



Discovering Lost Ways

**Outcome of the review and
recommendations for the way
forward**

March 2008

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Executive summary

In February 2007 the Executive Board of Natural England instigated a fundamental review of the Discovering Lost Ways Project (DLW), and endorsed proposals for potential realignment of the project. The purpose of the review was to assess whether the project still met the needs of people today and was aligned with Defra's and Natural England's current objectives and priorities.

The review was concluded in February 2008 when Natural England presented its recommendations for the way forward to Defra.

The following activities were carried out to inform the DLW review:

- Five Pathfinder projects, aimed at a) testing processes to transfer the results of research to local authorities for them to make orders to the definitive map; and b) investigating different ways of engaging with stakeholders (users, landowners, parish councils, local access forums, volunteer researchers) at the local level.
- A programme of national stakeholder workshops involving landowning, user and local authority interests, and technical workshops involving experts in rights of way (RoW) processes and law.
- A baseline survey of local authorities to assess the current resource allocated to rights of way and the current state of the definitive map.
- Delivery of the revised Archive Research Unit (ARU) service on a large scale and against the established fixed standards. Review of the fitness for purpose of the ARU service including independent quality assurance.

The review has resulted in a better understanding of:

- The scale of the task and estimated costs of researching historic routes and recording them on the definitive map.
- The character of historic routes - why they are not currently recorded on the definitive map, their physical characteristics, whether they are currently used and simply not recorded, and how often they might occur.
- How far the ARU is 'fit for purpose' in facilitating research.
- Other work and resources required to transform research into routes, for example setting priorities, identification of landowners and householders affected, site visits etc.
- The contribution and role (actual or potential) of different players – Parish Councils (representing local people), landowners, users, volunteer researchers, local access forums, highway authorities and the Planning Inspectorate.
- Identification of requirements for amended or new legislation to streamline processes.

For the reasons set out in the Report which follows, we have concluded that we should:

- withdraw from a programme of research that seeks to identify “lost ways” throughout England
- focus on convening and facilitating the discussion that will lead to a re-evaluation of the relevant law and procedures

This has formed the basis of our advice to Defra as we are confident that it is the only way to deliver real and lasting progress towards a Definitive Map and Statement (DM) that is a living record of a RoW network that meets people’s needs and expectations.

While we are proposing to withdraw from the current approach, Natural England remains committed to finding the most efficacious solution to the completion of the DM and the enhancement of the RoW network.

Background

The Discovering Lost Ways (DLW) project had its origins in the imposition by section 53 of the Countryside and Rights of Way Act 2000 (CROW) of a deadline for recording historic RoW on the “definitive map” of such rights that are maintained by highway authorities. The historical background to the DLW project is summarised in Appendix 1.

The intention of the legislation was that after the passing of this deadline (in the year 2026), any unrecorded historic rights would be extinguished. It was hoped at the time that this would provide an impetus for volunteers to get on and find the remaining historic rights, so that much-needed certainty about the extent of the RoW network could be delivered, for the benefit of all parties.

DLW was set up, in response to a request from Government, to help with the challenge of identifying historic rights which would otherwise be extinguished. Its aims were to develop a better RoW network through ensuring that RoW that have been “lost” are recorded on the Definitive Map and Statement, and those that have been under-recorded on the DM are also upgraded to the appropriate status.

Initially a scoping study was undertaken to assess the scale of the task to be undertaken and how support to volunteers could be provided. The conclusion of this study was that the Government’s plan simply to fund volunteer activity could not realise its objective of ensuring the completion of as much of the historic record of rights of way as was reasonably possible to achieve prior to the 2026 cut-off. The Agency concluded that a professional and systematized approach was required and an Archive Research Unit was established through a private sector contractor. To date the ARU activity has focussed on developing and refining a method for the systematic research of historic documents through a programme of activity in the counties of Cheshire, Shropshire, Nottinghamshire and Wiltshire.

The cut-off date for the purpose of s53 of CROW is subject to commencement by order, and no such order has yet been made.

The review of Natural England's involvement in DLW

Following the creation of Natural England in 2006 the Executive Board endorsed proposals for a potential realignment of the project to ensure that it met today's needs and Natural England's priorities.

A review began in February 2007 with the aim of evaluating the existing DLW delivery framework, defining Natural England's role in this area of work and making recommendations on a way forward.

The review was delivered through a series of Pathfinder projects and a structured programme of stakeholder engagement. Alongside this there was a realigning of the research approach to deliver efficiency savings.

The Pathfinder Projects

The purpose of the Pathfinders was to test different approaches for transforming research on lost ways into routes on the DM, and to look at ways of refining the research so that public benefit is optimised. Each Pathfinder was designed to test an aspect of the research process or stakeholder engagement. A summary of each of the approaches is given in the following table.

Table 1 – Outline description of the Pathfinder projects

1	Cheshire	Natural England worked with Cheshire County Council to implement the results of research already completed. A small number of applications for modifications to the DM have been made using the existing statutory framework.
2	Shropshire	This project involved working with Shropshire County Council to examine how routes might be implemented without making applications for DMMOs. The results of research completed in North Shropshire have been passed to the County Council for their consideration and action.
3	Nottinghamshire	Natural England has worked with Nottinghamshire County Council and local stakeholders to examine and demonstrate ways of focussing research to obtain evidence of routes that would have potential public benefits. The project is monitoring, recording and evaluating implementation. The focus has been on establishing evidence for lost ways that will provide the greatest public benefits.
4	Herefordshire	In Herefordshire the Local Access Forum (LAF) had set up a sub-group to prepare for

		DLW starting in the county. Natural England has worked with this sub-group to help assess how early consultation with local people could lead to a more efficient research process in terms of developing the base map by establishing local priorities and needs; identifying suspected lost ways; and, through identifying and working with local stakeholders. The overall aim has been to determine how local stakeholders might assist in achieving DLW objectives.
5	Volunteer projects and LAFs	Natural England has explored with local volunteer groups and LAFs ways in which the activities of existing skilled researchers and interested local people can be accommodated in the overall development and delivery of DLW. This has linked to other work undertaken to develop a database of surveying authorities to provide a resource of capabilities reflecting local circumstances.

Individual reports on each of the Pathfinder projects, together with other background information on the review, will be made available on the Natural England website. A full list of these reports and a publication timetable is given in Annex 3.

The stakeholder engagement

A series of three “stakeholder dialogue” workshops were held over summer 2007 drawing together a wide range of stakeholders to identify benefits and disbenefits of DLW and to discuss possible ways forward. Meetings of a separate Technical Working Group (TWG) were also held over the summer and autumn with the aim of exploring the practicalities and technical aspects of the process involved with putting different types of lost way on the DM.

The outputs of the stakeholder workshops, supplemented where relevant with the outputs of the TWG are contained in the report *Finding the Way Forward – December 2007* (see Annex 3 for date when this will be available on the Natural England website).

Outcomes from Discovering Lost Ways review

In undertaking the review we have been looking for outcomes that will take the project forward in a way that is:

- achievable – based on a delivery model that is conceptually simple and pragmatic
- integrated – aligned to Natural England’s strategic objectives, supporting its approach to recreation and access and embedded as a component of its delivery framework; and
- realistic – with a focus on working in partnership with stakeholders.

The review has highlighted and brought into focus the concerns and difficulties that have been faced by independent researchers and local authorities in their attempts to make the definitive map as complete and accurate as possible - and by property owners and land managers experiencing the sometimes ‘random’ effect of definitive map modifications, where they do occur, on their interests.

We have significantly increased our understanding of the issues and constraints surrounding historic research and the likely impact of the 2026 cut-off date in particular:

- The scale of the task and estimated costs of researching historic routes and recording them on the definitive map.
- The character of historic routes - why they are not currently recorded on the definitive map, their physical characteristics, whether they are currently used and simply not recorded, and how often they might occur.
- How far the Archive Research Unit (ARU) is ‘fit for purpose’ in delivering research.
- Other work and resources required to transform research into routes, for example setting priorities, identification of landowners and householders affected, site visits etc.
- The contribution and role (actual or potential) of different players – Parish Councils (representing local people), landowners, users, volunteer researchers, local access forums, highway authorities and the Planning Inspectorate.
- Identification of requirements for amended or new legislation to streamline processes.

The scale of the task – researching and recording

Research for the Pathfinder stage concentrated on 6 discrete areas in Cheshire, Shropshire and Nottinghamshire. To date 5 of these have been completed and the results are in the process of being checked. A total of 246 cases are expected (in 376 parishes) where it is considered that there is sufficient evidence that historic rights exist. This provides an average of around 0.7 cases per Parish which multiplied up across England, would

amount to around 5,971 cases. However some parishes do have significantly more cases, for example, there is an average of 3.2 case per parish for the area of Shropshire for which research has been completed. Since it is understood that the definitive map for both Cheshire and Nottinghamshire County Councils is more complete than for other areas and that the sample is still relatively small we consider that the original estimate¹ of around 20,000 cases across the whole of England is still valid.

Our initial estimate, based on 20,000 cases, was that the research cost per case would be £350. The cost of the ARU service to the end of March 2008 will be £2.7m and we estimate that a further £8.4m would be required to complete an England wide roll-out of this service making a total of £11.1m. This figure takes account of having implemented a wide range of service improvement as part of the Pathfinder stage. It also reflects the significant quantities of information that need to be sifted during a systematic trawl only to be subsequently disregarded. Thus, the updated estimate for the unit cost per case is £550, within a range of £385 to £4189 depending on the number of lost ways in the area.

There is no direct comparison for the service provided by the ARU. Based on information obtained for the review we estimate that the unit cost for a local authority to investigate a case to the standard of an ARU case file would be £400. This is cheaper, primarily, because the focus of the local authority research will be route rather than source led. However, direct comparison is not possible as a feature of the ARU approach is that a complete search has been made rather than an investigation of cases as they happen to come to light.

Our findings show that local authorities vary considerably in the rate at which they are able to process applications to modify the Definitive Map (DMMO). Our survey in 2007 indicates that the average number of outstanding applications per authority is 34 (although some have none and one has 233). Some authorities can keep up with the pace of applications whilst for others the backlog is increasing. An experienced rights of way officer tends to process around 4-8 applications a year but in a number of authorities, especially the unitaries, there are officers with little or no experience of processing DMMOs for applications based on historic evidence.

It is common for an application to take three years or more, from the start of work on it, to add to the definitive map. The responses to our survey suggest that the average time to process even an unopposed order to confirmation stage can range from 3 months to 15 years 4 months, based on current backlogs and resources. As more applications routinely result in public inquiries, these delays will inevitably increase.

Local authorities have indicated that the most significant factors affecting the cost of processing an application and order are whether it goes to public

¹ Discovering Lost Ways in England and Wales – Phase 1- Countryside and Community Research Unit, University of Gloucestershire, March 2002.

inquiry; advertising; and buying in legal advice. Based on figures supplied by surveying authorities to process applications to the definitive map, we estimate that it would cost (countrywide) around £80 million to process the estimated 20,000 routes, including use of the current ARU service, to the stage that the public are able to use them. This figure does not include any work necessary to bring routes up to a standard where they are easy to use.

The resource burden on authorities to deal with the evidence generated by the ARU would be huge, and even with regulations protecting any routes on the claims register from extinguishment in 2026 it could be many years before these routes became legally available.

The character of historic routes

A lost way is an historic footpath, bridleway or restricted byway which is not recorded, or is under-recorded on the DM. Their lack of recorded status today results from three main factors:

- Accuracy and completeness was variable in the original definitive map recording processes that began in the 1950s and there has been variable resourcing and approaches since
- The nature of the legislation and the way that it has evolved to operate; and the related tensions amongst the multiple stakeholders and lack of consensus
- The resourcing and priorities given to RoW by local and central government.

The review has highlighted that the term “Discovering Lost Ways” is in fact largely a misnomer, as many historic routes are not in fact ‘lost’ in the first place. They are currently used and in existence, but are simply not recorded on the definitive map. Around 50% of routes identified in Cheshire to date and around 70% in Shropshire appear from map analysis to be un-gated, fenced green lanes and surfaced tracks. Site visits verify that many of these are in fact in use, and a significant number of these tracks have recorded routes leading off them.

In addition, around 10-15% of the routes identified to date are upgrades in status from an existing right of way. That is, the route itself is recorded on the definitive map, but there is clear evidence to show that the public’s rights along it are under-recorded – for example, a bridleway is shown on the map as a footpath.

Truly lost, unused routes are therefore in the minority. This allays some of the concerns about the impact on property rights of ‘discovering’ these routes.

The likely loss in 2026 of the used, 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. Evidence would suggest that whilst parts of the routes we have identified often form the access to properties, the majority 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 is perhaps less than perceived, and a change in legislation (see below) could also help significantly in balancing any potentially conflicting interests.



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A lost way - a hedged lane, unrecorded on the definitive map but clearly in use. It crosses stewardship land, linking a public highway with a recorded footpath, forming a circular route from a nearby village. Although in use, unless claimed this route would be extinguished at cut-off.

A further issue is that evidence for the existence of many routes, particularly those in urban areas, cannot be found in the key documents being researched by the ARU.

Fitness for purpose of the Archive Research Unit service

The setting up and piloting of an ARU service on a large scale has highlighted many of the inherent difficulties in resolving problems associated with unrecorded rights. The researching and claiming of lost ways has traditionally been undertaken by local authority definitive map officers, volunteers and independent experts. It requires specialist knowledge and is subject to evolving case law and differences of opinion over the interpretation and weighting of evidence.

Realising the benefits of an ARU service is dependent on being able to adopt a standardised approach to research, and persuading local authorities and other stakeholders to do things differently from the way in which they have been used to doing them in the past. What we have achieved with the ARU service goes some way to addressing the problems, but is limited by the wider context and the desire to “public inquiry” proof applications for DMMOs.

The review found that a systematic trawl of archive offices does enable identification of lost ways, and that such a research method, with some re-scoping could provide a useful foundation for initiating a lost way claim.

The review identified that further research would be needed to develop cases to the standard necessary to survive through the claiming process and current litigious climate. Additional work is needed to extract ‘softer’ evidence, apply more subjective weighting of evidence and examine a wider range of local sources. Further improvements could be made to address these issues but significant business change would also be needed on the part of local authorities and other stakeholders to extract the maximum value out of an ARU service. The role of an ARU service provided by Natural England is always limited when it is the local authority that is responsible for determining cases and facing cross examination at public inquiry.

Through the ARU contract, the Countryside Agency/Natural England has developed a series of 'Research Standards' (amended following the first phases of the research). Stakeholders have indicated that these could have wider application in clarifying the interpretation of key documentary evidence.

The Project's work in accessing documents in the various national archive offices has been welcomed by stakeholders. Natural England could continue to play an important role in facilitating access to these documents and making them easier to view by local researchers.

Further added value could potentially be extracted out of the information collected by the ARU, for example providing access to the images of historic maps and other documents and sophisticated search facilities to estate agents, lawyers, and genealogists.

Transforming the research into routes

The Pathfinder projects in Cheshire, Shropshire and Nottinghamshire were specifically set up to determine how best to transform the results of DLW research into routes on the definitive map. In Cheshire we followed the statutory procedures for making an application for a DMMO which included the identification and notification of landowners.

In Shropshire we have worked closely with the County Council to implement the results of the research without making formal applications. The purpose of the Nottinghamshire Pathfinder was to examine and demonstrate ways of focusing the research to get evidence of routes that would have potential public benefit.

During the review five claims were made in Cheshire and twenty two cases have been transferred on an informal basis to Shropshire County Council. At the current rate we expect the ARU contract to produce around 350 case files by the end of March 2008.

The project was successful in developing a process for landowner/occupier identification using a mixture of Natural England's agri-environment scheme datasets, other major landowner datasets, address point and Land Registry. On the relatively small scale of the Cheshire Pathfinder this could be delivered, within existing resources, by the DLW team. However, roll out nationwide would require significantly more resources, whether managed in house or out-sourced. Surveying authorities are not generally resourced for this task, because the law requires the applicant to undertake the initial landowner identification and notification work.

Placing the onus on the applicant to identify and notify landowners can act as a deterrent to making an application for a DMMO as individuals wish to avoid any potential confrontation.

Authorities differ in their approach to the project. Some would prefer to remain independent from it, and receive cases through application only; others prefer a closer partnership, with transfer of cases on an informal basis, believing this offers more flexibility. However, with current legislation and general rights of way practice, it is likely that a significant number will resist processing any cases without application.

The Pathfinder projects also tested the application of a public benefit test to routes identified through the research. As the processes developed the application of a public benefit test became fairly simple – disregarding cases that did not connect to a highway, or were simply short spurs off a highway, and prioritising cases that showed evidence for higher rights. This work could feed into wider discussions on the use of public benefit as a tool for prioritising access, for example in connection with rights of way improvement plan processes or targeting of Environmental Stewardship.

Familiarisation with each case and site including its characteristics on the ground is essential if poor quality cases are to be eliminated from the process early on. Around 10 sites can be quickly visited in a day; clearly less if more investigation is required. Whilst Natural England staff did carry out this familiarisation work for the Pathfinder Projects, the resources are again not currently available to roll it out on a large scale.

Stakeholder engagement

A structured programme of stakeholder engagement has been a key element of the review. Any changes that Natural England should wish to make in its contribution to DLW, to ensure that it delivers value for money and maximises public benefit, should also be in tune to what stakeholders want to see happening, both in terms of the process of identifying lost ways and the resultant national network on the definitive map.

The programme consisted of a series of national level stakeholder dialogue workshops, held over the summer and autumn of 2007, and more local engagement through the Pathfinder projects with the end user community.

National engagement

Stakeholders have welcomed the increased communication and engagement that has taken place through the review year and have requested that this is maintained into the future. At the start of the first workshops, tensions between different interests were evident and expressed. However growing understanding (if not acceptance) of each other's perspectives meant people were able to work together to identify issues and potential solutions.

There was clear agreement that the current statutory and procedural context for researching lost ways, and getting them on the map, is complex and costly. This made it difficult for people to agree the overall direction although there was strong agreement about the need for action, direction, resources

and on-going dialogue. Despite these constraints, a potential action plan was beginning to form along the lines of:

- i. Set up a working group to consider improvement and streamlining of the statutory framework
- ii. Developing guidance on prioritisation of routes to research
- iii. Developing a sound research method/framework for lost ways
- iv. Carrying out a study to demonstrate ways that lost routes can contribute to a useable network and the benefits this brings
- v. Natural England acting as advocate and champion of public benefit to raise profile and secure funding

The project encountered difficulty at both the national and local level in maintaining landowner engagement. The analysis has taken into account any user bias and even greater effort will be made to engage with landowning organisations in the future.

Local engagement

The Nottinghamshire Pathfinder project worked closely with the local authority and their local access forum from the start of the research process. This approach was extremely effective in producing a shorter, better quality list of cases for research than would have otherwise been the case. It is important to recognise the skills, expertise and knowledge of local authority staff, of local communities and also the contribution of Natural England regional staff.

A number of the Pathfinder Projects engaged or consulted with Parish Councils at different levels. In Herefordshire the pilot parishes were able to provide information on routes on the ground, and also knew of local residents who would be able to make a contribution. Parish Councils have also shown an interest in the work in other Pathfinders and could be a way to mobilise volunteers and raise awareness of the project to local residents – who often have as much of a vested interest as farmers.

The DLW team attended a number of LAF meetings during the year and an electronic questionnaire was also circulated to seek views. 24 LAFs responded to this consultation and a number of individuals also submitted responses, amounting to contributions from 35 LAFs in all. The results suggest that many would be willing to work with DLW at a local level although some expressed concerns over the capacity for input to detailed issues. LAFs could have a role in helping to prioritise routes, sharing local knowledge, providing advice and also potentially carrying out negotiation work with landowners.

56 active volunteer researchers were consulted as part of the review process, both through telephone and face to face meetings. The findings show that the voluntary sector is still very enthusiastic to work with the DLW team, although somewhat frustrated by the lack of progress. Whilst some parts of the voluntary/user group sector are currently very active and successful in researching routes and getting them added to the definitive map, the process is long winded, specialist and confrontational and the situation has not

changed since the initial feasibility study undertaken by University of Gloucestershire in 2001. Indeed, there may now be fewer researchers as the NERC Act makes it no longer possible to claim byways open to all traffic, which was the main interest for the motorised user groups.

There could be a future role for Natural England in facilitating the work of the voluntary sector through providing funding for increased mobilisation, training, networking etc, although further work is required to define the scope and pilot this. However, it must be recognised that the volunteer sector will not on its own, and even with significant support is very unlikely to, be able to claim all unrecorded routes before 2026 – and the frustrations with the local authority backlogs faced by all who are involved in definitive map processes would still remain.

Legislation issues

According to the Regulatory Impact Assessment the intended effect of s53 of CROW was to place a limit on the date by which claims for the existence of rights of way can be made on the basis of historic evidence and to encourage completion of the definitive map. This would benefit both land managers and users in terms of greater certainty about the existence of rights of way. It was thought that it would also result in the bringing forward of claims so that their existence would be recognised earlier than under the current system and more routes would become available for use sooner.

There was an assumption that introducing a cut-off date would generate a considerable number of claims, many of which would result in orders, but that these could be processed reasonably quickly. This influx of claims, it was assumed, would overcome the slow progress that was then being made on recording rights of way on the definitive map.

Our experience to date has demonstrated that even a mechanised research process that generates sufficient evidence of the existence of rights will not of itself deliver the intended outcome behind the introduction of a cut-off date.

A number of legislative issues have been identified through all parts of the review, and warrant further consideration for possible resolution. They include issues surrounding the relationship of the List of Streets to the Definitive Map, powers to enable highway authorities to dismiss irrelevant objections, clarification of the treatment of urban areas where many thousands of routes are likely to be lost, and treatment of inclosure awards as legal events.

The following table sets out some of the ideas for streamlining rights of way legislation as put forward by stakeholders to Natural England. From our experience of delivering DLW we would suggest that this is not an exhaustive list but it provides a flavour of the types of issues which should be considered in more detail.

**Table 2 –
Some legal and procedural issues felt by stakeholders
to warrant further investigation**

	Suggestion	Comment
1	Do not commence s53 of the CROW Act to enact the 2026 cut off date	
2	Amend the Wildlife and Countryside Act to simplify the modification order processes	Suggestions include allowing highway authorities to dismiss irrelevant objections; taking the burden off applicants to notify landowners of a claim
3	Simplify and streamline public inquiry process	The public inquiry process is cumbersome, confrontational and resource intensive. Suggestions for streamlining include – limit right of objection to that of owner/occupier only in cases of additions and upgrades; get the Planning Inspectorate to take a stronger line in dismissing irrelevant objections; for cases based on documentary evidence use written representations of hearings rather than inquiries.
4	Clarify issues surrounding the List of Streets, the highway authority record of the road network.	The format and content of the List of Streets varies significantly between authorities. Researchers would welcome better guidance on the status of List of Streets, how to use them to complement to the Definitive Map and legislation to bring them to a consistent standard and footing.
5	Clarify the mechanism to record unrecorded footpaths in urban areas	Urban footpaths are not usually uncovered through historic documentary evidence but those in existence before 1949 will still be affected by the cut off date. Guidance is required on the best approach to recording these routes – or whether to simply exclude them from the cut off date
6	Amend legislation to allow for concurrent orders to reduce width of routes/enable extinguishment in whole or part	Currently there are procedures for these issues but they can only be done after the order has been confirmed. Such legislation changes could also allow for nature conservation and other land management issues to be taken into consideration
7	Allow for gates on restricted byways	Currently difficulties over allowing gates on restricted byways, which presents issues for landowners especially in the context of historic routes which are not currently 'laid out' on the ground

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|----|--|---|
| 8 | Change law to require public gain for (nearly) all path changes allowing a climate of co-operation and trade-offs to emerge. Change process/method of approach to landowner | A fundamental change to the current approach which may be more cost effective and streamlined |
| 9 | Change law to make creation orders more palatable to landowners | Look into the feasibility of providing compensation for new rights of way even where there appears to be some evidence of an existing public right (Funds would be required for compensation but might realise cost savings – on public inquiry etc - long term.) |
| 10 | By statute where routes are of mixed grade, upgrade to higher status/ assume certain categories of route (e.g. white roads) to be restricted byways unless the occupier can prove otherwise. | |
| 11 | Ability to treat Inclosure Awards and Quarter Sessions as conclusive legal events | Routes on Inclosure Awards and Quarter session records have already been subject to scrutiny of evidence of public rights. A legal event would enable them to be simply added to the map. |
| 12 | Get authorities to allow claims to be dealt with under delegated powers | Some authorities already allow claims to be determined at officer rather than member level. The response to this has been mixed because some officers prefer members to make the decision. |
| 13 | Provide guidance which brings consideration of public rights of way in line with the road network, and amend revenue support grant to include rights of way | Stakeholders believe that rights of way should be brought to an equal standing as other highways given their health and tourism use and potential. Including rights of way in the Government's revenue support grant to highway authorities would help to address maintenance liability concerns for newly recorded rights. |

Conclusions

The Discovering Lost Ways project has demonstrated that it is possible to set up a process for a systematic, source-led approach to research. We have identified ways in which the research process could be further streamlined to deliver public benefits, particularly through local consultation and we have started dialogue with stakeholders that can be fostered long term.

However, a mechanism for turning evidence into watertight claims (a claim that doesn't require significant further investigation by the local authority) has proved elusive. The Cheshire and Shropshire Pathfinder projects illustrated the difficulty of achieving this standard of output from a mechanised approach to research. The legalistic nature of the work requires significant checking to ensure freedom from error and each case requires input from a local context if the evidence is to meet the level required for a public inquiry. Such a level of detail was not part of the specification to the ARU and it is unlikely that any large scale, national contract could ever provide this context.

As a result we have reached the conclusion that even if preserved by the legislation, claims generated by the ARU research process could remain unprocessed for many years beyond 2026. In addition the systematic trawl through archives also turns up lots of inconclusive evidence. This, together with unprocessed claims, would defeat the objective of the 2026 cut-off date legislation.

In addition the research methodology does not extend to ways which don't have good documentary evidence and rely mainly on user evidence. This is particularly the case in urban areas. Our work to date both on the Pathfinder projects and through discussions with stakeholders has drawn attention to the fact that many of the so called "lost ways" are in regular use and that an unintended impact of the cut-off date could be a net loss of access.

The over-riding issues raised throughout the review concerned resourcing for rights of way and the present legislation. The current resourcing would severely limit the local authorities' ability to process our research outputs to modification order stage and then if required to public inquiry, or indeed to take on a further maintenance liability once the route is open for public use. The slow speed at which local authorities tend to process claims is not conducive to a quick return for either Natural England's or the volunteer sector's investment in research activity. This resource gap must be addressed if any historic routes project is to result in routes in the ground within an acceptable timescale.

We conclude that as things stand, the forced completion of the definitive map and statement by 2026 is not a practicable proposition. If the definitive map and statement is to be completed within a set timescale, a new legislative approach would be needed to streamline the relevant law and procedures, as well as to reduce the potential impact of recording historic rights of way in the minority of cases where public use would be a new imposition in modern terms, and would significantly conflict with the established land use.

It is clear from our review that continuing with a programme of research that seeks to identify “lost ways” throughout England, without first addressing the issues surrounding current legislative practice and procedures, cannot be justified in terms of either the resource cost or the delivery of a modern network that meets people’s needs and expectations.

While we are proposing to withdraw from the current approach with its associated complexity and costs, Natural England remains committed to finding the most efficacious solution to the completion of the Definitive map and the enhancement of our Rights of Way network.

Accordingly we provided the following advice to Defra:-

- a prerequisite for achieving real and lasting progress in this area is a proper re-evaluation of the relevant law and procedures by all the key national stakeholders, working co-operatively to establish a broadly agreed way forward.
- Natural England intends to convene and facilitate this discussion and, assuming that such broad agreement proves achievable, champion the necessary reforms to provide a proper foundation for turning the definitive map into a living record.
- with the advice of the Rights of Way Review Committee, we propose to establish an independently-chaired Stakeholder Working Group charged with developing the necessary package of legislative and other improvements.
- we recommend that Government should make clear its intention not to commence section 53 of CROW until it has the benefit of this group’s advice.
- we intend to withdraw from our programme of archive research.

As part of this change in approach it will also be important that stakeholders are kept informed and that Natural England provides relevant and advice and guidance, based on our experience of delivering DLW and the lessons learnt during the review.

Annex 1

Historical background to the Discovering Lost Ways Project

England has a unique heritage of ancient ways and the National Parks and Access to the Countryside Act, 1949 required creation of definitive maps of public rights of way in order to record and protect them. These were based on the knowledge of relevant local authorities about the paths in their area - but instead of it being purely a legal exercise to record existing rights, it took on a political flavour. This, coupled with insufficient resources being made available for the task in certain areas, resulted in many routes being wrongly recorded or not recorded at all, so that the network was left seriously fragmented and often dangerous.

An attempt was made in the Countryside Act 1968 to improve the process for reviewing the definitive maps but again poor resourcing and the impact of local government reorganisation in 1974 led to a virtual breakdown of the system. This led to subsequent legislation, the Wildlife and Countryside Act 1981, which provided for continuous review by Highway Authorities of these maps to make them up to date and complete. But by then the backlog of claims for modification to the maps had reached such a level that it was unlikely to be resolved in the foreseeable future. The 1981 Act also opened the way to the claiming of additional public rights of way by third parties such as local inhabitants or volunteers representing user groups, based on either historic evidence or evidence of at least 20 years' modern use of a particular way.

The procedures for, and the increasing adversarial approach to, determining such claims has resulted in situations where it can be many years before a historic right is recorded on the definitive map.

In 1998 the Countryside Commission published *Rights of Way in the 21st Century* which stated

“The legacy of past neglect and piecemeal legislation is a management framework which is expensive and time consuming . . . and which is perceived to generate conflict and uncertainty. . . . The condition of the network is likely to deteriorate again in the future unless a viable long term management system is now put in place. One of the obstacles to a viable overall system is the legal record, which is still far from up to date and on which progress is generally slow. . . .”

The Countryside Commission, therefore, recommended that Government should:

- ask it to advise on the scale and cost of researching and recording currently unrecorded public rights of way, and
- state its intention to enable the eventual closure of the definitive maps to further historically-based claims.

The Government picked up on this latter recommendation during the passage of the CROW Bill and enacted a 2026 cut-off after which any unrecorded historic rights of way would be extinguished.

Government hoped that introduction of the 2026 cut-off would act as a trigger to resolve all residual uncertainty about the existence of historic rights of way and encourage work to be done more quickly. The 2026 deadline was chosen so that there would be enough time to research forgotten rights and a commitment was given in the Rural White Paper to support the necessary research activity.

To promote this outcome, it:

- asked the Countryside Agency (the Commission's successor) to develop a programme to support capture of historic rights before the 2026 cut-off; and
- undertook to fund volunteer-based research and claiming activity at an average rate of £2m per year during this period.

To help scope this work, the Agency let a major exploratory contract, in 2001, to a consortium of experts led by the University of Gloucestershire. Their findings revealed the likely number of routes at risk from the cut-off date and the true extent of the inefficiencies in recording historic rights that had led to the backlogs within highway authorities, some of whom projected that up to 200 years would be required to process to completion all of the claims of historic rights of way that might be expected to result from existing methods of researching and claiming lost ways.

It seemed clear from these findings that the Government's plan simply to fund volunteer activity could not realise its objective of ensuring the completion of as much of the historic record of rights of way as was reasonably possible to achieve prior to the 2026 cut-off. The Agency concluded that a professional and systematised approach was required and an Archive Research Unit was established through a private sector contractor.

Having obtained approval from Defra and following competitive tendering, the Countryside Agency awarded a long-term £6 million service agreement contract to Mouchel Parkman to provide an Archive Research Unit (ARU) service. The function of the service was to systematically research relevant historic records, sifting information and producing dossiers of evidence where sound claims could be identified.

The first year of the service was to implement and pilot the service working at The National Archive and Cheshire & Wiltshire County Record Offices. This was the first time a 'source-led' approach had been tried on this scale and the volume of information gathered far exceeded expectations and capacity to process. An integrated project team was established with Mouchel Parkman and Countryside Agency to review the ARU service. Key findings were the need for:

- greater involvement of local authorities and other stakeholders
- bringing in other external data

- development of research standards to enable the consistent interpretation of historic records.

Following on from the review of the lead phase activity the ARU contract was renegotiated (completed August 2006) and a revised method implemented, initially through a test for a part of Cheshire. The test identified further improvements and resulted refinements to the research standards and development of detailed descriptions for outputs.

The Natural Environment and Rural Communities Act 2006, as well as legislating for the formation of Natural England, included provisions to curtail the future scope for establishing and recording public rights of way for mechanically propelled vehicles where these are based on either evidence of historic use, or dedication of use, by vehicles that were not mechanically propelled. These provisions further addressed some of the concerns that had led to the introduction of the cut-off date.

By the time Natural England was vested the DLW project was at the point of being rolled out to the remaining first wave counties and further work undertaken to transform the research outputs into routes on the ground.

As with several other activities transferring from its founding bodies Natural England called for a fundamental review of DLW in February 2007. The aim of the review was:

- to review and evaluate the existing DLW delivery mechanisms
- to define Natural England's role in this work through analysis of evidence and through stakeholder engagement
- to define the optimal and most cost effective approach to enable delivery of identified public benefits.

Annex 2

Glossary of abbreviations and acronyms

Abbreviations and acronyms used in this report	Meaning
ARU	Archive Research Unit
Defra	Department of Environment, Food and Rural Affairs
DLW	Discovering Lost Ways project
DM	Definitive Map and Statement
DMMO	Definitive Map Modification Order
LAF	Local Access Forum
NERC	Natural Environment and Rural Communities Act, 2006
RoW	Rights of way
TWG	Technical Working Group

Annex 3

Publication timetable

Title	Publication date
Summary of the University of Gloucestershire report, March 2002	Spring 2008
Pathfinder 1 – Cheshire – evaluation report, October 2007	Spring 2008
Pathfinder 2 – Shropshire – evaluation report, October 2007	Spring 2008
Pathfinder 3 – Nottinghamshire – evaluation report, November 2007	Spring 2008
Pathfinder 4 – Herefordshire – evaluation report, October 2007	Spring 2008
Pathfinder 5 – consultation with Local Access Forums and voluntary sector, November 2007	Spring 2008
DLW Research Standard 1 - introduction	Summer 2008
DLW Research Standard 2 – suspected lost ways	Summer 2008
DLW Research Standard 3 – documentary sources	Summer 2008
DLW Research Standard 3.1 – Inclosure records	Summer 2008
DLW Research Standard 3.2 – Tithe Survey records	Summer 2008
DLW Research Standard 3.3 – Finance Act records	Summer 2008
DLW Research Standard 3.4 – Deposited Railway records	Summer 2008
DLW Research Standard 3.5 - Deposited canal records	Summer 2008
DLW Research Standard 3.6 - Deposited turnpike records	Summer 2008
DLW Research Standard 3.7 - Ordnance Survey records	Summer 2008
DLW Research Standard 3.8 – Non-Ordnance Survey commercial mapping	Summer 2008
DLW Research Standard 3.9 – Estate records	Summer 2008
DLW Research Standard 3.10 – Quarter Session records	Summer 2008
DLW Research Standard 3.11 – 1929 Highways handover records	Summer 2008
DLW Research Standard 4 – Interpreting evidence and evaluating cases	Summer 2008
DLW Research Standard 5 - Photography	Summer 2008
DLW Research Standard 6 - Glossary	Summer 2008
Finding the Way Forward, December 2007	Spring 2008