

Stakeholder Working Group on Public Rights of Way

Meeting notes for the second meeting of the Group
held on 12th & 13th November 2008
at the Rutland Arms Hotel, Bakewell.

Attendance

- 2.1 The meeting was chaired by Ray Anderson and attended by: Alan Kind, Alasdair Mitchell, Alex Lewis, Andrea Graham, Dave Waterman, Gavin Stark, Gwyn Williams, Janet Davis, John Thorp, Kate Ashbrook, Mark Weston, Mike Walker, Paul Johnson, Richard Gething, Robert Halstead, Rosalinde Shaw, Sarah Slade, Sue Steer & Terry Robinson.
- 2.2 Apologies were received from Carys Drew.
- 2.3 Janet Davis and Sarah Slade were welcomed to their first meeting with the Group. Thanks were expressed to Andrew Shirley for attending the previous meeting prior to Sarah's return from maternity leave.

Actions from the previous meeting

- 2.4 DW provided an update on actions to investigate the scope for a regulatory reform order and PINS & DfT representation on the Group:

(1) Legislative Reform Orders (LRO) – previously known as Regulatory Reform Orders

- 2.5 LROs can be made under the Legislative and Regulatory Reform Act 2006. Their purpose is to achieve a net reduction in the burden imposed under any legislation. The burden may be on local authorities or persons or bodies corporate. The definition of a burden includes:
 - financial cost,
 - administrative inconvenience,
 - obstacle to efficiency, productivity
- 2.6 Comprehensibility of legislation can also be addressed by an LRO.
- 2.7 A new burden may be imposed in limited circumstances, so long as the overall burden is reduced.
- 2.8 There are a number of other constraints and the following appear particularly relevant to the possibilities being explored by the Group:
 - Cannot remove any 'necessary protection'
 - Cannot be controversial

- Objective cannot be secured through non-legislative means
 - Effect is proportionate to objective
 - Fair balance between public interest and adverse effects
 - Does not prevent any person from exercising rights or freedoms
 - Cannot create new offences
- 2.9 A statutory consultation process must be followed and although there are no prescriptive dates this is likely to take 18 months or so. The LRO would come into force on a common commencement date.
- 2.10 Whether an LRO would be a possible way of taking forwards SWG proposals would depend very much on the overall package. The 2026 cut-off provisions alone are not an obvious burden, although the s.53 provisions (of the 1981 Act) could be perceived as such. Careful consideration of the constraints highlighted above would be needed – ‘necessary protection’ in particular - and consultation would tease this out.

(2) PINS & DfT representation on the Group

- 2.11 PINS have agreed to field a representative at SWG and contact has been established with DfT. DfT attendance is likely to be on a one-off basis.
- 2.12 DW relayed some further information following a conversation with DfT and concerning records of highways. As well as the List of Streets, highway authorities are required to keep a computer based National Street Gazetteer & Associated Street Data. Each street has a unique reference number and a range of attributes recorded against it, structured according to BS7666 part1. Records are uploaded monthly to a national hub.
- 2.13 It was agreed to invite a DfT representative to a future meeting and convene a more detailed discussion of the theoretical & practical relationship between these records and with the definitive map.

Other actions (3) to (6)

- 2.14 Other actions related to preparation for this meeting and had been completed by the secretariat.

Further reflections on the Group’s remit

- 2.15 Draft terms of reference were circulated, along with the draft meeting note, following the initial meeting of the Group in October. These had been further amended by the secretariat following

comments from individual Group members. It was agreed that this version of the terms of reference would be adopted by the Group.

- 2.16 There was some discussion around how radical the Group should seek to be in terms of procedural reform. The Chair summarised this discussion by reminding the Group that central to its success would be to agree means of improving current DMMO procedures in order to resolve issues over the continuing existence of unrecorded historic rights and the need, or not, for a cut-off date. Resolving these key issues is its core focus and yardstick of success. It follows that the Group is not starting from a blank sheet. Equally it would not be productive for it to discuss issues over unrecorded rights in a vacuum. The Group's remit allows it to make wider recommendations to further the value and 'fit' of the public rights of way network, should it consider this appropriate.

Guiding principles

- 2.17 A series of breakout discussions took place over the course of the meeting with the aim of agreeing a set of guiding principles to act as a frame of reference for subsequent more detailed discussions by the Group, and for the shaping of its specific proposals. It was agreed that the secretariat would write up these discussions as a short paper for circulation to the Group along with this meeting note. The paper will be revised in the light of any comments received and a further version tabled for review and confirmation at the next meeting of the Group.

Discussion of an emerging framework for resolving issues associated with unrecorded rights

- 2.18 The point was made that although many unrecorded historic ways are still in public use, it may not be only those routes, or those for which there is an immediate demand, that are of value. Reference was made to a Court of Appeal ruling in connection with the Masters judgement (2001) which suggested that the recording of historic routes on the definitive map should be regardless of current use of the way, so that such ways are not lost and ramblers and horse riders have a simple means of coming to know of the existence of the way and starting to use it.
- 2.19 The point was made in response that the anxiety felt by land managers is over what are perceived to be 'new' routes, in the sense of not having been used for many years. This anxiety was particularly keen where the historic route is inconsistent with actual modern land use, especially in view of the perceived procedural difficulty of adjusting the alignment of the route, or the extent of the rights, to produce a better 'fit' with the modern land use. It was suggested that any future development in how routes are added to the definitive map needs to facilitate rather than hinder changes to

the alignment of routes which cause genuine problems for landowners and where alternatives/realignment can be sought which still preserve the network. Land managers were also concerned about the fact that uncertainty over the result of a claim could drag on for many years under current procedures.

- 2.20 The suggestion was made that the abandonment of the Discovering Lost Ways Project demonstrated that it is extremely unlikely that central resources would ever again be made available for exhaustive and proactive searching for and recording of all historic rights. Rather, the most viable way forward might prove to be continuation of a demand-led system for recording historic rights, with the associated cut-off provisions motivating volunteers to claim those that would be useful. In practice cases would only be put forward and pursued where real benefit was anticipated from getting the route recognised – so the system would to some extent be self-regulating.
- 2.21 In the light of these points, it was suggested that it might prove useful to distinguish explicitly between three different categories of unrecorded historic ways:
- a) Routes that although not recorded on the definitive map are nonetheless in use by the public, and not in dispute;
 - b) Historic routes that although not in use at the present time would be targeted by claimants as useful additions to the existing network of use on the ground; and
 - c) Other unrecorded routes - which might become a 'self closing avenue', should a statutory cut-off proceed.
- 2.22 There was general agreement that routes falling under category (a) should be made legally safe from any cut-off provisions.
- 2.23 Concern was expressed that in practice, operating within current procedures, the result of a claim does not necessarily turn out to be what was intended. An example was cited where the consideration of inclosure records as a part of one claim led to several further possible historic routes coming to light. These additional routes were perceived to be problematic and undesirable, with consequent protracted anxiety for affected property owners.
- 2.24 The view was expressed that whilst a problematic route might be acceptable were there to be some flexibility over alignment or width, current procedures for achieving such compromises could be protracted and were complex, especially to those such as property owners who do not have regular contact with them. In particular, it was noted that the owner must first accept the original route with no guarantee that an order to change the route would be made later in the process.
- 2.25 There was also some discussion around the respective roles of the voluntary sector and local authorities under the 'self-regulating' scenario. On the one hand the view was expressed that the optimum is for cases to be initiated by the voluntary sector and then

finished off by local authorities. On the other it was suggested that from an owner's perspective, it was preferable for cases to be identified by local authorities, as accountable public bodies more likely to prioritise route selection rigorously.

- 2.26 It was suggested that Rights of Way Improvement Plans (ROWIPs) could assist in focusing a demand-led approach. Natural England agreed to circulate a report it had recently commissioned on ROWIPs. It was suggested that although ROWIPs are of variable quality, such plans could be a suitable driver to people conducting research into unrecorded rights because the process of drawing one up had been an inclusive one, involving local consultation.
- 2.27 Whether this was always the case in practice was disputed however, and further the concern was expressed that identifying a 'hit-list' of routes within a ROWIP or other public document as a basis for claiming routes could have a negative impact on property owners. The issue of property blight was discussed and the point made that the recording of existing rights is not technically a blight issue: blight is related to future proposals. Nevertheless it seemed clear that the alleged existence of unrecorded rights could lead to uncertainty, anxiety and potentially devaluation of property. This made achieving early certainty about the status of possible historic routes highly desirable from all viewpoints.
- 2.28 Finally, it was agreed that in considering unrecorded rights, the very different situation in urban areas needs to be carefully borne in mind and adequately addressed. There might be no historic evidence of the status of urban alleys etc, and securing long term evidence of public use 'as of right' would be problematic because of the transience of populations in such areas. Yet such existing rights stood to be extinguished by the 2026 cut-off for lack of recording on a definitive map: indeed, some urban areas currently had no definitive map at all.

Initial thoughts on the scope for improving the current DMMO process

- 2.29 A tutorial session on the DMMO process was led by Rosalinde Shaw. The typical resolution time for even straightforward, unobjected applications was one to two years, because of the number of time-consuming and mandatory stages in the process. Running the process for a single case adds up to approximately 5 weeks of local authority officer time even in such straightforward cases. The procedural burden was graphically illustrated when a room-sized printout from Hampshire County Council's claim tracking database was held up in front of the Group.
- 2.30 Following this session it was agreed that at its next meeting the Group should consider further ways in which the current process could be improved.

- 2.31 A number of points and observations were made during discussion around a flow diagram of the main process steps, to be followed up in these subsequent discussions.
- 2.32 Making orders for more than one path is one possible way of reducing the administrative burden, but can lead to complications where a part of the order is objected to.
- 2.33 The possibility exists for the SoS to sever an order, so that an order may be part determined without the entire order-making process having to start again.
- 2.34 There was discussion around interpretation of the level of test required at stages when the order is made & determined. Case law decisions citing the 'reasonably alleged to subsist' and 'balance of probabilities' tests were referred to.
- 2.35 The point was made that it seemed bizarre that the process for giving the owner a fair hearing only occurred later in the process, after the order has been made.
- 2.36 Where an order making authority (OMA) refuses to make an order it is possible for an applicant to appeal and have it determined by the National Rights of Way case work team (NAT-RoW) and for it to be determined again at Inquiry. The suggestion was made that the appeal process could be simplified to ensure that such cases do not appear before an "inspector" twice.
- 2.37 The view was expressed that a possible consequence of addressing current delays at NAT-RoW would simply be to move the problem to another part of the system.
- 2.38 It was noted that all objected orders must be referred to the SoS, whether or not objections are irrelevant. A possible improvement to the process would be to enable authorities to discount irrelevant or 'remote' objections.
- 2.39 The view was expressed that the public should be allowed to voice their opposition to a claimed route being added to the definitive map and that all objections should be given a fair hearing.
- 2.40 It was alleged that local political concerns are known to have overruled determinations at times.
- 2.41 It is the responsibility of the applicant to notify owners of a claimed route prior to making an application. Several points were made in connection with this aspect of the procedure. It was suggested that identifying and informing affected landowners can be difficult (in terms of identifying the owner) and daunting for an applicant where there is potential animosity. There is a prescribed form for the applicant to serve notice on an owner, but this formulaic document is a highly unsatisfactory way for the latter to receive for the first time the news that a possible unrecorded route exists over his land. A negative reaction would be significantly less likely if things could be explained to the owner more fully and with more 'humanity' at this early stage in the process.

- 2.42 Applications are required to be accompanied by physical copies of evidence, and providing these is a significant cost to applicants. An outcome of the recent Winchester decision is a further disincentive to applicants to disclose in their application details of the full research they have carried out, since applications can be rejected if copies of all documents referred to in the application are not appended. This is despite the fact that in practice, surveying authorities invariably then refer to the original documents when considering applications.
- 2.43 The suggestion was made that the duration and result of a case is improved by having a thorough and comprehensive application. However, it was also suggested that the benefits of this are limited as local authorities are bound to repeat the investigation.
- 2.44 Once an order has been made, judicial review of decisions is not possible. This is because a review of decisions is specifically provided for (should this be required) after the statutory procedures have been completed, i.e. after the order is confirmed or not. This is referred to as 'statutory review', although the procedure is to all intents and purposes the same as for Judicial Review. The point was made that orders are currently being quashed at statutory review due e.g. to a procedural error by PINS that is irrelevant to the evidence. The suggestion was made to change the outcome of statutory review so that an order cannot be quashed, it can only be re-determined by PINS, thereby reducing time wasted by authority to make a new order and go through the Inquiry process all over again.
- 2.45 It was suggested that one way to simplify and speed up the process would be for the OMA to prepare a draft order and statement of case at order making stage, to be transmitted direct to SoS.
- 2.46 The point was made that whilst simplification of appeal procedures might be of some benefit, the overall impact of such improvements would be limited as the bulk of the effort is in OMA processing of claims.
- 2.47 It was suggested that the routine use of public inquiries is needlessly burdensome in cases turning on matters of legal fact - and that their nature is adversarial and hostile. Where any type of face-to-face session is justified at all, a greater use of hearings, with inspectors taking an inquisitorial type role to objective scrutiny of evidence, might be a better approach.
- 2.48 Finally, it was suggested that as well as considering how the current process could be improved, the Group should be prepared to consider more radical alternative models, and compare the benefits of each option in the context of the question: "Does it get us where we want to be?"
- 2.49 A possible alternative model very briefly outlined was for a simplified one-off process with similarities to the open access mapping approach. The premise suggested was for a single

integrated procedure incorporating radical new presumptions about the status of routes, based on the status accorded by the law either to particular types of historic document, or to unexplained public use. It would also need to enable account to be taken as an intrinsic part of the process of the 'fit' of historic routes with modern land use, particularly in cases where they were not currently in public use.

- 2.50 In the light of these discussions, the Group discussed adopting the strapline "Finishing the job" as a description of the scope of its work. This reference relates to the job begun in 1949 of trying to capture public rights of way on a definitive map for each area, with the aim of delivering new certainty about where such rights exist. [NOTE: some members have since expressed the view that this is not an accurate description of the work of the Group]

Planning the next stage of the Group's work

- 2.51 It was agreed that a general invitation would be extended to people outside the Group to make contributions to its deliberations. What the Group is particularly interested in is real world examples of situations where the current processes relating to recording or changing public rights of way are not working, why any of the parties involved have been deterred from using them, what the blockages are perceived to be, and ideas as to how these problems could be resolved. Are issues specific to local circumstances, or do they represent something more generic for which solutions could be widely applied? Examples of good practice would be welcome also.
- 2.52 The invitation should be to submit a short synopsis of issues and solutions. It would draw attention to the topics likely to be covered over the next few meetings. A closing date of the end of February was suggested. The process would be managed by the Secretariat.
- 2.53 In parallel with this process, Group members would continue, singly or in concert, to share outputs with others and seek feedback on how the Group's thinking was developing. It was suggested that improvements to the relevant Natural England website pages would be a way of encouraging wider input, and the Group secretariat agreed to investigate these options.

Agenda for the next meeting

- 2.54 It was suggested that the next meeting of the Group should include these items:
- A further tutorial session, this time from AL, focusing on the documentation associated with the DMMO application process.

- A further discussion over how current DMMO procedures could be improved, featuring proposals from RH drawing on discussions at this meeting.
- Review and confirmation by the Group of the guiding principles paper.

2.55 A subsequent meeting would look at the process for changing existing rights of way.

Action points:

- 2.56 GS/DW to liaise over PINS joining the Group and an invitation to DfT to attend a future meeting.
- 2.57 JD will (if possible) provide for circulation to the Group a copy of a paper prepared a number of years ago by John Trevelyan, reviewing the impact of the New Roads and Streetworks Act 1991 on public rights of way.
- 2.58 GS will circulate details of the web page to which SWG papers have been uploaded. He will also investigate options for creating a web 'home' for the Group, including a facility for the Group to make a call for input from people outside of the Group and possibly enable blog style interactive discussion of issues.
- 2.59 RH will prepare a proposal on how current DMMO procedures could be improved, as a basis for discussion at the next meeting of the Group.
- 2.60 GS will circulate a copy of the Hobhouse report to the Group.
- 2.61 GS will consider further suggestions to create a library of key documents and a system for the Group to record, tag and sort issues and suggestions put forward by people outside the Group.
- 2.62 TR will provide a copy of the Natural England research report on progress in taking forward Rights of Way Improvement Plans for circulation to the Group.
- 2.63 GS to implement a system for marking SWG papers according to their confidentiality rating:
- a) Red- papers in draft for circulation to Group members only;
 - b) Amber- papers that members may share with others outside the Group;
 - c) Green- papers that are available via the website.
- 2.64 RS will provide a copy of the DMMO procedure diagram used for the tutorial session, with each step in the process given a unique reference number that can be used for attributing comments/suggestions for circulation to the Group.
- 2.65 JD will provide for circulation to the Group details of statistics relating to the order making process collected by the Ramblers' Association.

- 2.66 GS will write up discussions over guiding principles and circulate to the Group for further comment. A revised version of the paper will then be tabled at the next Group meeting for confirmation and prior to wider circulation.
- 2.67 GS will prepare an indicative timeline with milestones for completing the work of the Group.
- 2.68 GS to circulate an agenda and location details for the next meeting of the Group. A slightly later finish time of 4pm was agreed.