GLEAM

Green Lanes Environmental Action Movement
Patron: HRH The Duke of Edinburgh KG KT
www.gleam-uk.org

A NEWSLETTER for those interested in protecting ancient ways from the ravages of use by motorised recreational vehicles.
AUTUMN 2012

GLEAM Replies to Defra Consultation

'An Opportunity Missed'

For many years there have been complaints that the process of determining rights of way is clumsy and over-complicated. Claims take far too long to resolve. Defra took up the challenge and passed the baton to Natural England who in turn set up a Stakeholders Working Group (SWG) to prepare a report and proposals. The Group consisted of 20 members representing a spectrum of user groups, land management and business interests, local authorities and officials. Their report with proposals, called "Stepping Forward", was published in March 2010.

Defra considered the report and issued a consultation paper (32 pages) covering only England to 95 organisations, of which GLEAM is one. The paper was issued on 14 May 2012 and invited comments and responses by 6 August 2012. It attaches the SWG report, three impact assessments (73 pages), a list of consultees and a pro-forma for responses (21 pages). These can all be found at http://www.defra.gov.uk/consult/2012/05/14/improve-rights-of-way/ .

SWG had tackled the task on the assumption that the cut-off for recording rights of way, introduced in the Countryside and Rights of Way Act 2000, will be implemented in 2026 as proposed. The report made 32 proposals and stressed that these must essentially be treated as a balanced package and implemented together. Defra has translated this as saying that implementation of the cut-off was regarded by SWG as a "core principle" but has not accepted the requirement for implementation as a package. Defra paraphrases the SWG proposals (16 questions) and then widens the scope of the consultation by extending the principles to public path orders for diversion or extinguishment (9 questions), and to rights of way consents attached to planning applications (4 questions).

GLEAM's response to the SWG section may be summarised thus:

- The cut-off date should be firmly applied. If a filter test by the authority has to happen, then a brief extra period should be allowed for that purpose.
- Protection given by s55 of CROWA 2000 against downgrading or deleting bridleways prior to the cut-off date should be extended to footpaths and restricted byways.
- It should be acceptable to lodge applications without copy documents if they are freely available to the authority and to the public. The Winchester case is misrepresented.
- Remitting quashed Definitive Map Modification Orders (DMMOs) direct to another inspector is wholly unacceptable. Authorities must be given the chance to reconsider the determination.
- Splitting DMMOs into contentious and accepted parts would be unworkable.
- DMMOs should be circulated in draft to help early detection of errors.
- Sanctions against withholding evidence would be unworkable.
- Giving authorities more discretion to filter out empty applications or irrelevant objections, and to make factual corrections of the DM after cut-off, is a laudable objective but would require very careful drafting.
- Reducing references to the Secretary of State by combining the Schedule 14 appeal process and the Schedule 15 determination process is unacceptable. It would defeat the whole purpose of Schedule 14 appeals.
- Wider scope for untrained Committees is unwarranted.
- Court sanctions against authorities for not dealing with applications in a set time would be unworkable.

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- More and better use of IT would be welcome, notably to improve s53B registers.

Further comments were made regarding public path orders and the allocation of costs.

GLEAM concludes with the view that the document is an opportunity missed for more radical changes of law. Given Defra's extension to public path orders and the constraints on application rights in that context, the proposals should also have addressed the lack of application rights in the context of Traffic Regulation Orders (TROs) and of BOAT cul-de-sacs. Remembering that GLEAM's main objective is to protect rural Green Lanes from damage, largely by recreational off-road motor vehicles, the consultation does not address this issue at all. It is this issue which is at the heart of GLEAM's campaign.

An electronic copy of GLEAM's response is available to members on request.

[The following letters have been received from Tim Palmer, a GLEAM member, and Graham Plumbe regarding the current state of highway law. Contributions to the debate from other members, for inclusion in future Newsletters, are very welcome -Ed]

26 April 2012

To The Editor

Dear Sir

Sinking in a Quagmire of Legalese

As someone who appreciates the beauty of our countryside, I am as appalled as any other member of GLEAM by the damage that motorised recreational vehicles make to our off-road Rights of Way .

However, having tried to read GLEAM newsletter articles over the years, I have begun to realise that the quagmires we need to eradicate are not only of the muddy sort; even more impenetrable and rutted are the quagmires of legalese and acronyms (QLA).

For example, just reading the second paragraph of the Spring 2012 article on Walna Scar Road is enough: "The reason for this volte face by GLPG was that NERCA had extinguished motor rights, but exempted claims where vehicular rights had been created by motor vehicles before 1930 (section 67(2)(e). That could be defeated by showing that such rights already existed historically, created by horses and carts before motor vehicles ever used the route."

Holy smoke, talk about not seeing the wood for the trees! Who cares whether horses and carts used the route before motor vehicles, or vice versa? Just because people smoked in trains and buses 100 years ago, doesn't give them the right to smoke in trains or buses today. The point is that the destruction of these surfaces, today, is making our Green Lanes unusable to the vast majority of people who walk, cycle or ride.

The real problem here is that because the current law is so obscure and ambiguous, these minority-interest groups can appeal almost any decision they want. All that is happening is that the lawyers, probably on both sides, are getting rich, and progress is depressingly slow. So, it seems to me that GLEAM members should be lobbying MPs around the country to get the law changed so that the straighforward principle that the minority should not be allowed to obstruct the rights of the majority, is upheld. If we had some clarity in the law, we would finally be able to enjoy the countryside in the beautiful and tranquil state it should be (and as a side benefit, the GLEAM newsletter would itself be less impenetrable and free from QLA).

Do other countries have such arcane legislation on these matters?

Tim Palmer

QLA

Tim Palmer's letter clearly merits an answer from GLEAM. Having overcome the first hurdle of realising that his own acronym reflects his preceding words rather than a well known expression such as Quadrifilar Loop Antenna, I try to meet the challenge. As to acronyms, I speak as one whose hand is regularly smacked by our Chairman for assuming (in the interests of brevity) that GLEAM (who?) members will by definition be up to speed. Point taken.

The immediate answer to the letter is "*and so say all of us - but pigs might fly*". The better answer perhaps is "*anything's possible, but only just*". After 20 years in PRoW (sorry - public rights of way) work, one comes to accept the vast complexity of highway law, the need for certainty as a fundamental legal principle and the momentum required to achieve any radical change. One's mind goes back to the brave souls who challenged the police and the gamekeepers on Kinder Scout some 80 years ago, but had to wait 68 years to get the Right to Roam in the CROW Act 2000.

NERCA 2006 itself is almost as radical, but took a shorter time. For many years there had been complaints that our green lanes were being desecrated by the growing 'exercise of rights' of offroading in/on increasingly damaging and noisy machines. The platform for these 'rights' was the maxim 'once a highway, always a highway' combined with the fact that the law knows only three types of highway - footpath, bridleway and carriageway. The last of these comprised rights of passage for all forms of wheeled vehicles, without distinction between carts, 4X4s and even lorries. GLEAM, formed in 1995 mainly to fight this very problem, was far from being alone in saying that utilitarian use by horse and cart in the 18th century ought not sensibly to justify recreational use in highly damaging vehicles in the 20th century. Sceptics among us (me included) could not see any real possibility of Parliament making a radical change in this respect, but a mounting concern for the environment worked wonders. Alun Michael, bless his heart, emitted this blinding ray of sunshine in a Defra consultation document in December 2003:

"*As Rural Affairs Minister, I have been approached by many individuals and organisations who are deeply concerned about problems caused by the use of mechanically propelled vehicles on rights of way and in the wider countryside. I share these concerns, having seen for myself examples of damage to fragile tracks and other aspects of our natural and cultural heritage in various areas of the country. There is considerable concern about behaviour that causes distress to others seeking quiet enjoyment of the countryside …*

I do not think that it makes sense that historic evidence of use by horse drawn vehicles or dedications for vehicular use at a time before the internal combustion engine existed can give rise to rights to use modern mechanically propelled vehicles. Those who suffer from vehicle misuse find this incomprehensible and in this paper we offer new proposals that are intended to address what many have come to view as the inappropriate and unsustainable way in which vehicular rights are acquired and claimed on rights of way."

When in January 2005 the results of the consultation were seen, it was apparent that political appeasement of both sides was pointing towards legislation so watered down as to make it meaningless. GLEAM immediately set about gathering an alliance of 21 organisations, from the CPRE, CLA and Ramblers down to humble local groups, and GLPG was formed. A small team combining different skills and using highly influential contacts (not least of which was Jim Paice, now being honoured following the reshuffle) set about procuring a range of changes to the Bill which started with an opinion from Leading Counsel as to human rights and retrospective legislation. Jim Knight took over from Alun Michael (a critical move) and the changes gained by meeting Ministers in both Houses were later described by the former Leader of the Parliamentary Bar as being unique in his experience. Even so, such radical legislation inevitably carried interpretative difficulties, although the resultant high profile cases such as Winchester (initiated by GLPG), Fortune and Maroudas, have hugely assisted GLEAM's original objective. Also, the changes introduced by both CROWA and NERCA required reams of amendments to other existing legislation, which is always a problem of radical change.

The story I tell is simply to demonstrate the practical difficulties of procuring such radical change. Rights of way legalese effectively started in 1189 as the origin of legal memory, and a succession of legislative changes in the 18th and early 19th centuries in particular formed the platform for modern law, taken together with a plethora of cases in the courts. Cultural changes in demography, transport, industry, technology, maintenance responsibilities, environmental thinking and so on have all played their part in developing a vast structure of law through which achievement of the obviously desirable objective identified by Tim Palmer is like trying to sprint through treacle wearing wellington boots.

Then there's the question of Parliamentary time. Seemingly, protection of the environment plays second fiddle these days to matters of huge importance such as foxhunting, same sex marriage or reforming the House of Lords. Some recognition of the rights of way problems led to the creation of the Stakeholders Working Group late in 2008 which reported in March 2010. The result of that is the recent consultation by Defra, GLEAM's response to which is described

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elsewhere in this newsletter. The substance of this is that SWG's brief was merely tinkering at the edges, and Defra's resultant proposals go little further. Through all this is the English sense of fair play, giving all interest groups a right to partake. Although democratic, it does lead to a herd of camels. In fact, I have to say that in spite of its complexity and longwindedness, the whole process of determining rights of way does have its merits in terms of opportunity for all. In spite of intellectual poverty on the part of administrators and, more recently, an acute shortage of resources, the system does attempt to rely on fair play.

Through all this GLEAM battles on but, in spite of having punched well above its weight in the NERCA contest and aftermath, and in spite of a range of political supporters and Royal Family patronage, bending the legislative ear to commonsense is a daunting challenge.

As for the impenetrability of GLEAM newsletters, I was not the author of the Walna Scar article but, as a regular contributor, can speak of the difficulty in reaching out to a varied audience in matters that are far more complex than appear on the editorial surface. That of course is exactly what Tim Palmer complains of but is there a prospect of the world being changed by mere mortals such as us? I suppose we can but try.

Graham Plumbe

NERCA/Winchester - the Ebbing of the Tide

by Graham Plumbe (Hon Adviser to GLEAM; Vice Chairman GLPG)

Natural Environment and Rural Communities Act 2006 (NERCA)

The Green Lanes Protection Group (GLPG, formed by GLEAM) initiated the major changes to NERCA at Bill stage which saved the countryside from several thousand BOAT claims. King Canute - aka the TRF - sought to stem the tide but has been engulfed. There comes a time however when the tide recedes, and there remain the lingering rockpools holding crabs.

One such rockpool is in **Northumberland.** A gentleman of devious imagination continues on behalf of the TRF in the Belsay case to invent convoluted arguments to circumvent the will of Parliament. One of these seeks to portray rights of way in a manner unknown to man, ie separate entities wrapped in cling film which decline to meld at junctions. By peculiar logic, a way that should have been caught by NERCA because it is on the Definitive Map (DM) escapes the crab net because of the alternative provision that ways on the List of Streets but not on the DM (see below) are saved by the cling film. NERCA cannot therefore apply on a sectional basis.

Aided and abetted by remarkably lenient treatment from the Planning Inspectorate (PINS) and the Quality Assessment Unit (which cannot understand the problem, and which the said gentleman paradoxically regards as a 'waste of time'), procedural favours are granted that make a mockery of PINS' own rules. Undismayed by having the argument already rejected by the inspector, and by another in the **Yorkshire Dales**, this stalwart battles on. Round three is in progress - but read on.

A second rockpool in **Northumberland** holds a baby octopus whose tentacles embrace the same case. NERCA exemption from the restriction on the creation of new BOATs is granted if, in May 2006, the way was NOT on the Definitive Map but WAS on the List of Streets (LoS) (ie those maintainable at public expense). This list is required under the Highways Act, but the way in which it is compiled varies greatly between counties. The Fortune v Wiltshire CC case considered what characteristics the list should have in order to qualify for exemption. The status of the NCC list had been challenged at a Hexham inquiry in November 2011 for a number of complicated reasons. The inspector chose to ignore the principal evidence, and gave the list a degree of licence not justified by the Fortune judgment. The consequences were not great however, as the BOAT in question has been found to be interrupted by a section of restricted byway. The challenge to the list however is being renewed at Belsay, fortified by far stronger factual evidence and by focus on the errors made by the first inspector. The arguments are strengthened also by the appeal judgment in Fortune which changes the emphasis of what the exemption is about.

Northumberland holds a third rockpool (at Simonburn) yielding an equally ludicrous argument from the same source. Here, the proposition is developed for various reasons that applications determined to be non-compliant following the Winchester case (absence of copy documents) should be treated as compliant. Northumberland CC pointed out that when the original order was quashed because of inspector error, the court ordained that the applications were indeed non-compliant and that the argument cannot be repeated. PINS adds that to find otherwise would be in contempt of court. The only other argument in the case is that, by virtue of inclosure awards in 1754 and 1765, the way "was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by [mechanically propelled vehicles]" - and thus gains exemption from NERCA. Against that background, PINS has

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cancelled the hearing but invited "written exchanges". It is food for thought that the mind producing this material was also a contributor (via the Stakeholder Working group) to the Defra consultation referred to elsewhere in this Newsletter.

As if these cases weren't enough already for **Northumberland**, a further case (Healey) has been referred to PINS. Although the reasons for this have yet to be seen, we may take it that this arises from another example of the same TRF guru having failed to supply copy documents. The application having been rejected at Committee level, NCC on its own initiative has ordered a restricted byway which is being opposed.

Yet another rockpool is in **Somerset** where the TRF lodged a series of claims repeating earlier ones that had failed under Winchester, but this time claiming exemption on the basis that in the 5-year period to NERCA commencement in May 2006, the primary lawful use by the public was in mechanically propelled vehicles. Somerset CC, having taken the TRF's user evidence as 'acceptable', has declined to recognise that SCC's evidence forms are woefully inappropriate and that, with a claims backlog of possibly ten years, it will be impossible to get balancing evidence. Given defective advice from Defra resulting from a defective briefing, and failing to recognise that BOAT orders cannot be made if the user test succeeds (by definition), SCC has made the masterly decision to do nothing at all about the claims. The only benefit to come from all this is a strong caution to the TRF that using the ways before the claims have been dealt with is a criminal offence. In fact, one prosecution was dropped after a police error, but another off-roader charge is proceeding.

Winchester

The Winchester case is of course a rockpool in its own right. Derivative problems still arise. Apart from the cases described above, we still have the question of using wrong map scales awaiting the outcome in the TRF v **Dorset CC** case. Judgment has been scheduled for 27 September and the result will be notified to members who have joined the GLEAM e-mail group. **Buckinghamshire CC** also has its share of cases in hand, two of which are pending Definitive Map Modification Orders (DMMOs), and one of which has been referred to PINS. These involve both the use of wrong map scales and the lack of copy documents. Another interesting case before the court is pending elsewhere, on which further news will be reported in due course.

Defra and PINS

"Bringing into question". NERCA contains what has hitherto been regarded as a non-contentious provision (s69), whereby a DMMO application now serves to "bring into question" the rights which may be established under the 20-year (Highways Act) rule. The application stops the clock. The question of whether such an application needs to be strictly compliant, as applies to exemption cases, was under debate. GLPG thought not, based on the Fortune judgment concerning a parallel exception clause. Defra thought it did, and said so in the website guidance. Defra then did a U-turn by way of a letter to authorities dated 30th May 2012 giving somewhat convoluted reasons. GLPG referred the matter to the authors of the rights of way bible - the Blue Book - who were considering the matter. They now take the opposite view to Defra and have amended the Blue Book accordingly -see http://www.ramblers.co.uk/rightsofway-book/bbe/ - 2nd Aug, page 105. GLPG is persuaded by their reasons (expanded privately) and agrees that strict compliance is needed - and so has done a matching U-turn but in the opposite direction. Defra has been invited to reconsider its letter, but has so far failed to reply.

"Duly made". The 1981Wildlife and Countryside Act, as amended in 2000, requires objections to DMMOs to state the particulars of the grounds relied on. The wording is mandatory, and the PINS' guidance correctly echoes this. In spite of this, PINS is repeatedly ignoring it own advice, and allowing objections to be lodged by the TRF without any grounds at all. Apart from the clear purpose of disadvantaging the opposition, this directly affects the status of the objector and the "right to be heard" - ie by way of public inquiry or hearing. Reliance is placed on Advice Note 7, which is not only in conflict with PINS' own guidance booklet, but is also plainly out of date and wrong in law as to legal authority. A complaint to the Quality Assurance Unit produced an answer which manifested a complete lack of understanding. A procedural complaint to an inspector has fallen on similar deaf ears, because inspectors normally do what they are told - by PINS! Reference to Hugh Craddock, who has replaced Dave Waterman as Head of Commons and Access Implementation Team, produced this helpful reply:

While I would like to consider the issues raised in your email in further detail, I regret that Defra's priorities mean that is simply not possible.

and later:

Our position remains quite clear, and is as set out in Advice Note 7. These matters were fully considered at the time of the complaint, which has now been determined.

One wonders what goes in the minds of administrators. The unlawful contents of Advice Note 7 were taken as being authority for not considering the contents of Advice Note 7, and for using Advice Note 7 to dismiss the specific complaint. A letter to Hugh Craddock pointing out that this is a matter of general policy affecting a range of cases remains unanswered, weeks later.

Oh well, you can't win them all.

[News Release from the Yorkshire Dales National Park Authority.]

Biker Fined for Illegally Using National Park Bridleway

Grassington, 21 August, 2012.

A motorcyclist has received an on-the-spot fine for illegally riding on a bridleway in the Yorkshire Dales National Park.

The man was part of a group of about eight bikers that ignored signs and drove up the bridleway in Coverdale running from Horsehouse alongside High Gill towards Fleensop.

The group was spotted by Sergeant Stuart Grainger of the Leyburn and Dales Policing Team.

"There is a clear sign showing a motorbike crossed out as you turn off the main road and another attached to the gate they had to open to proceed up the bridleway – so there was a clear prompt even if they claimed they didn't know the law concerning bridleways and footpaths," he said.

"I got between some of them and stopped the last two going up. The others looked back and shot off up the bridleway.

"I ran after one of them and grabbed hold of his backpack but he kept pulling away and I chose to let go of him rather than him falling off the bike. However, another one got stuck further up the track so I brought him back down and issued him with a £30 ticket for riding on a bridleway. The rider I stopped was from the Richmond area, so they may all have been local.

"Luckily there were no walkers using this narrow bridleway at the time, because had there been, they would have been put in danger by this group, or, at the very least, they would have found it intimidating and disruptive.

"I will be contacting local trail riding groups to ask them to remind members that bridleway and footpath use is illegal and damaging."

Nigel Metcalfe, the Yorkshire Dales National Park Authority's Area Ranger for Lower Wensleydale, said:"The majority of trail riders and 4x4 users who come into the National Park to ride on green lanes are responsible people who help to protect this fragile landscape by obeying the signs and going only where they are allowed.

"But there are always a few who think they are above the law and can go where they want, irrespective of the damage they may cause to the land and its wildlife.

"We work closely with the Police to patrol bridleways and footpaths that are being used illegally and we would urge members of the public to help by reporting any incidents."

It is illegal to ride a car or motorbike on any public footpath or bridleway so trail riders and 4x4 users are urged to make sure they know where they can legally drive away from the metalled road. This information is available on the Yorkshire Dales National Park Authority website at www.yorkshiredales.org.uk and from organisations such as the Trail Riders Fellowship.

'Cookies'

If you have ever wondered how websites like Amazon can remember what you last looked at, or how their recommended products are uncannily appropriate or how the advertisements on your page seem to mysteriously reflect the sort of things you last viewed, then the answer is probably due to something called 'cookies'. These are snippets of text in code format that are saved onto your computer by the website you are looking at, to track your browsing behaviour.

A new EU ePrivacy law that came into force on 26 May 2012 has been interrupted by the The UK Information Commissioner's Office (ICO) to require a website to check if users are prepared to allow information to be saved on their computers. Websites failing to comply are liable to a fine so many now have a prominent warning box when you first visit them to highlight the use of cookies.

The legislation is vague at the moment but does seem to permit cookies if they are deemed strictly necessary for the operation of the site. This is to cover cases often found on shopping websites where they need to remember what you have in your shopping cart.

Although there are cookies on the GLEAM website these are used purely for managing the pages. We have run a compliance test and are pleased to report that the site passes with a perfect 10. Visit http://bit.ly/KFmtcJ to see details.
Nick Marr

If you would like more information or wish to assist please write to:
GLEAM, P.O. Box 5206, Reading RG7 6YT. www.gleam-uk.org

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