
CAIRNGORMS LOCAL OUTDOOR ACCESS FORUM

Title: Rothiemurchus Estate - Access to Loch an Eilein

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Purpose: To bring before the Forum for discussion and comment a paper on an unresolved access issue in Strathspey.

Background

1. Loch an Eilein lies on the Rothiemurchus Estate in Strathspey about 4kms from Aviemore. The loch is surrounded by a network of well-maintained and attractive paths that stay close to the shore in most places and provide good views over the Cairngorm Mountains. The loch and the walks are serviced by a car park which is staffed during the day and at weekends. The car park is located about 100m from the loch shores. There is also a visitor centre and toilets open all year. Many of the visitor facilities and services in the area are supported by a management agreement between the estate and Scottish Natural Heritage.
2. On 12 May 2005 SNH received an enquiry from a member of the public about whether access rights for canoeing applied to the water at Loch an Eilein. The enquirer had been told by estate staff that access rights for canoes were denied on the basis that the loch is an SSSI and wanted to check that this was correct. SNH suggested that they assumed access rights would apply to the Loch under the Land Reform Act but they passed the correspondence to the National Park Authority (copied to the estate) which has duties under the legislation with respect to this matter.
3. The estate then replied to all parties suggesting there had been a misunderstanding and that the reason access to the water had been denied was that boating and canoeing has only been permitted in the past on payment and so is excluded from the access rights.
4. **The issue to be resolved therefore is whether or not the access rights under the Land Reform Act apply to Loch an Eileen.**
5. It is important to note that the role of the Local Outdoor Access Forum is not to decide on the matter one way or another but to provide advice and assistance to the Park Authority or any other party towards resolution of the issue.

Legal context

6. The issue of what land the access rights apply to is covered in Sections 1, 6 and 7 of the Land Reform (Scotland) Act 2003. Section 1 makes it clear that the rights apply to all land and inland water unless exempted under Section 6. The relevant part of Section 6 which provides exemptions in relation to charging for access states that:

“6(1) the land in respect of which access rights are not exercisable is land -
(f) to which -

(i) for not fewer than 90 days in the year ending on 31 January 2001 members of the public were admitted only on payment; and

(ii) after that date, and for not fewer than 90 days in each year beginning on 1 February 2001, members of the public, are, or are to be, so admitted.”

7. Under the Act the National Park Authority has a statutory duty to uphold access rights – that is to “...assert, protect and keep open from obstruction or encroachment any route, waterway or other means by which access rights may reasonably be exercised” (Section 13).
8. In order to carry out this function the Authority has several powers at its disposal to manage and uphold access rights including taking enforcement action. Notwithstanding these powers we have stressed that we are keen to work as far as possible with land managers and recreational users to develop solutions to issues by common understanding and collaboration.
9. It is notable that when the issue of charging for access was discussed in Parliament the Minister, Ross Finnie stated (Justice 2 Committee Debate, 25 June 2002):

“It is wholly incompatible and inconsistent in law for someone to charge for the exercise of a right. The right would cease to be a right and instead be part of an arrangement whereby people were granted access for a charge. It is explicit in Section 1 that because we are granting a right, there is no way in which anyone has legal basis for charging people for exercising that right.”

CNPA Information Gathering

10. Park Authority officers have gathered information about the issue in relation to the legal context above as summarised below.
11. *Signs:* In recent months there have been three different signs regarding water access at Loch an Eilein:
 - i. Before June 2005 signage at Loch an Eilein made no reference to access to the water apart from a sign with “No Boats” at the car park entrance.
 - ii. In June 2005 this sign was replaced by a sign stating “Access to the water by arrangement”
 - iii. In July or August 2005 this sign was replaced by another stating “Please ask about water activities and overnight”.
12. *Visitor information:* There is no specific reference to a charging scheme in relation to water access at Loch an Eilein in the estate’s visitor information leaflet or website and there is no indication that any such scheme was in place before January 2001. The estate’s view is that the public should contact the estate if they want to undertake an activity which is not stated in the main leaflet. On this basis the estate maintains that the public have been and are admitted onto the loch under conditions and by only on payment.
13. *Contact with the estate:* The estate have been asked to supply information about the charging scheme relating to access to the loch. No information has been supplied that suggests that admission was provided only on payment for more than 90 days before 31 January 2001 or for more than 90 days in each year since that time. Charges have however been made over a considerable period of time for access related to filming on

the loch, for special promotions and for access associated with special events and activities provided by the estate (such as weddings). In the summer of 2005 the estate report that a number of people who have taken canoes onto the loch have paid a small fee for access, apparently without objection.

14. *Contact with recreational users*: CNPA officers have searched for information to support the assertion that a charging scheme has been in place on Loch an Eilein. Having contacted the Scottish Canoeing Association and spoken to local canoeists, it has been confirmed that there no knowledge of access being charged for at Loch an Eilein. There is no reference or invitation in estate literature regarding access to Loch an Eilein for water based recreation such as canoeing. Rather, it was reported to CNPA officers that until very recently people have been actively discouraged from taking boat access on the loch.

Record of contact

15. An exchange of e-mail messages took place between CNPA officers and the estate from 25 May 2005 onwards. On 13 June 2005 CNPA officers wrote to the estate expressing concern about the refusal of access and stating that, following a review of the estate literature, CNPA could find no information relating to admission only on payment at Loch an Eilein. The letter requested more information from Mr Grant at the meeting on 22 June 2005.
16. On 22 June 2005 a meeting was held between the estate and CNPA staff. The meeting looked at whole estate issues but a significant part of the discussion focused on the access to water issue.
17. The estate asked CNPA officers to write to them making the situation clear so that they could consider their position and seek further advice if needed. CNPA officers wrote on 27 June 2005 stating the Park Authority's position:

"Having reviewed both the signage at the site and the visitor information available and having taken soundings from people who know the area we have not seen any evidence that members of the public have been admitted to the loch only on payment over the time period specified in 6(1) (f). Rather, people have been actively discouraged from taking access on the loch. Therefore we have concluded that as a result of the passage of the new legislation, access rights do apply to the loch.

I would therefore confirm our request that you:

1. *Remove the sign at the site that refers to "Access onto water by arrangement". If a further sign is necessary we would be happy to help with appropriate wording that fits with the legislation; and*
2. *Instruct members of your staff not to impede access for non-motorised water users."*

18. Although there has been an exchange of e-mail messages since that time the matter remains substantially unresolved.

Advice sought from the Forum

19. There are two substantial issues that are relevant to determination of whether or not the access rights under the Land Reform Act apply to Loch an Eileen. The first issue relates to an understanding of the legislation as described in paragraphs 6 to 9 above and the very specific circumstances in which land is excluded from the access rights where

charges have been and are being made. The second issue relates to the information available to CNPA (as reported in paragraphs 10 to 14 above) about the charging scheme and visitor management arrangements that have been and are no in place.

20. The Park Authority Board has now approved the procedures that should be used in upholding access issues (see Annex 1). Assuming that the interpretation of the legislation as described above is sound and that no further information comes to light the proposed course action would be for:

- i. CNPA officers to write to the estate again specifying the action that should be taken by the estate with a clear timetable;
- ii. Monitor compliance;
- iii. Then, if no further action is taken and no further information about a charging scheme is supplied within the timescale set down, officers prepare to serve a Notice on the estate to remove the relevant signs. The estate will have the option **either** to complete the work **or**, if they disagree with the decision of the Authority that access rights apply at Loch an Eilein, they may refer the matter to a Sheriff for determination.

21. Views of the Forum are sought.

**FRAN POTHECARY
OUTDOOR ACCESS OFFICER
25 AUGUST 2005**

ANNEX 1 - SECTIONS 14 AND 15: UPHOLDING OUTDOOR ACCESS RIGHTS

Sections 14 and 15 give specific powers to the Park Authority to take action against land managers who utilise prohibition signs, obstructions and dangerous impediments, etc for the main purpose of deterring or preventing the exercise of access rights.



