Unclassified County Roads
An Issues Report to the Countryside Commission

Introduction

1. Most people have a reasonable idea of what a footpath or bridleway is and what rights exist on them. As users of rights of way become more knowledgeable, they slowly become familiar with the basics of the Definitive Map system and, ultimately, aware of the existence of a parallel, "ghost" network of minor roads that are not identifiable as public rights either from the Definitive Map or the Ordnance Survey. These "secret highways" form a network of minor, semi-surfaced roads, stoned and cobbled highways and ancient green lanes amounting to at least 10,000 kilometres[1] already on highway authority records, and probably approaching half as much again if currently unrecorded roads are counted[2]. This hidden network is made up of Unclassified County Roads and offers tremendous potential for access to the countryside and recreation, coupled with some real problems of funding and management.

2. "Unclassified County Road" (UCR) is a non-statutorily-defined description of the lowest class of publicly-maintainable highway, other than those shown in the Definitive Map. "Unclassified" means that the road is recognised and regarded by the highway authority as of only local importance - too minor to have "A", "B", or "C"-type classification[3]. "County" means maintainable by a county in the sense of a highway authority, although boroughs, districts, and the new unitary authorities can, and do, contain "county roads". "Road" means that it is a highway. Most highway authorities regard UCRs as minor highways open to all types of traffic, but there are limited exceptions to this as explained below.

3. The expression "unclassified county road" came into use as a common term after 1929-30, when the general responsibility for public roads passed from the urban and rural district councils to the county councils[4]. By 1955 the term was sufficiently acknowledged to be used as conventional terminology in an Act of Parliament[5]. Strictly, the correct description of the lowest form of minor, publicly-maintainable road is "Unclassified Road", leaving out the "County". This is perhaps now increasingly appropriate as the extent of the county in local government diminishes. For this paper, "Unclassified Road" will be preferred and will mean the same as "Unclassified County Road". Before other terms such as "White Roads", "Green Roads" and "BOATs" are defined (see below), it is necessary to understand the evolution of the law regarding the maintenance and recording of public roads.

History.

4. English common law recognises three classes of highway: footpath; bridleway (which may, or may not, include the right of driftway); carriageway, or "full" highway. These classifications came down from Roman law, were well-established by the late Middle Ages, and have been approved by the courts in recent years[6]. Until the middle of the 19th century there was, unlike now, little concern about who could *use* which road. The debate was about who had to *repair* public roads, and this battle was regularly fought in the courts and Parliament[7]. Traditionally, highways fell to be repaired by the public, or the "inhabitants at large". Over the centuries, legislation defined this responsibility into a "statute labour" scheme whereby the common people of a parish were obliged to give a certain number of days labour each year to road repair, with materials being found as-and-where. This scheme was open to abuse and quite inefficient[8] and in 1835 it was replaced with the basis of the system we still have today, when Parliament directed that each parish or township must elect a "Surveyor of Highways" and levy a rate to raise the cost of repairs, rather than have the locals give labour and materials in kind[9]. Busy roads probably benefited little from this new scheme. The *Journal of the House of Commons* (the forerunner of *Hansard*) for this period is full of petitions to Parliament for funds to repair and improve specific roads, the then-equivalent of trunk and "A" roads.

5. Through the middle part of the 19th century the inadequacies of the 1835 legislation became apparent and were progressively addressed. Parishes, most of which were too small and disorganised to adequately manage roads, sanitation and the poor laws, were encouraged to amalgamate into District Highways Boards[10] for road repair functions, while the counties became responsible for "Main Roads"[11], which were disturnpiked toll roads. In 1894 the principal highways function of the parishes was put in the hands of the Rural and Urban District Councils[12], which stayed responsible until 1930, when the county councils became the highway authorities, in basically the same format as today[13].

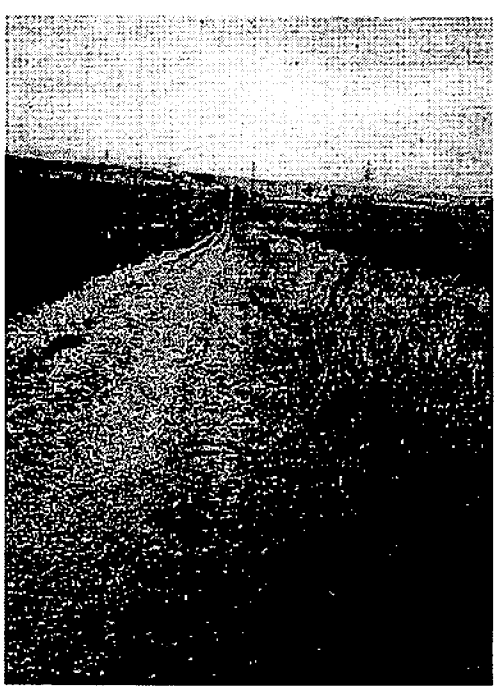
6. That is how the highway authorities evolved, but it is important to understand for what they were, and are, responsible. As said above, the public are traditionally responsible for the maintenance of all highways, either personally (by statute labour) or through their elected government and taxation/rates. The law does recognise exceptions to this liability,

notably where a landowner enclosed a highway to his benefit[14], or where a highway was maintainable by a particular person or persons for some legal or historical reason[15]. The Highway Act, 1835 recognised and continued these exceptions to the general rule of public liability for repair. That Act also introduced the principle that no new road should become publicly maintainable until it was awarded a certificate by the justices of the peace, stating that it was properly made up. This rule is the basis of what is now generally called "adoption".

7. Thus, the Act of 1835, the interim legislation, and the main handovers of responsibility in 1894 and 1929/30, meant that the succeeding responsible authorities had to know which highways they were responsible to maintain. There was no universal way of recording this information, but the parishes and later, larger, units did know their own roads. In 1815 Parliament ordered that all parishes and townships must, under threat of penalty, make a return of the mileage of all "paved roads" and "other roads used by carriages" in their charge[16]. In England and Wales 16,955 parishes and townships made this return, with only 120 defaulting. The aggregated mileage for each county is then given to the half yard. Some parishes, district boards and RDCs maintained good records of publicly-maintainable highways, and passed these across to the counties in 1929[17]. In other places the information appears to be less comprehensive. During that 1929-30 handover, from RDC/UDC to county authority, in most areas maps of the publicly-maintained roads were prepared. These are generally known as the "1929 handover maps" and form the basis of the highway maintenance records still in use by the county councils and other highway authorities.

8. These "handover maps" were not "definitive" in two senses. Firstly, they were not prepared to a common national standard, using common symbols and definitions, nor were they open to public scrutiny and debate. Secondly, they were not exclusionary in that the failure to show a road in the handover maps did not, and does not, mean that it is not publicly maintainable. What the maps did was to show the "roads" which the RDC/UDCs believed they had a *liability* to maintain, or, and this is not always clear, which the RDC/UDCs *did* maintain. There is nothing in any legislation leading up to the 1929 handover that states all such publicly maintainable roads are carriageways, but this is arguably implicit. Certainly, in 1929 the RDC/UDCs did not hand across to the counties their responsibility to assert public interest and rights over bridleways and footpaths[18]. So, in 1930, the county councils had a general duty to repair all roads that were publicly maintainable before 1835 (unless it could be shown that there was a private liability to repair, but this is quite unusual) and, for the first time, these roads were formally classified in terms of importance and consequent standards of repair.

9. It is important to consider the physical nature of public roads in 1930, and the type of traffic that used them. By that time, most main roads (in the general sense) were tar-surfaced, and completely new roads were starting to be built for motor traffic, often to bypass difficult town centres. Many minor roads in town were still cobbled, and thousands of miles of country road still unsealed, but often with a high-grade stone surface. The "unclassified road" as now defined by each county council was the bottom end of this hierarchy, but it was a very wide class - most roads then were of low, or no, classification by then-current standards. Agricultural and commercial traffic were starting to use motor power, but horses were still a common form of locomotion. Unclassified roads were lesser in the sense of strategic, inter-town importance and surface-quality, but they were commonly used by the local traffic, as for centuries past. They were also maintained by the traditional "lengthsman" in most country areas.



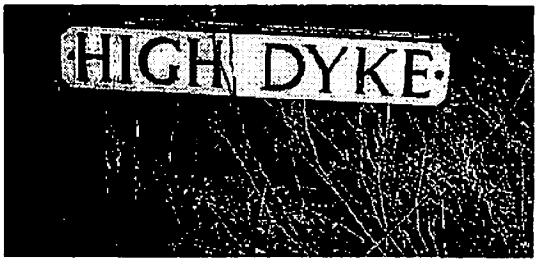
Unclassified roads are not only to be found in remote, or upland, areas. This is *Sewstern Lane*, running for many miles parallel to the Great North Road on the Lincolnshire/Leicestershire border, described by Professor Hoskins in the *Making of the English Landscape* as a very old drove road.

10. Soon after the handover of road responsibility to the counties in 1929-30, there was pressure on the Government to acknowledge and record "public rights of way" - footpath and bridleway rights - and to generally promote access in the countryside[19]. This led to the Rights of Way Act 1932, under which the District Councils had a power to prepare maps of public rights of way, although few actually did so. This Act was intended to identify

public rights of passage which came in "below" the public road hierarchy, then newly placed in the care of the county councils. Although its importance as legislation is small, the 1932 Act does seem to have been part of the impetus towards wider countryside and access legislation leading, post-war, to the National Parks and Access to the Countryside Act 1949, which created the Definitive Map system. This Act made the highway authorities for ordinary roads also the highway authorities for footpaths, bridleways and Roads Used as Public Paths (RUPPs), with a duty to repair (limited in the case of RUPPs), protect and assert the public's interest.

11. In the gestation period of the 1949 Act, the unclassified road network was still in general use. In the post-war decade the nature of agriculture and country life changed dramatically. Draught horses were superseded by motor wagons and tractors, while the few remaining droves of sheep and cattle were replaced by truck transport. By 1955, the need to improve road communications in rural areas was obvious, and the Agriculture (Improvement of Roads) Act was passed, recognising that forestry and the centralised milk industry demanded the upgrading of many unclassified roads. In the 1950s many stone-surface unclassified roads were tar-sealed for the first time[20], leaving a "rump" of unsealed, occasionally unsurfaced, unclassified roads that received little, if any, public maintenance.

During this post-war decade, the creation of the first Definitive Maps generally avoided roads that were already acknowledged to be publicly maintainable by the counties[21]. The Definitive Map was concerned with recording public footpath and bridleway rights, sometimes alongside the "Road Used as a Public Path" (RUPP) which, in general, was also something "less than" an unclassified road. So, by reason of unforeseen parallel legislative and social change, footpaths, bridleways and RUPPs became formally recognised and of increasing importance for recreation, while the unsealed remnant of the unclassified road network steadily declined in use and public awareness. This trend continued at least until the late 1960s. If there is one identifiable factor that re-awakened public awareness of, and interest in, the unclassified road network, it is the implementation of the Countryside Act 1968. This Act set out procedures for the reclassification of RUPPs[22], with the now-superseded "suitability" and "hardship" tests, which resulted in most RUPPs being reclassified as bridleways (and in more cases than is generally realised, wrongly reclassified as footpaths). The fear of losing the right to pass along many unsealed highways galvanised motorcycle enthusiasts and resulted in the formation in 1970 of the Trail Riders' Fellowship (TRF). This group started to look closely at the history, law and distribution of the highway network and effectively "rediscovered" the pattern of unclassified roads[23]. As the TRF matured into a recognised recreational organisation, their links with horse riders, cyclists, carriage drivers and, ultimately, walkers, spread knowledge of the existence and potential of unclassified roads for recreation. This wider interest blossomed with the continued resurgence of interest in recreational horse riding and the development of the mountain bike. The corollary of this renewed interest in unclassified roads was a noticeable reluctance by some highway authorities to, variously, admit they exist, admit they have any particular public status, assert public rights over them, and maintain them, even to footpath or bridleway standards.



High Dyke is the local name for the Roman *Ermine Street* in Lincolnshire, a fine, wide green road. Lincolnshire County Council considers the county's unsealed roads to be possibly the largest area of uncultivated land left in the whole shire.

Definitions.

12. There is no statutory definition of **"Unclassified County Road"** or **"Unclassified Road"**, but a non-statutory version might be attempted thus:
An unclassified (county) road is a minor highway that is usually, although not always, publicly maintainable; usually, although not always, recorded on the highway authority's "list of streets" per s.36(6) Highways Act 1980; usually, although not always, of carriageway status in common law; and usually, although not always, not additionally shown in the Definitive Map of rights of way.
That is really too loose to be of use in defining what most people generally consider to be an unclassified road. Common understanding would be:
An unclassified county road, which may or may not have a sealed surface, is the lowest status of road shown in the highway authority's list of streets, which are highways maintainable at public expense, and which is not a footpath or a bridleway.
For the purposes of examining the recreational potential of unclassified roads, that abbreviated definition is adequate.

13. **"Green Lane"**, or **"Green Road"** and, in an older meaning than is now taken, **"Green Way"**, are merely descriptive terms in widespread use. As the name implies, it is a road with a green - unsealed -

surface. Many surviving green lanes are indeed green - grassy surface and enclosing hedges and trees. Perhaps, over the years, there has been a slight distinction in use between these terms. "Green Way" might, typically, be applied to a classic downland track, such as the Wiltshire ridgeways[24]. "Green Lane" might be applied to the aforementioned grassy, hedged lane (Banbury Lane in Northamptonshire would be a good example) while "Green Road" might include more major, not necessarily unsurfaced highways such as Roman roads and old turnpikes (perhaps typified by The Corpse Road over Cross Fell). A way that fits any of these terms might be a carriageway, bridleway or, more rarely, a footpath; a wholly-private road may also be, visually, a green lane. Thus, it is a physical description, rather than any real definition of status, although most surviving green highways are public ways of bridleway or carriageway status. Some, but by no means all, unclassified roads are green lanes/roads/ways.

14. **"White Road"** is a comparatively recent term. It is sometimes thought to refer to the white appearance of chalk, or crushed-stone, minor roads, but this is unlikely as an origin. In modern practice, "White Road" means a road physically depicted on Ordnance Survey *Landranger* or *Pathfinder* maps by means of parallel lines, but where there is no colour between those lines. The road is shown in the natural white of the map paper. Absence of infill colour by the Ordnance Survey denotes that i) the road is not an "A", "B", or motorway road (which have specific colour codes) and ii) is not otherwise tarmac-surfaced (typically yellow on the *Landranger* series). "White Roads" may be shown with a red or green symbol superimposed on them, denoting that the way is shown in the Definitive Map as a footpath, bridleway, RUPP or BOAT but, equally, may be bare paper-white, which does not distinguish between untarred unclassified roads and private roads, such as farm access ways. Similarly, the Ordnance Survey maps show "Paths" by means of single broken black lines. Some of these are also untarred unclassified roads, and most people now extend the term "White Road" to include such "Paths" where these have public status.

15. **"Byway"** is dictionary-defined as "a secondary, or side, road, especially in the country", but earlier use of the term has effectively been overwhelmed by the statutory expression **"Byway Open to All Traffic"** (BOAT) which, per s.66(1) of the Wildlife and Countryside Act 1981 means ".... a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used". This definition means that a BOAT is a general-purpose highway mainly used by the public for walking and horse riding, rather than with vehicles. An unclassified road can fit BOAT criteria (many, perhaps most, unsealed ones do) but cannot be entered in the Definitive Map as a BOAT without going through a statutory procedure. Most, but not all, BOATs on the Definitive Map are there because they were formerly RUPPs and have been through the statutory (1968 or 1981) reclassification procedure.

16. **"Road Used as a Public Path"** (RUPP) is a term created by the Act of 1949 and intended to operate to include in the Definitive Map public rights on foot and horseback over ancient general purpose roads. Under procedures first created in the Countryside Act 1968 and later modified by the Wildlife and Countryside Act 1981, RUPPs must be statutorily reclassified as BOATs or bridleways (very occasionally as footpaths). There is considerable debate as to whether RUPPs generally or individually carry vehicular status and to the evidential weight, in the reclassification process, of their original classification, but, at least until reclassification, they are deemed to bear at least public bridleway rights[25]. Some counties have, or had, "dual-status" roads which are or were at the same time both unclassified roads and RUPPs, but this is not very common[26]. RUPP issues are similar to, but not completely overlapping, unclassified roads. A longer examination of the mechanics and legal implications of RUPP classification and reclassification is set out in Appendix I

17. **"Greenway"** is a term that immediately introduces confusion with "Green Road" and "Green Way", but which requires clarification because of its current popularity. "Greenway" is now usually taken to mean a mostly, or all, motor-vehicle-free road or way, often for the use of cyclists and pedestrians only. The cycle track charity Sustrans, has popularised the concept of "Greenways" as a national and local network of car-free roads for every-day purposes, rather than solely for recreation. The Countryside Commission has picked up the attractiveness of a "parallel road network" and included it in *Quality of Countryside: Quality of Life* as a topic worthy of further discussion. Unclassified roads might well form the core of any future "Greenway network" so it would seem prudent to agree a meaning for "Greenway" (or an alternative term) so that all involved are talking about the same thing. At present they are not; Sustrans' concept of "Greenways" provides at best minimal facilities for horseriders, whereas it would appear that the Countryside Commission would prefer look to a multi-user network, as set out in *A Living Countryside* (1996).

The size and scope of the network.

18. All highway authorities in England have unclassified roads and all the rural, or partly rural, ones have some which are unsealed, or tarred but relatively traffic-free, and therefore of interest and value for recreation. Each year, when putting together returns for the Standard Spending Assessment, highway authorities are obliged to tell central government the mileage of roads which are their maintenance responsibility. These statistics are broken down to include a figure for "Green Lanes", which are defined as "Unsurfaced roads with a right of passage for vehicles". The lengths claimed by the various highway authorities are reported by the Chartered Institute of Public Finance and Accounting (CIPFA)[27] and are readily available. The figures for bridleways, RUPPs and BOATs principally come from information gathered for this report in 1996, with the gaps for non-responders filled by figures collated by the Countryside Commission in 1990/91 (CCP 395: Local Authority Expenditure on Rights of Way). The accuracy of these figures is open to some question - some lengths given seem to be rather neat round figures. The distances given for RUPP and BOAT are still undergoing considerable change because of reclassification, but the lengths involved will mostly be redistributed between BOAT and bridleway columns. Figures given also suggest some connection between "green lane" mileages given in returns to the government, and the lengths of BOAT/RUPP.

This information is tabulated on page 6, overleaf.

19. Clearly, in many highway authority areas, the "green lane" network forms a major part of the total available to horse riders and cyclists, and well as being a good stand-alone network for horse-drawn and motor vehicles. The figures alone probably do not reflect the real value to the recreational network of unclassified roads. This is because many, perhaps most, of the unclassified roads are physically more attractive to users (especially "casual" users) than much of the footpath and bridleway network. Why? Because the unclassified roads often have at least the remnants of hard surfacing, are less often obstructed or ploughed, are frequently well-defined or enclosed, and generally have an air of antiquity and interest. Where many footpaths and bridleways are just a "bare" right of way to pass over somebody's land, marked at best by a beaten track, the unclassified roads are "ancient highways" - physical entities in themselves and all the more enjoyable for that[28].

20. It is important to realise that the current register of unclassified roads is not finite. There are many miles of old road that meet the criteria for being maintained at public expense and should, by law, be properly recorded by highway authorities on their List of Streets. If a highway authority is satisfied that a road does meet the criteria then it must properly list the road. While this is not a "definitive" process, it is one way of acknowledging and recording a road's public status in a simpler, quicker and cheaper way than immediately initiating a Definitive Map Modification Order (DMMO)[29] to add each road to the Definitive Map. Across England there are a number of areas with "pockets" of old roads which should be listed but which, for some reason, have been overlooked or "lost". Most of these could be claimed by means of a DMMO, but it is probably better at this stage to count them as "unrecorded unclassified roads" because, like identified unclassified roads, their existence is not readily known by the general public. They are the classic "secret highways". How many miles of such lost roads exist is obviously difficult to say, but one reliable estimate has a potential for almost 1500 DMMO orders to add BOATs to the Definitive Map in one county alone[30]. With current levels of knowledge it is very speculative to estimate the position across England - other counties will undoubtedly have far fewer potential claims - but there could be half as much again as the present assessed distance of 10200 kilometres of unsealed unclassified road[31] - certainly a very significant recreational potential, but a massive, possibly unmanageable workload for highway authorities under present procedures, even though the highway authorities are under a statutory duty to make the appropriate DMMOs.

Many unclassified roads keep their usability during winter weather. This is Middlehope Lane, Upper Weardale, County Durham, an enclosed public carriageroad dating from the boom period of lead mining. Cross country skiers often use these roads in winter.

Table of Lengths of Unsealed Unclassified Road and other Public Rights of Way (in kilometres)

HIGHWAY AUTHORITY	GREEN LANES	BOATS	RUPPS	BRIDLE-WAYS	FP
[Avon CC]	114	0	114	200	
Bedfordshire CC*	80	80	0	1400	2410
Berkshire CC*	320	202	161	260	1119
Buckinghamshire CC*	194	7	16	649	2964
Cambridgeshire CC*	222		3		
Cheshire CC*	160	1	160	124	3000
[Cleveland CC]	20	20	0	200	
Cornwall CC*	48	174	0	522	3483
Cumbria CC*	346	111	0	1878	5451
Derbyshire CC*	175	0	56	494	4851
Devon CC*	312	60	0	570	5300
Dorset CC*	821	16			
Durham CC*	83	38	0	573	3019
East Sussex CC*	32	68	68	678	2448
Essex CC*	800	194	0	680	5120
Gloucestershire CC*	149	4	288	360	~~2580~~ 4153
Hampshire CC	774	168	369	850	3500
Herefordshire CC*	116	19	4	358	2863
Worcestershire CC*		0	8	648	4021
Hertfordshire CC*	251	137	122	576	2227
[Humberside CC]	32	12	0	453	1322
Isle of Wight CC*	32	47	0	266	514
Kent CC*	234	229	169	694	5777
Lancashire CC*	21	2	27	388	6050
Leicestershire CC*	173	68	4	584	2705
Lincolnshire CC*	235	13	220	770	3047
Norfolk CC*	397	37	542	443	2560
Northamptonshire CC	166	97	0	600	2300
Northumberland CC*	21	79	45	1295	3133
North Yorkshire CC*	482	2	80	1609	5471
Nottinghamshire CC*	187	1	54	799	2355
Oxfordshire CC*	286	1	286	970	2553
Shropshire CC*	100	20	385	795	4643
Somerset CC*	305	7	312	927	5116
Staffordshire CC*	0	50	0	355	3750
Suffolk CC*	109	132	163	553	4455
Surrey CC*	73	122	4	1045	2203
Warwickshire CC	109	1	3	460	2315
West Sussex CC*	190	16	161	1006	2816
Wiltshire CC*	727	628	251	1540	3485
Harrow LBC	6	N/A			
Enfield LBC	9	N/A			
Kingston-u-Thames LBC	1	N/A			
Waltham Forest LBC	3	N/A			
Bolton MBC	31	0	48	2	302
Tameside MBC	11	0	2	6	271
Wirral MBC	138	10	0	80	86
Solihull MBC	10	0	0	7	249
Calderdale MBC	462	N/A			
Kirklees MBC	342	N/A			
Leeds CC	290	4	0	148	620
TOTAL	10199	2877	4125	26765	122457

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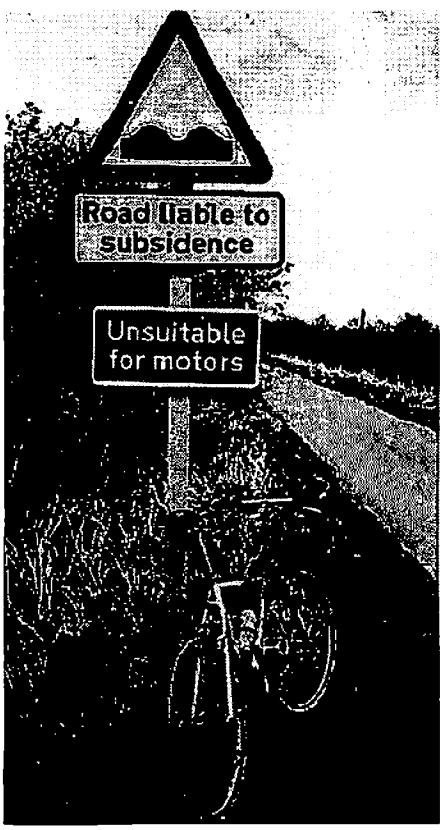
Notes to table:

1. * means FP, B'way, RUPP, BOAT information updated from a survey made for this report in March 1996.
2. Where no response to this survey, figures are from Countryside Commission CCP 395 of 1990/91.
3. Hereford & Worcester figures for rights of way given separately, but "green lanes" figure is aggregated.
4. [.....] denotes county replaced by unitary authorities in April 1996.

Issues relating to identification and status.

21. Identifying acknowledged and recorded unclassified roads is reasonably easy to somebody well versed in rights of way law. The Highways Act 1980 requires the highway authority to maintain its List of Streets as a public document[32]. As with the Definitive Map, anyone is able to inspect the List of Streets (which is usually, but not always, a map) and copy the information thereon across to their own maps or records. For the public this is plainly a very difficult first step in that people generally know that they can walk on a footpath, ride on a bridleway, etc., but have little, if any idea, that there is this other, rather arcane class of highway. While many highway authorities are now improving the signposting of rights of way, the situation can arise where footpaths leading off a roughly-metalled unclassified road will be signposted, but there will be nothing to reassure the public that they have a right to be on the unmetalled road itself in the first place. In recent years some highway authorities have acted to provide this missing information to the general public. Many unclassified roads now have an "unsuitable for motor vehicles" sign. Such a sign seems clear to most people that the road is open to them to use, but that its condition may be poor. For walkers, riders and cyclists, that is quite positive information.



22. Where the unclassified roads have a "green" surface, rather than weather-deteriorated metalling, and therefore unlikely to have an "unsuitable" sign, some highway authorities have signposted the ends sufficient to tell the public of their right to pass along, without encouraging ordinary motor traffic. For example, Cumbria County Council has recently signposted some of its unclassified roads with wooden finger posts announcing "public by-road", sometimes with the terminus given. This is principally done where unclassified roads lead on to footpaths and bridleways, thus informing or reassuring the walking, riding and cycling public that they are indeed on a public through-route.

23. Northumberland County Council has taken this policy one stage further. That county has a pattern of unsealed unclassified roads that significantly enhances the recreational value of the network of bridleways and, to a lesser extent, footpaths. Until the early 1990s, almost all these unclassified roads were depicted on Ordnance Survey maps only as "white roads", thereby failing to tell the public of their right of way. Northumberland County Council, on a parish-by-parish basis, assessed the unclassified roads and, where they satisfied BOAT criteria, made the appropriate DMMOs and added them to the Definitive Map. Within a short period, the Ordnance Survey had received this new Definitive Map information and depicted the "new" Northumberland BOATs on the *Landranger* series. The benefit of this to the public is immediately apparent. Where previously bridleways and footpaths joined roads or tracks of no clear public status, or dead-ended in open countryside, the continuation of the public right of way is now clear to see. As far as is known, no other county has yet decided to adopt this approach. Management of use by avoiding formally acknowledging the existence of public rights is still widely practised by highway authorities which are severely short of resources and under political pressure from anti-access factions.

24. Over the past 10 years many approaches have been made to the Ordnance Survey for them to reproduce information from the List of Streets on *Landranger* and *Pathfinder* maps. After much work by the OS and its user groups liaison committee a pilot project was launched to test a method of collecting the necessary information and depicting it on the maps. The first revised *Landranger* map to carry this information (sheet 124, *Dolgellau*) was issued in the summer of 1995 as a pilot to test public reaction (each copy sold contained a questionnaire to gauge the buying public's reaction to the pilot scheme) with the unclassified roads depicted by red lozenge symbols which, according to the map legend, denote *Other Routes with Public Access*. The Ordnance Survey's *Information Paper* 2/1996 reports

that the pilot scheme drew an "overwhelming positive response" (but with some criticism of the symbol used) and that the scheme will now be extended to include all *Landranger* maps in England and Wales.

This signpost is at a junction of unsealed unclassified roads at Blagill, Alston, in Cumbria. The roads are shown on the Ordnance Survey as "white", with no indication of their public status.

25. The legal status of unclassified roads continues to be a point of debate. Most counties state that the unclassified roads on their List of Streets are roads for all classes of traffic - carriageways. A few counties say that they cannot be sure of this ("some may be only bridleways or footpaths") although they still claim central government grant on the basis that they *are* vehicular highways. Where RUPPs are dual-status: unclassified roads *and* RUPPs, the fact that they are unclassified roads is material evidence when the RUPP status is up for statutory reclassification[33]. In past years, Inspectors have generally tended to the view that unclassified roads are vehicular highways, but since 1994-5, there has been a noticeable trend for Inspectors to say in their decision letters that unclassified roads *may* be only footpaths and bridleways, therefore unclassified road status does not necessarily serve to prove that a RUPP should be reclassified as a BOAT[34]. Inspectors do not make law, but their decisions certainly influence highway authorities in their future approach to access issues. In another case, an Inspector confirmed Devon County Council's DMMO to add some unclassified roads to the Definitive Map as bridleways because "they are too steep for horse-drawn vehicles and there is no evidence that motor vehicles have ever used them"[35]. Decisions like these may mean that highway authorities will, in future, be shy of readily declaring unsealed unclassified roads to be of a particular status without subjecting each road to the examination of the DMMO process.

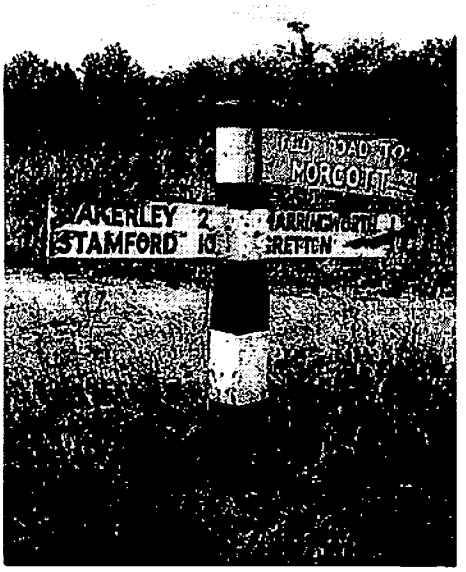
26. The best opinion on the matter at present seems to be that there is nothing in statute or case law to say definitively that all unclassified roads are carriageways (there is nothing to say that stretches of the Great North Road are carriageway status, but lots of people drive along it), but that the attitude of Parliament and the Executive, as may be implied from various statutes from 1815 to 1955, and allied correspondence, is that unclassified roads should be presumed to be carriageways in the absence of evidence to the contrary[36]. In 1987 LARA wrote to all English and Welsh county highway authorities asking if they regarded their unclassified roads as being public carriageways. The responses are tabulated in Appendix III. If local authorities in future decide that the status of each and every unclassified road must be proved, *ab initio*, before they will acknowledge and assert public rights on them, then the chances of readily incorporating these roads into the recreational network - of making them the basis of any future "Greenways" network, is seriously limited. This is an issue which may have to go to the courts for resolution or guidance at some point.

This firm-surfaced green lane is actually a remnant of the 1770s version of the Great North Road, leading down to a ford across the River Tees, just south of Darlington.

Maintenance standards and liabilities.

27. The very term "unclassified road" means that the road has a low priority for maintenance/repair. At this level of the road hierarchy, maintenance is often just patching and is almost always reactive to traffic levels[37]. Where an unclassified road starts to carry a higher level, or different character, of traffic, perhaps where a new housing estate is built, then the highway authority has the power to upgrade the road as appropriate. Similarly, where traffic declines, the highway authority is not bound to maintain the road to its former higher standard, but can let it deteriorate to a level to match the traffic's needs. There is a further option in that the authority can, perhaps tacitly, adopt a policy of "benign neglect" where maintenance levels are allowed to drop even below that needed by current traffic, thereby discouraging traffic from using the road. This is in effect a form of traffic calming and control and will generally be welcomed by non-motorised users of the roads. The legal requirement is that an unclassified road should be maintained for the "ordinary traffic" of the area. Ordinary traffic can certainly include horses and cycles. In effect, ordinary means any traffic that is not "extra-ordinary", a legal term meaning traffic which, because of its unusualness, frequency and character, is likely to inflict out of the ordinary damage to a road. See Appendix II.

28. Unclassified roads seem to be vulnerable to highway authorities seeking closure orders, or downgrading to bridleway or footpath status, because of a real or potential fear that they will be obliged to spend money on repair[38]. The test for such an order (which is applied for at the magistrates court under the provisions of s.116, Highways Act 1980) is that the road is "unnecessary" for the public's use. *Unnecessary* is quite an easy test to satisfy where reasonable alternatives for motor traffic exist. Indeed, although recreation is a valid "need" a great proportion of unclassified roads could be closed or downgraded if highway authorities sought orders and vigorously promoted these before the justices.
Because of this, the traditional users of unsealed unclassified roads tend to accept, even prefer, a very low level of repair by the highway authority. One course of action open to the highway authority (if any action is taken when complaints are made), is to seek a stopping-up order (closure) or, more recently, to make a traffic regulation order (TRO) prohibiting the public with vehicles. For example, rather than do repairs, North Yorkshire County Council made two traffic regulation orders in 1994/5 prohibiting public use of motor vehicles, horse-drawn vehicles, and bicycles on two unclassified roads where the landowners had complained about patches of damage[39]. Part of the problem comes about because the unclassified road network is the Cinderella of the rights of way system. In most highway authorities, footpaths, bridleways and BOATs are allocated a set amount of funding. Unclassified roads are repaired (if they are repaired at all) out of the general maintenance budget for all the county's roads and, of course, this is inevitably spent on more heavily-trafficked highways. This funding crisis is now exacerbated by the passage of time (once well-made roads are finally beginning to crumble before nature's onslaught); Lack of even basic repair and drainage (lengthsmen were taken off a full generation ago); heavier and more widespread agricultural traffic (food now goes out to stock in winter, rather than stock being brought in closer); and some damaging recreational use (4wds, especially in wet weather). Perhaps the solution lies, at least in part, in a fuller recognition of unclassified roads' recreational and "heritage" potential, thereby making them more attractive for funding from existing resources than, perhaps, unremarkable footpaths. But, it is always going to be relatively expensive to maintain unsealed roads, bearing weighty farm and access traffic, to a very high standard.



Leicestershire and Northamptonshire identify some of their "green" unclassified roads as field roads, and most are traditionally used by agricultural traffic. The increasing size of these vehicles is causing some problems.

The scope of the network for recreation.

29. The current use, and potential of, the network of unclassified roads for recreation has already been outlined in this paper. In essence, there are three principal factors that define the network's value. One is that the unclassified roads themselves tend to be "nicer" than bare rights of way over land - they are often enclosed, tend to have a pleasant, durable surface, a feeling of antiquity, and sometimes a known history (Roman, old turnpike, old trade route, etc.). The second is that without knowledge and use of unclassified roads, the effective network of footpaths, bridleways and BOATs is truncated - the sum of both networks provides a far better recreational facility than the "Definitive Map paths" alone. The third factor is in the wide range of people/activities which unclassified roads can accommodate: horse-drawn carriages; motor vehicles; the disabled in cars and special vehicles; cyclists (not just hard core mountain bikers); horse riders; walkers (serious and family); cross-country skiers; and people requiring vehicular access for off-highway activities such as climbing and hang gliding.

Management of unclassified roads.

30. Management of unclassified roads is currently almost non-existent. While most (almost all?) highway authorities have a policy on rights of way, few of these contain much, if anything, about unclassified roads (The Recreational Strategy of South Hams District Council is a laudable example of what all might choose to do - see Appendix IV). Management is therefore essentially reactive to problems, e.g. users complain about obstruction and surface; users complain about each other; landowners complain about users and dispute legal status. And, after the complaints are lodged, the highway authority is unlikely to have much of a budget with which to address them.

31. Proactive management, where it happens, is much the same as for BOATs and bridleways: Signpost and map sufficient to properly inform the public; adequately maintain a balance between users' needs and expectations and available resources; educate and advise all users on respectful and minimum-impact use of the ways (such as not driving heavy vehicles after prolonged wet weather); and use legal methods of control where persuasion fails to work[40]. But, as with maintenance, the fact that most unclassified roads are a highways department, rather than rights of way department, responsibility, means that it is not clearly the job of access/rights of way officers to undertake these management initiatives. A further complication is that many unclassified roads are needed for, and damaged by, agricultural traffic. Highway authorities may be reluctant to spend significant money on repairing to a high standard roads that will inevitably be disturbed again by tractors.

32. Perhaps the most important aspect of unclassified road management is the need to make adequate repairs as and when these become obviously necessary. Where roads were made with stone sub-bases they tend to be remarkably resilient to weather, traffic, neglect, and the passage of time. But, where the combined effects of nature and users does cause erosion then this is necessarily more expensive to remedy than simply scraping and flattening the top layer of a dirt-surfaced BOAT or bridleway. The proper repair of stone-built roads (perhaps Roman or "Macadamised") is necessarily labour-intensive and highway authorities undertake this only rarely. In a significant number of cases, lack of maintenance has led to problems which will now cost a lot of money to remedy; money which highway authorities might think disproportionate to the number and nature of users of the roads. To these authorities it may be simpler and cheaper to prohibit use than to repair when and where such problems arise, although there is no evidence that this is a general policy. Somewhere there is a balance to be struck between these conflicting interests. That balance is the key to successful and acceptable management of the unclassified road network.

Signposting is pro-active management in itself.

Can and should the law be changed?

33. If unclassified roads are a Cinderella class of highway, could a solution be found to their problems by changing the law? It has been argued by the opponents of recreational motor vehicle use that the law should be changed so that all unclassified roads are automatically prohibited to non-local private vehicles (this is claimed to be the situation in Germany), perhaps with a system whereby highway authorities can, at their discretion, declare some unclassified roads open to the public[41]. This solution is quite radical, overturning centuries of common law and statute protecting the public's fundamental right to pass along the highway. It might also create a network of publicly-maintained, "private roads" for the benefit of country dwellers. Whilst traffic levels might decrease, especially in busy areas like the Lake District, the speed of "permitted motor traffic" would almost certainly increase - the roads would become

their "private race track" and the attractiveness and usefulness to non-motorised users might actually decrease[42]. There is already in law a power for a highway authority to go to the courts and have the public liability to repair a road removed by what is known as a "cessor order" (s.47 Highways Act 1980). What you then have is a non-publicly-maintainable unclassified road, which is not maintainable by anybody[43]. Would this be an attractive option if adopted on a widespread basis? Although some roads are "self-repairing" as the action of traffic squashes and flattens ruts once they reach a certain size, most recreational users would find the surfaces unacceptable.

34. If it is accepted that radical measures such as the across-the-board banning or prohibiting public use with vehicles is too big and unnecessary a step (as current Government thinking seems to be)[44] then the most attractive management power would seem to be the review of the mechanism for applying traffic regulation orders: Smaller, less intrusive signposting; cheaper and easier advertising of orders; the use of tailored-to-problem, rather than blanket, orders - all these have been suggested. But, even with these powers, most unclassified roads will still need repair after bad weather and agricultural vehicle use if they are to be pleasant and usable for walkers, riders and, especially, cyclists. To do this requires an adequate maintenance budget and management policies and initiatives. Under current practices, this in turn requires unclassified roads to be detached from the "ordinary road" management system and attached to the public path management system. If unclassified roads are appended to public paths, commonsense suggests that they should go on to the Definitive Map. This is perhaps the biggest question - how to do that?

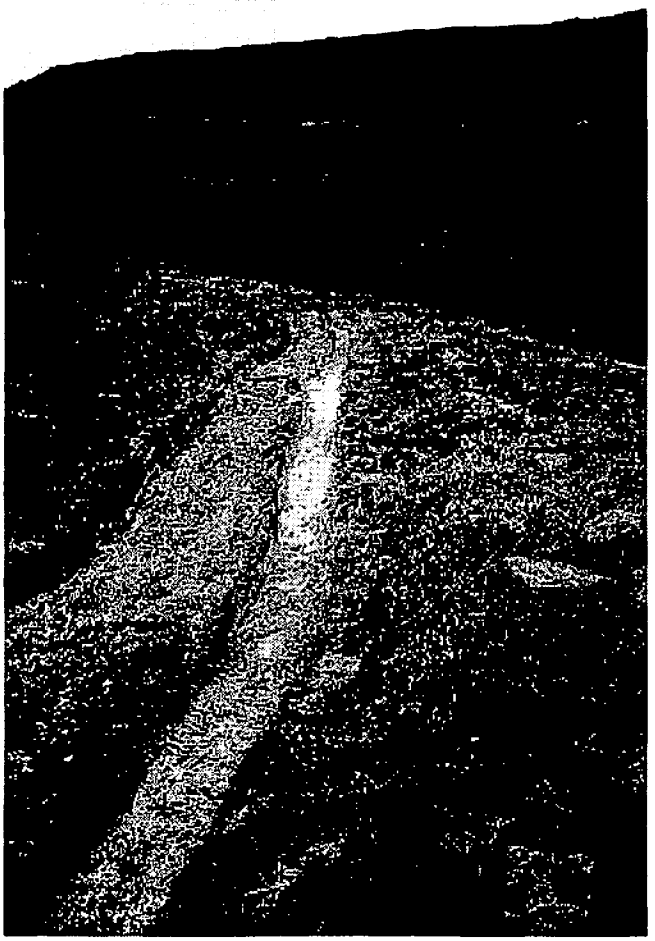
35. Most highway authorities believe that adding unclassified roads to the definitive map by individual DMMOs would be a huge burden on already-stretched resources and, on the political front, would cause a great deal of protest about "opening up these roads to four wheel drives". However, the experience of Northumberland County Council is that making omnibus orders to add criteria-meeting unclassified roads to the Definitive Map produces little general outcry and allows objectors who believe they have evidence that individual roads are not carriageways to object to the orders. This would be very similar to the process of reclassifying RUPPs, but the "default status" would effectively be BOAT, not bridleway. Of course, if a highway authority was aware of cogent evidence that a particular unclassified road is only a bridleway, then it could make the order appropriately (which it can already do - as Devon recently has[45]). It would appear that this could be promoted as a general policy by way of a Government Circular, but highway authorities would probably be reluctant to comply without additional funding being made available.

36. The alternative is to leave well alone, persuade highway authorities of the recreational and heritage value of unclassified roads, gently introduce and promote them to the public, and "let the system take its course" as regards repair and the occasional battle about status. That last option becomes less attractive if the idea of a planned and managed national network of "Greenways" is taken up.

Notes to main text

[1] Source: Chartered Institute of Public Finance and Accountancy - *Highways and Transportation Statistics*. (Annually updated).
[2] See section 4 below.
[3] Road classification was introduced by statute in 1919.
[4] The Local Government Act 1929 ss.28-39.
[5] The Agriculture (Improvement of Roads) Act 1955.
[6] Typically in *Suffolk CC v. Mason* (1979) 2WLR 571.
[7] The *Journal of the House of Commons*, on almost every day of business, makes fascinating reading on the general state of the nation's roads.
[8] See *The Story of the King's Highway*, Sidney & Beatrice Webb.
[9] Highway Act 1835.
[10] Local Government Act 1858; Highways Act 1862
[11] Local Government Act 1888
[12] Local Government Act 1894
[13] Local Government Act 1929.
[14] *Ratione clausurae*.
[15] *Ratione Tenurae*.
[16] Act 55 Geo. III, cap.47.
[17] This is evident from archive research for the purpose of making applications to modify the definitive map.
[18] This liability to assert and protect public rights on footpaths and bridleways only became the responsibility of the highway authority on the coming into force of the National Parks and Access to the Countryside Act 1949.
[19] Although it is not particularly relevant to rights of way as such, the *Report of the National Parks Committee* (Hobhouse - cmnd. 3851) in 1931 was seminal in focusing government thoughts on access issues.
[20] Records of which roads were surfaced in this tranche are sketchy, but it seems likely that this Act provided the funding to seal the Wrynose and Honister Passes in the Lake District, Park Rash in the Yorkshire Dales, Dowgang Hush in the North Pennines, and many stone roads in Wales.
[21] The original field surveyors for the first Definitive Map were advised on what to include- and what to leave out - in *Surveys and Maps of Public Rights of Way*, January 1950, prepared by the Commons, Open Spaces and Footpaths Preservation Society, and approved by the Ministry of Town and Country Planning. Surveyors were advised to avoid "metalled" roads.
[22] That RUPPs were even then a confusing class of highway was confirmed in the *Report of the Footpaths Committee* (Gosling) 1968. Interestingly, Gosling recommends that RUPPs be reclassified not as "BOATs", but as "unclassified roads", a suggestion which, if taken up, might have caused less contention than the system which came out of the 1968 legislation.

[23] At this time most people referred to "Old County Roads".
[24] "Green Ways" in the sense of ancient downland tracks are referred to in government circulars advising on criteria for recording ways as RUPPs in the first Definitive Maps, and in a similar sense by Lord Denning in the *Hood* case in 1975 [*R. v. SoS for the Environment, ex parte Hood* (1975) 3 WLR 172].
[25] This was clarified in *Hood*, see note 27 above.
[26] An illustration of the difficulties such dual-status can cause is clear in the legal and procedural confusion in, and subsequent very uncertain outcome from, the reclassification of the RUPP/UCRs of the former county of Westmoreland in the early 1980s, done under 1968 Act procedures.
[27] See note 1. above.
[28] The idea of recording these intrinsic characteristics of ancient unclassified roads crystallised into a suggestion by the Motoring Organisations' Land Access & Recreation Association (LARA) in the late 1980s that such ways should be acknowledged as "Heritage Byways". Similar suggestions have since come from other individuals and organisations with no motoring interest.
[29] S.53(3)(c)(i) Wildlife and Countryside Act 1981.
[30] This figure comes in 1996 from a private individual who regularly makes applications to add ways to the definitive map, and who has a very high success rate. This list of 1500 potential orders includes, he says, "only those with a very high probability of ultimate confirmation of order".
[31] As just one example, recent archive research in the former county of Cumberland reveals a large and recreationally significant network of "lost" publicly-maintainable highways.
[32] Ss.36(6)&(7), Highways Act 1980.
[33] All remaining RUPPs must be reclassified under the provisions of s.54 of the Wildlife and Countryside Act 1981.
[34] This trend may be seen in the reports on Inspectors' decisions printed in *Byway & Bridleway*, the journal of the Byways and Bridleways Trust.
[35] DoE Ref. FPS/K1100/7/7 of 7 July 1995, reported in *Byway & Bridleway* 1995/8.
[36] Typically "Unless there is evidence to the contrary therefore the showing of a way on the list of publicly maintainable highways as an unclassified county road is probably indicative of the existence of an all-purpose highway" - letter from the Directorate of Rural Affairs in the DoE to the Rights of Way Review Committee, 9 June 1983.
[37] See Kind, *Surface standards and ordinary traffic*, 1995, Byways and Bridleways Trust in Appendix.....
[38] The author's experience is that such actions are random rather than following any pattern or policy. Attempts at management by closure have to an extent been superseded in recent years by highway authorities being more ready to use traffic regulation orders.
[39] At Fangdale Beck and Pockstones Moor. The Fangdale TRO is now permanent, prohibiting even pedal cycles, but the Pockstones temporary order went out of time and has not been renewed (as at April 1996).
[40] Such mechanisms are now well established as the codes of conduct/good practice of user organisations such as the Trail Riders' Fellowship, All Wheel Drive Club and the Offroad Cycling division of the Cyclists Touring Club.
[41] This is the central policy of the Green Lanes Environmental Amenity Movement (GLEAM).
[42] Horse riders and cyclists are generally more concerned about the speed and aggression of vehicular traffic than vehicle numbers.
[43] Such orders are still made on occasion. The author persuaded Northumberland County Council to make one such instead of seeking to completely close a minor road.
[44] Since the publication of the ...white paper, the Department of Environment has retained consultants to investigate current management measures for recreational vehicular traffic on rights of way and advise on how the current law and practices might beneficially be changed.
[45] See note 35 above.

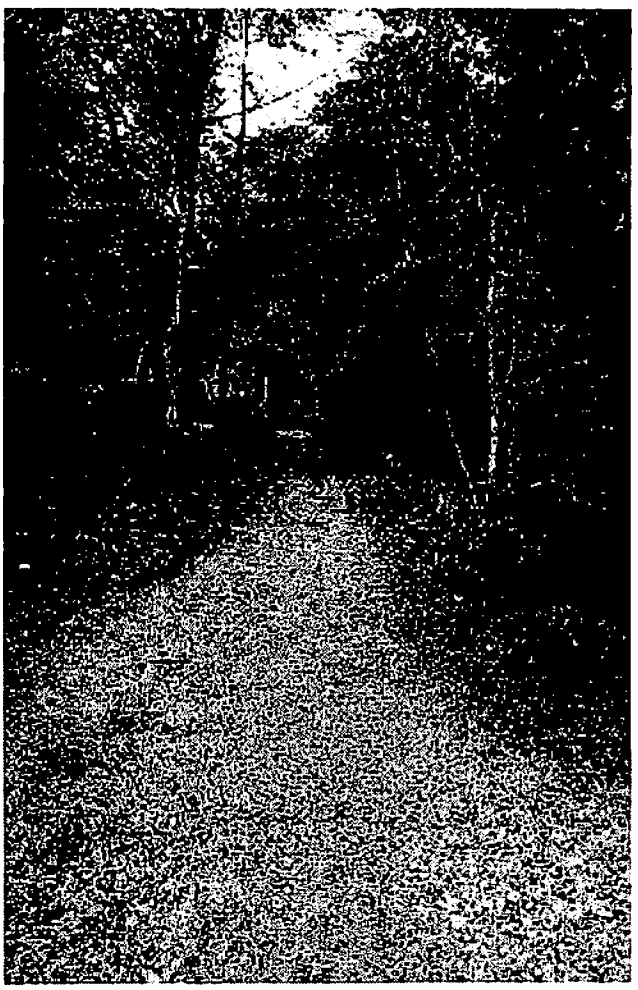


Above: The sign says "Private Road", but this is one of many "forgotten" publicly maintainable highways in the old county of Cumberland. When highlighted on an Ordnance Survey map, these roads make a huge improvement to the recognised network of unclassified roads and rights of way.

Left: This unclassified road at Fangdale Beck, in North Yorkshire, is now prohibited to all vehicles, including bicycles. The surface is eminently suitable for bicycles which can, in any event, access the road via a linking bridleway without contravening the order.

Right: Another stretch of Ermine Street (see picture on page 3), this time at Goose Green, Hertfordshire. The highway authority has imposed a traffic regulation order on this stretch, which prohibits the passage of wide/heavy vehicles when ground conditions are soft, but allows the free passage of narrow/light vehicles at all times. The road surface is well maintained.

Below: The new garden to the side of this rebuilt farmhouse is an unclassified road - the former main highway up Teesdale. To ensure that the public knows of the right of way, the highway authority has erected wooden finger posts similar to those pictured on page 7.



Appendix I
Roads Used As Public Paths: Status and Reclassification

Introduction

1. If the law surrounding the status of unclassified roads seems vague and confusing, that concerning Roads Used as Public Paths (RUPPs) is even worse to comprehend. This Briefing Paper is not intended to provide a full explanation of the law on RUPPs and the mechanisms of their management in the Definitive Map processes, but it is useful to understand the basic similarities to, and differences from, the processes involved with unclassified roads.

2. It is important to understand that the statutory processes by which RUPPs and unclassified roads can be shown on the Definitive Map as BOATs, bridleways or footpaths. RUPPs are reclassified under the provisions of s.54 of the Wildlife and Countryside Act 1981 (**reclassification**), because they are already on the Definitive Map and are having their true status examined and re-assessed. To put an unclassified road on the Definitive Map would require an order made under s.53 of the same Act, a process known as **modification**. Where an unclassified road is "dual status RUPP" - already shown on the Definitive Map as a RUPP, then the reclassification process will be used. Where an unclassified road is "dual status bridleway or footpath" - already shown on the Definitive Map as a public path, then if it seems that the true public right is that of BOAT, a modification order would be used to effect the correction.

History

3. RUPPs are a creature of the National Parks and Access to the Countryside Act 1949, defined in s.27(6) as "..... a highway, other than a public path, used by the public mainly for the purposes for which footpaths and bridleways are so used". In essence, the draughtsmen of the Act realised that there was, by 1949, a network of unsealed/green roads that were "more" than footpaths and bridleways, but even then at the very bottom of the general-purpose road hierarchy. On the basis that most public use of these roads was by then on foot or horseback, the scope of the new Definitive Map was made wide enough to record public rights of passage, on foot or horseback, over these now largely disused highways. It was not the intention of the Act to definitively record any public carriageway rights, but the process of making the first Definitive Maps arguably served to identify evidence and presumptions that do indicate a carriageway status for RUPPs.

4. The question of what public rights do, in truth, exist over RUPPs has been contentious for over forty years. Official government guidance was given as to the showing of RUPPs in the first definitive maps. Following the recommendations of the Gosling Committee in 1968, the Countryside Act 1968 introduced a process known as reclassification, whereby all RUPPs would be progressively examined as to their true public status and henceforth shown in the Definitive Map as: Byway Open to All Traffic (BOAT), bridleway or footpath. This process was found to be difficult and unsatisfactory, and the Wildlife and Countryside Act 1981, while maintaining the principle of reclassification into one of the three Definitive Map status's, changed the mechanism of the reclassification processes and the evidential tests to be applied therein.

5. Some highway authorities made their first Definitive Maps with no, or very few, RUPPs. Others had scores or hundreds of RUPPs (see the table on page 5 of the main Report for the current position). Some authorities went through their reclassification process in the period between the Acts of 1968 and 1981 (e.g. County Durham and Staffordshire); others are still heavily involved in a long list of cases (e.g. Hampshire, Somerset, Norfolk), or have even effectively to start (e.g. Northumberland, North Yorkshire). Although there is a duty on highway authorities to carry out these reclassifications, the contentious nature of the individual cases, coupled with increasing pressure on resources for other countryside access work, has led to a noticeable recent de-prioritising of reclassification (e.g. Hampshire, Somerset).

Putting RUPPs on the Definitive Map

6. The Act of 1949 created a process to make the first Definitive Maps. The surveying authorities had a duty under s.28(1) to consult district and parish councils as to arrangements for the first survey, before it commenced, so that these authorities could provide evidence. Where parish councils proposed to give evidence there had to be a parish meeting to consider it first, and if rural district councils intended putting in evidence for parishes where there was no parish council, the RDC had to arrange for a parish meeting to be held. The district and parish councils could be compelled by the courts to provide evidence if they were reluctant (s.28(3-4)). The test to be applied to evidence which tended to show the existence of a RUPP was that, at the relevant date, "in the opinion of the surveying authority" "was.... or was

reasonably alleged to be, a road used as a public path" (s27(2)).

7. In January 1950, the Ministry of Town and Country Planning approved a memorandum of the Commons, Open Spaces and Footpath Preservation Society. This went out to all local authorities,, along with Circular 81 of 1950, and set out where the duty to survey lay, the consultation and check procedures, and what the field surveyors were looking to establish as they did their job. This memorandum illustrates the origins of the terms "CRF" and "CRB" and states:

- "Road used as a public path" means a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used.
- Under the Act, it is the duty of every County Council in England and Wales to carry out a Survey of rights of way.... and to compile a map showing them.
- .....What this amounts to, in plain language, is that every County Council requires to be informed by all District and Parish Councils in the county, what public footpaths, bridleways and roads mainly used by pedestrians and horse riders there are in the parish.
- The [council] Committee should then consult any other maps and records which may help. These include Inclosure Award maps, Tithe maps, Parish maps, ... old Ordnance Survey maps...old minutes of the Parish and District Councils.
- They [the surveyors] should mark with a continuous line.....All highways which the public have a right to use with vehicles, e.g. public cart roads and lanes, including green (i.e. unmetalled) lanes, but which are mainly used as footpaths or bridleways.
- Public paths should be distinguished on the maps... with the symbols "F.P.", "B.R.", "C.R.F.", or "C.R.B", as explained in section 4 below.
- Highways which the public are entitled to use with vehicles but which, in practice, are mainly used by them as footpaths or bridleways, should be marked on the map "C.R.F." or "C.R.B."... with a note in the schedule also that their main use is as a footpath or bridleway as the case may be.
- Symbols to be used in marking maps: Public Carriage or Cart Road or Green (unmetalled) Lane mainly used as a Footpath:- C.R.F. Public Carriage or Cart Road or Green (unmetalled) Lane mainly used as a bridleway:- C.R.B.

8. After the surveyor had done his survey, the ways he had pencilled in on his base map would be subject to a wide scrutiny in a process set out in the Act. The existence of the "draft map and statement" was formally notified to the Minister, copies prepared and made available for public inspection for a period of at least four months (s.29(1)). Landowners of land crossed by newly-recorded rights of way, and "persons interested in such land" could then require sight of any documents which were evidential in the process which put the right of way in question on to the draft map (s.29(2)). Those "interested persons" could then make representations or objections and have those heard by a "person appointed by the authority for the purpose" (s.29(3)). If this hearing process and the subsequent consideration by the authority leads to the deletion or addition of a way shown on the draft map, then an advertisement was made (including the London Gazette and local papers) affording a period for further objections and representations. These later objections and representations were notified to the original objector, with the availability of a second hearing by a "person appointed by the authority for the purpose", following which the authority would decide whether the path should be deleted from the draft map, left in, or modified to a different status. Following a re-advertising of the authority's decision, "any person aggrieved" could object (s.29(5)) and the Minister would then give that appellant and the surveying authority "an opportunity of being heard by a person appointed" and, following the Minister's decision on this process, the draft map would form the basis of the "provisional map and statement" (s.30(1)). The provisional map, once prepared, was made known to the public by a statutory notice. In this cycle of notice-and-hearing, "the owner, lessee or occupier" of land affected by rights of way in the provisional map could apply to Quarter Sessions for a correcting declaration, that going to status, position, width and limitations (s.31(1-8)). Once this provisional phase was properly completed the authority was under a duty to publish a "definitive map and statement", with errors and omissions being corrected in a "from time to time review" (s.33(1)).

9. In June 1950, the Ministry of Town and Country Planning issued Circular 91 which offered further advice: "The phrase 'road used as a public path', which is defined in s.27, is intended to describe highways such as the Berkshire Ridgeway, and other 'green ways' which are now mainly used as footpaths and bridleways, although greater public rights of passage over them exist or are alleged to exist". Circular 91 thus accords with the provisions of the Act of 1949. Surveying authorities are advised to show ways as RUPPs where they *are* public carriageways (mostly used as public paths) or where such higher rights are *alleged* to subsist.

10. In October 1953 another circular, Circular 58/53, came out of the Ministry of Housing and Local Government advising: "Representations or objections to the effect that a way shown on a Draft Map as a bridleway is in fact a RUPP, or vice versa, have sometimes been made, presumably with a view to establishing the existence or absence of public rights

other than on foot or horseback; and on occasions the view has been expressed that the provisions of s.27(6) and s.32(4) are conflicting. The Minister thinks that the following comments might be helpful; it will be understood that any question on the interpretation of the Act is a matter for the Courts. The survey provisions of the Act are only directed to establishing the existence of such rights of way as are proper to footpaths and bridleways, and are not intended to settle the question whether the public have any other rights over such ways (e.g. a right of way for wheeled traffic). The surveying authorities are also required to show any way which in their opinion was a road used as a public path, that is to say a highway which is used mainly, but not entirely for walking or riding. S.27(6) gives a legal definition of both a bridleway and a RUPP but whether a way is shown as a bridleway or as a RUPP the survey will only determine (in the words of s.32(4) "that the public had thereover a right of way on foot and a right of way on horseback..." It has been suggested in some quarters that a Definitive Map showing a way as a RUPP would provide *prima facie* evidence on the question of rights other than on foot or horseback, but it is difficult to see that a Court would accept such evidence in the face of the specific provision of s.32(4) that "this paragraph shall be without prejudice to any question whether the public had any rights of way other than the rights aforesaid".

11. There, effectively, the matter rested until the advice of the Gosling Committee in 1968 led to the 1968 Act reclassification procedures. This reclassification process was designed to look not only at the "true status" of a RUPP - was it a carriageway, bridleway or footpath, but also introduced a discretionary test. Where a RUPP was shown to have vehicular rights, then the reclassification tribunal could still reclassify as bridleway or footpath if the way was judged "unsuitable" for vehicular traffic, or there would be no "hardship" to vehicular users in losing their rights. This set of tests proved controversial, difficult to administer and legally flawed - reclassification on "suitability or hardship" did not operate to extinguish carriageway rights and many RUPPs which were lawfully bridleways were reclassified as footpaths.

12. This last point, on the "default status" of RUPPs being bridleway, ultimately came to court in *R. v. SoS for Environment Ex Parte Hood* [1975] Q.B.891. In *Hood*, Lord Denning had a lot to say about RUPPs, such as: [the object of the draughtsman] "was to include cartways over which there is a public right of cartway but which are used nowadays mainly by people walking or riding horses....." In the same case, Pennycuick J. said that the definition of RUPP was one of "the utmost obscurity" but felt that the implication was "apparently that there is also occasional but subsidiary use for carts or wheeled traffic". Even more forceful is the judgement in *Suffolk County Council v. Mason* [1979] A.C.705 where Lord Diplock said "The definition of a 'road used as a public path'.....must be a full highway, for otherwise it would be a public path...." and "....a road used as a public path must include a cartway". Lord Hailsham, L.C., said "...there are some highways which not being footpaths or bridleways, must be considered as public carriageways but which, being used by the public mainly for the purposes of footpaths or bridleways (i.e. 'public paths') are to be given the third designation used in the maps of 'roads used as a public path'".

13. In 1981 The Wildlife and Countryside Act swept away the confusion of the 1968 tests and codified the effect of the *Hood* case. Now the tests are simple: if vehicular rights are shown to exist the RUPP becomes a BOAT. If vehicular rights are not shown to exist, and bridleway rights are <u>not</u> shown <u>not</u> to exist, they are bridleways (watch out for the confusing double negative here). If bridleway rights are shown not to exist, they are footpaths. Assessment of the evidence of status for each RUPP is carried out first by the highway authority, then, if their order is objected to, by the Secretary of State (through an Inspector at public inquiry). The advice to Inspectors from the Secretary of State is: "Authorities and Inspectors should take into account all the evidence that exists concerning the rights that exist over the right of way in question. That is the evidence which resulted in the way being shown on the definitive map as a RUPP in the first place plus any additional evidence since discovered. To classify a RUPP as a byway open to all traffic a public right of way for vehicular traffic must be shown to exist".

14. RUPP reclassification has become more contentious and complicated in recent years, with authorities and Inspectors producing widely differing decisions on roughly comparable evidence. One RUPP reclassification order has now caused three public inquiries and one appeal to the High Court, and is not resolved yet - a fourth PI seems inevitable and another court case possible (Glatton, Cambridgeshire) and in another the highway authority has requested the Secretary of State to call in the case from his Inspector after a very dubious decision (Hampshire). It seems that nobody is happy with the way reclassification is handled. Landowners and anti-vehicle have challenged a significant number of decisions in the High Court recently (with mixed results), vehicle user groups regard the process as a heavily-biased lottery, and highway authorities have no worthwhile "precedent" on the making of orders. Reports of these reclassification cases are regularly published in *Byway & Bridleway*, the journal of the Byways and Bridleways Trust.

Appendix II

Part 1: Unclassified Roads: Surface Standards and Ordinary Traffic

Introduction

1. This paper is not about the origins of the duty to repair highways, nor who must do it. It is not (directly) about the prioritisation of budgets, or the rights and wrongs of tractors, mountain bikes, four-wheel-drives, and the rest. It is about the standard of surface that highway authorities are obliged to maintain (or in some circumstances, ensure are maintained by others) on the various classes of minor highway. As set out in the training course brief, we are not looking specifically at footpath surface standards, but since bridleway and byway surfaces tend to be more problematic, the answers in those areas should cover any questions about footpaths. Neither are we looking directly at ploughing of public paths, but the surface standard of post-ploughing, reinstated paths is effectively the same as those which are not disturbed. The Byways and Bridleways Trust is the recipient of much information from across the country on the problems and concerns of byway and bridleway users. The principal concern reported is obstruction, because this sterilises the way, and probably adjacent ways, out of the available network. Most users are pragmatic. An obstruction that may be reasonably negotiated is a nuisance; it may be reported, but most are simply lived with. The second most important users' concern is surface condition. Again, most are realistic in their expectations, and want only a safe and reasonably passable highway surface. In general, across the whole path network, the public's expectations are not high. People want passability and adequate safety. How far must a highway authority go to provide these? How may an adequate level of maintenance be determined?

Who shall maintain: what is ordinary traffic?

2. Let us start from the premise that the minor highways network is maintainable at public expense. There are limited exceptions, such as Byways Open to All Traffic (BOATs) that were not reclassified from Roads Used as Public Paths (RUPPs)[1], general-purpose roads that came into being after 1835, but which have not been adopted for maintenance[2], and highways set out under inclosure awards where the maintenance responsibility is clearly pinned on to a certain person or persons[3]. Experience shows that many, perhaps most, public-to-user, but private-to-maintenance inclosure award roads have, through the passage of time, become regarded as publicly maintainable. Some are on the List of Streets as unclassified roads, others are on the definitive map as maintainable RUPP/BOAT or bridleway[4]. Known post-1835 unadopted roads tend to be an urban phenomenon. In general, then, the highway authority must maintain or repair a highway in *such a state as to be safe and fit for ordinary traffic*[5] and so as to be *reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year*[6]. You will see from the case citations that these judgements came in the period when non-motor vehicular use of highways was increasing as a result of increased trade, expanding population, and a move of that population towards living in towns and cities. The railways had temporarily destroyed most long distance use of the highway, be it for coaching or droving, but, overall, roads were probably then in greater use than ever before.

3. Another case, from the early days of the motor vehicle, considered the proposition that where the traffic develops, the roads that traffic may lawfully use must be developed to keep pace[7]. Jelf J: "The condition of this road was....partly by the traction [engine] traffic, partly by ..... carts and horses, partly by the weather, but primarily and chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic, including the traction traffic, which was not more unusual or onerous than they ought to have expected to come upon it". In general, the highway authorities followed this guidance, in the years after, by tar-spraying thousands of miles of stone road to cope with increasing motor vehicle traffic.

4. It is therefore well established that a highway authority must keep a publicly-maintainable highway in sufficiently good repair to allow the free

[1] S.47 of the National Parks and Access to the Countryside Act 1947 made all then-existing, and some later-added, footpaths and bridleways publicly maintainable. S54(4) of the Wildlife and Countryside Act 1981 makes all reclassified RUPPs publicly maintainable, even if they were not before. BOATs added to the definitive map under s.53(3)(c)(i) does not automatically become publicly maintainable, but may be because it was a highway before 1835.

[2] S.23 Highways Act 1835

[3] For example, *Haresby Lonnen*, Northumberland

[4] These highways might carry a dual maintenance liability: both the highway authority and the person(s) named in the inclosure award.

[5] *Burgess v. Northwich Local Board* (1880) QBD 264

[6] *R v. High Halden* (1859) 1 FF 678

[7] *Attorney General v. Scott* [1905] 2 KB 160

passage of 'ordinary traffic' or 'traffic that might be reasonably expected to use it' at all times of the year. Does this mean that a proper, made up surface must always be provided? The answer, *Brains Trust*-style, is: it all depends. In law, a highway is strictly just the right to pass and repass over someone's land[8], although the term is now often extended to include the physical roadway itself. That 'basic' situation is typified by most public footpaths, or by headland bridleways - there is little or no 'beaten track', almost never any made-up way. As long as the public is able to pass and repass over the ground, without undue difficulty or danger, then the fact that they get dirt on the top of their shoes in wet weather is not very likely to amount to the way being out of repair. That said, if the right of way is in an urban situation, where people use it to go to work, or to the shops, in ordinary clothes, then it might be held that a higher standard of maintenance is necessary to satisfy the needs of local ordinary traffic. There is nothing to prevent a highway authority providing a made-up surface for a public footpath or bridleway. They do it all the time in urban areas and, of course, on significant lengths of the Pennine Way and other long distance paths which are gaining made-up tops that they traditionally never had. As regards the right of way, if not environmental impact, this is simply responsive maintenance.

5. The next consideration is the enclosure of highways. Historically, highways were unenclosed, or very wide between enclosures[9]. The later common law was clear: where the highway was foundrous, passengers could lawfully skirt around the bad bits, "even on to the corn"[10]. This was back in the days of repair by statute labour, repair that was little more than filling the worst bits with stone and gravelling over the top. But where a highway was enclosed by the occupier of the land it crossed, the maintenance liability passed on to that occupier. The justification is clear. The occupier gains an advantage by restricting the ability of the public to skirt around foundrous sections of highway; he must bear the necessarily higher cost of keeping the newly-enclosed highway in usable condition[11]. Inclosure awards followed this trend towards enclosing highways; after all, if the idea was to improve agriculture, there was little point in having the public - including huge droves of cattle - ranging widely across the land at the side of highways. The inclosure awards sometimes made these enclosed roads repairable by the public, sometimes by one or more occupiers of adjacent land, depending on the antiquity of a particular road, and who derived most benefit from its enjoyment[12].

6. Where roads were physically enclosed ('enclosure' can include merely marking and delineating) the surfaces were almost always made-up to some extent. They had to be to reasonably cope with ordinary traffic at all times of the year. In many places that surfacing has eroded, sunk down, or been lost to local robbery, but it did once exist[13]. If a great many 'green roads' are, or once were, provided with a made-up surface, does this place a higher duty of repair on the highway authority? I can find no authority for guidance on this other than that which may be deduced from one of the more recent cases, *Hereford and Worcester County Council v. Newman*[14] in which the Court of Appeal held that 'out of repair' must be given its ordinary, natural meaning (it does not include obstructions). It might be held that where a made-up way is deficient, there is a higher imperative on the highway authority to repair it than there is on them to provide a new, or better, surface, on a highway which has never enjoyed such. Before any highway engineers throw themselves under a rapid transport module, I must qualify that by saying I do not think that anyone has a realistic chance of going to court and obtaining an order to oblige a highway authority to maintain to a high standard a made-up road that is now little used for everyday purposes unless the applicant can show that there is a real demand for the road which can only be satisfied by its upgrade. There is nothing remarkable in this, and Government advice in Circular 1/83 (albeit strictly for definitive rights of way) suggests that maintenance should satisfy current needs. Similarly, where the traffic on ordinary roads declines in volume, or perhaps in economic importance, a highway authority may be justified in adopting a policy of 'benign neglect'[15], at least as long as these roads remain 'reasonably passable' to ordinary traffic[16]. Thus the provision of a made-up surface for a highway is dependent on levels of traffic, the nature of that traffic, and the nature of the highway (especially enclosure). It is unlikely that a highway authority would be obliged to provide or maintain a made-up surface beyond the real needs of the traffic

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[8] *Ms Salisbury v. Great Northern Railway*, 28 L.J.C.P. 40

[9] The Statute of Westminster, 1285, required a clear space of 200 feet to either side of inter-market town highways.

[10] G. Jacob, Law Dictionary, 1772

[11] G. Jacob, Law Dictionary, 1772

[12] The interpretation of user and maintenance clauses in inclosure awards has caused much argument in recent years. The matter was recently aired in the Court of Appeal in regard to the reclassification of an RUPP at Glatton, Cambridgeshire. See various *Byway and Bridleway* for further information.

[13] The Roman roads are a good example. Even ones that archeological excavation has proved to be well built have, in places, the appearance of unsurfaced lanes - muddy, grassy, potholed, yet the original stone construction may lie deep below this covering. Even stone roads that have dropped out of regular, heavy use only in the last 200 years can be covered with mud deep enough to suggest to a passer-by that no surface ever existed.

[14] [1975] 1 WLR 901

[15] As is tacitly admitted in Cumbria, Devon, Cambridgeshire and others.

[16] Does a strip of grass growing in the middle of a tarmac road really matter to users? Might deliberate neglect of minor roads amount to 'traffic calming' and a disincentive for too much visitor traffic, such as is currently being mooted in the Lake District?

expected to make use of it, but where a made-up surface already exists, even low levels of traffic can expect that the surface be adequately maintained. For example, where a 3 mile long stony road is in generally good condition except for an eroded 'bombhole' in one place, it is more reasonable to expect good quality repair of that section than it would be to expect high-quality upgrading of a 3 mile long stony road that is rough for all its length. Why? Because of the clear passability of the smoother road to ordinary traffic when the repair is effected[17].

7. Liability to repair is one thing, but what are the standards of repair that the public might reasonably expect? If, one day, Leicestershire County Council said "We have decided that, henceforth, the B6047 will have a rolled stone surface instead of tarmac" as long as that surface is safe and adequate for the traffic it carries, then the decision would probably be beyond challenge (indeed, it might be a desirable piece of traffic-calming?). But if local residents and through-traffic complained of broken windscreens, skids, bumps and chipped paintwork, then on application to the justices under s.56 of the Highways Act 1980, it might well be held that such a stone surface does not satisfy the needs of modern day 'ordinary traffic', both in its nature (low-slung cars with wide tyres) and its density.

Byways Open to All Traffic

8. BOATs, and to a lesser extent RUPPs, are undoubtedly the most contentious minor highway, with the newspapers regularly running articles on their use, abuse and reclassification. We can, perhaps deal with RUPPs briefly by stating the good practice of at least one county. Where there is good evidence that a RUPP bears public vehicular rights then that county treats it as a public vehicular highway (most likely a BOAT, but possibly an unclassified road). If there is doubt about vehicular status, and in the absence of firm evidence of its being only a footpath (something as cogent as a Quarter Sessions order) that county treats the RUPP as being a bridleway. This seems to be the fairest and most pragmatic approach until such time as reclassification is completed. BOATs are not all the same when it comes to surface repair. The most common situation is where a BOAT was formerly a RUPP and has been reclassified under the provisions of s.54 of the Wildlife and Countryside Act 1981. The other situations are i) where the BOAT was formerly not on a public record of rights of way, or on the definitive map as a footpath or bridleway, or ii) where the BOAT was originally only on the List of Streets (an 'unclassified road') and the highway authority has decided to modify the definitive map to show the way as a BOAT[18]. There are also quite a few BOATs that are concurrently listed as unclassified roads because the RUPPs they were reclassified from were 'dual-status' RUPP/UR.

9. There is a not-uncommon view that highway authorities are not under a duty to maintain BOATs for the passage of vehicles. This arises from s.54(7) WCA81: "Nothing in this section or section 53 shall..... oblige a highway authority to provide, on a way shown in a definitive map and statement as a byway open to all traffic, a metalled carriage-way, or a carriage-way which is by any other means provided with a surface suitable for the passage of vehicles". But ss.53 and 54 are only concerned with modifying the definitive map to properly show the public rights of passage that exist over land. If vehicular user over a piece of land, that is mainly used for the purposes for which footpaths and bridleways are so used, gives rise to a successful claim to modify the definitive map to show therein a BOAT, then the highway authority is not under any obligation to provide a 'proper' surface for vehicles. Indeed, such a way is not publicly-maintainable anyway as it falls outside the maintenance criteria of the Act of 1949. If a BOAT was reclassified from a RUPP it will be publicly-maintainable regardless of whether or not the RUPP itself was. It is also necessary to consider the meaning of "provide" in s.54(7). The dictionary has provide as "furnish or supply", so does s.54(7) apply only to the provision of made-up surfaces where none existed before? I quail before the obfuscation of parliamentary draughtsmen and fall back on the official response: "It would be for the courts to interpret".

10. Many BOATs, in the various types outlined above, were public highways before the introduction of the Highways Act 1835. That means that they were, and still are, publicly-maintainable highways - ordinary, common law highways. That 'pre-1835' status is a separate issue to ss. 53 and 54 of the Act of 1981. Thus, a BOAT might be publicly-maintainable because it was reclassified from a RUPP, or because it was a pre-1835 public highway, or both. Where a BOAT is also a pre-1835 maintainable highway, that is a concurrent status, not a former status now restricted by the way being shown in the definitive map as a BOAT. It would be iniquitous for a highway authority to be able to say to residents who are obliged to use an unclassified road, or people who wish to pass along in the course of ordinary journeys, "We think that this road should be shown as a BOAT, therefore we will add it to the definitive map and then

[17] Local authorities seem ready to use one problem area on a road as a reason to close or restrict it in total, rather than repair, e.g. Pockstones Moor, Fangdale and Black Hambleton, North Yorkshire.

[18] Perhaps the best example here is Northumberland County Council which, aware of the public's lack of knowledge of unclassified roads, resolved, where appropriate, to show these on the definitive map as BOATs so that riders, cyclists and walkers could see how they link with the bridleway and footpath network.

we do not have to repair it anymore such that you can pass along". A better approach is to apply 'benign neglect' to such a road and maintain it to minimal standards. A highway authority may say "Frontagers have private rights over such a road anyway - their use is irrelevant and they can maintain it themselves if they wish". This would be incorrect. Occupiers' and frontagers' rights of passage along a public carriageway are subsumed into the public right, at least until such time as that public right is lawfully stopped-up[19].

11. Regardless of whether or not a highway authority is obliged to provide a surface for vehicles, the limitation in s.54(7) is of small use to a highway authority seeking not to repair a BOAT. An out of repair BOAT would still have to be maintained to a standard high enough for the 'reasonable use' of walkers and horse riders, and that would be quite adequate for the passage of trail bikes and mountain bikes, if not ordinary road bicycles. The level of maintenance would have to be at least as high as it would if the BOAT were only a bridleway and, as said above, if there is an existing 'proper' surface, then the standard of that surface should be the guideline for any repairs.

Unclassified Roads

12. Rough unclassified roads are the Cinderella of minor highways. They are almost invariably maintenance-funded from the same budget as the authority's 'more important' roads and, as might be expected, get only the left-overs, if anything. Footpaths and bridleways (and increasingly BOATs) have a separate maintenance budget. This might not be as big as it should be, but at least the officers responsible know what they have to spend and may allocate accordingly. Unclassified roads, below the standard of local, frequently-used motor road, range from quite good rough tarmac, to a faint track over open land. Most, though, of interest for recreation, are (or were) properly-made roads that, for whatever reason, never received the tar-sprayers' attentions. Popular with all types of recreational users, such unclassified roads in many, perhaps most, highway authority areas, have now deteriorated through neglect to the point where use is difficult or impossible. Faced with a potentially high maintenance bill, highway authorities are looking to close some roads, and make others 'access only' by means of traffic regulation orders. The fairness and effect of such 'traffic management' is not the concern of today's seminar. In recent years the combination of long wet periods, almost total neglect since the last county lengthsmen were redeployed in the post-war years, and the impact of heavy vehicles, has resulted in unclassified roads deteriorating much more quickly than before - some to the point of impassability. What can and should be done? The knee-jerk reaction is to follow the ancient tradition of blaming the traffic rather than the road, and to reach for the blank pad of traffic regulation orders. In some cases, particularly where the road was never more than an unsurfaced mud track, a weight restriction is probably the fairest and most practical form of traffic restriction, especially if combined with some positive management work. In other situations - where the road has, or has had, a stone surface, and the problems are localised - washouts, bombholes, etc - then it would be difficult for a highway authority to refuse such basic repair, especially where it has a budget for purely recreational footpaths, many of which are hardly ever used.

13. There has never been enough money for repairing roads. Read the *Journal of the House of Commons* for 25 years either side of 1800 and you will see that often half the day's business is about road repair and upgrading. How to fund the repair of the bottom end of the unclassified road network is starting to become one of the most important issues in recreational access to the countryside. These are often the most attractive minor highways, and they certainly get the widest range of use. If they do not get the highest level of use that is because the public cannot recognise them from the Ordnance Survey Map, yet their mostly robust surfaces are able to withstand regular recreational traffic with minimal maintenance.

14. What standard of repair and maintenance should unclassified roads enjoy? Most users would say to the highway authority "follow the law and keep them in reasonable repair for ordinary traffic". By that they mean treat them much like bridleways and byways: fill the holes (to be safe for horses and cyclists), keep on top of drainage, and cut back the vegetation - exactly what the lengthsmen did for generations. A simple care and maintenance regime. If the demands of local traffic are such that the condition of a road has to be improved, then the highway authority must react accordingly, just as they have done for hundreds of years.

[19] Frontagers' private rights might be argued for where they clearly own the subsoil of the whole width of the road, but what of where they own only 'their half', or post-inclosure, none at all?

Part 2: Unsealed Unclassified Roads: Extraordinary Traffic

Introduction

15. The role which the concept of "**extraordinary traffic**" plays in highway law is a curious one. We are all familiar with the duty placed upon highway authorities to maintain the highways for which they are responsible, and the systems of taxation which fund such general upkeep of our public routes. The concept of "extraordinary traffic" however amounts to an exception from this basic principle that roads should be, as it were, "free at the point of delivery". Although a particular taxpayer will have paid his general taxes in the usual way, he may nevertheless, in certain circumstances, be liable to "top-up" his contribution. It is, if you like, a thoroughly market driven exception to an otherwise socialist system. Like all the best law, this exceptional area has a long - and in some respects, complex -history. The position is of course now governed by statutory provision - s.59 of the Highways act 1980, but this is itself based on earlier statutory provisions; and they, in turn, grew out from the pre-existing common law position; that is, the view of the matter which had already been reached by the ordinary courts of the land quite independently from any intervention by Parliament.

The common law

16. The approach of the common law derives from the law of nuisance. Without going into the law of nuisance in any detail, it is the area of the law which operates in both the public an the private spheres to deal with situations where one person's use of land causes a nuisance to a neighbour or to the public at large. At common law, an action was therefore available at the suit of an individual, or a highway authority, for special damage in respect of a highway nuisance caused by use of excessive weights or traffic on the highway. Such an action was unrelated as such to any duty to maintain - that this is so is clear from the fact that it could be maintained by an individual as well as by the highway authority; and by the fact that an injunction could be sought in appropriate circumstances - that is to say, such excessive user could be restrained for the future. Such an action was therefore not primarily concerned in effect with shifting the burden of taxation, but rather with preventing such nuisances from occurring. Once the statutory role of highway authorities became more clearly defined, there was clearly a logic to regulating the nuisance question in a related way; and specifically to enacting provisions by which those who make extraordinary use of the highway could be made to contribute to the costs of maintenance, rather than simply to pay damages to those to whom they cause damage, or be prevented from making such use of the highway at all. In an increasingly complex commercial world, highway use might be better allowed at the cost of specific users, rather than ruled out altogether.

17. The context of increasing use of highways by heavy vehicles at the end of the last century provided the necessary impetus for appropriate legislation, which was first contained in s.23 of the Highways and Locomotives (Amendment) Act of 1878. This was in its turn amended by s.12 of the Locomotives Act of 1898; and then replaced in succession by s.54 of the Road Traffic Act, 1930 and s.62 of the Highways Act, 1959; before taking on its current form as s.59 of the Highways Act, 1980. The modifications have been incremental, rather than revolutionary, and the basic form of the legislation has remained unchanged for a century. It is an open question whether or not this is a good thing, just as it is an open question whether it is a good thing that the cases which decided what the section actually means date similarly from its early operation, and not its more recent use. From an optimistic point of view, perhaps this means that its proper use and meaning was so soon made clear by the courts that there has been no need in recent years to litigate. Those of you with experience of the section and its structure may, on the other hand, favour the sceptical thesis that the language is so general and obscure that no one has dared litigate in the context of such an uncertain possible outcome.

18. The important core of the section is:

> "**59** (1) ... where it appears to the highway authority for a highway maintainable at the public expense, by a certificate of their proper officer, that having regard to the average expense of maintaining the highway or other similar highways in the neighbourhood *extraordinary* expenses have been or will be incurred by the authority in maintaining the highway be reason of the damage caused by *excessive* weight passing along the highway, or other *extraordinary* traffic thereon, the highway authority may recover from any person ("the operator") by or in consequence of whose order the traffic has been conducted the excess expenses."

Practical matters

19. To deal with some minor practical matters to begin with. It is clear from the case of *Wirral Highways Board v Newell* [1895] 1 Q.B. 827 that, although the necessary surveyor's certification must be

in writing, it will not matter if it deals with more than one highway at a time, nor if it does not particularise the damage in great detail. The certificate is not evidence of the measure of damage, but a condition precedent to the right to bring an action.
It should also be said that in the instance where the Minister is the relevant highway authority, then by subsection 5, the need for a certificate of any kind is dispensed with: the Minister can act simply where "it appears to him that" - although no doubt he would be held subject to standard *Wednesbury* controls (at the very least) as to how he might exercise that discretion. The areas of the section which are of the most interest in practice, and which have given rise to the most difficulty, are those setting up the concept of "average expense of maintaining the highway or other similar highways in the neighbourhood" and the concept of "extraordinary expenses [which] have been or will be incurred by the authority in maintaining the highway be reason of the damage caused by excessive weight passing along the highway, or other extraordinary traffic thereon".

20. So far as the first notion is concerned, this began in the 1878 Act as "having regard to the average expense of repairing highways in the neighbourhood". This, hardly surprisingly, caused extraordinary difficulty in practice. Surveyors seem to have begun by entering into calculations of this kind: there are so many miles of highway in the parish; the annual expense of repairing them is so much; therefore the average expense of repairing highways in the parish is so much per mile or per furlong. This gave rise to several problems. To begin with, the section referred to "neighbourhood" not "parish". In some cases therefore, reference was made to all the parishes in the highway district; in others to three or four neighbouring parishes; and in others still to all those parishes through which the road in question passed. The next step was to exclude the cost of maintaining the highway in question from the average cost calculation. Then, of course, account was taken of the widely differing types of highway, and so the idea took hold of taking the average expenditure on similar roads in the neighbourhood. This view was authoritatively stated as the correct approach by the Court of Appeal in *Billericay Rural District Council v Poplar Union and Keeling* [1911] 2 K.B. 801. Similar uncertainty emerged as to what precisely was meant by "average". Was the actual cost of repairing the highway in question to be compared against the average for other similar highways during only the period of the excessive user, or would a "longer" average give a more realistic figure?

21. These difficulties have been more or less ironed out, originally by common law decisions such as in the *Billericay* case; and now also by slight changes to the language of the section in the later amendments and re-enactments. It is now clear that for the purpose of determining whether the expense incurred was extraordinary, a comparison is to be made between the actual expense of repairing the particular highway after it has been damaged by the extraordinary traffic and the average expense of repairing comparable highways in the neighbourhood. In the context of the present section this may, of course, involve a comparison between the actual or likely expense of repairing the particular road and the average expense of repairing that road or similar roads in the neighbourhood. It is vital to keep in mind that all this goes to the first kind of extraordinariness relevant to the section, that is the extraordinary expense. But the word "extraordinary" appears twice. The second question is to what cause or causes can the extraordinary expense be ascribed, and is that extraordinary? What can count as "damage caused by excessive weight passing along the highway, or other extraordinary traffic thereon", as opposed to extraordinary expense as a result, say, simply of a hard winter?

22. The important case here is that of the Court of Appeal in *Hill v Thomas* as long ago as [1893] 2 Q.B. 333. Finlay J. in the 1922 case of *Butt and Co. v Weston-super-Mare Urban District Council* [1922] 1 A.C. 340 described the decision as classical, and as leaving very little that may be said upon the law on the subject. If we had all been just a little more on the ball we could have held this seminar two years ago in honour of its centenary.

Summarising the principles

23. The principles to be deduced from *Hill v Thomas* are well summarised in Pratt and Mackenzie's *Law of Highways* as follows:

(1) For traffic to be extraordinary it must either:

(a) be of such a weight or character as to be out of the common order of the traffic which normally uses the road, or

(b) be of greater volume than that which ordinarily uses the road.

(2) The traffic must be extraordinary in comparison with that which ordinarily uses the particular road in question.

(3) Traffic which would otherwise be extraordinary is not so if it is of a type which is necessarily and commonly used on the particular road in question in the course of some locally recognised industry.

(4) Mere long user by the undertaker or pioneer of extraordinary traffic does not make it any the less extraordinary.

(5) The fact that a vehicle is properly constructed according to statutory requirements is immaterial if the use of it constitutes extraordinary traffic within (1)(a) above.

24. These general principles extract the core from *Hill v Thomas* and a host of decisions which have fined down its conclusions since. Reference to each and every such authority is however not only time-consuming, it is also apt to be misleading. The question of whether or not traffic is extraordinary is a question of fact to be arrived at in the context of the particular matter before the court at any time. This has the further consequence - as well as making prediction difficult - that appeal courts are unlikely to disturb primary findings made by justices or county court judges, if there was evidence which could reasonably support the conclusion which was arrived at. In the context of a short paper such as this, there is time to consider only a very small number of actual decisions, and thus a small number of questions which may arise. I am conscious of the material already covered today in the context of surface requirements, and also of the sort of problems you are to go on to discuss amongst yourselves after this session. I have therefore chosen a few cases to get a further flavour of the courts' approach, and tried, despite their antiquity, to consider how they might affect current scenarios which some of you may already face.

25. One of the most interesting questions - and most obviously relevant today - is that of how something becomes a recognised business of a particular neighbourhood. For example, quarrying in many of the early cases, or more topically, perhaps tourism or leisure pursuits today. In *Williams v Davies* (1880) 44 J.P. 347, 67 loads of timber were transported over a three month period. The loads were heavier than normal agricultural loads. This was held to be extraordinary: it did not matter that the timber was the natural produce of the land. What mattered was the extraordariness of such weight of natural produce being transported in such a concentrated time. In *Hill v Thomas* itself, the carts used to carry the building materials to construct a fort were not in themselves bigger or heavier than those used for agricultural and other purposes in the neighbourhood. Nevertheless the decision by the justices that the increased amount of such comings and goings, and the extraordinary purpose of constructing a government fort, amounted to exceptional traffic, was not disturbed on appeal.

26. In *R v Ellis* (1882) 8 Q.B.D. 466, a traction engine was used twice a day, during a wet season, for the cartage of manure along a highway which communicated at either end with main roads, and was principally used by farmers and occupiers of land adjoining it for ordinary farm traffic. The engine weighed 8 tons and the road was worn into deep ruts. The metalled part was bulged into the ditches on each side, and the road was rendered unfit for use. This was held to be extraordinary, and the decision was not disturbed on appeal. The argument that the uses of traction engines was an ordinary incident of agricultural industry was not accepted. This might be so on some roads, but it was not so here. Having regard to the character of the road, and the mode in which it was generally used, it was impossible to hold that the use of such engines was an ordinary incident of the traffic upon it. This case well demonstrates the difficulty which lies at the heart of the application of the section. When does the arrival of new technology - or merely of new fads and recreations -upon our highways become ordinary?

27. Certainly these cases suggest that because a route has been used before by, say, farmers with a particular sort of vehicle, that will not prevent a dramatic increase in the number of such vehicles from being extraordinary. It is also clear that although a certain kind of traffic is ordinary on certain roads in an area, it can still be extraordinary on others.

28. So far as the pioneer of a new industry is concerned, the position would seem to be this. First, the question will always be one of fact for the court. But, Parliament can hardly have intended that all highways should be stereotyped by this legislation in a particular state of construction and user; and where it is clear that traffic is a reasonable development of the natural resources of a locality, it is not obvious that increased maintenance costs should be borne by the entrepreneur and not by the local community which may benefit as a whole. That said, as the fourth of the principles set out above makes clear, a single pioneer cannot be his own persistence make ordinary what is otherwise extraordinary. But, if a whole new industry develops in an area, and the highway authority is slow to act, then the courts' view of what is normal may well move on.

29. A further issue of obvious relevance in the modern context is that of the proper person to contribute, that is the person "by or in consequence of whose order the traffic has been conducted". Certainly the employer of an independent contractor may be liable under the current wording - indeed the additional wording "or in consequence of whose order" was added to make this point clear. He will not however always be liable, but only if it is a necessary consequence of his order that the damage is caused. If the contractor could reasonably have been expected to carry out the work without resorting to the use of extraordinary traffic, then the ultimate employer will not be liable..

Appendix III

County authorities' view on the status of unclassified roads in their area.

In 1987 the author of this report wrote to all county councils in England and Wales and posed the question: "Do you regard the unclassified roads in your care as bearing public vehicular rights?".

The responses received were:

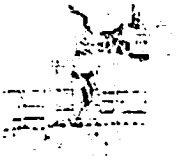
Bedfordshire	Yes
Berkshire	Yes
Cambridgeshire	Yes
Cheshire	Yes
Derbyshire	Yes
Devon	Yes (some under review)
Dorset	No
Durham	Yes
Dyfed	Yes
Essex	Yes
Glamorgan (Mid)	Yes
Glamorgan (West)	No
Gloucestershire	No
Gwent	Yes
Gwynedd	No
Hereford & Worcester	Yes
Humberside	Yes
Kent	Not sure
Lincolnshire	Yes
Norfolk	Yes
Northumberland	Yes
Nottinghamshire	No
Oxfordshire	Yes
Powys	Yes
Shropshire	Yes
Somerset	Yes
Staffordshire	Yes
Suffolk	Yes
Surrey	No
Sussex (West)	Yes
Warwickshire	No
Wiltshire	Yes
Yorkshire (North	Not sure*

* confirmed as Yes by other correspondence.

Appendix IV

South Hams District Council's draft policy on "green lanes"

Issues & Policies



- To approach private landowners with a view to establishing permitted riding areas or toll rides, particularly near to Plymouth, the coast and the Dartmoor fringes
- Liaise with the British Horse Society and Devon County Highway Authority on providing guidelines for improving road safety for horses and riders when carrying out road improvement works
- To work with Devon County Highway Authority on increasing maintenance of green lanes where they can have a significant effect on the network of riding routes in the district.

4.7 Green Lanes

"Green Lanes" is the general term used to refer to unsurfaced, minor rural lanes. The legal status of these lanes varies, some are private, some are public rights of way (bridleways or byways) but the majority are unclassified County Highways.

The Countryside Commission best defines a Green Lane as: *"an unmetalled track which may or may not be a right of way for the public either on foot, horse, bicycle or motor vehicle, including a motor bicycle, which is usually bounded by hedges, walls or ditches."*

Many green lanes are very old and have interesting histories as pack horse tracks or even smugglers lanes. In the past they were well used routes as part of the highway network but during this century, improvements have resulted in smooth hard road surfaces over much of the original network with those lanes that remained unsurfaced largely falling into dis-use.

Some lanes are now hardly visible but others which were once important and well-built routes are still substantial even though un-used, overgrown and almost forgotten.

Green lanes are still used today for access for agricultural purposes. Some are used for recreation by walkers, horseriders, off road cyclists, trail bike riders and four wheel drive vehicles. Green lanes are therefore a very important recreational resource. The deep, steep sided lanes, with attractive bankside vegetation have a quiet, 'away from it all' atmosphere far removed from the traffic of the metalled roads. They are becoming increasingly important as countryside recreation becomes more popular and traffic increases on the main highways.

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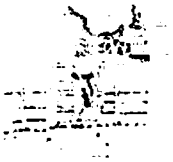

Although many lanes are currently used for recreation, there are unfortunately many more which are too overgrown, or the surfaces too muddy or stony to be of great recreational value. These lanes also have historical, cultural and wildlife significance and they are potentially a wonderful, currently untapped, resource for recreation in the district.

One of the main problems inhibiting wider use of green lanes is a lack of maintenance. Increasing demands on limited highway maintenance resources means that Devon County Highway Authority can very rarely carry out maintenance works on minor rural lanes. Because of this, such lanes can develop drainage problems and surface damage. Lanes used for agricultural access are usually kept trimmed back by farmers but where this is not the case, green lanes can become impassible with overgrown hedgerows. Where green lanes are kept open by agricultural vehicles, they may still be unusable by recreational users in all but the driest weather due to deep mud and ruts on the lane surface.

Old lanes and tracks are an important recreational resource

Devon County Highways Authority's current policy on green lane maintenance is one of encouraging self help by local people and landowners. The Highway Authority will provide limited materials and practical advice but local people need to carry out repairs themselves. This policy appears to be ineffective at the moment in bringing green lanes up to the standard needed by recreational users. This may be because people are not aware of the help they can get, and also because for agricultural users of the lanes, a muddy, rutted lane is not a problem therefore there is no incentive for improving drainage or the track surface. Some piecemeal clearance work does take place by local people or user groups but this is not really addressing the problem. If green lanes are to be brought up to a standard to enable larger scale use for recreation, much greater resources need to be allocated for their maintenance as the current situation is unacceptable.

The burden of improvement and maintenance work need not fall entirely on the shoulders of Devon County Highways Authority. If the green lane network is to be truly developed as a recreational resource, a range of funding sources and project partners should be sought including SHDC, the Countryside Commission, parish councils and countryside recreation user groups. The 'opening up' of the green lane network has the potential to solve some of the access problems discussed in previous sections such as the lack of recreational routes for horseriders and safe routes for cyclists. It is therefore important that user groups are closely involved.

Another problem with green lanes is that they are 'secret'. Many people do not realise that they exist or that the public may use them.

If the standard of green lanes were improved, their full recreational potential could be realised including signing them from metalled highways, as is the case with rights of way.

Some unclassified county roads are being designated as 'byways' under the current

Issues & Policies

Definitive Map review which means they will eventually appear as rights of way on ordnance survey maps.

The tourism sector has a potentially important role to play in helping to improve the green lane network. As discussed, under 'Tourism' (4.11), the suitability of this area for countryside recreation is largely responsible for the income the district generates through tourism. It is only right that some of this income is re-invested in maintaining the natural attractions of the area: green lanes come into this category. Tourism operators are now realising that contributions (financial or in kind) to countryside recreation projects is 'money well spent' as it can reap benefits for their own businesses. Linking recreational routes that use green lanes into tourism establishments can bring extra income to local businesses and give them a vested interest in helping to maintain the green lane network.

In the past, parish councils employed a 'lengthman' to maintain minor lanes in their parish. The re-introduction of lengthmen should be considered with possible funding coming from a variety of sources (including the tourist sector). This person would be responsible for carrying out small scale maintenance and clearance works on the lanes. Many maintenance problems, if dealt with early, are relatively small. It is when they are neglected for long periods that they can worsen necessitating more substantial and costly remedial works. A lengthman on the ground would help to stop this happening.

It must be noted that recommendations for improvement as discussed here are not relevant for every green lane in the South Hams. Any improvement, and maintenance work that takes place should be targeted onto lanes where it will be most cost effective in terms of enhancing recreational provision in the locality. Close liaison with DCC Highway Authority and countryside user groups will be necessary to achieve this.

Some green lanes are sensitive due to their special wildlife value and increased use will not be encouraged in such cases.

Policy Guidelines for Green Lanes

- To realise the potential of the green lane network in the South Hams for improving opportunities for countryside recreation.
- By working with funding and project partners, and in close liaison with Devon County Highway Authority to open up green lanes that have become inaccessible and to improve the standard of those which are inadequate for recreational purposes.

Recommendations for Action

- To continue to increase enjoyment of green lanes by interpreting their historical background and wildlife interest through guided walks (as part of *Jigsaw and Coastal Events)* or self-guided trails.
- To investigate possible sources of funding for green lanes including Countryside Commission, European Community grants, the tourist industry, Rural Development Commission, sports organisations and countryside user groups.
- Working with Devon County Council and South Hams Parish Councils, to investigate the feasibility of re-introducing lengthmen.
- To target those green lanes which are a high priority for improvement due to providing important recreational links.

4.8 The Natural Environment

The value of the South Hams in terms of landscape and wildlife interest is evident from the range of statutory and non-statutory landscape and nature conservation designations in the area. The *South Devon Area of Outstanding Natural Beauty*, the *South Devon Heritage Coast* and *Coastal Preservation Area* and numerous *Areas of Great Landscape Value* are the statutory designations included in the Structure and Local Plans which aim to conserve the landscape beauty of the area.

There are a number of statutory *Nature Reserves* and *Sites of Special Scientific Interest* and non-statutory *County and Local Wildlife Sites* within the South Hams. These are designations showing nature conservation interest. The *1992 South Hams Wildlife Survey "revealed the presence of an outstanding series of wildlife habitats scattered throughout the District ... these habitats support a number of species of national importance"* (Devon Wildlife Trust, 1993).

It is important that the wildlife interest of the South Hams is conserved and safeguarded, not only for its own sake on moral and scientific grounds but also because the economy of the district depends upon it. The 1992 survey recognises this when is describes the overall wildlife resource as *"remarkable"* and *"deserving recognition and promotion as one of the major assets of the District. The abundance of these wildlife habitats contributes significantly to the high landscape quality of the South Hams and is therefore fundamental to the economic success of a District which thrives on green tourism"*

It is important therefore that when providing for access and recreation in the district, the needs of landscape and nature conservation are given over-riding precedence. Data collected during the 1992 Landscape and Wildlife Surveys and recommendations in the Kingsbridge and Salcombe Estuary Draft Management Plan, can be used as a basis for highlighting sites that might be sensitive to visitor pressure and therefore inappropriate for the development of access.

The South Hams Landscape