



# Order Decision

Site visit made on 8 April 2010

by **Susan Doran** BA Hons MIPROW

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

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Decision date:

**24 MAY 2010**

## Order Ref: **FPS/Q9495/7/24**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Lake District National Park Authority (Part of Right of Way 206008, High Close, Bassenthwaite Parish) Definitive Map Modification Order 2008.
- The Order is dated 7 April 2008 and proposes to modify the Definitive Map and Statement for the area by downgrading to Footpath that part of the Bridleway 206008 as shown in the Order plan and described in the Order Schedules.
- 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.

## Summary of Decision: **The Order is not confirmed**

### Procedural Matters

1. In addition to the statutory objection from the Byways and Bridleways Trust ("the BBT"), a representation supporting the Order was submitted from the Kendal Group of The Ramblers.
2. This matter is to be determined by the written representations procedure. I carried out an unaccompanied visit.

### The Main Issues

3. The Order has been made in consequence of an event specified in Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 ("the 1981 Act"). This requires me to consider whether the evidence discovered, when considered with all other relevant evidence available, is sufficient to show that part of the highway shown in the map and statement as a highway of a particular description, as a bridleway, ought to be there shown as a highway of a different description, as a footpath, and that the Map and Statement require modification. The evidence adduced is documentary.
4. My consideration of the evidence in determining whether or not the Map and Statement should be modified is weighed on the balance of probability. However, in the case of a 'downgrading' there are stringent requirements to be met. The evidence discovered by the Lake District National Park Authority ("the LDNPA") must be new, it must be of sufficient substance to rebut the presumption that the Definitive Map is correct, and it must be cogent evidence that a mistake was made when the Definitive Map was drawn up in the 1950s.
5. In considering the issues I take into account relevant guidance and case law, as relied upon by the parties.

## Reasons

6. The evidence discovered by the LDNPA is the objection made in March (and again in April) 1953 by Bassenthwaite Parish Council ("BPC") to the inclusion of the Order route by the then Cumberland County Council ("CCC") in the Draft Definitive Map and Statement as a bridleway.
7. Guidance produced by *defra*<sup>1</sup> states the evidence must be new. This is qualified in that an order, here to downgrade a right of way, "*cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made*".
8. The LDNPA quotes *Burrows*<sup>2</sup> on the discovery of evidence, confirming that the same evidence previously considered cannot simply be re-examined, and Section 53(3) requires the discovery of evidence which was "*not produced to the decision maker who made or approved the existing version of the definitive map*"; *Mayhew*<sup>3</sup> which held the discovery of evidence requires the discoverer "*applying his mind to something previously unknown to him*"; and *Riley*<sup>4</sup>, which held that new evidence should be different from that originally relied upon.
9. The legislation<sup>5</sup> afforded an opportunity for challenges to be made where, for example, an error or omission had occurred in the Draft Map. BPC wrote to the Clerk of the County Council (27 March 1953) pointing out the discrepancy between the footpath claimed in the Parish Survey and what was shown on the Draft Map. A further letter to the County Surveyor (25 April 1953) elaborated upon the discrepancy. A memorandum from the County Surveyor to the Clerk of the County Council followed, enclosing BPC's letter, and referring to objections to the claims of bridleway rights which the County Surveyor had "*deemed it expedient to make*" further to the continuation of routes into other parishes, and to representations by the Friends of the Lake District. I conclude from this that the County Surveyor found it necessary to amend the status of certain routes within the Parish. The Clerk acknowledged BPC's second letter on 26 June 1953 and the "*minor corrections*" CCC had been asked to consider (which had been noted), seeking BPC's views on the addition of 5 other routes claimed.
10. The BBT argues there is no evidence the objection was, and no evidence it was not, resolved. According to the LDNPA the records of both BPC and CCC are quite extensive. This being so, one might expect to find a clear determination on this objection in the archives (and on all other matters in BPC's representation) had it been made one way or the other, but there appears to be none. It is plain, however, that CCC received, acknowledged and noted the issues raised by BPC. The County Surveyor had given consideration to the status of the Order route, and the decision to effect the amendment was a deliberate one, as detailed in the memorandum. Therefore, it can be argued that CCC considered the objection and it was dealt with at the time the Draft Map was being drawn up, and thus the proper procedures were carried out.

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<sup>1</sup> Department for Environment, Food and Rural Affairs Rights of Way Circular (1/09), Guidance for Local Authorities, Version 2 October 2009, paragraph 4.33 (it is Version 1 March 2009, on which the LDNPA argues its case. However, although now superseded, the guidance remains the same)

<sup>2</sup> *Burrows v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 132 (Admin), paragraph 26

<sup>3</sup> *Mayhew v Secretary of State for the Environment* [1993] 65 P & CR 344

<sup>4</sup> *R v Secretary of State for the Environment ex parte Riley* [1990] 59 P & CR 1

<sup>5</sup> The National Parks and Access to the Countryside Act 1949

11. Determinations were published by CCC, and a seemingly standard letter was sent to Parish Councils giving notice of them. For Bassenthwaite Parish this was a list of the modifications CCC considered requisite to the Draft Map, being the 5 additional ways claimed, and the variation of one of the routes detailed in BPC's letters. It could be that CCC only issued a determination in those cases where an alteration was to be made to the Map, so where no change was deemed necessary, no determination was made, although I have no knowledge of how objections were determined elsewhere by CCC.
12. It is possible that in determining some of the matters raised by BPC, the representation in question was simply overlooked. It is clear from the correspondence that CCC was concerned to resolve the representations in respect of the 5 additional ways claimed. Nevertheless, there is no evidence that BPC continued to pursue its objection through the appropriate channels, although this might have been expected given that documents following the publishing of the Definitive Map indicate a consistent stance was taken with regard to the status of the Order route.
13. The Draft Map recorded the structures shown on the Parish Survey Map, including a (possible) stile; and the footpath status recorded in the Survey would have been evident to CCC since they went on to amend it, as demonstrated by the memorandum. Thus I find there is evidence that the Parish Survey was taken into account, rather than that CCC did not consider it properly.
14. Defra guidance<sup>6</sup> addresses procedural matters in the light of rights of way already shown on the Definitive Map and Statement, and is relied on by the LDNPA. It says the Inspector's role is not to adjudicate on whether procedural defects were made when a right of way was added to the Definitive Map, but goes on to say, *"Unless evidence concerning a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status was ignored) there can be no reason for an Inspector to consider it..."*.
15. Having regard to the evidence, it is possible that the surveying authority failed to address the objection at the time, and the matter can be investigated now. However, BPC's objection was acknowledged and noted by those dealing with the Draft Map, the County Surveyor had looked at the routes, mostly in terms of their continuation, and determinations were made in respect of routes to be added or altered and, in particular, included one of those set out in BPC's letters to CCC. The Draft Map mirrored details from the Parish Survey, indicating it was not ignored. It seems to me this is good evidence that the proper procedures were followed by CCC at the time and the objection duly considered. Thus I find the evidence discovered is not new.
16. If on the other hand I were to accept BPC's objection as new evidence, I consider below whether it is of sufficient substance to displace the presumption that the definitive map is correct, and whether it is cogent.

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<sup>6</sup> Letter dated 15 February 2008 from Defra to The Planning Inspectorate

17. The *Trevelyan* case<sup>7</sup> is cited by both parties with particular reference to the following statement by Lord Phillips M.R., "*Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put into the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.*"
18. The LDNPA also cites the judge's interpretation of *Trevelyan* in *Thould*<sup>8</sup>: the initial presumption is that a disputed right of way exists, its addition to the definitive map having been based upon reliable evidence of its existence following the proper procedures. However, this presumption is capable of being rebutted by evidence which shows the contrary to be the case.
19. CCC began its rights of way survey in 1950 enlisting the help of parish councils. BPC was apprised in detail of the procedure and requirements of the Survey and the LDNPA comment that the documents it returned were of a thorough and detailed nature.
20. BPC's Survey Map annotates the Order route "FP", diverging from a route annotated "BR", bearing the same reference number and which continues as a separately numbered bridleway. Structures recorded are gaps, field gates, fences<sup>9</sup> (with or without barbed wire) and a stile. However, if a stile was present I do not consider it means public bridleway rights did not, or could not have existed. A Survey Form corrected in several places is difficult to interpret, but the Survey Schedule accompanying the Survey Map records the way as a bridle-road and footpath, with no stiles. The reason for believing it to be public is given as the 1895 Parish Council Minutes. These provide a list of 23 footpaths reported by the Footpaths Committee, including the Order route (no ways are recorded at a higher status) and suggest it carried at least footpath rights at the time. The Parish Council's 1935 Survey was also consulted (its contents are not reported, and no copy of it has been provided). The LDNPA concludes that BPC intended to claim a bridleway from which branched a footpath, the Order route, which seems a reasonable conclusion to draw when considering the Survey Map and Schedule together.
21. The Draft Map, sent to BPC for public display and inspection, showed the Order route as a bridleway, and recorded the structures shown on the Parish Survey Map. BPC wrote to CCC (paragraph 9) in response to a Minute of a Parish

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<sup>7</sup> *Trevelyan v The Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 266, paragraph 38

<sup>8</sup> *Thould v Secretary of State for the Environment, Food and Rural Affairs* [2006] EWHC 1685

<sup>9</sup> These 'fences' are defined by BPC in a letter dated 26/04/51 as a low fence, or one that was steady and easily climbed.

Council Meeting recording an agreement to protest about the route being so shown. In their second letter, BPC suggested the western end of the way be re-numbered to that of the bridleway to Peter House, with the footpath (the Order route) branching from it. I consider the Minute, even if regarded as representing the views of the members of the Parish Council (as evidence of reputation) remains of some weight to be put in the balance with the other available evidence.

22. The LDNPA concludes there is clear evidence of an error in that CCC marked both paths as bridleways because BPC had merged the first part of the bridleway and the footpath with the same number on the Survey Schedule. This, they say, would not have occurred if the routes had been claimed separately, each with a discrete status.
23. The only available evidence concerning how the Order route came to be recorded as a bridleway is the CCC memorandum (paragraph 9). The LDNPA points out that the Order route does not cross into a neighbouring parish<sup>10</sup>. Subsequent correspondence from CCC to BPC (paragraph 9) clarifies that the representations refer to additional routes. Therefore neither of the explanations given in the memorandum appears applicable to the Order route.
24. However, the memorandum goes on to say "*I make no comment at this stage as it will be found that most<sup>11</sup> of these routes can only be considered in relation to their course through neighbouring parishes*". It seems to me that there must have been another reason, or reasons, for the County Surveyor to find it expedient to make the alteration. Whilst there is no clear evidence available to us now of the basis on which the route came to be recorded as a bridleway, there is nothing to indicate from this that its amended status resulted from BPC's merging together the sections of the route as one, as the LDNPA suggests. There must have been some evidence in existence and available to CCC at the time that made it reasonably arguable that such a right of way existed and which led to their decision to show it as a bridleway.
25. Determinations made in respect of the Draft Map and Statement, were notified to BPC on 12 April 1954 (paragraph 11) and the appeal procedure against them explained. The Provisional and Definitive Maps continued to show the Order route as a bridleway.
26. Other evidence to weigh in the balance is provided by Ordnance Survey ("OS") mapping. I understand most of the Order route appears on the 1860 OS map<sup>12</sup>. The 1900 25-inch edition OS map marks it as far as High Close (Kestrel Lodge) and annotates it "FP". Although not providing evidence of status, it is evidence of what was surveyed on the ground, and I consider indicative of a way physically available only to pedestrians at that time. Although consistent with the 1895 Parish records, this would not preclude the possibility of higher rights having been acquired by the time the Definitive Map was being prepared.
27. Correspondence following the Definitive Map process details complaints about obstructions along this and adjoining routes whose status had been contested since May 1952 according to extracts from BPC Minutes. Surveys by CCC

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<sup>10</sup> The LDNPA states that only one of the routes referred to in BPC's letters went to the Parish boundary

<sup>11</sup> My underlining

<sup>12</sup> A copy of this map was not provided in the LDNPA submission.

Engineers indicate the Order route appeared to be a footpath rather than bridleway. The view of landowners and others was a mistake had been made in recording its status. Under a Special Review of the Definitive Map in 1976, the landowners applied to have the Order route (and connecting bridleway) downgraded. However, this was not possible under the Countryside Act 1968 without new evidence that could not have been considered or made available at the time the Map was drawn up.

28. The Definitive Map is presumed correct unless there is evidence to establish otherwise. Having reviewed all of the evidence, and notwithstanding that which supports the status of footpath, it is evident that CCC considered the Parish Survey, considered the Order route and had noted BPC's representations when drawing up the Draft Definitive Map. The route's status was amended and shown thereon as a bridleway. With the passage of time, what evidence caused this change in status cannot now be known. However, in the light of my findings, I conclude that the proper procedures were followed and evidence of such status existed to support the decision made by CCC to show the Order route as a bridleway. Thus, even if I were to accept BPC's objection as new evidence, I find it is not of sufficient substance or cogency to displace the presumption the Definitive Map is correct so as to tip the balance in favour of a mistake having been made.

### **Conclusions**

29. Having regard to these and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

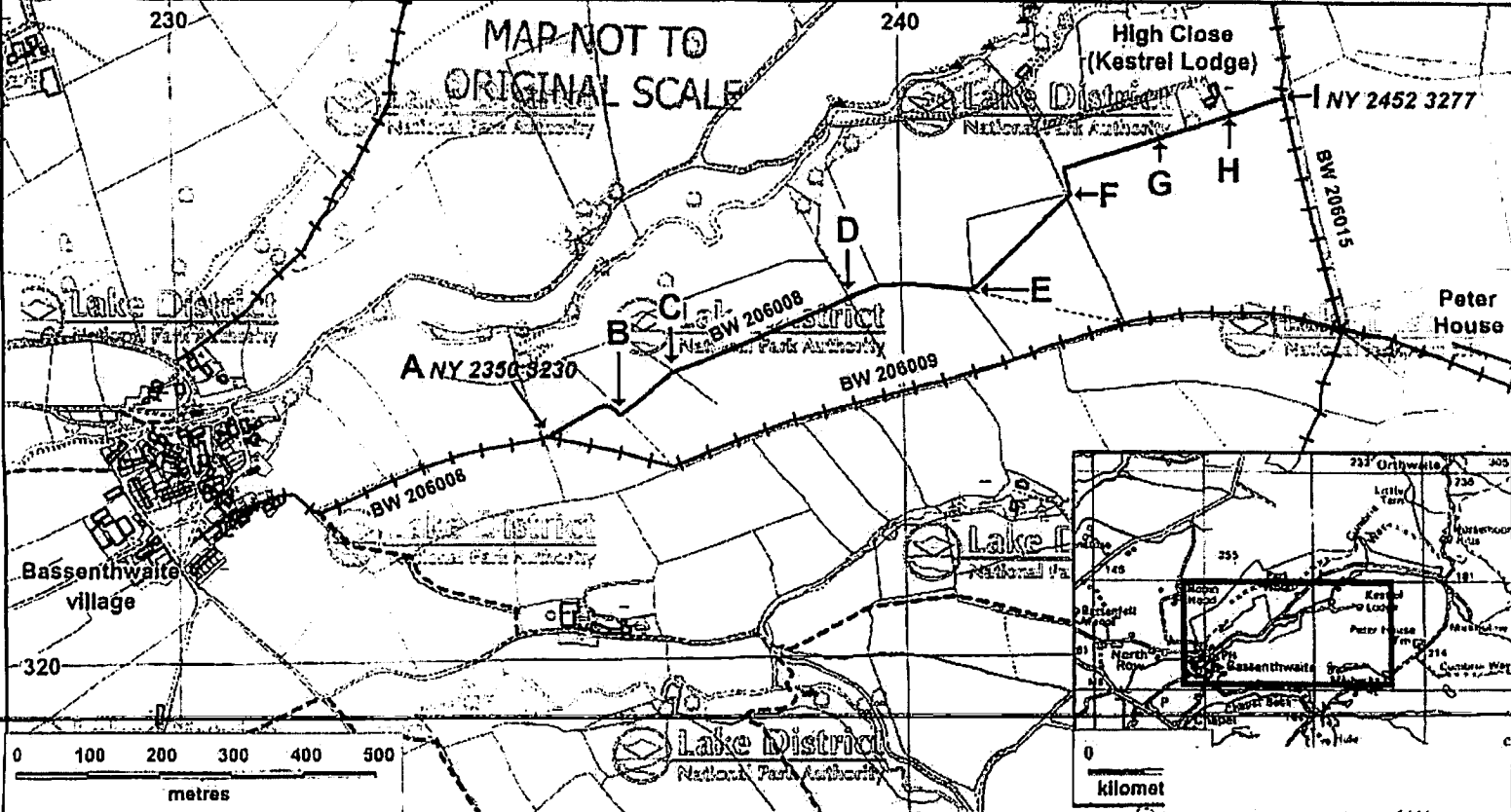
### **Formal Decision**

30. I do not confirm the Order.

*S M Doran*

**Inspector**

**MODIFICATION ORDER, PART OF RIGHT OF WAY 206008  
HIGH CLOSE, BASSENTHWAITE PARISH  
WILDLIFE & COUNTRYSIDE ACT 1981 SECTION 53(3)(c)**



**Lake District**  
National Park Authority

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March 2008

- Section of Bridleway 206008 to be downgraded to Footpath
- Other Public Rights of Way

LDNPA (Part of Right of Way 206008, High Close, Bassenthwaite Parish) Definitive Map Modification Order 2008

Authorised Signatory