Report of the CRoW Working Group to the BCA AGM 2014

Introduction

In June 2013 BCA accepted my proposal to set up a Working Group with the following remit:

> ***That BCA investigates the position with regard to access to caves on CRoW land in England and reports back to BCA Council as soon as possible.***

Wales comes under the same CRoW (Countryside and Rights of Way) legislation as England but the administration of this is overseen by the Welsh Assembly under separate Welsh organisations and Cambrian Caving Council is recognised as the "governing body for caving in Wales", hence I felt a BCA working group should concentrate on England.

Appendix 1, "A POSSIBLE APPLICATION OF CROW TO CAVING", produced by Bob Mehew, examines in detail what is meant by access land under the CRoW Act - basically it is "open country" (i.e. mountain, moor, heath, or down), RCL (registered common land), land more than 600 m above sea level or is land Dedicated for the purposes of the Act.

It is acknowledged that, if land is covered under the CRoW legislation, this has the added benefit of reducing the level of liability to the landowner.

My proposal was prompted by the acknowledged level of concern over access to Casterton Fell, which is an access area under the CRoW legislation (hence walkers may wander wherever they will on the surface of the land) but where access for cavers to the multiple entrances to the huge cave system underlying the Fell is controlled by CNCC at the request of the landowner, who requires that only a limited number of permits are issued. CNCC is put in the position of being threatened with withdrawal of all access to the Casterton area unless it can control caver access; while a substantial number of cavers consider the restrictions to be unreasonable and feel that access for cavers to land designated under the CRoW legislation should be on the same basis as for walkers.

Two articles in DESCENT have since highlighted the issue: Sam Allshorn in issue 235 "Caves and Crow, an analysis of caves in Northern England" and Tim Allen in issue 237 "Cave Access, out in the open". I have written a response to Tim's article, which will appear in issue 238.

Initial Work

Having been appointed convenor of the group I began by seeking help to compile a database for all caving regions in England which would identify as a minimum:

1. caving areas covered by the CRoW legislation;
2. caving areas which include SSSIs (Schedules Sites of Scientific Interest) designated by NE (Natural England) or SAMs (Scheduled Ancient Monuments) designated by EH (English Heritage); and
3. areas where a special permit or permission (obtained in advance) and public liability insurance are required in order to obtain access to caves;

and the overlap between these different areas within the various regions.

The point being that designation as an SSSI or SAM confers protection which can override the CRoW access legislation if this is required for reasons of conservation. Hence access to a cave under any revised CRoW legislation would not necessarily mean that it is a "free-for all" - either NE or EH may impose restrictions on access or take legal action if damage is caused underground. I have been told by one cave scientist that 75% of caves overall are covered by SSSI legislation, though this clearly varies from region to region.

Cavers in Northern England, the Peak District, Devon & Cornwall and the English part of the Royal Forest of Dean are already at work but I have yet to hear from any Mendip cavers although I have kept their C&A Officer informed.

I now have some interim results from the North, the Peak District and Forest of Dean which already show the great variation in the situation around the regions, although the database has yet to be completed.

Northern England: 71% of their 2,500+ caves are on CRoW land; in some cases, e.g. Leck Fell, this applies to 100% of caves; a number of other areas, e.g. East Kingsdale, Easegill, The Allotment and Fountains Fell, have more than 90% of the caves on CRoW land.

Peak District: Out of a total of 645 sites, 459 have been checked so far and of these only 11% are on CRoW land; 58% of sites overall are SSSIs but 79% of the SSSIs lie on CRoW land; only 1 cave on CRoW land has access restrictions and one show cave lies under CRoW land; there are a few sites with no access at all.

Royal Forest of Dean: All 171 sites in the English area have been checked. 43% are on Designated Access Land and 84% of these require Crown permission for access underground; less than 5% overall are SSSIs, only 2 of which are on Dedicated Access Land. The Forest is unique in that it has no ordinary CRoW access land but it does have land which has been specially "Dedicated" by the Forestry Commission under the CRoW Act; here permission from the landowner to reach the entrance and permission from the Crown to go underground are both required and this applies to both caves and mines. It must be emphasized that there is no right of underground access in the FoD without specific Crown consent.

Anomalies

It has become apparent firstly that the CRoW legislation itself says **nothing at all** about access to caves; caving is not listed as being permitted but neither is it listed as an activity prohibited under CRoW in the 2010 guideline document issued by Natural England, NE 13FS[1].

However, the legal guidance issued separately by NE and Defra (Dept. of Environment, Food & Rural Affairs) is that the CRoW legislation relates to "open air recreation" and that caves are not "open air", thus CRoW does not allow access to caves. One of their advisors also commented that:

> *CRoW boundaries relate to surface areas. Cave systems may meander around under the ground in a way that is very difficult for anyone to relate to the mapped boundaries. If the caver reaches the point underground where he crosses the boundary and the land above is no longer open country or RCL, how is he to know it? He has no means of relating his position to the statutory maps.*

Despite this surface mapping of SSSI boundaries, cavers are currently monitoring SSSIs underground on behalf of NE and, of course, know exactly where the features they are monitoring lie in relation to the surface. In addition, SSSI and SAM legislation allow for the prosecution of anyone who causes damage to a scheduled site underground - so the existence of caves and mines frequented by people is acknowledged and the exact position of their activities underground must be known for a prosecution to succeed.

Tim Allen's DESCENT article challenges this definition of "open air" and it has been conceded by EN and Defra that descent of an open shaft from the surface **does** constitute an "open air activity" - the question then becomes: where does the "open air" end and the "cave" begin?

In the case of some open shafts surrounded by CRoW land, the boundaries have been drawn to exclude the shaft itself from the surrounding CRoW land, e.g. Marble Steps and Eldon Hole. In other cases the shaft itself is included within the CRoW boundaries.

In 2009 an NE commissioned a report, NECRO 12 edition 2, which recommended in section 3.2.1:

> *"The CROW Act provides for open-air recreation, basically on foot, which would **include** the following activities:- … **potholing** …"*

It then went on to list those activities which should be specifically excluded.

However, the 2010 EN guideline document referred to above did not follow this 2009 recommendation - it makes no mention at all of caving but instead says:

> *13.4.2 The access afforded by CRoW*
>
> *CROW provides the public with a right of access on foot only. This includes running, climbing, photography, having a picnic, and bird watching. Wheelchairs are also allowed.*
>
> *It does not include cycling, horse riding, camping, or rock climbing.*

So climbing is included but rock climbing is excluded under this definition!

In some areas, particularly in the Yorkshire Dales, by longstanding custom and practice, no permission is required to descend caves whether they are on CRoW access land or not.

NCA and BCA's past Role in this

The history of attempts to include caves in the CRoW legislation dates back to 1998, when the then NCA Conservation and Access Committee responded to the government proposals on the projected legislation. It is clear from the minutes of the C&A Committee meetings of the time that all regions, including the Forest of Dean, as well as BCRA, Pengelly, etc. were included in the formulation of the responses in favour of caving being included in the CRoW legislation. There was no dissent recorded at the time, nor was there dissent when this decision was reported to NCA Council.

All these decisions were reported in NCA's magazine "SpeleoScene", which was posted free of charge to every member club of NCA and was available for free in caving shops. The progress of the legislation through Parliament was followed in succeeding SpeleoScenes and was reported to NCA Council and to the 1999 NCA AGM. In SpeleoScene of May 2000 an article: "**The Countryside Bill"** appeared, quoting a CCPR (Central Council for Physical Recreation) press release from Robert Pettigrew, Chair of the Outdoor Pursuits Division, which included the following:

> "*... We wish to take forward the principles of free and responsible access in a spirit of collaboration, to the benefit of countryside interests as well as those of recreation and environmental understanding. ... England is not a land in which everything is forbidden except what is expressly permitted, but one in which everything is permitted except what is expressly forbidden. ... We need to follow best practice elsewhere, especially in Europe where there is a history of recreational enjoyment of land and water, and open-air tourism, to the economic benefit of local communities."*

Mick Day, NCA and later BCA Chairman, was the caving representative on the Outdoor Pursuits Division of CCPR and there was no question but that caving was regarded by CCPR as an "outdoor pursuit".

In 2008 the BCA Chairman's Report to the AGM referred to BCA's membership of the CCPR Outdoor Pursuits Division and went on to say:

> ***CCPR Access Policy**: CCPR has a long-standing history of supporting members' desire for increased access to land and water. One of CCPR's key strategic priorities is to secure sustainable access to land and water for sport and recreation, underpinned by good practice in outdoor and adventurous activities. The initial draft document merits further work to satisfy as wide a range of members as possible. Also, DEFRA has just (iv-2008) published the draft Marine Bill, including provisions on access to the English coast.*

He also noted that CCPR acknowledges a single named representative of each member body in order to provide a democratic structure for meetings of its divisions (BCA is a member of the Outdooor Pursuits Division, OPD).

(What was formerly the CCPR has now been renamed the Sport & Recreation Alliance.)

Where Next

It seems clear that in order to obtain access to caves under the CRoW Act BCA itself, on behalf of cavers, will need to seek a new interpretation of the law relating to access underground.

It is therefore for members at this AGM to decide whether BCA should attempt to take this matter forward.

Jenny Potts, 12 May 2014

REPORT FROM CRoW WORKING GROUP TO BCA AGM 2014.

Motion for BCA AGM

The BCA Working Group on Countryside and Rights of Way Act of 2000 (CRoW) is instructed to pursue legal advice on the application of CRoW to caving, subject to Council's agreement if funding is required,

and subject to that advice being favourable,

instructs BCA Council to amend the terms of reference of the Working Group to:

a) The Working Group has a membership of:
    i. A Convenor nominated by Council,
    ii. BCA's Conservation and Access Officer,
    iii. A representative from each Regional Caving Council and National Body member,
    iv. Any other persons nominated by Council, and
    v. As non voting members, any persons that the Working Party may co-opt;
b) Completes its work on identifying potentially affected cave and mines in England and also Wales;
c) Undertakes negotiations on behalf of BCA with other bodies interested in CRoW;
d) Negotiates with Natural England and Natural Resources Wales on behalf of BCA to obtain acceptance of the legal advice;
e) Produces advice to regions on acceptable forms of access agreements based on the legal advice and information from Natural England and Natural Resources Wales;
f) Make recommendations on aspects of conservation to the Conservation and Access Committee;
g) Produces advice to regions for use in briefing land owners on developments; and
h) Produces advice to regions on any appropriate supplementary topics.

Proposed B Mehew Individual Member 57

Seconded

REPORT FROM CRoW WORKING GROUP TO BCA AGM 2014. APPENDIX 1.
THE POSSIBLE APPLICATION OF CROW TO CAVING

1. Section 2(1) of the Countryside and Rights of Way Act of 2000 (CRoW) states "*Any person is entitled by virtue of this subsection to enter and remain on any access land for the purposes of open-air recreation*..." subject to various conditions. The key phrases are therefore are 'access land', 'open-air' and 'recreation'. The purpose of this note is to review legal interpretations of the meaning of each phrase. CRoW only applies to England and Wales. Scotland has it's own law which explicitly covers caving. Northern Ireland has no equivalent law.

2. Access land is defined in subsection 1(1) of CRoW as:

> *In this Part "access land" means any land which—*
> *(a) is shown as open country on a map in conclusive form issued by the appropriate countryside body for the purposes of this Part,*
> *(b) is shown on such a map as registered common land,*
> *(c) is registered common land in any area outside Inner London for which no such map relating to registered common land has been issued,*
> *(d) is situated more than 600 metres above sea level in any area for which no such map relating to open country has been issued, or*
> *(e) is dedicated for the purposes of this Part under section 16,*
> *but does not (in any of those cases) include excepted land or land which is treated by section 15(1) as being accessible to the public apart from this Act.*

3. In England, a number of caves have been identified as being on 'registered common land', notably in the Dales at Ingleborough and Clapham. In addition, it is known that many of the Forest of Dean sites are on Forestry Commission land which is 'dedicated land' under section 16. Land over 600m is easily identifiable and excludes anywhere on Mendip. A slightly closer look at land above 600m in areas of potential interest to cavers and miners indicates that few other cave or mine entrances lie on land above 600m. But the vast majority of caves and mines on access land are likely to lie on land which has been identified as 'open country'.

4. Subsection 1(2) of CRoW helpfully defines 'open country' as:

> *"open country" means land which—*
> *(a) appears to the appropriate countryside body to consist wholly or predominantly of mountain, moor, heath or down, and*
> *(b) is not registered common land.*

And also defines 'appropriate countryside body' as:

> *"the appropriate countryside body" means—*
> *(c) in relation to England, the Countryside Agency, and*
> *(d) in relation to Wales, the Countryside Council for Wales;*

5. Parts of the Countryside Agency were subsequently merged with parts of other bodies to form Natural England (NE) who now holds this role for England. In Wales, the Countryside Council for Wales was merged together with functions from other bodies into the body known as Natural Resources Wales (NRW).

6. This definition of 'open country' mirrors that used in section 59(2) of the National Parks and Access to the Countryside Act of 1949 as passed, though not as amended by the Countryside Act of 1968. (That extended the definition to cover woodland, rivers and canals and their watersides.) It is perhaps expected that in the first major debate following the introduction of the bill for the National Parks and Access to the Countryside Act there was even then protests about the limited intent of the bill. The late Barbara Castle[i] said in that debate "*We have tended in the past to consider that the working-class enjoyment of the open air must necessarily and permanently be limited to hiking and cycling. That is not the vision we get from the Hobhouse Report*." (The Hobhouse report proposed the basic structure for the National Parks and Access to the Countryside Act.)

7. A key feature of the definition of 'open country' is that it means land of certain types. And provided it is land of one of those types, it is therefore 'access land'. So the word 'land' is qualified by access to produce the phrase 'access land' which comprises of certain types of land as defined in section 1(2). Common law reaffirmed as recently as 2010[ii] states that the owner of land owns from notionally the centre of the earth to the skies above. This position also provides for clarity where a cave is sufficiently long to extend beyond the land of one land owner. Simply put, each land owner owns that part of the cave which lies on their land.

8. This common law position is reinforced by the Law of Property Act of 1925 which at section 205(1)(ix) defines land as including *"...mines and minerals, whether or not held apart from the surface"* and goes onto state *"mines and minerals" include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same . . .*". Indeed this definition was slightly amplified in the Land Registration Act of 2002 where in section 132(1) it states that land includes "*land covered with water, and mines and minerals, whether or not held with the surface*".

9. Hence it is proposed that in law 'access land' means not only the surface but also what is below that surface. And that it matters not whether access land was defined on the basis of it being 'open county', 'registered common land' or 'dedicated land'.

10. It is also worth reflecting that given the definition of land also includes above the surface. So in theory a person could use the above surface space. Except that CRoW specifically excluded from the right of access the activities of hang-gliding and para-gliding under paragraph 1(s) in Schedule 2. (CRoW does not exclude kite flying so it is clear that not all above surface activities are prohibited.) NCA's submission[iii] to the consultation paper which preceded the CRoW bill made clear that we viewed the bill should cover caving. The subsequently published paper[iv] on responses specifically mentions that at least response mentioned CRoW should cover caving. So clearly the lawyers who drafted the bill were alert to the fact that the definition of land included both above and below the surface and its implications. And by implication, that they consciously chose to not exclude land below the surface and hence include the caves which might lie therein.

11. The Physical Training and Recreation Act of 1937 contains no definition of recreation but consistently uses the phrase 'physical training and recreation' and 'exercise and recreation', suggesting a relationship between exercise and recreation. The Education and Inspections Act of 2006 includes a section which is intended to amend the Education Act of 1996 by the addition of a new section which at subsection 157(B)(13) contains the not overly helpful definition that "*recreation" includes physical training (and "recreational" is to be construed accordingly).* A search using Westlaw UK facilities[v] on the word 'recreation' by itself produced a large number of hits. When limited to those associated with land, many turned out to be related to planning applications and the meaning of sport and recreational facility within planning guidance.

12. However, The Work at Height Regulations of 2005 (No. 735) in paragraph (4) (d) of at regulation 3 includes the phrase "...*caving or climbing by way of sport, recreation, team building or similar activities*". It goes onto to usefully note in paragraph (6) (a) that "*caving" includes the exploration of parts of mines which are no longer worked*". This is in line with the membership of the British Caving Association (BCA, the national body for caving in the United Kingdom of Great Britain and Northern Ireland) of the Sport and Recreation Alliance. (The Sport and Recreation Alliance is the umbrella organisation for the governing and representative bodies of sport and recreation in the UK, being the successor to the Central Council of Physical Recreation.) Sport England also recognised caving as a sport and BCA as the national governing body. And as a consequence, HM Revenue and Customs accept that suitable caving clubs can apply for Community Amateur Sports Clubs status. Thus it is concluded that the law does recognise caving as a recreation.

13. A search on the phrase 'open air' by itself also using Westlaw UK facilities identified only one case of interest. This was based on a request for an open air cremation by a Hindu. The judicial review judgement indicated that the phrase 'open air' is not applicable when inside a building. Paragraph 14 of Schedule 1 of CRoW usefully defines building as "*includes any structure or erection and any part of a building as so defined, but does not include any fence or wall, or anything which is a means of access as defined by section 34; and for this purpose "structure" includes any tent, caravan or other temporary or moveable structure*".

14. This affirms that 'open air' cannot be inside a building and other manmade structures. But can 'open air' be inside natural things such as a cave or man made things such as a mine? Subsection 93(4) of the Environmental Protection Act of 1990 states *"open land" means land in the open air".* And interestingly subsection 1(2) of the Environmental Protection Act states "*The "environment" consists of all, or any, of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground."* Which seems to imply that the air within caves and mines is not 'open air'. Reading several cases involving mines indicates that the phrase 'open air' is used to denote locations on the surface of the land[vi].

15. So open air recreation is recreation which is carried on in the open air and not in a building, structure or other enclosed space such as a cave or mine. It is a statement of the obvious that many recreations can be conducted in the open air as well as inside buildings, a simple example being dancing. Normally caving would be conducted beneath the surface, underground. But there are a few caves with entrances which require caving techniques whilst still very much in the open air. So caving is undertaken in the open air and hence can be described as an 'open air recreation' in such circumstances.

16. NE is reported[vii] as "...still not convinced that caving is an open air activity (or even that it takes place in the outdoors, for that matter). What they have conceded is that cavers do have the right of access (under CRoW) to open caves and potholes on the sides of mountains and the like, because they are in effect open to the air." It has also been reported that Natural England have stated in an email[viii] that: "It is the view of our Access Specialist that it's pretty clear that in common parlance, the term "open-air recreation" wouldn't be perceived to include use of areas under the ground. And this is what two different Defra lawyers thought (DEFRA's view in 2001 referred to below). It might well be different where a large open cave sets in the side of a mountain, as for example sometimes happens in the Lake District. In such a case a person entering the cave still has a very real sense of open-air recreation. But once one is in effect disappearing down tunnels in the ground, it seems to me that one immediately loses that sense."

17. The exciting feature of this information is that it appears that NE concedes that caving is an 'open air recreation'. But I suggest that they fall into the common misapprehension that the phrase 'open air' also qualifies the phrase 'access land'. It is suggested that most people have been interpreting the statement "...*access land for the purposes of open-air recreation*..." as if it read "...on any access land for the purposes of recreation in the open air...". But as noted in paragraph 9 above, the lawyers who drafted the bill were aware of the desire to see caving included. They did not see fit to explicitly qualify 'access land' by the use of 'open air' or to make clear they were explicitly talking about 'recreation in the open air'. My argument is that to take an example such as dancing, not only does CRoW give a person the right to dance on the surface of the 'access land' but because 'access land' also includes the caves below it surface, CRoW also give that person the right to dance in a cave. For dancing substitute caving.

18. It is therefore proposed that the working group seek legal advice on the merits of this argument, including if necessary to paying for that advice, subject to Council's agreement as to the specific costs. (One barrister has indicated a willingness to provide pro bono work, subject to work load.) If legal advice is favourable, it is proposed that the working group directly negotiate with Natural England and Natural Resources Wales.

19. It is acknowledged that if this line of argument is successful, then there are substantial implications for cave access agreements; simply put, most will no longer be legal. It is therefore proposed that subject to such legal advice being favourable, then the Working Group's terms of reference be expanded to include BCA's Conservation and Access Officer and that the working group take on the task of producing advice to regions on acceptable forms of access agreements under the new interpretation and any appropriate supplementary topics (such as educational material on cave conservation and early briefing notes for regions to use to keep land owners informed).

20. This paper has been based on a piece of work looking in some detail at CRoW, a copy of which is available on request. Further planned work includes reviewing the impact of CRoW covering caves on the liability of land owners.

Bob Mehew
29 April 2014

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[i] See http://hansard.millbanksystems.com/commons/1949/mar/31/national-parks-and-access-to-the .

[ii] See para 10 to 28 in http://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0032_Judgment.pdf .

[iii] NCA, Access to the Open Countryside – A Consultation Paper, Comments of the National Caving Association, Proposal 15, 1998.

[iv] DETR, Access to the open countryside in England and Wales : analysis of responses to the Consultation Paper : executive paper, February 1999.

[v] See http://legalresearch.westlaw.co.uk/ .

[vi] See for example Mackenzie v Coltness Iron Co. Ltd, (1903) 11 S.L.T. 350.

[vii] T Allen, Cave Access – Out in the Open, Descent (237) p30 to 32, April/May 2014.

[viii] See http://ukcaving.com/board/index.php?topic=16409.msg214924#msg214924 .

Web addresses as at 29 April 2014