



Order Decision

Inquiry opened on 27 November 2012

Site visit made on 26 and 29 November 2012

by Barney Grimshaw BA DPA MRTPI (Rtd)

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 16 January 2013

Order Ref: FPS/Q9495/7/28

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Lake District National Park Authority (Bridleway 506027, High Hampsfield Farm, Broughton East Parish) Definitive Map Modification Order 2011.
- The Order is dated 20 September 2011 and proposes to modify the Definitive Map and Statement for the area by upgrading part of a footpath to bridleway status and adding a bridleway which together form a continuous route running southwards from the Pubic Road U5232 near High Hampsfield Farm Broughton East, as shown in the Order plan and described in the Order Schedules.
- There were 3 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a public Inquiry into this Order on Tuesday 27, Wednesday 28 and Thursday 29 November 2012 at Victoria Hall, Grange-over-Sands. I made an unaccompanied site inspection on Monday 26 November and a further inspection on Thursday 29 November accompanied by representatives of parties who appeared at the inquiry, including the Lake District National Park Authority, the Order Making Authority (OMA) and the principal objector.
2. The Order route was the subject (along with other routes) of a previous order made in 2005. This was determined in 2007 with the effect that the Order route was to be added to the definitive map as a Restricted Byway. However, this decision was subsequently quashed by a judgement in the Court of Appeal, now referred to as the *Whitworth* case¹. Accordingly, the OMA has now made this new Order.
3. At the inquiry an application for costs was made on behalf of the Lake District National Park Authority against Mrs Whitworth and Mr and Mrs Pimblett. This application is the subject of a separate decision.
4. In writing this decision I have found it convenient to refer to points on the claimed way as shown on the Order Map. However, objectors requested at the inquiry that annotations used in the original order should continue to be used instead of those included in the current Order to avoid confusion. I therefore attach a plan prepared by the OMA, which shows both old and new notations. Whenever I have referred to a point on the Order route in this decision I have

¹ Whitworth & Others v Secretary of State for Environment Food and Rural Affairs [2010] EWCA Civ 1468

quoted the annotation used in the previous order in brackets after that used in the current Order.

The Main Issues

5. With regard to the section of the Order route that is currently not recorded as a right of way of any sort, the requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the Definitive Map and Statement subsists along the Order route.
6. With regard to that part of the Order route that is now recorded as a footpath, the requirement of Section 53(3)(c)(ii) of the 1981 Act is that the evidence should show that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
7. Some of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
8. Common law also requires me to consider whether the use of the way and the actions of the landowners have been of such a nature that the dedication of the way by the landowners can be inferred.

Reasons

Documentary Evidence

Pre-Inclosure Maps

9. The two earliest maps of the area that have been produced, referred to as a Survey of Ancient Inclosures and a Map of Grange and Lindale Area, are both undated. Both show most of the land crossed by the Order route as open fell with no features marked but the area around High Hampsfield Farm is shown as being already enclosed. However, both maps show the road at High Hampsfield in its present position and both appear to show a gap in the boundary of the open fell area in the vicinity of Point X(C1). This would suggest that there may have been an access point to the fell in this position, as well as at other points where gaps are also indicated. The Map of Grange and Lindale Area also appears to show open access to the road at Point Z(D) whereas the Survey of Ancient Inclosures is less clear.

The Inclosure Process

10. A private Act of Parliament for the inclosure of open land in the parish of Cartmel was passed in 1796. William Johnson was appointed to survey the area before inclosure and produced a Survey Map in around 1800. This map shows a route similar to the Order route running southwards from Point X(C1) and then south-eastwards roughly to the point I have annotated W1 but then departing

from the line of the Order route to join what is now RB 526038 at Point W2. The map also shows a route running from this point W2 to point W(B) and on to Point E following the line of RB 526038.

11. Subsequently a Draft Award Plan was prepared showing a wall separating two proposed allotments (those of John Strickland and the Bishop of Chester). This would have crossed the route previously shown by Johnson near Point W1 but, this route is no longer shown and a different route running from the current RB 526038 at Point W(B) towards High Hampsfield is shown. This route is similar to but not the same as the Order route and appears to exit the open fell land which was to be enclosed some distance to the east of Point X(C1). The route from W(B) to E following the current RB 526038 is also shown.
12. The Award itself was made in 1809 and included provision for the setting out of a number of public and private routes of various descriptions. One of these was described as *"Another private carriage and drift way of the breadth of twenty feet called Hampsfield Road leading from the village of Grange northwards along the east side of allotments herein severally awarded to...and over the allotments herein severally awarded to James Fletcher Agnes Atkinson and Langley Sunderland the Bishop of Chester and John Strickland to Hampsfield and to an ancient inclosure belonging to William Turner"*. The Award Plan shows similar routes to the draft plan, one roughly following the line of the Order route running from Point W(B) towards High Hampsfield Farm close to which the word *'Hampsfield'* is marked and another running along the line of the current RB 526038 to Point E which was at the boundary of the inclosure of William Turner.
13. It was contended on behalf of the OMA that both of these routes must have been part of the awarded Hampsfield Road as otherwise both would not have been shown on the plan and a single route could not have led to both Hampsfield and William Turner's inclosure. On behalf of objectors it was argued that if the inclosure commissioners had intended to award two routes they would have said so but the Award makes no reference to Hampsfield Road dividing in any way. Also, it was stated that the word *'Hampsfield'* as used on the plan should be interpreted as a general term applying to all buildings in the local area, including that now known as Home Farm, which was formerly known as Hampsfield Farm. The placing of the word *'Hampsfield'* on the plan was not necessarily significant as map makers would place such annotations wherever it was convenient and did not obscure other details. If this were the case, the route from W(B) to E could be interpreted as leading to both Hampsfield and William Turner's inclosure.
14. In my view, the description of Hampsfield Road in the Award is unambiguous as far as the route from Point W(B) to Point E (now RB 526038) is concerned. This is the only route linking the southern section of the road to William Turners inclosure. It is less clear whether the route from Point W(B) towards High Hampsfield Farm was also intended to form part of the same road. The term *'Hampsfield'* might have been a general term for an area which included William Turner's inclosure and it is difficult to understand why the Award did not state that the route split into two at point X(B), if this was what was intended. On the other hand, the route is marked on the Award Plan and presumably existed on the ground at the time, although there is no evidence that it was ever twenty feet (6.1 metres) wide.

15. Although the Inclosure Award describes Hampsfield Road as a '*private carriage and drift way*', it was argued on behalf of the OMA that this did not necessarily mean that the public did not have the right to use it. The Award makes clear that the route was to be maintained "*..by the inhabitants of the Chapelry of Broughton aforesaid in such manner as the public roads within the said division...*". Also, the Award contains no provision restricting use of the 'private' way to any individuals or groups. However, since the commissioners chose to describe both public and private carriageways in the Award, it must be assumed that there was intended to be some difference between them and an obvious reason for this could well have been that use of 'private' ways was restricted to a limited, albeit unspecified, class of user.
16. Overall, it is my view that it cannot be assumed that the Order route, or a route similar to it, was part of Hampsfield Road, awarded as a private carriage and drift way in the 1809 Inclosure Award. Furthermore, even if Hampsfield Road did include the route similar to the Order route that is shown on the Award Plan, the Award does not indicate the existence of public rights over it.

Commercial Maps

17. Two commercial maps prepared before the inclosure process, those of Cary (1778) and Yates (1786), do not show the Order route.
18. Greenwood's map (1818) indicates a route similar to the Order route as a 'Cross Road' as does Hennet's map (1829). Maps prepared by Paterson (1826) and Teesdale (1828) also show a similar route but have no key. Cary's 1/2" map (1830) shows a similar route as a 'Parochial Road'.
19. Twentieth century maps, mainly produced for cycling and motoring, such as those of Bacon (1901 and 1920), Philips (1920/30), Geographia (1920s), Bartholomew (1937) and Gail and Inglis (undated), do not appear to show a route similar to the Order route but do indicate one continuing from Point W (B) towards Home Farm.
20. These maps were drawn at small scale and some appear to be copied from others. They are also quite generalised and limitations imposed by the scale of the maps meant that features such as roads were drawn far larger than they would have been on the ground. Also, the maps do not differentiate between public and private routes, although it can be argued that, since they were generally prepared for use by travellers, they would have mainly included routes that were thought to be open to the public.
21. Overall, it is my view that it would be unwise to draw firm conclusions from these maps. However, the consistent inclusion of a route similar to the Order route on the small scale maps produced in the first half of the 18th century suggests that a route of some perceived significance existed on the ground at that time.

Other Plans

22. An Indenture of 1888 includes a covenant relating to the erection of a fence crossing the line of the Order route which was to have a gate "*at a suitable point*". The accompanying plan shows the Order route and other routes which appear to serve quarries. There is no indication of whether the route was subject to any public rights.

23. A plan accompanying deeds relating to High Hampsfield Farm, dated 1944, shows the Order route but also gives no indication of whether there were any public rights over it.
24. Plans of the High Estate from 1800 and 1865 indicate parts of Hampsfield Road further south than the Order route. This is annotated either "*Road from Hampsfield*" or "*To Hampsfield*", suggesting that the section shown formed part of a through route, although the line that this took further to the north is not indicated.
25. A sale plan of the Yewbarrow Estate dated 1874 also shows a section of Hampsfield Road further south than the Order route. This is annotated "*PUBLIC HIGHWAY*" and "*To Hampsfield*" but, again does not indicate whether the route continued along the Order route.

Ordnance Survey (OS) Maps

26. The earliest OS map of the area, the 1st Edition 6" map of 1845, shows a route similar to the Order route from Point W(B) to X(C1) and the route from Point W(B) to Point E and some other routes. Close to Point X(C1) two routes merge and a single route is shown continuing through the yard at High Hampsfield to Point Z(D). When this map was resurveyed and republished in 1888, the only route shown between Points W(B) and X(C1) was the Order route.
27. The OS 1st Edition 25" map (c. 1880) shows only the Order route (and the route from Point W(B) to Point E. The 25" map of 1913 shows similar information but also another route running from a point a short distance to the south of Point E to X(C1). This route is annotated '*F.P.*' (footpath), possibly suggesting that other routes not so annotated might have been something other than footpaths.
28. More modern OS maps, such as that of 1968, show the Order route (and the route from Point W(B) to Point E. The Order route is annotated '*Track*'.
29. OS maps can be taken as providing an accurate representation of features which existed on the ground at the time they were surveyed but they did not indicate whether or not there were any public rights over routes that were shown. However, they do confirm that a route along the line of the Order route has been in existence from some time before 1845 until the present day. Although other routes in the area have sometimes been shown the only two routes that appeared consistently throughout this period were the Order route and the route from Point W(B) to Point E, which is now part of RB 526038.

Finance Act 1910

30. This act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. This survey was carried out by the Board of Inland Revenue under statutory powers and it was a criminal offence for any false statement to be made for the purpose of reducing liability. The existence of public rights of way over land had the effect of reducing the value of the land and hence liability for the tax; they were therefore recorded in the survey.
31. High Hampsfield Farm and all the land crossed by the Order route were included in a large plot, No. 44, in the survey. The records for this plot indicate

that a deduction of £110 was claimed in respect of 2200 yards of footpaths and reference is made to the existence of "3 or 4 rights of way". The OMA has attempted to relate these references to known paths within the plot but concluded that, although it could be inferred that at least one more path was accepted as a public right of way than is currently recorded, it could not be stated with any confidence that this was intended to refer to the Order route.

Definitive Map Records

32. The Order route would not appear to have been indicated in any maps or statements prepared in connection with the definitive map prior to the making of the original order in 2005.

Aerial Photographs

33. Aerial photographs taken in 1963, 1974, 1983 and 1988 all show the Order route, indicating that it was probably evident on the ground throughout that period although providing no evidence of its status.

Conclusions regarding Documentary Evidence

34. The documentary evidence that is available indicates that a route running between Grange and High Hampsfield has existed since before 1800. The route changed when the land was inclosed but a route following the line of the current Order route appears to have existed for over 200 years. However, it is my view, for the reasons expressed in connection with each of the various documents referred to, that neither the Inclosure Award nor subsequent documents show that public rights of any sort subsist over the route.

Evidence of Use

Date when public use was brought into question

35. It was generally accepted that public use of the Order route was brought into question in 1993 when the ownership of High Hampsfield Farm changed and the new owners, Mr and Mrs Lockwood, took action to challenge users of the route or at least that part of it that passes through the farm yard (Points X(C1) to Z(D)). A sign was erected stating "No public right of way" and the gate at Point X(C1) was locked. The evidence of a number of users of the route corroborates that of Mrs Lockwood herself that the sign was erected and the gate locked in the late summer of 1993.
36. At the inquiry one witness, Dr Henderson, stated that she and her husband had been challenged when walking through the yard of High Hampsfield Farm in late 1987 or 1988. It appeared from her evidence that she and her husband were new to the area at that time and had missed the path they intended to follow and approached High Hampsfield from the south south-west but probably not by way of the Order route. The identity of the woman who challenged them was not known although she was said to have emerged from the farmhouse. At the time the landowners would have been Mr D Repton and his brother.
37. In the circumstances, I do not believe that this single isolated incident was sufficient to bring public use of the Order route into question or to indicate the landowners' lack of intention to dedicate it as a public right of way. Accordingly, it is my view that the 20 year period of public use required before

dedication of the Order route can be presumed under the 1980 Act runs from around September 1973 to September 1993 in this case.

Users' Evidence

38. A total of 49 people have provided evidence of their claimed use of the Order route over a period from the 1920s until 1993. All but one of these had provided evidence before the inquiry, mainly by completing User Evidence Forms (UEFs) but a few in the form of statements or letters. Some people submitted evidence in more than one form. In addition 8 people who had previously provided evidence also appeared at the inquiry along with one other who had not done so before.
39. Twenty five people claimed to have used the route solely on foot, 14 only on horseback, 6 both on foot and horseback, 2 on foot and bicycle, 1 on foot, horse and bicycle and one in horse drawn carriages. In total this means that 34 people claim to have used the route on foot, 21 on horseback, 3 on bicycles and 1 with carriages.
40. Six people made reference to having received permission to use the route from the landowner, although on analysis and in the light of further information there was some doubt as to whether the nature of the 'permission' really meant that all use by the people involved was not 'as of right' for the purposes of the 1980 Act. Another three people had only used the Order route before the commencement of the relevant 20 year period and one had only used it occasionally, after ensuring she was not observed following a challenge the first time she had used it. It would also appear that some users of the route, being local residents, were known to and themselves knew the owner(s) of the land during the relevant period. A number reported having seen and spoken to them for example. It was suggested that this meant that their use was effectively with the permission of the landowner but there was no evidence of any specific permission having been given and users stated that they themselves did not regard their use as being by permission.
41. Even if the evidence of all those who referred to having permission and those who only used the route before 1973 or used it covertly to some degree is disregarded, it still leaves evidence of use of the Order route by 27 people on foot, 18 on horseback, 2 on bicycles and 1 with carriages. A number of people also stated that they had seen others using the route.
42. These had all used the route during at least some of the period 1973 to 1993 and 15 had used it throughout that period. The frequency of use claimed varied from more than once per day to very occasionally. The majority of those providing evidence claimed to have used the route either monthly or less often. No users reported having been challenged or obstructed in their use before 1993 (with the exception of one person already referred to).
43. It was argued on behalf of objectors that it was unlikely that the route had been used as much as was claimed, particularly by horse riders, as such users or any evidence of their use had rarely been seen. Mr Fairfoull gave his expert opinion to the effect that use of the claimed route by horse riders would have left visible evidence in the form of hoof prints and droppings and yet neither users nor occupiers of the land had reported seeing such evidence. However, it seems possible to me that users of the route might have regarded such evidence of horse riders as being of no consequence to them and accordingly

not something that was remembered at some time later. There was also some suggestion that the nature of the surface of the route might have changed somewhat between 1993 and 2012.

44. On balance, it is my view that the available evidence of public use of the Order route in the period from September 1973 to September 1993 is sufficient to raise the presumption that the route had been dedicated as a public bridleway unless there is sufficient evidence that there was no intention during that period to dedicate it. However, there is not enough evidence of use with vehicles to raise the presumption that any higher rights had been dedicated.

Evidence of lack of intent to dedicate

45. During the relevant 20 year period, all the land crossed by the Order route was owned by the Repton family, by Mr R Repton until his death in 1986 and then by his sons until 1993.
46. There is very little substantive evidence of any action taken by landowners before 1993 to indicate a lack of intention to dedicate the Order route as a public right of way. There is a single report of a challenge made by an unknown woman in 1987 or 88 and some statements to the effect that Mr R Repton would not have allowed strangers to cross his land. However, there is no actual evidence of challenges being made by him whereas there is evidence of public use of the Order route without challenge.
47. Mr Denis Repton, who occupied High Hampsfield throughout the period 1973–1993 and was joint owner of the land crossed by the Order route from 1986 to 1993 has stated that he did not give permission to anyone to use the route nor did he stop anybody from using it on horseback although he also stated that nobody was using it on horseback after 1986.
48. A number of people who claim to have used the route reported having seen members of the Repton family when using it and speaking to them, but were not challenged in any way regarding their presence on the route. Mr D Repton confirmed in his written evidence that he had seen several people, who he was able to name, riding on the route (before 1986).
49. In the circumstances, it is my view that there is not sufficient evidence of action taken by landowners to indicate that there was no intention during the relevant 20 year period to dedicate the Order route as a public bridleway to negate the presumption that it was so dedicated.

Conclusion regarding Evidence of Use

50. The Order route can be presumed to have been dedicated as a public bridleway in accordance with the provisions of the 1980 Act as a result of public use in the period from September 1973 to September 1993.

Common Law

51. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
52. In this case, the claimed route appears to have been in existence for over 200 years and there is little evidence of any action taken by landowners to prevent

public use of it. There is also evidence that the public has actually used it since the 1920s. In these circumstances it would be reasonable to infer that the route had been dedicated as a public right of way at common law but, in view of my conclusions regarding the dedication of the route under the provisions of the 1980 Act, I have not felt it necessary to pursue this aspect further.

Other Matters

53. It was submitted on behalf of the OMA that in the judgement in the *Whitworth* case no fault was found in the previous inspector's reasoning and conclusions with regard to the existence of bridleway rights over the Order route. It appeared to be suggested that in the light of this the current Order ought to be confirmed. However, it is my view that the court in the *Whitworth* case did not review the inspector's analysis except in so far as to satisfy itself that there was at least some evidence to support his conclusions and that they were not irrational. I must now deal with the new order on the basis of the evidence submitted in connection with this. Although much of this may well have been considered previously, not all of it was and I am not constrained in reaching my conclusions by previous decisions made by an inspector or indeed the court, except in so far as questions of law are concerned. I have therefore considered the current Order entirely on the basis of the evidence submitted to me in relation to that Order.

Conclusions

54. Having regard to these and all other matters raised, I conclude that the Order should be confirmed.

Formal Decision

55. I confirm the Order.

Barney Grimshaw

INSPECTOR

APPEARANCES

For the OMA

Robin Carr Consultant, representing Lake District National Park Authority (LDNPA)

Who called:

Mrs Jane Pape Path user (on foot and horseback)

Mrs Jean Rogers Path user (on horseback)

Mr Donald Harding Path user (on foot and bicycle)

Mrs Wendy Bowen Path user (on foot and horseback)

Dr Lis Fell Path user (on foot and horseback)

Mrs Carol Winder Path user (on foot, horseback and bicycle)

Mrs Lucy Calvert Path user (on horseback)

Mr Nick Thorne Countryside Access Advisor, LDNPA

Objectors

Anthony Elleray QC Counsel, instructed by Helen Clutterbuck, Napthens Solicitors, representing Mr B Whitworth on behalf of Mrs Whitworth and Mr & Mrs Pimblett.

Who called:

Mr Dennis Crowe Nephew of former landowner

Mr Michael Roscoe Resident of adjoining property and path user.

Mr Geoff Fairfoull Senior Equine Consultant, ADAS

Mrs Maura Lockwood Former landowner

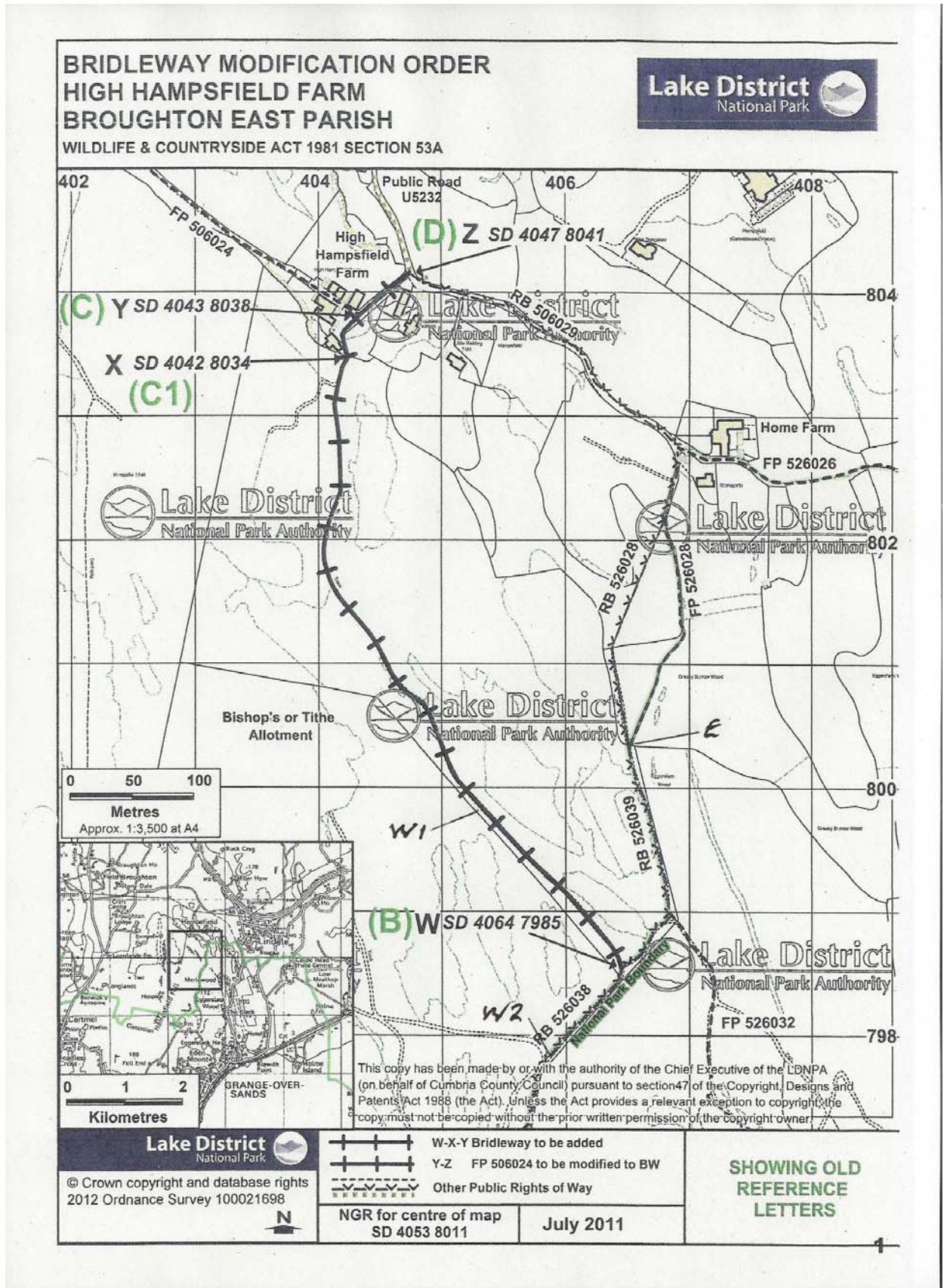
Dr Meg Henderson Path user (on foot)

Mr Barrie Whitworth Acting for current landowners

Mr David Andrews Cartographic Survey and Mapping Consultant

DOCUMENTS

1. Undertaking on behalf of objectors with regard to the transcript of inquiry proceedings.
2. Statement of Case and supporting documents, LDNPA.
3. Proof of Evidence of Nick Thorne.
4. Statement of Case and supporting documents on behalf of Mrs Whitworth and Mr & Mrs Pimblett.
5. Statement of Patrick Lowe.
6. Representation of Mr A Kind.
7. Copies of diary entries in connection with visits to badger setts, Dr Henderson.



Map not to original scale