

Regulatory Committee

Meeting to be held on 04 February 2015

Electoral Division affected: Rossendale East

Wildlife and Countryside Act 1981
Definitive Map Modification Order Investigation
Deletion of Part of Bacup Footpath 616, Higher Boarsgreave, Bacup
File No. 804-538
(Annex 'A' refers)

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Executive Summary

Deletion of part of Bacup Footpath 616 in connection with previous decision to upgrade to and add Bridleway between Cowpe Road and Rooley Moor Road (File No. 804-538)

Recommendation

1. That part of Bacup Footpath 616 be deleted as shown on the Committee plan between points F-I.
2. That when an Order is made pursuant to Section 53 (3) (c)(i) and (ii) of the Wildlife and Countryside Act 1981 to add a bridleway and to upgrade Bacup Footpaths 617, 616 (part), 609 and 612 (part) to bridleways on the Definitive Map and Statement of Public Rights of Way that the Order also includes, pursuant to Section 53 (3) (c) (iii), the extinguishment of part of Bacup Footpath 616 between points F-I on the Committee plan.
3. That being satisfied that the test for confirmation can be met the Order be promoted to confirmation.

Background

An application under Schedule 14 of the Wildlife and Countryside Act 1981 was received from the Forest of Rossendale Bridleways Association for a public bridleway to be recorded on the Definitive Map and Statement of Public Rights of Way.

The application was considered by the Regulatory Committee at their meeting on 22 October 2014 and Committee agreed to make an Order to upgrade Bacup Footpaths

617, 616 (part), 609 and 612 (part) to bridleway and to add a bridleway on the Definitive Map and Statement of Public Rights of Way as shown on the Committee plan appended to the Committee Meeting Report between points A-H.

Following the Committee meeting officers started to draft the legal Order and it became apparent, when looking at the existing Definitive Statement, that an error had been made when the Definitive Map (First Review) was drawn in the 1960s and that a short section of Footpath 616 had been incorrectly drawn - as shown on the Committee plan between points F-I and that the footpath should actually have been drawn to follow the existing track between points F-G.

A drafting error of this type can only be dealt with by way of a Definitive Map Modification Order.

The Committee decision of 22 October 2014 was that an Order should be made to record the route between points F-G as a Bridleway. This further report deals with the evidence that has subsequently been discovered by the authority that the part of Footpath 616 shown on the Definitive Map between points F-I should be deleted. The effect would be that the bridleway F-G is shown instead of, rather than as well as, footpath F-I.

The County Council is required by law to investigate the evidence and make a decision based on that evidence as to whether a public right of way exists, and if so its status. Section 53(3)(b) and (c) of the Wildlife and Countryside Act 1981 set out the tests that need to be met when reaching a decision; also current Case Law needs to be applied.

An order for deleting a way shown on the Definitive Map and Statement will be made if the evidence shows that:

- That there is no public right of way over land shown in the map and statement as a highway as any description

When considering evidence, if it is shown that a highway existed then highway rights continue to exist ("once a highway, always a highway") even if a route has since become disused or obstructed unless a legal order stopping up or diverting the rights has been made. Section 53 of the Wildlife and Countryside Act 1981 (as explained in Planning Inspectorate's Advice Note No. 7) makes it clear that considerations such as suitability, the security of properties and the wishes of adjacent landowners cannot be considered. The Planning Inspectorate's website also gives guidance about the interpretation of evidence.

The County Council's decision will be based on the interpretation of the evidence discovered by officers and documents and other evidence supplied by the applicant, landowners, consultees and other interested parties produced to the County Council before the date of the decision. Each piece of evidence will be tested and the evidence overall weighed on the balance of probabilities. It is possible that the Council's decision may be different from the status given in any original application. The decision may be that the routes have public rights as a footpath, bridleway, restricted byway or byway open to all traffic, or that no such right of way exists. The

decision may also be that the routes to be added or deleted vary in length or location from those that were originally considered.

Consultations

No further consultations have been carried out prior to this report being submitted to the Regulatory Committee.

Advice

Executive Director for the Environment's Observations

Points annotated on the attached Committee plan.

Point	Grid Reference (SD)	Description
A	8419 2053	Junction of Footpath 612 and southern end of U7774 Cowpe Road.
B	8420 2052	Gate across route
C	8424 2047	Junction of Footpaths 608, 609 and 612 at Boarsgreave Farm
D	8425 2048	Gate across route
E	8429 2066	Unmarked junction of Footpaths 616, 609 and 610 with route
F	8432 2071	Unmarked junction of Footpath 616 with route
G	8435 2072	Junction of Footpaths 617, 618 and 619 west of gate.
H	8435 2072	Gate across route
I	8433 2073	Junction of Footpath 616 with 619

Description of Route

The section of recorded Footpath that is the subject of this report commences at an unmarked point on the track (point F) and extends in a north easterly direction across rough pasture for approximately 20 metres to the unmarked junction with Footpath 619 south of a stone wall (point I).


Access along the route is unobstructed but there is no evidence of a worn track.

The total length of the route is approximately 20 metres.

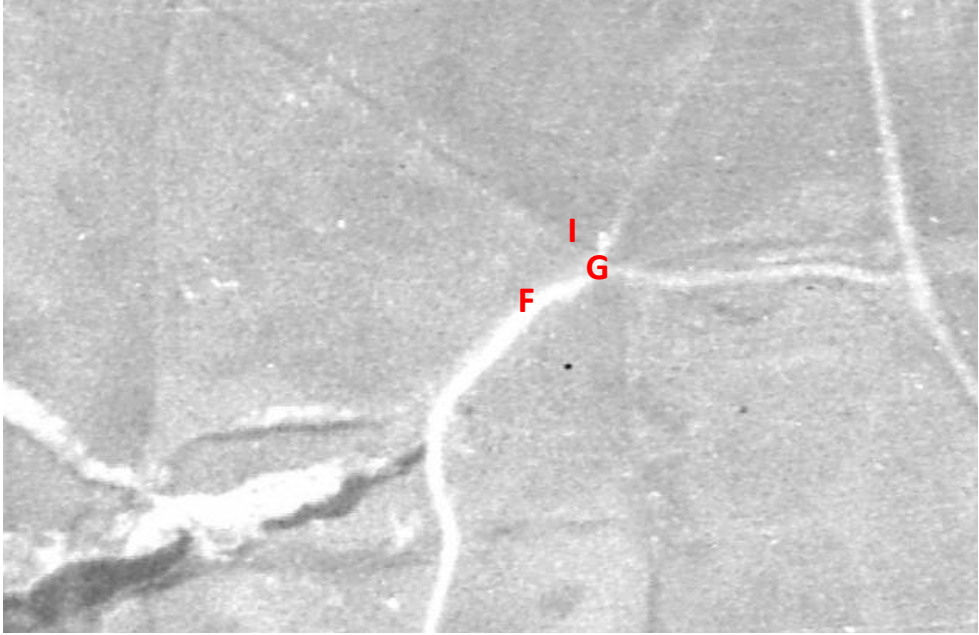
Key Map and Documentary Evidence

This report details the key map and documentary evidence only.

Document Title	Date	Brief Description of Document & Nature of Evidence
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25 Inch OS Map	1893	The earliest OS map at a scale of 25 inch to the mile. Surveyed in 1892 and published in 1893.
		
Observations		The earliest large scale Ordnance Survey map shows an unbounded track (double pecked lines) curving round in a general north easterly direction from point F to point G where it meets the routes subsequently recorded as Footpaths 619, 618, 617. The route under investigation between points F-I is not shown.
Investigating Officer's Comments		The route under investigation did not exist as a physical feature (track) in 1892 but the routes between points F-G-H and H-I did.
25 Inch OS Map	1929	Further edition of 25 inch map (surveyed 1891, revised in 1927 and published in 1929.
Observations		The route under investigation is not shown and the junction of routes is shown in same way as on the 1893 and 1910 Ordnance Survey maps.
Investigating Officer's Comments		The route under investigation did not exist as a physical feature (track) in 1927 but the routes between points F-G-H and H-I did.
Aerial Photograph¹	1940s	The earliest set of aerial photographs

¹ Aerial photographs can show the existence of paths and tracks, especially across open areas, and changes to buildings and field boundaries for example. Sometimes it is not possible to enlarge the photos and retain their clarity, and there can also be problems with trees and shadows obscuring relevant features.

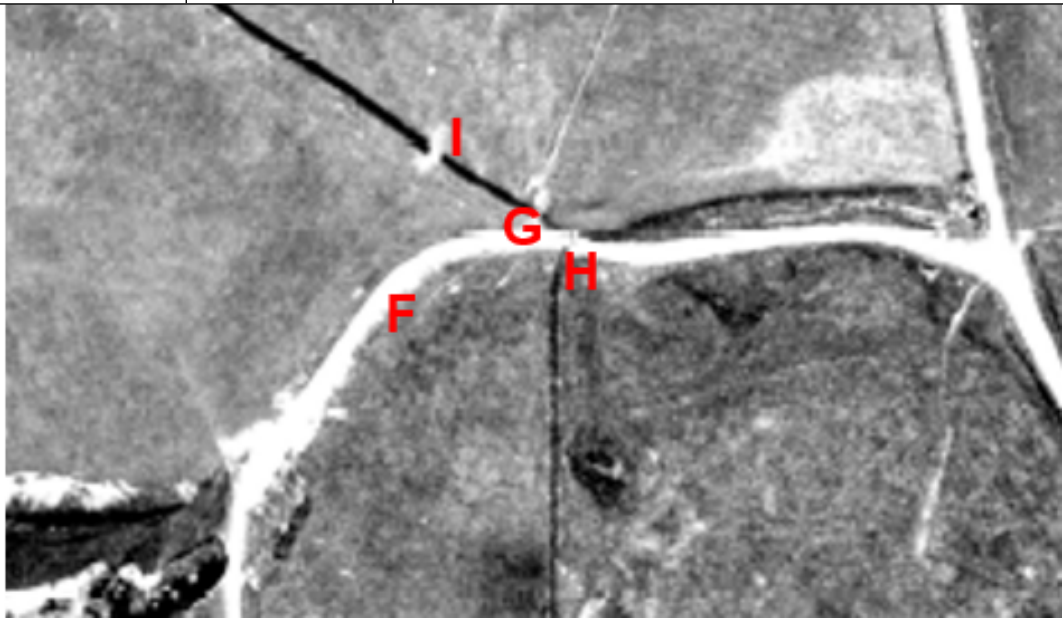
		available was taken just after the Second World War in the 1940s and can be viewed on GIS. The clarity is generally very variable.
		
Observations		<p>A track can be clearly seen curving round in a north easterly direction from point F to point G where it meets the routes subsequently recorded as Footpaths 619, 618, 617.</p> <p>The route under investigation between points F-I is not shown.</p>
Investigating Officer's Comments		<p>A worn track did not exist between points F-I indicating that at the time that the photograph was taken the route was not in use, or that use was not significant.</p>
6 Inch OS Map	1956	<p>The OS base map for the Definitive Map, First Review, was published in 1956 at a scale of 6 inches to 1 mile (1:10,560). This map was revised before 1930 and is probably based on the same survey as the 1930s 25-inch map.</p>



Observations		<p>A track can be clearly seen curving round in a north easterly direction from point F to point G where it joins the routes subsequently recorded as Footpaths 619, 618, 617.</p> <p>The route under investigation between points F-I is not shown.</p>
Investigating Officer's Comments		<p>At the time that the survey for the map was carried out use was along the routes F-G-H and H-I and that the route under investigation was not the one in use.</p>
1:2500 OS Map	1963	<p>Further edition of 25 inch map reconstituted from former county series and revised in 1961 and published 1963 as national grid series.</p>



Observations		The route under investigation is not shown and the junction of the routes at point G is shown in the same way as on the earlier editions of the 6 inch and 25 inch Maps.
Investigating Officer's Comments		The route under investigation did not exist as a worn track on the ground in 1961 although the tracks that it joined were shown as being unenclosed so access would probably have been unobstructed.
Aerial photograph	1960s	The black and white aerial photograph taken in the 1960s and available to view on GIS.

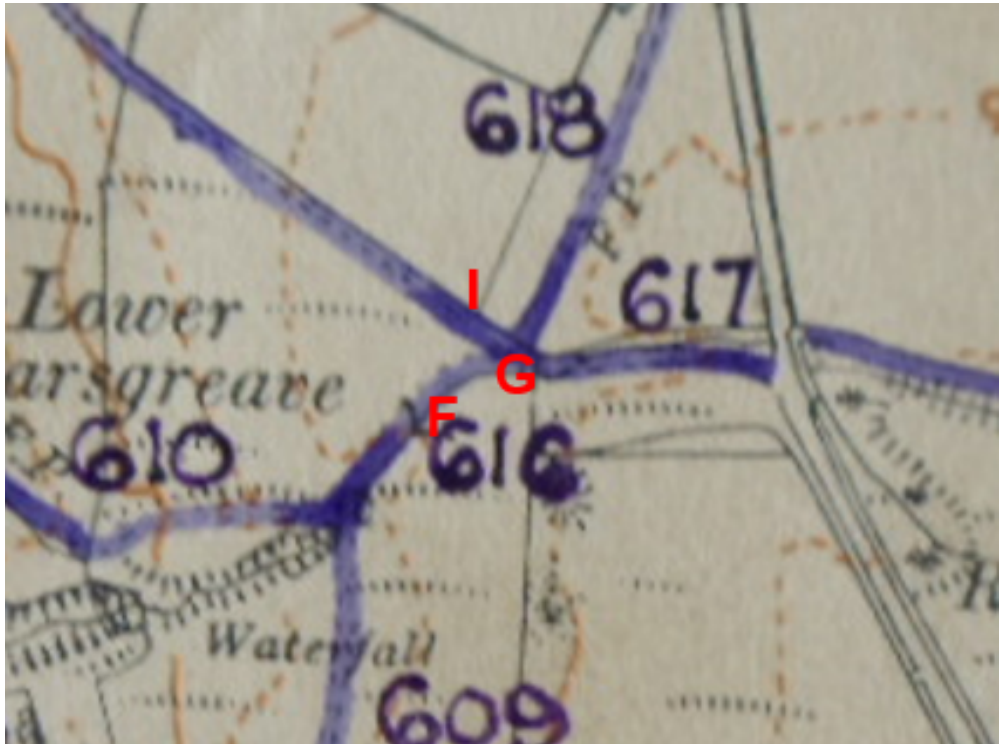


Observations		The route under investigation is not shown as a visible track on the ground but the route along the track between points F-G-H is
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		clearly visible.
Investigating Officer's Comments		It may have been possible to pass along the route under investigation between point F and point I but the photograph does not show up a worn track that would indicate frequent use.
Definitive Map Records		<p>The National Parks and Access to the Countryside Act 1949 required the County Council to prepare a Definitive Map and Statement of Public Rights of Way.</p> <p>Records were searched in the Lancashire Records Office to find any correspondence concerning the preparation of the Definitive Map in the early 1950s.</p>
Draft Map		<p>In the case of municipal boroughs the map and schedule produced by the initial survey was used, without alteration, as the Draft Map and Statement. The Draft Maps were given a "relevant date" (1st January 1953) and notice was published that the draft map for Lancashire had been prepared. The draft map was placed on deposit for a minimum period of 4 months on 1st January 1955 for the public, including landowners, to inspect them and report any omissions or other mistakes. Hearings were held into these objections, and recommendations made to accept or reject them on the evidence presented.</p>



<p>Observations</p>		<p>The route under investigation between point F and point I is not shown. The route of Footpath 616 is shown along the track between point F and point G. No objections or representations were made to the County Council about the inclusion of the route between point F and point G as a public footpath or the fact that a route was not shown between point F and point I.</p>
<p>Provisional Map</p>		<p>Once all representations relating to the publication of the draft map were resolved, the amended Draft Map became the Provisional Map which was published in 1960, and was available for 28 days for inspection. At this stage, only landowners, lessees and tenants could apply for amendments to the map, but the public could not. Objections by this stage had to be made to the Crown Court.</p>



<p>Observations</p>		<p>The route under investigation between point F and point I is not shown. The route of Footpath 616 is shown along the track between point F and point G. No objections or representations were made to the County Council about the inclusion of the route between point F and point G as a public footpath or the fact that a route was not shown between point F and point I.</p>
<p>The First Definitive Map and Statement</p>		<p>The Provisional Map, as amended, was published as the Definitive Map in 1962.</p>



Observations		The route under investigation was not shown and the route of Footpath 616 was shown in the same way on the First Definitive Map as on the Draft Map and Provisional Map.
Revised Definitive Map of Public Rights of Way (First Review)		Legislation required that the Definitive Map be reviewed, and legal changes such as diversion orders, extinguishment orders and creation orders be incorporated into a Definitive Map First Review. On 25 th April 1975 (except in small areas of the County) the Revised Definitive Map of Public Rights of Way (First Review) was published with a relevant date of 1 st September 1966. No further reviews of the Definitive Map have been carried out. However, since the coming into operation of the Wildlife and Countryside Act 1981, the Definitive Map has been subject to a continuous review process.



Observations		<p>The route under investigation is shown as part of Footpath 616 between point F and point I terminating at a point on Footpath 619. The track shown as part of Footpath 616 on the Draft, Provisional and First Definitive Map between point F and point G is not shown to be part of the Footpath.</p> <p>The Definitive Statement describing the route of Footpath 616 remained unaltered from the Draft through to the Definitive Map (First Review) stating the position of Footpath 616 as "Continuation of footpath 609 at Boarsgreave and in an easterly direction to junction with Footpaths 617, 618 and 619. In good condition."</p>
Definitive Statement		<p>Definitive Statement for Bacup 616 -619 has remained unaltered from the Draft through to the current (First Review) Definitive Statement</p>
Observations		<p>Footpath 616 "... to junction with Footpaths 617, 618 and 619."</p> <p>Footpath 617 "Continuation of footpath 616 and commencing at kissing gate and field gate..."</p> <p>Footpath 618 "Starts at kissing gate and field gate at junction of Footpaths 616 & 617 and proceeds in a northerly direction..."</p> <p>Footpath 619 "Starts at a junction of footpaths 616 & 617 and proceeds in a north-westerly direction..."</p>

Investigating Officer's Comments		<p>From 1953 through to 1962 there was no indication that the route under investigation was considered to be a public footpath by the Surveying Authority.</p> <p>There were no objections to the fact that the route was not shown on the First Definitive Map when the map was placed on deposit for inspection or at any stage of the preparation of the Definitive Map.</p> <p>The Definitive Statement for the 4 footpaths Bacup 616-619 indicate that they all meet at a point which is at a kissing gate and field gate and that 616 is a continuation of 617. The only arrangement that can be described in that way is consistent with that shown on the Draft, Provisional and First Definitive Maps.</p> <p>No legal order diverting Footpath 616 to the alignment shown on the Definitive Map (First Review) has been found. This suggests that the different alignment of the route may have resulted from a drafting error – particularly given the scale of the OS map used (1:10,560).</p>
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Landownership

Summary

The Ordnance Survey maps and aerial photographs examined do not show the route under investigation and although access between point F and point I may have been unobstructed it is far more likely that public use was along the track between points F-G.

Except for the current Definitive Map the records consistently show the route of Footpath 616 along the track between points F-G and this is consistent with the Definitive Statement that has remained unaltered from the Draft, to the Provisional, First Definitive and Definitive Map (First Review).

No legal order diverting Footpath 616 to the alignment shown on the Definitive Map (First Review) has been found and taking into account the lack of map or documentary evidence that could account for the change it is considered that the different alignment of the route is most likely to have resulted from a drafting error – particularly given the scale of the OS map used (1:10,560).

County Secretary and Solicitors Group Observations

Assessment of the Evidence

The Law - See Annex 'A'

In Support of Making an Order

The way the line of footpath is shown on records as detailed above

Against Making an Order

Need for cogent evidence

Conclusion

In this matter it is claimed that the line shown on the Definitive Map should be deleted.

It is advised that to remove a route from the Definitive Map it is necessary to show on balance that it was put on the Definitive Map in error. In this matter the route to be deleted (F-I) was shown on the First Review Definitive Map relevant date of 1966 and so the error needs to be shown to have been made in 1966.

Case Law (Trevelyan) confirms that cogent evidence is needed before the Definitive Map and Statement are modified to delete a right of way. Lord Phillips MR of the Court of Appeal stated that:

“Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.”

One such evidence of error could be sufficient evidence of a correct route nearby.

In caselaw (Leicestershire case) Collins J held that in these circumstances,

“if (the decision maker) is in doubt and is not persuaded that there is sufficient evidence to show the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive.”

Looking at how F-H has been consistently recorded on records, the Committee would normally be asked to consider whether the route shown F-H is already a footpath at law and

should be added to the Definitive Map and then whether this means that it was the correct route of the footpath network in 1966 and therefore the route F-I was recorded as on the Definitive Map in error in 1966. It is suggested that whilst this approach is appropriate, Committee is reminded of the previous recent decision of the Committee that an Order be made to record F-H as a bridleway. It is suggested that the authority cannot therefore consider making an Order that F-H be recorded as a footpath at this time.

It is suggested therefore that route F-H is considered and evidence for it being the correct line of the footpath be considered but a decision about it being recorded as footpath by an Order be not made at this time.

Section F-H is, as shown above consistently shown as a route on maps and documents and recorded as a footpath on the first Definitive Map. In contrast the route claimed for deletion F-I is not shown on any map until the Definitive Map (First Revision) of 1966. It is suggested that Committee may consider that there is evidence by way of the maps and documentary evidence that the route claimed for deletion F-I on balance was recorded in error from 1966 onwards and should have continued to be recorded on the line F-H.

The Committee should consider whether it is unlikely that two paths existed so close to each other or whether there was only one public route through to point H from the south which should have continued to have been recorded.

Taking all the evidence into account it may be considered that there is sufficient cogent evidence to suggest that the route F-I was recorded in error and that it should be removed from the Definitive Map

It is advised that the evidence is sufficient to not only satisfy the test to make the Order to delete but also to promote the Order to confirmation.

Risk Management

Alternative options to be considered - N/A

**Local Government (Access to Information) Act 1985
List of Background Papers**

Paper	Date	Contact/Directorate/Tel
All documents on File Ref: 804-538		Megan Brindle, 01772 535604, County Secretary and Solicitors Group

Reason for inclusion in Part II, if appropriate

N/A