

# GLEAM



Green Lanes Environmental Action Movement  
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[www.gleam-uk.org](http://www.gleam-uk.org)

**A NEWSLETTER for those interested in protecting ancient ways  
from the ravages of use by motorised recreational vehicles.  
AUTUMN 2008**

## **The 5-year mpv main user test**

**A Public Inquiry rejects a TRF claim for BOAT status**

*Michael Bartholomew,  
Chairman, Yorkshire Dales Green Lanes Alliance*

The NERC Act makes provision for a number of exemptions from the extinguishment of public mechanically propelled vehicular (mpv) rights. Section 67(2)(a) says that if the main lawful public use of a route during the five year period ending on 2 May 2006 was by mpvs, then mpv rights on that route are not extinguished. The onus of proving the balance of use being mainly by mpvs lies with the mpv users.

A group of trail riders attempted to use this section of NERC in order to change the status of a section of Moor Head Lane, in the Yorkshire Dales, from Restricted Byway to Byway Open to All Traffic. They presented their case at a Public Inquiry on 1 July 2008. The Inspector issued his decision on 29 July. The Inspector concluded that the trail riders had failed to show, on balance of probabilities, that the main use of Moor Head Lane was by mpvs.

The trail riders' case rested chiefly on written testimony supplied by nearly 90 trail riders. This recorded their assertions that they had ridden the route at various times during the five year period. A supplementary part of the trail riders' case was an assertion that the badly-damaged state of the route would have reduced its appeal to non-motorised users to such an extent that their numbers were vanishingly small.



The Inspector was not persuaded. He accepted evidence, supplied by the Yorkshire Dales National Park Authority and by the Yorkshire Dales Green Lanes Alliance, that there was plenty of non-motorised use of the route. But his decision rested on his view that simple evidence of use by one group or another is incapable of establishing the crucial comparison between motorised and non-motorised use. What would be needed to make a '5-year main use' case would be rigorous, impartial surveys of the balance of use during the 5-year period. No such surveys were undertaken on Moor Head Lane.

Off-roaders may produce evidence of their own use over these five years, probably based on their own personal subjective recollections. However, evidence of use by other users, on foot, on horseback, on pedal cycles and in horse-drawn vehicles, probably does not exist. This is because, at the time, there was no requirement or incentive to record it. In such cases it is simply not possible to prove any balance of main use, by mpvs or by anyone else.

The Moor Head Lane Inquiry has wide implications. 4x4 and motorcycle user groups all over the country are gathering testimony from their members of motorised use of many green lanes. This is in the belief that their testimony will be sufficient in itself to establish 5-year main use. On the strength of the Moor Head Lane Inquiry, it will not. This Inspector's decision will thus be a useful precedent for future inquiries based on the 5-year-main-use test.

# The Winchester Appeal

## *Hundreds of BOAT Applications thwarted*

The earlier stages but not the outcome of this case, R (*ex parte Warden and Fellows of Winchester College and Humphrey Feeds Ltd*) v Hampshire County Council and The Secretary of State for Environment, Food and Rural Affairs, were reported in our Spring Newsletter. For completeness and convenience we repeat these stages, and then give the very satisfactory outcome of this landmark case.

Schedule 14(1) Wildlife and Countryside Act 1981 requires that any application must be accompanied by **copies** of any documentary evidence that the applicant wished to adduce in support of his claim. This case involves BOAT claims on a restricted byway in the parish of Twyford and a bridleway in the parish of Chilcomb. The Chilcomb claim was made by the TRF prior to the cut-off date, and the Twyford claim was potentially exempt from the provisions of the NERC Act for a different reason. However, both were made without copies of **any** supporting documentary evidence, merely lists of documents. We considered, therefore, that the applications were incomplete and were not valid. In its general guidance on the NERC Act, Defra did (in our view) wrongly advise local authorities on the level of detailed evidence needed to support BOAT claims. Hampshire County Council had therefore wrongly determined this double application as a BOAT. Fortified by an Opinion from George Laurence QC, we were supporting litigation which would overturn the Defra guidance and the determination made by Hampshire County Council.

The case went to Judicial Review in the High Court in November, but unfortunately the judge ruled against us and refused leave to appeal. This judgment, which has now been overturned, can be read at: [www.bailii.org/ew/cases/EWHC/Admin/2007/2786.html](http://www.bailii.org/ew/cases/EWHC/Admin/2007/2786.html) (18 pages). George Bartlett QC, deputy judge, when refusing leave to appeal from his judgment, gave as the reason for this being that there was “no reasonable prospect of success, for the reasons given in the judgment”. The two landowners involved, Winchester College and Humphrey Feeds Ltd, sought leave from the Court of Appeal instead, and this was granted. The Winchester College Governing Body agreed to pursue the appeal. In view of its national importance, the date of the hearing was expedited. It was heard in the Court of Appeal before Lord Justices Ward, Dyson and Thomas on 15th and 16th April.

On 29th April the Court of Appeal handed down its judgment which overturned the High Court judgment. The Court of Appeal judgment can be read (20 pages) at [www.bailii.org/ew/cases/EWCA/Civ/2008/431.html](http://www.bailii.org/ew/cases/EWCA/Civ/2008/431.html). In essence, the judges said that compliance with Sch 14 Wildlife and Countryside Act 1981 must be strictly applied. It is necessary for pre-20 Jan 2005 applicants (pre-19 May 2005 in Wales)

- a. to have completed the prescribed form correctly,
- b. to have supplied a map to a scale of not less than 1:25,000 showing the route claimed, and
- c. to have supplied copies (not just a list) of any documentary evidence relied on.

It is estimated that at least 500 BOAT applications are affected by this judgment.

It is now up to objectors to BOAT applications to ask for the evidence supporting those applications (in some counties these can be seen on the website), and to make objections where the above conditions are not satisfied. If the application has already been determined by the authority, the decision should be revisited. If an order has already been wrongly made, the situation becomes more complicated. In this case, objectors should contact GLEAM for advice.

There was a second issue in respect of one of the two applications - whether Hampshire County Council could properly determine it in the absence of a valid certificate of notice being served on landowners. The court found against us on this issue, but that is immaterial as the applicant fell at the first hurdle. This problem in fact affects few if any other cases, because exemption from extinguishment of rights does not depend on such a certificate other than in exceptional circumstances.

The TRF has informed its members that it was not involved in the Winchester case, and so could do nothing about it. The fact is that both applicants - Messrs Tilbury and Fosberry, both senior officers of the TRF - were sent full court papers and invited to join the action as interested parties. Both spurned the offer.

## Winchester Shock Waves

by Graham Plumbe

Hon Adviser, GLEAM; Vice-Chairman, GLPG

As reported in this Newsletter, the Winchester appeal in April held that BOAT applications made before the cut-off date of 20 January 2005 (19 May 2005 in Wales) would only qualify for exemption if they were properly made – i.e. were compliant with the regulations. A survey of all counties in England and Wales has yet to be undertaken to assess the results, given that some 880 pre-cut-off claims were recorded jointly by Defra and GLEAM in early 2006. Speculation has been that about 500 of these would fail, but that number may well be exceeded. This article reports certain pointers.

**Somerset** spearheads the claim failures. There were 102 pre-cut-off applications (the second highest in the country), and all have bitten the dust. This unique situation derived from orchestration of standardised TRF claims in 2003/4, clearly by someone with inside information on Government proposals and with knowledge of Somerset's road maintenance records. Sadly for the TRF, the orchestrator failed to follow the rules, and the identical wording used fell at the first hurdle. The new (Dec 2007) Map Review Team Leader, struggling with the legal principles in NERC Act and even more so as to the Winchester judgment (and responding very reluctantly to help from GLPG), has now rejected all claims with a view to confirmation in Committee in October. Problems with Somerset County Council's dithering as to active support of enforcement by the police is however an ongoing saga.

**Hampshire** is another beacon of light on a smaller scale. Out of 20 pre-cut-off claims, 18 were non-compliant and are being rejected - either by redetermination or by outright dismissal if still pending. Of the two remaining, one is being opposed by Hampshire CC on appeal and the other is an acceptable access claim. Effectively a clean sweep.

Equally gratifying is **Yorkshire Dales** National Park Authority, which initially declined to apply NERC Act to any of its 9 pre-cut-offs, but has now changed its mind on all of them following Winchester.

Winchester does not shut the door completely. It remains open to claimants to renew their applications on the basis that exceptions other than those relying on date and compliance can preclude extinguishment of vehicular rights under NERC Act. That is principally where the main lawful use over the five years to 2 May 2006 has been by the public in motor vehicles. Designed to protect motor vehicular use of the "ordinary road network", the legislation is unclear as to how this should be measured; but inspectors seems to be applying commonsense and Defra guidance in looking for positive evidence of all types of use from claimants. Another straw being clutched at by the losing Winchester applicants has been that the existence of steam traction engines qualified the making of a carriageway under an inclosure award in 1855 as having been "construction, ... under an enactment, of a road intended to be used by [motor vehicles]". That has been roundly dismissed by Hampshire CC with the help of the Professor of History at the University of York and the Vehicle Collections Manager of the National Railway Museum at York.

Odd-ball situations emerge from some counties. GLEAM member Ivan Barnes drew attention to **Lincolnshire's** belief that a decision to make a BOAT order could not be reversed. Detailed legal argument has brought about a change of heart. GLEAM member Diana Mallinson spotted an inspector's decision in **Warwickshire** which quite wrongly applied a different subsection as not requiring a compliant application. At GLPG's request, that has been corrected by Defra and the Planning Inspectorate for inspectors generally, and the landowners are being urged to appeal against the one that slipped the net. **Nottinghamshire** CC made an application to itself and then argued exemption, disdaining the opinion of both counsel and Defra that this is unlawful. That aberration is now with an inspector to rectify, following submissions by GLPG. Another GLEAM member, Sandy Milne, has reported irrational thinking by **Dorset** CC which believes that photographic enlargement of a map drawn to the wrong scale will satisfy the clear requirement in the Act. That is again being addressed with our help.

GLEAM members are urged to report any other situations where authorities do not appear to be applying the rules properly. This can be done either through the contact methods shown on the GLEAM website at <http://www.gleam-uk.org/> or by telephoning me on 01252 850282.

## GLEAM - Working to protect peaceful and quiet enjoyment of the countryside

The following article is reproduced by courtesy of Media Wales Limited.

### 'Spotters' to report Beacons off-roaders

May 13 2008 by Sally Williams, Western Mail

"SPOTTERS" are on patrol in the Brecon Beacons this summer to report illegal off-roaders to helicopter police teams overhead.

Dramatic scenes unfolded over the May bank holiday weekend, when police helicopters were called in to help catch illegal off-roaders in the Brecon Beacons National Park.

After liaising closely with the local community National Park Authority wardens teamed up with Dyfed Powys Police to organise a joint operation to apprehend 4x4s and bikes off-roading through protected countryside in the National Park.

During the seven-hour operation, so-called "spotters" positioned at key observation points, tipped off the National Park wardens and police about the whereabouts of the suspected offenders.

The police cautioned the drivers of five motorcycles and six 4x4s and called in air support when one of the 4x4s attempted to evade the police by driving around the open moorland.

Sam Ridge, assistant area warden for Brecon Beacons National Park Authority said the driver finally gave himself up when he realised that two police helicopters had his every move covered. He said: "The wardens receive more complaints about illegal off-roading than anything else. The vehicles and bikes cause considerable damage to the landscape destroying the areas they pass through, upsetting and endangering the legal users of bridleways and footpaths. "It is surprising how noisy these machines are and they cause considerable distress to residents and visitors trying to enjoy the tranquility of the park."

Liz Daniels from Brecon Beacons Holiday Cottages added: "Most of our visitors show their personal commitment to maintaining the rights of way in the park by making a contribution to a charity that repairs the local foot paths. Imagine how they feel when they see what damage the illegal off-roaders have done. Recently visitors have commented on how rutted the footpaths are becoming – you can often see the tyre marks."

PC Owen Dillon, who co-ordinated the operation for Dyfed Powys Police said: "This joint operation has resulted in six 4x4 vehicles, five motorbikes and one car being reported under Section 34 of the Road Traffic Act 1988 for illegal off-roading.

"The driver who failed to stop initially will be reported under section 34 of the Road Traffic Act."

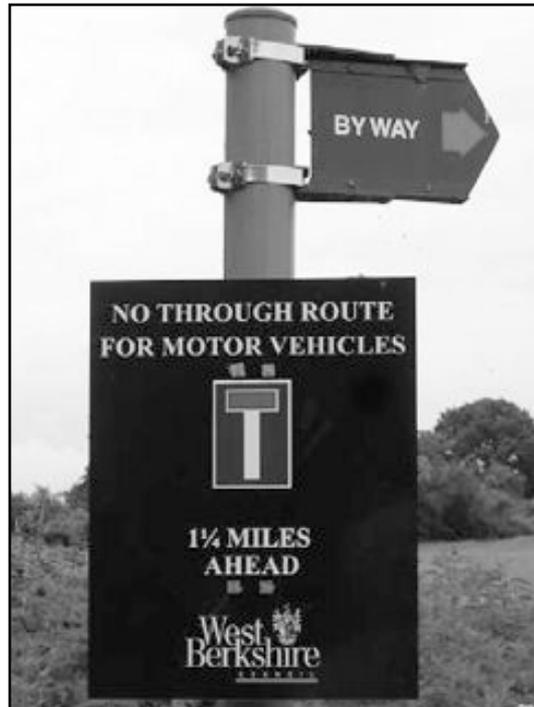
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### *BOAT Cul-de-Sacs*

All over the country there are many BOATs which end as cul-de-sacs for motor vehicles. These BOATs may start where they leave a normal tarmac road or another BOAT; but they become a cul-de-sac at the other end where they can only be exited onto a Restricted Byway or some lesser Right of Way. The number of these BOAT cul-de-sacs greatly increased following NERC Act, when all remaining RUPPs became Restricted Byways. In the Unitary Authority of West Berkshire alone, which is a small area compared with many counties, there are 13 such BOAT cul-de-sacs.

Following requests from GLEAM, the West Berkshire Council has now put up signs at the start of all these BOATs which end as cul-de-sacs, saying that there is no through route for motor vehicles X miles ahead. A photograph of one of these signs is shown here.

Other local authorities are now being pressed to put up similar signs in their areas.



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