

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.
SPRING 2012**

Walna Scar Road and Garburn Pass in the Lake District – definitely not BOATs

by Diana Mallinson

Many of the green lanes I research are exempt from the Natural Environment and Rural Communities Act 2006 (NERCA) because they are on the List of Streets, but not on the Definitive Map. This means that any historic evidence (generally setting out as a public carriage road in an Inclosure Award) which is conclusive of public vehicular rights, will lead to BOAT status. But if there is no Inclosure Award or other conclusive evidence as to the public's rights, the issue becomes one of probability. In other words, which explanation is more likely? That a particular green lane was used by the public with horse-drawn carts, or only with horses or on foot? If the Order Making Authority or the Planning Inspectorate (PINS) comes down on the side of carts, the green lane becomes a BOAT, open to modern day motorised vehicles. To get bridleway or footpath status, in the absence of conclusive historical evidence, I have to try to prove a negative, i.e. that the lane was never used by the public with carts.

A change in position

This article is about two lanes, Walna Scar Road and Garburn Pass, where the position was different; the Green Lanes Protection Group (GLPG, founded by GLEAM in 2005) was trying to prove that the lanes were used by horse-drawn vehicles. Against this the Cumbria Trail Riders Fellowship (CTRF) were arguing that motorbikes were the first vehicles with which the public used the lanes. 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.



Walna Scar Road and Brown Pike

These routes had been added to the definitive map as bridleways in the 1980s, as part of a review of the Definitive Map. CTRF applied in 2005 to the Lake District National Park Authority (LDNPA) for upgrades from bridleway to BOAT, and then claimed s67(2)(e) exemption. This meant they had to argue that any earlier or contemporary horse-drawn vehicle use had not created public vehicular rights. LDNPA considered that the historical evidence for both routes pointed to public vehicular rights having been created before 1910 by horse drawn vehicles, and therefore made orders upgrading the bridleways to restricted byways in 2007. CTRF objected, and the orders were referred to PINS for determination (by written representations, as there are no living witnesses of pre-1930 use!). I noticed these representations (this was during PINS's experiment of putting all statements of case on its website) and alerted Graham Plumbe to CTRF's claims of s67(2)(e) exemption. We decided to fight these claims on behalf of GLPG, Graham concentrating on the legal arguments and me trying to find further historical evidence for public horse-drawn vehicular use.

Walna Scar Road

The unsealed section of Walna Scar Road runs from near Coniston west to the Duddon Valley, crossing the pass near Brown Pike at a height of over 600 metres. It is well used by walkers and mountain-bikers as a through route, and to get to Coniston Old Man and neighbouring fells and to bridleways. Historically it was the route by which six slate quarries carted slate to Coniston, Torver and the Duddon Valley. So the main issue was: was the slate transport by public or private rights? But our investigation looked at a lot more besides, e.g.

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- the Torver Highways Accounts from the 18th and early 19th centuries: for example the parish spent £4, or 73% of its highways budget, on Walna Scar Road in 1783, and repaired the bridge at the boundary with Coniston in 1803. (Note that LDNPA spent at least £45,000 on repairing damage caused by recreational motor vehicles and storms in 2002-9.)
- had Walna Scar Road been a packhorse route? Alan Kind, CTRF's advocate, argued this, but there was no contemporary documentary evidence of it. (This was also a U-turn from his position during the review in 1982, when he argued it was a public cart road)
- 19th century records of quarries owned by the Crown Estate in Torver parish held by the National Archives

We also had a lot of help from Alastair Cameron, the historian of the Coniston slate industry, both from his knowledge of the physical remains of historic quarry access and of documentary and oral history records.

Some of the evidence produced by CTRF of pre-1930 motorbike use was indisputable – e.g. a photo of a side-car combination, ridden by a one-armed rider, at the summit of Walna Scar Road, in an event in 1917. But most, if not all, of this early motorbike use appeared to be hill climbs, i.e. the motorists didn't use the entire route; whereas our evidence indicated that horse-drawn carts had used all of it.

As readers of this newsletter and viewers of GLEAM's website will know, PINS's first decision on the status of Walna Scar Road was quashed in August 2010; Defra conceded on one of nine grounds of appeal, that of procedural unfairness, because CTRF's response to our representations had not been copied to us for comment. LDNPA then reconsidered all the evidence and argument (which by then amounted to more than 400 pages of text and maps) and decided to make a new order for restricted byway status in January 2011. CTRF objected, but withdrew their objection in November 2011. So the long saga of the battle for Walna Scar Road finally ended with PINS's confirmation of restricted byway status in January 2012. Graham and I are very grateful to the individuals and organisations who supported the appeal which led to the quashing of the first decision, and who helped with publicising the fact that recreational motor vehicle use of Walna Scar Road was illegal following the quashing.

Garburn Pass

The other route claimed under this exemption by CTRF was Garburn Pass, which is the shortest route between the settlements of Troutbeck and Kentmere. It is well used by walkers and pedal cyclists (it forms part of an MTB Coast-to-Coast route, and has been used by the Rough Stuff Fellowship who take road bikes over mountain tracks).

CTRF's evidence of pre-1930 motor vehicle use was limited to published recollections of young motorbikers in the 1920s and a photo of a competition, so it was arguable that this use was insufficient to create public vehicular rights. But there was also evidence that there were no public vehicular rights before this early motorised use – an Inclosure Award of 1842 setting out part of Garburn Pass as a public bridle and private carriage road, and a report compiled for one of the highway authorities in 1895 which alleged Garburn Pass was a bridle road only. To counter this evidence, we had to show either that public vehicular rights existed before the Inclosure Award, and were not stopped up by it ("once a highway, always a highway"); or that public vehicular rights were created by horse-drawn vehicular use after 1842. A lot of digging in the archives and local libraries, and legal argument by Graham, demonstrated both propositions. The archives and libraries revealed, amongst other evidence, the following:

- Quarter Sessions papers showing that Garburn Pass and its continuation to Ambleside was a public carriage-way in 1762.
- LDNPA had already found one Victorian guidebook describing Garburn Pass as a part of an excursion for small carriages; Troutbeck and Kentmere inhabitants, led by local resident Robert Courtier, went through the many historic guidebooks held at the Armitt Collection, Ambleside, Dove Cottage Library, Grasmere and Kendal Library to find more such references. Robert also tabulated references to modes of transport over Garburn Pass from the diaries of Margaret Browne, who moved from Kentmere to Troutbeck on her marriage in 1863.
- official and newspaper reports of the English Lake District Association's successful campaign to get the highway authority to repair Garburn Pass for tourist drives at the end of the 19th century.
- the highway authorities' decisions on requests by Friends of the Lake District (founded in 1934 and now a GLPG member) for a traffic regulation order to prevent motor vehicle trials over Garburn Pass in the 1930s.

Garburn Pass was confirmed by PINS as a restricted byway in September 2011. So anyone who wants to follow Margaret Browne, her friends and relations, and Victorian tourists, by driving a horse-drawn carriage over it, can now legally do so. We are very grateful to Robert and other people in Troutbeck and Kentmere for their research and representations.

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I hope this article has helped explain why I was arguing, contrary to my usual position, that public vehicular rights had been established by horse-drawn vehicles on these routes; and to express one of the things I have learnt from researching these two routes, that it is important to look at all the available documentary evidence to try to provide the best possible estimate of the probability of vehicular status.

Dr Diana Mallinson is a Committee Member of the Yorkshire Dales Green Lanes Alliance, and a member of GLEAM and of the Peak District Green Lanes Alliance. Readers will have appreciated that her capacity for research into Rights of Way matters is unsurpassed. [Ed.]

NERCA/Winchester - a Winter of Discontent (for the TRF)

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

Natural Environment and Rural Communities Act 2006 (NERCA)

Pre 1930 vehicular use: The melted snowman of the winter was undoubtedly the TRF case on Walna Scar - a precious fell pass from Coniston in the **Lake District**. The strange U-turn of positions between GLPG and the TRF, based on exemption from NERCA by virtue of motor use in the 1920s, was described in the last newsletter. Having suffered a quashing order and faced with a new restricted byway (RB) order, the TRF put in a meaningless objection thus setting matters in train for yet another inquiry. They were therefore put on notice as to costs, leading to a surrender last November. The final confirmation as RB was published in January. Characteristically averse to humble pie, the TRF attributed this to the OMA findings - which had in fact been diplomatically presented as "finely balanced" - rather than to the trouncing received from GLPG. Also in the **Lake District**, Garburn Pass (again a precious fell pass, running east from Troutbeck) proved to be another melted TRF snowman. RB finalisation was in October and the appeal period ran out in December. On both Walna and Garburn, the decision did not in the event turn on rights being established by pre-1930 motor use. The fulcrum was the prior existence of rights based on horse and cart use. Although law played an important part, in both cases the battle ultimately depended on thorough historical research by Diana Mallinson (with some help), described in a separate article.

List of Streets (LoS): The Court of Appeal judgment in the marathon Fortune case, reported here last August, was handed down on 20 March. Appeal dismissed. For anyone thinking of litigating unwelcome decisions, the case is said to have cost the losers £1m, and George Laurence QC said he was "exhausted". On construction, the court said "*We agree with Mr Laurence that the court must, in determining a question of statutory interpretation, steer between the [sea monsters] Scylla and Charybdis of the textual and purposive approaches, but having thus set our course we arrive at a different destination from that of Mr Laurence.*" There follows a very useful Ministerial quote as to the whole purpose of NERCA. In essence, the court agreed with the High Court judge on all aspects, notably that to qualify as a list generating exemption from NERCA, the LoS must be accessible to the public. The original findings as to a deposited 'single list' and clear information were not disturbed, and were extended by acceptance of computerised presentation. The 'character of the list' was not destroyed by the inclusion of errors or the omission of categories of highways. The need for strict compliance under Winchester was distinguished by different drafting. The judgment can be found on the Bailii website <http://www.bailii.org/recent-decisions.html>. In **North Somerset** slow progress is being made on a series of BOAT claims by a bridleway association, but common sense is prevailing and the only recent developments have been progressing towards bridleways. The one major exception is clearly without the LoS protection, where GLPG has objected but the determination is still pending.

Sectional treatment: Convolution arguments continue to flow from the TRF, sometimes difficult to follow and so far consistently rejected by inspectors. The first strand appeared to be that the status of a way should be decided as a whole if exemption on part only succeeded. That has evaporated, and been replaced by an argument that sections of a way are to be treated separately from sections of a right of way - thus distinguishing the effect of the definitive map from that of the LoS. **Northumberland** in particular is being afflicted by this plague, but again (so far) being rejected by inspectors. Further complications are arising over application of the inquiry rules by PINS, where confusion reigns.

5 year user test: Still smarting from having 102 claims rejected as invalid by **Somerset CC** as a result of Winchester, the TRF are now lodging a stream of claims asserting the exemption under NERCA arising where the main use of the way by the public in the 5 years to May 2006 was in motor vehicles. Such a claim is plainly untenable in respect of most if not all of the green lanes in question, and the claims themselves are supported by a web of mis-statements of law. Meanwhile, TRF members have been driving on the lanes in the misguided belief that the existence of a claim justifies such use. Quite apart from the procedural complications in deciding this test ahead of deciding whether historic rights existed in the first place, the matter is further complicated by SCC having very little legal understanding of NERCA and the Road Traffic Act, compounded by an apparent bias in favour of off-roaders. If one adds uncertainty of

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law and lack of resources on the part of the CPS/police, and apathy on the part of the Local Access Forum, readers will understand the pool of treacle through which GLPG is trying to wade. That said, at least one prosecution of TRF members is provisionally in hand.

Winchester

Map scales: Compliance requires production of a "map drawn to a scale of not less than 1:25,000". The fanciful notion on the part of the TRF, that such a map is created by blowing up a 1:50,000 map to double its size, continues to occupy the time of the High Court, Dorset CC and a bevy of expensive lawyers. At the suggestion of DCC, GLPG applied to join as interested party (to introduce an element of technical commonsense) which the court accepted, albeit in a personal name. Landowners have very helpfully banded together to fund the cost. The TRF were given permission to argue their case which, following delays due to non-availability of counsel, is due to be heard at the end of May. Inspectors have already thrown out such a claim on three occasions in Dorset, twice in DMMOs and once in an appeal against an adverse Council determination.

As an alternative argument, the TRF asserts that that even if the scale is wrong, it doesn't matter as long as the route is correctly shown. That involves the triviality or 'de minimis' exception allowed by Winchester. GLPG is demonstrating to the court the practical consequences, in rights of way terms, of using a small scale map.

Wrong maps feature also in two more cases in **Buckinghamshire** where GLPG has objected.

Copy documents: Lack of copy evidence was the central theme in the **Winchester** case. The same defect has occurred elsewhere, including **Dorset** where it is an alternative theme to the map scale issue. Various claims in **North Somerset** are also in the firing line on this issue, and again in **Buckinghamshire** where GLPG has objected to another claim for this reason. A forthcoming inquiry in **Northumberland** also features under this heading. The issue has now emerged in **Durham** where the Council obtained a curious opinion from counsel that strict compliance is a matter of subjective judgment - reliant on the de minimis principle. The Council decided to proceed on that footing, and the matter was referred to the High Court in January.

Defra and PINS

After Budget cuts axed the Government Office for the North East, appeals against Council determinations were transferred to PINS from 1st February 2011. This appears to have been beneficial, in that decisions are now made by inspectors which has speeded up the process.

GLPG continues to press for improvements in policy and inspector conduct. One policy issue is that appeal decisions are made taking into account changes in law but without reference to interested parties or to new evidence - including as to facts which may relate to the changes in the law. That is particularly relevant in cases of compliance under Winchester. Another policy under challenge is that of conceding quashing orders on a single most obvious ground without any consideration of other issues. That leaves loose ends and inevitably invites further long and expensive processes in re-arguing the issues all over again. It is a sad fact that by nature the more junior echelons of both Defra and PINS prefer defence to reason.

The conduct of PINS itself is in question given that it doesn't appear to understand its own inquiry rules. The outcome of this in at least two cases will be reported in the autumn. As ever, watch this space.

John Poulter

It is with great sadness that we record the death of John Poulter in January 2012 following a long illness which he appeared to shrug off. He was Vice-Chairman of the newly-formed Peak District Green Lanes Alliance. He and his wife Joyce were indefatigable campaigners for the protection of Rights of Way in the Peak District against damage and abuse by motor vehicles. He was the author of the leading article in the GLEAM Autumn 2011 Newsletter, "*A lot is happening on Chertpit Lane (or Paradise Lost?)*", and he played a major part in the GLEAM 2011 AGM.

We extend our deepest sympathy to his family and to his many friends in Derbyshire, where he will be greatly missed.

David Gardiner

**If you would like more information or wish to assist please write to:
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