reiterate the case previously put to me on her behalf but I will deal with just one point that arises from them. The issue concerns the report compiled by Mr Bintley in 1895 on "*the Condition of Highways within the Council's District, lately under the Management of the Surveyors of Highways*" which is considered in paragraphs 30–40 of my interim decision. (The report's relationship to more recent highway records is covered in the subsequent six paragraphs.)
33. Mrs Airey has again pointed to some of the roads surveyed by Mr Bintley which, she says, were not public vehicular roads, thus casting doubt on the interpretation of his report as encompassing only public carriageways. In her submission, other examples show that he included private roads, albeit some that carry a public right of way on foot. She again highlights Glen Lane, Crook Hall Lane and High Leys Lane as examples of roads considered by Mr Bintley to be "*little more than an accommodation road*" and "*simply and purely accommodation roads ... [that] only serve about three or four farms*".
34. These three roads are all recorded as unclassified county roads. No evidence has been provided to determine the extent of the public's rights over each of these three lanes. In the absence of evidence to show otherwise, the general presumption is that each route is a public vehicular highway, notwithstanding how it may have appeared to Mr Bintley at the end of the nineteenth century. Indeed Mr Bintley's examination of the condition of each one relied on the fact, noted in the title of his report, that each road had "*lately been under the Management of the Surveyors of Highways*". Of course that does not preclude the possibility that a route was maintained as a public bridleway or footpath but such instances are rare.
35. The Bintley report is a key document in this case and is evidence to which, as I stated at paragraphs 44 and 71 of my interim decision, I attach considerable weight. I have no reason to alter any of the conclusions I reached which led me to that view.

36. To conclude, I remain satisfied that the evidence before me is sufficient to show, on a balance of probability, that the Order route (A-B-C) should be recorded on the definitive map as a restricted byway.

Other Matters

37. Several objections comment on the impracticality of using the ford today with a vehicle given the relatively narrow gap between the stone footbridge and an adjacent mature tree which stands at the point where Lane Cottage Lane meets St Sunday's Beck. I fully recognise that.

38. The process of examining evidence to determine the status of any route involves looking at records of what was in existence in the past, in some instances centuries ago. It is not a case of taking a logical approach to the rights of way network and seeking to fill a gap on the definitive map (as occurs here between points A and B).

39. Neither is it a question of assessing the practicalities of opening up any lost rights, nor of undertaking a risk assessment or health and safety study. All those things may be relevant to the future management of the route in question but they do not affect the impartial assessment of its legal status.

40. Similarly, Cllr Hodgson's suggestion for a diversion of the route is not a matter I can take into consideration; it may be a matter to be pursued with the highway authority once the status of the route is confirmed but it does not affect my decision on this Order.

41. On behalf of his constituents, Tim Farron MP has sought reassurance that equal consideration will be given to all comments submitted and that "*the effect of the decision on both parties be weighed-up and measured fairly.*"

42. I am able to confirm that I have taken into consideration all the evidence put before me; I have weighed that evidence fairly, irrespective of the party who provided it but taking account of "*the custody in which it has been kept and from which it is produced*"⁴. However the effect of the decision on any of the parties is not a matter which I can properly take into consideration in determining an order of this nature.

Conclusion

43. I remain 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 (B-C) should be upgraded to restricted byway status.

44. 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 the previously proposed modifications to record in the Order the ford at point B.

⁴ As is required by Section 32 of the Highways Act 1980

Formal Decision

45. The Order is confirmed subject to the following modifications:

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".

Sue Arnott

Inspector

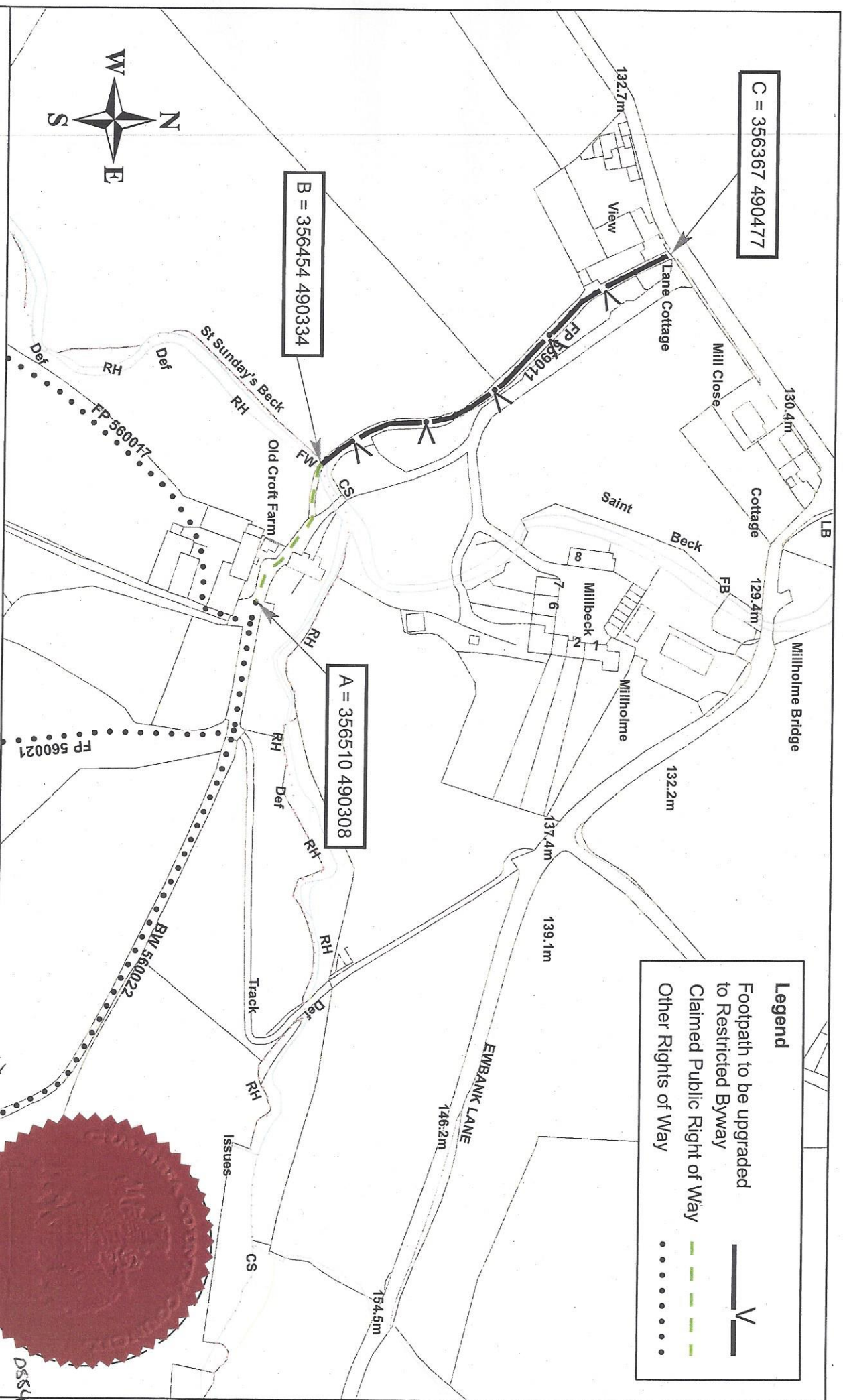
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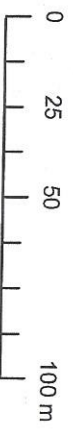
- Footpath to be upgraded to Restricted Byway
- Claimed Public Right of Way
- Other Rights of Way



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