

Definitive Map Review Parish of Payhembury

Report of the Chief Officer for Highways, Infrastructure Development and Waste

Please note that the following recommendation is subject to consideration and determination by the Committee before taking effect.

Recommendation: It is recommended that a Modification Order be made to modify the Definitive Map and Statement by adding public footpaths between points A – E, E – H – N and E – P as shown on drawing HIW/PROW/20/11.

1. Introduction

This report examines a proposal arising out of the Definitive Map Review in the parish of Payhembury in East Devon district, for the addition of a number of connecting footpaths at Hembury Fort.

2. Background

The original survey by Payhembury Parish Council in 1950 under s.27 of the National Parks and Access to the Countryside Act of 1949 produced a map and details of 31 footpaths submitted to the County Council. Comments were added on behalf of Honiton Rural District Council. Twenty-five of the footpath routes surveyed were withdrawn or omitted or described as not required. The remaining six routes were recorded for consultations at the Draft Map stage in 1957 and for the Provisional Map, which were then recorded on the original Definitive Map, considered as having existed from the relevant date of 1st September 1957.

The reviews of the Definitive Map under s.33 of the 1949 Act, which commenced in the 1960s and 1970s but were never completed, produced several requests to amend the Definitive Map. Two Class III roads were requested to be downgraded to bridleways but this did not take place. Requests were also made to delete Footpaths 5 and 7 and part of footpath 8. These were successfully pursued and are detailed below. There were no proposals made to add new routes during these reviews.

The Limited Special Review of Roads Used as Public Paths (RUPPS), also carried out in the 1970s, did not affect this parish.

The following orders have been made and confirmed:

Highways Act 1959, Magistrates' Court, Honiton Petty Sessional Division S.108 Stopping Up Order 1968 (Footpath No. 12 Payhembury)

East Devon District Council (Footpath No. 8 Payhembury) Public Path Extinguishment Order 1977

East Devon District Council (Footpaths Nos. 5 & 7 Payhembury) Public Path Extinguishment Order 1983

Devon County Council & Roy John Coker (Bridleway No. 19 Payhembury) Public Path Creation Agreement 1993

Legal Event Modification Orders will be made for these changes under delegated powers in due course.

The current review began in March 2019 with a public meeting held in the Village Hall, Payhembury, which was advertised in the parish, in the local press and online.

3. Proposals

Please refer to the Appendix to this report.

4. Consultations

General consultations on the applications were carried out in August to November 2019 with the following results:

County Councillor Ian Chubb	-	no comment;
East Devon District Council/AONB	-	no comment;
Payhembury Parish Council	-	no comment;
Country Land and Business Association	-	no comment;
National Farmers' Union	-	no comment;
Trail Riders' Fellowship/ACU	-	no comment;
British Horse Society	-	no comment;
Cycling UK	-	no comment;
Ramblers	-	no comment;
Open Spaces Society	-	no comment;
Byways & Bridleways Trust	-	no comment;
4 Wheel Vehicle users	-	no comment;
Devon Green Lanes Group	-	no comment

Specific responses, including from the owners of the land affected, are detailed in the Appendix to this report and included in the background papers.

5. Financial Considerations

Financial implications are not a relevant consideration to be taken into account under the provision of the Wildlife and Countryside Act 1981. The Authority's costs associated with Modification Orders, including Schedule 14 appeals, the making of Orders and subsequent determinations, are met from the general public rights of way budget in fulfilling our statutory duties.

6. Legal Considerations

The implications/consequences of the recommendation have been taken into account in preparing the report.

7. Risk Management Considerations

No risks have been identified.

8. Equality, Environmental Impact (including climate change) and Public Health Considerations

Equality, environmental impact (including climate change or public health implications have, where appropriate under the provisions of the relevant legislation, been taken into account.

9. Conclusion

It is recommended that a Modification Order be made to modify the Definitive Map and Statement by adding public footpaths between points A – E, E – H – N and E – P, as shown on drawing HIW/PROW/20/11. Details concerning the recommendations are discussed in the Appendix to this report.

Should any further valid claim with sufficient evidence be made within the next six months it would seem reasonable for it to be determined promptly rather than deferred.

10. Reasons for Recommendations

To undertake the County Council's statutory duty under the Wildlife and Countryside Act 1981 to keep the Definitive Map and Statement under continuous review and to progress the parish-by-parish review in the East Devon district area.

Meg Booth
Chief Officer for Highways, Infrastructure Development and Waste

Electoral Division: Whimble & Blackdown

Local Government Act 1972: List of Background Papers

Contact for enquiries: Thomas Green

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Background Paper	Date	File Ref.
Correspondence File	2000 to date	TCG/DMR/PHEMB

tg120220pra
sc/cr/DMR Parish of Payhembury
02 260220

A. Basis of Claims

The Highways Act 1980, Section 31(1) states that 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 actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

Common Law presumes that at some time in the past the landowner dedicated the way to the public either expressly, the evidence of the dedication having since been lost, or by implication, by making no objection to the use of the way by the public.

The Highways Act 1980, Section 32 states that 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.

The Wildlife and Countryside Act 1981, Section 53(3)(c) enables the Definitive Map to be modified if the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows that:

- (i) a right of way not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
- (ii) a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
- (iii) there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

The Wildlife and Countryside Act 1981, Section 56(1) states that the Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein, but without prejudice to any question whether the public had at that date any right of way other than those rights.

The Wildlife and Countryside Act 1981, Section 53(5) enables any person to apply to the surveying authority for an order to modify the Definitive Map. The procedure is set out under WCA 1981 Schedule 14.

1. **Proposal 1: Claimed footpaths at Hembury Fort, consisting of two access paths from Witness Moor Car Park (1 and 2), a lower rampart circuit (3), a middle rampart circuit (4), an upper rampart circuit with links to FP11 (5), and the circuit within the top enclosure (6). Junctions within the network of routes are labelled A-S, as shown on plan HIW/PROW/19/43.**

Recommendation: It is recommended that a Modification Order be made to modify the Definitive Map and Statement by adding public footpaths between points A – E, E – H – N and E – P, as shown on drawing HIW/PROW/20/11.

1.1 Background

- 1.1.1 In the summer of 2012 Devon County Council was contacted by several members of the public reporting that signs had been erected on the site of Hembury Fort, a Scheduled Ancient Monument, stating 'Private Woodland – no right of way' or similar. These signs were purportedly erected by contractors undertaking tree felling and scrub clearance on behalf of the landowner, under a Higher-Level Stewardship Scheme (HLS) with input from Historic England. This prompted 19 user evidence forms to be sent in to Devon County Council in 2012, with a further 2 during informal consultations in 2019. Access was not physically restricted, and the landowner has allowed the public to access the site on a permissive basis under the HLS. No formal application has been made to Devon County Council under Schedule 14 of the Wildlife and Countryside Act to record the routes. Despite the site currently being accessible to the public, Historic England and colleagues in the Historic Environment Team at Devon County Council have both raised concerns that legally recorded footpaths on the ramparts could contribute to the erosion of the Scheduled Ancient Monument.
- 1.1.2 Despite some early evidence that refers to Hembury Fort as a 'common' it was not registered under the Commons Registration Act 1965, or as access land under the Countryside and Rights of Way (CROW) Act 2000. The Commons Act 2006 created new options for land to be registered in several pioneer authorities, of which Devon was one. However, an application to record a Town or Village Green cannot be submitted more than one year after use as of right has ceased. Therefore, it is not possible for Hembury Fort to be registered as either common land or a town or village green at this stage under this legislation. For this to occur would require dedication by the landowner.

1.2 Description

- 1.2.1 The claimed routes that were included for public consultation were extrapolated from the user evidence forms submitted to Devon County Council. Almost all the users accessed the hillfort by one or both of two access paths leading from the car park at Witness Moor (points A and L). The remaining routes indicated by users generally follow the lines of the ramparts of the hill fort and a circuit around the upper enclosure. All routes that were marked by more than 5 of the 19 users were included for informal consultation and appear on the proposal map HIW/PROW/19/43. To avoid undue confusion this report will generally refer to paths by the names that appear on the proposal map (access path 1, upper rampart circuit, etc). Points on the map will be referred to in specific cases where more detail of location is necessary.
- 1.2.2 Access path 1 (A-S-B-C-D-E) follows the line of the parish boundary, bounded on the east by a ditch and bank with mature beech trees and to the west by scrub and woodland, and runs across and up the ramparts and onto the top of the fort via the east gate. It is a well-trodden path with a firm flint-rich surface up until the ramparts

of the fort It is of a substantial width between A-S but considerably narrower where it runs up and across the steep slopes of the ramparts. There is now an interpretation board and fencing, along with a kissing gate, near to point A on this route.

- 1.2.3 Access path 2 (L-K-J-I-H) runs from the minor country road near the Witness Moor car park through woodland in a southerly direction and then turns generally south-east and runs up the ramparts of the fort to the upper enclosure at point H. It is a narrow path, unsurfaced but well-trodden and passes through a timber chicane midway between point L-K. Where the path traverses the ramparts of the fort, between points K-H, it is extremely steep in places.
- 1.2.4 Three rampart circuits were indicated on user evidence forms, all appearing to follow the tops of the ramparts of the hillfort: the lower rampart circuit (B-R-K-S-B); middle rampart circuit (C-Q-J-C); and the upper rampart circuit (D-O-M-I-D). They generally follow the tops of the ramparts, this being the easiest topography to traverse, but twist and wind to a certain degree where they meet natural obstacles – trees, boggy ground, dense undergrowth, etc – on the route, as shown in the photos. The ramparts are most defined at the northern end of the hillfort, the southern end being less prominent but still a distinct and obvious feature. However, where the ramparts are less steep the paths are not always as well-defined, apparently due to users having a greater width available to them. The western section of the upper rampart circuit is currently very overgrown and appears very little used, if at all.
- 1.2.5 The upper rampart circuit links into the existing Footpath 11 via two short sections of path, M-N at the western side and O-P on the eastern side. Both sections are clearly visible on the ground and obviously well-trodden.

1.3 The Definitive Map Process

- 1.3.1 The claimed routes were not included in the survey of paths on behalf of the Parish Council in 1950 for recording as public rights of way on the Definitive Map. One path at Hembury Fort was put forward for recording, which ran from the Honiton-Cullompton road up to the top of the fort where it follows a small loop. This subsequently became the current Footpath 11. It is described on the submission form as *'giving access to the open space and old Earthworks – early British and Roman.'* It also states that it is *'A most important open space and renowned for its views.'* Under the grounds for believing the path to be public the parish council submitted *'undisputed passage of the walking public for generations.'* They also submitted that they had undertaken no repairs or *'upkeep'*. There were no objections to this addition.

1.4 Documentary Evidence

- 1.4.1 Ordnance Survey, Surveyors' Drawings 1806-7 and Cassini 1st edition 1"/mile map 1809 and later (Old Series);

Early historical maps at smaller scales do not show the site in enough detail to depict the proposed footpaths. The OS Survey Drawings and the First Edition 1" map both show a road or track leading from the Honiton-Cullompton road up to the top of the hillfort on the western side. The route is roughly (but not exactly) similar to the line of the current Footpath 11 which runs over a wide track from the A373 up to the top of the fort. A track is also shown on both these maps extending to the north from the northeast corner of the fort, appearing to be on a similar line to the claimed main access path (A-E) that runs along the parish boundary.

1.4.2 Greenwood's Map 1827

It is also shown similarly on Greenwood's 1827 map, believed to have been mainly copied from earlier Ordnance Survey map editions, though the route is only clear where it enters the fort and does not appear to be shown where it joins the Honiton-Cullompton road.

1.4.3 Payhembury Tithe Map 1839 & Apportionment 1839

Tithe maps were drawn up under statutory procedures laid down by the Tithe Commutation Act 1836 and subject to local publicity, which would be likely to have limited the possibility of errors. Roads were sometimes coloured and colouring can indicate carriageways or driftways. Public roads were not titheable. Tithe maps do not offer confirmation of the precise nature of the public and/or private rights that existed over the routes shown. Public footpaths and bridleways are rarely shown as their effect on the tithe payable was likely to be negligible. Routes which are not included within an individual apportionment are usually included under the general heading of 'public roads and waste'.

1.4.4 Hembury Fort is shown on the Payhembury Tithe map, the bulk of the site falling within plot 52 which is recorded as in the ownership of John Venn and consisting of 'rough pasture & furze'. Plots 50 and 51 are in the same ownership and are recorded as arable land, both of which appear to be on land crossed by the two access paths on the proposal plan. There are no footpaths or bridleways marked on the map.

1.4.5 Ordnance Survey 25" to a mile First Edition map

Surveyed in 1887, this map shows no footpaths or tracks on the site of the hill fort. The fort itself is shown as open ground, with a few trees on the eastern slopes. It is named as Hembury Fort but there are no other annotations.

1.4.6 Ordnance Survey 25"/mile early 1900s; Finance Act 1910 map & records

The later edition of the Ordnance Survey 2nd edition 25" to the mile map revised in 1903 shows a footpath running up from the Honiton-Cullompton road and leading up to the west gate of the fort where it terminates. Up to this point it follows the line of the current Footpath 11. No other footpaths or tracks of any kind are shown on the site. The same later maps were used as the basis for the 1910 Finance Act survey to ascertain the value of land for the purpose of taxation.

1.4.7 The proposed routes fall within hereditament 733, recorded in the field book as Hembury Fort Hill, of 28 acres and in the ownership of Julia M. Paynter. There are no deductions recorded for public rights of way or other rights or easements other than the Tithe. Under the 'particulars, description and notes made on inspection' section ordnance no. 280, which is the fort itself, is noted as being 'common', as opposed to ordnance nos. 266 and 503 which are arable and plantation respectively. Also written in this section is the phrase '*Hembury Fort is an old Roman Encampment of historic interest*'.

1.4.8 Parish Council minutes

Records of Payhembury Parish Council meetings are held at the Devon Records Office as well as in the parish, though it appears that there is a large period for which the minutes do not survive. A small number of entries from the late 19th century have survived but do not contain any references to Hembury Fort. Likewise, the minute book covering the period from October 1976 – July 2001 does not contain any references that shed any light on public footpaths or public rights at Hembury Fort. There are no surviving minutes covering the Definitive Map process in the 1950s and 1960s.

1.4.9 Later Ordnance Survey mapping and Bartholomew's maps

Maps at smaller scales from the earlier 20th century, particularly by Ordnance Survey and Bartholomew's map editions from 1910 to the later 1940s, are not detailed enough to show the site in any detail. They depict the hill fort but show no paths on or across the site.

1.4.10 Later Ordnance Survey 'A' edition larger-scale mapping 1963, around the time that the Definitive Map was being drawn up, shows several footpaths on the site. One runs from the A373 at the south of the site and leads roughly straight up and over the hill fort in a northerly direction, and then generally follows the line of access path 2 to join the minor county road, roughly at the spot where the Witness Moor car park is now located. A second path follows roughly the same line as the current Footpath 11 to the top of the fort where it then links to the first path described above. A third short section of path links the two paths described above near the southern boundary of the site.

1.4.11 The showing of the routes on early and later maps records their physical existence at those times until more recently and possibly up to the present. They do not indicate on their own or support the existence of public rights of way, which would require other more significant supporting evidence. That is in accordance with the disclaimer carried by Ordnance Survey maps since 1889 and by other editions, which may be presumed to also apply to earlier and other commercial maps.

1.4.12 Sale Plans and catalogues, 1899, 1923 and 1938

Hembury Fort is listed in the sale catalogues but there is no reference in any of them to any public rights. The lot is described the 'well-known Hembury fort Hill', 'historical Roman fort' and 'an archaeological feature of great interest.' The 1938 catalogue states that the site is sold subject to an agreement dated 24th April 1930 granting a license to excavate, which must be assumed to be for Miss Dorothy Liddell's excavations that took place in the early 1930s. It is also stated in the 1938 catalogue that it is sold subject to publication under Section 12 of the Ancient Monuments Consolidation and Amendment Act 1913.

1.4.13 Aerial photography

An aerial photograph of Hembury Fort from the early 1930s, contemporary with Miss Liddell's excavations which are visible in it, shows several clear paths on the site. The photo is taken from a southerly direction. The eastern slope of the fort is thickly wooded while the rest of the site, including the flat area to the north of the fort, is mostly open apart from a few trees in the central part of the western side. A path is clearly shown running from the A373 (where the current gateway is) up to the top of the fort and crossing the southern half of the upper enclosure. It does not appear to continue to the north beyond this point. A track is also clearly shown that is consistent with the line of the current Footpath 11 to where it reaches the top enclosure. It then continues diagonally across the upper enclosure to north-east gate, roughly at point E on the proposal plan. A path is also clearly shown running around the upper rampart on the south, east and west sides, possibly on the north side but it is not possible to make with any certainty. It appears there may be paths on some of the other ramparts, but these are not clearly visible.

1.4.14 RAF aerial photography from 1946–9 shows the path that was visible in the early 1930 running from the A373 up the southern ramparts to the top of the fort, as well as the track that is roughly on the line of the current Footpath 11 up to the top of the fort. The eastern ramparts are now far less thickly wooded than they were in the early 1930s. There appears to be a path on the upper rampart at the north of the fort, though in general the poor image quality means that it is difficult to see much detail.

- 1.4.15 An aerial photo dated to 1984 shows the site from the south-south-west. Footpath 11 is clearly visible, as is the enclosure circuit on the northern half of the fort. The photograph was taken shortly after excavations by Malcolm Todd and there appears to be infrastructure associated with this in the centre of the northern half of the fort. There appear to be traces of paths on the lower and upper ramparts on the south of the fort. The south-west ramparts are mostly clear of tree growth but appear to be covered in bracken, as is much of the top of the fort. The remaining ramparts are almost completely obscured by tree growth.
- 1.4.16 Aerial photography from 1999-2000 (clearly taken during the summer months) shows the site to be far more heavily wooded than it was half a century earlier. The route of the two access paths are completely hidden by tree cover, as are most of the ramparts bar those at the south-west of the fort. Most of Footpath 11 is visible except for the northern part which is under tree growth. There are paths clearly visible between point E-F and most of the enclosure circuit apart from the southern section.
- 1.4.17 Aerial photography from 2006-7 (again, clearly taken during summer months) shows a very similar picture to that of 1999-2000, although tree cover has become more extensive. Footpath 11 is not clearly identifiable except for some of the section on the top of the fort. A lot of the enclosure circuit is visible as before but only part of the section between points E-F can be made out.
- 1.4.18 Aerial photography from 2015-17 also shows the site during the summer months. Tree growth on the ramparts has continued to thicken but the top of the fort has been mostly cleared of tree and scrub growth. The enclosure circuit is visible in its entirety, as is the path between points E-F. Footpath 11 is visible in certain places.
- 1.4.19 Google Streetview
Images from Google Streetview taken in March 2009 show the western ramparts at the northern end of the fort. They show the slopes to be wooded but fairly open, with some understorey scrub growth underneath the mature trees. The images clearly show well-worn paths cutting through banks where the two access points meet the minor county road at points A and L. At point A the path is clearly visible leading off into the woods in the general direction of the proposal route towards point S.
- 1.4.20 British Newspaper Archives
Despite numerous articles relating to the excavations led by Miss Liddell, as well as several property sales, there is no record of any articles referring to either public rights of way or public access on Hembury Fort.

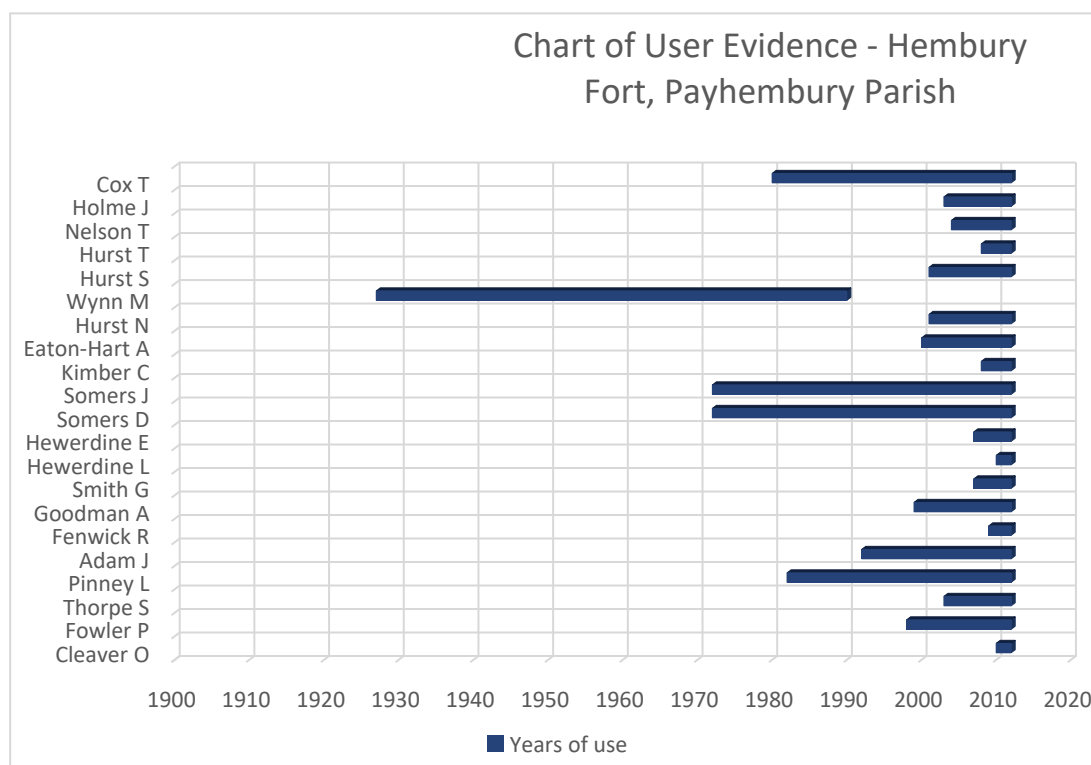
1.5 Definitive Map Reviews and Consultations

- 1.5.1 None of the proposed routes were considered for inclusion during the original Definitive Map process in the 1950s. Only the current Footpath 11 was recorded at that time, with no objections to it being recorded. There have been no proposals put forward to add paths or amend the existing Footpath 11 during uncompleted reviews in the 1970s.

1.6 User Evidence

- 1.6.1 19 user evidence forms were received by Devon County Council between August 2012 and June 2013. These were prompted by the erection of signs on the site in July 2012 that stated the land was private and access to the public was prohibited. A further 2 forms have been received during informal consultations, bringing the total to

21 forms. The user evidence covers the period 1927-2012, the years of use being summarised in the chart below.



- 1.6.2 81% of users stated that they used access path 1 between A-S and then on to point E. Except for the two short paths linking to Footpath 11, this is the most common path indicated on the maps submitted with the user evidence forms. This route provides the main access from the car park at Witness Moor, which is the obvious place to park for people visiting the site. The car park at Witness Moor was constructed in its current form in the mid-2000s but it appears that prior to this people would still park in this area, either on the wide verges or on the area of rough ground where the current car park now exists.
- 1.6.3 48% of users stated that they used access path 2 between points L-H. This path also leads from the Witness Moor car park, though not directly as it joins the minor county road approximately 50m (55 yards) south of the car park. It traverses the ramparts of the fort between point K-H and is therefore very steep in places at this end. This may partly explain why fewer users state they have used this path compared to access path 1.
- 1.6.4 The upper and middle rampart circuits are included on 62% and 66% respectively of users' maps, either entirely or partly. The lower rampart circuit is only included on 38% of user evidence maps and is also less well-defined at present on the ground. Due to the nature of the site and the difficulty in capturing the terrain on a map it is not always clear precisely which routes have been marked on the users' maps. This is particularly the case concerning the upper rampart circuit and the enclosure circuit, where it is not always clear which one it is that users have intended to mark as they are in very close proximity on maps at the sort of scales submitted by users.
- 1.6.5 52% of users claim to have used some or all of the enclosure circuit on the top of the northern half of the fort. Unlike the rampart circuits that are inconsistently defined on the ground, the circuit around the top enclosure is currently a well-worn path and is

clearly shown on aerial photography from 1984 onwards. It appears that this forms part of a circuit around the top of the fort with the existing Footpath 11.

- 1.6.6 90% of users have recorded use of one or both of the short links between the upper enclosure/rampart and the existing Footpath 11 at points N and P. The best views have always been available at the south of the fort and seems logical that most users will have passed this area on their walks. To do so would require using one of these short links into Footpath 11 if you were accessing the site from the two main access paths.
- 1.6.7 Only one of the users stated that they had ever obtained permission from the landowner. Lucy Pinney states that in December 2003 she *'rang Mr Gundry, he said I was welcome to use the route or any other route on the fort.'* As to her knowledge of who owns the land she states that it *'Used to be Mr Gundry. Asked him in 2003 if it was okay to walk the route. He said I was welcome and he had no objection at all to anyone walking on Hembury Fort anywhere.'* It appears that the reason she contacted Mr Gundry to ask permission was because she wished to write a short piece in The Times newspaper recommending the site to other walkers. She supplied a copy of the article with her evidence form. The map accompanying the form suggests that she accessed the site from an unusual direction, certainly not consistent with the other users who almost exclusively used one or both of the two access paths on the proposal plan. However, she states on her evidence form that she has used the routes since 1982, so it appears that she used them for 21 years before obtaining permission. She states that the landowner *'used to be Mr Gundry'* which may imply that she was unsure if this was case at the time of completing the form. She also notes that there are *'many different paths on Hembury Fort, all used frequently by the public.'* Further information supplied via email suggests that Mr Gundry tolerated, and perhaps even encouraged, use by the public rather than allowing them to use the site only with his express permission.
- 1.6.8 The subsequent article in The Times newspaper was published on 20th December 2003. Walkers are recommended to park in the small layby indicated on Pinney's map and to follow a circular route similar to that marked on her map. However, it does not imply that you need to stick to any set routes and encourages readers to explore the site. Pinney writes that *'the fort is owned by John Gundry, a kindly local who doesn't object to walkers.'* According to Lucy Pinney the article was reprinted several years later and Mr Gundry did not contact her to object.
- 1.6.9 Of the 21 users who completed evidence forms 8 stated that they believed the land to be owned by Mr Gundry, Mrs Gundry or the Gundry Estate. One user – Mrs Fowler – simply stated *'I thought it was common land'*. The remaining users did not know who the landowner was or left it blank.
- 1.6.10 None of the 21 users say that they had seen any signs or notices prior to July 2012 to indicate that there was no public right of way or that the land was private. Several answered that they had seen signs but noted that this was only in 2012 and that prior to this they had never seen any on the site at all.
- 1.6.11 None of the 21 users who completed forms state that they were ever turned back or told that the way was not public, either by the landowner or by anyone else.
- 1.6.12 Of the 21 users, 18 believed that the landowner was aware that the public were using the paths. Several users commented on the well-trodden paths and large numbers of people walking there as being a reason for believing this to be the case. Of course, one user – Lucy Pinney as mentioned above – stated that she knew the landowner

was aware because he had told her so. Only one user believed the landowner was unaware of use by the public, with the remaining two users leaving this question unanswered.

- 1.6.13 18 users state that they believe the paths they used to be footpaths. Two users have stated that they believe the routes to be bridleways but indicated that they used them on foot. Neither has given any explanation as to why they believe them to be bridleways. One user has left this section of the form blank.
- 1.6.14 18 of the users explicitly mention that the paths are well-used by others, using phrases such as '*often meet others using path*', '*all used frequently by the public*', '*everyone was using it*' and '*used by a number of members of the public on a regular basis*'. Several have commented that

1.7 Landowner and Rebuttal Evidence

- 1.7.1 The current landowner, Carrel Jevons, was sent a landowner evidence form along with details of the proposal during the informal consultations. A landowner evidence form has not been submitted by Mr Jevons, though a letter has been received from his solicitor. This letter suggests that there is an element of statutory incompatibility between the legal protection of the Scheduled Monument and the proposed addition of footpaths. A copy of the Judgement in the Newhaven case was enclosed with the letter. The comparison is not a direct one as the Newhaven case relates to a Town and Village Greens rather than public rights of way, but it is covered in the discussion below.
- 1.7.2 Mr Jevons acquired the land shortly before the use by the public was called into question, and in 2013 made a Section 31(6) deposit with Devon County Council. The previous owners appear to have been the late Mr and Mrs Gundry. Mr Jevons has not provided any evidence to suggest any direct or overt actions were taken by Mr and Mrs Gundry during the relevant period that would rebut the claim.

1.8 Discussion

- 1.8.1 Statute (Section 31 Highways Act 1980)
Section 31(1) of the Highways Act 1980 states that if a way has actually been enjoyed by the public 'as of right' and without interruption for a full period of 20 years, it is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The relevant period of 20 years is counted back from a date on which the public right to use the way has been challenged. Although access was not physically restricted, the erection of signs reading 'Private Land No Right of Way' on the site in July 2012 were clearly a challenge to the use of the paths as of right by the public. As such, the relevant period for consideration in this case will be July 1992 to July 2012.
- 1.8.2 The user evidence clearly shows that the paths at Hembury Fort have been used by the public for the whole of the relevant period, with no evidence that this was interrupted at any time. The general consensus of the evidence is that this use was 'as of right'. There is no evidence that use took place with any force or secrecy. One user out of the 21 who completed forms sought permission midway through the duration that she claims that she used the paths. However, it appears that this was sought prior to publication of a short newspaper article about the site rather than as a simple request for permission to walk the paths, which she had been doing for the previous 21 years without permission. No other user received or sought permission

to use the paths and none stated that they considered that they were not allowed to use them without permission.

- 1.8.3 None of the users record there being any signs, notices, barriers or anything else on the paths during the relevant period to inform them that they were using them on a permissive basis. With the exception of the user who obtained permission from the late Mr Gundry, none of the users record that they were ever stopped, turned back or told that they could not use the paths. Nearly two thirds of the users were not aware who the landowner was, and those that were aware never considered that the landowner objected. Taking all of this evidence together it is very persuasive that the use by the public was as of right. The available evidence also suggests that the landowner, Mr Gundry, had no objections to people using the paths (or at least took no actions to communicate otherwise), and that he would certainly have been aware of the public using them. At present the site is very well used by the public, especially dog walkers, under permissive access as part of a Higher-Level Stewardship scheme. The user evidence forms suggest that the site was also very well-used by the public during the relevant period before the HLS, with many stating they saw many other people walking there.
- 1.8.4 The difficulty in determining the user evidence in this case occurs when assigning it to a defined way or ways. The number and variety of routes recorded on the user evidence forms creates a complex picture of use, as is demonstrated by the resulting proposal map. A public highway of any status allows the public to pass and re-pass along it, the means by which they may do so varying depending on the status. Evidence of roaming away from the proposed routes must therefore be discounted. As such, for the purpose of dedication the user evidence must support not only use as of right, but the users passing and re-passing along defined routes rather than roaming across an area. The fact that some of the proposed paths have always been visibly well-worn on the ground, as evidenced in the aerial photography, suggests that users were sticking to paths for the majority of the time. This is also suggested by the forms themselves and the further information supplied by a few of the users. Whilst roaming clearly did occur on the site it was obviously happening alongside frequent and heavy use along defined paths. As such it therefore seems logical to consider that a considerable amount of user evidence relates to users passing and re-passing along defined routes rather than roaming. This is particularly the case for certain sections of the claimed paths, as discussed below.
- 1.8.5 Analysis of the maps submitted by the users shows certain of the proposed paths to be more popular than others. The main access path between points A-E is used by more than three quarters of those who submitted forms. It runs alongside a historic boundary hedge bank, with woodland on the opposite side, and there is little evidence on the ground of people deviating from the route. It appears that most users travel to the site by car, park at Witness Moor then pass and re-pass along the path as a means of accessing the hillfort itself. This therefore suggests that the test of passing and re-passing along a defined route is met in the case of access path 1 between points A-E.
- 1.8.6 Upon reaching the fort itself most users state that they used part or all of one or more of the rampart circuits. The quality and accuracy of users' maps varies, and it is often difficult to depict exactly which path they claim to have used, though in general they seem to suggest the paths are on top of the ramparts. The ditches between are very boggy in wet weather and the sides of the ramparts are very steep, making it unlikely that these were used on a regular basis. However, many of the ramparts are difficult to traverse due to vegetation. Tree growth, particularly scrub, appears to have been very dense in many parts of the hillfort during the relevant period. More open areas

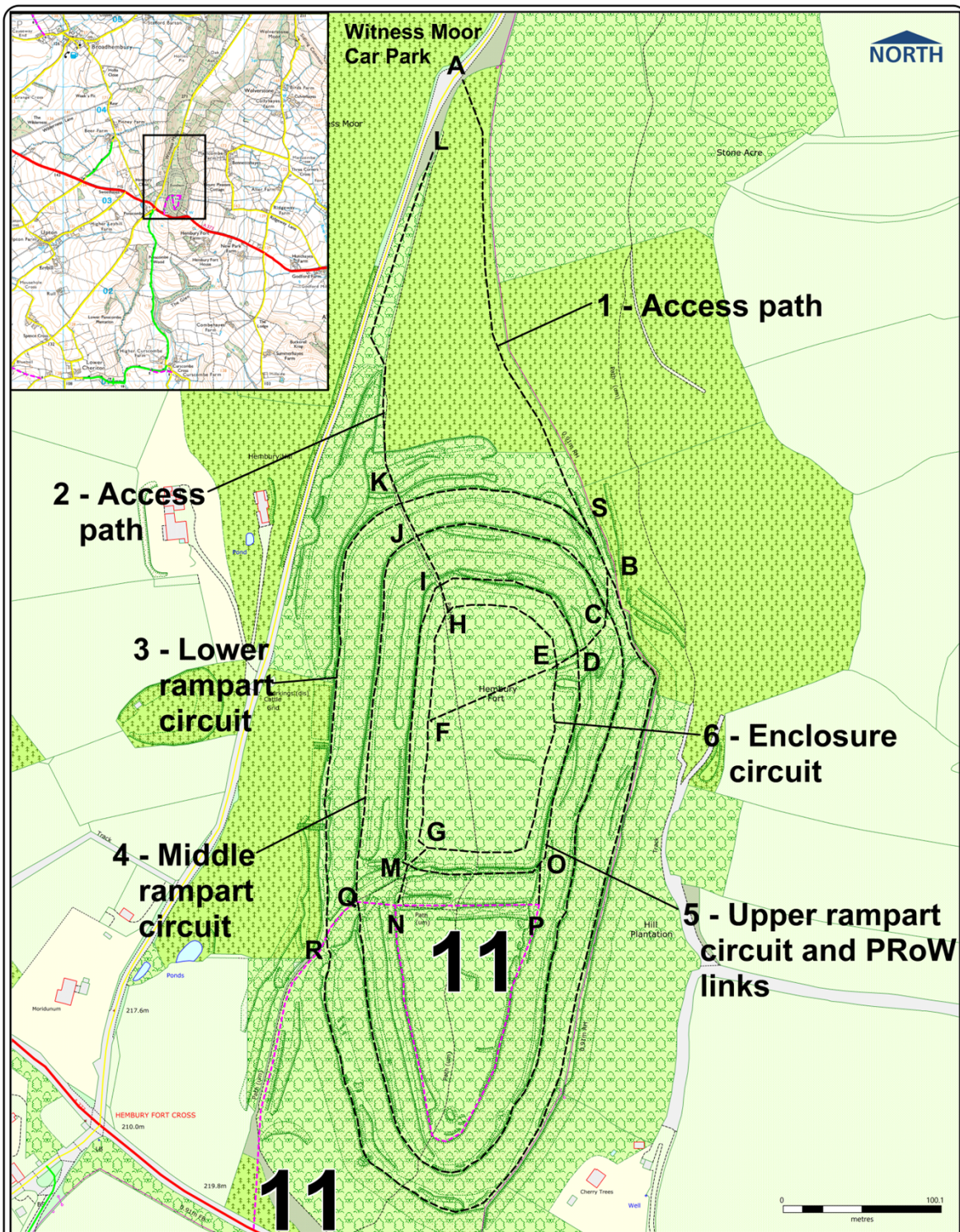
are also susceptible to bracken and bramble growth, particularly in the summer months. The aerial photography demonstrates the extent of the vegetation and also how trees block any view of defined paths that existed underneath. As such, from the aerial photography it is not possible to corroborate exactly which sections of the rampart circuits were accessible and being used during the relevant period.

- 1.8.7 Due to the nature of the site it must be foreseen that there may have been a degree of roaming taking place as well as users following defined paths. Almost all the users saw fit to mark paths on the maps that accompanied their user evidence forms and none specifically refer to roaming. Many of the forms refer to the paths being 'well-used', 'well-worn' or similar descriptions that suggest the users were generally following paths that were clearly visible on the ground. The users who elaborated on their user evidence forms all appear to have stuck to clearly worn paths when they visited the site, with two stating that they roamed only occasionally when with their grandchildren. Therefore, while it is clear that some roaming around the site took place, it is also clear that most of the use can be considered passing and re-passing along defined routes, particularly so in the case of access path 1 and upper enclosure circuit.
- 1.8.8 The issue of statutory incompatibility has been raised by the landowner, and while the case referred to relates to a town and village green application there is some common ground between town and village green and rights of way law. A judgement in the Supreme Court in December 2019 [*Lancashire County Council v Secretary of State for the Environment, Food and Rural Affairs and R (NHS Property Services Ltd) v Surrey County Council*] established a three-point test for statutory incompatibility. The first two are that the land must be acquired for a statutory purpose, and then that it must for the time being be held, but not necessarily used, for that purpose. The third test is that the statutory purposes for which the land is held is incompatible with the use of that land as a town and village green. Whilst the Ancient Monuments and Archaeological areas Act 1979 provides the Secretary of State with powers to acquire compulsorily any ancient monument for the purpose of securing its preservation, this has not happened in the case of Hembury Fort. As such it seems that the first two tests for statutory incompatibility would fail, should it be held that the case law applies to rights of way. The third test would require the existence of public footpaths to be incompatible with preservation of the ancient monument. Public access (including a proposed permissive path) has been allowed and encouraged by the current landowner under the Higher Level Stewardship scheme. It is common for other scheduled monuments to have public footpaths recorded over them, with examples in the south west being Membury Castle, Lambert's Hill, Pilsdon Pen, Eggardon and Flower's Barrow among others. Many others such as Woodbury Castle are registered open access land. It would therefore seem that public access and footpaths are not incompatible with the preservation of a scheduled monument.
- 1.8.9 Common Law
The other basis for dedication is if there was any other significant supporting evidence from which dedication of the route as such can be presumed or inferred under common law. At Common Law, evidence of dedication by the landowner can be express or implied and an implication of dedication may be shown if there is evidence, documentary, user or usually a combination of both from which it may be inferred that a landowner has dedicated a highway and that the public has accepted the dedication.

- 1.8.10 As has already been discussed, the user evidence shows regular use by the public over many years. The extent and nature of this use makes it very unlikely that the landowner was unaware that it was taking place. Indeed, it appears that the landowner was expressly made aware of use by the public by one of the users. Historic aerial photography shows that certain of the proposal routes (as previously discussed) have been well-worn on the ground, reflecting the user evidence. There is no evidence to suggest that the landowner took any steps to communicate a lack of intention to dedicate prior to 2012 and in fact the evidence suggests that they were aware of use and appear to have acquiesced to it. The available evidence therefore indicates that the test for common law has been met, with evidence being particularly strong in the case of Access Path 1, the enclosure circuit and the two short links into Footpath 11.

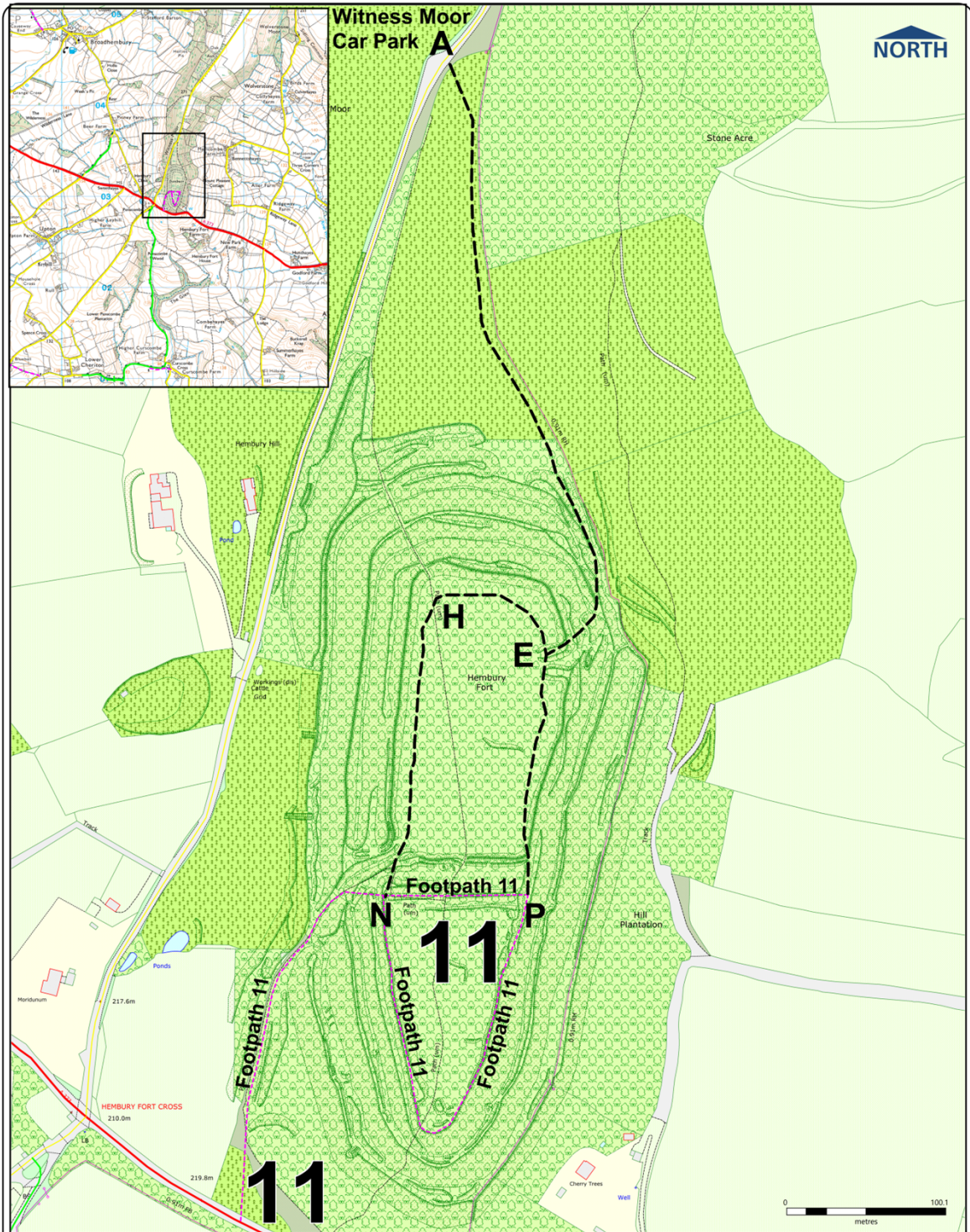
1.9 Conclusion

- 1.9.1 The user evidence is consistent in suggesting the public used the claimed footpaths as of right during the relevant period between July 1992 and July 2012, prior to this use being challenged. Some of the proposed paths were clearly used more than others. The main access path has historically been used by people visiting by car (likely to be the majority of users) as it allows the easiest access between available parking and the hillfort itself, certainly during the relevant period. The circuit around the upper enclosure, linking into the current Footpath 11 to create a circular loop, is similarly well-used and is corroborated by aerial photography from 1984 onwards which confirms that it was present on the ground as a well-worn footpath during the relevant period as well as being recorded on user evidence forms. The user evidence, reflected and supported by the photographic evidence, clearly demonstrates that the public were passing and re-passing along these particular sections of path on a consistent and regular basis throughout the relevant period, without prejudice to any use that occurred concurrently on the rest of the site. The ramparts have clearly always been used but it is not possible to tell with certainty that they were definitely used (especially in their entirety) during the relevant period or if parts of them did not exist at that time due to the dense vegetation.
- 1.9.2 From this assessment of the evidence submitted, in conjunction with other historical evidence and all evidence available, it is considered sufficient to support the claim that footpath rights subsist or are reasonably alleged to subsist on Access Path 1 (points A-E), around the upper enclosure circuit and linking in with the current Footpath 11 via the two short links (points E-H-N and E-P), as shown on drawing HIW/PROW/20/11. Accordingly, it is recommended that a Modification Order be made to record a footpath on the sections of Proposal 1 between points A – E, and E – H – N and E – P as shown on drawing HIW/PROW/20/11 and if there are no objections to the Order, or if such objections are subsequently withdrawn, that it be confirmed.



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<p>DEVON COUNTY COUNCIL Definitive Map Review, Payhembury Parish Informal Consultations, Proposal 1: Multiple footpaths at Hembury Fort</p>	<p>Drawing number: HIW/PROW/19/43 Date: July 2019 Scale: 1:1,500 Drawn by: TCG</p>
<p>Claimed footpaths - - - - - Existing footpath - - - - -</p>	<p>Meg Booth Head of Highways, Infrastructure Development and Waste</p> <p>Devon County Council</p>



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DEVON COUNTY COUNCIL
 Definitive Map Review, Payhembury Parish
 Proposal 1: multiple footpaths at Hembury Fort
 Proposal routes recommended for addition

Drawing number: HIW/PROW/20/11
 Date: Jan 2020
 Scale: 1:1,500 @A2
 Drawn by: TCG

Existing
 footpath

Routes
 recommended
 for recording

Meg Booth
 Head of Highways, Infrastructure Development and Waste

Devon
 County Council



Access path 1 - Point A



Access path 1 - A-S



Access path 1 - S-B



Access path 1 - D-E up to top of fort



Enclosure circuit E-G



Enclosure circuit E-H



Upper rampart circuit D-I



Upper rampart circuit I-M



Middle rampart circuit Q-J



Middle rampart circuit Q-C



Middle rampart circuit Q-C (south west)



Path in upper ditch by middle rampart Q-C



Lower rampart circuit R-B (east side)



Lower rampart circuit R-B (south west side)



Access path 2 - point L



Access path 2 - L-K