

Stakeholder Working Group on Public Rights of Way

Meeting notes for the sixth meeting of the Group
held on 5-6th May 2009
at Losehill Hall, Castleton, Hope Valley, S33 8WB

Attendance

- 6.1 The meeting was chaired by Ray Anderson and attended by: Alan Kind, Alasdair Mitchell, Alex Lewis, Andrea Graham, Carys Drew, 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 (1st day only).
- 6.2 Apologies were received from Dave Waterman.

Notes of the previous meeting

- 6.3 The draft meeting note circulated by the secretariat was confirmed, subject to the changes identified in matters arising below.

Action points from the previous meeting

- 6.4 All action points had been completed.

Matters arising

Changes to the draft meeting notes for March

(NB: the number of the affected paragraph is given in square brackets)

- 6.5 [5.8] Clarify that protection is to avoid accidentally extinguishing rights where an unrecorded route continues to be in use by the public and that several possibilities had been suggested as to how this could be achieved¹.

¹ Footnote by the Secretariat: When subsequently reviewing this passage from the March meeting notes a further technical point was identified that may need to be clarified. A suggestion was made that one way of protecting such routes is to allow accrued evidence of public use to be admissible after the cut off date has taken effect as the basis for a prescriptive claim. The further point is that in the case of unrecorded historic rights, public use before the cut off date is 'of right' rather than 'as of right'. So for this approach to work it would need to be possible for use 'of right' to be treated in the same way as use 'as of right' in any subsequent claim based on user evidence.

- 6.6 [5.11] Clarify that 'registered during' means 'applied for by the end of'.
- 6.7 [5.19] Clarify that the Group 'did not rule out' recommending a package that included bringing the cut off date forward but that other options were also under consideration.
- 6.8 [5.26] Reorder this paragraph and make clear that blanket recording of Street Works Register (SWR) routes at a default status was 'a possibility not entirely ruled out' at this stage.
- 6.9 [the heading above 5.27] Separate out the aggregated headings and explain that the Group had chosen to consider these proposals together.
- 6.10 [5.41] Insert that a point about distinguishing between roadside and other cycle tracks had been made.

Points discussed further in connection with the March meeting note

- 6.11 There was discussion over the meaning of 'useful' in connection with unrecorded rights and the role that self-regulation might have in respect of claims. The usefulness of an unrecorded route might be agreed upon in some situations whilst in others it might depend on one's point of view. Views on the usefulness of a particular route might also change over time. If taken to extremes, that could be taken to suggest that any route could turn out to be useful at some point in the future. It was suggested that self-regulation, promoted by limiting the window for capturing useful routes, could be important in this context. Volunteers would then need to prioritise the claiming of routes they consider to be the most useful, and avoid speculative claims based on weak evidence. There is also the question of capacity within the voluntary sector and the extent to which it might or might not need to be developed to encourage this kind of self-regulation.
- 6.12 There was further discussion over the nature of the greater 'certainty' the Group had expressed the wish to move towards - and in particular, factors that it was argued might exaggerate the uncertainty felt by land owners over the possibility of their being affected by 'out of the blue' unrecorded rights. Heightened awareness of a push to capture unrecorded rights within a limited time frame could lead to more widespread concern and a greater level of anxiety among land managers. For individuals affected by a particular claim, a prolonged period for the case to be resolved (which was often the experience at present) could be felt to increase rather than reduce uncertainty. This applies especially to 'out of the blue' claims and the fear that 'it could be me next'. Any package would need to seek ways of addressing this issue, both in avoiding unnecessary concern and in ensuring that claims that could have a detrimental effect on landowners can be swiftly and pragmatically determined.
- 6.13 There was further discussion around the right of an applicant to appeal to the Secretary of State where a determination is not made

within 12 months. A view was expressed that so long as surveying authorities (SAs) have a clear statement of priority they should be allowed to get on with processing claims as soon as is reasonably practicable. Attempting to force the pace could be counterproductive and cause SAs to respond by putting more effort into fighting off appeals. A counter view was expressed that some SAs are still sitting on claims or not giving this area of work sufficient priority.

Towards a possible implementation model

- 6.14 The main focus of the Group's previous meeting in March had been a first framework, drafted by the Secretariat, of possible key proposals from the Group. This paper had been well received and promoted some extremely useful discussion. The Group had agreed that the Secretariat should give further thought to how this package of ideas might be made more integrated and cohesive. In particular, it had wanted to see greater emphasis on negotiated solutions, where these prove possible in place of traditional 'adversarial' approaches. The Secretariat had responded to this challenge and circulated a paper² in advance of the May meeting. This paper was now discussed.
- 6.15 It was suggested that the paper would have benefited from a diagram to show the process that might be adopted to put these ideas into practice. It was felt that a right to apply for creation of new rights of way, to complement those captured under such a process, should be simultaneously adopted, and would reduce the likelihood of claims based on questionable historic or user evidence.
- 6.16 A suggestion was made that the two "big ideas" discussed in the paper – Recognition Agreements (RAs) and Bulk Orders (BOs) – offer little scope to make a difference in practice. It was difficult to see why land owners would be interested in making RAs, or how BOs could translate the lessons learnt about such approaches in urban areas to the rural context. A particular difficulty experienced by SAs in making modification orders for more than one path at a time is that an objection to one part of the order can lead to the need for the whole order to be re-made. So the ability to put to one side contested routes to be resolved at a later stage while proceeding with uncontested elements of modification orders should be considered.
- 6.17 A view was advanced that putting all SWR routes on the definitive map (DM) would be an enormous task and present the difficulty of attributing a particular status to such routes. The administrative burden created for many SAs would be significant and a distraction from other work. The rights concerned often took the form of 'rabbit warrens' running through areas such as housing estates. The

² MTGPAPER 6.1: Towards a possible implementation model, Secretariat, May 2009.

routes were already recorded on an official map, and it was difficult to see the purpose in recording them on another one. There was rarely in practice any argument as to their existence as public rights, and they already show up on conveyancing searches.

- 6.18 A counter view was expressed that SWR routes might be added to the DM by means of a legal event order – or the existing entry in the SWR could be given a new status that would protect the route from new development. Either approach appeared preferable to leaving the routes vulnerable to such change, as the status quo would do.
- 6.19 A comment was made that the DMMO regime “groans under the weight of its own inefficiencies” and was not fit for purpose in delivering the results it needed to deliver. That was why the sort of ideas set out in the paper were important and demanded attention by the Group.
- 6.20 A suggestion was made that a key part of the current problem is the principle adopted by the 1981 Act that all changes to the DM have to be supported by comprehensive evidence. Until that point, the approach that had been taken was more about identifying routes that appeared to have the characteristics of a public right of way, and inviting any objections to their addition to the definitive record. There was considerable support around the table for the point that the move in 1981 to a rigorously evidential approach may have been a retrograde step, because of its consequent dire impact on the time taken to determine cases and thereby deliver certainty.
- 6.21 It was suggested that what was needed was a final, one-off attempt to capture the useful historic routes that are missing from the DM. Inevitably such a process would have to be resource intensive for a relatively short period. Under the 1949 process, the Ramblers, Open Spaces Society, parish councils etc fed relevant information to SAs, and appropriate routes were put on the DM without having to resort to individual case-based orders. This approach clearly offered massive economies of scale and avoided endless delays for all concerned in securing the outcome. In response, a view was expressed that a new review process should not be necessary since the 1949 process had been carried out and that since then SAs had been allowed ample time to get their records straight.
- 6.22 The query was raised as to whether such an approach would be capturing routes that genuinely appeared to have the typical characteristics of public rights of way, or merely routes that people would like to have. Clearly using such processes to capture the latter would be inappropriate.
- 6.23 It was noted that in Devon and in Shropshire, the SA has been carrying out parish-by-parish assessments involving local communities of what apparent rights of way are missing from the DM, followed by consideration of the status of each. But this process has already been going on for something like 20 years.

- 6.24 It was proposed that what is required to achieve real progress is a new one-off review process. Such a review would build on the existing DM rather than start from scratch. Appropriate use would be made of RAs to increase the element of negotiation with land owners. Missing urban routes would be captured in bulk by reference to the SWR. There would be a finite time span for the review, a simplified process and active engagement of volunteers. The process would also deal with routes already included on the register of applications. The unique selling proposition of the process outlined would be the scope to cut a swathe through existing red tape by avoiding a case-based regime completely.
- 6.25 A comment was made that from the land owner's point of view, trying to reach agreement from the outset on the nature and appropriate alignment of any right would be a major step forward compared with current procedures, which were inherently adversarial.
- 6.26 A suggestion was made that under a review of the type that had just been advocated, the SA need not itself be researching missing routes. Rather, parish councils, local access forums and volunteers would suggest apparent missing routes during a limited time window, after which the 'shutters would come down' on this opportunity to put forward or claim historic routes. Asking parishes to submit routes would be the simplest approach and providing simple instructions and guidance would encourage more to respond. Contributions from the voluntary sector and other individuals could help to make up for any gaps. The routes that had been suggested would be put by the SA on a plan or draft map that somehow depicted their relationship to the routes already on the DM. Only the land owner would have the right to object to the addition of these routes, or higher rights, to the DM. The objection might either be absolute – a challenge that the historic route exists at all – or practical – a proposal that because of land use considerations it should be altered in some way. The system would make specific provision for changes to address reasonable suggestions along the latter lines.
- 6.27 A view was expressed that if this kind of process were introduced, effective communication with affected land owners would be essential as the danger would be that the routes suggested to the SA were no more than a list of routes people wished to have.
- 6.28 The Chairman summarised this part of the discussion so far. The proposal was that some kind of draft plan would be assembled, based on prima facie evidence that additional or higher public rights may exist along the routes shown on the plan. This would trigger either an objections process of the type described, or active negotiation of RAs with affected land owners, to get the plan properly vetted, remove inappropriate routes and get others recorded with necessary changes to address modern land use considerations. The revised plan would then be incorporated into

the DM on a bulk basis. This approach would be designed so far as possible to avoid the adversarial climate that often attends claims at present.

- 6.29 A comment was made that the proposals could in principle be acceptable to land management interests, subject to getting the fine detail right. One important aspect of the detail was that in cases where there was some objection to the route and agreement could not be reached on the way forward, the SA should be required to decide whether the route was a right of way (or had the higher status suggested) based on the balance of probabilities, rather than the “reasonably alleged to subsist” test. The Crown Prosecution Service uses the test that a case if brought is more likely than not to succeed. Here the approach should be that the route is more likely than not to be a public right of way.
- 6.30 A concern was expressed that previously determined claims might be revisited in any new review process. A comment was made that established law provided that this could not happen unless new evidence had come to light.
- 6.31 A suggestion was made that a review process of the type described would enable existing use-based claims to be disposed of rapidly and ‘got out of the way’ early on, on the basis that few would be objected to. It would need to be left to potential claimants to decide whether or not to advance further claims during a review - putting forward a route that has been in use for 19 years say could be self defeating.
- 6.32 A comment was made that an important attribute of such a process would be an ability to sever the processing of unopposed routes from the processing of opposed ones – enabling the former to be added to the DM early in the process, while allowing the latter to be given proper consideration in negotiation with the land owner.
- 6.33 A question was raised as to how definitive the updated DM would be at the end of such a process. It was suggested that it was a necessary and logical extension of the CROW principle (that historic routes that are unrecorded and unclaimed on a specific cut-off date should be extinguished) that once accepted onto the DM, routes and their status should no longer be capable of subsequent legal challenge. The DM could still be developed, through creation processes, through the capture of rights based on prescriptive claims, and through the statutory diversion and extinguishment processes – but the historic information it had captured would be regarded as complete, and safe from challenge. The DM would be “definitive, but not set in concrete”.
- 6.34 A Group member asked what it would be about the process that had been suggested that would allow the DM to become truly definitive in this way, when the 1949 process had not led to such an outcome. The Chairman suggested that the purpose of such a process would be to provide sufficient confidence that useful

historic rights had been captured to make it reasonable for the cut-off to be brought into effect. Many outmoded historic routes might be lost but there would have been a genuine, final opportunity to capture useful ones. As had been pointed out, it would remain possible for the DM to develop through prescriptive claims based on long use, and through creation orders to fill gaps in the network.

- 6.35 Overnight, based on this constructive dialogue, the Secretariat drafted a further paper setting out an outline of the kind of review process the Group had been discussing, as a possible model for implementation in conjunction with significantly bringing forward the cut-off date. In the event, this paper was not substantively discussed by the Group and is simply appended as Annex 1 to these meeting notes.

Linear Access and the Birds & Habitats Directives

- 6.36 At the end of Day 1, the Group held a discussion about Linear Access and the Birds & Habitats Directives, facilitated by a paper³ and presentation by Gwyn Williams. It was explained that in some circumstances there is an absolute obligation to prevent damage or deterioration to areas designated under the Birds & Habitats Directives (SPAs and SACs).
- 6.37 Where a new right of way was being created, this was likely to be regarded as a 'plan or project' under the Habitats Directive, and requires appropriate assessment to be done by the public body proposing the creation. Should it be ascertained that creation of the right of way would have an adverse affect, this would lead to changes in the routing or design of the public right of way to mitigate this effect.
- 6.38 However, the DMMO procedure is a recording process concerned with determining whether a right already exists, and thus it cannot be argued that it is a plan or project under the meaning of Article 6.3-6.4 of the Directive. However, Article 6.2 – an obligation to prevent site deterioration still applies. It was suggested that the Government was at risk of being in breach of the Directives if this matter was left not addressed. Powers to regulate or divert a right of way to prevent damage or disturbance to the interest of SSSIs (which underpin SPA/SAC designation) were made through CROW. The question was how the DMMO process related to use of these powers?
- 6.39 Two suggestions were identified: first, that the surveying authority was already under a duty to consult with NE to seek their advice on whether CROW powers should be exercised in response to the DMMO process where confirmation of a right of way might lead to site deterioration. The second, that Natural England becomes a

³ SWG_C099: Linear Access and the Birds & Habitats Directives, Gwyn Williams, 17th March 2009.

formal consultee to the DMMO process, and thus could set in train such procedures as necessary.

- 6.40 The Group agreed to keep these considerations under review as its deliberations proceeded.

Discussion of options relating to the cut-off

- 6.41 At the beginning of the following day's discussions, a view was expressed that further discussion of a review process would be futile at this time since such an approach would create enormous difficulties for land owners without providing concomitant benefits. It was explained that land owner representatives had never wanted the cut-off in the form introduced by the 2000 Act and that prior to the Act the CLA had at the time sought to persuade Government to put an immediate end to historic rights not featuring on the DM. A view was expressed that this would be the best approach, so that all parties could look forward rather than backward. Creating a new window specifically to enable the efficient capture of useful historic rights – no matter how short the window might be – would lead great disquiet among land owners. An intensive process to identify and upgrade routes currently under-recorded on the DM might be acceptable, but an intensive process facilitating the capture of 'out of the blue' historic routes would not. Scrapping the idea of a cut-off completely would be preferable to bringing it forward and creating such a capture window: at least then there would be no particular time incentive to motivate people to seek the recording of additional historic routes on the DM. The concentration at recent meetings on possible new processes had lost sight of the very useful ideas that had been put to the Group at the Sheffield Cathedral meeting about simplifying and streamlining existing DMMO procedures in ways that involved closer and earlier working with land owners. That approach was the best way forward for the Group to investigate.
- 6.42 A further view was expressed that some aspects of the outlined review process had considerable appeal for land owner interests, notably the emphasis on providing flexibility to negotiate sensible outcomes with land managers and doing away with the 'reasonably alleged to subsist' test in determining claims. It was suggested that incorporating some of the ideas behind the review proposal in simplified and streamlined DMMO procedures appeared to offer the most promising way forward and should be properly examined by the Group. It was agreed that the next meeting would look in further detail at the scope for improving existing procedures. Suitable discussion material would be developed by the SA representatives, working in discussion with the Secretariat.
- 6.43 A comment was made that the cut-off had always been a controversial provision from a user point of view. If the Group could agree on scrapping the idea, that might be welcome. If it was to remain in force and come into effect in 2026 or 2031, it would make

sense to streamline the existing DMMO regime as advocated by some other members. Any proposal to accelerate the cut-off significantly would be more difficult to sell to users unless it was accompanied by some kind of concerted effort to capture useful unrecorded rights.

- 6.44 It was suggested that another factor making the current processes long-winded and unwieldy was the unconstrained ability for anyone to object to proposals – whether they be proposals to capture historic routes on the definitive map, or proposals to make common sense changes to them for land use reasons before such capture occurs. In both cases there needed to be a substantial limiting of the ability to object, to avoid the current potential for protracted and adversarial processes.
- 6.45 The Chairman reminded members that under the current regime, registration of claims represents the start rather than the end of the process of arriving at certainty about the existence of historic rights of way. However the case-based regime was streamlined, it seemed likely that the backlog of registered claims would remain and others would build up over time to be determined. If every claim continued to require its own order in order to be determined, the backlog might logically grow rather than shrink. This might mean that a 2026 or 2031 cut-off would merely signal the beginning of a much longer period during which claims would be determined and orders made, alongside other SA case work relating to claims based on long user evidence, and proposals to move or extinguish routes.
- 6.46 In the light of this discussion the Group agreed a change to the planned agenda and instead held a workshop style session to identify all the available options in relation to the cut-off and consider the pros and cons of each. The output of this discussion has been captured by the Secretariat in a separate paper entitled ‘Options relating to the ‘cut-off date’ for unrecorded rights of way’ and dated 20th May 2009. This attempts to capture in an impartial way the key attributes of each option: categorising them as strengths or weaknesses proved too subjective.
- 6.47 The paper was circulated to members after the meeting, and is appended as Annex 2 to this meeting note. It was agreed that Group members would use this paper as a basis for testing views on the options with immediate constituents in preparation for a further discussion at the June meeting.
- 6.48 The Group noted that the options relating to the cut-off were merely one part of the story. Whatever approach to the cut-off made best sense, consideration would also need to be given to improving the relevant processes to make them more timely and effective.
- 6.49 There was some discussion of whether in the light of developments at this meeting the Group might consider offering a number of possible options in its final report, rather than recommending that

Government ought to pursue any particular approach. It was pointed out that such an approach, though 'easier' at one level, would effectively disenfranchise the Group. It would make it far more likely that Natural England would devise its own separate recommendations to Government; and that Government would then pursue whatever approach it thought fit. The one-off scope for the Group to achieve the political weight and influence of an agreed package of improvements would have been lost.

A proposal for recognition agreements (RAs)

- 6.50 Following the workshop on options the Group went on to discuss in more depth the specific proposal for RAs that had been referred to earlier in the meeting. Robert Halstead introduced this proposed mechanism as outlined in a paper previously circulated to the Group⁴. The idea is based on pioneering work of the Trails Trust in the Mendips area.
- 6.51 A suggestion was made that negotiation over a RA could include scope for re-routing of a path to avoid pinch points whilst respecting the integrity of the route. A concern was raised that this would amount to a diversion and that the public should therefore have a say in any changes. A further point was made that upgrading the status of a path could similarly affect existing users and that they should therefore be entitled to have a say. A suggestion was made that for expediency some changes at least could be considered *de minimis* and not be subject to public consultation. A comment was made that the majority of diversions go through unopposed once the order is made – although objections are more often made at earlier stages. A suggestion was made that a criterion for objecting to a change should be if the alternative offered would be 'substantially less convenient' than the original route.
- 6.52 A comment was made that procedures already exist for the diversion of public rights of way and that the Group should not create further processes. A suggestion was made that owners might not be aware of this and that making sure owners were aware of this possibility could encourage more owners to seek diversions rather than oppose modification orders. A point was made that the problem for owners is that diversion is discretionary and that they would have to acquiesce to the claim before having a guarantee that the route would be diverted. A suggestion was made that inspectors could be given powers to make agreements conditional on being able to divert. A point was made that the mechanism would be more difficult to apply in a situation where multiple owners were involved. A further point was made that if change were included a suitable alternative alignment might not be possible within the confines of land owned by one individual.

⁴ SWG_C104: Proposal for Recognition Agreements, Robert Halstead, March 2009.

- 6.53 In the approach used by the Trails Trust a payment is often made to the owner and a suggestion was made that financial inducement could be included within the RA mechanism. The case for this is that payment offers a further inducement to the owner and opportunity to look at the management of the route. A suggestion was made that reaching a settlement including a financial element was better than going down the route of claim and counter claim. A comment was made that there was a need to be prudent and be able to demonstrate benefit from any such investment.
- 6.54 In conclusion it was said that a RA mechanism, or some of the principles underlying it, may be worthy of consideration as part of the way forward.

Communications

- 6.55 Towards the end of the meeting the Group held a short discussion over communications. It was noted that members will be seeking views of immediate constituents on the options paper described above.
- 6.56 A suggestion was made that it might be beneficial to the Group to find out more about the 'Lost Highways Project' being undertaken by Cambridge County Council.
- 6.57 A question was asked over England Access Forum (EAF) interest in the Group. PJ said that he had been in contact with EAF and offered reassurance that LAF members representing each of the main sectors of interest were included on the Group.

Future meetings

- 6.58 The next meeting of the Group will be on 25th June in Sheffield. It was confirmed that this meeting would consider further suggestions for improvements to the DMMO process.
- 6.59 The point was made that this two-day meeting had been unable to make the kind of progress that had been hoped for towards identifying an agreed way forward. This was likely to put pressure on the scope to deliver an agreed report by the end of 2009. A further meeting of the Group was proposed, in addition to the already confirmed programme of meetings.

Action points

- 6.60 All to seek views of immediate constituents on the options paper ahead of the June meeting.
- 6.61 GS to liaise with RS over the presentation(s) for the June meeting on streamlining existing procedures.

- 6.62 GS to confirm details of the additional meeting scheduled for November. *[The Secretariat have subsequently confirmed 26th November 2009 as the date of this additional meeting. The meeting will be held in London at Ashdown House]*

**KEY ELEMENTS OF EMERGING APPROACH
FROM LOSEHILL DAY 1 – PLUS QUESTIONS**

Sequence	Associated questions
<p>1. The surveying authority seeks returns from its parish councils (and the local access forum?) about historic routes they consider to be unrecorded or under-recorded rights of way.</p> <p>2. Through public advertisements etc, the same option to make returns is extended to others with an interest. (For example local user groups and existing volunteer claimants may choose to put in returns for consideration by the SA.)</p> <p>3. In all cases returns should be on the basis that it appears more likely than not that such rights actually exist.</p> <p>4. This conclusion may be based on documentary evidence, clear patterns of existing public use, or other factors they consider establish a prima facie case that the right exists.</p>	<p>How long is the period for returns?</p> <p>How are those who are invited to make suggestions made aware of the routes already on the definitive map, and their status?</p> <p>Should they be told (how?) about applications that are already in the system? Or is it a more robust approach to treat such claims as a complementary input into the SA's own deliberations? Would the requirement for the SA to determine existing applications remain?</p> <p>Should the ability for users to make <u>new</u> applications to record historic rights be replaced by, suspended by, or supplemented by, such a new approach?</p> <p>Should the process cover non-historic routes for which there is evidence of current use?</p> <p>What national and local guidance would be required to help ensure that returns to the SA focus on routes with real merit?</p>
<p>5. SA evaluates the returns that have come in, and compiles a Draft Map showing rights that appear to it more likely than not to exist by judging the standard of evidence presented.</p> <p>6. The SA does <u>not</u> quality assure this map through a wider sweep of relevant historical records. However, it seeks initial reactions from relevant land owners.</p>	<p>How long does this part of the process take?</p> <p>When and how would those who submitted returns hear about the SA's conclusions? Should they be able to challenge why particular routes have been omitted from the Draft Map? Or should the system rely on the SA being by definition fair and neutral in its approach?</p>

<p>7. Some potential outcomes would be:</p> <ul style="list-style-type: none"> a. Owner has no objection – in which case right is added to DM. b. Owner has disproving evidence – in which case right is not added to DM. c. Owner seeks changes to right before recording, pointing to possible threat to viability of existing land use. Recognition agreement gives effect to necessary changes if appropriate, and right is recorded so modified. 	<p>Would the absence of a detailed evidence sweep by the SA affect the credibility of the process and the ability to negotiate sensible outcomes?</p> <p>How would information from current applications factor into all of this?</p> <p>Would the Draft Map be public, or merely a basis for informal negotiations with affected owners?</p> <p>What influence should SA members have on the content of the Draft Map?</p> <p>What objections should be possible to SA's plans to:</p> <ul style="list-style-type: none"> (a) modify existing rights by recognition agreement (b) continue with recording of rights shown on Draft Map where owner is fundamentally opposed to this? <p>What relevance has the concept of an appeal to either scenario?</p>
<p>8. At the end of this one-off process, the DM would become exactly that: "definitive, but not set in concrete".</p> <p>9. The top effects of this would be:</p> <ul style="list-style-type: none"> a. The existence of the rights shown on the DM, at the level shown, cannot subsequently be challenged. b. Historic rights of way not captured on the DM cease to exist, subject to what we decide about protection v recording of SWR routes. 	<p>How soon could the end of this process reasonably be?</p>

<p>c. DM is still able to evolve, through:</p> <ul style="list-style-type: none">i. 20 year use claimsii. Path creation powersiii. Existing path diversion and extinguishment procedures.	
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Stakeholder Working Group on Public Rights of Way

Options relating to the 'cut-off date' for unrecorded rights of way

Background – SWG and 'cut-off date'

The Stakeholder Working Group was convened by Natural England in October to:

- consider the issues and difficulties associated with the process of recording of pre-1949 and other public rights of way that are not currently shown on the definitive map and statement maintained by surveying authorities;
- work together with the aim of reaching consensus on a balanced package of strategic reforms in law and procedure that in the Group's view would bring real benefit to the various interests potentially affected by the claimed existence of such rights; and
- where appropriate, draw attention to any other issues the Group identifies that may effect improvement of access.

The Group has so far held six meetings. Further information about it can be found on Natural England's website at:

<http://www.naturalengland.org.uk/ourwork/enjoying/places/rightsofway/swgrow/default.aspx>

Section 53 of the Countryside and Rights of Way Act 2000 (CROW) provided that certain public rights of way that existed in 1949 but are not recorded by a specified date would be extinguished at that date, which it refers to as the 'cut-off date'. The Act specified 1st January 2026 as the cut-off date, but allows regulations to defer this date by up to five years. It also allows regulations to exempt particular categories of right of way from this extinguishment.

Section 53 has not yet been commenced. Defra has indicated that it will not be commenced at least until the Stakeholder Working Group has reported.

At its meeting on 5-6 May, the Group assessed all of the options it considers are available in relation to whether and when the cut-off date should take effect⁵. In the light of that discussion, this paper attempts to capture in an impartial way the key attributes that were identified by the Group for each of the five options. This write-up of the discussion has not been agreed by the Group, but seeks to capture the main points raised by members in relation to

⁵ There was brief mention of possibly applying a different cut-off approach to under-recorded as opposed to unrecorded rights of way, but this option was not analysed in detail at the meeting.

each option. Different members will take different views as to the importance of particular attributes, and whether they amount to strengths or weaknesses.

It was agreed that members would be free to discuss this analysis with representatives of their sector of interest, to inform the Group's further consideration of the subject. Whatever view the Group ends up taking in relation to the cut-off date will form part of any wider package of reforms that it develops and recommends. It will also remain possible to make the network of recorded rights more cohesive through claims based on long use, and through use of statutory creation powers.

Secretariat
20th May 2009

‘CUT-OFF DATE’: THE 5 OPTIONS AND THEIR KEY ATTRIBUTES

Option 1a: 2026 cut-off is implemented, extinguishing unrecorded rights

CROW cut-off provision is commenced, and takes effect in 2026. Certain rights not recorded on the definitive map by then are automatically extinguished on that date.

- People are already familiar with the concept of a 2026 cut-off.
- Can be implemented without primary legislation.
- Discourages spurious claims by applicants, because these might prevent determination of ‘genuine’ claims in time to save rights.
- Certainty achieved in 2026 (or 2031, if extension power used) that no more rights will be added to definitive map based on pre-1949 documentary evidence.
- Even if the DMMO procedures were streamlined, it is highly probable that some useful rights would be lost. Applications would not prevent this unless determined before 2026/2031.
- The ability to protect useful public rights could be compromised by:
 - delaying tactics by objectors, and
 - under-performance by surveying authorities.
- No new momentum to put the past behind us and look forward.
- Owners remain subject to ‘out of the blue’ claims until 2026/2031.
- System allows applications, but there is no certainty that they will be processed. This would appear dishonest.
- Likely to produce a claims rush at some point before 2026/2031, which if at the last minute could increase the likelihood that useful claims will not be determined.

Option 1b: 2026 cut-off is implemented, extinguishing unclaimed rights

CROW cut-off provision is commenced, and takes effect in 2026. Certain rights not recorded on the definitive map by then are automatically extinguished on that date unless they are covered by registered applications.

- People are already familiar with the concept of a 2026 cut-off.
- Can be implemented without primary legislation.
- Good fit with Defra policy to date: they have signalled an intention to make regulations allowing claimed rights to be protected from extinguishment.
- Certainty achieved in 2026/2031 that no more rights will be added to definitive map based on pre 1949 documentary evidence, unless already the subject of a registered claim.
- It should be possible for useful rights to be protected.

- All applications are determined – would look more ‘honest’ than option 1a.
- No new momentum to put the past behind us and look forward.
- Owners remain subject to ‘out of the blue’ claims until 2026/2031.
- After that, no new applications may be made, but applications already in the system may take many years to be determined: potentially indefinite uncertainty.
- Likely to produce a claims rush at some point before 2026/2031.

Option 2: 2026 cut-off is scrapped

CROW cut-off provision is in effect scrapped, thereby preventing any automatic extinguishment of public rights. This might be achieved either by never commencing section 53 and ultimately repealing it, or by using regulations to create widespread exemptions from extinguishment at the cut-off date.

- Significant change in policy enacted by Parliament.
- Making this change without primary legislation might be seen as a surprising use (or abuse) of powers.
- No loss of useful rights. ‘Once a highway – always a highway’ remains true.
- No reason for a claims rush. But the reduced incentive to make claims means there is never certainty about their extent either.
- Owners remain subject to ‘out of the blue’ claims indefinitely, and the map never becomes truly ‘definitive’.
- No new momentum to put the past behind us and look forward.
- System remains backward looking.

Option 3a: 2026 cut-off is brought forward to take effect as soon as possible⁶

The CROW cut-off and associated extinguishment of certain rights of way is implemented quickly following consultation on the subject and primary legislation. Any rights that existed in 1949 and that are not already recorded on the definitive map by the time the cut off takes effect are automatically extinguished unless either covered by registered claims, or exempted by regulations.

- Poor fit with policy to date. Parliament in 2000 believed a lengthy period is required for capture of rights before the cut-off takes effect.
- Would require primary legislation.
- Very rapid extinguishment of public rights would be highly contentious, particularly if any retrospective extinguishment were involved.
- Likelihood of massive and ill-informed claims rush over a short period, in an effort to circumvent the worst potential losses of rights.
- Probably fewer cases for surveying authority to consider than under the other four options.
- Earliest certainty for landowners, and ability to 'look forward not back' is delivered quickly.
- Potential loss of public rights.
- Issue over the cost of 'buying back' (through creation mechanisms) useful rights extinguished in this way.
- It was suggested that there could be an impact on some people who rely on unrecorded public rights to reach their own land or property.
- Saving provisions would require careful thought - for example in respect of urban paths.

Option 3b: 2026 cut-off is brought forward to take effect after a one-off process of perhaps six years to secure recording of useful rights

The CROW cut-off regime is brought into effect much earlier than 2026. But first there is a time-limited window during which alternative procedures to the current DMMO processes are used to promote efficient capture of 'obvious' unrecorded rights. This might involve a draft map of unrecorded rights being developed and discussed with owners, with new flexibility for surveying authorities to make changes to routes before recording them, to prevent serious impacts on modern land use.

- Would require primary legislation.

⁶ When debated by the Group, this option referred to 'immediate' cut-off. But Defra, who were not present at the discussion, have since advised that there would inevitably be a significant period of 'lead time' in considering such an option, consulting on it, analysing responses and then legislating to give effect to the modified cut-off. So even if Parliament could be persuaded to give the legislation retrospective effect, it is unlikely that the cut-off could effectively date from 'now'.

- Certainty achieved by 2017 that no more rights will be added to definitive map based on pre 1949 documentary evidence.
- Early positive engagement with affected owners, coupled with new scope to address real land use impacts through necessary modifications before rights are recorded. This decreases emphasis on adversarial approaches.
- Might be possible also to take same approach to already registered claims based on documentary evidence and/or claims based on long use.
- Capable of reducing existing claims backlogs and short circuiting case-by-case DMMO-based processing.
- Option to rule out new documentary claims completely, in favour of proactive engagement by surveying authority with parish councils, LAFs and user groups/volunteers in compiling draft map. This would avoid a claims rush and minimise spurious cases - but would rely on strong quality assurance work by authority.
- Highly dependent on surveying authorities being willing and able to make positive use of these powers, and having support from their members in doing so.
- Capable of capturing most useful rights before cut-off takes effect.
- It was suggested that landowning interests would be alarmed at the prospect of a 'fresh' exercise to capture unrecorded rights, particularly any rights of which they are currently unaware .
- Only likely to be radically more efficient in practice if 'irrelevant' objections – whether to recording obvious routes, or to changing them to address serious land use impacts – could be ignored by the surveying authorities.