



The Motoring Organisations' Land Access & Recreation Association

# 18 Years of Countryside Access Legislation A Review of Changes Affecting BOATs and Unclassified Roads

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## I. CRoWA: background and chronology

- I.1. CRoWA in 2000 had two primary countryside access purposes:
  - firstly to create the ‘right to roam’ for walkers in England and Wales, and
  - secondly to cap the current processes for recording rights of way on the basis of historical evidence (‘lost ways’). This ‘cut-off’ is intended to take effect from 1 January 2026, with some savings and exceptions.
  - A further provision converted those RUPPs still awaiting reclassification orders under WCA processes into RBs.
  - There will be an extension, to include BOATs, of the power for highway authorities to authorise stock-control gates, as they currently can for FP & BR.
- I.2. The ‘right to roam’ provisions were promptly commenced.
- I.3. The cut off in 2026 (which is not yet commenced) means that no further unrecorded footpaths and bridleways can be added to the DMS after 2025, and no correction can be made where a recorded footpath should be shown as a bridleway. Transitional provisions and some exceptions will apply.
- I.4. CRoWA also provides that no further BOATs can be added to the DMS after 2025, and this was effected by the insertion of a new s.54A into WCA by paragraph 3(4) of Schedule 5 of CRoWA. This provision is similarly not in force until the 2026 cut-off is commenced.
- I.5. CRoWA provides that the Secretary of State will make a commencement order for the ‘cut off’ in due course. No order has yet been made.
- I.6. The CRoWA provision to convert all extant RUPPs to RBs was not commenced until 2006, when the commencement order took force immediately before s.67 of NERCA was commenced. See ‘NERCA immediate effects’, below.
- I.7. If all the rights of way provisions in CRoWA were commenced without regulations providing exceptions and savings, the cumulative effect for motorists from 2026 would be:
  - All BOATs already on the DMS would not be affected.
  - All RUPPs with public vehicular rights would lose the right of way for mechanically propelled vehicles by becoming RBs.
  - UURs (sometimes referred to as ORPAs) with public vehicular rights would not be affected, except that:
    - from 2026 no UUR can be added to the DMS as a BOAT, and,
    - from 2026, if any UUR turns out to be only a FP or BR, then (on the face of the Act) those rights are extinguished. (see below on the implications in making DMMO applications for unsealed unclassified roads).
- I.8. It is extremely unlikely that these remaining CRoWA provisions will be commenced without accompanying ‘checks and balances’, because the government has consistently said that these, and the further provisions in the DA, will be commenced as a package.
- I.9. Following ministerial undertakings around 2000, the government tasked the Countryside Agency (now Natural England) to start a national research project,

*Discovering Lost Ways*. This ultimately turned into a blind alley, because the statistical approach adopted frightened the government into believing that a grossly overstated number of 'lost ways' would be added to the DMS.

- 1.10. When DLW foundered, in 2008 the government set up instead the Stakeholder Working Group (later sometimes called the Deregulation Act SWG) to look at the 2026 cut-off and allied provisions. This is discussed later because of the intervention of NERCA in 2006.

## 2. NERCA: immediate effects

- 2.1. From 2 May 2006 in England, and 16 November 2006 in Wales, unrecorded public rights of way for MPVs were extinguished. There were two principal exceptions:
  - roads on the s.36(6) LoS on those dates but not also on the DMS as FP or BR, and
  - roads on the DMS as BOATs on those dates.
- 2.2. For clarification, NERCA references roads on the 'list of streets' (LoS) but the terms 'unsealed unclassified road' (UUR), and 'other route with public access' (ORPA), are in more-general everyday use to mean the same thing.
- 2.3. The CRoWA provision converting RUPPs to RBs was commenced immediately before this NERCA provision was commenced, with the effect that RUPPs with public vehicular rights lost their public MPV rights element on that day.
- 2.4. There were limited savings and exceptions to the NERCA provisions. For example, extant modification orders (but not reclassification orders) to add BOATs to the DMS would be processed through to completion.
- 2.5. 'Dual status routes.' Where at the date of commencement of NERCA any road that was on the DMS as a footpath, bridleway, or restricted byway (former RUPP), and was also on the list of streets, loses any MPV rights it may have had, and assumes only its DMS status.

## 3. The Stakeholder Working Group and the Deregulation Act 2015

- 3.1. The government set up the SWG in 2008 to advise on the implementation of the 2026 cut-off and associated matters. The group issued a report in 2010, *Stepping Forward*, containing a number of recommendations, primarily regarding FP and BR only. The group continued meeting, working towards draft regulations to put these measures into force when a suitable legislative opportunity arose.
- 3.2. The government decided to use the Deregulation Bill 2014 as the statute to contain these measures, and that Bill was passed as the Deregulation Act 2015. The rights of way provisions therein require regulations to bring them into effect.
- 3.3. The SWG (assisting DEFRA) has worked steadily since 2015, considering draft regulations and making recommendations to the parliamentary draughtsmen. As at 31 December 2018 the DA work of SWG and DEFRA is on hold due to the parliamentary and departmental workload of Brexit.
- 3.4. The regulations will be made as a package. The commencement of the cut-off date will be accompanied by an effective amendment of CRoWA such that any UUR that,

from 2026, turns out to be only a FP or BR will not be extinguished. There is therefore no need to submit 'insurance' DMMO applications, as is now happening across England and Wales.

#### **4. What will happen when the 'cut-off package' is commenced?**

- 4.1. On the assumption that the government will make parliamentary time for commencing the CRoWA cut-off provisions package (which will require a number of statutory instruments) there will not be a great impact on UURs with a right for the public with MPVs.
- 4.2. No further BOATs can be added to the DMS after 2025 (savings and exceptions apply).
- 4.3. There will be a need, within a relatively short timescale, to resolve by DMMOs and DMMO applications, the recording of the correct width of BOATs in the DMS. Failure to do this seems to close the door on these corrections after the cut-off date.
- 4.4. There will be a power for highway authorities to authorise stock control gates on BOATs.

#### **5. The Motoring Stakeholder Working Group and the Deregulation Bill 2014**

- 5.1. During the Scrutiny Committee stage of the Deregulation Bill, groups opposed to recreational motor vehicles on unsealed roads made a pitch to the Committee to get new restrictions inserted into the statute. LARA and its Members opposed this.
- 5.2. The then-Minister for Rural Affairs saw that there are issues that need investigation and potentially regulatory change, and he (via DEFRA) tasked Natural England to convene a Motoring Stakeholder Working Group to investigate the national situation and make consensus recommendations in a report. The MSWG first met in 2016, and at various times afterwards. Progress was small and slow, and was in early 2018 disrupted by the report of a further parliamentary initiative.

#### **6. The House of Lords Select Committee on the Natural Environment and Rural Communities Act 2006**

- 6.1. This Select Committee, sitting in 2017-8, looked at various aspects of NERCA, and as LARA anticipated, organisations opposed to recreational motors on unsealed roads (principally those on the MSWG) made submissions seeking the Committee's support in gaining further primary legislation prejudicial to motorists' interests. LARA and the TRF presented oral evidence and written submissions.
- 6.2. The Committee's report was published on 22 March 2018: *The countryside at a crossroads: Is the Natural Environment and Rural Communities Act 2006 still fit for purpose?* This recommended that there should be investigation into how the process of making traffic regulation orders could be simplified, and made more flexible and appropriate to the task of regulating excessive and anti-social motoring. This investigation was launched at the end of November 2018, and the MSWG remains inactive while it is carried-through.

- 6.3. As part of the same initiative, DEFRA has highlighted the need to revisit and update its own report *Making the Best of Byways* (2005).

## **7. Summary as at 31 December 2018**

- 7.1. The 2026 cut-off has not been commenced. No regulations have been made.
- 7.2. There is no risk of extinguishment of any UURs which turn out to be only FP or BR unless and until the cut-off part of CRoWA is commenced.
- 7.3. S.54A of WCA does not become operational until the cut-off provisions of CRoWA are commenced, so BOATs can still be added to the DMS up to 2026 and beyond, subject to the constraints introduced by NERCA in 2006.
- 7.4. The commencement of the RUPP provisions in CRoWA, followed by the commencement of NERCA, means that all RUPPs with public vehicular rights, including those with an unresolved reclassification order, have already lost the MPV part of those rights.
- 7.5. Nothing has been done as regards commencing the survey of traffic authorities consequent on the House of Lords Select Committee report (March 2018).

## **8. Are DMMO applications for unsealed unclassified roads necessary?**

- 8.1. There is a widespread perception that 'unclassified roads' will be, or may be, extinguished on 1st January 2026, unless there is an application to put them on the definitive map, made and registered by that date. A widespread policy or practice of making applications to add UURs to the DMS seems to have as many downsides as attractions, and is not necessary anyway.
- 8.2. Northumberland County Council started a rolling programme in the early 1990s to make orders (on statutory duty: not on applications) to record minor unclassified roads as BOATs. This was pre-ORPA, and so these roads appeared on the OS maps only as 'white roads': no indicator of public rights.
- 8.3. Derbyshire County Council has made and is making orders to add unclassified roads to the DMS, consequent on a block of applications made in 2003/4. Most orders are for BOAT, but a significant number are for bridleways, based on historical direct evidence that a particular road was never more than a bridleway.
- 8.4. Other counties have made some DMMO orders on unclassified roads, including notably Oakridge Lane in Hertfordshire, which single order required to get to final confirmation (as a BOAT): nine years, three inspectors, two High Court Challenges, two public inquiries, and five decision letters.
- 8.5. In both Northumberland and Derbyshire it is clear that as soon as there is publicity – consultation, site notices, etc – the general quiet equilibrium of the county road network often changes to a considerable commotion of opposition. This may be opposition to BOAT status ('we do not like motors'), or owners and occupiers saying 'there is no public road here at all'. As local authorities suffer ever-greater funding cuts, their own inputs into applications and order determinations (often via public inquiries) diminish considerably. There is an increasing perception that the

authorities feel they have discharged their burden by making an order; the outcome does not really matter to them.

8.6. Thus the voluntary groups have to enter into such opposed cases, and essentially present and prosecute each case, often in the face of specialist opposition. That is a very big burden, and is proportional to the number of orders made.

8.7. DEFRA's view on DMMO applications to record unclassified roads:

- 11 June 2012. *"We are prepared to accept that the vast majority of unsealed rural routes shown in the list of streets held by most highway authorities are likely to be shown to be carriageways on investigation."* [our emphasis]
- 11 July 2018. *"Defra's policy on UCRs is that we cannot make blanket assumptions about rights over unclassified roads because there are some cases where the rights are not clear. Should it be necessary, each road would have to be assessed on the evidence. Where any dispute about status occurs, the local authority should endeavour to ascertain what rights exist over that road, and make sure that it is properly recorded on the appropriate records, i.e. the Local Street Gazetteer, list of streets, and/or the DMS. This is not to suggest that all unclassified roads would all need to go through the DMMO process. There is no duty on local authorities to proactively screen and research the status of every unclassified road, but they are obliged to modify the DMS where this is requisite upon the 'discovery of evidence' in any case. Some unclassified roads would qualify to be recorded on the DMS as BOATs (until section 54A of the 1981 Act prevents them being recorded as BOATs at the cut-off date), and a some as bridleways. Others would not qualify for being recording on the DMS, and these would continue to be dealt with in the same way as other highways that are part of the 'ordinary roads' network."*

## 9. How should user organisations act in the present situation?

9.1. As DEFRA says, if there is evidence that any particular unclassified road is a footpath or bridleway, then make an application, but 'blanket applications', or any without direct evidence as to status (vehicular, or equestrian), are simply choking an already failing DMMO system to a greater degree, and this runs the risk of a statutory adverse reaction (just as with NERCA 2006).

9.2. Given that it is the government's intention to commence the cut-off date as a package with the various exceptions (footpath and bridleway county roads are to be an exception) user groups and individuals might usefully stop making such applications except where there is positive evidence that a particular unclassified road is only a footpath or bridleway.

9.3. Anyone (or any organisation) has a statutory right to make a DMMO application to put a right of way on the DMS. But there are anyway relatively few unclassified roads where non-motor rights of access are disputed. There is surely more virtue and benefit in making applications for 'lost way' footpaths, bridleways and restricted byways?

## **10. Abbreviations**

*In this paper the following abbreviations are used:*

Bridleway (BR)

Byway open to all traffic (BOAT)

Countryside and Rights of Way Act 2000 (CRoWA)

Definitive map and statement (DMS)

Definitive map modification order (DMMO)

Deregulation Act 2015 (DA)

Discovering Lost Ways (DLW)

Footpath (FP)

Mechanically propelled vehicle (MPV)

Motoring Organisations' Land Access and Recreation Association (LARA)

Motoring Stakeholder Working Group (MSWG)

Natural Environment and Rural Communities Act 2006 (NERCA)

Other route with public access (ORPA)

Restricted byway (RB)

Road used as public path (RUPP)

Section 36(6) list of streets (LoS)

Stakeholder Working Group (SWG)

Trail Riders Fellowship (TRF)

Unsealed unclassified road (UUR)

Wildlife and Countryside Act 1981 (WCA)

See also the LARA Glossary for more information: <https://laragborg.wordpress.com/glossary/>