



The Trails Trust

Registered Charity No. 1094139 www.thetrailstrust.org.uk

The Charity that creates, improves and preserves access to the countryside for all - on foot, bicycle, ridden and driven horse and disabled conveyance.

The unforeseen consequences of extinguishing historic public rights of access to the countryside as planned in 2026.

Briefing - December 2021

This briefing is intended to give a short overview only and will be followed by a more comprehensive paper.

1. Background

The Countryside and Rights of Way Act 2000 (section 53) introduced a cut-off date for adding historic paths to definitive maps. The cut-off date is currently 31st December 2025 beyond which all public rights to these paths will be extinguished.

2. The argument

The arguments advanced by Government for closing Definitive Maps are:-

- To give certainty to landowners in knowing where rights of way exist
- To balance the (initial) unpopularity of right to roam legislation

TTT considers that the public and Government policy interest in preserving and recording unrecorded and under recorded ways, far outweigh arguments about certainty and balance for landowners - especially where this involves preserving valuable green lane infrastructure through a legally binding recording in perpetuity on Definitive Maps.

Trails Trust members and others have identified a large number of emerging and damaging unforeseen circumstances which also extend to the Deregulation Act 2015 recommendations.

These unforeseen consequences need to be explored in detail but this briefing offers a very strong indication of how the public and Government policy will be adversely affected.

3. The solution is to address current Definitive Map recording process through negotiation with all those involved, mitigating issues and streamlining Definitive Map application and determination processes.

4. Certainty?

4.1 The Government is continuing down this path because landowners want certainty about the historic rights of way that exist on their land but if the public can find unrecorded ways, why can't landowners? This data is readily available.

4.2 The Trails Trust questions if consigning historic public rights to the bin is really what landowners and land managers want – or is it what their representatives think they want?

4.3 The Discovering Lost Ways Outcome of the Review March 2008
<https://studylib.net/doc/7527967/discovering-lost-ways---the-institute-of-public-rights-of>
Stated

‘Evidence would suggest that ...the majority (of lost ways) are sunken, walled or hedged lanes which impact little on land use or farming activity. There are clearly issues for individual landowners who find an application submitted for a new route on their land.

However, the scale and impact perhaps is less than perceived...’

4.4 TTT officers have talked to landowners and farmers for over 40 years about unrecorded rights of way. TTT interviewed 50 landowners and farmers in the Mendip Hills AONB ELMs test 159 where the subject of unrecorded public rights was often discussed.

TTT has found that landowners and land managers are very interested in providing access (see ELM 159 report <http://www.thetrailstrust.org.uk/pages/downloads.php>) subject to certain provisos (reward / location / public education / improved infrastructure / economic opportunity). They are also very interested in and willing to provide habitat and biodiversity enhancement within the access space.

4.5 With regard to unrecorded historic rights of way many landowners do not understand the process. Those who have been involved in a rights of way application have found it confrontational and many preferred the negotiation / (re) dedication approach taken by TTT and other user groups. In the ELMs test several said that the 2026 cut off had ‘made things worse’ and they preferred the ‘steady drip of applications coming through to be dealt with’. There is certainly no appetite out there for the 2026 removal of unrecorded public rights.

5. Balance?

TTT considers that this reason given to close the Definitive Map based on this so called ‘balance’ is wrong for these reasons:-

5.1 Landowners affected by the right to roam legislation are not the same as those affected by unrecorded historic rights. According to the Ramblers (www.ramblers.org.uk) analysis of lost ways, the region which has most historic public rights of way to lose is the South West of England (9210 miles). Yet SW England has only 5.4% open access land (see table)

Compared to open access land hectares by region, the regions that lose the most historic ways have 4 out of 5 of the lowest % of open access land.

English Regions	Lost Way Miles	Open access (hectares)	% of total area
South West of England	9210	130,584.9	5.4
East of England	6505	29,880.0	1.5
West Midlands	6291	27,816.2	2.1
South East of England	6221	63,025.2	3.2
Yorkshire and the Humber	4524	236,192.5	15.2
East Midlands	3889	42,105.9	2.7
North West of England	2508	278,190.6	18.6
North East of England	2011	206,498.2	23.8

5.2 Multi-users are disproportionately affected by the closure of the definitive Map for reasons of so-called balance.

Carriage drivers, horse riders, cyclists (and disabled in those groups and those using ATVs) are effectively barred from

- 79% of the recorded network,
- one million hectares of open access land (in England)
- the coast path

- most other national trails

Barred (either legally or physically due to the installation of inappropriate structures – which includes stiles (especially ladder variety), kissing gates and Bristol gates).

5.3 Multi user 'lost' rights not only stem from unrecorded ways but from a multitude of under recorded rights already included on the Definitive Map (for example footpaths that have unrecorded bridle or carriageway rights). Exchanging local (doorstep) rights for the open access rights on foot at the other end of the country is wrong.

6. Unforeseen consequences of closing the Definitive Map after 2026 identified by TTT members and others (these are in brief but all these issues need to be fully explored and resolved before any Definitive map is closed).

6.1. Loss of green infrastructure

The loss of assets rich in culture, heritage, active travel and economic benefit.

Miles of unregistered and unowned green lanes will be lost to the public. Many are in use. Green lanes are vital cultural heritage for both public access (promoting human health) and for habitat and wildlife corridors that are crucial for nature recovery.

According to the Government's own 25-year plan <https://www.gov.uk/government/publications/25-year-environment-plan>

The plan says 'We will introduce a new environmental land management system to deliver this. It will incentivise and reward land managers to restore and improve our natural capital and rural heritage.

The Discovering Lost Ways Outcome of the Review March 2008
<https://studylib.net/doc/7527967/discovering-lost-ways---the-institute-of-public-rights-of>
Stated

'The likely loss in 2026 of the unused, unrecorded routes will lead to a significant decrease in availability of access to the countryside and will also have an adverse impact on local history and heritage.'

'Around 50% of routes identified in Cheshire and 70% in Shropshire appear from map evidence to be un-gated green lanes and surfaced tracks.'

The review highlighted that the term 'Discovering Lost Ways' is a misnomer. Many historic routes are not 'lost' but in existence and used. Site visits verified that these unrecorded routes were in use.

Loss of active travel and economic value. Old lanes, often linking quiet unclassified roads and rights of way are a valuable resource for green tourism and active travel. Most have stone surfaces perfect for walking, riding, carriage driving and cycling a hybrid / electric bike on and are easily accessible for disabled people on ATVs and disabled people included in the latter user categories.

The current cost of providing a similarly hard surfaced route is around £125,000 / kilometre (Mendip District Council 2021).

25 year plan - 'The economic benefits that flow from the natural world and **our natural heritage** have begun to take a greater prominence in policy-making, thanks in part to the ground-breaking work of Professor Dieter Helm's Natural Capital Committee (NCC). We see these benefits in increased productivity from our natural resources and a lessening of the demands placed on them. We see them in the **boost to our mental and physical well-being.**'

Double bounded lanes offer the corridor routes for public countryside access that 86% of ELM test 159 land owner / land manager participants said they preferred <http://www.thetrailstrust.org.uk/pages/downloads.php>

6.2 Unregistered land The number of affected lanes is becoming more evident as adjacent land is being registered by owners who are not claiming a freehold interest in these lanes. There is no freehold landowner here requiring certainty as to the public right of access that exists along these ancient ways.

6.3 Loss of historic Landscape features Once the public right along these lanes, is definitively denied in 2026, boundaries (walls, hedges, banks, ditches many of ancient and unique origin) are at risk of destruction.

6.4 Loss of doorstep routes that are in use but are unrecorded / under-recorded – this is contrary to Government aspirations about public use of green belt as a means to access countryside.

Consequences:-

a) people will travel more by motorised vehicles impacting negatively on pollution levels. This is in direct conflict with the government's expressed aim of encouraging non-motorised vehicular use locally in the 'Working Together to Promote Active Travel' briefing for local authorities and other vulnerable road user promotions.

(b) higher user impact on landowners / farmers who do have recorded routes across their land.

(c) adverse effects on horse riders and carriage drivers - horse ownership may decline causing a negative impact on local economies (**especially** on farmers and businesses who supply feed, tack and livery etc). The economic value of the equestrian sector stands at £4.7 billion of consumer spending across a wide range of goods and services each year. This has increased from £4.3 billion in 2015. (Beta 2019)

Equestrians are mainly women, elderly and disabled who will be penalised from accessing their local countryside network safely for active travel, sport and recreation.

d) contrary to Government active travel plans and Cycling and Walking Investment Strategies

6.5 Loss of the principle mechanism used by the public and voluntary organisations to upgrade and add routes and unrecorded rights that the public is entitled to use and that complete gaps in local networks. Other mechanisms used to create / provide rights of way (1980 highway act s26 creation, s25 dedication, express dedication at common law and CROW Act 2000 dedication all have issues or are unexplored / unused mechanisms).

6.6 Loss of landowner rights where dependent on unrecorded historic public carriage road rights. Landowners will lose rights too where they are dependent upon unrecorded public carriageway rights to drive to land in their ownership which is accessed along unrecorded lanes not owned by them. There may be an exemption for this (!) but why should landowners have their rights to travel along green lanes protected and the public lose theirs?

6.7 Loss of public access to culture, heritage and history in the countryside – this is contrary to Government's own 25-year plan.

6.8 Loss of natural asset / public value

The Ramblers estimate that 49,000 miles of unrecorded ways exist. The Discovering Lost Ways project estimated 13,650 miles of under recorded routes exist on definitive maps (estimate (15% of 91,000 miles of currently recorded footpath).

= 62,650 miles (100825.4 km) at a (modest) width of 2 metres (0.002km) =

= 201.6508 square kilometres = 49828 acres @ £9200 / acre = £458, 417,600

The public could be losing an asset estimated at almost £0.5 billion

A large mileage of unowned infrastructure, old lanes, roads and highways that have stone surfaces and are in use or could be brought into use for active travel are threatened by this legislation. This infrastructure is in many cases an unrecorded permanent public asset linking the minor road network with nearby communities. The cost of replacing these unrecorded ways with new (leased) paths is in the region of £125, 000 per km for a purpose built multi user surfaced path or £40,500 'rent' for an unsurfaced path delivered on a 30 year permissive path agreement under countryside stewardship.

6.9 Voluntary effort to save rights before the 2026 deadline

a) Voluntary resources! Time and money could be better spent.

b) Lengthening Definitive Map application queues lodged with Local Authorities – Somerset County Council has 414 cases.

c) Applications are not being dealt with in a timely manner by Somerset and other authorities. In Somerset, determination time stretches to approximately 41 years at the current rate. Users who have crucial evidence to support an alleged public right will have died.

6.10 Extinguishment of width under Part 2 CROW Act 2000

Rights to the full width (where not recorded) will be extinguished on green lanes and roads (carriageways) that are recorded as only having footpath or bridleway rights.

Consequences of this could be:-

a) Loss of one boundary (loss of habitat) / part of the way fenced off

b) Difficulty in users passing

6.11 Gating of Restricted Byways (Deregulation Act 2015)

Consequences

a) Incentive to remove lane boundaries (loss of habitat) once gates can be placed across to align with field boundaries instead of having to keep lane boundaries in good repair.

b) Increasing / allowing Impediments to public users particularly affecting disabled users

6.12 A large number of exemptions will be required including any:-

a) carriageway (other than one comprised in a way shown on the definitive map as a footpath or bridleway)

b) unsurfaced unclassified county roads (any way on the list of streets or local street gazetteer) of which Somerset has 433 sections of publicly maintainable country lanes totalling 204 kilometres,

c) urban way (as yet undefined), (at some arbitrary date),

d) way comprised in an application for a DMMO,

e) designated way,

f) way which came into being after 1949,

g) way which remains in regular use (on terms yet to be defined),

h) way in Inner London,

i) way in an area where the cut-off date has been postponed in regulations and any way which is excepted in s.54 CROW

And it's still not clear what legal recording mechanism will be available to the public to save any of the above once the Definitive map application process is closed. For instance, if a Highway Authority chooses to cease maintaining an unsurfaced county road how will public rights be protected in future if no application to legally record those rights can be made?

6.13 Forcing applicants to appeal to magistrates' court (Deregulation Act 2015)

- a) What is the depth of magistrates' knowledge regarding the common and statute law that applies to public rights of way, compared to the Planning Inspectorate (PINS)?
- b) The process cost to applicants is likely to be around £800 compared to the current appeal process which is £0 (apart from resources spent preparing the appeal).
- c) Magistrates courts are said to be 2 years behind.

6.14 Changes to the evidential test (Deregulation Act 2015) – a more difficult test being imposed

All applications will be assessed under the higher evidential 'reasonable allegation' test instead of the lower 'balance of probability' test which applies in some circumstances.

Consequences will:-

- a) increase Order Making Authority (OMA) costs without a reciprocal cost reduction in PINS
- b) slow down the already slow rate of determining Definitive Map modification order applications
- c) position OMAs where PINS should be by asking OMAs (instead of PINs as now) to balance opposing evidence – in a political environment (Regulation committee members etc) that currently PINs is not affected by
- d) indicate increased officer training - query whether officers and councillors will get this right.

Note on Deregulation Act provisions.

Some of provisions are very helpful (small amendments, right to apply for diversions, local highway authorities to identify and inform landowners of applications, basic evidential tests, dealing with objections) but some recommendations will make the process slower and add a greater evidential and cost burden to hard pressed volunteers which is unfair and unjust.

6.15. Extinguishing unrecorded rights, particularly higher user rights, is contrary to Julian Glover's landscapes review report 2019. <https://www.gov.uk/government/publications/designated-landscapes-national-parks-and-aonbs-2018-review>

He says 'there seems little logic across the country to the nature of rights of way at the moment. Cumbria and Shropshire are rich in bridlepaths. In some other places, almost all routes are only open to walkers not horse riders or cyclists. As even rural roads become busier and more dangerous, it is all the more important that fair access is given **to all.**'

7. Conclusion

The public's interest and Government's policy interest in preserving and recording unrecorded and under recorded ways, particularly green lane infrastructure, far outweighs arguments misconceived notions about so-called 'certainty' and 'balance' for landowners.

User groups and volunteers have identified and continue to identify a large number of unforeseen consequences which will become apparent after the Definitive Maps 2026 closure. These consequences will cause a whole scale loss of public rights damaging to local economies, environment, local nature recovery and active travel aspirations. The provisions of the Deregulation Act 2015 with regard to rights of way will have inflict further damaging consequences by reducing user widths and increasing evidential and financial burdens on all parties involved.

8. Recommendations

- abandon the 2026 deadline for extinguishing historic rights of way
- abandon any deferment (2031) for extinguishing historic rights of way
- re-assess the rights of way reform recommendations introduced in the Deregulation Act 2015 for unforeseen consequences to rights of way width, recording processes and increased burdens inflicted on public and local highway authorities.
- review membership and terms of reference of the Stakeholders Working Group set up in 2010 and consider replacing it with a National Access Group with a wide remit to consider reforms and creation of a rights of way network fit for modern society similar to the Welsh Access Forum <https://naturalresources.wales/days-out/recreation-and-access-policy-advice-and-guidance/networks-and-partnerships/national-access-forum-for-wales/?lang=en>

Consider ways to overcome barriers including:-

- repairing access creation and dedication mechanisms that don't currently work well and promote their use (highways act 80 s25, s26, express dedication at common law etc)
- introducing negotiation into the process at a local level to avoid entrenched positions and misunderstandings arising from the process
- including the identification and preservation of historic infrastructure and rights into environment land management schemes with appropriate advice
- setting up a national access forum as exists in Wales (as above)

And finally, better leadership and listening from Government is required

UK Property Estate Agents & Property Consultants Strutt & Parker

<https://www.theguardian.com/environment/2008/apr/23/conservation.endangeredhabitats>

Richard White, a partner in the land management consultancy Strutt & Parker, said in 2008 that landowners' attitudes have changed in recent years.

'They realised that access was fundamental to the economics of the countryside. Many landowners feel the government's rhetoric on access has been dictatorial, and this encouraged entrenched positions. But there's a willingness among the more enlightened land managers for dialogue with user groups. We need better leadership from government, and more money spent on access.'