

REGULATORY COMMITTEE
6th OCTOBER 2004

SHERSTON: CLAIMED BYWAY AT PINKNEY

Purpose of Report

1. To consider objections received to the making of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 and determine which stance to be taken when the Order is forwarded to the Secretary of State for the Environment.
2. If the Order is confirmed by the Secretary of State and in view of the environmentally sensitive nature of the site, to seek approval for the making of the following:
 - An application to the Magistrates' Court, under Section 116 of the Highways Act 1980, to stop up entirely the vehicular rights; and
 - A Road Traffic Regulation Order, under Section 22 of the Road Traffic Regulation Act 1984, to prohibit all other use (equestrian and pedestrian) for a certain period of the year.

Background

2. The Order provides for a byway open to all traffic to be added to the Definitive Map and Statement over what is considered to be the old ford crossing of the River Avon, adjacent to Pinkney Bridge, as shown between points A-B on the attached plan at **Appendix A**.
3. Early in 1999 Sherston Parish Council made enquiries of the Authority as to the possibility of the protection of what was perceived to have been the traditional, accepted public access to the River Avon. It was considered that the crossing of the river, adjacent to the historical bridge, was an 'old public ford'. A location plan is attached at **Appendix B**.
4. The Parish Council's desired status for the area, disregarding what any evidence may prove, was for pedestrian access. It was considered that any status higher than this would have a detrimental effect on the river, wildlife, flora and banks.
5. The situation is complicated by the fact that the river in the vicinity of the site has been assessed to show it supports populations of protected species including the native white clawed crayfish, bullhead, brown trout and probably brook lamprey.
6. An Ecological Appraisal of the site has been undertaken by the Authority and this is attached at **Appendix C**.
7. A preliminary investigation was undertaken to assess whether there could be sufficient historical or documentary (map) evidence available to support the Parish Council's contention that the crossing was a ford (a highway of some category) to enable the Parish Council to submit a formal claim to add the way to the Definitive Map and Statement pursuant to Section 53 of the Wildlife and Countryside Act 1981.

8. No evidence was uncovered which specifically showed a “ford” at the position in question. However, some evidence showed that there were possibly areas of land additional to the strictly required line of the existing road, to the west side of the bridge crossing, to both the north and south sides of the river, which could be part of the highway, intimating the ford crossing.
9. The map evidence was somewhat anomalous and was not considered sufficient on its own, on the balance of probabilities, to merit making an Order, pursuant to Section 53 of the Wildlife and Countryside Act 1981. The Parish Council was advised at the time that the only other option was to claim that the way had come into being by usage pursuant to Section 31(1) of the Highways Act 1980.
10. No formal application for a Modification Order had been received by the Authority at this stage. In view of this the Parish Council were simply advised, in a letter dated the 26th February 1999, that:

“Not only does the evidence not appear strong enough to support the claim. A byway would not be favoured, I understand, by the Parish Council or others because of the environmentally sensitive nature of the crossing. It would also fail in the test required in respect of the definition of a byway before a claim may proceed.”
11. In July 1999, after making enquiries of use and from its own local knowledge, Sherston Parish Council resolved that it would be appropriate to submit an application to claim the ford as a public right of way based on “evidence of regular and continuous use by ‘horses and people over generations’.” However, because local feelings were now running very high, both for and against such a course of action, it is believed the Parish Council was somewhat reluctant to proceed.
12. On 20th August 1999, however, Mr. and Mrs. S. Livingstone-Learmonth elected to submit an application for an Order under Section 53(3) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by adding a bridleway in the position of the alleged ‘ford’.

Main Considerations for the Council

13. The legal definition of a bridleway, pursuant to Section 66(1) of the Wildlife and Countryside Act 1981 is “A highway over which the public have the following, but no other rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without the right to drive animals of any description along the highway”. (Section 30 of the Countryside Act 1968 gives the public the right to ride bicycles on bridleways, provided that they give way to walkers and horseriders. This right is subject to any orders or bylaws which may be made to prohibit cycling on a particular bridleway).
14. In support of the application some 25 user evidence forms were received containing evidence of use from 29 persons whose names are listed in **Appendix D**.

15. Clarifying Statements were taken by the Authority from nine persons, eight of whom had submitted user evidence forms (paragraph 14) with the addition of John Richards, who is Mrs. P. Richards' husband (No. 6 in **Appendix D**). These statements, from a large proportion of the longest users (listed in **Appendix E**), corroborated and expanded upon the user evidence. Preliminary statements in the form of Statutory Declarations were also received prior to the formal application for the way, via the Parish Council, from 10 persons, all of whom (apart from No. 8) later submitted user evidence forms (see paragraph 14). Their names are also listed in **Appendix E**.

16. Land Ownership

- (a) Mr. and Mrs. R. Hill have owned Avon Cottage, which is situated to the south of the river adjacent to the bridge, since 1981. Mr. A.R. Jones owns Bridge Cottage, which he inherited in 1976 just to the north of the bridge. Mr. Jones has stated he believes he owns the area of land to the north of the river over which the ford is alleged to run. However, this land was not declared as being in private ownership in 1910, pursuant to the Finance Act, and although Mr. Jones has been asked for proof of ownership none has been forthcoming. It is believed that Mr. and Mrs. Hill have registered the southern bank in their title with riparian ownership to the centre of the river at the Land Registry but not the southern part of the alleged ford leading to the river (immediately adjacent to the bridge).
- (b) The southern part of the crossing from the access from the road to the river itself, between the road and the Hills' registered title, has no other known registered owner. The Hills have, however, successfully registered a right of way across the southern part of this area, from the road to the property boundary.
- (c) A Caution has been lodged under Section 53 of the Land Registration Act 1925 over the whole of the area between the road and the Hills' registered title, as follows:

“(12th January, 1998) CAUTION in favour of Thomas Lestock Somerville Livingstone-Learmonth of Park Farm, Pinkney, Malmesbury, Wiltshire, SN16 0NX against the first registration of the freehold land shown and tinted pink on the filed plan of the above title number filed at the Registry and being land on the south side of the River Avon, Pinkney, (SN16 0NX).”
- (d) The statutory declaration accompanying the Caution sets out that the cautioner is interested in the land as the owner and occupier of Park Farm, Pinkney (Park Farm). “My family and I, since first coming to Park Farm in 1968, and our predecessors in title have exercised a right of way for the purposes of washing and watering of horses and cattle. At no time have I or my family ever sought anyone's consent for exercising this right and I believe also that there are other families in the area who exercise a similar right.”

Reasons for the submission of the application

17. The application has been prompted by the increasing attempts over time by Mr. and Mrs. Hill to prevent use of the river by the public, particularly with horses.

Legal Considerations

18. The matter has now been formally lodged with the Authority by way of an application pursuant to Schedule 14(1) of the Wildlife and Countryside Act 1981, to be determined under Section 53 of the Act, which places a duty on the Authority to keep the definitive map and statement under continuous review.
19. Section 53(2)(b) states:
- “As regards every definitive map and statement the surveying authority shall:-*
- b) *as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.”*
20. The events referred to in subsection (2) (b) are set out in Section 53(3)(b). The relevant event for the purposes of the current application is:
- “the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path.”*
21. The statutory presumption of dedication allows that dedication of a way as a highway can be presumed after public use for 20 years. Section 31 of the Highways Act 1980 sets out the elements that must be satisfied for dedication to be claimed. The relevant parts of the section state:
- 1) *“Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*
- 2) *The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*
- 3) *Where the owner of the land over which any such way as aforesaid passes:*
- a) *has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*
- b) *has maintained the notice after 1st January 1934, or any later date on which it was erected,*
- the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*

- 4) *In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.*
 - 5) *Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway."*
22. Section 31(1) states that after a period of use of the way by the public for 20 years, the landowner will have dedicated the way as highway by accepting and permitting such use. It is established through case law that the inference to be drawn is that a person (the landowner) who had the legal capacity to grant to the public a permanent right of passage intended to and did dedicate the way. Conversely, in *Jaques v Secretary of State for the Environment*, Laws J. accepted that if a landowner seeks to establish that he had no intention to dedicate "he must prove it by overt acts, directed (as Lord Denning indicated in *'Fairly v Southampton County Council*) to the public who use the way in question.
 23. Section 31(2) deals with the calculation of the 20 year period and Section 31(3) relates to when the right of the public to use the way is first brought into question. This must be at the instigation of the landowner. There must be evidence of some overt acts on the part of the landowner to show the public at large that he had no intention to dedicate. The required 20 year period of public use would be counted back from this date.
 24. Since there appears to be no known landowner, any signs or notices which have been erected on the land by a third party have no legal force. In view of this, the 20 year period of use of the way by the public would be calculated from the date of the application to the Authority to add the way to the Definitive Map and Statement.
 25. At the time of the application the legal test being used to determine whether byway status could be claimed was governed by the decision in *R v Wiltshire County Council ex parte Nettlecombe Ltd* (1998). This judgement decided that to claim a byway it must strictly accord with the wording of its definition as set out in Section 66(1) of the Wildlife and Countryside Act 1981 and be currently used by the public on foot, on horseback and with vehicles and in the correct proportions. This judgement has now been overturned by the case of *R v Secretary of State for the Environment, Transport and the Regions, ex parte Masters* (2000). The Court of Appeal's view was that Parliament's intention was to preserve rights of way to give access to the countryside for walkers and horse riders. Parliament also intended to include ways over which the public had vehicular rights, even if the rights were rarely, if ever, exercised by the public. The definition of byway is referring to a type of highway. It does not seek to limit byways open to all traffic to those which are currently and actually used. It would cover, for example, public carriageway roads that have fallen into disuse but whose character makes them more likely to be used by walkers and horse riders than by vehicles.

26. At the Court of Appeal, Lord Justice Roch upheld the judgement of Hooper J. in Masters. He stated:-

“Parliament did not intend that highways over which the public have rights for vehicular and other kinds of traffic should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than vehicular traffic because they were more suitable for use by walkers and horse riders than by vehicles. Indeed, where such ways were previously shown in the maps and statements as roads used as public paths, Parliament made it obligatory that they continue to be shown on maps and statements when these were reviewed after 28th February 1983.”

27. The decision has now clarified the “user test” to be applied. A Modification Order adding a byway open to all traffic will be appropriate where historical evidence of vehicular use exists but recent public use was exclusively by walkers or horse riders or both or such use exceeded all the other public use. The test for a carriageway to be a byway open to all traffic relates to its character or type and in particular, whether it is more suitable for use by walkers and/or horse riders than vehicles.
28. It is clear from the Land Registry information (set out in paragraph 16 above) that there is no registered owner of the southern access to the river, between the road and the Hill's property, Avon Cottage. This situation is corroborated by evidence contained in the Tithe Award of 1842, the Finance Act map of 1910 and other map evidence.
29. A similar situation appears to exist in respect of the northern access to the river. Mr. Jones of Bridge Cottage purports to own it but has not produced any title to it. No information can be obtained from the Land Registry as the land has not been submitted for first registration. The land is detached from Bridge Cottage, being situated on the other side of the main village road. It is not shown as being in private ownership under the Finance Act 1910 nor being subject to tithes in the Tithe Award of 1842.

The Consultation Procedure

30. Prior to any public consultation exercise by the Authority and to the submission of the application, letters of objection or representation were received by the Parish Council and forwarded to the Authority on 28th July 1999. The Parish Council also forwarded a petition containing 17 signatures against any access to the river, based mainly on environmental issues and the effect that the hunt and dogs would have on the area. The signatories to the petition are as follows:

- | | | | |
|-----|------------|-----|----------------------|
| (a) | P. Cutcher | (i) | A. Spencer |
| (b) | S. Cutcher | (j) | L. Howells |
| (c) | Pettit | (k) | M. Brownlow |
| (d) | Pettit | (l) | H. Gibb and Family |
| (e) | D. North | (m) | A. Pattie |
| (f) | T. Pattie | (n) | M. Watson and Family |
| (g) | G. Pattie | (o) | A. Watson |
| (h) | J. Pattie | (p) | D. Walsh and Family |

31. The Parish Council produced and forwarded with the above a résumé of the objections and representations and this is attached at **Appendix F**.
32. Correspondence was also received directly by the Authority at this time from the two affected property owners, Mr. R. Hill (letters dated 2nd February, 3rd July and 13th September 1999, 4th October 2000 and 16th July 2001) and Mr. A. Jones (21st February 1999) objecting to what was being preliminarily proposed. Letters objecting to the proposals on environmental grounds were also received from Mr. A. Spencer (31st January 1999), Mr. and Mrs. Watson (28th February 1999) and the Environment Agency. A letter of support was received from Mrs. P. Livingstone-Learmonth (19th May 1999) on the grounds of usage and a letter from the Parish Council (16th July 1999) informing the Authority of its decision:-

"Council resolved to request that an appropriate right of way be designated immediately adjacent to and upstream of the Avon Bridge. Council wishes the rights to be restricted to pedestrians and equestrians only with vehicular traffic prohibited"

Formal Public Consultation

33. A formal public consultation exercise was carried out in May 2003 and the objections and representations received are listed in **Appendix G**.

User Evidence

34. The Witness Evidence Forms and the subsequent statements show that the majority use of the way has been as a bridleway. Only four out of the twenty-nine witnesses say they used the route on foot with two crossing the river and two not. With regard to equestrian use, approximately half indicated in their original Witness Evidence Forms that they used the way over the south bank only, into the river and along it to varying degrees, and back out again over the south bank. The other half showed that they had used the way in both directions across the river using both the south and north banks. Upon subsequent investigation it transpired that those who showed they had used the south bank only had admitted such use because they had assumed it was the south bank in dispute. They had not used the northern bank for some years for the reasons set out in paragraph 35 below. To rectify this, revised plans were submitted showing journeys across the river using both banks. The subsequent statements corroborate this position.
35. Use of the way as a bridleway is evidenced as far back as 1930. There are over twenty witnesses who say they have used the way as a bridleway for periods in excess of twenty years. It does appear, however, that use of the northern bank began to diminish in the early 1980s when Mr. Jones of Bridge Cottage began to take responsibility for its upkeep and maintenance. It is probable that the northern bank, in fact, has not now been used for a number of years because Mr. Jones maintains it to such a high standard that users were reluctant to cut up the grass with the horses' hooves.

Conclusion regarding User Evidence

36. It is considered that there is sufficient user evidence (i.e. more than eight persons who have used the way as a bridleway for periods in excess of twenty years) to satisfy the criteria set out in Section 31 of the Highways Act 1980, for a presumption of dedication of the way as a bridleway and therefore an Order could be made under Section 53 of the Wildlife and Countryside Act 1981. However, because there appears to be (and always has been) no known owner of the land over which the way passes, an Order cannot be made on this basis alone (see paragraph 23).

Other Evidence

37. It can be seen from the above that there has been significant use of the way since 1930. This is evidenced by the Witness Evidence Forms and the subsequently taken statements.

38. Other more detailed evidence has been given in correspondence as follows:-

- (a) Letter dated 10th April 1999 from **Mr. W.H. Pritchard** to the Parish Council:-

- (i) "The Avon Bridge at Pinkney was repaired during the 1960s which necessitated it being closed for several days. During this time, access was available through the ford, immediately upstream of the bridge, and it was improved for this use by the importation of a considerable amount of gravel from South Cerney. Remnants of this "as dug" gravel can still be found close to the bridge and garden on the north side and probably also on the south bank.
- (ii) In the 1970s a geological/seismographic survey was carried out involving the drilling of three or four boreholes and probably the detonation of charges. This all took place in the open area on the north bank.
- (iii) I recall that in 1980 or thereabouts, the Parish Council planted two trees on the north bank, meant to indicate the Council's belief that this was a public space which it wished to be retained.
- (iv) The upstream side of the bridge has been used for horse washing for as long as I can remember, with access being gained from both sides of the river."

- (b) Letter dated 19th April 2003 from **Ms E. Hinton** to the Parish Council:-

- (i) "In the 1940s my father-in-law owned Leatts Farm.... I live at Leatts Farm, there was not any mains water. The drinking water was brought every day on the milk lorry in two churns for domestic use. The water for the cattle, horses, poultry and other farm use was drawn every day from the river, which was one of my husband's jobs. He would take the horse and the large water barrel onto the hardstanding right of way, which is a crossing through the river, and fill the barrel.
- (ii) This right of way was for the use of horses, carriages and of course cattle for all time.

- (iii) In the last war cattle were driven through the river (over the hardstanding) by drovers as petrol was scarce and cattle went to market in that way - on foot."
- (c) Letter dated 18th March 1999 from **Mr. W.F. Goodenough Hillier**:-
 - (i) "Having lived the whole of my 71 years at the above address and my ancestors for the previous 320 years, I can recall a considerable history of this local area.
 - (ii) Throughout this period to my knowledge and that of my forebears there has always been a right of way across the shallow bed of the river at this point.
 - (iii) During the first 10 years of my working life the farms in this area relied mainly on cart horses to work the land, the two farms at Pinkney being no exception, their working horses being regularly watered at this point in the river by the then Carter and Stockman Mr. Dick Puter
 - (iv) There is no doubt this was used long before the building of the road bridge. Stepping stones were still there when I fished for minnows as a young boy.
 - (v) My great great grandfather was riding that way on horseback, having graduated from Oxford University in 1647. It has been used for pleasure by many generations ever since"
- (d) Letter dated 21st February 1997 from **Mrs. R. Thomson** to the Parish Council:-

"I have lived in and around the area all my life and have used the river for 30 years. We used to be able to cross the river from one bank to the other, but some time ago Mr. Jones from Bridge Cottage started mowing the grass and all riders stopped crossing but went in and out on the same side. The south side owned by the Highways"
- (e) Letter dated 14th May 2003 from **Mrs. D.J. Gleed**:-

"I've known it to be used as a public area for the last 54 years."
- (f) Letter dated 5th July 2003 from **Mrs. M. Matthews**:-

"It is important to keep open these old drovers' ways as part of the river's heritage...."
- (g) Letter dated 20th May 2003 from **Mr. W.F. Goodenough Hillier**:-
 - (i) ".... Previous generations of my long established village family were able to use this medieval ford to cross the River Avon on horseback before the building of the bridge in 1740.
 - (ii) The approach to this former ford from the north has become silted over the years and has now been grassed over...."

Additional Considerations

39. There would almost certainly have been a ford in situ, prior to the construction of the bridge. The proven date of the construction of the bridge is, however, not known. There appears to be no known owner of either the northern or southern areas of access into the river. This is further corroborated by more detailed evidence given in correspondence. No ownership in itself is indicative that the areas are, and always have been, regarded as part of the public highway. In such a remote area, it would almost certainly have been the case that those moving livestock and riding horses in this area would have taken advantage of the river for the animals to drink.

Map Evidence

40. The known map evidence was assessed in early 1999 after the initial enquiries by the Parish Council. The Authority's response at that time, based purely on the then known map evidence only, was that it was not sufficient to recommend the making of a Modification Order. This evidence was as follows:-
- (i) **Andrews and Dury's Map of Wiltshire dated 1773** - Indicates the bridge only with access road to farms.
 - (ii) **Plan showing "Certain Estates in the Parishes of Sherston and Pinkney", c.1840** - A more detailed plan which shows areas to the north and south of the river, on the ford side, as part of the road network. The road now continues south to connect with Foxley Road.
 - (iii) **Plan of the Tithe Award (Commutation Agreement) dated 29th August 1842** - Again a larger scale plan showing both the surveyed northern and southern access areas down to the ford. The southern area is coloured as part of the road network. The northern area is not but braced as included. The areas are not subject to Tithe Apportionment. Areas on the opposite side of the bridge are also shown coloured (as highway) and there are other discrepancies in the vicinity. The Award is therefore considered anomalous in respect of what it evidences as highway.
 - (iv) **The Finance (1909/10) Act 1910** - The plan for the area, scale 1:2500, shows both the southern and northern access areas to the river not declared as being in private ownership and therefore not assessed for tax purposes. The inference from this is that they were considered as forming part of the public highway at the time and not taxable.
41. However, in view of the subsequent properly submitted application to add the ways to the Definitive Map and Statement, and taking into consideration all the other evidence in paragraphs 34 to 38, further research into the map evidence was undertaken. The original map evidence has been reassessed and some other supporting map evidence uncovered. The further map evidence is as follows:-
- (i) **Quarter Sessions Order 1904** - Diverts part of the road (full highway) which is currently not recorded in the highway records as such, giving credence to the evidence suggesting the way was a through route from the B4040 Malmesbury Road to the C68 Foxley Road, for all traffic from at least the mid 1800s and the possible requirement for the ford.

- (ii) **1st Edition Ordnance Survey, one inch, published 12th August 1828** - Shows the whole of the road between the B4040 and the C68 on its pre-diversion route. Pinkney Bridge is surveyed on the route and also both the southern and northern access areas to the river crossing (ford) adjacent to it.
- (iii) **Ordnance Survey, one inch, later Edition, c.1852** - This shows the same situation as set out in (ii) above but much more clearly.
- (iv) **E. Weller's Map of Wiltshire 1862, Bacon's Map of Wiltshire c.1876 and Philip's Cycle Map c.1890** - These commercially produced small-scale maps all show the complete road in existence between the B4040 and the C68.

Conclusions regarding the evidence as a whole

- 42. The vast majority of objections received regarding this proposal prior to making the Order are on environmental grounds or that it is simply not desirable. These are, of course, matters the Authority cannot take into consideration when determining the issue. It is not a question of whether the ford is desirable or the effect it may have on land or on anyone's interest. It must rest on whether the evidence uncovered, in its entirety, suggests on the balance of probabilities that a right of way is reasonably alleged to subsist over the route in question.
- 43. Ownership of both the southern and northern access areas to the river has been assumed by third parties. In respect of the southern area in particular, the assumed owners have alleged trespass by users. There is much conflicting evidence regarding verbal challenges to use and the alleged erection of notices on the route at differing times. However, evidence shows that the land forming the access areas to the river is not, and has not been, in private ownership and therefore any challenges and erection of notices by third parties, and indeed the question of trespass, have no legal status in determining the matter. This position also prevents the Authority making an Order based solely on use, as stated above at paragraph 36.
- 44. Case law has now changed to enable a byway to be added to the Definitive Map (see paragraphs 25 and 26).
- 45. It is considered that the weight of the evidence, including historical, documentary, map, user and that provided in correspondence, in total supports the contention that, on the balance of probabilities, a right of way is reasonably alleged to subsist over the route in question.
- 46. It is further considered that the said evidence, based on the above criteria, suggests the route would historically have been and therefore still is today a highway for all purposes.

The Order

- 47. In view of the above conclusions an Order was made under Section 53(2) of the Wildlife and Countryside Act 1981 on the 27th November 2003 and advertised in the local press and on site on the 4th December 2004. The statutory period in which objections or representations to the Order could be made was extended to the 20th February 2004.

Representations and Objections received

48. Representations in support of and objections to the Order were received by the Authority within the relevant period from the persons whose names are listed in **Appendix H**.
49. All of the 20 statutory objectors' main reasons for objection were on environmental grounds. Other objections against the Order break down as follows:-

Objection	Objector
The existing bridge means there is no need for a ford crossing	1, 2, 4, 5, 11 and 16
Never seen anyone using the way	1, 9, 12, 15, 16 and 17
There must be confusion over the route	1 and 12
Failure to protect other byways in the county	3, 5, 8 and 10
No recreational or other benefit	5 and 19
Danger of 4 x 4s and access onto road	12
Dislike of 4 x 4s, noise and damage	13, 16, 17 and 19

50. All of the 41 representations received fully support the making of the Order with the vast majority also indicating support for the proposed full closure to vehicles and/or closure for all use during the trout spawning season. Two persons (6 and 8) state that any restriction on use was unnecessary as it had always been used without any detrimental effect.

Consideration of Objections

51. It is considered that none of the objections received bring any evidence which might change the conclusions set out in paragraphs 42 to 46.

Environmental Impact of the Recommendation

52. The site lies within the designated Cotswolds Area of Outstanding Natural Beauty (AONB).
53. The River Avon, in this vicinity, has been recognised as being of County importance for its wildlife and designated as County Wildlife Site Ref. No. ST.96.43.
54. The area supports an important population of native white clawed crayfish, currently free of crayfish plague and which is a species receiving statutory protection under the Wildlife and Countryside Act 1981.
55. The Authority has been informed by the Environment Agency that the river at the location in question also contains species of fish, such as bullhead and freshwater lamprey which are included in Annex II of the European Habitats Directive. White clawed crayfish are also included in Annex II of the Habitats Directive. Whilst this does not in itself accord these species specific protection, it contributes to the environmental importance of the site. Dependent on the results of the ecological survey by the County Ecologist (see below), the presence of this assemblage of species of European importance may increase the ecological value of the River Avon in this vicinity to national or international importance. Bullheads are found at the site all year and use it for spawning during April, May and June.

56. This section of the Sherston Avon is a valuable spawning area for brown trout. Under the Salmon and Freshwater Fisheries Act 1975, Part 1 provides that it is an offence to wilfully disturb any spawning fish or any bed, bank or shallow where any spawn or spawning fish may be found. The closed season for brown trout for the Sherston Avon is 15th October to 1st April. However, there may be spawning fish outside these dates. This will be dependent upon weather conditions from year to year.
57. The Environment Agency has also raised concerns about the possible physical damage which could be done to the river bed and banks. It is suggested that treading in of the banks will raise bed levels just upstream of the bridge and increase the local flood level. Treading in of the banks may also cause damage to the crayfish habitat. White clawed crayfish are known to reside in burrows in the banks of rivers and consequently damage to the banks may result in the death of individual crayfish.
58. Wiltshire Wildlife Trust has raised concerns regarding the above but also in respect of the habitat of other wildlife in the environs, including little grebe and kingfisher. The Agency also suggests that the trampling of the river margins would have a detrimental impact on wildlife by way of the following:
- (i) Loss of marginal plants;
 - (ii) Loss of cover and nesting habitat that these plants provide;
 - (iii) Loss of invertebrates associated with marginal plants with a localised impact on grey wagtails and bats in particular, which feed on insects;
 - (iv) Loss of plant root systems which would lead to de-stabilising of the margins and a consequential increase in erosion and siltation load in the river (considered a potential threat to the trout spawning areas as well as to the crayfish).
59. Because of the possible negative environmental impact of the Recommendation, the County Ecologist was tasked with undertaking an Ecological Appraisal of the area over which the route is proposed (see paragraphs 6 and 63 and **Appendix C**).

Proposals for a Traffic Regulation Order

60. In view of the environmental impact a byway across the ford might have, it has been stated, in response to all objections based on environmental grounds, that if the Order is confirmed, the Authority would be minded to also make a Road Traffic Regulation Order prohibiting vehicular use of the way entirely, as such use would be considered completely inappropriate.
61. It has also been stated that the Authority would take into account the trout spawning season by including in the Order a complete prohibition of use i.e. vehicular, equestrian and pedestrian, during the period 20th December to the end of March each year.
62. The Environment Agency has recently reassessed the length of time it is appropriate to have a complete prohibition of use. It is suggested that such prohibition should also be for the period that the bullheads spawn to include the months February to June, and to extend the prohibition for the trout spawning from 15th October to the end of March.

63. The Authority's (County Ecologist's) recommendations are set out on page 11 of the Ecological Appraisal (**Appendix C**). In the light of the findings, it is now thought appropriate to extinguish the vehicular rights entirely to avoid the way being shown as a byway on the Definitive Map if the Order is confirmed. It is considered this should diminish the possibility of illegal use and the repercussions of such.
64. The proposed Road Traffic Regulation Order to be made under Section 22 of the Road Traffic Regulation Act 1984 would now be required to restrict the remaining equestrian and pedestrian use only for the period October to May each year on the grounds of "conserving its flora, fauna and geological and physiographical features" pursuant to Section 5, as amended by the Countryside and Rights of Way Act 2000.
65. The Ecological Appraisal concurs with the Environment Agency's revised views (paragraph 62) in respect of the trout spawning season, recommending prohibiting all use for the period October to April. It also recommends including May to protect brook lamprey.
66. The foregoing effectively means that the public would be unable to use the byway during the period October to May. In other words, it could only be used by pedestrians and equestrians during the period June to September. It is considered, therefore, that the Road Traffic Regulation Order should be made as recommended.
67. If appropriate, the Authority could write to the Inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs to determine whether the Order should be confirmed requesting that if the Modification Order is confirmed a sufficient period is allowed before the Order comes into operation for the process of advertising and seeking confirmation of the Traffic Regulation Order and applying to the Magistrates' Court for the Extinguishment of vehicular rights. Subject to the Orders being confirmed, this should ensure that the byway would not be open to traffic until the Traffic Regulation Order and Extinguishment Order were in place to provide the required protection to the environment.

Risk Assessment

68. There are obvious risks associated with the use of a ford across a river by both pedestrians and equestrians, particularly at times of high water or flood, but these are not matters which can lawfully be taken into consideration under Section 53 of the Wildlife and Countryside Act 1981.

Financial Implications

69. The Authority has a duty to determine this matter pursuant to the relevant legislation. The result of this, in this particular case, is that there will be the associated costs of the almost certain Public Inquiry and further costs associated with the proposed Road Traffic Regulation Order and extinguishment application to the Magistrates' Court.

Options Considered

70. There are statutory procedures to be followed associated with the duty to make Section 53 Orders which the Authority has no choice but to adhere to. In cases where no objections are received to the making of an Order, the Order-making Authority may confirm it as unopposed. Where objections are received and not withdrawn, the Order and all associated papers must be forwarded to the Planning Inspectorate for determination by the Secretary of State.

After determining the strength, validity and nature of the objection, the Authority may submit the Order recommending one of the following three stances that:-

- (i) The Order be confirmed.
- (ii) The Order be not confirmed.
- (iii) The Authority takes a neutral stance at any Public Inquiry.

Reasons for Recommendation

71. To comply with the statutory requirements.

Recommendation

72. That:-

- (i) The Order providing for an additional byway to be added to the Definitive Map adjacent to the existing bridge at Pinkney, Sherston, be submitted to the Secretary of State for the Environment, Food and Rural Affairs for determination with the recommendation that it be confirmed;
- (ii) An application be made to the Magistrates' Court, under Section 116 of the Highways Act 1980, to stop up the vehicular rights on the grounds that they are unnecessary for public use, reserving the pedestrian and equestrian rights thereover;
- (iii) A Road Traffic Regulation Order be made, under Section 22 of the Road Traffic Regulation Act 1984, to prohibit all other use (equestrian and pedestrian) for the period October to May each year on the grounds of "conserving its flora, fauna and geological and physiographical features", pursuant to Section 5, as amended by the Countryside and Rights of Way Act 2000;
- (iv) The Authority (County Ecologist) monitors the use of the crossing and annually surveys the crayfish population to determine the impact of the use of the way on the ecological value of the old ford crossing.

GEORGE BATTEN

Director of Environmental Services

Report Author

ALAN HARBOUR

Rights of Way Officer

The following unpublished documents have been relied on in the preparation of this Report:

Correspondence with Parish and District Councils, Environment Agency, English Nature and other interested parties.