

# Monmouthshire County Council

Countryside Access



DRAFT REPORT 1 OF 3 Route A: DMMO for BOAT

**DRAFT: Report 1 of 3 (section A to C)  
Licence and Regulatory Committee Report  
Definitive Map Modification Order**

**34Mod: To add the route – Woodcock Cottage to  
'MINNETTS LANE' as a public byway open to all traffic.**

**November  
2017**



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## Glossary

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BOAT .....	Byway Open to All Traffic
BR.....	Bridleway
BT .....	British Telecom
CRB .....	Cart Road Bridleway
CRF .....	Cart Road Footpath
CROW 2000.....	Countryside and Rights of Way Act 2000
DEFRA.....	Department for Environment, Food & Rural Affairs
DMMO .....	Definitive Map Modification Order
DM&S .....	Definitive Map and Statement
FP .....	Footpath
GRO.....	Gwent Record Office
LoS .....	List of Streets
MCC.....	Monmouthshire County Council
MPV .....	Mechanically Propelled Vehicles
NRW .....	Natural Resources Wales
NERC 2006.....	Natural Environment and Rural Communities Act 2006
NPACA 1949.....	National Parks and Access to the Countryside Act 1949
OSS .....	Open Spaces Society
PRO .....	Public Record Office [KEW]
PROW.....	Public Rights of Way
RB.....	Restricted Byway
RUPP.....	Road Used as Public Path
WCA 1981 .....	Wildlife and Countryside Act 1981

# 1. Introduction: Definitive Map Modification Order

A Definitive Map Modification Order (DMMO) application supported by 27 evidence forms for Route A and 28 evidence forms for Route B, claiming the use of the routes as byways open to all traffic, was submitted under section 53 of the Wildlife and Countryside Act 1981(WCA) by Mr J Nettleship on the 22 September 1990 for an area shown on the location plan Appendix 1.1.

1.1. The application sought to add two routes, Route A and B, to the Definitive Map and Statement. Route A on the application plan (Appendix 1.2) is located between county road C71-2 in the north and Rogiet passing through Minnetts wood to the south. Although the plan does not show the full extent of "Route A" the description is clear on certificates (i) & (iii) of the Definitive Map Modification Order application (Appendixes 1.3 & 1.5) which states "the adding of the byway open to all traffic from Woodcock Cottage, Five Lanes to Rogiet which may include upgrading to a byway open to all traffic the footpath CRF 17 from Parish Boundary to Rogiet" and shown on the map annexed hereto." (Fig. 1.1)

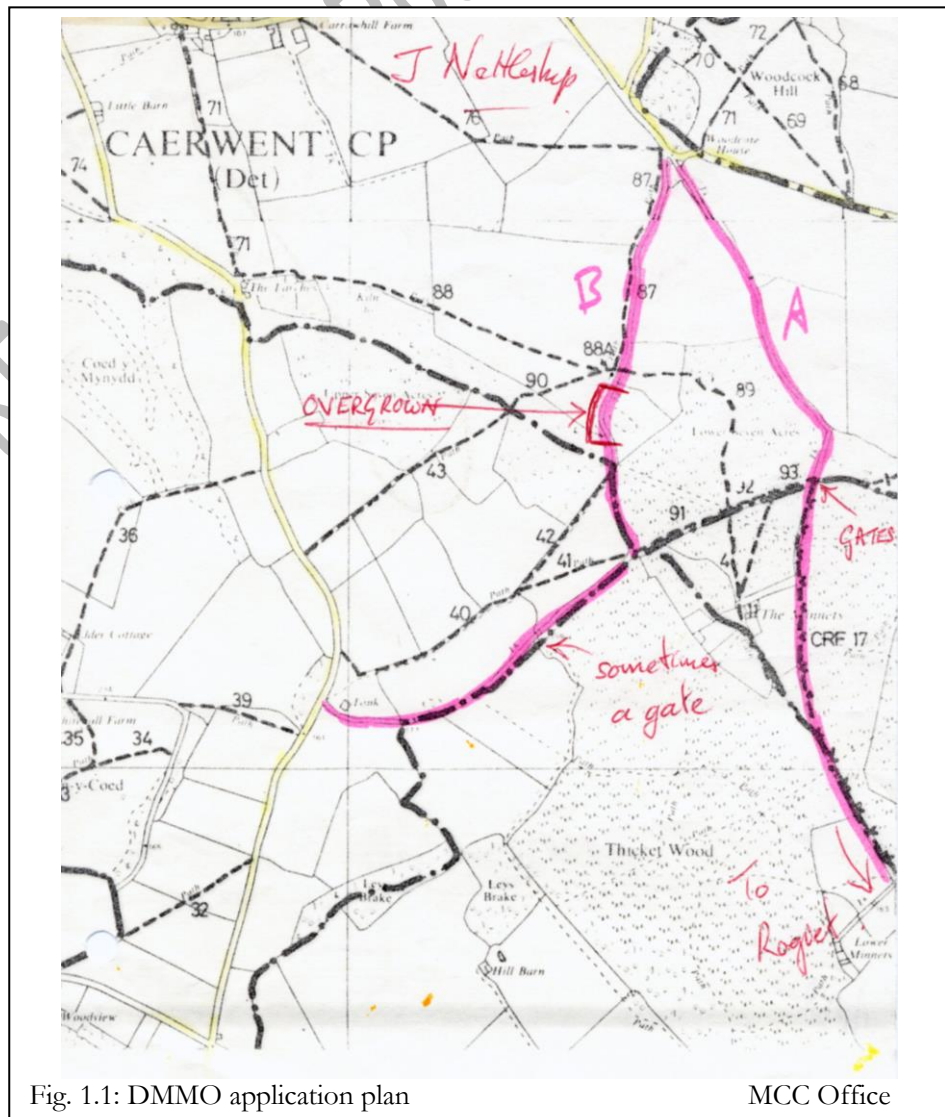
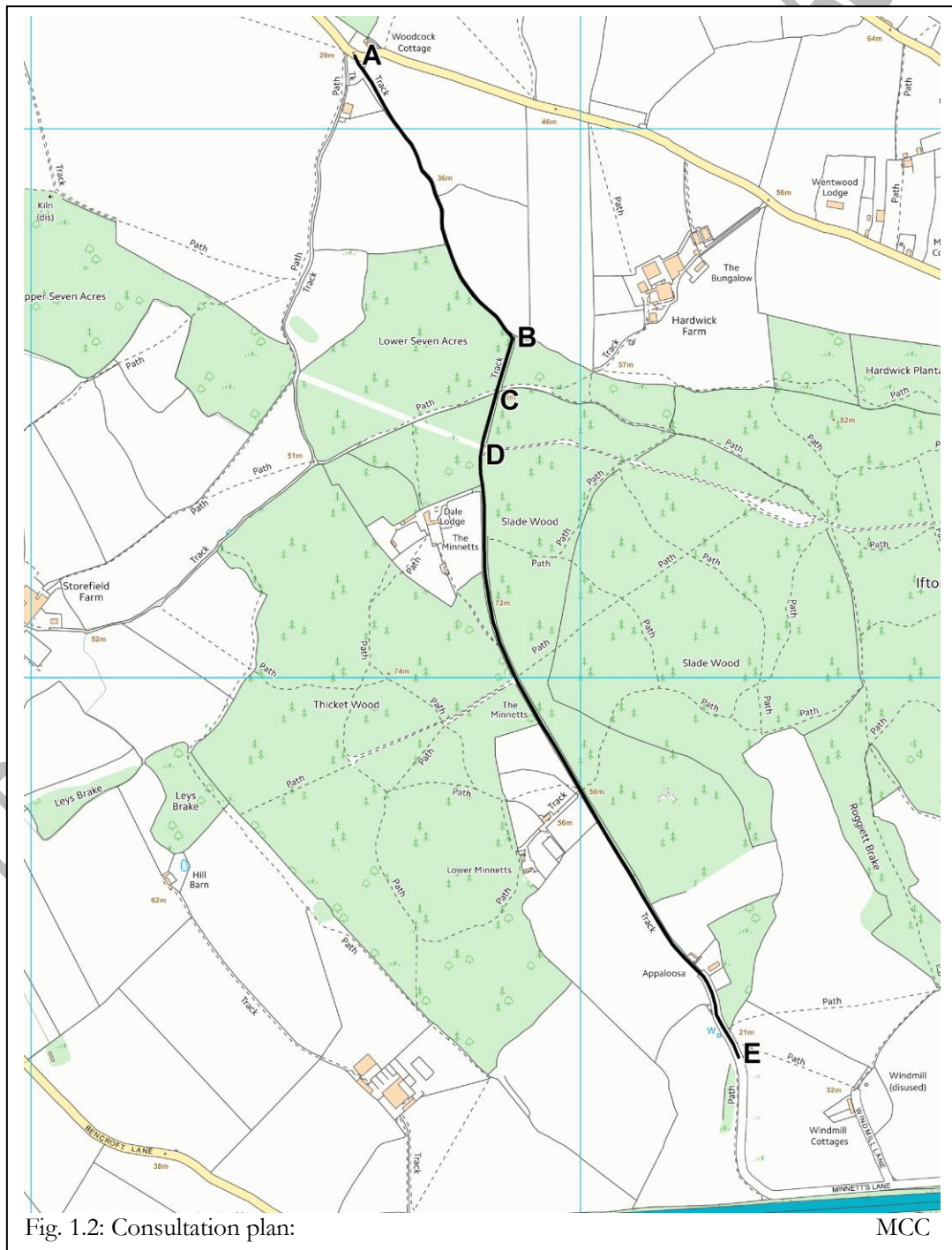


Fig. 1.1: DMMO application plan

MCC Office

- 1.2. The whole length, between points A to E (consultation plan Fig.1.2), is implied even though CRF 5 Llanvihangel Rogiet is neither mentioned in the certificate (i) description or included on the submission plan (Fig.1.1). The written words “To Rogiet” confirm the inclusion of the whole length of the route in question.



- 1.3. On the 6 March 1990 Mr J.A. Stotland applied to divert a section of Route A. This was met with the fact that he did not own the track that he proposed to divert and therefore was unable to make the diversion order.

- 1.4. In 1990, an investigation, undertaken by the Head Warden of Countryside, revealed that the southern part of the route in question, C to E, was shown on the Commons Enclosure Act dated 1855 and on the 1855 magistrate's highway certificate, issued under the Quarter Sessions<sup>1</sup> for the completion of repairs. This historical documentation is examined in Chapter 7 of Report 2 of 3.
- 1.5. As a result of the DMMO application, the research and the meeting held between the County Engineer (Area Manager (East)) Mr G. Noble, Councillor Richards, Assistant Solicitor Miss J. Millward, and Public Rights of Way Officers Mr J. Willis and Mrs R. Reid on the 4<sup>th</sup> November 1992 it was agreed that Route A was an old parish road and would be the responsibility of the Highway Dept.
- 1.6. After this meeting Mr G. Noble sent a letter to Councillor Richards dated 5<sup>th</sup> November 1992 (Appendix 1.6) stating that:-
- "...track (Route) A was an ancient parish road and as such, is already a public highway. Registration of the public's right of way on this road is unnecessary. I shall arrange for this road to be added to my records as byway maintainable to "Green Lane" standard".*
- The highway maps have been marked up with reference to the letter from G. Noble to Councillor Richards (Fig. 9.3 and 9.4).
- 1.7. The matter was considered by the County Planning and Economic Development Committee at a meeting held on the 1<sup>st</sup> December 1992 (Appendixes 1.7 to 1.8) and it was recommended that the County Council should decline to make the Definitive Map Modification order on the grounds that the route in question was and remains an existing public highway. Nothing further was undertaken for Route A.
- 1.8. The recent business use of the section C to E (CRF 5 & 17 (L-Rogiet & Rogiet)), also known as Minnetts Lane, has brought to my attention that Route A, C71-10, is not on the 1988 "List of Streets". The implications of this and the recent legislative changes brought about by the 2006 Natural Environment and Rural Communities Act (NERC) has made it necessary to investigate the whole route, A to E, under the Definitive Map Modification Order process.
- 1.9. Due to the tests under the 1981 WCA and the 2006 NERC Act having different implications for section A to C than those for C to E it is best practice to either make two different DMMO orders or determine to not make any orders and instead implement the process to register the whole route on the Highways "List of Streets".

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<sup>1</sup> GRO: Ref: Q/MHC 10-2: 16th July 1852



Either way evidence needs to be examined to establish the status and whether any of the tests under NERC apply.

- 1.10. **The subject of this report investigates the route in question** between points A (Grid Ref: ST4459:9013) to C (Grid Ref: ST4484:8962) in the community of Caerwent detailed on the consultation plan (Fig 1.2). This route is not registered as a public right of way or detailed on the 1988 Highways “List of Streets”.
- 1.11. The route in question between points C (Grid Ref: ST4484:8962) to E (Grid Ref: ST4527:8835) which is recorded on the Definitive Map and Statement as Cart Road Footpaths 5 & 17 (L-Rogiet & Rogiet) remains subject to a 1990 claim to upgrade to a public byway open to all traffic and is detailed in Report 2 of 3.

## 2. Legal Basis

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- 2.1. Historical office correspondence and reports support the claim that the route between points A and C was regarded as highway. A record has been made that the route should be maintained to “Green Lane” standards. This historical information influences the remainder of the route C to E as the consultation plan (Fig. 1.2) shows the route in question to be a direct connection between two existing highways.
- 2.2. The Council needs to decide whether the presented evidence suggests that the route in question should be recorded as a public byway open to all traffic (available to the public on foot, with horses and with motorised vehicles), or a restricted byway (available to the public on foot, with horses and with vehicles other than mechanically propelled vehicles), or a public bridleway (available to the public on foot and with horses) or a public footpath (available to the public on foot only).
- 2.3. The 1980 Highways Act (HA) s31 (1) provides the statutory foundation for the occurrence of an event under Wildlife and Countryside Act 1981 (WCA) section 53(3)(c). A WCA 53(3)(c) event gives rise to a necessity for modification by order under the 1981 WCA section 53 (2).
- 2.4. **Section 53(3)(c)(i)** of the 1981 WCA concerns itself with any type of public right of way, such as a public footpath, bridleway, restricted byway or byway open to all traffic, which are not shown in the Definitive Map and Statement that exist or reasonably alleged to exist over land in the location to which the map relates. Section 53(3)(c) of the 1981 WCA is distinct from other sections of the WCA as in these cases historical evidence is uncovered to support such a claim (or amendment or otherwise) for a claim that is made prior to the 1<sup>st</sup> January 2026.
- 2.5. Documentary evidence is often considered in determining DMMO applications as stated by section 32 of the HA 1980. *“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”*

- 2.6. It is therefore necessary to consider the relevant sections of the Highways Act 1980 (HA) in assessing the tests that must be met for 20 years use. The respective 1980 HA and 1981 WCA are repeated below for information. The 2006 Natural Environment and Rural Communities Act (NERC), has some bearing on the route in question and is interrogated in Chapter 12 of this report.

### **Highways Act 1980 s31**

- (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.*

### **Wildlife and Countryside Act 1981 s53**

- (2) *As regards every definitive map and statement, the surveying authority shall*
- (a) *as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and*
  - (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*

### **Wildlife and Countryside Act 1981 s53**

- (3) *The events referred to in subsection (2) are as follows –*
- (c) *the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –*
    - (i) *that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or subject to section 54A, a byway open to all traffic;*

The above 1981 WCA **section 53(3)(c)(i)** is relevant for the route in question, A to C, if it is acknowledged that the route should be recorded on the Definitive Map and Statement and not recorded on the Highways “List of Streets”.

### **Countryside and Rights of Way Act 2000**

- 2.7. The 2000 CROW Act ensures that section 47 & 48 do not affect the operation of the relevant sections and schedules of the 1981 WCA if either an order or an application has been made before the commencement date of the 2000 Act. In this case the DMMO application for the route in question is dated 22 September 1990 and it was decided, as the route was a highway that there was no need to make a DMMO.
- 2.8. However, as the recording of the whole route in question has not been implemented or completed it is therefore understood that the DMMO remains.

### **Natural Environment and Rural Communities Act 2006**

- 2.9. The DMMO application for "Route A" (section A to E) was made prior to the 2006 NERC Act. The northern section between points A to C was deemed to be a highway which was partially recorded on the Highway plans but not on the "List of Streets".
- 2.10. However, an assessment using the tests from both the 2006 NERC Act and the Wildlife and Countryside Act has been made by investigating all historical evidence which has shown that the whole route should be recorded as a highway on the "List of Streets".

### **Calling into question**

- 2.11. In 1990 the applicant, knowing that the routes, referenced as "A" & "B", were not maintained by the Council and discovered that both routes were not registered on the Definitive Map and Statement or the Highways "List of Streets". Therefore, the applicant submitted the claim, under the Wildlife & Countryside Act (WCA) 1981 s53(2) to register and upgrade all the routes as public byways open to all traffic.
- 2.12. The calling into question of the whole route, for the purposes of the 1980 Highways Act (HA) section 31, is therefore the discovery that the routes were not registered for public vehicular rights and were not maintained. The application dated 22<sup>nd</sup> September 1990 is taken as the date when the status of the public rights for the whole route was brought into question.

### **3. Highway Act s31(1) Tests**

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- 3.1. Presumption of dedication by continuous use relies on each element of the Highways Act Section 31(1) being met. These are considered below by reference to the application and evidence as submitted.

#### **Where a way over any land.....**

- 3.2. All the Ordnance Survey maps show the route in question as a “fenced minor road”.
- 3.3. The land over which the alleged route A to E runs is shown on the 1910 Finance Act Map as not being under any specific individual ownership. The section of the route A to C is not recorded on the Definitive Map and Statement as a public right of way. While section C to E has been recorded on the Definitive Map and Statement as CRF 5 & 17 (L-Rogiet & Rogiet).

#### **...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...**

- 3.4. Ways cannot be claimed where use has been criminal or where access barred by any statutory provision. There is, notwithstanding any circumstances of which the council are currently unaware, no indication that this has occurred in the route, section A to C.

#### **...has been actually enjoyed...**

- 3.5. Evidence forms indicate continuous use of the route, A to C, from 1970 to 1990. The historical maps and documents are investigated to determine any possible public vehicular rights and are discussed later in this report.

- 3.6. There are only a few evidence forms for the section C to E.

#### **...by the public...**

- 3.7. There is minimal vehicular use for section A to C due partly to its surface condition and overgrowth.
- 3.8. The reasons given in the evidence forms indicate use as a through route between existing highways C71-2 and the cart road footpaths 5 & 17 (L-Rogiet & Rogiet) which in turn connects with unclassified county road C75-1. The type of public use associated with public interest is mainly for leisure and not for business purposes.

**...as of right...**

3.9. As of right, is taken to indicate use that has occurred without force, secrecy or permission (*nec vi, nec clam, nec precario*)

Force

3.10. No implication that the way was used by force, that any obstruction to the route was destroyed or dismantled, other than by natural deterioration, in gaining access or any challenge was issued in the evidence thus far submitted.

Secrecy

3.11. Use is indicated to have been open and continuous. The implication exists within the evidence forms that the usage was without any inference of stealth or subterfuge.

Permission

3.12. No respondents indicate that they were given permission to use the route in question for access.

**...without interruption for a full period of 20 years...**

3.13. Sufficient use of the way must be shown for a 20 year period. The evidence for the whole route A to E is obtained from all the historical documents and maps that are discussed in detail in Chapter 7 of reports 1 and 2.

3.14. The DMMO evidence forms for the route in question indicated that access was available continuously from 1970 to the time of calling into question in 1990. Twenty-seven users report walking the route in question while out of those 27 only five report using the route with a vehicle, while four use the route on horseback and one on a bicycle.

**...no intention during that period to dedicate it.**

3.15. No Highways Act s31(6) deposit is recorded in respect of the route in question referred to as the land is not registered to any particular owner.

3.16. It is acknowledge that when a route similar to this has no registered owner then the landowner on each side of the way is responsible up to a centre line. Section A to C of the route in question has various adjacent owners (Fig. 5.1) while National Resources Wales owns the majority of the land either side of the route in question between points C to E. However, regardless of whether or not the land is registered to any particular owner does not prevent the route being "Listed" as highway or registered as a public right of way.

- 3.17. There is also no other indication of an overt intention not to dedicate demonstrated within the evidence.
- 3.18. Although it must be acknowledged that an intention not to dedicate and an outline of any actions taken in supporting such a position typically arise as a response to an application rather than within an application itself. An assessment that no intention to dedicate appears to have existed at this point must therefore be considered without prejudice to the likelihood of any future evidence being uncovered in the course of the modification order.

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## 4. Evidence Forms

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- 4.1. Certificate (i) of the DMMO application form states that the applicant hereby applies for an order under section 53(2) of the 1981 WCA modifying the definitive map and statement for the area by adding the byway open to all traffic from Woodcock Cottage, Five Lanes to Rogiet which may include upgrading to a byway open to all traffic the footpath CRF 17 from Parish Boundary to Rogiet” and shown on the map (Fig. 1.1).
- 4.2. Although the submission plan does not show the full extent of “Route A” the description is clear on certificates (i) & (iii) (Appendixes 1.3 & 1.5) and the whole route between points A to E (Fig. 1.2) is understood.
- 4.3. Twenty-seven Definitive Map Modification Order evidence forms have been submitted to the Authority for route in question, A to E (Appendixes 4.1 to 4.58). Of these 27 people 24 have also witnessed using Route B. These are investigated in report 3 of 3.
- 4.4. The User Evidence time line chart (Appendix 4.59) shows that out of 27 evidence forms there are:-
  - 4.4.1. Twenty-seven users having walked the route.
  - 4.4.2. Twenty-five users mention the presence of gates which are described by one user as - “...one double gateway, one side narrow, one side wide (for vehicles) at the parish boundary. Never Locked”. This records that use of the route in question, A to C, although maybe limited, was not prevented.
  - 4.4.3. Thirteen users having walked the route for the full 20 year period.
  - 4.4.4. One user having used the route on horseback for the full 20 year period. Another two horse riders covering only 7 years of the 20 year period. There is one other horse rider that has used the route outside the 20 year period during the years 1930 to 1936. Only four horse riders in total.
  - 4.4.5. One user having used the route on a bicycle. There are no cycle routes on the Definitive Map and Statement. Therefore, the minimal designation for the route in question would be bridleway which accommodates this type of use.
  - 4.4.6. Five users have used the route in a motorised vehicle.
    - 4.4.6.1. Three users having used the route in a motorised vehicle during the 20 year period. Only two out of these three have used the route with a vehicle for the full 20 year period. These two users



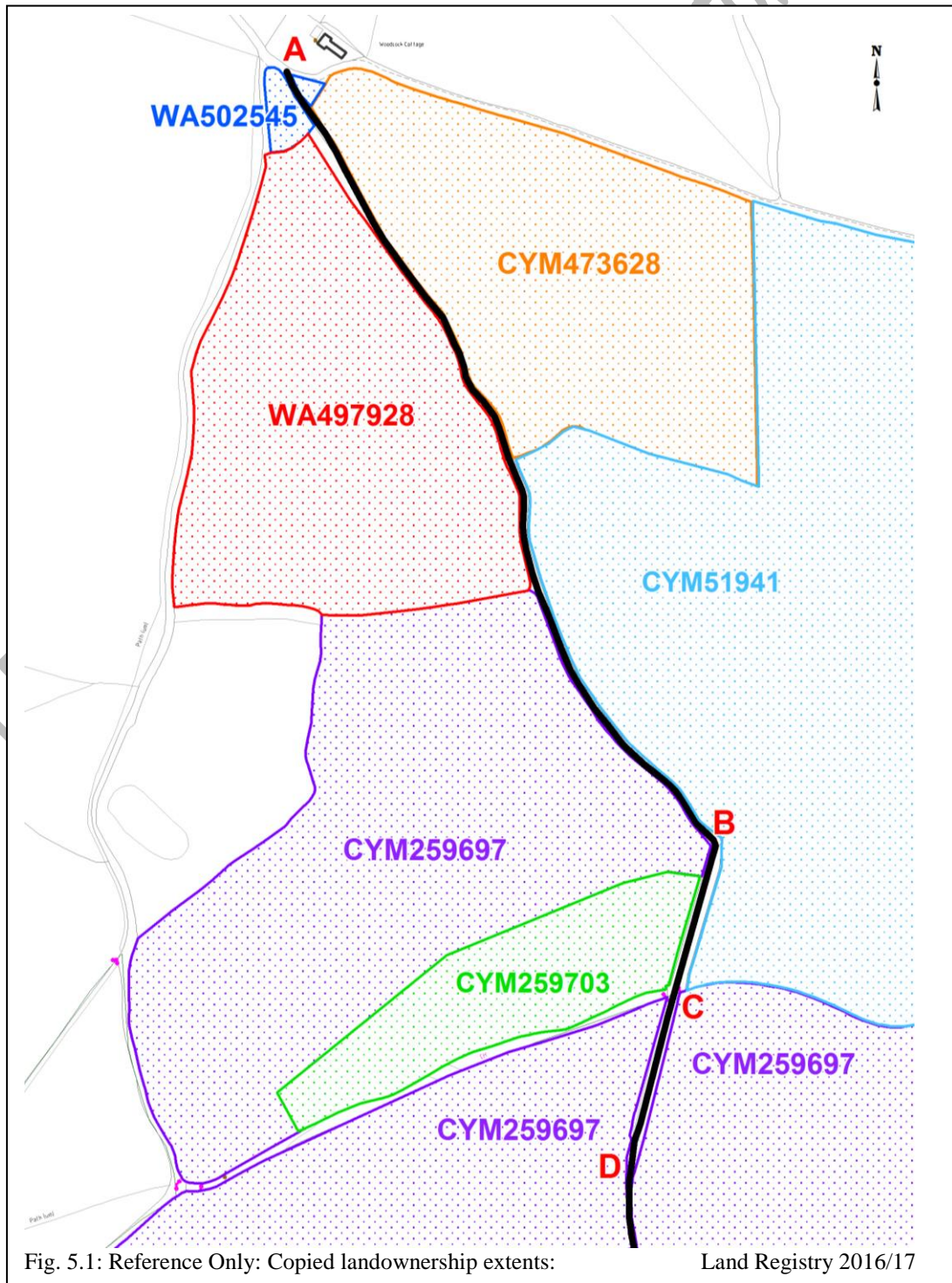
describe their vehicular use of the route in question between points C to E and not of the whole route.

4.4.6.2. One vehicular user describes the route in question, A to C, as rutted and only passible in a tractor.

- 4.5. The majority of use reported is walking. This type of usage does not prevent the existence of other higher rights. It is possible that the surface condition and overgrowth for large parts of the year have, in the main, prevented the public from using the route in question in motorised vehicles.
- 4.6. There are minor references on the evidence forms for Cart Road Footpaths 5 & 17 (L-Rogiet & Rogiet).

## 5. Land Registry

- 5.1. The results of the Land Registry searches issued on the 27 August 2008, the 25<sup>th</sup> February 2016, the 11<sup>th</sup> August 2017 and the 15<sup>th</sup> September 2017 show that the route is not registered to any specific owner. All the Title deeds searched show that they are adjacent to the route in question, A to C which significantly sets the whole route in question into the public domain but does not clarify the status of public use.



- 5.2. Title deed number WA502545 is for Woodcock Cottage, Five Lanes, Caerwent, Caldicot NP26 5PE and entries on the registered title, dated the 25<sup>th</sup> Feb 2016, state that Mr E. J. Frances as being the proprietor since July 2012. The plan showing property boundary edged in red abutting the route in question - Appendix 5.1.
- 5.3. Title deed number WA497928 is for the land at Five Lanes, Caerwent, Caldicot and entries on the registered title, dated the 25<sup>th</sup> Feb 2016, state that Mr D. A. Haines, of Oaklands Farm, Llanvair Discoed, Chepstow, Mon. NP16 6LY, as being the proprietor since June 2008. The plan showing property boundary edged in red abutting the route in question - Appendix 5.2.
- 5.4. Title deed number CYM473628 is for land lying to the south east of Five Lanes Farm, Five Lanes, Caerwent, Calidcot and entries on the register title, dated 15 September 2017, state that Mr L. Williams, of Upper Grange Farm, Magor, Monmouthshire NP26 3AT as being the proprietor since December 2009. The plan showing property boundary edged in red abutting route in question - Appendix 5.3.
- 5.5. Title deed number CYM51941 is for Hardwick Farm, Five Lanes, Caerwent, Caldicot NP26 5PH and entries on the register title, dated the 25<sup>th</sup> Feb 2016, state that Mr M. Smith as being the proprietor since December 2001. The plan showing property boundary edged in red abutting the route in question - Appendix 5.4.
- 5.6. Title deed number CYM259703 is land lying to the south western side of Hardwick Farm, Caerwent, Caldicot and entries on the register title, dated 15 September 2017, state that the National Assembly for Wales care of The Director of Legal Services, Welsh Assembly Government, Crown Building, Cathays Park Cardiff CF10 3NQ, as being the proprietor since November 2005. The plan showing property boundary edged in red abutting the route in question - Appendix 5.5.
- 5.7. Title deed number CYM259697 is for Thicket Wood, Slade Wood and Lower Severn Acres, Caerwent, Caldicot and entries on the registered title, dated the 11<sup>th</sup> August 2017 state that the National Assembly for Wales care of The Director of Legal Services, Welsh Assembly Government, Crown Building, Cathays Park Cardiff CF10 3NQ, as being the proprietor since November 2005. The plan showing property boundary edged in red abutting the route in question - Appendix 5.6.1.
- 5.8. This title references a conveyance of land dated 18<sup>th</sup> November 1953 (Appendixes 5.6.1 to 5.6.22) and refers to the route in question under part II the location called Slade Woods – describing it as ‘Upper Seven Acres over Ordnance Number 8 to roadway Rogiet/Carrow Hill’. This evidence implies higher public rights when using the term ‘roadway’. Moreover, the extracted plan for this area shows the

route in question to be left uncoloured and not included within the property boundaries.

- 5.9. Landownership does not prevent public rights being registered. However, the evidence that the route in question has not been registered to any specific owner/s adds weight to other evidence which when taken together, on balance, supports public rights.
- 5.10. The land registry evidence along with the depiction of the whole route A to E on all historical maps suggests public vehicular rights.

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## 6. Pre-Order Consultations

- 6.1. The period of the pre-order consultation for the Definitive Map Modification Order to register the route in question, A to E, as either a byway open to all traffic, on the Definitive Map and Statement or as a highway recorded on the Highways “List of Streets” ran from the 1<sup>st</sup> November 2017 to 30<sup>th</sup> January 2018

Pre-Order Consultation results dated 2018			
1	Matthew Lewis	Head of Countryside	
2	Ruth Rourke	Countryside Access Officer	Continuous input.
3	Kate Stinchcombe	Biodiversity Officer	
4	Claire Williams	Legal Services	
5	Paul Keeble	Highways	
6	Councillor P. Murphy	Councillor for Caerwent	
7	Councillor L. Dymock	Councillor for The Elms	
8	Councillor L. Guppy	Councillor for Rogiet	
9	Clerk Mrs L. McKeon	Community Council, Caerwent	
10	Clerk Mrs B. Cawley	Community Council Magor with Undy	
11	Clerk Mrs M. Williams	Community Council Rogiet	
12	Mr John Nettleship	Applicant	
13	Mrs A Underwood	The British Horse Society	
14	Christine Hunter	Open Spaces Services	
15	Sir/Madam	The Byways & Bridleway Trust	
16	Mr R. Bacon	Natural Resources Wales	
17	Mr J. Askew	Tread Lightly Area	
18	Mr A. Thomas	Ramblers	
19	Mr D. Wyatt	Green Lane Association	
20	Mr M. Slater	CTC	
21	Sir/Madam	LARA	
22	Sir/Madam	ACU	
23	Mr R. Gould	British Telecom	
24	Sir/Madam	National Grid	
25	Ms R Humphreys	Welsh Water	
26	Sir/Madam	Western Power	
27	Mr E. J. Frances	Woodcock Cottage, Five Lanes, Caerwent, Caldicot NP26 5PE	
28	Mr D. A. Haines	Oaklands Farm, Llanvair Discoed, Chepstow, Mon. NP16 6LY	
29	Mr L. Williams	Upper Grange Farm, Magor, Monmouthshire NP26 3AT	

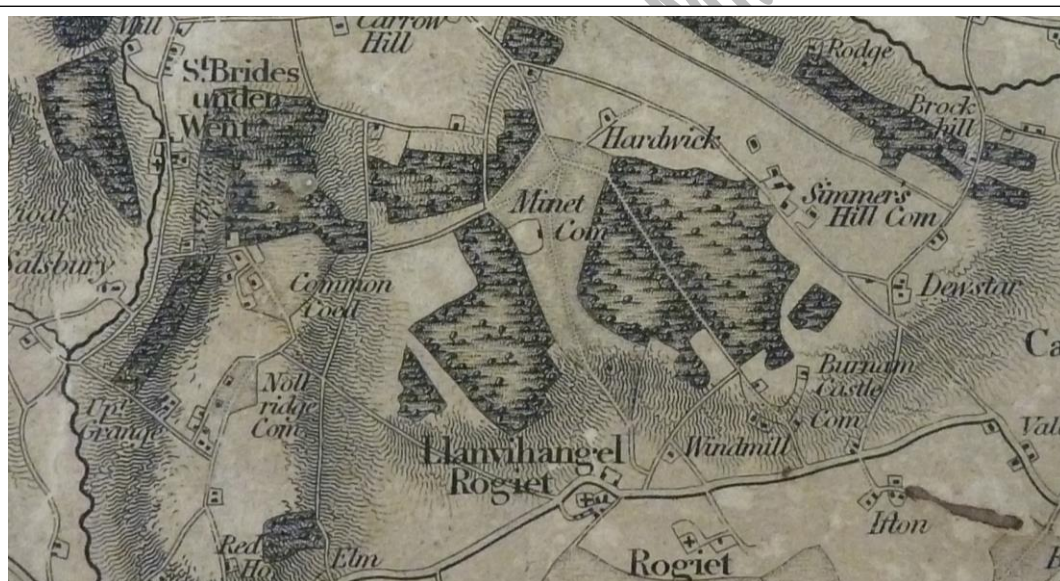
30	Mr O. Smith	Hardwick Farm, Five Lanes, Caerwent, Caldicot NP26 5PH	
31	The Director of Legal Services	The National Assembly for Wales Welsh Assembly Government, Crown Building, Cathays Park Cardiff CF10 3NQ	
32	Mr & Mrs J. Lewis	Upper Minnetts, Minnetts Lane, Rogiet, Caldicot NP26 3US	
33	Mr D. J. and Mrs L Richards	Lower Minnetts, Minnetts Lane, Rogiet NP26 3US	
34	Mr S. C. Phillips	1 Green Farm Cottage, Rogiet NP6 3UP	
35	Mr A. E. Stephens	Appaloosa, Minnetts Lane, Rogiet, Caldicot NP26 3US	
36	Sir/Madam	Gwent Wildlife Trust of Seddon House, Dingestow, Monmouth, NP25 4DY	

6.2. The consultation shows

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## 7. Historical Map Evidence

- 7.1. Legislation requires that all historical evidence is investigated which, on the balance of probabilities, may support the allegation that the route in question may or may not be a byway open to all traffic.
- 7.2. **The 1823 Price's map** shows the route in question. The route is marked by parallel solid and broken lines which suggest that the route is firstly a minor fenced road until it enters Minet Com (Minet Common) then it continues as an unfenced road through the common. Therefore, as it is shown on this map it was clearly constructed pre-1835.

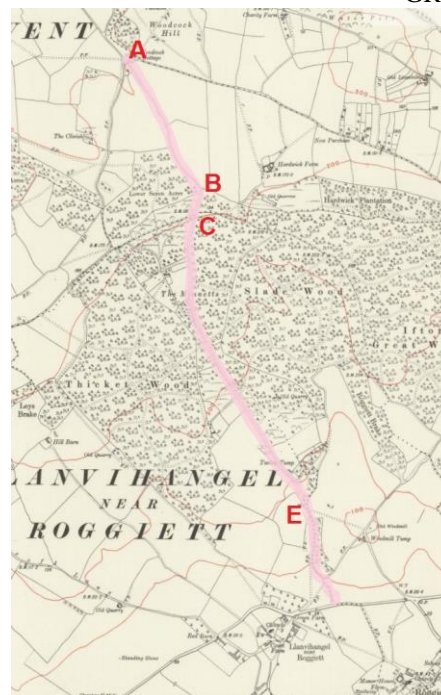


1823 Price's Map: not to scale:

GRO



1823 Price's Map:



1922 Ordnance Survey Map:

Fig. 7.1: Comparison between Price's Map and OS Maps: (not to scale and route highlighted)

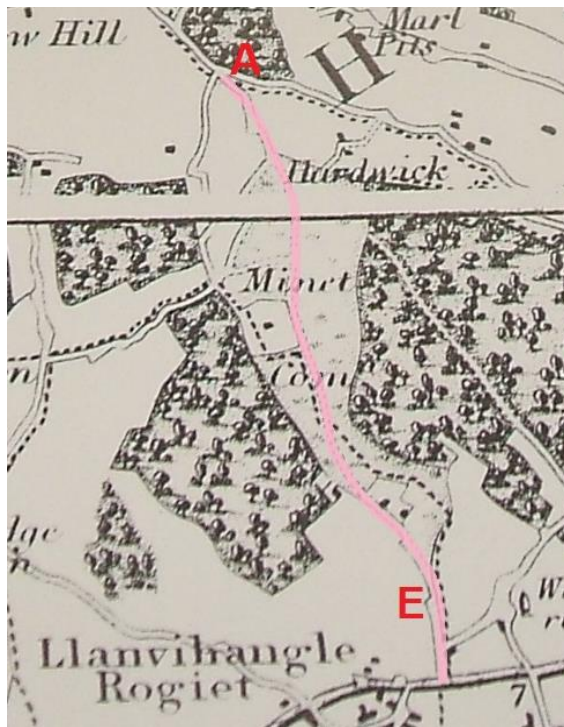


7.3. **The Greenwood Map (scale 1 inch to statute mile), published in 1830, shows the route on a similar alignment as the Price's map and the 1922 Ordnance Survey map. Again the route is depicted as a minor fenced road leading to Minet Common and then passing through the Common as an unfence road.**

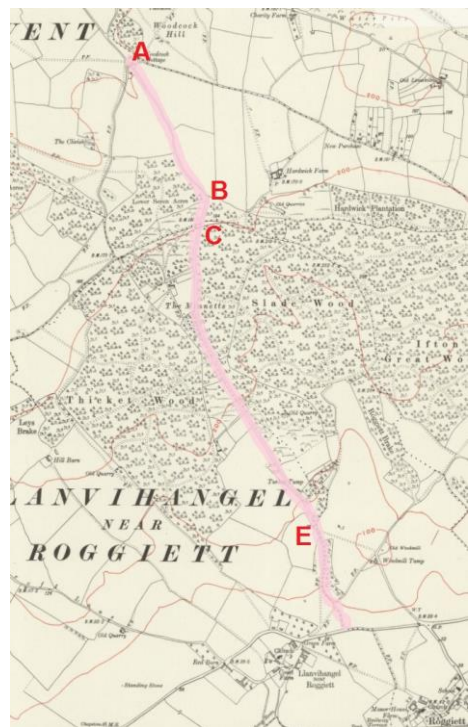


1830 Greenwoods Map: not to scale

MCC Office



1830 Greenwoods Map:



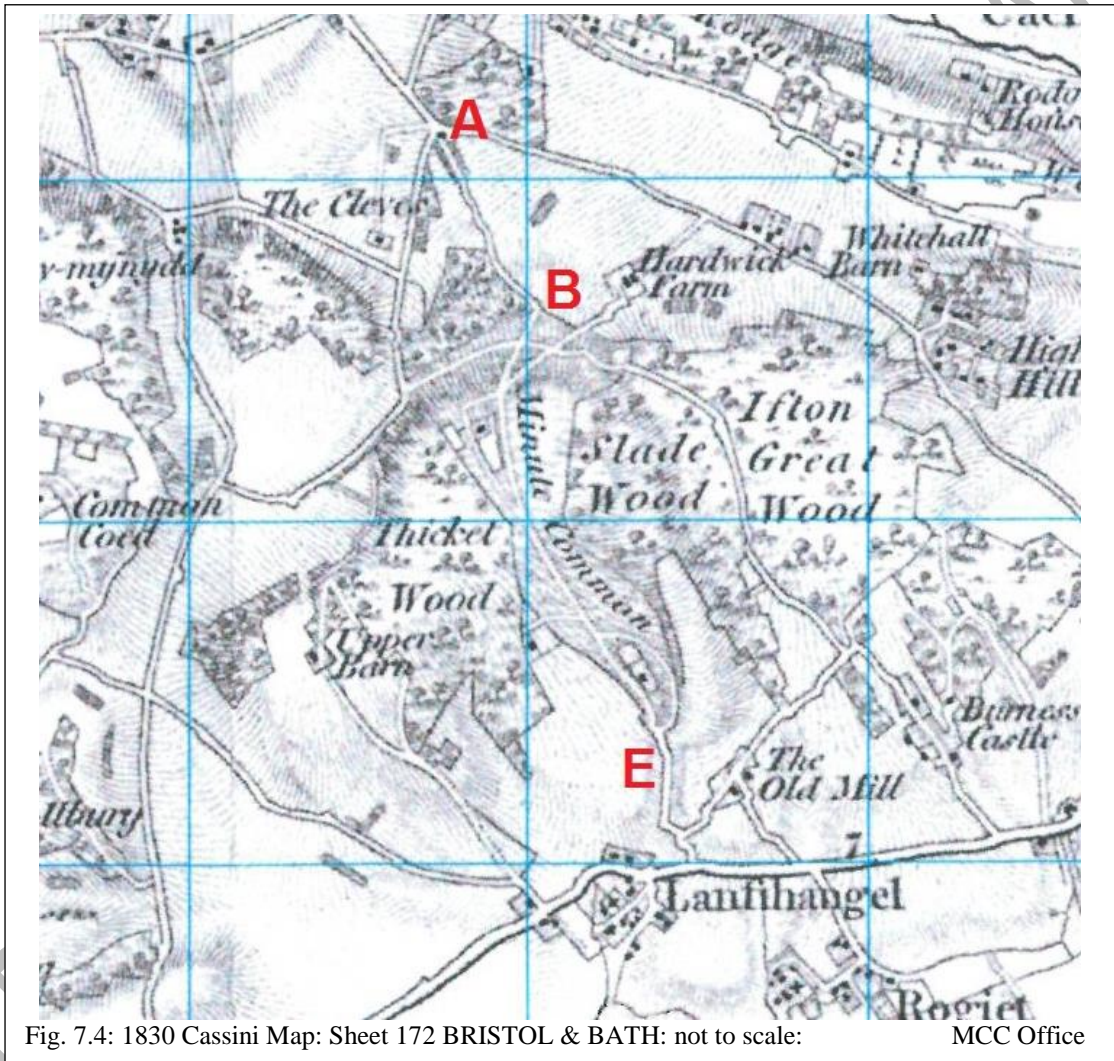
1922 Ordnance Survey Map:

Fig. 7.2: Comparison between Greenwoods and OS Maps (not to scale and route highlighted)

- 7.4. The 1830 maps do not usually extend to the detail required for the depiction of footpaths. In some locations marked on the Greenwoods maps there are recorded differences between footways and roads which is not shown at this location. The depiction of the route in question on this map suggests that the route is higher in category to that of a footpath.
- 7.5. Although the 1830 Greenwoods map depicts the route in question, it is known that the Greenwoods map is a poorer copy than that of the other mapping therefore other documents need to be investigated prior to the determination of public status of the route in question.
- 7.6. **The David and Charles Map (scale 1 inch to statute mile), Sheet 68 dated 1 May 1830, does show the route in question.**



7.7. **The 1830s Cassini map 172 (scale 1:63,360)**, being a facsimile of the Ordnance Survey Sheets 19 and 35 published in 1817 and 1830 respectively, shows similar alignment for the route in question on the Greenwoods map and is a replica of the markings on the David & Charles map.



7.8. All the plans discussed so far show that the route between points A to E as marked by both solid or broken lines. The broken lines illustrate a change in surface and show the route to pass through Minet (Minute) Common which is indicated as being unfenced.

- 7.9. **The 1830 Ordnance Survey map (scale 1 inch to statute mile)**, is the base map to the Cassini and David & Charles Maps and is known to be more accurate in the depiction of physical features surveyed.
- 7.10. The Ordnance surveyors were given the duty to mark all the physical features that they encountered whether public or private but were not to concern themselves with, or enquire into, rights of way.

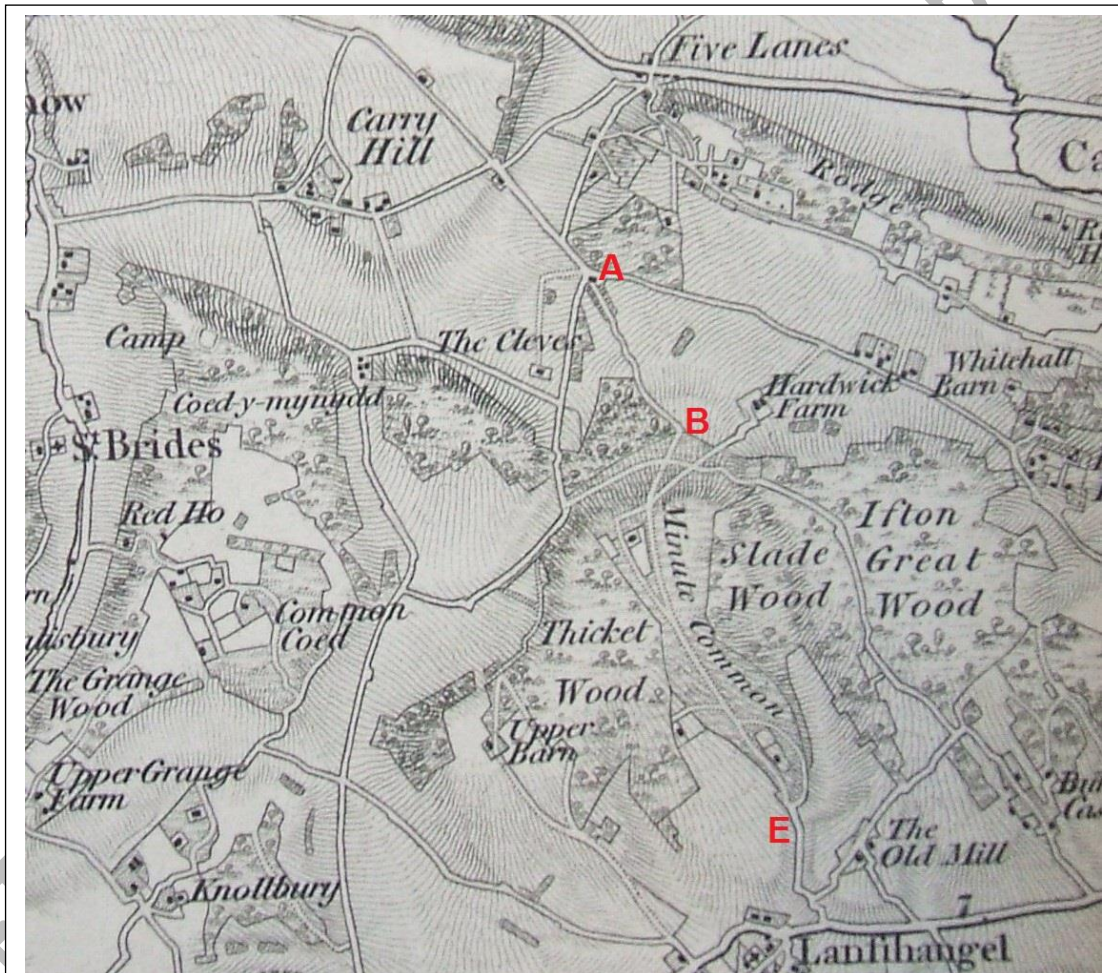


Fig. 7.5: 1830 1<sup>st</sup> Edition Ordnance Survey Map: not to scale

GRO

- 7.11. When comparing the David & Charles, Cassini and 1830 OS maps it is noted that there are differences with some 'roads' marked by solid bold lines and other 'roads' marked by broken lines. The 'roads' marked by broken lines cross open fields or pass through Minute (Minet) Common.
- 7.12. All the 1830 maps discussed so far are of a scale that only enables the depiction of roads that are shown to cross north, south, east and west through and around Thicket Wood, Minute Common, Slade Wood and Ifton Great Wood while at this detail there is no route alignment proceeding northwest from Hardwick Farm. When these 1830 maps are compared with other mapping data sets it suggests

that minor routes such as footpaths and maybe bridleways were not physical features that could be recorded at the scale of 1 inch to statute mile.

**The 1835 Highways Act.**

- 7.13. A public highway is established when any way has been dedicated and accepted by the public at large. A way which was a public highway before the passing of the 31<sup>st</sup> August 1835 Highways Act is repairable by the parish without the formalities prescribed in section 23 of this 1835 Act.
- 7.14. All the historical maps prior to 1835 successfully show that the route in question was a highway before 1835 and, therefore, the cost of making it up must be borne by the Authority.
- 7.15. The 1835 Act deals mainly with the responsibility of maintenance for “roads, occupation ways and horsepaths not footpaths”. This means that the issue of public maintenance does not clarify the public status of the route and it is false to assume that because a way is shown on a pre-1830s map that it is an ancient public highway automatically implicating higher public rights.
- 7.16. All the historical maps and associated documents need to be investigated to show that the public at large have accepted use of the way by whichever means.

- 7.17. **The Tithe Maps** hold significant evidence for public rights of way as routes are shown shaded and without apportionment numbers separating those ways from the purpose of the Tithe maps which was to take a tithe/tax from the profits of arable land. The lack of Tithe apportionment numbers means that the strip of land that forms the route in question was not in any individual ownership and was not arable and therefore did not produce a product that was taxable.
- 7.18. There are first class and second class Tithe maps that when compared with the Ordnance Survey maps for section, A to C, all show a similar alignment for the route in question and this suggests that there are higher public rights.
- 7.19. **The 1841 Tithe map for Saint Brides Netherwent** dated 27<sup>th</sup> November 1841 (Fig: 7.6) shows the route in question shaded brown between points A and B as the access for Minutes Common.

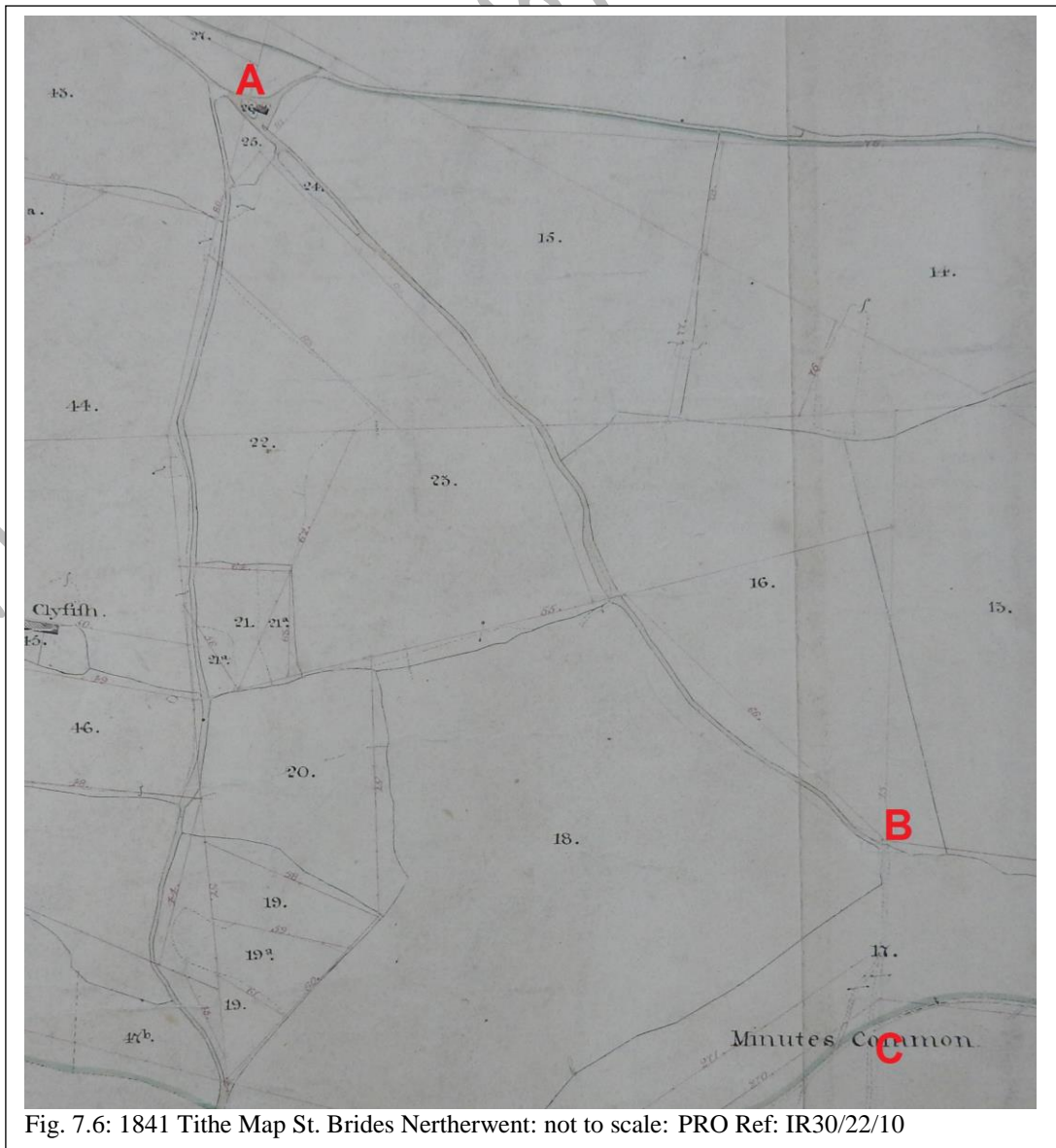
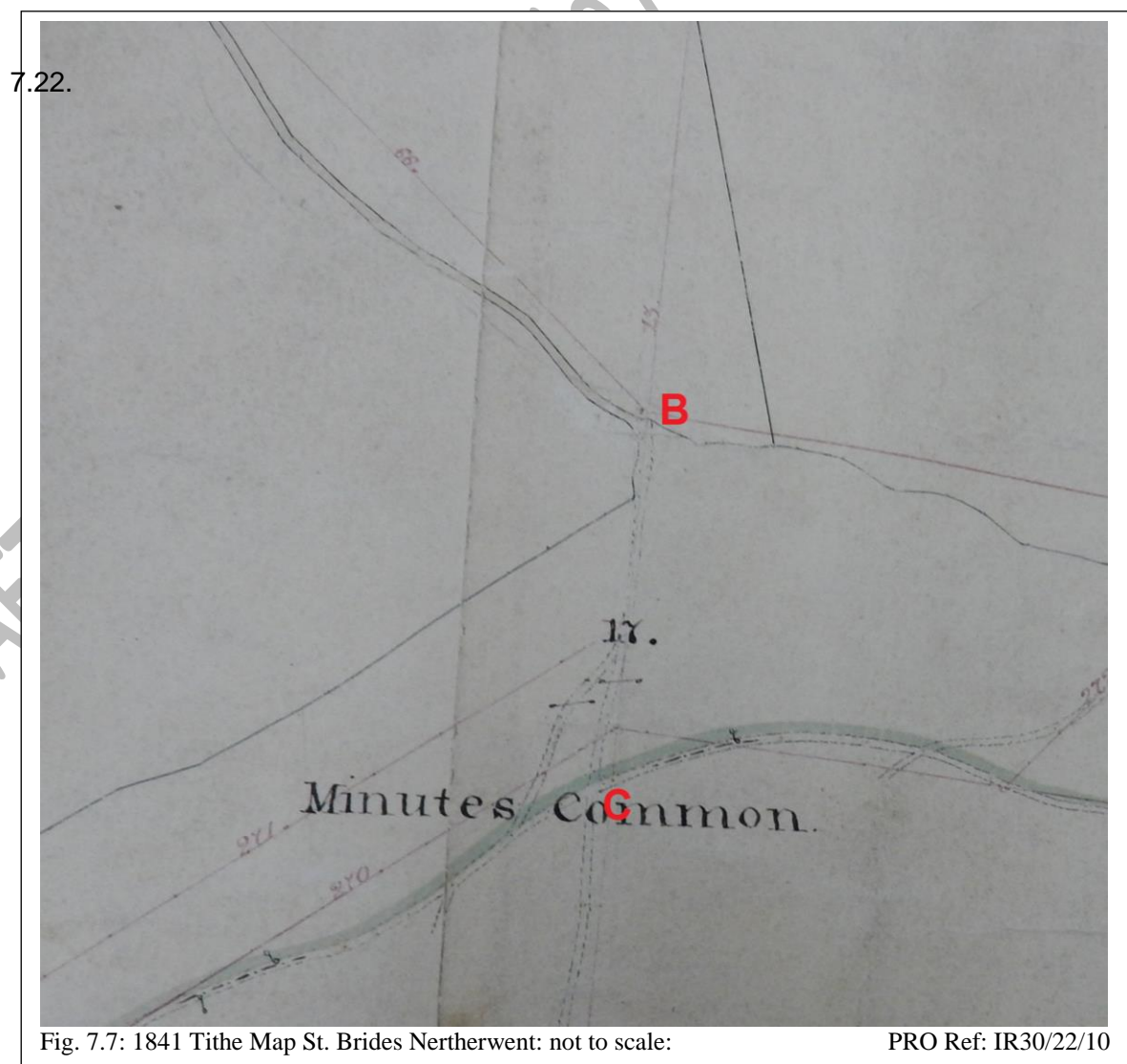
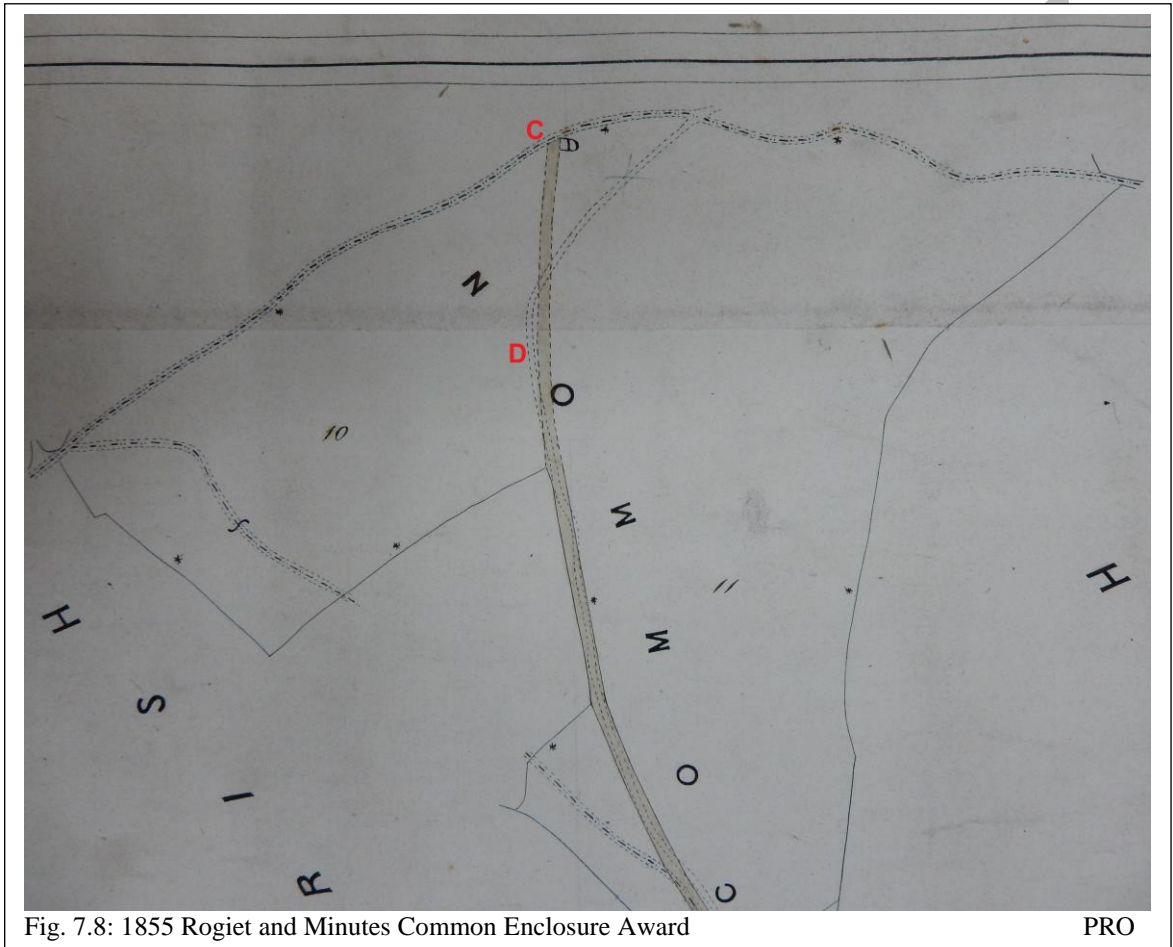


Fig. 7.6: 1841 Tithe Map St. Brides Netherwent: not to scale: PRO Ref: IR30/22/10

- 7.20. Additionally, when any tithe map is compared with the highway documents it is noted that normally all roads shaded on the highway maps are also shown shaded on the tithe maps confirming that all routes shown shaded on the tithe maps should also be recorded on the Highways “List of Streets”.
- 7.21. Fig. 7.7 shows that the shading stops at point B of the route in question and the remainder of the route is depicted by parallel broken lines. This does not mean that public rights stop at point B the change in marking shows the route to continue over the Common to the community boundary following the alignment shown on all the historical maps. The fact that the area is designated as a common entitles the public to the whole use of the land. The parallel broken lines mark the “unfenced” alignment of the route in question to continue over the community boundary to connect with the route marked on the 1855 Rogiet Enclosure Award.



7.22. An Enclosure Award for St. Brides Netherwent is not available for inspection. I am aware that Enclosure Awards and the Tithe documentation are in some cases interchangeable as the period of enclosure for England and Wales was from 1595 to 1918.

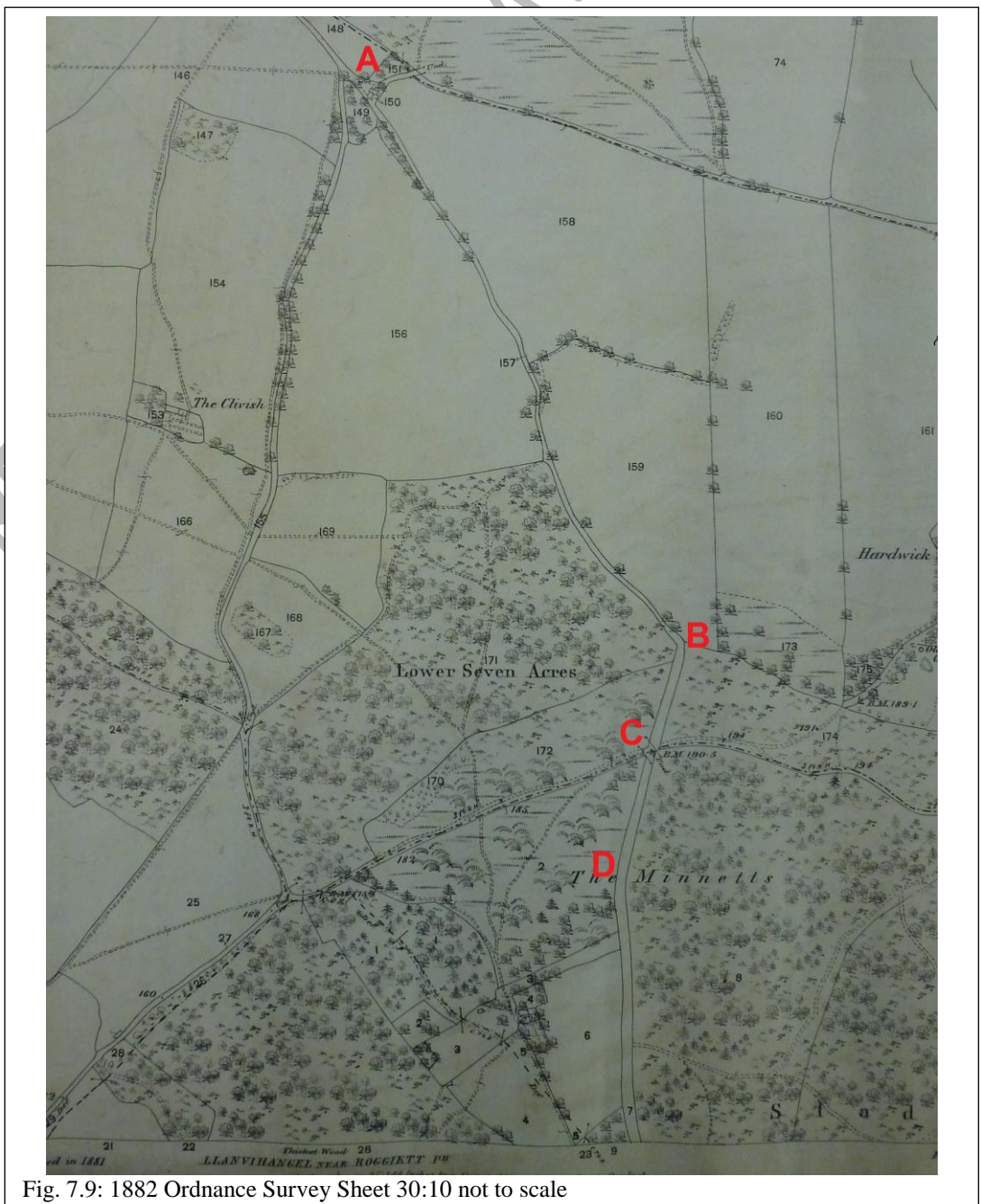


7.23. Although, the 1855 Rogiet Enclosure Award (Appendixes of transcript 7.1 to 7.4) does not include the route in question past the community boundary this evidence still has weight when combined with the 1841 St. Brides Netherwent Tithe map (Fig 7.6). Both records prove that the route in question was an access to the Minutes Common and also a direct link between the communities in the north with Llanvihangel Rogiet in the south. These historical maps taken together with all the 1830 maps and all the Ordnance Survey maps for the area, on balance, show the route in question to be a continuous thoroughfare.



7.24. **Ordnance Survey** was given the duty to depict all physical features that were encountered. The marking of the route on Ordnance Survey maps does not specify whether or not the route is private or public. However, the marking of the route in question differs to the markings for the physical features like footpaths. Footpaths are mostly illustrated by double broken black lines along with the symbol “FP”. This comparison shows that the route in question probably has higher public rights which with all the evidence for the whole route, A to E, suggests public vehicular rights.

7.25. **The 1882 Ordnance Survey Map sheet 30:10 (Fig. 7.9)** shows the route in question marked by two solid parallel lines and on the same alignment as the 1841 Tithe map.



- 7.26. The conventional signs and symbols (Fig. 7.10) used for the six inch maps have been kept as standard over the years. The route in question is indicated by two solid parallel lines that represent a minor road that is fenced.

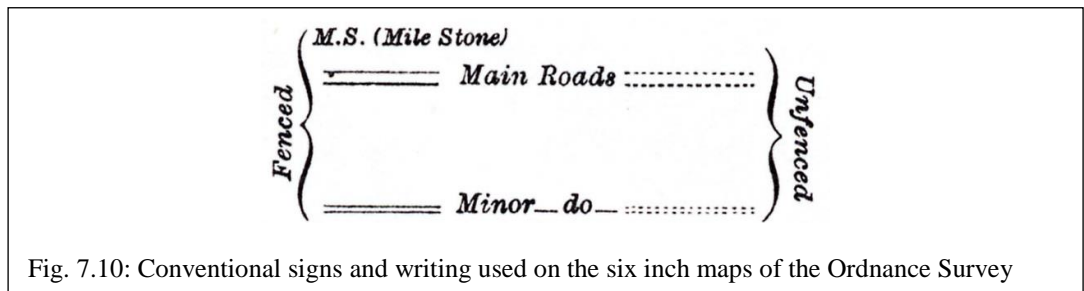


Fig. 7.10: Conventional signs and writing used on the six inch maps of the Ordnance Survey

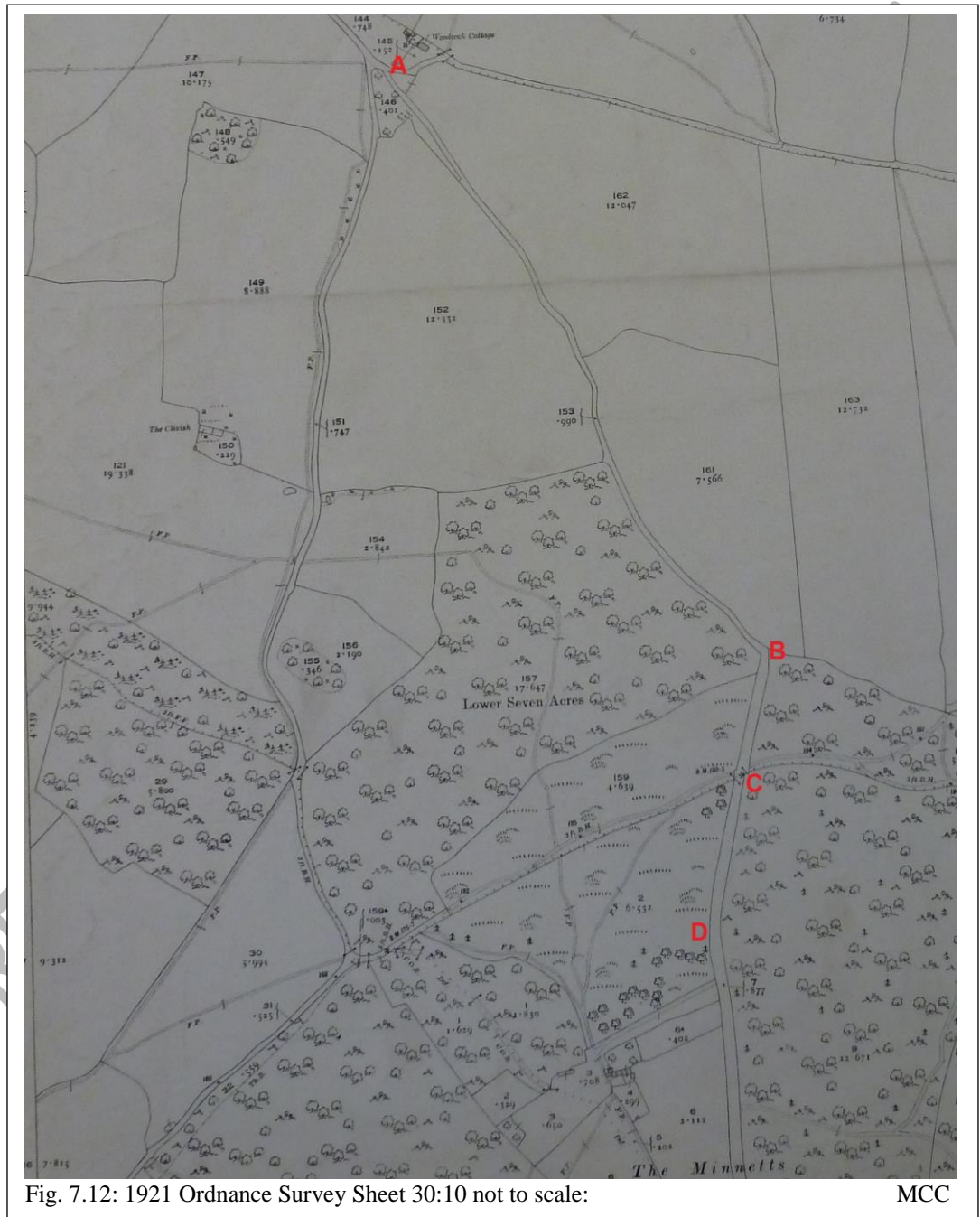
- 7.27. **The 1901 Ordnance Survey Map** again shows the route in question marked by two parallel solid black lines, indicating a fence minor road.



Fig. 7.11: 1901 Ordnance Survey Sheet 30:10 not to scale:

MCC

7.28. The 1921 Ordnance Survey Map again has similar linear markings to the previous OS maps discussed. This evidence further supports vehicular rights.



7.29. Furthermore, if such a solid line represents a solid structure, such as a fence, then if a solid line crosses a route or way then this is interpreted as a gate or another type of barrier. It is noted that this entire route between points A and E has no solid lines representing barriers that would prohibit or limit the usage of the route. This suggests that the entire route in question was a public thoroughfare for equestrians and/or motorists.

7.30. **The 1910 Finance Act Maps** provided for the levy and collection of a duty on the increment value of all land in the United Kingdom. In this way, private owners were required to surrender to the State part of the increase in the site value of their land, which resulted from the expenditure of public money on communal developments such as roads, common land or public services.

7.31. The reason for the production of the Finance Act Maps, Registers and Field books was to record land values and not for the purpose of recording the extent of the publicly maintainable highways.

7.32. The “working copy “ of the Finance Act map (Fig. 7.13) for this area shows the route in question to be uncoloured and when compared with the highway record it typically shows that the roads shaded on the highway map are also uncoloured on the Finance Act map suggesting that the road was considered public.



Fig. 7.13: 1910 Finance Act Map - working copy: Sheet 30:10

GRO

7.33. The Finance Act maps record the extent of landownership which provided for the levy of various tax duties on lands, these Finance Act records also help with the status of any routes that are in question.

7.34. The 1910 Finance Act maps that are kept in the Public Record office, are cleaner and clearly show the route in question to be uncoloured. The braces that link plots of land together have mostly been carefully drawn to not colour over the route in question which adds weight to the evidence supporting the higher status of public rights such as vehicular.

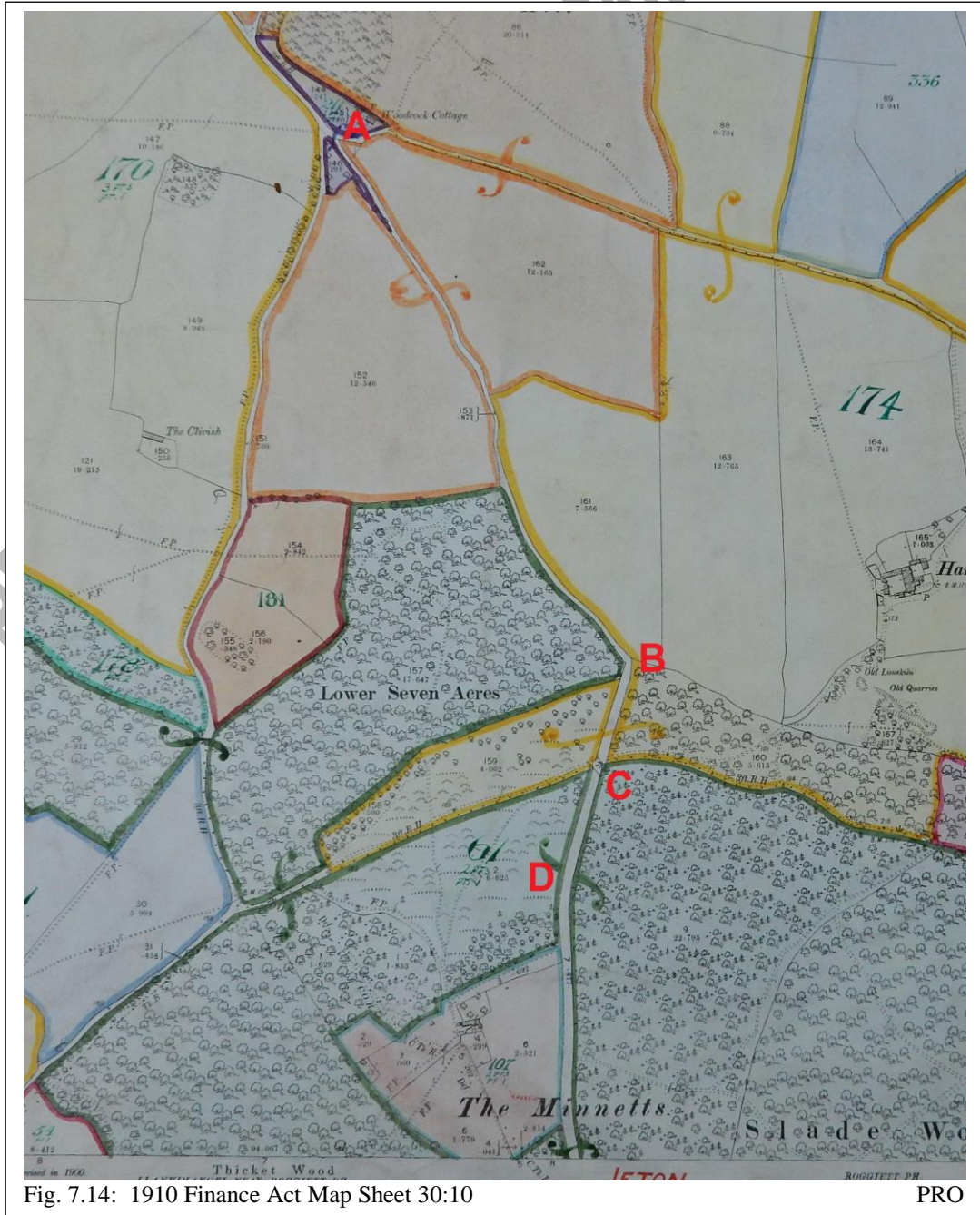


Fig. 7.14: 1910 Finance Act Map Sheet 30:10

7.35. Furthermore, routes normally for vehicular traffic were left uncoloured or “white out” while a monetary deduction in the calculation of tax for each property was

recorded in the Register and Field books for “Public Rights of Way or User” when referring to footpaths.

7.36. The Register Book that accompanies the Finance Act Map, for this area, lists the plot numbers for all the land adjacent to the whole route between points A to E. In this report I have investigated the plots that lie between points A to C. These plot numbers are 61, 174, 176 and 211.

7.37. The Finance Act Map Field books detail which plots have deductions for “Public Rights of Way or User” indicating that public rights cross over the plots. However, there is no way of linking the numerical value to any given footpath alignment or for that matter what total length of right of way represents a level of value for deduction purposes

7.37.1. Plots 61 = £25.00; 174 = £10.00; 176 = £10.00 and 211 (no record found).  
The valuation and deduction calculation has not been detailed in the Field books and the monetary value allocated to these plots does not appear to include the route in question.

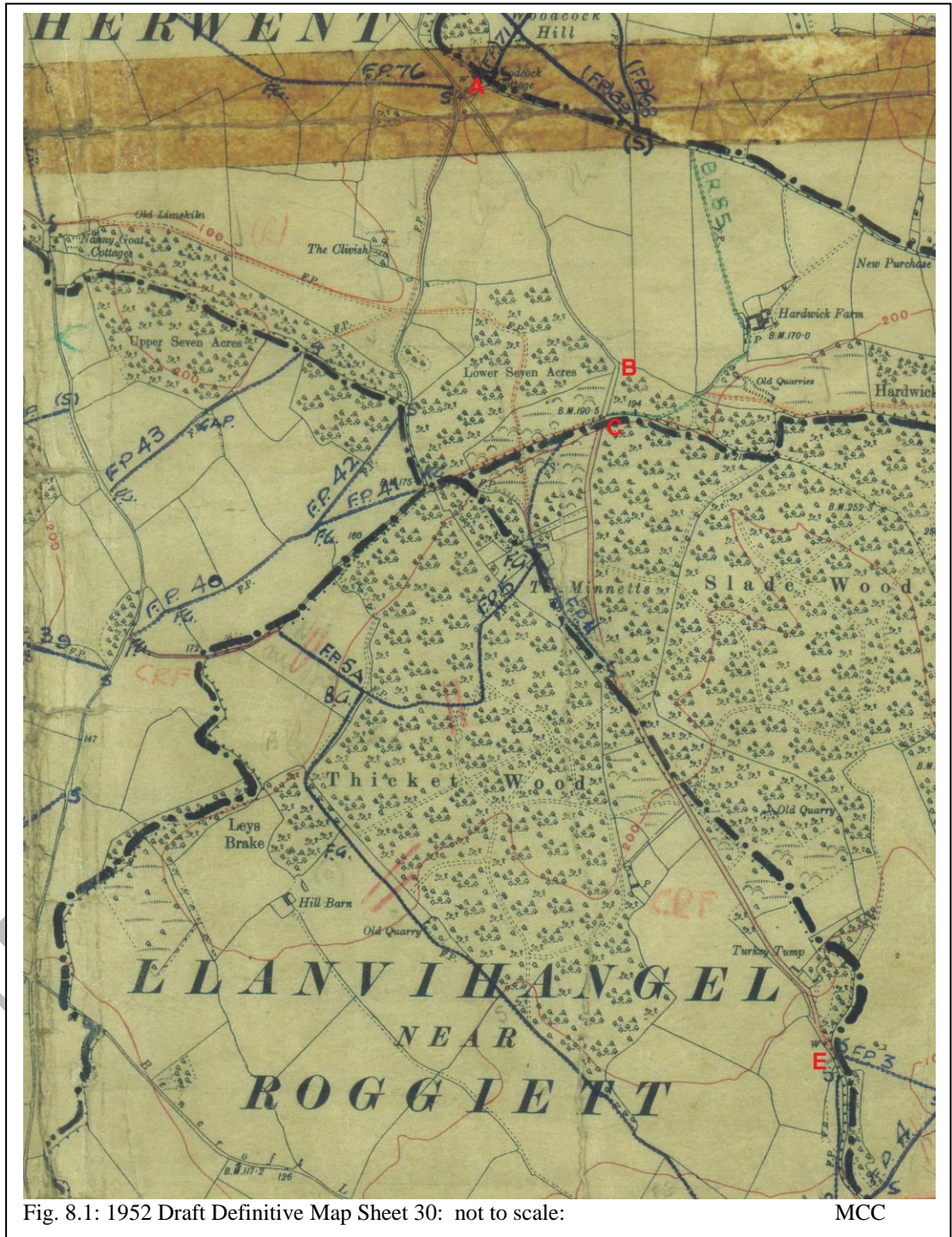
7.38. When the 1910 Finance Act Maps, Registers and Field books is combined with the 1855 Enclosure Award, 1841 Tithe map and all the Ordnance survey maps it strongly suggests that, on the balance of probabilities, the route in question has public vehicular rights.

## 8. The Definitive Map and Statement

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- 8.1. The Definitive Map communities are Caerwent, Llanvihangel Rogiet, Rogiet and Undy. Modern communities are Caerwent, Magor with Undy and Rogiet. For section A to C the community is Caerwent.
- 8.2. The public rights of way are registered on the Definitive Map and Statement for the area of Monmouthshire. These maps have a “Relevant” date of 1<sup>st</sup> July 1952; were finally published on the 16 November 1967 and are now kept under continuous review by Monmouthshire County Council Countryside Office.
- 8.3. The County Council was required under section 27 of the National Parks and Access to the Countryside Act 1949, to carry out a survey and define all those footpaths, bridleways and roads used as public paths which it considered were public. The process of producing the Definitive Map and Statement went through three stages.
- 8.4. The former County of Monmouthshire (Gwent) carried out this task by sending a map to every Community Council. The Community Councils were asked to walk every path and provide details of them. A public meeting had to be held and local people recommended alteration at this stage.
- 8.5. **The Draft Map** was deposited in all District Offices as well as at County Hall. Notice of its publication and where it could be inspected was given in local papers and the London Gazette. A period of time (not less than four months) was allowed for representations and objections to be made to the Council in relation to the paths shown or omitted on the draft plans and statements. The Draft map was published on the 16<sup>th</sup> December 1952 and 12 years later the Provisional map was published on the 17<sup>th</sup> September 1965. During this period any user who was not satisfied with decisions could appeal to the secretary of state who appointed a representative to hear appeals and come to a decision.
- 8.6. As a result of the first consultation the Draft Definitive map has a number of working marks recording changes made. There are short parallel red lines that remove the alignments of routes marked in blue and there are red lines that add the alignments of omitted public rights of way. The Draft Definitive Map dated 16 December 1952 shows the alignment of the route in question A to C unmarked.

- 8.7. The Draft map shows that the surveyors assumed the route in question to be public highway as other existing public rights of way terminate at the route in question north of the community boundary.



- 8.8. All the markings show that various consultations resulted in the additions and deletions of the alignments of ways. However, at no time was the route between points A to C added suggesting that the surveyors at the time regarded that section to already be a public road. This assumption is supported by the evidence recorded on the Tithe, Finance Act maps and also the Rogiet Enclosure Award.



- 8.9. Furthermore, the lack of red markings on the Draft map suggests that the Highway records were not interrogated at the time of the survey for if they had been then probably section A to C would have been marked by a red line. However, this has not occurred and a claim has been submitted to record the route as a byway open to all traffic.
- 8.10. The section A to C has been previously investigated and a decision was made not to make a Definitive Map Modification Order as this part of the route in question was deemed to already be public highway and should be recorded on the “List of Streets”. This decision was made at Committee dated 1<sup>st</sup> December 1992 and is discussed later in Chapter 9.
- 8.11. The only Draft Definitive statement is for Bridleway 85 Caerwent which states:- “Highmoor Hill Road to Minnetts Lane, Links Highmoor Hill Road to Minnetts Lane.” This description refers to the colloquial name for section C to E of the route in question but does not use the term “county road”. This again suggests that the Highway records were not interrogated at the time of the survey. This description also does not refer to BR 85 Caerwent linking with CRF 17 Rogiet and does not lend additional support to the claim.

8.12. **Additions and Deletions map** shows red lines to add a route while blue lines delete a route. There is no red line marking the section A to C of the route in question. This evidence is confirmed by the 1992 Committee decision that deemed the route, section A to C, was already highway and should be recorded on the “List of Streets”.



Fig. 8.2: Additions and Deletions map sheet 30: not to scale:

MCC

- 8.13. **The Definitive Map** shows no markings for section A to C of the route in question. Registered public rights of way in the area are marked by bold pink (purple) lines for footpaths; solid green lines for bridleways and broken green lines for roads used as public paths (now restricted byways).
- 8.14. When all appeals and objections to the Draft Definitive Map and Statement had been processed the Provisional Map was published on the 17<sup>th</sup> September 1965. The Provisional Map was deposited for a period of 28 days and in this case no appeals were made and the title “Provisional” on the map sheet was changed to “Definitive”. The Definitive Map was published on the 3<sup>rd</sup> November 1967.

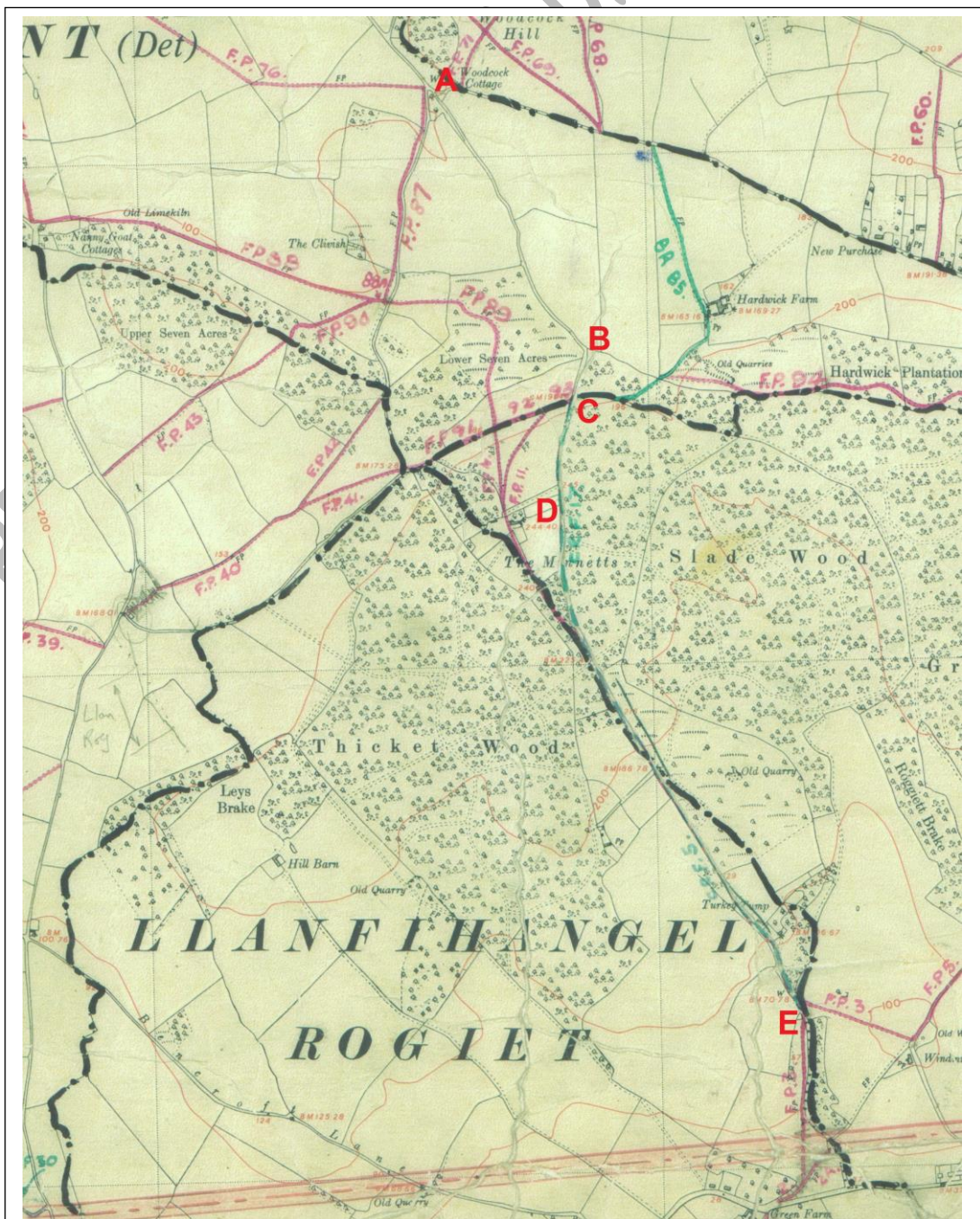


Fig. 8.3: 1967 Definitive Map sheet 30: not to scale:

MCC

8.15. **The Definitive Map Statements** only give a brief description of each way (Appendixes 8.1 to 8.4). The public rights of way bridleway 85, footpath 93 Caerwent and cart road footpath 17 Rogiet junction with section A to C of the route in question.

8.15.1. The statement for 85 Caerwent:- 85 Bridle path (BR) (Appendix 8.1)  
*“Highmoor Hill Road to Minnetts Lane, Links Highmoor Hill Road to Minnetts Lane.”*

This statement refers to the route in question as “Minnetts Lane” and the colloquial reference to this name does not mean that the route in question is a public highway. However, with all the historical documentation taken together for the whole route, A to E, it suggests that the colloquial name now has some legitimacy.

8.15.2. The statement for 93 Caerwent:- 91, 92, 93 Footpath(FP) (Appendix 8.2)  
*“From Parish Boundary and FP 41 (Undy parish) in an easterly direction to junction with BR 85.”*

This statement does not refer to the route in question as a county road and therefore does not support higher public rights. This does not mean that those higher rights don't exist. It only means that the Definitive Map Statement does not record any evidence that would support higher public rights.

8.15.3. The statement for 17 Rogiet:- 17 Cart Road Footpath (CRF) (Appendix 8.3)

*“From CRF 5 (Llanvihangel Rogiet Parish) N through the Minnett's to Parish Boundary.”*

This statement only gives a location and describes the direction the route travels.

8.16. The Definitive Map statements examined here are limited in their support of higher public rights. However, on balance, all the historical documentation investigated and the Rogiet Enclosure Award for the continuation of the route in question so far suggests that public vehicular rights do probably exist for the entire route.

## 9. The Highway Records

9.1. Both the 1<sup>st</sup> April 1949 and current “List of Streets” do not record the route in question as a county unclassified highway. Even so the Ordnance Survey maps show the route in question, A to E, as a “minor fenced road” suggesting that all public user types utilised the entire length of the route as a thoroughfare.



Fig. 9.1: 1<sup>st</sup> April 1949 Historical highway record: not to scale:

MCC

9.2. The entry in the “List of Streets” is dated 16<sup>th</sup> June 1988 and this describes county unclassified road C75-1 as Turkey Tump Road proceeding from a point south of Highfield Bungalow, GR45278835, in a southerly and easterly direction passing route C75-2 to junction with B4245, GR45708798 (Appendix 9.1). This description does not go with the 1949 historical highway map. County Road C75-

1 only has a northerly/southerly alignment on the 1949 highway map and not an easterly extension.

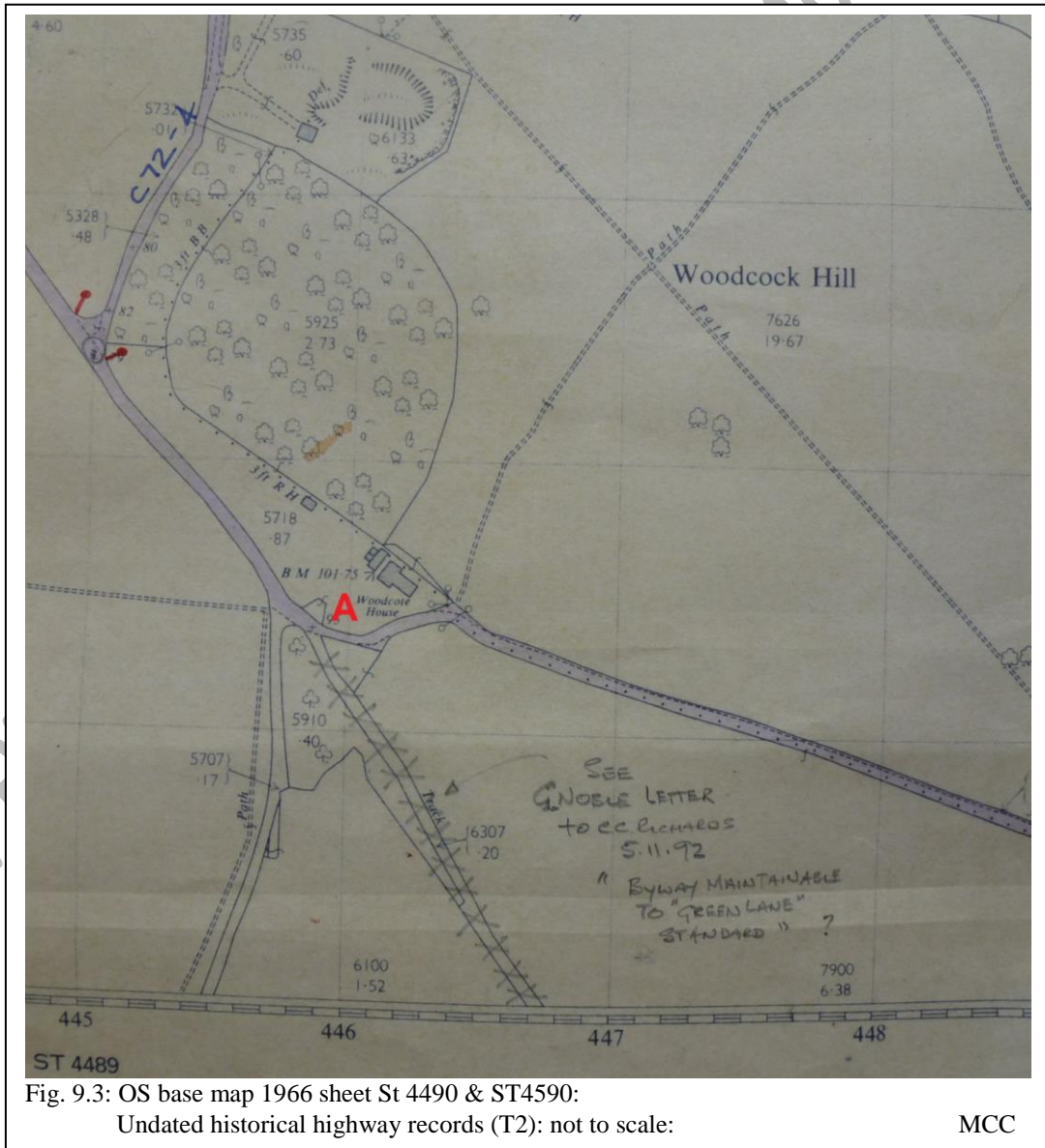
- 9.3. The Highway extent marked on the 1921 Ordnance Survey base maps, shows no changes with the extent of the publicly maintained highway. This does not mean that there are no public vehicular rights. All the evidence investigated shows that, on balance, higher public rights do exist.



- 9.4. The 1921 Ordnance Survey map sheet 30-10 shows the full extent of the route in question between points A to C to be marked by parallel black lines indicating

that at the time of the survey the way was a fenced minor road. The alignment of which is similarly depicted on the 1841 St Brides Netherwent Tithe Map.

- 9.5. **The 1966 Ordnance Survey maps** are also investigated and these show a note alongside the section of the route in question, A to C, referencing a letter and clearly stating that the way should be designated as a “Byway maintainable to ‘Green Lane’ standard”. This information is not reflected on the 1988 “List of Streets”, probably an oversight.



- 9.6. **The 1966 Ordnance survey map** sheet ST4489 & ST4589 (Fig.9.4) again shows the same note referencing the route in question, A to C, as a Byway. This evidence along with all the historical evidence investigated, on balance, suggests that public vehicular rights exist. If these rights exist over this section this lends evidence to higher rights existing over the section between points C and E, and visa-versa. In fact the 1855 Rogiet Enclosure Award that laid out the route in

question, C to E, by an Act of Parliament along with all the historical evidence secures the highest public rights for the entire route.



Fig. 9.4: OS base map 1966 Sheet ST44889 & ST4589

Undated historical highway records (T2): not to scale:

MCC

- 9.7. The note referenced on these 1966 highway maps was the result of an investigation undertaken by Monmouthshire County Council officers in 1990
- 9.8. A meeting was held on the 4<sup>th</sup> November 1992 between Mr G. Noble of Highways; Councillor Richards, Ms J Millward County Solicitor; Mr J. A. Willis & Ms R. Ried of Countryside. It was agreed that the route (A to C) was an old parish road and would be the responsibility of the Highway Department.
- 9.9. A letter dated 5<sup>th</sup> November 1992 (Appendix 1.6) from G Noble, Highways Engineer confirms to Councillor Richards the decision made at the meeting of the 4<sup>th</sup> November 1992 and states:-

*“The advice given by the Chief Executive Officer is that the lane referred to as track A (C71-10) on the attached plan is an ancient parish road and as such, is already a public highway. Registration of the public’s right of way on this road is*



*unnecessary. I shall arrange for this road to be added to my records as a byway maintainable to 'Green Lane' standard."*

9.10. A report was submitted to Planning Standing Sub-Committee on the 1<sup>st</sup> December 1992 (Appendixes 9.2 to 9.3) and it was resolved not to make a Definitive Map Modification Order (DMMO) because the route was already a public highway and there was no need to re-register the route and states that:-

*"The application has been the subject of investigation by the Chief Executive Officer and the County Engineer and Surveyor and it has been ascertained that the route in question is already a highway maintainable at public expense."*

9.11. A memo dated 21<sup>st</sup> August 2002 (Appendix 9.4) from Countryside public rights of way team to Head of Highways requesting that the "List of Streets" is updated in accordance with the conclusion made by the Chief Executive Officer and County Engineer, and that the route in question is also cleared of overgrowth.

9.12. **The 1988 "List of Streets"** (Appendix 9.1) is the legal record for publicly maintained highway the provenance of which has its origins in the 1925 public health legislation and that initially there was only a requirement to hold a list for urban areas.

9.13. Then section 30 of the 1929 Local Government Act transferred the responsibility for the maintenance of highways from the rural district areas to county councils. From 1930 to the enactment of the 1959 Highways Act there was no obligation on the county council to produce and keep up-to-date a statutory "List of Streets".

9.14. A "List of Streets" was not required by legislation to be made until the Highways Act 1959 which stipulated that the council of every borough and urban district (but not counties) had to make and keep up-to-date a "List of Streets" within their areas, which are highways maintainable at public expense.

9.15. The documents known as "hand over maps" were produced in 1929. However, these records and any "List of Streets" made after 1959 have not been retained.

9.16. Therefore, the evidence in support of public vehicular rights that utilise the alignment of the route in question rests firstly with common law, the 1835 Highways Act; then with the all the Ordnance Survey Maps showing the route to continue as a thoroughfare. When this evidence is taken together with all the differing historical evidence that alternately cover the entire route it shows, on balance, that the highest public rights already exist and that the "List of Streets" should be amended to record these rights.

## 10. Aerial photographs

10.1. The Aerial photograph dated August/September 1964 shows the route in question, A to C, as a deeply marked linear feature. The first part clearly shows that the hedge rows have been carefully maintained while the next section, further south, looks more overgrown but remains evident and there is notably some gaps in the hedge/tree canopy showing the continuation of the route.



Fig. 10.1: Aerial photograph: Dated August/September 1964: not to scale:

GRO

10.2. **The Aerial photograph dated 6 July 1971** shows the route in question, A to C, but not as distinctively as the section proceeding southwards and eastwards from point D. This suggests that section A to C was not as frequently used when compared with section C to E. Although the aerial photographs show this it does not mean that there are no public rights.

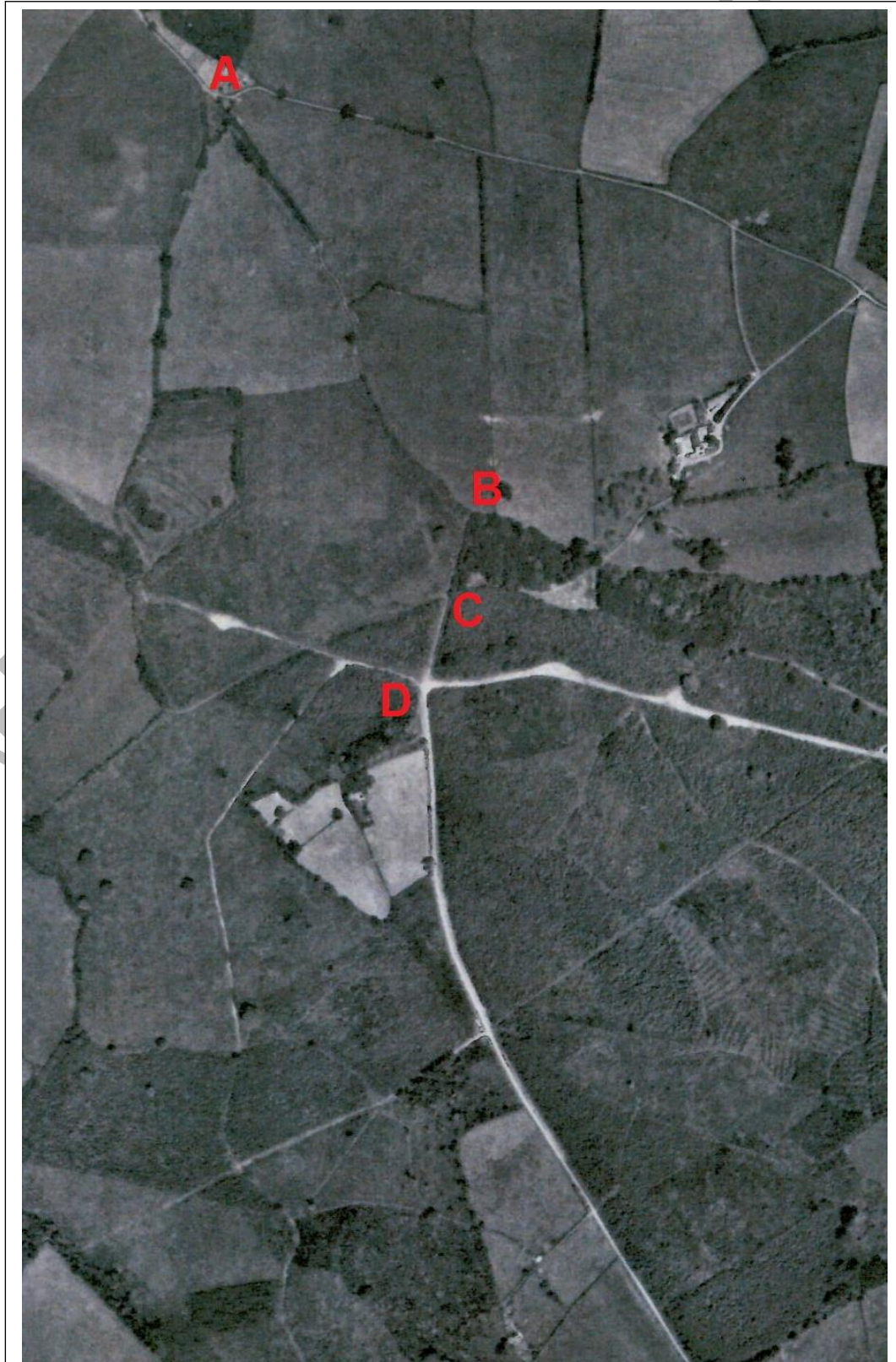


Fig. 10.2: Aerial photograph: Dated 6 July 1971: not to scale:

GRO

- 10.3. **The 2004-2005 Aerial photograph** again shows the route in question on the same alignment. The northern section is clearly visible between the field boundary hedge rows but the southern section is cover from view by a canopy of trees.

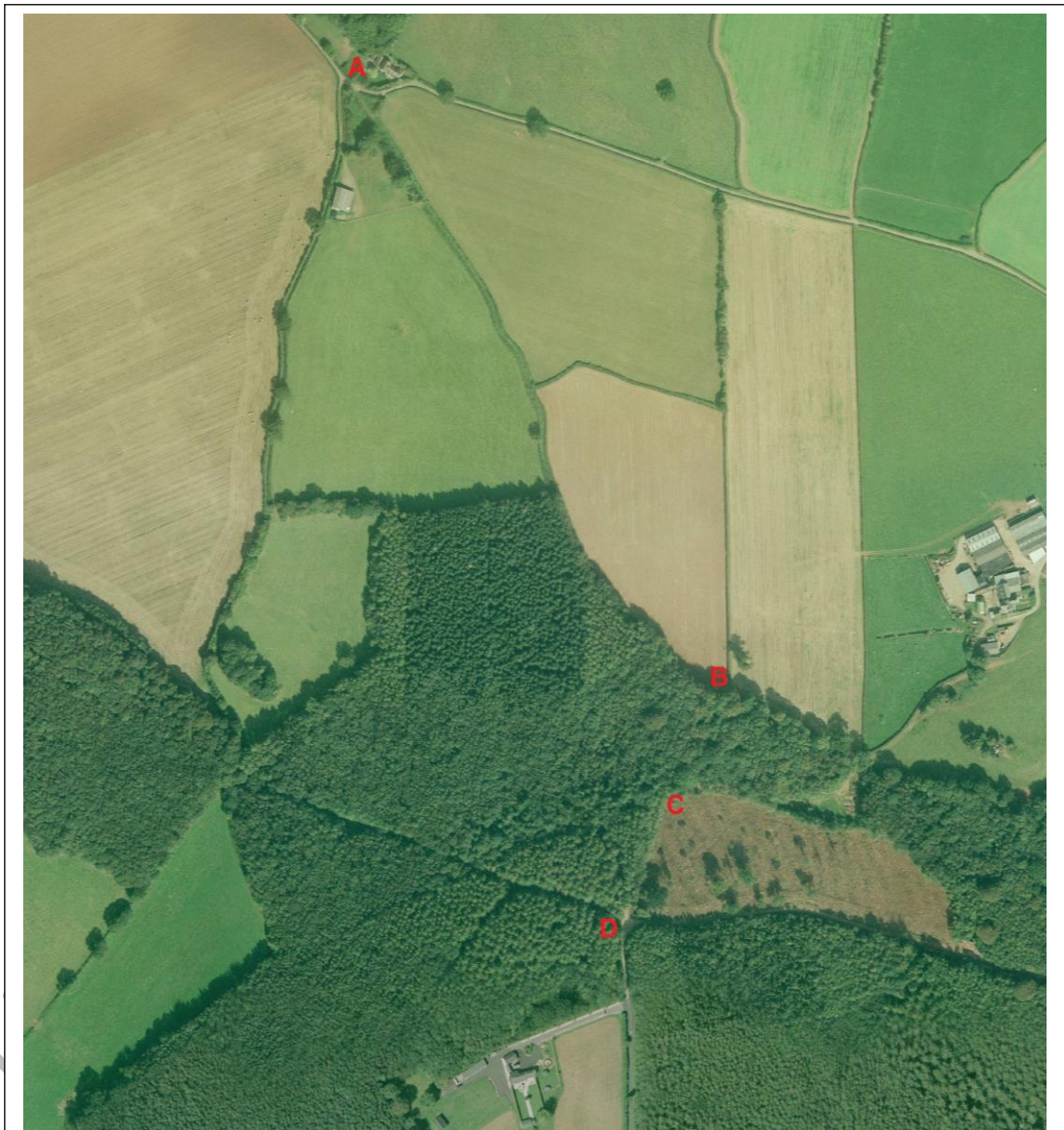


Fig. 10.3: Aerial photograph: Dated 2004-2005:

MCC

- 10.4. Other historical evidence along with these aerial photographs demonstrate that there has always been a linear alignment between points A to E and when taken together, on balance, this shows that public rights are probably in existence.
- 10.5. At no time during this period has there been anyone stopping or preventing people using the route. However, this aerial photograph shows that over growth may have limited the use of the route in question at various times of the year. It is this overgrowth and lack of maintenance which has brought the route into question.

## 11. Site photographs (Appendixes 11.1 to 11.2).

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- 11.1. The photographs taken on the 12<sup>th</sup> October 2017 show a wide open track the surface of which is partly grassed and partly bare earth. The entire route has no barriers preventing any type of public and or private use.
- 11.2. Photograph 1, Appendix 11.1, shows the route in question as an open track the surface of which is covered with grass and the adjacent field boundary hedge rows are kept maintained.
- 11.3. Photograph 2, Appendix 11.1, shows the route in question continuing southwards with marked vehicle tracks leading to a field gate. This shows that this part of the route in question is used for private field access.
- 11.4. Photographs 3 to 5, Appendix 11.1, shows the route in question remaining as an open, grass surfaced track with recently maintained hedgerows.
- 11.5. Photographs 6 and 7, Appendix 11.2, shows the route in question with an earth surface between the boundary of the wood and the boundary hedgerow of the adjacent field.
- 11.6. Photograph 8, Appendix 11.2, shows the route in question with a deeply rutted earth surface through the wooded area and it is noted in this photograph that the gates described by one user as - *"...one double gateway, one side narrow, one side wide (for vehicles) at the parish boundary. Never Locked."* are not evident across the route in question, A to C, but are shown here to be alongside the route.
- 11.7. Photograph 9, Appendix 11.2, shows the route in question with a stone to dust surface along with a sign that says "no vehicle access". I am aware that in summer of 2017 National Resources Wales installed this sign.
- 11.8. The site photographs along with all the historical evidence and the land registry documentation show that the route in question, A to C, has always been open for use and has never been included in any individual land ownership. The evidence in the photographs shows that the adjacent hedgerows are regularly maintained and the route in question clear of any obstruction suggesting that it is a highway and should be recorded on the "List of Streets".

## 12. The Natural Environment and Rural Communities Act 2006

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- 12.1. Regulations associated with restricted byways (RB) and roads used as public paths (RUPPs) came into force on the 11<sup>th</sup> May 2006 in Wales through the Countryside and Rights of Way Act 2000 (Commencement No. 8 & Transitional Provisions [Wales] Order 2006).
- 12.2. The Natural Environment and Rural Communities Act 2006 (NERC) sections 66-72 Part 6 came into force in Wales on the 16<sup>th</sup> November 2006.
- 12.3. A guide for local authorities, enforcement agencies, rights of way users and practitioners compiled by DEFRA for Part 6 of NERC and Restricted Byways is used here to test whether or not the Act applies in this case.
- 12.4. The 2006 NERC Act flow chart, illustrating the process for determining public rights of way for mechanically propelled vehicles (MPVs) over any given way, are included on Appendixes 12.1 to 12.3. The NERC Act sub-sections that do apply to the route in question have been repeated and commented on below.

### **Testing of the claim against the NERC Act 2006**

- 12.5. Section 67(1) extinguished, on commencement, public motor vehicular rights over every highway that was not already shown on the definitive map and statement, or was shown only as a footpath, bridleway, or restricted byway. In effect this means that public rights of way for mechanically propelled vehicles have been extinguished over every highway not already shown on the definitive map and statement.
- 12.6. If this section 67(1) were left with no further explanation it would mean that not only public vehicular rights are extinguished along this route in question but also virtually the whole of the existing highway network including other highways such as county unclassified roads. However, subsection 67(2) introduces a series of exceptions to protect certain highways from such extinguishment under subsection 67(1). **Any route that qualifies under any one or more of these exceptions would not have its public rights of way for mechanically propelled vehicles extinguished.**
- 12.7. Subsection 67(2)(a) – excepts ways that have been lawfully used more by motor vehicles than by any other user types in the five years preceding

commencement. The intention here is to except highways that are part of the 'ordinary roads network'. It is not incumbent on the local highway authority to undertake a detailed investigation or survey of "main lawful use" on every way.

- 12.8. The Authority does not have extensive records of motor vehicle use for route "A" or "B" (Fig.1.1). There is a limited amount of vehicular use over the route in question, A to C, noted at a site visit on 17<sup>th</sup> October 2017. However, the Order Making Authority is aware that there has recently been increased private vehicular use of the route in question, C to E, for business purposes while previously it has only been used as access to private homes and to park near point D to walk in the area.
- 12.9. Subsection 67(1) says that an existing public right of way for mechanically propelled vehicles is extinguished if the route in question is over a way which, immediately before commencement, was not shown in a definitive map and statement or was shown in a definitive map and statement only as a footpath, bridleway or restricted byway. However, this is only subject to the exceptions under subsections 67(2) to (8).

Comment

- 12.10. *Section A to C is not registered on the Definitive Map and Statement. Therefore, at first without the exceptions of subsections 67(2) & (3) the public mechanically propelled vehicular rights are extinguished.*
- 12.11. *Cart road footpaths 5 & 17 (L-Rogiet & Rogiet) are registered on the Definitive Map and Statement. Therefore, as these routes were shown on the Definitive Map and Statement, essentially as RUPPs (mainly used as footpaths hence the term "cart road footpath") the public mechanically propelled vehicular rights are extinguished.*
- 12.12. ***BUT THE EXCEPTIONS UNDER SUBSECTION 67(2) to (8) need to be applied prior to determination and if any one or more of the exceptions does apply then public mechanically propelled vehicular rights are not extinguished. In other words "public MPV rights remain".***

**The flow charts (Appendixes 12.1 to 12.3) illustrating the process of determining whether or not a public right of way for Mechanically Propelled Vehicles (MPVs) over any given way are extinguished by section 67 of the Natural Environment and Rural Communities (NERC) Act 2006 have been used as helpful aids.**

12.13. **Subsection 67(2)(a) states that public MPV rights are extinguished unless the main lawful use by the public during the period of 5 years ending with commencement was use for MPVs.**

Comment

12.14. *There is currently no recorded lawful vehicular use made by the public during the period ending on the 11<sup>th</sup> May 2006 of the route in question between points A to C.*

12.15. *However, for cart road footpaths 5 & 17 (L-Rogiet & Rogiet), section C to E, the main lawful use is for pedestrians only. The term “cart road footpath” means that the route is a road used mainly as a public footpath.*

12.16. *This means that under subsection 67(2)(a) public MPV rights are extinguished for all the routes investigated.*

12.17. **Subsection 67(2)(b) states that public MPV rights are extinguished unless, immediately before commencement, the Way is shown on the “List of Streets”.**

Comment

12.18. *The part of the route in question, A to C, was to be returned to the “List of Streets” and is discussed mainly in Chapter 9. The failure to add this to the “List of Streets” means that public MPV rights are extinguished however the correspondence and committee papers remain as evidence for higher public MPV rights.*

12.19. *Route “B” and CRF 5 & 17 (L-Rogiet & Rogiet) are not on the “List of Streets”.*

12.20. *This means that under subsection 67(2)(b) public MPV rights are extinguished for all the routes investigated.*

12.21. **Sub-Section 67(2)(c) states that public MPV rights are extinguished unless the way is created (by an enactment or instrument or otherwise) on terms that expressly provide for MPVs.**

Comment

12.22. *The part of the route in question, A to C, is supported by historical documentation such as the Finance Act Maps showing the route uncoloured; the Tithe Map showing the route shaded and all the Ordnance Survey Maps showing the route as a “fenced minor road” leading to Minnetts Common.*

12.23. *Route “B” is discussed in more detail in report 3 of 3.*

12.24. *Routes CRF 5 & 17 (L-Rogiet & Rogiet), C to E, is shown on an 1855 Rogiet Enclosure Award along with a “Certificate of Roads” which is evidence that the route was expressly created.*



- 12.25. This means that under subsection 67(2)(c) there is an exception and **public MPV rights are not extinguished** specifically for the part of the route in question, C to E, (CRF 5 & 17 (L-Rogiet & Rogiet)).
- 12.26. However, there is no exception for the part A to C of the route in question and public MPV rights are extinguished as no Enclosure Award has been found for St Brides Netherwent.
- 12.27. **Sub-Section 67(2)(d) states that public MPV rights are extinguished unless the way was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by MPVs.**

Comment

- 12.28. The part of the route in question, A to C, is supported by the same historical documentation as listed in point 12.22 and these documents are not classed as enactments that enforce the construction of the routes. Therefore public MPVs rights are extinguished.
- 12.29. While the continuation of the route in question, C to E, (CRF 5 & 17 (L-Rogiet & Rogiet)) is shown on the 1855 Rogiet Enclosure Award along with a "Certificate of Roads" which is an enactment that does enforce the construction and layout of the road. Therefore, **public MPV rights are not extinguished** for route in question, C to E, (CRF 5 & 17 (L-Rogiet & Rogiet)).
- 12.30. **Sub-Section 67(2)(e) states that public MPV rights are extinguished unless the way was created by virtue of use by such vehicles during a period ending before 1<sup>st</sup> December 1930.**

Comment

- 12.31. When taking all the historical evidence together it suggests that the route in question, A to E, was probably constructed between 1830 and 1855. However, it is difficult to establish public vehicular user evidence during a period ending before 1<sup>st</sup> December 1930 as motorization only became common in 1918 after the First World War. This means that if there was no historical mapping evidence, subsection 67(2)(e) would extinguish public MPV rights for all routes investigated.

12.32. **Sub-Section 67(3)(a) states that public MPV rights are extinguished if an application under Section 53(3) of the WCA 1981 is made before 19 May 2005 (Wales) for any other type of way other than a byway open to all traffic.**

Comment

12.33. *Route “A” (that is from points A to E (Fig. 1.2)) was originally part of a 1990 Definitive Map Modification Order application to register the route as a byway open to all traffic. Furthermore, the decision to include the route in question, A to C, on the “List of Streets” by virtue of a Committee Report and supporting letters was not implemented which means that the 1990 DMMO remains outstanding. Therefore, the 1990 DMMO to register a byway open to all traffic remains which means **public MPV rights are not extinguished.***

12.34. *The route in question, C to E, (CRF 5 & 17 (L-Rogiet & Rogiet)), is subject to a DMMO and under section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 it states that the discovery by the Order Making Authority of evidence which (when considered with all other relevant evidence available to them) shows that a highway registered on the map and statement as highway of a particular description ought to be there shown as a highway of a different description provides for the making of this DMMO.*

12.35. *Currently, due to NERC, section C to E (CRF 5 & 17 (L-Rogiet & Rogiet)) has been upgraded from road use as a public footpath to a restricted byway. In light of all the evidence investigated it suggests that the whole route in question, A to E, has **public MPV rights that are not extinguished.***

12.36. *Route “B” (Fig. 1.1) is part of the same 1990 Definitive Map Modification Order application to register the route as a byway open to all traffic and is dealt with in report 3 of 3.*

12.37. **Sub-Section 67(6) states that public MPV rights are extinguished ensuring that the application is valid as stipulated by this sub-section 67(6).**

Comment

12.38. *Routes “A” and “B” (Fig. 1.1) do have a valid Definitive Map Modification Order application for byways open to all traffic. Although, the application plan (Fig. 1.1) does not show the full extent of the route to be investigated, the application, made on the 22<sup>nd</sup> September 1990, clearly stipulates the possible upgrading of the existing routes CRF 5 & 17 (L-Rogiet & Rogiet). This means that under subsection 67(6) there is an exception and **public MPV rights are not extinguished** for all the routes being investigated.*

## **Conclusion**

12.39. It has been demonstrated here that with the valid 1990 Definitive Map Modification Order to register byways open to all traffic the exceptions under subsections 67(3)(a) & (6) of the 2006 NERC Act are therefore met and **public MPV rights are not automatically extinguished.**

12.40. Furthermore, the route in question, C to E, is shown in the 1855 Rogiet Enclosure Award documents which specifically created roads by an enactment this means that under subsection 67(2)(c) of the 2006 NERC Act **public MPV rights are not extinguished.**

12.41. The 2006 NERC Act states that if any one or more of the exceptions are met under subsection 67(2) then **public mechanically propelled vehicle rights are not extinguished.**

12.42. This assessment clarifies that the 2006 NERC Act does not remove public vehicular rights. Furthermore, on the basis of the balance of probabilities under the Wildlife and Countryside Act 1981 section 53(3) all the available historical documents investigated confirms that public vehicular rights do exist.

## 13. Section A to C - Review

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13.1. While the whole route, A to E, is part of the 1990 Definitive Map Modification Order sections of the route have been dealt with separately. In view of this it is appropriate to split the route into two sections A to C and C to E if it is decided that DMMOs should be made two separate orders would be required.

13.1.1. Section A to C of the route in question was believed (in 1990) to already have the highest public vehicular rights that should be recorded on the "List of Streets". The formality of placing the route on the "List of Streets" remains incomplete.

13.1.2. Section C to E of the route in question is already recorded on the Definitive Map and Statement as a public cart road footpath which was in 2006 upgraded to a restricted byway by the 2006 NERC Act. The 1990 Definitive Map Modification Order claims that this section of the route in question should be upgraded to a public byway open to all traffic.

13.1.3. Furthermore, it has recently been brought to the Authority's attention that section C to E is subject to heavy vehicular use of which the local inhabitants have made complaints due to the wear and tear of the sealed surface that they put in at their private expense.

13.2. The Council needs to decide whether the evidence suggests that the routes in question should be recorded as public byways open to all traffic, restricted byways, public bridleways, public footpaths and make the appropriate DMMOs or to resolve to not make the DMMOs and instead seek to insure that the whole route is registered on the Highways "List of Streets".

13.3. The 1980 Highways Act section 31 stipulates a full period of 20 years of uninterrupted use of a way over any land unless the way is of such a character that use of it by the public could not give rise at Common Law to any presumption of dedication.

13.4. Under Common Law the expressions "without force"; "without secrecy" and "without permission" are in turn included in the 1980 Highways Act section 31(1).

13.4.1. **Without force** is met because, although 25 users mention the presence of gates, this has not prevented the use of the whole route in question, A to E. These gates have been described as - "one double gateway, one side narrow, one side wide (for vehicles) at the parish boundary. Never locked". Furthermore, all the historical maps investigated prior to 1952,

the relevant date for the Definitive Map and Statement, show no markings that illustrate a barrier therefore suggesting that higher public rights already exist.

13.4.2. **Without secrecy** is met as the inhabitants of the area have openly utilised the route in question to access Minnetts Common.

13.4.3. **Without permission** is met as the local inhabitants honestly believe that they have the right to drive their vehicles over the route in question to access their properties. Furthermore, the Land Registry documents show that there is no specific or individual landowner to grant permission.

13.4.4. **As all the terms under common law are met therefore I believe that a presumption of dedication is made and the route in question, A to E should be registered as a highway on the “List of Streets”.**

13.5. However, an investigation under the combine tests of the 1981 Wildlife and Countryside Act section 53(3)(c)(i); the 2000 Countryside and Rights of Way Act and the 2006 Natural Environment and Rural Communities Act (NERC) are made to confirm those conclusions under Common Law.

13.6. In considering this case the Council seeks to determine whether or not public vehicular rights exist and cannot take into account need, nuisance or suitability.

13.7. The majority of user evidence is walking. Out of the 27 user evidence forms submitted for “Route A” all twenty-seven users report walking the route while only 13 users have walked the route for the full 20 year period. There are a total of four horse riders having used the route and only one has used the route on horseback for the full 20 year period with the addition of one other user having used the route on a bicycle. While there are five users having used the route in a motorised vehicle only three of them have used the route during the 20 year period and two of these three has used the route with a vehicle for the full 20 year period. These two users describe their vehicular use of the route in question between points C to E and not of the whole route. One vehicular user describes the route in question, A to C, as rutted and only passible in a tractor.

13.8. The user evidence does not prevent the recording or the existence of other higher public rights as it is possible that neglect and lack of repair has prevented the public from using the route in question in a motorised vehicle.

13.9. The Land Registry plans showing that the route in question is not registered does not determine public or private vehicular rights. However, the lack of registered

landownership does assist with the presumption of dedication under Common Law.

**13.10. Pre-Order consultation has not been conducted yet.**

13.11. The 1823 Price's and all the 1830s historical maps all show the route in question as a through road between points A to E and when this early 1800s evidence is combined with the 1835 Highways Act, it suggests that the route in question has always been a highway.

13.12. The 1841 Tithe map shows the route in question with a similar alignment to that which is also depicted on all the Ordnance Survey maps.

13.13. The Enclosure Award documents for St Brides Nertherwent cannot be found. However, as all the Ordnance Survey, Tithe and Finance Act maps show the route in question on the same alignment, and when this is combined with the substantial evidence of the 1855 Rogiet Enclosure Award for the section C to E, it suggests that the whole route in question, A to E, is public highway. Therefore, the route in question, as previously determined by the 1992 Committee, should be recorded on the Highways "List of Streets".

13.14. The whole route A to E is shown on 1882, 1901, 1921 and 1922 Ordnance Survey maps as being a through road. The Ordnance Surveyors, under legislation, were given the duty to depict all physical features that were encountered. The conventional signs and symbols (Fig. 7.10) indicates that the route in question is a minor road that is fenced. If a solid line represents a solid structure, i.e. a fence, then if a solid line crosses the alignment of a route it is interpreted as a gate or another type of barrier. There is no marking of any barrier across the route in question showing the route to be open enabling use by all types of user both public and/or private.

13.15. The 1910 Finance Act Maps, Registers and Field books record the extent of landownership and provided for the levy of tax duties on lands. The 1910 Finance Act Maps record roads as uncoloured while other routes, mainly footpaths, are flagged by a monetary value in the Register and Field books under the column for "public rights of way or user". If a route is shown uncoloured, that is outside of any specific ownership, it suggests that the road was considered to be public. This evidence along with the Common Law, the 1835 Highways Act, all the Ordnance Survey Maps and 1841 Tithe Map suggests that higher public rights already exist.

- 13.16. The Definitive Map and Statement, relevant date 1<sup>st</sup> July 1952, published on the 16<sup>th</sup> November 1967 shows no markings and records no description referencing the route in question, A to C.
- 13.17. Furthermore, the Highway records do not “list” or show the route in question shaded on any highway mapping data sets.
- 13.18. Contrary to the Highways “List of Streets” there seems to already be higher public rights in existence which are supported by Common Law, the 1835 Highways Act, all the Ordnance Survey Maps, the 1841 Tithe Map and the 1910 Finance Act Maps.
- 13.19. The aerial photographs and site photographs complete the substantial evidence investigated and suggests that higher public vehicular rights for the whole route, A to E, already exist.
- 13.20. The 2006 Natural Environment and Rural Communities Act has been assessed and if any one or more of the exceptions are met under subsection 67(2) then public mechanically propelled vehicle rights are not stopped up. The tests under *subsections 67(3)(a) & (6) of the 2006 NERC Act* have been met by the 1990 Definitive Map Modification Order application that has been submitted to register the route in question, A to E, as a byway open to all traffic.
- 13.21. All the historical mapping and other documentation detailed within this report and taken together with the evidence for the section, C to E, investigated in report 2 of 3, suggests that the whole route in question should be recorded on the Highways “List of Streets”.

## 14. Conclusion

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- 14.1. All the historical documentation combines and confirms that the section A to C is, on balance, a highway and should be recorded on the Highways “List of Streets” and maintainable at public expense.

DRAFT REPORT 1 of 3 Route A DMMO for BOAT



## 15. Recommendation

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- 15.1. Members are invited to resolve that authorisation be given to the Assistant Chief Executive (Corporate Governance) to not make a Modification Order under 53(2) of the Wildlife and Countryside Act 1981 but to instead insure that the route in question as detailed in this report is recorded on the Highways "List of Streets".

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