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 2014

AVON RIVER CROSSING AT FOSSEWAY, EASTON GREY, Near MALMESBURY

by John Tremayne

This is a short tale of events going back to the early 1990s.

The Fosseway which, as most are aware is an important Roman road, crosses the River Avon at Easton Grey, North Wiltshire, in an Area of Outstanding Natural Beauty.

Adjacent to the crossing is a Roman settlement which comprises a significant small town, one of five located in Wiltshire. It is a Scheduled Monument and considered to be of national importance. There are also other remains that both pre- and post-date the Romans. Furthermore there is ecological importance at the site; the river is a spawning ground for trout and a family of otters live further along the bank. The bird life of the area is special and abundant.

For many years, starting as long ago as the early 1990s, there has been extensive misuse of this section of the Fosseway (originally designated as a BOAT). This was particularly by irresponsible 4x4 users driving in and out of the river, and carving extensive damage into the river bank and into the surrounding surface, exposing and damaging the archaeological remains. There is a perfectly usable vehicular bridge at this point of the crossing, which most drivers chose to ignore (presumably because it did not present a challenge and was no fun). The Fosseway, the river and the surrounding area increasingly became a vehicular playground.

Over many years attempts were made to prevent abuse at the site, including the installation of barriers and bollards. However, these defences were invariably winched out of the way by the 4x4 fraternity, and the situation worsened quite quickly. Notices were posted on 4x4 club websites encouraging members to make full use of this area. The police became involved, but could not of course watch the site 24/7, and advised walkers and other bona fide users not to approach the gangs of 4x4 drivers. Having seen some of them myself, I would agree that this was sensible advice! Some of them looked very threatening. Temporary TROs were issued from time to time, but the 4x4 drivers chose to ignore them. The surface of large sections of the Fosseway itself began to deteriorate badly.

Eventually English Heritage became involved because they were increasingly concerned about the damage to the Scheduled Monument, but a shortage of funds prevented them from initially taking direct action. After several more years of discussion involving various interested parties (including Wiltshire Council, English Heritage, Easton Grey Parish, police, farmers and landowners) in 2011 Wiltshire Council (then recently unitized) grasped the nettle and issued a permanent TRO. This

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also involved the erection of heavy locked gates at either end of the relevant section of the Fosseway. The TRO does not apply to motor cycles, horses and walkers for whom smaller (side) gates have been erected. Substantial fencing has also been erected along parts of the Fosseway in order to prevent access to agricultural land and the Scheduled Monument.

Since then we have lived in relative peace. I say "relative" because every now and again the 4x4 fraternity try to break the gates, largely unsuccessfully, but the damage has to be repaired (out of council tax funds!)

It was a very long haul, but we got there in the end, and I would particularly like to pay tribute to the members and officers of Wiltshire Council who eventually got us over the finishing line. At least the grass is now looking greener (both literally and metaphorically). The Romans can now rest in peace!

A 4x4 vehicle in the flooded river Pang in winter 2014.

The Battle for Peace – spaces to be watched
(including NERCA/Winchester)

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

This report usually focuses on NERCA matters but recent events have carried into new realms the battle for peace from motors in the countryside. Our last newsletter (see www.gleam-uk.org) reminded members of the correlation between GLEAM and GLPG (the alliance founded by GLEAM), the achievements in changing the Natural Environment and Rural Communities Act 2006 (NERCA) when still a Bill, and the success of the Winchester case [2008] as to implementation. This report embraces joint action in the field of new legislation with the Peak District Green Lanes Alliance (PDGLA), a very active member of GLPG. That is the first of two cliff-hangers.

In the wider battle, the TRF trumpets its victories (mainly Pyrrhic) as to Traffic Regulation Orders, but is much quieter as to the string of local byway claims it has lost. The flood of byway applications potentially exempt from NERCA (originally counted as 880, a large proportion of which have bitten the dust) is now drying up, but a big issue remains. The Dorset litigation as to map scales is the second cliff-hanger.

THE DEREGULATION BILL – GLPG/PDGLA

In July 2013 the Government presented a draft Deregulation Bill for consultation purposes in which a small part is devoted to rights of way. A Joint Parliamentary Committee started hearing evidence about the proposals in the bill in October. PDGLA has been waging a prolonged war against

desecration of Peak District green lanes by offroaders, and resolved to make a submission. Its Chairman duly appeared before the Committee on 4 Nov 2013. GLPG was closely involved in preparatory drafting of the representation, and attended the Committee in support. The subsequent Committee Report is at http://www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftdereg/101/10107.htm#a59 in which paras 147-154 relate. Although the Committee set its face against new measures from the outset, it noted the scale of the offroading problem and the level of support for measures to tackle it, and called on Government for action. The need for reform is recorded in para 154. Written evidence was submitted to the Committee from PDGLA, GLEAM, GLPG, YDGLA, Friends of the Ridgeway and many individual members and sympathisers.

On 23 Jan 2014 the Bill itself was presented to Parliament. Progress of the Bill can be followed at http://services.parliament.uk/bills/2013-14/deregulation.html. It passed its 2nd reading on 3 Feb 2014 and completed the Commons Committee stage on 25 March. The part of the Bill covering rights of way is now at clauses 18-24 and Schedule 7. The provisions are mainly to enshrine the consensus proposals put forward by the Stakeholder Working Group (SWG) in March 2010 after two years' work. These concerned only procedural matters which Defra are promoting as being deregulatory. Although the measures only tinker with the underlying problems, and far more radical reform is required, PDGLA decided to seize the opportunity to try and correct the particular problem of mechanically propelled vehicles (MPVs) using unsealed green lanes. Many of these are outside the clutches of NERCA, being on the List of Streets (LoS) (which does not record the level of rights), but not on the Definitive Map and Statement (DMS) (which does). These are commonly referred to as Unclassified County Roads (UCRs). The proposal is to reclassify all unsealed UCRs (UUCRs) as restricted byways (RBs – which are not available to MPVs), but with exception clauses for the normal road network, for access, and for ways that are clearly footpaths or bridleways or have no public rights at all. Because UCRs are not on the DMS, classification as RBs will not remove any established rights. Such a measure would be highly deregulatory in removing a large burden from the shoulders of local authorities who are, in some cases, going through the lengthy process of trying to determine rights on UUCRs. Another major factor is the cut-off date in 2026 for altering the definitive map, at which point, for complex legal reasons, it will become impossible to prevent MPV use of UUCRs where no such rights exist.

It is known that Defra is intent on keeping the SWG measures intact as they were formulated as a package. The PDGLA proposals do nothing to undermine them; indeed they would in fact complement them.

GLPG drafted the PDGLA amendment and agreed to stand as promoter, given the far wider range of members it represents. The amendment was introduced by John Hemming (MP for Birmingham Yardley) as New Clause 2 on 11 March, but was sidelined by House Officials for reasons which were unfounded. A new amendment was introduced (and debated) instead, inviting the Government to consult further and report on the problem, but this amendment was withdrawn as the Government now proposes to set up a new SWG with the objective of a consensus as to the motor vehicle problem. Anyone with any experience of the issue knows that consensus is a pipedream.

GLPG has revised the original amendment to meet issues raised by its members. An attached Explanatory Note addresses the bogus reasons given by officials for the sidelining, and also explains the reasoning behind the amendment as revised. Copies are available on request. The way ahead lies in pursuing the matter in the House of Lords. Although the Government has so far declined to include any new measures on offroading in the Bill, GLPG and PDGLA are greatly encouraged by

the official recognition of the need for reform and the level of awareness that has been generated.

THE DEREGULATION BILL – GLEAM

GLEAM supported the PDGLA proposal and also sought to introduce a measure to improve the system of Traffic Regulation Orders (TROs) – supported in turn by GLPG. The aim was to provide for an appeal system against repeated refusals by local authorities to apply TROs banning MPVs when requested to do so. This could not be said to be deregulatory (the main objective of the Bill), so the concept did not achieve recognition. The ultimate objective remains.

TRF v DORSET CC

This case rests on the appeal judgment in Winchester College & ANO v Hampshire CC [2008] wherein it was decided that, to gain exemption from extinguishment of motor vehicular rights where applications were made before 20 Jan 2005, the application must be fully compliant with the statutory requirements. One such requirement is that the application map must be drawn to a scale of not less than 1:25,000. In the **Dorset** case (previously reported in this news letter) GLPG is an Interested Party (albeit personally represented). Dorset CC (DCC) won in the High Court, but the Court of Appeal, in a very strange decision in May 2013, found that application maps blown up from 1:50,000 satisfied the minimum drawn scale requirement. Application to the Supreme Court for leave to appeal was made by DCC supported by GLPG, and was granted on 24 March 2014. The outcome of that will decide the fate of 11 Dorset BOAT claims. It will set the precedent as to whether the law means what it says. Can devious legal argument overcome plain horse sense?

The map scale issue underlies (or has been an additional factor in) several order decisions already decided in **Dorset**, in **Buckinghamshire** and in **Hertfordshire**. It is also possible that the issue will be used as a lynchpin in a challenge to the *Winchester* case itself when the Dorset case reaches the Supreme Court. As our heading suggests, watch this space.

***WINCHESTER* - OTHER**

Another grenade contained in *Winchester* was the need to attach to a byway application copies of all evidence relied on. Failure to do so has been the death knell in several cases, or has been a fall back in cases where underlying rights depended primarily on historical evidence or legal issues. Such cases have occurred in **Buckinghamshire** (Stowe), in **West Sussex** (Upper Beeding), and two cases in **Northumberland** (Healey and Simonburn). It overlays another in **Hampshire** (Damerham/Rockbourne) where the application has been rejected (following a quashing order on the first Order Decision) but a Schedule 14 appeal has been lodged.

NON-NERCA - Icknield Way

GLEAM continues to help its members in non-NERCA cases, the most notable of which has been a section of the Icknield Way at Pirton in **Hertfordshire**. This historic way, thought to be pre-Roman, was the subject of a bridleway order in 2011, but provisionally modified to byway open to all traffic by an inspector in Jan 2013. GLEAM and GLPG members (assisted by James Pavey of Thomas Eggar LLP, a GLEAM Hon Adviser) objected and a complex battle ensued, involving extensive historical evidence, inclosure law, dedication law, jurisdiction of an inspector, onus of proof and sundry other matters. In summary, and after a public inquiry, the inspector decided in Jan 2014 to confirm the original bridleway order. The TRF recognised defeat by not appealing. This is a highly significant decision given the importance of this well known route.

Help is also given to members in more general matters, an example of which is in **Devon** (Morchard Bishop). Here a complex case in 2008 led to a restricted byway decision, but owners now need

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guidance as to exercise of rights of access. This involves educating the Council in turn as to how to apply such rights, given abuse by motorists including followers of an ill-informed local hunt.

Christopher Marsden v Powys County Council

by Andrew Kelly MSc AMIPROWO
(GLEAM representative for Wales)

Key points to the case:
Chris Marsden and his followers (TRF & LARA) are of the opinion that the duties imposed by highway authorities are absolute. This is despite the powers under the Road Traffic Regulation Act 1984 in managing the highway network if its status is being brought into question. Mr Marsden goes on by saying that "the lack of finances" is no defence when it comes to repairing routes when they are considered "out of repair".

Two of the key questions that need answering in this case are – when is a highway out of repair? What circumstances have to be put in place for a way to be out of repair? The issues of lack of finances is taken from the Wilkinson v City of York Council [2011] case; albeit this was a case for a claim of damages and defence to maintain a highway under Section 58 Highways Act 1980. (Section 58 concerns special defence in action against a highway authority for damages for non-repair of a highway.) It must be remembered here that there are no regulations in place that determine how the Highway Authority discharges or decides how it carries out its duties. The question then has to be asked – is it reasonable to prioritise public resources, especially relating to maintenance of the highway network?

Another important point that the case needs to address is the standard of maintenance given to the highway network. This includes both sealed and unsealed roads, as well as the public rights of way network. It is considered that the most relevant landmark case relating to the standards of maintenance is that of Sharpness New Docks and Gloucester and Birmingham Navigation Co v Attorney General in 1915. Despite this case being almost 100 years ago, it has to be taken to account, together with other cases such as that of Masters v SoSETR [2000], as well as the definition of a byway open to all traffic under Section 66(1) Wildlife and Countryside Act 1981; but it still has important implications for today's traffic.

A key question: Does a Traffic Regulation Order trump an action under Section 56 Highways Act 1980 (Proceedings for an order to repair a highway)? This important point of law has not yet been answered and is one that this case hopes to answer.

Details of the case:
Chris Marsden is a recreational 4x4 user living in Herefordshire. He has a strong belief that any route that exists on a County's List of Streets is vehicular, whether or not the way appears on the respective definitive map of public rights of way.

In 2005 this campaigner decided that there was a just reason to serve a Section 56 notice on Powys CC for what he considered to be the way forward to get the County to repair a certain byway in the County. It must be said here that Mr Marsden was in discussions with the County Council so as to avoid any costs to either side, even before taking the case to the Magistrates Court. This is allowed for such cases through the Section 56 process if no action is forthcoming.

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In fact Powys in their defence had been instrumental in setting up an off-road forum to create what has been affectionately known as the Cambrian Mountains Exemplar Project. As a direct result of this forum, Powys then undertook a massive survey of all their fragile routes.

This was to produce a strategy for use in the event of any claims by any users or lobby groups that considered them to be out of repair – a key component of Section 56. This survey took up an incredible amount of time; but most important of all for Powys was that it established the cost of putting into repair all the routes identified within the strategy. This would cost an incredible £1.2M to put right the damage that the likes of Mr Marsden and his followers had caused. Surely it is not reasonable to ask a county to put right the damage that effectively others have deliberately caused? Resulting from this survey, Powys have identified the management objectives by which to tackle these routes and define them as either "sustainable", or even at the opposite end of the spectrum as "unsustainable". It may surprise members of GLEAM to learn that Mr Marsden was consulted on this document and was in broad agreement with it. Despite this fact, he still served a mountain of Section 56 notices to force Powys to repair these routes, even though he supported the principle of what all concerned in the 4x4 user groups were trying to achieve.

The Section 56 notices that Mr Marsden was serving concerned BOATS as well as other routes, as recorded in the County's List of Streets. In turn this action resulted in a hearing in the Courts, before finally the Justices concluded that the routes which Mr Marsden considered to be out of repair were not in this condition. The Justices completely threw out each allegation. They commented that the Strategy that Powys had drawn up "was a reasonable approach", and the Temporary Traffic Regulation Orders were "there for a purpose". For Mr Marsden all this was what he did not want to hear, and the court went against him by imposing full costs of £19,199.60.

Mr Marsden decided he was not going to accept the Magistrates decision, so decided to appeal. With this case considered to be an important one, user groups in the form of the TRF and LARA came forward to underwrite the costs of such an appeal. To date there have now been no fewer than four hearings in a Crown Court. Each time the Courts sit, the fees incurred with the case creep up and up, costing the taxpayer more and more. Clearly none of us know how much the final bill will be. If it goes against Powys, then the off-road user groups will have scored an incredible victory that none of us could have predicted from the outset of the case.

The court case is still ongoing, but has been adjourned yet again .....Watch this space as to the final outcome.

Summary:

This case raises a couple of key unanswered questions such as the standard of repair and the required maintenance standards for highways.

For any questions relating to this article or case, please send an email to: fforddlas1966@btinternet.com

GLEAM aims to protect public paths from wanton and illegal damage.
If you would like more information or wish to assist please write to:
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