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| **Order Decisions** |
| Site visit made on 28 March 2023 |
| **by Claire Tregembo**  |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
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| **Decision date: 28 April 2023** |

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| **Order Ref: ROW/3282626** | **Creation Order** |
| * This Order is made under Section 26 of the Highways Act 1980 and is known as The Lake District National Park Authority Public Path Creation and Definitive Map and Statement Modification Order 2021 - Creation of footpaths 408028, 408092 & 408093 at Brotherilkeld and Taw House, Eskdale Parish.
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| * The Order is dated 27 April 2021 and proposes to create three public footpaths as shown on the Order Plan and described in the Order Schedule.
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| * There was one objection outstanding when the Lake District National Park Authority submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The Order is confirmed.**  |
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| **Order Ref: ROW/3282630** | **Extinguishment Order** |
| * This Order is made under Section 118 of the Highways Act 1980 and is known as The Lake District National Park Authority (Extinguishment of footpath 408028 and part of footpath 408032 at Brotherilkeld, Eskdale Parish) Public Path Extinguishment and Definitive Map and Statement Modification Order 2021.
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| * The Order is dated 27 April 2021 and proposes to extinguish two public rights of way shown on the Order Plan and described in the Order Schedule.
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| * There was one objection outstanding when the Lake District National Park Authority submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The Order is confirmed.** |
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| **Order Ref: ROW/3282633** | **Diversion Order** |
| * This Order is made under Section 119 of the Highways Act 1980 and is known as The Lake District National Park Authority Public Path Diversion and Modification Order 2021 -Diversion of footpaths 408008, 408029 & 408032, Brotherilkeld, Eskdale Parish
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| * The Order is dated 27 April 2021 and proposes to divert three public footpaths as shown on the Order Plan and described in the Order Schedule.
* There was one objection outstanding when the Lake District National Park Authority submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The Order is confirmed.** |
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Preliminary Matters

1. I made an accompanied site visit on 28 March 2023 with representatives of The Lake District National Park Authority (the Authority) The National Trust (the NT) who own the land, and the objector.
2. Although there are three separate orders, the routes in them are interlinked and some sections are dependent on each other. Therefore, they are being considered concurrently. It would be possible to confirm some of the Order routes but not others. However, if I were to do this, modifications may be required to ensure that the footpaths connect to other routes. I will refer to various sections and points shown on the Order Plan and have attached a copy of it to the end of my decision.

**Main Issues**

***The Creation Order***

1. Under Section 26 of the Highway Act 1980 (the 1980 Act), if I am to confirm the Order, I need to be satisfied that there is a need for the public footpaths, and that it is expedient that they should be created. In determining the need for the footpaths. I must have regard to:
2. the extent to which the paths would add to the convenience or enjoyment of a substantial section of the public, or the convenience of persons resident in the area; and
3. the effect which the creation of the paths would have on the rights of the persons with an interest in the land, account being taken of the provisions for compensation.

***The Extinguishment Order***

1. The Order is made on the grounds that the paths are not needed for public use. Under Section 118(2) of the 1980 Act, if I am to confirm the Order, I must be satisfied that it is expedient to extinguish the paths having regard to:
2. the extent, (if any) to which it appears that the paths would, apart from the Order, be likely to be used by the public; and
3. the effect that the extinguishment of the paths would have as respects land served by the path, account being taken of the provisions for compensation.
4. Where an extinguishment is being considered concurrently with a creation, Section 118(5) provides that I may have regard to the extent to which a path provided by the Creation Order will provide an alternative path or way when considering the likely future use of the path proposed for extinguishment.
5. In accordance with section 118(6), any temporary circumstances preventing or diminishing the use of the path or way by the public shall be disregarded.
6. I have had regard to the judgements of *R v SSE ex parte Stewart* [1980] KPL 537 and *R v SSE (ex parte Cheshire County Council)* [1991] JPL537 which clarified the relevant tests to be applied. Whilst the Authority must consider the need for the path for public use when making the Order, I must look at its likely future use.

***The Diversion Order***

1. Section 119(6) of the 1980 Act involves three separate tests for an Order to be confirmed. These are;

Test 1: whether it is expedient in the interests of the landowner, occupier, or the public for the paths to be diverted. This is subject to any altered point of termination of the paths being substantially as convenient to the public.

Test 2: whether the proposed diversions are substantially less convenient to the public.

Test 3: whether it is expedient to confirm the Order having regard to the effect which; (a) the diversion would have on public enjoyment of the paths as a whole, (b) the coming into operation of the Order would have as respects other land served by the existing public rights of way, and (c) any new public rights of way created by the Order would have as respects the land over which the rights are so created and any land held with it.

1. In determining whether to confirm the Order at Test 3 stage, (a)-(c) are mandatory factors. On (b) and (c) of Test 3, the statutory provisions for compensation for diminution in value or disturbance to the enjoyment of the land affected by the new paths must be taken into account, where applicable. Other relevant factors are not excluded from consideration and could include those pointing in favour of confirmation.

***All the Orders***

1. I need to have regard to any material provision of any rights of way improvement plan (ROWIP) prepared by any local highway authority whose area includes land over which the Orders would create, extinguish, or divert public rights of way.

**Reasons**

***The Creation Order***

1. The Creation Order, if confirmed, would create three new paths, sections E-F, P-T-Z and D-R. The first two sections are unrecorded routes and section D-R is intended to replace section E-I-H which is proposed to be extinguished by the Extinguishment Order.

*The need for the proposed paths*

1. Section E-F links Brotherilkeld with Taw House and provides a footpath between FP408008 and FP408011 on either side of the river. It has been shown on Ordnance Survey maps since at least 1860 with a bridge over the river at point E. It is known to have been well-used for many decades and is a popular route. Therefore, I consider there is a need for this footpath.
2. Section P-T-Z is a well-used path and forms a link between two of the proposed footpath diversions. I am advised that it has been used for many years and is the most heavily used path between Brotherilkeld and the fells. Therefore, I consider there is a need for this footpath.
3. The proposed section D-R is intended to replace section E-I-H of the existing footpath FP408028 which runs between FP408008 and FP408032. This indicates that there is a need for a footpath between the two paths.

*The extent to which the paths would add to the convenience or enjoyment of the public or the convenience of residents*

1. Section E-F provides an important and convenient link between the footpath networks on either side of the river. It is the only footpath crossing this section of the River Esk, although there is a road bridge to the west. It allows the use of a variety of circular and linear walks. I consider it adds to the convenience and enjoyment of the public and residents.
2. As the most heavily used path between Brotherilkeld and the fells, P-T-Z adds to the convenience and enjoyment of the public. It also has a more sustainable surface than FP408008 to the west.
3. It has been suggested that a wider width should be created to allow walkers to deviate around wet patches without trespassing. The site visit took place on a very wet day. There was shallow standing water in several places along the Order route but, the surface underneath was firm and useable with appropriate footwear. I consider that most walkers on this path would expect to encounter puddles. I consider that the proposed width of 1.8 metres is adequate for the footpath.
4. Concerns are raised over the accessibility of the bridge on route E-F, and the gates on routes E-F and P-T-Z. A memorial plaque indicates that the current bridge was erected circa 1964. Although it could be more accessible, it has been used by walkers for many years and appears to be suitable for use. Under the Equalities Act 2010 (the 2010 Act) public authorities are required to make reasonable adjustments to improve accessibility. The Authority intends to provide a more accessible bridge when it requires replacement. However, they do not believe it would be a reasonable adjustment to replace it at this time. I agree with this view.
5. The wicket gates on the footpaths are easy to use with wide openings. The Authority has confirmed that the gates meet the agreed standard in the Lake District National Park Structures Standards approved in 2011 (LDNPSS) which conform to BS 5709:2006. They are less restrictive than many access controls such as stiles and kissing gates. I do not consider it necessary for the gates to adhere to the latest British Standards when an alternative local policy is in place. The grid references given in the Order for the gates are correct.
6. Section D-R crosses one boundary through a field gate. There are three boundaries, a spring, and a boulder bank on section E-I-H. As the proposed footpath requires fewer structures than the existing footpath, I consider it to be more convenient for the public and residents even if the existing footpath was not obstructed. Furthermore, section D-R does not cross the spring or the boulder bank, so it is easier to use and more convenient than the existing footpath.
7. If travelling to and from the northeast, you would have to travel approximately 20 metres further using route D-R than on section E-I-H. I consider that this extra length has limited impact on the convenience and enjoyment of walkers when the length of the connecting footpaths is taken into consideration.
8. Overall, I consider that section D-R would add to the convenience and enjoyment of the public and residents, particularly when compared to the existing footpath.

*The effect on persons with an interest in the land*

1. The NT identified section E-F in a project to legally record new public rights of way over their land. The NT and their tenants accept the creation of all the footpaths included in the Creation Order.
2. The Creation Order would remove the liability for the surface of the Order routes from the landowner. It is unclear who has been maintaining the bridge over the river, but the Order would place this with the highway authority or their agent creating certainty for everyone.Therefore, I consider that there are no adverse effects on persons with an interest in the land.

*Conclusions on whether it is expedient to confirm the Creation Order*

1. The Creation Order routes are needed for public use and would add to the convenience and enjoyment of the public and residents. There are no adverse effects on the landowner or their tenants. Having regard to these and all other matters, I consider that it is expedient to confirm the Creation Order.
2. I note that sections E-F and P-T-Z connect to the line of the proposed footpath in the Diversion Order and, if it were not confirmed, would not connect to the wider footpath network. Therefore, I would need to modify the Creation Order to include short sections E-D and G-P of the Diversion Order. In those circumstances, I consider that these sections would be needed for public use and would add to the convenience and enjoyment of the public.

***The Extinguishment Order***

1. The Extinguishment Order, if confirmed, would extinguish sections A-B and E-I-H. Both footpaths are currently obstructed. However, I will disregard these obstructions and consider their use as if they were available to the public.

*The extent to which it appears that the paths would, apart from the Order, be likely to be used by the public*

1. Section A-B runs along a riverbed and is obstructed at either end by stone bridge parapets. It is enclosed on one side by a stone wall and an embankment on the other. There is limited space on the riverbanks for the public to walk. Another footpath, FP408027 runs along a wide track between the same points on a shorter, more direct route.
2. I consider that the public are unlikely to walk in the riverbed and would use FP408027 instead. They are also unlikely to want to negotiate structures over the bridge parapets at either end which are likely to be fairly high above shallow water. Therefore, I consider that section A-B is unlikely to be used by the public.
3. Section E-I-H passes through three boundaries, over a spring and down a boulder bank. The proposed replacement footpath, section D-R, only passes through one field boundary. I have already concluded in paragraph 20 above, that section D-R is more convenient and easier to use than section E-I-H. Therefore, I consider that this footpath is unlikely to be used by the public if the Creation Order is confirmed.

*The extent to which the Creation Order would provide alternative paths*

1. As previously concluded, if the Creation Order is confirmed, section D-R would provide an alternative route that is more convenient and easier to use than section E-I-H.

*The effect that the extinguishment of the paths would have as respects land served by the paths, account being taken to the provisions as to compensation*

1. Access to the farm is along FP408027 which is not being extinguished, although it will be renumbered. There is nothing before me to indicate that the extinguishment of section A-B would affect land served by the existing route.
2. The extinguishment of section E-I-H would allow better management of the farmland and provide more fields without access to walkers and dogs. The alternative route proposed by the Creation Order interferes less with farming activities. Therefore, the extinguishment of this section of the footpath would have a positive effect on the land served by it.

*Conclusions on whether it is expedient to confirm the Extinguishment Order*

1. I consider that section A-B is unlikely to be used by the public to any great extent. Therefore, I consider it is expedient to confirm the extinguishment order for section A-B. The extinguishment of section E-I-H is dependent on the alternative route, D-R being created. If section D-R is created, section E-I-H is unlikely to be used by the public to any great extent. I have concluded in paragraph 26 above that it is expedient to confirm the Creation Order for D-R. Accordingly, I conclude it would be expedient to confirm the extinguishment order for section E-I-H.

***The Diversion Order***

1. The Diversion Order, if confirmed, would divert three footpaths. Section C-I-G-Q of FP408008 would be extinguished and replaced with section C-D-E-G-P-Q. Section K-W-N of FP408032 would be extinguished and replaced with section K-Y-Z-M. Section J-L of FP408029 would be extinguished and replaced with section K-L.
2. The existing footpaths all cross field boundaries and structures are not provided in many of them, so they are effectively obstructed. However, I will disregard these obstructions and assess their use as if they were available to the public.

*Whether it is expedient in the interests of the owners, lessees, or occupiers of the land and the public that the paths should be diverted*

1. The Diversion Order has been made in the interests of both the owners of the land and the public. The NT lease the land, so I will also consider the impact on their tenants.
2. The proposed diversion of FP408008 between C and G is in the interests of the landowners and their tenants. It would move the footpath from fields used for lambing to an enclosed corridor alongside the river. This would keep walkers and dogs out of the fields preventing them from disturbing livestock. This would allow better utilisation of lambing fields with good grazing, of which there are few. This is particularly the case for the small paddocks close to the farm which are used to hold weaker lambs and ewes. For these reasons, I consider that the diversion of section C to G is in the interests of the landowner and their tenants.
3. The existing section of FP408008 between G and Q traverses two very steep sections of former riverbank which are difficult to use. There are no objections to its diversion onto section G-P-Q. I consider that the diversion of this section of the footpath is in the interests of the public.
4. The proposed diversion of FP408032 would move it from the definitive line to the walked line. The definitive line runs across a steep, rocky slope and, apart from some short sections, is not visible on the ground. The incline of the slope makes it awkward to use and it crosses several springs and gills which are rocky and slippery. A pond has also encroached across it at one point. By comparison, the proposed footpath follows part of a farm track then a natural, stone path with shallow, level ford crossings across the gills and springs. It is safer, easier to use and follow, and is not encroached upon by the pond. I consider that the diversion of FP408032 is in the interests of the public.
5. A section of the definitive line also has trees planted along it. They are currently small and have limited impact on the footpath. However, as they grow, they could require thinning or pruning to ensure that they do not encroach on the footpath. The proposed route is not affected by tree planting. Therefore, I consider the diversion of this section of the footpath is in the interests of the landowner and the public.
6. Currently, FP408029 crosses the corner of an enclosed field crossing two unbroken boundary walls. The proposed diversion follows the wall around the edge of this field with no boundary crossings. The landowner or their tenants would not have to provide and maintain structures, and the public would not have to use them. I consider that the diversion of FP408029 is in the interests of the landowner, their tenants, and the public.

*Whether any new termination points are substantially as convenient to the public*

1. The start and end points of footpath FP408008 are unchanged by the proposed diversion.
2. The north-eastern end of footpath FP408032 would move approximately 150 metres to the northeast and terminate on the same footpath. The other end remains unchanged. If walking up or down the valley, there would be minimal change in the length. If walking a circular route along footpaths FP408032 and FP408008 it would be 150 metres longer. However, considering the overall length of the footpaths and the terrain, this distance is minor. I am satisfied that the new termination point will be substantially as convenient to the public.
3. The north-eastern end of footpath FP408029 would move approximately 20 metres northeast terminating on the same footpath. The other end remains unchanged. For walkers heading northeast, it would provide a slightly shorter route but would be slightly longer for those heading southwest. This distance is very minor, particularly as walkers are likely to be covering considerable distances when using the connecting footpaths. I am satisfied that the new termination point will be substantially as convenient to the public.

*Whether the new path will not be substantially less convenient to the public*

1. The proposed section of FP 408008 would be 70 metres longer than the existing footpath. It would cross two field boundaries through a kissing gate and a wicket gate. Between C and G, it would run between the river and a fence with a width of 1.8 metres for most of its length. However, there would be a pinch point of 1.3 metres alongside a wall and a 20 metre section with a width of 1 metre. The section between G and Q would have a width of 1.8 metres and would be unenclosed. The existing footpath crosses fields and passes through five field boundaries.
2. The surface of the proposed section between C and G is less even and level than the existing footpath. I agree that this makes it less convenient to the public, but not substantially so. It has been suggested that it should be surfaced according to the Authority’s Cycleway and Standard Footpath Construction with a useable width of 1.8 metres and an additional width of 0.3 metres from constraints on either side. I do not consider that a formal surface would be appropriate in this location. The NT has previously undertaken minor surfacing work and further improvements could be made if it became necessary. The highway authority or their agent would be responsible for maintaining the footpath to a standard suitable for use if the Diversion Order is confirmed.
3. Because the proposed footpath is enclosed, it does feel more confined than the existing footpath. It also reduces the space available to pass other walkers, particularly on the narrower sections. However, there is still sufficient space for two people to easily pass along most of the footpath. The fence is low with views over the wider landscape limiting the feeling of confinement.
4. Although the surface, width and fencing make the proposed footpath less convenient than the existing footpath, I do not consider it to be substantially less convenient.
5. It is claimed that the riverbank is eroding. However, I did not see any signs of ongoing erosion and the Authority does not recall any over the last fifteen years.
6. The proposed section between G and Q avoids two steep banks on the existing footpath making it more convenient to use.
7. The reduction in boundary crossings makes the proposed footpath slightly more convenient. I consider the increase in length to be minor when considering the overall length of the footpath.
8. I have already concluded in paragraph 41 that the proposed line of FP408032 is easier to use with safer crossings of the springs and gills. This makes the footpath more convenient for the public.
9. It has been suggested that a formal surface should be provided. The line of the proposed footpath is firm underfoot and easy to use and follow, particularly once the proposed waymarking is completed. Providing a surface here would, in my opinion, have a negative impact on the landscape. Furthermore, due to the amount of water runoff from the hills, a constructed surface could be more prone to erosion than the existing footpath leading to a poorer surface with additional maintenance liability.
10. It is only 20 metres longer which is insignificant considering the overall length of the footpath.
11. There would be three structures on the proposed footpath, a field gate, a kissing gate, and a ladder stile. The existing kissing gate does not meet the standard specified in the LDNPSS but would be replaced if the Order is confirmed. The field gate is easy to use, and the ladder stile meets the specification in LDNPSS.
12. A gate is more accessible and preferable to a ladder stile. However, this is the northern boundary of the farm, and the tenants are concerned that the gates on the Order route are not fully stock proof. They consider a ladder stile to be essential to avoid livestock escaping and the onerous and lengthy task of regathering them. The ladder stile also prevents illegal motorbike access which is becoming a problem in the area. The nearby field gate has been heavily reinforced because of this issue. The Authority considers it unreasonable to demand a gate at this point but will continue to negotiate this if the situation changes. A ladder stile is less convenient for the public. However, given the terrain and the length of the footpath, I do not consider that a ladder stile at this point makes the diversion route substantially less convenient.
13. The diversion of FP40829 would remove the need for two structures on the footpath making it slightly more convenient to use. The new footpath is 5 metres longer, but given the total length of the footpath, this is insignificant.
14. I do not consider that the diversions would make any of the footpaths substantially less convenient for the public. Some sections would be more convenient.

*The effect of the diversion on public enjoyment of the path as a whole*

1. The diversion of FP408008 between C and G would move it from across a field to the riverside. Many walkers are likely to find a riverside footpath more enjoyable than a cross-field one. The removal of the steep slopes between G and Q would make this section more enjoyable. I consider that the diversion of this footpath would not impact on its enjoyment and for many walkers, it would be more enjoyable.
2. I have already concluded in paragraph 41, that the proposed line of FP408032 is easier to use and follow, therefore the diversion would make it more enjoyable. The views would remain the same and it appears to be the preferred route. I consider that the diversion would not affect the enjoyment of this footpath.
3. The diversion of FP408029 is minor and will have no impact on the enjoyment of the overall route.

*The effect of the diversion on other land served by the existing paths and the land over which the new paths would be created*

1. The proposed diversions are supported by the landowners and their tenants. The footpaths to be extinguished do not appear to provide access to any land. Some sections of the proposed new footpaths are used as access tracks, but the diversion will not affect this use.

*Conclusions on whether it is expedient to confirm the Diversion Order*

1. I consider the diversion of section C-G of FP408008 to be in the interests of the landowners and section G-Q to be in the interests of the public. The diversion will not be substantially less convenient to the public and section G-Q will be more convenient. It would not impact on the enjoyment of the footpath and many walkers will find it more enjoyable.
2. I consider that the diversion of FP408032 is in the interests of the public and will make the footpath more convenient to use. I do not consider that there will be any effect on the enjoyment of the public.
3. I consider that the diversion of FP408029 is in the interests of the public, the landowners, and their tenants. It will not make the footpath substantially less convenient or affect its enjoyment by the public.
4. Having regard to these and all other matters raised, I conclude it is expedient to confirm the Diversion Order.

**Rights of Way Improvement Plan (‘ROWIP’)**

1. The Authority believes that the Orders fit with the aims of the ROWIP to continuously assess the extent that the access network meets the present and future needs of the public. Nothing has been raised by any other party.

**Other matters**

1. Unrecorded rights, issues and obstructions on other rights of way, unofficial diversions, the presence of dogs in the farmyard, poor management of the network and lack of action by the Authority were referred to. However, these matters do not relate to the Orders before me and I have not taken them into consideration.

**Overall Conclusions**

1. Having regard to the above, and all other matters raised in the written representations, I conclude that the Extinguishment Order, Creation Order and Diversion Order should be confirmed. As I have concluded that all the Orders should be confirmed modifications are not necessary.

**Formal Decision**

***The Creation Order***

1. I confirm the Order.

***The Extinguishment Order***

1. I confirm the Order.

***The Diversion Order***

1. I confirm the Order.

*Claire Tregembo*

INSPECTOR

Order Map

