

Scottish Public Services Ombudsman Act 2002

Report by the Scottish Public Services Ombudsman of an investigation into a complaint against:

The Scottish Executive Enterprise, Transport & Lifelong Learning Department

Complaint as put to the Ombudsman

1. Mr C¹ complained of failures by the Scottish Executive Development Department (the Department²) to address a number of issues that had arisen from upgrading the A74 to a motorway through part of land he managed (the Estate). In particular, Mr C complained of failures to:

- (a) clarify responsibility for future maintenance work on a private water mains to the Estate which crosses the motorway;
- (b) identify the location of another water pipe for which he is responsible;
- (c) conclude a legal agreement about the use of shared access;
- (d) return land that was compulsorily purchased and not used; and
- (e) respond to correspondence.

He complained that this meant he was unable to finalise his compensation claim and may therefore have to pay additional capital gains tax.

¹ A key to the names used in this report is set out in the glossary.

² Prior to 1 July 1999 responsibility for upgrading trunk roads in Scotland, and related issues, lay with the Scottish Office Development Department. The Scottish Executive Development Department assumed those responsibilities from 1 July 1999 and they were subsequently transferred to The Scottish Executive Enterprise, Transport & Lifelong Learning Department in 2003. For convenience, I generally use the term “the Department” throughout this report to refer to the body responsible at any given time for the upgrade of the A74.

Investigation and jurisdiction

2. Mr C originally complained, through a Member of the Scottish Parliament, to the Scottish Parliamentary Commissioner for Administration (SPCA). His office began an investigation in June 2001, after obtaining comments from the Head of the Department. That investigation was still in progress when the office of SPCA ceased to exist on 22 October 2002. I therefore assumed responsibility for the investigation under the terms of Paragraph 4 of Schedule 7 of the Scottish Public Services Ombudsman Act 2002.

3. Relevant documents, including the Department's files, were obtained and a number of interviews were carried out. I have not put into this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Paragraphs 5-8 provide general information about the administrative background and the statutory provisions relating to Mr C's complaint. Paragraphs 9-57 set out the evidence and my findings and recommendations are in paragraphs 58-71.

4. I am empowered to investigate administrative actions taken by or on behalf of the Scottish Executive and other public bodies listed in Schedule 2 to the Scottish Public Services Ombudsman Act 2002. These include the Department. Section 7(1) of the 2002 Act provides that I may not question the merits of discretionary decisions of public bodies taken without maladministration. It is not my function to determine the legal implications in agreements relating to the extent of ownership of land; such matters are for the courts to decide.

Statutory and administrative background to Mr C's complaint

5. Section 2 of the Roads (Scotland) Act 1984 (the 1984 Act) provided for the Department to re-construct, alter, widen, improve or renew any trunk road. The Secretary of State as roads authority could, by means of a scheme under section 7 of the 1984 Act, be authorised to provide a motorway and, under section 9, alter any road that crossed the path of the motorway. Sections 103-119 of the 1984 Act provided various powers for the Secretary of State to purchase land required in connection with the construction of the motorway, either compulsorily or by

agreement. The Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 applied to any compulsory acquisition. Compulsory Purchase Orders relating to the motorway and affecting the Estate were made in 1991 and 1992. Section 61 of the 1984 Act and section 109 of the New Roads and Streetworks Act 1991 allow the roads authority and the roadworks authority respectively to grant permission to a person to place or to retain apparatus in a road and to inspect, repair, alter or renew that apparatus.

6. In 1986 the Department issued a booklet, "Compensation - a guide for house owners and tenants" which states that, where part of a person's property was required by the acquiring authority:

'you are entitled to market value compensation for the land that is acquired, plus compensation for severance and injurious affection (any depreciation in the value of the remainder of your property resulting from the loss of the part taken, and the construction or use of the works). The acquiring authority will sometimes agree to carry out accommodation works (eg constructing a new access or new walls) in lieu of the cash compensation or part of it; and where an increased burden of future maintenance of such works falls on you this is included in the compensation by way of injurious affection.'

7. Landowners who are entitled to compensation for the compulsory acquisition of some or all of their land can, at any time, make a written claim for an advance payment of the compensation due. Such claims are calculated at 90 per cent of the compensation agreed or 90 per cent of the amount estimated and must be met by the acquiring authority within three months. The District Valuer, on behalf of the acquiring authority, in this case the Department, usually conducts the negotiations for the amount of compensation to be paid. The District Valuer is an independent official employed by the Valuation Office Agency (VOA) of the Inland Revenue.

8. The Lands Tribunal for Scotland adjudicates on disputes in connection with the valuation of land, in particular disputes over compensation where land has been compulsorily purchased and over

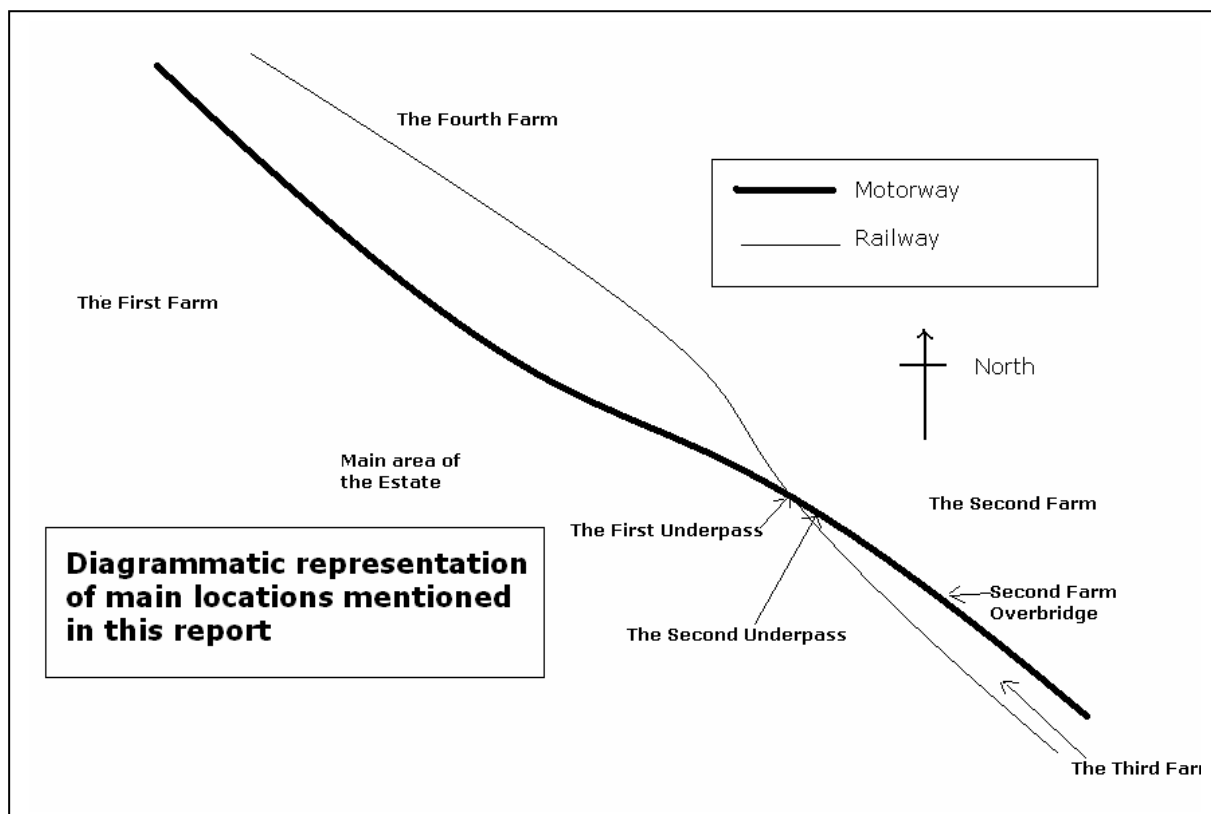
injurious affection of any land. However, there are time limits for making such a reference. The Tribunal will arbitrate where the parties have agreed to refer a dispute to it.

Mr C's complaint

9. Mr C explained in a letter to SPCA's office that the items which he considered the Department had failed to deal with could be grouped under three headings:

- (a) The Estate had quite a substantial private water supply, which was crossed by the motorway in two separate places. The Estate needed to clarify the responsibility for any future maintenance required on this main: firstly, within the area of the motorway itself; secondly where it lay under local authority property on the detrunked A74; and thirdly where it ran through an area of land which the Department gave Railtrack permission to use as a maintenance compound. A long length of plastic pipe had also been installed to feed a trough on a farm which was part of the estate (the First Farm). The maintenance of this pipe was the Estate's responsibility, and they therefore required a map from the Department, showing exactly where the pipe lay. Because it was plastic, not metal, it could not be traced without a map.
- (b) The motorway left the Estate's land at the southern end at the march between a farm which was part of the Estate (the Second Farm) and another farm which was not part of the Estate (the Third Farm). As a result of the motorway construction, the march fence line between these two ownerships had had to be altered. In addition, they now shared the same access route. Input was required from the Department to complete legal documentation covering the use of the shared access and also the transfer of any land required to allow for the altered line of the march fence.
- (c) An area of land was compulsorily purchased, supposedly for the motorway, but in the end was not used. This was contrary to a prior agreement which Mr C had with the Department and therefore the land needed to be returned to the Estate.

10. Mr C considered that the Department's failure to answer correspondence concerning the above items, and their failure to take any positive action to try and produce a solution, constituted an administrative fault on their part. A chronology of events relevant to Mr C's complaint is set out at Annex A to this report. The diagram below illustrates the relative locations of places mentioned in this report.



Comments from the Head of the Department

11. At the start of this investigation the then Head of the Department provided a detailed account of the Department's dealings with Mr C. He described Mr C's case as complex and ongoing since April 1990. He explained that a decision was made to upgrade a section of the A74 to motorway standard in 1987 and the proposals to implement that decision affected various interests in the Estate. Construction of the relevant sections started in 1992/93 and the motorway opened to traffic in 1994. In 1997, responsibility for operating these sections of road was transferred to a company (the Company) under a design, build, finance and operate (DBFO) private finance initiative contract. The Company has

control and access rights over land within the Operation and Maintenance boundary until May 2027. The Head of the Department wrote:

'The first two points [of Mr C's complaint] relate to water mains which were laid to supply the Estate as part of the accommodation work to mitigate the effect of the new motorway. To deal with the issues it has been necessary to investigate, survey and reference the location of the various water pipes, and we have been liaising with the consulting engineers for the scheme, [Firm A] and [the Estate]'s surveyors, [Firm B]. All information confirming the private water supplies has now been received and the consulting engineers have prepared the relevant plans which specifically address the locations of the mains. We had also asked West of Scotland Water to confirm whether their plans of the area ... on which were sketched the presumed location of a connection on to the main, the water meter and the 50 mm pipe along the road boundary were correct, or if not the true location. This was required for an agreement under the terms of section 61 of the Roads (Scotland) Act 1984. At the same time the sleeved crossing carrying a main under the motorway needed to be examined to determine whether it was practicable for the plastic pipe to be withdrawn for repair in the event of a burst or blockage since, if not, [the Department] would have to take responsibility for repairs. West of Scotland Water confirmed that the location of the connection, meter, and 50 mm diameter pipe, as indicated on [the Department's] plan, was correct.'

12. The Head of Department also stated:

'[(a) Mr C] said that [the Department] had failed to clarify responsibility for future maintenance work, on a private water main to his property, which crosses the motorway. The background to this complaint is that it was necessary to pipe [the Estate]'s private water supply under the A74(M). [The Estate] asked the Department to accept responsibility for the maintenance of those lengths of private water main passing under the motorway from which, by law, they are prevented access. There is a further complication in that part of the water supply crosses land belonging to [the Department] at [the

First Underpass] and is used by Railtrack for access to the West Coast Main Line. [The Department] confirmed that it would accept responsibility for the maintenance of those lengths of private water main passing under the motorway in February 1991. The Department wrote to [Firm C], the solicitors acting on [Mr C's] behalf, on 12 May 1997 agreeing that it would be sensible to draw up a formal document recording the maintenance of the private water supply pipes and asked [Firm C] to prepare the first draft setting out the matters which should be included in the agreement for consideration. Since then, there has been a lengthy exchange of correspondence regarding the identification of the exact location of the appropriate pipes and drawing up the location plans of the pipes to be included in the agreement. As I noted above, our consulting engineers have now prepared drawings of the locations of three water supply pipes which cross the motorway, and will seek to agree these on site with the Estate's surveyor. Thereafter, it should be possible to move on to drafting the agreement.

[(b) Mr C] said that [the Department] has failed to identify the location of a water pipe for which [Mr C] is responsible. In December 1998 there was uncertainty about the location of a 50 mm plastic pipe laid from a connection to the public main in the A74 near [the Fourth Farm] generally along the line of [a B road] and feeding various water troughs. This had been laid alongside the motorway boundary and site surveys were undertaken to establish whether or not it lay within land owned by [the Department]. This has now been referenced as noted above and the information will be passed to the Local Roads Authority to allow them to complete the Section 61 agreement where appropriate.

[(c) Mr C] said that [the Department] has failed to conclude a legal agreement about the use of a shared access. The Department requires servitude³ rights of access over the bridge approach roads for maintenance of [an overbridge near the Second Farm – the Second Farm Overbridge]. Part of these servitudes would be from

³ A servitude is a burden placed on an area of land allowing a right to be exercised by one landowner over the property of another landowner.

[Mr C] with the remainder from the adjoining proprietor [of the Third Farm – now Mr and Mrs D]. It would also appear that both [Mr C] and [Mr and Mrs D] should have reciprocal servitude rights of access to secure the arrangements made in relation to use of the overbridge. Whilst the matter is legally speaking between [Mr C] and [Mr and Mrs D], the Department is prepared to provide the necessary plans (based on the up-to-date Ordnance Survey) and meet both [Mr C's] and [Mr and Mrs D]'s reasonable legal fees involved up to a sum of £500 plus VAT. The [Department] approached both parties served by [the Second Farm] Overbridge and informed them of the Department's proposals following the acquisition of [the Third] Farm by [Mr and Mrs D]. Before any further action can be taken, it is necessary to have sight of the originals of both [Mr C] and [Mr and Mrs D]'s title to establish exactly each title boundary at this location. Our legal advisers subsequently wrote out to [Mr and Mrs D]'s Solicitors who agreed to the servitude proposals but added that they would also need to seek confirmation with the solicitors acting on behalf of [Mr and Mrs D]'s family trust who also have an interest. Our legal advisers have not received a response yet but have recently sent a reminder letter. As soon as agreement is reached with this interest we will be in a position to finalise the servitude agreements for [the Second Farm] Overbridge.

[(d) Mr C] said that [the Department] has failed to return land that was compulsorily purchased and not used. [The Department] had given an undertaking to [the Estate] that actual land take would be kept to the minimum necessary for the works and that land would not be acquired for mitigation or landscaping. [Mr C] believes that two areas of former estate land at [the First] Underpass and [the Second Underpass] should not have been compulsorily purchased and have requested that these areas should be returned.

[The First] Underpass: The land in question was acquired in relation to the construction needs of the motorway including the need to provide a culvert associated with a stream diversion and drainage outfall under the adjacent railway by thrust boring. Having regard to the importance of this pipe and the possible complexity of

any future maintenance, the Department wished to retain ownership of this land. Additionally, Railtrack's hardstanding and access to the West Coast Main Line was lost as a result of construction of the new [Second Farm] Railway Bridge. [The Department] had agreed that a suitable replacement facility would be provided and the Department constructed the replacement hardstanding on the land acquired. [Mr C] also has a private water main which crosses the plot. The Department does not consider that this land is surplus to requirements although the grant of a servitude will need to be agreed with [Mr C] to cover his access to his private water main.

[The Second] Underpass: In November 1998, [Firm B], the chartered surveyors acting on behalf of [the Estate], were advised that The Company had full control of land [in the area of the Second Underpass] in terms of the Operation and Maintenance contract and that they had been asked to determine their need for that area and if possible decide on whether it could be deemed surplus. It had been suggested that, when and if it was deemed surplus, the land would be offered back to the Estate; but the timescale would depend upon The Company's decision regarding their need of it throughout a very long-term contractual responsibility. The Company subsequently identified land at [the Second] Underpass which was considered to be surplus to requirements in terms of the M6 DBFO Agreement, and [Firm B] were advised in December 1998 that this land was not required and that arrangements would be made to convey this surplus land to [the Estate]. It will first be necessary to secure a formal amendment to the DBFO agreement before the land can be declared surplus and conveyed to the estate. Arrangements are in hand to draft the amendment to the agreement.

[(e) Mr C] said that [the Department] has failed to respond to correspondence. [Firm B] wrote to [the Department] on 11 November 1999 to express concern about lack of progress. They wrote again on 6 January 2000 to a new contact and enclosed a list of outstanding issues. They said that if no action had been taken by 20 December 2000 then [the Estate] would consider what further action could be taken to resolve matters. They said that [the Estate]

were unwilling to agree compensation claims until all practical matters had been resolved. They wrote again on 10 July 2000 to express disappointment at not having received a reply to their letter of 6 January 2000. The Department replied on 12 July 2000 to say that outstanding issues had been discussed with the Department's agents and that we now had their report together with plans showing location of water main at [the Estate]. These were to be discussed with our legal advisers the following week and a detailed response would follow. This was followed up by a further letter to [Firm B] on 22 August 2000 confirming that our legal advisers were being consulted, but meanwhile [Firm B] were asked to clarify what was meant by the final point (item 18) on their list of outstanding issues. [Firm B] replied on 24 August 2000 acknowledging that this had been dealt with. There was no further correspondence with [Firm B] but there were a number of telephone calls and correspondence continued with [Firm C].

[f Mr C] has said he is unable to finalise his compensation claim and may have to pay additional capital gains tax as a result of [the Department's] mishandling. He seeks full redress. [Mr C] raised this question of delay in concluding matters of compensation, which in turn impedes reinvestment of the outstanding balances, and its implications for Capital Gains Tax purposes. The complaint in the Statement of Complaint is the first time that we have been advised of this possible consequence, but we feel that we should address this issue as quickly as possible. As the application of Capital Gains Tax is outwith our remit, we have taken external advice. The advice received indicates that [Mr C] should alert the relevant Inspector of Taxes immediately of the present delays so that he can consider exercising whatever flexibility he may have in settling the critical deadlines in relation to liability and payment of the tax. A letter was sent to [Mr C] advising him accordingly. If his discussions with the relevant Inspector of Taxes do not yield a satisfactory result in this matter, then he has been asked to advise us accordingly. We could then consider whether there is an alternative means of addressing this particular aspect.'

Mr C's evidence

13. **Mr C** told my Complaints Investigator the major agreements and numerous meetings between himself and the Department formed the basis of his letter of 14 February 1991 (see Annex A), which set out the critical terms and conditions under which he had withdrawn his previous objection to the scheme. The Department had responded clarifying a number of issues. Officer 1 was the department official involved at that stage and Mr C himself attended all the meetings and conducted negotiations on all issues except for surveying and valuation issues. He had been, and continued to be, the main contact point for the Department. However, he felt that the change in personnel in the Department had contributed to the delay in resolving what he felt were small and straightforward issues. Each time there was a change in personnel he had to start anew bringing them up to speed.

14. The agreement allowing Network Rail, formerly Railtrack, use of land at the First Underpass had not been recorded because he had not anticipated that it would develop into the major issue it was now. During the mid-90s, an official of Firm A had asked his permission to allow Network Rail an access point at the railway track. Mr C had complied believing it would comprise simply of an access gate. The official had failed to explain what the access point would consist of or that the water pipe would be re-routed right through it. Two months later Network Rail had established a compound and mounted a sign which said 'RAILTRACK: KEEP OUT'. He was also concerned that diggers and other equipment that Network Rail were using might damage the pipe and that there was nothing to stop them from building a structure over it. Mr C referred to Officer 5's letter of 15 July 2002 which raised the option of fencing off the area of the compound which housed his pipe. (Officer 5 was a solicitor working with the Department's Road Directorate on road schemes.) Mr C said he was content with this, as his overriding concern was to be able to access the pipe and prevent Network Rail from damaging it. However, Officer 5 did not seem to be progressing this option. Mr C had initially argued that the Department should return the land at the First Underpass because it was not being used for the purposes of the road. He did not believe it had been necessary to purchase it for the thrustbore because part of it was on an adjoining piece of land which he owned and was not

compulsorily purchased. However, it was not the fact that the land was compulsorily purchased that was the issue but that he could not access his water pipe.

15. The Estate's old water mains under the old A74 had been damaged by roadworks and difficulties in accessing and maintaining the mains had alerted Mr C to the importance of the placing of his water pipes in relation to the motorway at a very early stage. Apart from the water mains to the First Farm (which was supplied by public water), the Estate's water supply came from the base of a hill to the northeast (ie on the opposite side of the railway and motorway). There were holding tanks there, from which a 5-inch pipe supplied the water with a smaller 2-inch pipe branching off this main to supply two locations. The Department had re-laid these pipes and Mr C confirmed that he had agreed the location of all these pipes with them. It became clear early on in discussions with the Department that they would have to assume responsibility for maintaining and accessing water pipes where they fell within the motorway because he was physically barred from entering the motorway.

16. In his letter which outlined the terms and conditions under which he had withdrawn his objection, Mr C said a mutually agreeable and legally binding agreement had to be drawn up to cover the terms of the maintenance. The Department had agreed to do this but had suggested that a letter would suffice instead. Mr C did not believe that a letter would have the same weight as an agreement or be sufficiently legally binding on the Department for events which might happen in 25 years time. Also, his experience with the Department over the past ten years had not inspired him with confidence that a letter would suffice. He agreed it would be difficult to draw up an agreement that set a time limit to complete repairs, as the nature of the repair would determine how quickly it could be resolved. He accepted the 'as soon as reasonably practicable' basis but said that a response time should be set. This was because it could be difficult to determine where a pipe had burst and a huge amount of water could be channelled down through the ground as most roads now had gravel drains beside them. A leak was not always visible from the road: the Estate had experienced a leak that had lost 20,000 gallons of water daily which had not been visible from the road.

So the need to repair a pipe within the motorway boundary would not be apparent if water from the burst has been channelled down through the gravel drains.

17. When the Department located the First Farm's water mains in 2002, they realised they had been placed on Council land, one metre from Mr C's land. He had not been consulted about its position before it had been laid. A contractor had been employed to install the pipe but the fact that its exact location was not known was only discovered when Mr C had asked the Department for plans of the pipe some years later. It took the Department some time to locate the pipe because it was plastic and therefore difficult to locate, as they could not use a metal detector (they had employed local plumbers to hand dig to find the pipe). His concern was maintaining the pipe because he was not receiving a servitude or way leave to enter the verge owned by the Council but would have to apply for a road opening permit. Mr C had asked the Department to move the pipe into his land. They told him that they would investigate the possibility. He thought that they had done so but this was second-hand through a local plumber and he had not heard officially from the Department. Alternatively, his second proposal was to put the pipe in a duct which would remove the necessity of digging up land, so that if there was a fault on the pipe it could be disconnected and the old one pulled out while pulling through a new one. He had not received a reply from the department on this. He had suggested these two options because he was comparing the situation to what he had before the motorway was built which was free and easy access to a water burn in the field. It seemed wrong to him to unnecessarily burden him with this problem because the pipe had been laid in Council land rather than his.

18. Mr C stated that the Department also had difficulty in locating the pipe which was laid in a duct under the motorway itself and which was to join up with their old pipe that had run under the A74. The pipe had been buried under a mountain of earth and the two ends of the pipe were lost. This pipe was also made of plastic which made it difficult for the Department to find. Nobody at the Department seemed to have plans to show where the pipe had been laid. It had been installed and was now working so its maintenance was the issue.

19. Referring to the pipe at the First Underpass, which was laid under the tarmac footpath in the foundations of the motorway bridge, Mr C said that the Department had originally intended that it should pass through the motorway, rather than under it, making it within the motorway boundary and the Department's responsibility. He would like the Department to assume responsibility for maintaining this part of the pipe given that they had installed it. If that could not be achieved he would accept compensation for any future repairs that would arise, although this would be difficult to estimate. Practically, he required the right to be able to access the pipe and repair it - he could not afford to spend days negotiating access with the Council. He was not sure what his rights were in repairing his pipe on Council land but, given that every other public body needed a servitude to repair pipes on his land, he thought that he must need the same. As long as he had the right to repair it, then it was a compensation issue. Mr C would accept this if the Department informed him in writing that legislatively they were not responsible for accommodation works and that he did have the right to make emergency repairs without needing a road-opening permit.

20. Turning to the issue of the Second Farm Overbridge, Mr C said that this was straightforward and easily resolved. The Second Farm (belonging to the Estate) and the Third Farm (now belonging to Mr and Mrs D) used to have separate entrances. They now have a shared access through the Second Farm Overbridge and the boundary (a fence which ran through a small paddock) between the two farms had been demolished. All that was required to resolve this issue was for one farm to buy the paddock, which would establish the boundary, and for an agreement to be drawn up outlining shared maintenance on the access. His understanding was that the previous owner of the Third Farm, Mr F, had kept the paddock and had not sold this on with the farm. He was currently renting the Second Farm from the Estate. Everybody was on friendly terms and it would not be a problem to sort it out, it was just a case of doing it. He had not discussed the issue with Mr and Mrs D because he was not sure what exactly the position was but if the Department asked him to, he would be happy to do so and resolve the issue. The Department had said the delay had been caused by the Family

Trust but that had been nearly two years ago and he did not know what the Department had been doing since then.

21. He did not believe that confusion about terms had contributed to the delay, because both sides had referred to the same piece of land and issues, and the nature of the discussion did not depend on what the land was called. He did not believe there was any other confusion and these issues, which were straightforward and clearly defined, had been ongoing for a good number of years. The most complex issue was the First Farm's water main which only came to light in 2000 when it became apparent that the location of the pipe was lost but the others were straightforward. For example, the issue about the land in the area of the Second Underpass was very straightforward. It was compulsorily purchased but not used for the motorway. A change in the design of the Second Underpass shortly after the land was compulsorily purchased meant that it was no longer needed. The Department said that the land would be returned but Mr C had not heard anything further. There was an issue about the solum of the road, which provides access to the land. The Department did not seem to know who owned it but had recently indicated that Mr C appeared to be the owner. However, this was not the issue because whoever owns the road could grant him a servitude.

22. Mr C said his main complaint was the Department's failure to respond or actively attempt to resolve the issues. He referred to Officer 5's letter of 15 July 2002 (see Annex A) to demonstrate the Department's inactivity:

- Mr C had not received any further details about the assurance that repairs to pipes within the motorway boundary would be carried out as soon as reasonably practicable.
- Officer 5 suggested that he should raise compensation issues direct with the District Valuer but Mr C pointed out that he could not agree compensation until these issues had been resolved with the Department.

- Mr C said he did not need a servitude for the pipes within the motorway because the Department was responsible for maintaining the pipes there; what he did need were servitudes for access to their pipes within land owned by the Council or Network Rail.
- Mr C said nothing had happened on Officer 5's offer to discuss further the granting of another servitude on land housing the Estate's private water mains.
- Officer 5 said this pipe served other water troughs but Mr C said this was not true. Nor did he know if the pipe had been diverted at the head wall or whether the Department had investigated if the pipe was in ducts, as indicated by Officer 5. (Mr C later discovered that the water pipe supplying the First Farm has had two other water troughs connected to it.)
- Officer 5 said no progress had been made with Network Rail and contact continued to be made but Mr C had heard nothing further. He commented that if the Department could not progress the issue with Network Rail, there was little chance that he would be able to do so if any problem arose with the pipe. Officer 5 had also suggested that the motorway boundary could be altered so that the water pipe at this section lay outside it and that this could be discussed further but nothing had happened.

23. Mr C said the Department had admitted that many points needed further investigation before there could be more discussions. If the Department was constrained in what they could do, they should inform him of those constraints with the evidence to support their position. For example, if they were unable to provide servitudes they should explain why. He would accept their position if they could show they were acting properly and justly. In response to the Department's letter of 31 March 2004 (summarised in Annex A) Mr C wrote to my Investigator saying that while Officer 5 had not resolved all the outstanding issues, he had adopted a more positive approach and demonstrated a will to conclude

matters. However, matters did not then progress until the meeting in October. Although the outcome of that meeting had seemed positive, in May 2005 Mr C wrote to my Investigator that Firm C had been unable to obtain a response from Officer 5. It seemed he wished to reach agreement on the issue of fees before dealing with other matters.

Evidence from Departmental staff

24. My staff interviewed the following Departmental officials who were involved with Mr C's case:

- case officer responsible for Mr C's case (Officer 3);
- project administrator for the team responsible for the M74 scheme and Mr C's case (Officer 4)
- solicitor advising the Department on land issues arising from the M74 scheme and Mr C's case (Officer 5)

25. **Officer 3** explained that there were three stages to building a road: design, construction, management and maintenance. His division was responsible for promoting road orders and issuing compulsory purchase orders at the design stage. Once a route had been chosen, construction engineers in the branch designed the road. The division then published Orders in newspapers promoting the new scheme and informing the public and affected landowners of the proposed route. Affected members of the public had an opportunity to make objections, which had to be made within a set time. The division would attempt to address any objections that were raised but if they could not be resolved a Public Local Inquiry is held. If the Inquiry is favourable (or there are no objections) the division promotes the main order. The next stage is paying compensation to landowners and others affected by the scheme. The construction division then assumes responsibility for the scheme and when the road has been built it is passed over to the network management and maintenance division.

26. Officer 3 said there had been two significant reorganisations in the Department since he joined, in 1996 and 1999. In 1996, two branches

had been merged and he became the case officer responsible for Mr C's case and all compensation claims for the M74. Neither he nor members of his team had any previous knowledge or experience of the scheme and Mr C's case, which meant it had been very difficult to progress the case. (The division's workload also increased after the second reorganisation in 1999.) Officer 4 had overall responsibility and, together with Officer 5 and consultant engineers, was co-ordinating action taken on the case. However, the project manager was a senior engineer, who took the scheme forward. The responsibility ultimately lay with the senior engineer because he had knowledge of the scheme. Meetings with landowners were conducted by engineers who established accommodation works, etc.

27. Officer 3 described his workload as heavy; his most busy period being from 1996 to date. Because of the reorganisations, the division had lost staff and experience and gained a heavy load of orders to be published. Also, new schemes usually took priority over compensation issues. He said that there were always compensation cases outstanding that had not been agreed with the District Valuer. Landowners were reluctant to accept any compensation until they had agreed accommodation works, fence lines etc. Delays were generally because of matters outstanding with the District Valuer.

28. When asked by my Complaints Investigator what had caused the delay in locating the pipes, Officer 3 said that knowledge and staff experience had been lost through reorganisation. They had been aware from correspondence that there was a water pipe at one location but the Department subsequently discovered that there were water pipes at several locations. There had been some confusion on both sides as to where the pipes were. A site meeting had been conducted in 1999/2000 between a departmental official and Mr C but the meeting was not fruitful and there was still confusion on both sides. This official left the division in 2001 and there were no further meetings until Officer 4 and Officer 5 met on site on 14 February 2002. Firm A had plans drawn (probably from information provided by Mr C and the early surveys conducted ten years previously) but even on these it was difficult to see where the water mains were and some of the drawings themselves had been mislaid. It

had been so difficult to pinpoint the pipes because there were more water pipes than the one they had initially been aware of and it was very large area. Firm A had a vast warehouse of plans relating to the whole scheme.

29. When asked why there had been delays in following up correspondence, such as a three-year delay by the Department in following up a request for information from Firm A, Officer 3 said he believed it was due to the reorganisation of the division, the publication of new orders and the changeover of engineers, which happened simultaneously. In 1998, the division's project engineer had asked them to find out from Firm A the location of the water pipes. He had been the official most involved in the discussions with them and had most of the on-the-ground knowledge of the scheme. In 1999, he left with no replacement. The Department therefore lost momentum in dealing with the case due to the reorganisation and it was Mr C's reminders that brought his case back to the division's attention. The District Valuer's inquiries had also prompted them and the Department itself wanted to resolve the case. Officer 3 added that there was no division-wide system in place to ensure that correspondence was followed up. Instead, officials used their individual diaries.

30. **Officer 4** had become project administrator for the team responsible for the M74 scheme and Mr C's case when the division was reorganised and two design teams were amalgamated in 1999. He had two main areas of responsibility: (i) branch responsibility for promoting road schemes, publication of road orders, compulsory purchase orders for the acquisition of land for road schemes and (ii) divisional responsibility for preparing estimates and monitoring the budget. Officer 4 said the financial aspects of his work have been steadily increasing over the years and could be time-consuming throughout the year. This has been recognised by senior management and as a result Officer 4 had been detached temporarily from his branch duties to concentrate on this aspect.

31. He did not become involved with Mr C's case until the statement of complaint for this investigation has been issued. Before then, Officer 3

would deal with routine correspondence and any issues arising out of the case. Officer 3 would work with an engineer when one was available. In 1999, an experienced engineer was transferred to another post (see paragraph 28 above). Another engineer had been helping for the past year. It was very important to have an engineer's expertise and knowledge when dealing with technical issues, such as maintenance and access of pipes, that had arisen in this case.

32. After the statement of complaint for this investigation had been issued, Officer 4 had spent a great deal of time on the case; he considered the documents, held numerous progress meetings, brought together officials in the Department and Firm A to determine and clarify outstanding problems. Firm A had been very good and helpful in working with the Department to progress matters. Many of the agreements made with Mr C and/or his agents were made over 10 years ago. Some of the people involved then had now gone and so it had been difficult trying to find out exactly what had been agreed. Officer 4 regularly brought together the various departmental officials involved in the case and a representative from Firm A to progress matters. He had produced a briefing note after each meeting.

33. My Investigator commented that 'action points' did not seem to progress from month to month, citing October and November 2002 briefing notes as an example. Officer 4 explained they were sometimes overwhelmed by work. Also, he did not at times circulate the briefing notes and action points as quickly as he would like. They took them forward as quickly as they could, given other pressures of work, for example Officer 5 was involved with another scheme which was time-consuming. The head of division was aware that the problems in progressing action points were down to pressures of work. He had requested extra staff, which had not been ruled out but it was difficult for the Department to make decisions on staffing levels when other changes to the Department were being considered. The briefing notes comprised of outlining the current situation and action points agreed. The action points from the previous meeting were used as an agenda. The meeting would decide the most appropriate person to take action points forward.

The briefing notes did not reflect the total amount of work done on the case, others were doing extra work on the background.

34. When commenting on how much time he spent on the case, Officer 4 said there was pressure and conflict between his divisional and casework responsibilities. Also, there were pressures between casework itself, for example, progressing new schemes conflicted with addressing compensation issues left over from old schemes. There was pressure on the Department by politicians to deliver new road schemes by the target dates and new schemes normally took priority over issues arising from old schemes. His workload had been extremely heavy since 1999.

35. As a project administrator, Officer 4 was in overall charge of the case. However, he had his own casework and expected staff to alert him to any problems that may arise in theirs. It was likely that he would become aware of delays from correspondence coming in referring to them; in which case he would put a note on the file to ask for an update and an explanation. However, he was well aware that delays had arisen because of lack of resources and the huge volume of work. In 1999, he had regarded the delays in the case as a resource and workload issue and that staff were pushing things forward as best they could. In addition, there was a disruption with staff changes and new people learning new jobs. After 1999 there were some 'casual' members of staff which also had contributed to the delay and in 2000 the branch had carried some vacancies. Matters improved in 2001.

36. Even if their workload was more manageable, Officer 4 believed difficulties would remain and it would be some time before an agreement could be reached since the parties were still some way apart. If these difficulties could not be resolved through negotiation and compromise then the issue would need to be referred to the Lands Tribunal. One area on which both sides disagreed was the placing of the water pipes. Mr C would like the pipes outwith his land to be moved into his land. Departmental discussions had indicated that repositioning the pipe into Mr C's land would be expensive. Officer 4 was not aware that Mr C had ever been advised of this. He said that accommodation works that were agreed with landowners as part of the compensation package should not

put them in a better (or worse) position than they would have been before the road scheme started.

37. When asked if Network Rail failed to respond to the Department's correspondence, Officer 4 said he was not involved directly in contact with Network Rail but there was an understanding in the office that if Network Rail was involved considerable delays could be incurred. The head of the division was aware of difficulties with Network Rail but there was little that could be done.

38. There were a number of other difficulties with the case. For example, there was confusion between both sides on meaning of terms, etc. A site meeting had therefore been held on 14 February 2002 to address this and to clarify and determine the nature of the problems. No site meetings had been held after the statement of complaint had been issued. Another difficulty arose from the handover of the case, which had led to problems in understanding and identifying the different issues. Officer 4 was seeking input from an official who, he had recently discovered, had an early involvement as a consulting engineer to establish what he had agreed and discussed with Mr C. Officer 4 said many of the agreements made over 10 years ago had not been written down. The A74(M) had been a high prestige project; it had been progressed very quickly and he believed a few short cuts may have been taken in order to secure agreements and push the scheme forward.

39. My Investigator asked about the missing correspondence relating to the Second Farm Overbridge referred to by Firm C in their letter of 28 August 2000. Officer 4 replied he would look into it but thought it unlikely that it would have been lost internally. Officer 4 explained that he would normally expect to see all correspondence coming into the branch in which he was based but he might not always see correspondence sent to colleagues in other branches. Also, because of workload, they might not be as careful in checking that correspondence was all there and up-to-date as it should be. Their solicitors might enter into correspondence but he would not necessarily see nor be copied it. He might see part of it and acknowledged it would be better if he could bring his file up-to-date but his current workload did not make that

feasible. Officer 4 said there was no branch system to monitor correspondence; officials had individual systems and monitoring was time-consuming.

40. Also, when branches in the division had been amalgamated, the different ways of maintaining records of expenditure were not compatible. Officer 4 had been introducing a land register but progress was slow because of pressures of other work. This register would show all land acquired by compulsory purchase order or agreement and would provide a complete list of land where compensation had not yet been finalised. This would enable the Department to better record the financial situation and better case-manage. It would also help them to become more proactive and ensure that they did not lose sight of the issues. However, it was a considerable piece of work given the huge amount of cases; it required an individual to consider each and every case to determine its stage and any issues outstanding.

41. **Officer 5** said his involvement in Mr C's case had been limited before the statement of complaint for this investigation was issued. He had then become more involved and provided legal advice to the Department. He had also endeavoured to ascertain the position, the matters outstanding and take them forward. It did not seem to him that there was a handle on the big picture because there were so many people involved on both sides who were dealing with different individuals. After the statement of complaint was issued, the Department had a series of meetings with Mr C and/or his agents to establish all outstanding matters (although Officer 5 himself had only been involved in one meeting) and there had been a long and detailed exchange of correspondence. He worked on the case alongside other matters and, although very busy, he considered he had enough time to spend on the issues as they arose. The case was not progressing very quickly on either side but he said there were a lot of matters to be resolved that went beyond those covered in the statement of complaint. These were being taken forward.

42. Officer 5 believed both sides had now agreed the location of the water pipes and that Mr C's surveyors were happy the plans showing the location of the pipes were accurate but the Department had not had this

confirmed in writing. (Firm A was dealing directly with Mr C's surveyors on this issue.) However, there were still related outstanding matters. From memory, Officer 5 said there were three water mains in question. One water main serving the First Farm's water troughs partly ran along a public road. Part of the water main was situated outside Mr C's land. Mr C therefore wanted either: (i) this part of the water main moved into his land; or (ii) the Department to assume responsibility for its maintenance, servitude rights from the local authority, contact details, and guidance on what happens if maintenance was required. The Department was considering whether the pipe should be moved into Mr C's land and trying to establish what might have been agreed all those years ago.

43. The second pipe crossed the motorway at another location. (Note: in his evidence at paragraph 15, Mr C refers to this as a 2-inch pipe, branching off the main to supply two locations.) The Department had accepted responsibility for its maintenance (for which the Department would need access to Mr C's land) but had yet to agree specific rights for accessing and placing chambers. Also, Mr C was seeking guarantees as to time taken for repairs. None of these issues were easy to resolve.

44. The third water main is in a local public road that passes under the motorway at the First Underpass. Mr C wanted the Department to assume responsibility for its maintenance. To date the Department had resisted this because they had no evidence to suggest it had been part of any original agreement made between the parties. The pipe also runs through land owned by the Department, but which was occupied by Network Rail, at the First Underpass. Mr C would like the piece of land that houses the pipe to be returned but the Department intended to provide Mr C with servitude rights instead. Issues relating to the three water mains (such as maintenance, time limits, granting servitudes and costs) were the main outstanding matters to be resolved and were subject to on-going discussions.

45. Turning to compulsory acquisition orders, Officer 5 said there were Acts of Parliament and various cases that governed what compensation landowners were entitled to receive. These formed the basis of

discussions that took place with the District Valuer acting on behalf of the Department. In Mr C's case, these discussions had taken place and were on-going. Referring to the pipes, Officer 5 said they did not constitute monetary compensation but 'actual works'. He said the pipes must have been laid as 'accommodation works' (the only basis on which the work would have been carried out) which were carried out as part of the compulsory purchase and they form part of the compensation. He understood that in such circumstances the landowner was responsible for future maintenance of such accommodation works. The Department had accepted responsibility for maintenance of the pipes where they cross the motorway and those outside the motorway boundary were Mr C's responsibility, but he was entitled to compensation to offset that responsibility. This was a matter for discussion in terms of the overall compensation of the compulsory purchase. That was his understanding of the situation and the basis on which matters had proceeded. The Department's objection to Mr C's request that the Department maintain the water pipes was that they did not maintain accommodation works, which the landowner normally owned and was responsible for. He said the Department had to follow the rules and be consistent. However, the Department were still considering their position and carrying out further checks to find out what exactly had happened and what had been said in the original discussions between the agents of both sides on the ground. If an obligation had been given on behalf of the Department, then it would be honoured. Officer 5 said that there seemed to have been a series of correspondence and meetings on the ground of which there was no record. The Department was currently attempting to locate some records in Firm A's files.

46. When asked why he believed an agreement between the Department and Mr C outlining the Department's responsibilities in relation to maintenance and time limits might not be necessary, he said it was because the Department had stated clearly in a letter that they would be responsible for maintaining the water pipes within the boundaries of the motorway. A letter setting out the Department's obligations would enable Mr C to take action if the Department breached the terms of the letter. He believed the terms of agreement being sought by Mr C's solicitors were unreasonable and unnecessary - there would be nothing to

be gained by either party entering into a formal agreement on those terms. It might also set an unwelcome precedent. Furthermore, there were difficulties in reaching agreement between both parties on time limits for repairs because both sides differed on what was reasonable. A time limit would be artificial since it depended on the nature of the repairs necessary and he had suggested that the Department be obliged to conduct repairs as soon as reasonably practicable. It would be in the Department's interests to do so because it would be dangerous to leave a burst pipe on the motorway. He did not, therefore, believe it would be in the Department's interests to have a formal agreement.

47. Officer 5 said the current position regarding the section 61 agreement (which refers to section 61 of the Roads (Scotland) Act 1984, allowing the road authorities to permit an individual to place apparatus in a public road) was that there was no agreement. He did not think it would be competent for a local road authority to grant a servitude on a local authority owned road. The Department had advised Mr C of the local authority's position which was, as the pipe was already in the road when they took it over, nothing further was required. He thought they had already indicated what their requirements were for maintenance of the pipes. He did not believe he could insist that the local authority entered into an agreement and, as he had said, he did not believe there was any need. Mr C's solicitors were still seeking a servitude from the Department for the water pipe at the First Underpass so far as it lay outwith the Estate but the Department would only grant a servitude where the pipe crossed its own land except where that pipe lies within the boundaries of the road.

48. My Investigator asked about delays in finalising the servitude agreements over the Second Farm Overbridge. Officer 5 said the Department could not issue a servitude agreement between the owners of the Second and Third Farms. The Department was seeking servitude rights of access over land forming part of the Second and Third Farms for access to the overbridge for maintenance purposes. As part of its proposals to the landowners concerned, it offered to assist them in some practical respects should those landowners wish to enter into reciprocal servitude arrangements of each other's land. The Department had no

liability or obligation in relation to access arrangements between the owners of the Second and Third Farms and could not require either of them to enter into such arrangements. An individual and a Trust now jointly owned the Third Farm and the Department were unable to obtain agreement from the Trust. A colleague had been dealing with it and, while he did not know when they had last chased, they were simply getting no response from the Trust at all. There was nothing further the Department could do if one or the other of the owners did not agree. He said they had tried to keep Mr C aware of developments but this was just one aspect of all the matters that were subject to lengthy and time-consuming correspondence.

49. My Investigator also asked Officer 5 about the missing correspondence relating to titles for the Second Farm Overbridge referred to by Firm C in their letter of 28 August 2000 (see Officer 4's evidence at paragraph 39). He explained that there were individual files for individual matters and the missing correspondence was probably on another file. A colleague had looked at the titles. If it was in his file, then it was up to him to copy it to other files but he would not have been required to copy that correspondence to any other file. There was not a central file to which all correspondence is copied. Nor did he, Officer 5, always receive copies of letters - different departmental officials had dealt with the case before the statement of complaint for this investigation had been issued. Officials did not necessarily always have a complete picture of the situation but the Department had now taken action to address that. Since then, he had brought all files together in order to resolve all outstanding matters. (Note: my Investigator examined all the papers relating to Mr C's case provided by the Department and the correspondence was not there.)

50. Officer 5 stated the Department had reconsidered whether the land at the First Underpass was surplus and the legal basis of the acquisition. The Department had concluded that the exercise of the statutory powers for the acquisition of the land was satisfactory; it had been acquired for purposes in connection with the road. The Department had originally acquired the land because of the thrustbore situated there (a major piece of drainage which went under the railway). Network Rail was now using

the land. It was unusual for the Department to use their statutory powers to buy land for someone else but as he recalled they were acquiring land from Network Rail which they (Network Rail) had been using as a hardstanding and access to the West Coast line. While the Department was not required to provide a new access, they agreed to do so because it seemed reasonable given that land was available which could be used for that purpose. Even if Network Rail had not been occupying the land, it would not be surplus because of the thrustbore.

51. The Department had therefore offered to grant Mr C a servitude for access to the water pipes, rather than return the land. Mr C had not refused the offer but would prefer to have the land returned. Network Rail appeared to have taken more land necessary for access and had set up some type of compound, occupying the land under which the water pipe runs. Network Rail's occupation had not yet been formalised. The land the Department had acquired from them had not been compulsorily purchased, the transaction had been voluntary, and part of this had to be finalised. Once the Department had concluded an agreement with Mr C (which he believed they were close to), then the Department would conclude all outstanding matters with Network Rail and formalise the arrangements. The Department would ensure that if Network Rail's compound was still standing, then the boundaries were clearly stated so that Network Rail's operations did not interfere with or prevent Mr C from carrying out maintenance to the water pipe. However, negotiations with Network Rail took time - there were a number of transactions with them that were ongoing.

52. When commenting on the timescales for releasing the surplus land at the Second Underpass to Mr C, Officer 5 said that on 17 October 2001 a plan was sent to the Company which sought confirmation that the land could be removed, as they had previously stated some years earlier. They replied on 19 October but the following period was taken up by the main correspondence between the Department and Mr C and the meeting in February 2002 regarding all outstanding issues including surplus land and its extent. On 15 July 2002, the Department wrote to Firm C setting out their position on all outstanding issues including the surplus land at the Second Underpass. On the same day, the agreement removing the

surplus land from the contract with the Company was sent to the Company for execution or revision.

53. On 31 July 2002, the Company returned the agreement signed by them. The Amendment Agreement was sent to the Company for execution at the same time as the Department's position was set out in writing to Mr C. This was following the meeting discussing all outstanding issues. Officer 5 did not consider that there had been a delay in that regard. Matters were being progressed so that all issues could be dealt with in the implementation of arrangements, to be agreed with Mr C, to resolve all outstanding issues. The surplus land being sought by Mr C extended beyond the land included in the Operation and Maintenance contract. However, following the return of the Amendment Agreement by the Company, the Company was unable to provide satisfactory evidence of the authority of the authorised signatory to execute the agreement on its behalf. The Company therefore produced a new authorisation which post-dated its execution of the agreement. In those circumstances, Officer 5 felt that a fresh Amendment Agreement should be executed and this had now been completed. The effective date of release of the land from the Operation and Maintenance contract was 20 October 2003.

54. Officer 5 said that, in addition to the land at the Second Underpass, Mr C wanted the land that formed the solum of the old road. Under long-established rules, the previous owner of the land was entitled to have it offered back in the first instance if it was surplus to requirements. The compulsory purchase order shows the owner of the solum of the road as unknown. Officer 5 had therefore recently asked Mr C for the title to show that he owned the land. He was still waiting to get sight of this. His personal preference would be to get agreement on all outstanding issues, including this one, and then implement them all. It would be possible to do it piecemeal but he would prefer to do it all at once.

55. When asked about his practice on issuing reminders, Officer 5 said he took each case on its merits when deciding whether or not to send reminders. Referring to his letter of 15 July 2002 to Firm C, Officer 5 said he did not send a reminder because he did not want to push the other side; he was seeking a response to a complex letter and had a meeting in

the meantime. He would have at some point rung to ask what was holding things up. He did not meet Officer 4 until two months after receipt of Firm C's response of 19 November 2002 to his letter; he had to take instructions and consider the file to see what had happened. The issue was extremely complex, their position was at such odds with the Department's own, and the matter could not therefore be dealt with quickly.

56. Issues had been identified in the statement of complaint but subsequent issues had arisen and needed to be resolved. When either side issued a letter, it could take months to reply because of the complexity of issues. The Department were still considering options but believed the gulf between both sides might be too great to bridge. Officer 5 considered that the appropriate body to consider a dispute would be the Lands Tribunal. He said that accommodation works formed part of the compensation for the compulsory purchase of land and, by statute, disputes in connection with compensation matters were referred to the Lands Tribunal for Scotland. There was a time limit for referring disputes to the Tribunal, which he confirmed had elapsed in this case. The Department would therefore have to consent to any application to the Tribunal being made by Mr C. He understood that the Department would be agreeable to such a reference to resolve outstanding issues. Even outwith the statutory context of compensation, Officer 5 said it would be open to both parties to agree to make a reference to a body for arbitration. The terms of reference would have to be agreed between the parties. He believed the most appropriate body would be the Tribunal in these circumstances. However, the Department still sought to agree a resolution of all outstanding issues with Mr C although a further meeting would only be held if both parties agreed.

Further evidence from the Department

57. Later in my investigation the Department provided further evidence at the request of my Investigator. On the matter of the First Farm's water main, the Department said that when the motorway was being planned, its route crossed the Estate's private water mains but other major constraints, such as the proximity of the existing A74, the West Coast Mainline railway, a river and the Estate, determined its alignment.

The private water mains, where they fell within the motorway boundary, were to be maintained in the manner outlined by Mr C in his letter of 20 April 1990. When considering the options available to divert the water mains, the Department sought to minimise the disruption to the alignment of the water mains. At the First Farm, the water main was to be provided to connect water troughs in various fields. Mr C recorded his agreement with the Department in his letter of 14 February 1991, which said the Department would install water troughs in all fields severed from the original water supply on a 'sensible' agricultural basis. This resulted in the installation of an extensive supply network. Mr C did not indicate any objection to these proposals during the development of the design in discussions with him. The routes of these diverted water mains had been indicated on drawings and in particular, the contract accommodation works drawings. Referring to an official's understanding that the Department had agreed to put any new water supply into land owned by the Estate, the Department said it did not have any record of this and would make its position clear in any future response to Mr C. In the Department's letter of 31 March 2004 to Firm C, the Department accepted that an oral agreement had been made whereby any new water supply to be installed would be located in Estate land where possible. The Department outlined various options to accommodate the agreed arrangements. Furthermore, the Department confirmed that they would grant a consent under section 61 of the Roads (Scotland) Act 1984 for the placing of pipes which lie within a road maintained by the Scottish Executive and that the land at the Second Underpass could now be declared surplus and returned to Mr C. Referring to the pipe at Network Rail's compound, the Department proposed to declare an area of land large enough to house and maintain the pipe surplus and return to Mr C. However, there remained a number of outstanding issues but the Department proposed to hold a meeting to resolve as many of these as possible⁴.

Findings

58. Mr C complained to me of five areas of failure by the Department (see paragraph 1 of this report) arising from up-grading the A74

⁴ This letter is summarised more fully in Annex A.

motorway through part of the land he manages. I now consider each of those issues in turn.

(a) Failure to clarify responsibility for future maintenance work of private water mains

59. The Department agreed on 5 October 1990 to assume responsibility for maintaining those sections of the Estate's private water main which pass under the motorway. However, when my investigation began, no agreement had been made between the Department and Mr C which set out and clarified the Department's responsibility. The meeting held on 26 October 2004 (see Annex A) advanced matters but my understanding is that there is still no formal agreement. Evidence obtained in the course of this investigation indicates that there are three factors which account for this situation: the length of time taken to identify the exact location of the pipes; failure to reach agreement on issues relating to maintenance; and inconsistencies in the view taken by the Department of whether a formal agreement with Mr C was necessary.

60. Dealing firstly with the time taken to identify the exact location of the pipes, I note that although the Department asked Firm A for copies of the plans showing the water mains in 1997 the locations were not conclusively agreed until 2003. This investigation has found no evidence to suggest any technical or engineering reason for this seven-year delay. While correspondence between the various parties necessarily took time, much of the delay was avoidable and included considerable periods of inactivity by the Department and Firm A. Problems arose because the Department and its agent, Firm A, were unable to utilise the as-built records of the water mains. It is unclear why these as-built records were not used although the fact that Firm A had to produce new plans indicates that as-built records were never produced or were lost. That would have had less impact if permanent marker posts had been erected at strategic points above the route of the main. Not to have produced as-built records, or to have lost or misplaced them, and not to have installed marker posts, is a serious failure for which I criticise the Department.

61. Another cause of delay was the failure to agree terms of agreement. Officer 5 has said that there were many matters to resolve (see

paragraph 41 above). While I recognise that some issues may take more time to resolve than others, it seems to me that the Department should have done more than it did to reach agreement with Mr C on these issues. For long periods the Department took no action at all. Latterly, the Department chose to communicate with Mr C largely through a detailed and lengthy exchange of correspondence. It is my view that many of the issues would have been more easily discussed and resolved through face-to-face meetings. It is notable that the meetings held on 14 February 2002 and 26 October 2004 helped clarify outstanding issues and identify ways forward (although the necessary follow-up did not always occur). I criticise the Department for their failure to progress the matter satisfactorily.

62. I turn now to the question of a formal agreement. In his response to the statement of complaint issued by my predecessor's office, the then Head of the Department referred to the Department's agreement to draw up a formal document. The Department's commitment to provide this continued until 15 July 2002 when Officer 5 said that the Department would not enter into such an agreement but would instead provide a letter confirming liability. Mr C does not consider a letter sufficient, partly because of his experience of dealing with the Department over the past 10 years. I understand why Mr C should take that view. I find Officer 5's position surprising given what had been said by the Head of the Department. I note that subsequently the Department seem to have reverted to their original position. While that is welcome, I consider the position previously adopted by Officer 5 was unreasonable and contributed to the delays which occurred.

63. In sum, I uphold this aspect of Mr C's complaint. I am pleased to note that there was substantial progress at the meeting involving Mr C, the Department and others on 26 October 2004. However, it is disturbing to note from the letter which Mr C sent to my office in May 2005 (paragraph 23) that a formal agreement has still not been reached. This is highly unsatisfactory. I recommend that the Department follow up on any issues still outstanding and in particular draw up and implement a formal agreement as a matter of urgency.

(b) Failure to identify the location of another pipe for which Mr C is responsible

64. The First Farm's water main was a new supply laid by the Department as part of the 'accommodation works' agreed with Mr C when the A74 was upgraded to a motorway. Mr C's concern about it arises because a section of it had been placed in Council land, rather than his land, making accessing and maintaining the water main problematic. Officer 4 told my investigator that many of the agreements made over 10 years ago relating to the A74(M) project had not been written down and that he was seeking input from an official who had an early involvement in the project to establish what had been agreed with Mr C (paragraph 38). On 31 March 2004, the Department informed Firm C that their investigation had revealed that an agreement had been made. They said that they would honour it (see Annex A). I welcome that decision. However, I am extremely concerned that an agreement such as this, which is integral to Mr C's compensation claim (see paragraphs 6), was not formally recorded by the Department or their agents. I uphold this aspect of Mr C's complaint. I recommend that the Department review their procedures to ensure such agreements are recorded in future.

(c) Failure to conclude a legal agreement about the use of a shared access

65. As far back as 1990, the Department and Mr C agreed that a shared access for the Second and Third Farms was essential. Yet a legal agreement has not yet been concluded. Part of this very substantial delay has arisen from missing correspondence relating to titles for the overbridge built to provide the access. I have again found evidence of failings by the Department to chase up correspondence between the parties concerned. There is no evidence in the Department's files that the matter was being actioned on a regular basis. The Department undertook to formalise the arrangements between the parties yet they have failed to take the action required to conclude such an agreement. I uphold this aspect of Mr C's complaint. Again, I recommend that the Department follow up on any issues still outstanding and draw up and implement an agreement as a matter of urgency.

(d) Failure to return land compulsorily purchased but not used

66. Mr C has complained that two areas of land compulsorily purchased for the purposes of the motorway but not so used have not been returned to him in accordance with an agreement he had with the Department. As far back as August 1993, the Department had been aware that one of the areas of land in question was not required (see Annex A). However, it was not until 2003 that an agreement had been completed between the Department and AutoLink on the release of the land. I consider this delay to be excessive.

67. On 24 November 1996, Mr C wrote to the Department requesting the return of a second area of land (near the First Underpass), yet it was not until 2004 that the Department informed Mr C that the land housing the water pipe at the First Underpass could be declared surplus and returned to him. While I am pleased to see this issue resolved, it is not clear why the Department did not reach the same decision in 1996 when the issue first arose, given that my investigation has established that the material circumstances have not changed since then. I uphold this aspect of Mr C's complaint. I recommend that the Department now conclude matters as quickly as possible.

(e) Failure to respond to correspondence

68. This investigation has found evidence of numerous instances of the Department failing to respond to correspondence from Mr C and/or his representatives. For example Firm C's letter of 28 August 2000 was not answered for 15 months and their letters of 31 March and 7 June 2000 received no response at all. These unacceptable failures, for which no apologies have been given, arose partly from an absence of any brought forward and monitoring systems, but also because different officers were dealing with the case which meant that not all correspondence was copied to the main file. Officer 5's insistence on informing Mr C and/or his representatives on issues as a whole, rather than as they come up, further contributed significantly to the delays of months and even years in some instances. I uphold this aspect of Mr C's complaint. I recommend that the Department implement "brought forward" or similar administrative and/or monitoring systems to minimise the chances of similar failures occurring in future.

General findings and conclusions

69. In my view, underlying all of the shortcomings I have identified was a lack of motivation on the part of Departmental staff to deal with the case once the road scheme had been completed. I understand that this was partly because of lack of resources and volume of workload, but also because compensation issues were dealt with by the same branch that handled new schemes (see paragraph 34).

70. I accept that resources are finite and it is clear that the Department prioritises new schemes. However, I consider that the way in which the Department dealt with Mr C has not only caused him injustice but has created additional work and expense for the Department itself. Certainly administrative failures by the Department and its agent during the early 1990s (such as failure to record agreements and meetings and properly file correspondence (paragraph 38 and 45)) led directly to some of the difficulties the Department faced in later years. Similarly, lack of basic administrative support mechanisms such as adequate arrangements for filing papers or a simple brought forward system, made it unnecessarily difficult for the Department to progress Mr C's case. Moreover, the organisation of the branch has also led to a situation whereby the Department's ability to exercise sound financial management of public funds is severely compromised. The Department does not yet have a complete land register showing all land acquired by compulsory purchase order or agreement and outstanding compensation issues. The absence of this information has implications for the Department's ability to forward plan and ensure it has sufficient resources to deal with its workload. Certainly, the branch reorganisations of 1996 and 1999 suggest poor planning and a lack of foresight. For example, it meant that administrative officers with knowledge and/or experience of both the scheme and Mr C's case were transferred leaving a steep learning curve for both Officer 3 and Officer 4. Furthermore, the project engineer left the branch in 1999 and was not replaced. This lack of continuity has severely hampered the Department's handling of Mr C's case and contributed to the delays which have been identified in this report. This is a matter of concern – particularly as there are likely to be others who have been affected by these shortcomings in a similar way as Mr C.

71. Related to the departure of the project engineer is the lack of a project manager in this case. It is not clear from the evidence of Officers 3, 4, and 5 exactly who has overall responsibility for progressing Mr C's case or indeed who should have overall responsibility. The lack of a project manager with appropriate authority to actively progress and resolve issues as they arose is a systematic failure contributing to the maladministration by the Department. As a result, there was a lack of strategic direction and the responsibilities and duties of the three officials involved in this case have never been clearly set out. This has meant a lack of communication, forward planning and monitoring and no timetable of events against which progress could have been monitored. Officer 4 did implement monthly meetings when my predecessor's office issued a statement of complaint but this attempt to initiate aspects of project management to Mr C's case was undermined by volume of work and lack of resources (paragraph 33).

General Recommendations

72. I have made recommendations above relating to specific aspects of Mr C's complaint. Overall, it is clear that Mr C and his agents have been put to considerable time and trouble pursuing the five issues over an excessively protracted period. A clear resulting injustice to Mr C is that he will have had to pay out far more in professional fees that he would have done if the Department had dealt with his case within a reasonable time. It is not possible to quantify that additional cost precisely but I recommend that in recognition of the very substantial injustice caused to Mr C the Department should make him a payment equivalent to all the professional fees he has incurred in his dealings with the Department and its agents. In addition, I recommend that Mr C should receive a payment of £5,000 in recognition of the time and trouble to which he has been put in pursuing his complaint over such a lengthy period. I also recommend that the Department apologise to Mr C.

73. As I have noted in paragraph 70, the Department does not yet have a complete land register showing all land acquired by compulsory purchase order or agreement and has not yet identified all outstanding compensation issues. I recommend that it does so as a matter of urgency

and appropriately compensates anyone who has been adversely affected in a similar way to Mr C. I also recommend that the Department review its structures and processes with a view to addressing the systemic problems I have identified, in particular the tension in prioritising work on old and new schemes.

Professor Alice Brown
Scottish Public Services Ombudsman

22 July 2005

Annex A

Summary of events relevant to Mr C's complaint

1990

20 April: Mr C wrote to the Department saying that a shared access for the Second Farm and Third Farm was essential. The crossing point near Second Farm's cottage with the farm road on the east side of the motorway linking the old Second Farm access road and the first of the Third Farm's fields would satisfy the requirements of both farms.

23 April: The Department said the list of accommodation works outlined in his letter of 20 April, including the shared access, seemed reasonable and they agreed to them in principle.

18 June: A note of a meeting between the Department, Firm A and Mr C in which it was agreed that Firm A would produce a specification for the water main crossings and the Department would maintain the sleeves in which the pipes were run and would further consider responsibility for maintenance of the pipes. The possibility of an overbridge at the Second Farm was also discussed.

7 August: Firm A wrote to the Department about their meeting with Mr C held on 12 July. They said two water mains crossings had been identified at specified locations. They envisaged that the first would be sleeved under the motorway whilst the second would be diverted under the First Underpass.

September: Mr C wrote to the Department saying it appeared that at a point where the Estate's water main crosses the A74 this would be underneath a section of the newly contracted road. The Estate requested the Department accept future maintenance on the section of pipe where it was beneath the road.

October: The Department responded accepting his proposals regarding the water mains, subject to agreement on details.

10 October: A meeting was held between the Department, Firm A, the District Valuer, Firm B and Mr C, in which it was agreed that the length of private water mains presently running along the A74 northbound verge would be relayed in the adjacent field belonging to the Estate.

1991

14 February: Mr C wrote to the Department outlining a list of all items discussed and agreed through negotiations with the Department. He would withdraw his previous objection to the scheme if the Department confirmed that these were correct. One of the items outlined was an agreement that the Department would provide the water mains pipes and associated valves, etc, where these passed under the motorway, so as to maintain continuous supply and maintain these in the future. A mutually acceptable legal document would be drawn up to cover this maintenance. The Department also accepted responsibility for future maintenance on the main at the point where it crossed the A74. Where the private water mains passed under the disused carriageway of the A74, access would be available to the line of the pipe and the depth would not exceed 1.5 m. The length of private water mains presently running along the A74 northbound verge would be re-laid in the adjacent field.

The Department responded to Mr C saying they agreed the items were correct but clarified that they would accept responsibility for maintaining those sections of water mains passing under the motorway to which Mr C would be prevented access but would not accept responsibility for the de-trunked A74 and the new all-purpose road.

1992

July: The Department wrote to Mr C saying that any land which had been compulsorily acquired from the Estate and which was found at the end of the works to be surplus to requirements would be offered back to the persons within the Estate from whom it had been acquired.

1993

7 January: Network Rail wrote to the Department requesting a new access point onto the railway line of 30 metres by 10 metres in size and finished in suitable hardstanding material.

17 August: Firm A wrote to the Department enclosing, amongst other things, drawings showing an area adjacent to the Second Underpass not required.

1994

28 July: Network Rail wrote to Firm A saying the location of the access point at the east end of the First Underpass and related proposals were satisfactory, subject to the area being fenced off from the railway line and surrounding land and road and the area being capable of withstanding heavy road vehicles.

13 October: Firm A wrote to Network Rail confirming the details they had previously agreed for the hardstanding at the access point.

1995

10 February: Firm A wrote to Mr C enclosing a plan showing the route of the water supply pipe from the main to the First Farm's troughs. He said he would write again when he had inquired about maintenance responsibilities with the Department.

13 June: The Department wrote to Mr C about the First Farm's water mains saying they would maintain the duct beneath the motorway but the water pipe itself should be maintained by the Estate throughout its length from the public supply to the trough. To facilitate access, he had asked the consultants to ensure that the locations of the duct crossings were indicated by permanent markers and that the duct beneath the motorway extended to just outside the boundary fences into drawpits.

11 September: Internal departmental minute outlining a list of accommodation works agreed at a meeting between the Department and Mr C held on 7 September. The Department agreed to pay for reasonable legal costs associated with formalising the agreement between the owner of the Third Farm and the Estate on the use of Second Farm Overbridge.

1996

29 November: Mr C wrote to the Department enclosing a map showing two areas of land [at the First Underpass] which were compulsorily purchased. He believed the areas should not have been acquired and requested their return.

23 December: The Department wrote to Firm A asking them to confirm whether the area identified by Mr C was surplus to requirements.

1997

8 January: Firm A wrote to the Department about the land adjacent to the First Underpass. As Network Rail had lost a hardstanding and access to West Coast Main Line following construction of a new Second Farm Railway Bridge, the Department had agreed that a suitable replacement facility be provided. Firm A constructed the hardstanding but were unaware of any servitude. Mr C had a private water main which crossed the plot and had been involved in discussions regarding the location of the hardstanding, as one of the original proposals had been to acquire more land from him. Not surprisingly, Mr C considered the land surplus. Mr C might believe that the land has been sold to Network Rail but he might also be concerned about access arrangements to the water main. Firm A confirmed the land was not surplus. They said it would be prudent to check whether or not arrangements have been formalised with Network Rail and how it affected the private water main and drainage network.

9 January: The Department responded to a letter which Firm A had written on 12 November 1996 about the Estate's private water main (copy not on file). The Department should not take on maintenance liability for the water pipe and existing ducting. The design was not satisfactory and responsibility for the pipeline outwith the motorway boundary would not be passed to the Company under the DFBO contract. In the DBFO contract, the Operation and Maintenance liability to rectify defects within DBFO would extend only to ducts within Operation and Maintenance land. The water pipe was private and should be repaired and maintained by the Estate. The pipe should have been designed to allow it to be removed outwith the motorway boundary without the need for the Estate to have access within the motorway fence. If the design

did not allow this, it was not satisfactory; Firm A should explain why it had happened and outline the contractor's proposals for rectifying it.

23 January: Firm A responded to the Department's letter of 9 January. Routes and diversions of the private water supply mains of the Estate appeared to have been the subject of direct agreements between Mr C and the Department. The Department had undertaken to consider future liability for the pipes in June 1990 but as far as they were aware, this had not yet been decided. The Department had also undertaken to maintain the sleeves in which the pipes lay. Their design reflected the agreement made between the Department and Mr C. They said that members of the public should not be allowed access to the sleeves which were within the motorway boundary and suggested that the Department could enter into an agreement with the Estate whereby the Estate is relieved of liability for future maintenance or to divert the main clear of the motorway entirely.

31 January: A departmental official sought advice from Officer 5 about whether a formal arrangement had been made with Network Rail about their use of land.

6 March: Officer 5 minuted Officer 3 about the land at the First Underpass. One of the areas was included in the Operation and Maintenance boundary but there was no information as to why the area was included within the site boundary. However, it appeared that the land was not surplus. Engineers might wish to reconsider the inclusion of this area within the Operation and Maintenance site boundary thereby making the area surplus but in the meantime, the land should remain under the Department's ownership. Regarding the agreement with Network Rail, the Department had agreed to provide an access point but further clarification about a formal agreement was needed. He requested a copy of any correspondence with Network Rail and a record of the agreement reached with them on what the Department had agreed to provide. As none of the areas had been identified as surplus, no further action could be taken.

April: Firm B wrote to the District Valuer outlining the issues that needed to be addressed either by means of compensation or resolved with the

Department. This included: the Department's liability for future maintenance and repair or replacement of private water main which crosses the motorway in writing; the land adjacent to the First Underpass occupied by Network Rail; surplus land at the Second Underpass to be returned; the access road to the Second and Third Farms should be subject to either a servitude agreement or purchased by the Department and then sold back to the parties.

9 April: The Department wrote to Mr C saying the land at the First Underpass had not been identified as surplus.

1 May: Firm C wrote to the Department reminding them that a legal agreement outlining the Department's responsibility for the maintenance of pipes within the motorway boundary had yet to be drawn up.

7 May: Note of an internal departmental meeting held on 6 May to discuss Firm B's letter of 3 April. A departmental official agreed to pursue the issues raised, including making agreement with the Estate about the Department's future liability for the duct and pipe within the motorway boundary.

12 May: The Department wrote to Firm C agreeing that a document covering the maintenance of the water pipes should be drawn up and requested a first draft from them.

17 July: Firm A wrote to the Department providing a sketch of the private water main that crossed the motorway, which they understood would be included in a legal agreement between the Department and Mr C regarding its maintenance.

24 July: An official sought legal advice about an agreement. It outlined the Department's original undertaking to put a pipe in the sleeve so that Mr C could maintain it but as the pipe jams in the sleeve, the Department has assumed responsibility for maintaining the pipe where it passes under the motorway. A set of conditions to the agreement was outlined and advice sought as to how best to implement them.

1 August: The solicitor asked the official for documentation evidencing the present arrangement, whereby the pipe is allowed to run under the motorway with maintenance responsibility being exercised as outlined in the official's minute of 24 July.

4 August: The official responded that the record of negotiations which preceded the agreement was contained in minutes of many meetings with the Estate but there was no single reference document. A document was needed so that future generations in the Estate and the Department could know the position.

13 August: The solicitor minuted the official questioning whether an agreement was really necessary, although there would be no problem in preparing one. However, he was concerned about whether the Department should assume responsibility for somebody else's pipe.

18 September: Firm C responded to the Department's letter of 12 May requesting information on the location of the various water mains installed. Once they had the plans, they would request the Estate to detail areas which would cause problems in the future and any document to be drafted would be done by reference to the plans.

October: The Department wrote to Firm A enclosing a copy of Firm C's letter of 18 September and asked them to provide two copies of the plans showing the water mains.

23 October: The District Valuer wrote to the Department referring to correspondence from Firm B and asked them to confirm the position about access by the Estate to the water pipe in the land occupied by Network Rail.

10 December: Firm C wrote to the Department asking if they were in a position to supply a copy of the plans showing the location of the water mains.

11 December: The Department responded saying the plans had been requested and would be forwarded to Firm C as soon as possible.

The Department faxed Firm C's letter of 10 December to Firm A.

15 December: Firm A wrote to the Department saying they had prepared and sent a detailed plan for the water main in response to a request from the Department in July 1997 and attached a copy.

17 December: The Department wrote to Firm C enclosing a copy of the plan.

1998

6 January: Firm C responded to the Department's letter of 17 December saying the plans only showed one of the main's crossings underneath the motorway. Mr C provided plans (copies of which were enclosed) showing the three sections of private water main which have been affected by the motorway. The first was a 2-inch pipe. Mr C understood the Department had accepted full maintenance responsibility for the section of the pipe between the motorway fences. Mr C also required a servitude for the area under the two-way road. The second section was a 5-inch pipe bringing the water supply in from the source. Network Rail had set up a compound on part of the land housing the pipe, land which Mr C believed should be returned. In the meantime, he needed the right to access the pipe for repair. The pipe also passes through an underpass where it is buried under the pavement. A servitude would be necessary for this area. The third section was a new pipe which served the First Farm's water troughs. The line shown on the plan is where the pipe should have gone, the actual location of the pipe could not be confirmed by Mr C. He required a servitude for any area where the pipe lay outwith the Estate.

1 May: Firm B wrote to the District Valuer saying that they could not reach a settlement until all the outstanding issues had been dealt with and outlined the issues that had been the subject of correspondence between themselves and the Department.

7 May: The District Valuer enclosed a copy of Firm B's letter of 1 May to the Department for them to address.

28 July: The District Valuer wrote to the Department referring to his letter of 7 May and asked if the outstanding matters had been resolved.

August: Firm B wrote to the District Valuer asking what progress had been made in resolving the outstanding issues.

August: The District Valuer referred Firm B's letter to the Department asking them to contact Firm B direct as the outstanding matters related to accommodation works.

12 October: Firm B wrote to the Department saying they had been involved in negotiations with the District Valuer over compensation for some time but were unable to conclude them because of the outstanding works which had not been completed by the Department. They were not aware of any progress having been made since April 1998.

20 October: Firm C wrote to the Department expressing concern that nothing had been heard from them since their letter of 11 December 1997. Mr C had asked them to launch a formal complaint.

11 November: Firm B wrote to the Department referring to their letter of 12 October.

The Department wrote to Firm C in response to their letter of 20 October apologising for not progressing the matter but referred to their request made in May 1997 for a first draft of an agreement covering maintenance of the private water supplies with across the motorway.

The Department wrote to Firm B in response to their letter of 12 October. They acknowledged that their failure to resolve outstanding issues (which had been caused by pressure of other work) had impeded progress towards concluding compensation and apologised for the delay. The Company now controlled the land at the Second Underpass and they had been asked to determine if the land was surplus. When and if it was deemed surplus, it would be offered back to Mr C but the timescale would depend upon the Company's position regarding their need of it throughout a long-term contractual responsibility. Records were being examined to

address the Second Farm Overbridge issue with a view to drawing up a formal legal agreement which reflected rights of use and future maintenance burdens. Firm B was asked for their views on what was required.

13 November: Firm B replied to the Department saying the Estate was anxious to progress matters and they responded with further views as requested.

16 November: Firm C responded to the Department's letter of 11 November saying they were prepared to draft an appropriate agreement but felt that they needed a response to their letter of 6 January.

24 November: The Department wrote to Firm C confirming active pursuit of matters relating to the Estate's water supply which passes under Network Rail's compound. Firm C were asked for a first draft agreement document.

26 November: Firm C wrote to the Department agreeing to prepare a draft deed of servitude but again referred the Department to their letter of 6 January in which details of three sections of the private water main were outlined rather than just the one previously discussed by the Department.

December: An internal departmental minute pointed out that the land used by Network Rail was owned by the Department but outside the Operation and Maintenance boundary. It was noted that the use of the area by Network Rail had to be formalised and provision made for the Estate to access the pipe, preferably by granting servitudes to Network Rail and the Estate.

December: The Department faxed West of Scotland Water with a plan showing the First Farm's water main asking them to confirm whether this was the true location.

A departmental internal minute asked an engineer to ascertain the Company's willingness to declare the area indicated at the Second Underpass surplus.

The Department wrote to the Company asking whether the land shown on the attached plan was surplus to requirements, in which case the Department would need to consider procedures for the removal of the land from the agreement and its return.

4 December: The Department wrote to Firm A seeking their assistance on outstanding matters. First, there were two locations where the Estate's private water mains passed under the all-purpose road and other side roads, which are the responsibility of the local Council. They requested Firm A prepare plans for the agreement and said the whole length of the 5-inch main running through the First Underpass should be shown. Second, there was uncertainty about the location of the 50 mm plastic pipe laid from a connection to the public main in the A74 near the Fourth Farm generally along the line of the B723 and feeding various water troughs. It would be necessary to establish this by hand digging at about four locations to enable a plan to be drawn showing where it lies within the road boundary of the B723. This would be used for a section 61 agreement (which permits the retention of pipes in public roads subject to appropriate conditions). At the same time the sleeved crossing of the motorway should be examined to determine if it is practicable for the plastic pipe to be withdrawn for repair in the event of a burst or blockage since, if not, the Department would have to take responsibility for repairs. Third, Firm A was asked to prepare a plan showing the area of ground adjacent to the new Second Farm railway bridge on which the trackside access for Network Rail had been constructed. The plan should show the drainage system and the Estate's 5-inch water main. This plan should be used in conjunction with servitudes for Network Rail and the Estate.

The Department wrote to the Council saying that the Estate sought their approval in principle to draw up an agreement in terms of section 61 in relation to the water mains which lie within the former A74 trunk road and associated side roads in the vicinity of the First Underpass and to the

north of it. They proposed that the Estate negotiated with the Council direct. Plans were being prepared showing the exact locations of the mains. Another pipe, which was laid generally along the line of a B road to feed a number of water troughs, might in some places be within the road boundary and the Department would draw up a plan for a similar section 61 agreement.

The Department responded to Firm C's letter of 26 November. They hoped to secure a section 61 agreement from the Council which would be more appropriate than granting servitudes. The agreement could be applied to all the locations where Mr C's pipes lay in the public road (as opposed to the motorway). Where a 50mm pipe crossed under the motorway, the Department had already agreed that full responsibility would be taken and they were waiting for Firm C's first draft of the agreement. Where the First Farm's water main crossed the motorway, it might be possible to withdraw the pipe from the duct to repair. If not, a similar agreement could be drawn up. The Department would investigate this and the location, which was in doubt. The area of ground adjacent to the railway bridge used by Network Rail for a maintenance access was owned by the Department and an access for Network Rail had been constructed on it to replace a former access from the A74. A decision had not yet been made as to whether the land should be retained and subject to an agreement or servitude or conveyed to Network Rail but the Estate's interests in relation to the water pipe would be secured by an appropriate mechanism. The land was not surplus to requirements and could not be returned. They said the criticism in Firm C's letter was unhelpful.

8 December: The Department wrote to Firm A requesting a plan of Third Farm's bridge which would enable land requirements for the pavements and the servitudes for access is to be determined.

10 December: The Company wrote to the Department saying that the area at the Second Underpass was surplus to requirements.

14 December: Firm C responded to the Department's letter of 4 December. They requested a draft agreement in terms of section 61 to consider and said Mr C would accept an agreement as opposed to a

servitude if there were no unacceptable conditions. A draft deed of servitude in connection with the pipes crossing under the motorway was now being prepared. They requested copies of the Department's Title to the areas over which the servitudes were to be granted.

21 December: West of Scotland water wrote to the Department confirming that the location of the connection, meter, and pipe as indicated on their plan was correct.

29 December: The Department informed Firm B that the land at the Second Underpass was surplus and could be returned to Mr C. A plan of the land at the Second Farm Overbridge had been prepared which would enable an access agreement to be drawn up by the Department, who needed input from Firm B as requested in their letter of 11 November before preparing the draft.

1999

11 January: Firm C wrote to the Department asking for copies of their Title to the areas over which the servitudes were to be granted to enable them to prepare draft deeds.

12 January: The Department wrote to the Council asking for a response to their letter of 4 December 1998.

Firm B wrote to the Department asking if progress had been made on the land at the Second Underpass and the Second Farm Overbridge, referred to the fact that no progress had been made in resolving the position between Network Rail, the Department, and the Estate and sought an undertaking from the Department about maintenance of the water mains.

13 January: The Department wrote to Firm C saying they had yet to receive a response from the Council regarding the section 61 agreement and that the engineers were investigating whether the pipe could be withdrawn. Copies of the Department's titles over the servitude areas would be forwarded to them once received from their Solicitor's Office.

21 January: The Department wrote to Firm B saying that the land at the Second Underpass would be returned to Mr C and they awaited Firm B's input as requested in the Department's letter of 11 November 1998 regarding the Second Farm Overbridge. Rather than servitudes, the Department was seeking to obtain section 61 agreements from the Council.

27 January: The Department sent a further reminder to the Council.

28 January: Firm A faxed the Department saying they were trying to locate their as-built records for the Estate private water mains and the pipe serving the First Farm's water troughs. A plan for the First Farm's pipe would be prepared once trial holes were dug to locate its line, which should be completed within three to four weeks. They referred to their letters of 8 and 23 January 1997 regarding the Department maintaining the pipes within the motorway boundary or diverting the main.

5 February: Firm A wrote to the Department providing an update on their progress. They attached a plan showing the water main through the First Underpass and outlined details of quotes from local contractors to locate the water main at the Fourth Farm. They confirmed that the main across the motorway had been laid in a duct and replacing it should not be problematic. Also attached was a plan of the layout of land and services adjacent to the First Underpass and the new Second Farm railway bridge.

23 February: The Department responded to Firm C's letter of 14 January setting out the current position on, amongst other things, the Second Farm Overbridge, and the servitude at the Second Farm railway bridge. On the latter, the Department said Network Rail were to be granted a servitude at the same time as Mr C but asked Firm B to identify the route of the water main where it crosses the railway line as a first step. On the Second Farm Overbridge, the Department proposed to acquire servitude right of access from Mr C and the owner of the Third Farm, and provide the necessary plans and reasonable legal fees for the servitude right of access granted by both Mr C and the owner of the Third Farm to the other. The Department asked if these proposals were

acceptable and, if so, requested copies of Mr C's original titles to plot the boundary.

9 April: Firm C wrote to the Department saying they did not object to the matter of the servitudes at the Second Farm railway bridge being dealt with at the same time on the condition that Network Rail did not unreasonably delay matters. They had asked Mr C to identify the route of the water main. As soon as they had received confirmation from Mr C that he was happy with the Department's proposals regarding servitudes at the Second Farm Overbridge, they would forward his title.

26 May: The Department wrote to Firm C referring to the letter of 9 April asking if they were able to progress the matter of the servitude proposals at the Second Farm Bridge.

4 June: Firm B wrote to the District Valuer about the meeting to be held between them, the Department and Mr C. The outstanding issues to be discussed included future maintenance of private water supply, land used by Network Rail for access point; surplus land at the Second Underpass, and the legal basis for shared access at the Second Farm Overbridge.

9 June: Firm C wrote to the Department following up their letter of 9 April. A plan showing Mr C's water main, where it crossed the railway line and into Network Rail's compound, was enclosed. Mr C required a servitude from where the pipe passes from the railway line until it re-enters the Estate. Confirmation was requested that Network Rail would be prohibited from using or storing anything on the part of the compound housing the pipe. On the Second Farm Overbridge, Mr C accepted the Department's proposals regarding servitude for both maintenance and access subject to conditions.

29 June: Meeting held between the District Valuer, the Department, Firm B, and Mr C.

16 July: The Department wrote to Firm A requesting further information about the water main at the First Underpass and asked them to proceed to locate the water main at the Fourth Farm in the manner outlined in

their letter of 5 February. It was noted that continuity might have been lost with the departure of the engineer.

20 July: Firm C wrote to the Department, referring to their letter of 9 June and asking for an update on the current position.

29 July: The Department wrote to Firm C requesting sight of title deeds and confirmed that consultants had been asked to locate the water pipe.

9 August: Firm C sent the title deeds to the Department's solicitor. On the same day, Firm C wrote to the Department confirming that the title deeds had been sent direct to the Department's solicitor.

10 November: The Department's solicitor wrote to Firm C, apologised for the delay in dealing with servitudes at the Second Farm Overbridge, and requested their help in identifying which of the individual titles related to the Overbridge.

11 November: Firm C wrote to the Department expressing concern at the lack of progress and attached a list of items outstanding from April 1998.

2000

6 January: Firm B wrote to the Department asking for a response to their letter of 11 November 1999. The Department had suggested that they set out their position. If no action was taken by 20 February then Mr C would consider further action to resolve matters. Mr C was unwilling to agree on the compensation claims until all practical matters have been resolved.

16 February: An internal Firm A minute which said the water main at the First Farm had been easily traced on the east side of the motorway. The water mains at the First Underpass and also been located and drawings showing both water mains had been prepared.

24 February: The Department faxed Firm A urgently requesting information about the location of the water mains.

1 March: Firm A outlined the current findings to the Department and attached drawings.

9 March: Firm A outlined details of the water main at the First Underpass to the Department.

31 March: Firm C wrote to Officer 5 saying they had not yet received plans for the servitudes.

10 July: Firm B wrote to the Department saying they had not received a response to their letter of 6 January.

12 July: An internal departmental minute said Firm A had sent plans and they needed to arrange another meeting to take matters forward. It also referred to phone calls and letters from Firm B. On the same day, the Department wrote to Firm B saying outstanding issues had been discussed with Firm A and they now had their report together with plans showing locations of the water mains at the Estate. These would be discussed with Officer 5 next week and a detailed response would follow.

2 August: The Department faxed Firm A requesting them to plot the plans they had sent on an up-to-date ordinance survey based plan and asked what the position was regarding maintenance etc. of the Estate's private water supply as raised in their letter of 9 January 1997.

22 August: The Department wrote to Firm B referring to their letter of 11 November 1999 and apologised for the long delay in progressing the case, which they hoped would be resolved soon. The Department was liaising with their solicitor's office and Firm A on the private water supplies and plans and expected to receive drawings later that week. Another branch within the Department would address the surplus land issue.

25 August: Officer 5 wrote to Firm C asking for a response to his letter of 10 November 1999.

28 August: Firm C responded saying they had written on 23 November 1999, enclosing two copies of titles which were returned on 9 December. They then wrote on 31 March and 7 June asking for the plans relating to the servitudes which had been promised shortly after 9 December but received no response to their letters.

12 October: Firm A wrote to the Department attaching drawings which showed the water mains around the Estate and advised the Department to contact the Estate for comment on the drawings.

30 October: The Department wrote to Firm C asking them to indicate where the private water main crossed at one point of the motorway boundary.

8 November: Firm C wrote to the Department enclosing a plan on which Mr C had marked the location of the water supply.

2001

10 April: Officer 3 made a file note which said the Department now had the correct plans drawn up by Firm A to prepare the servitudes.

30 April: My predecessor's office issued a statement of complaint which set out the basis of this investigation.

5 June: A Departmental meeting was held to discuss the statement of complaint. It was agreed that: Firm A would arrange a site meeting with Firm B to agree the position of the pipes to Firm B's satisfaction and produce final reference plans with accurate location names; Officer 5 would update Firm C about the current position and seek agreement on the pipes once the plans had been finalised; Officer 5 would write to Firm C about the consents required for Second Farm Overbridge, confirm that the land at the Second Underpass was surplus and make arrangements to release the land to Mr C; Officer 5 would check the legality of Network Rail's hardstanding.

8 June: Firm C wrote to the Department saying the plan attached to the letter of 9 May seemed correct.

21 June: Firm A wrote to Firm B enclosing copies of plans and asked them to contact the Department to agree the location of the water mains.

28 June: Internal departmental minute asking for plans so that the land at the Second Underpass could be returned.

4 July: Officer 5 wrote to Firm C setting out the current position on three issues. On the private water mains, Officer 5 would write again to reach overall agreement on all servitudes required when the location of all water mains was agreed. On the Second Farm Overbridge, the Department were awaiting confirmation from the new owners of the Third Farm that the proposals were acceptable and he apologised for not telling them that the owners had changed which had caused the delay. The Department was in the process of returning surplus land at the Second Underpass, but said that the land at the First Underpass was not surplus.

11 July: An internal departmental minute noted that the Department had requested a list of other potential Ombudsman cases from the District Valuer but a response had not yet been received. The Department agreed to send a reminder and discussed several other 'potential Ombudsman' cases.

7 August: Firm A wrote to Firm B asking for a response to their letter of 26 June about the pipes.

14 August: Firm B wrote to Firm A enclosing Mr C's letter of 9 August to them which outlined his concerns about the pipe serving the First Farm's water trough and the First Underpass and which also confirmed the drawings were correct.

28 August: Firm A responded to Firm B. On the same day Firm A wrote to Mr C enclosing more sketches of the Estate's water mains

29 August: An internal e-mail postponed the progress meeting until 4 September.

5 November: The Department wrote to Firm C raising another servitude issue.

11 November: Officer 5 wrote to Firm C referring to their letter of 28 August 2000 and said he had asked the Department to investigate.

16 November: Firm A wrote to Firm C enclosing copies of drawings of the First Underpass.

26 November: Officer 4 e-mailed departmental officials an updated version of the action points on Mr C's case and apologised for not doing so sooner.

28 November: Firm C responded to the Department's letter of 5 November. They said Mr C needed a servitude from the owner of the land which housed a short section of the water mains serving the First Farm's water troughs. The route of the water main also posed long-term maintenance problems, for which Mr C should be compensated. They requested details about the maintenance of pipes carried out by the Department and confirmation that provision for access to Mr C would be provided in the servitude. They also said they requested servitudes for the sections of pipe running through Network Rail's compound and the First Underpass that ran outwith the Estate's land and requested proposals from the Department about maintenance, allowance, access, and compensation for that part of the pipe that runs under the tarmac pavement. For maintenance purposes, the section of pipe running through Network Rail's compound should be fenced off. They confirmed the plans showing the water mains as provided by Firm A show the correct location to the pipes. Referring to the land at the Second Farm Overbridge, they proposed that the small paddock should be bought by either Mr C or the owner of the Third Farm from the other to establish the boundary and requested a servitude for the access road (the basis of its shared use by the Department, Mr C and the owners of the Third Farm had also to be agreed). They referred to land at the Second Underpass which they understood had been declared surplus to requirements. They referred to a schedule prepared by Firm B dated April 1989 pointing out

that items numbered 1 to 12 were valuation items that remained unresolved.

17 December: Firm C wrote to Officer 5 referring to their letter of 10 December. Mr C had agreed to grant the additional servitudes requested by the Department, on condition that all outstanding matters outlined in their letter of 28 November were dealt with by the Department by 15 February 2002. They said Mr C was happy to be informed about issues as they arose and did not need a letter from Officer 5 dealing with all matters at once.

19 December: Officer 5 minuted Officer 4 about Firm C's letter of 17 December expressing concerns about their time limit and said they were dealing with complicated issues. He requested a meeting early in the New Year to fully address Firm C's letter.

Officer 5 responded to Firm C's letter of 17 December expressing concerns about the imposition of the time limit saying it had not been clear what the outstanding matters were. The Department had established most of them and the remainder would be addressed in his full response to their letter. He stressed the complexities of the issues and the involvement of third parties and could not confirm if the Department would be able to comply by the time limit.

24 December: Officer 3 wrote to Firm A enclosing a copy of Firm C's letter of 28 November asking for comments.

28 December: Firm C wrote to Officer 5 saying they believed their letter of 28 November detailed the outstanding matters and requested that the Department comply with the time limit in those matters that did not involve third parties, or at least endeavoured to do so in most of the other matters.

2002

11 January: Mr C wrote to Officer 5 expressing concerns that the Department did not have a clear picture of the outstanding matters and suggested a meeting.

14 February: A site meeting was held between Mr C, representatives from Firm B, Firm C and officials of the Department including Officer 4, Officer 5, a representative from Firm A and the District Valuer.

4 March: Firm C wrote to Officer 5 summarising the matters discussed at the meeting of 14 February. Officer 5 had said he did not believe the Department would be prepared to assume responsibility for sections of the pipe except where they fell under the motorway, as specified in the Department's letter of 14 February 1991. Also, any increased costs arising from maintaining pipes outwith Mr C's land was a compensation issue. In connection with the pipe to the First Farm's water trough, Firm C said Officer 5 had agreed to investigate the possibility of moving some sections of the pipe into Estate and Council land and respond to Mr C on this issue within two weeks; also, to investigate ducting of sections of the pipe under roads and under all areas of ground outwith the Estate. Firm C therefore requested further confirmation on the issue of maintenance, access and compensation from Officer 5. Regarding the water main which crossed the A74, Mr C sought a formal legal agreement on maintenance, repairs, and renewal. On the pipes under the First Underpass, Firm C outlined the maintenance problems and requested that the Department assume responsibility for the section of the pipe under the bridge under the motorway. The obligation outlined in the Department's letter of 14 February 1991 could reasonably be interpreted as including this section of pipe because of potential damage to the motorway structure itself. On the section of pipe in ground used by Network Rail, Firm C suggested that the section of land which houses the pipe should either be returned to the Estate or fenced off so that its route and access were protected with servitude rights to the Estate. Additional servitudes were required for any section of the pipe not within Estate land and Firm C stressed that access at all times without notice was a necessity because otherwise properties may be without a water supply. Additional issues relating to compensation were outlined. Officer 5 had agreed to contact Network Rail to discuss their usage of the compound. Turning to the Second Farm Overbridge, Firm C said the Department should bear the cost of the sale of the paddock and Officer 5 indicated that this was a compensation issue. Officer 5 agreed that the Department would prepare plans to be used for the servitudes for the access road and

meet the reasonable legal costs of Mr C and the proprietor of the Third Farm in formalising the arrangements. Officer 5 also said he hoped to hear from the family trust (joint owner of the Third Farm) soon. Finally, Firm C noted that the land at the Second Underpass would be offered back to Mr C and that Officer 5 would check with the local authority the status of the road adjacent to it.

17 May: Firm A prepared an approximate estimate of the cost of realigning the First Farm's water main into Estate land. On the same day, a finalised version of the Department's note of the meeting with Mr C and representatives held on 14 February was circulated to departmental officials and Firm A.

14 June: Departmental officials met to discuss Firm C's letter of 4 March.

15 July: Officer 5 responded to Firm C's letter of 4 March. He made a number of general comments. He said the Department had provided part of the infrastructure for the supply of water but was not responsible for the water supply itself. If the cause of the failure of the water supply was determined to lie within the motorway boundary, then the repair would be carried out by the Department (the roads authority) as soon as reasonably practicable. Any representations made in connection with compensation issues should be raised directly with the District Valuer, who acted on behalf of the Department. The Department would not grant servitudes for water pipes within the motorway boundary because it might interfere with the future operation of the motorway. He did not intend to contact the local roads authority about granting a servitude for a water pipe within the local road boundary and they needed no further documentation in addition to the plans which had been provided by the Department showing their location. The Department would not enter into a formal agreement on the maintenance of water pipes but would provide a letter confirming liability if required. He then turned to specific issues. He confirmed the Department would maintain the parts of the Estate's private water mains where they fell within the motorway boundary but would not be responsible for either the private water mains or for the ducts through which they pass or pipes outwith the boundaries of the

motorway and resulting increased maintenance costs was a compensation issue. Regarding the pipe to the First Farm's water troughs, he said the pipe served other water troughs and the Department proposed to divert the existing water pipe to the head wall to bring it within the local road boundary. They would investigate whether the pipe was in a duct, if not, then ducting would be provided. Chambers would be provided to access the pipes under the local roads. The Department would arrange to carry out this work provided the local roads authority agreed. The Company operated and maintained the stretch of motorway bridge housing the water main and will be instructed to carry out any maintenance to this main within the motorway boundary. Turning to the pipes under the First Underpass, the Department was not liable for maintenance of the water main and will not take it on. No progress had been made with Network Rail and contact continues to be made. The Department would prefer to fence off part of the land and grant a servitude, rather than declare it surplus. The Department has considered altering the motorway boundary so that a small section of the water main that currently falls within the motorway boundary will lie outside it. Referring to the Second Farm Overbridge, any compensation issues should be addressed to the District Valuer. The Department sought servitude rights of access to maintain the Overbridge but the access arrangements between Mr C and the owners of the Third Farm were not a matter for the Department. The Department had no liability to prepare plans to meet costs in this matter but if both parties agreed to the Department's proposals, then plans would be prepared and limited costs met. One of the joint owners of the Third Farm had not yet responded to the Department. Progress was being made in releasing the surplus land at the Second Underpass. The solum of the adjacent road had been compulsorily purchased and would be released to Mr C if it was deemed surplus and he was identified as the previous owner.

2 October: Officer 4 produced a briefing note of outstanding land issues. The action points relating to (a) and (b) of Mr C's complaint were to wait for Firm C's response to Officer 5's letter of 15 July. Officer 5 recommended that a reminder should not yet be sent. On (c), the Department was still waiting for confirmation of agreement of the proposals from the new owners of the Third Farm and Officer 5 was to

seek agreement of understanding from Firm C. On (d), the Department would be able to offer the land at the Second Underpass back to Mr C once it had been released by the Company. The engineer was to arrange for the amendment agreement (to remove the land from the contract with The Company) to be signed and a departmental official was to check whether the adjacent road was formally 'stopped up'. Officer 5 was to check the reasons and legal position for allowing Network Rail to use the hardstanding at the First Underpass. It was also noted that the estimate for rerouting the pipe serving the First Farm's water main was too much and that Mr C said he did not give his consent to a scheme to have the pipe running along the road.

19 November: Officer 4 produced a briefing note of outstanding land issues. The issues and action points remained the same as in October's briefing notes except that Officer 5 was now to issue a reminder to Firm C seeking their response to his letter of 15 July and that he had checked the position regarding Network Rail's access at the First Underpass. It was noted that Mr C had been advised that the land at the First Underpass was not surplus.

Firm C responded to Officer 5's letter of 15 July and apologised for the delay in replying. They said that Mr C would prefer that the Department agreed to be responsible for maintenance of the pipes outwith ground belonging to the Estate, given the difficulty in agreeing compensation. Alternatively, where the Department is not responsible for maintenance, they should ensure that all sections of the pipe can be maintained by Mr C easily and at minimal cost. It was unacceptable for maintenance of the sections of the pipe outwith the motorway to be dealt with by way of compensation unless they were re-laid so as to make maintenance possible at a reasonable cost. The pipe serving the First Farm's water troughs should be re-laid into the Estate and, where it does not fall within the Estate, it should be laid in a duct to ease repairs. They again requested the time limit for repairs to the sections of the pipe the Department is responsible for maintaining. They could not provide a list of compensation issues until they knew the extent to which the other outstanding items were going to be remedied. They asked why the Department believed it could not grant a servitude for water pipes within

the motorway boundary. They also required servitudes to be granted from the local authority (and other confirmation regarding access for maintenance etc.) and said that they had received servitudes from them previously on behalf of other clients. The Department had agreed to provide a legally binding document saying they were responsible for maintaining the pipes within the motorway boundary; they did not mind if it took the form of an exchange of letters but it must be capable of being founded on. Responsibility for maintenance of the water main should ultimately remain with the Department. Regarding the pipes under the First Underpass, the Department should be responsible for its maintenance. Mr C would prefer the area of land at Network Rail's compound to be returned but he would accept a servitude from the Department with sufficient land being fenced off to allow Mr C access to the water main. They insisted the Department pay the cost of arrangements regarding the Second Farm Overbridge because there would have been no need for the bridge if it had not been for the construction of the motorway.

10 December: Firm C wrote to Officer 5 requesting a response to the letter of 19 November.

17 December: Officer 4 produced a briefing note of outstanding land issues. Firm C's letter of 19 November was discussed by Officer 5 and Officer 4 who agreed to meet early in the New Year to discuss the Department's response. All other action points remained the same.

19 December: Officer 5 responded to Firm C's letter of 10 December saying he would respond further once he had received instructions from the Department.

2003

9 January: Firm C wrote to Officer 5 saying they looked forward to his response to their letter of 19 November but that little progress seemed to have been made. They asked if Officer 5 envisaged a satisfactory solution of all outstanding matters soon.

17 January: Officer 5 responded to Firm C's letter of 9 January saying he would contact them further when he had received instructions from the Department.

21 January: Meeting between Officer 5 and Officer 4 to discuss Firm C's letters of 4 March and 19 November 2002. Issues considered were: the First Farm's water mains - whether Mr C had been put in the same position as he would have been if the motorway had not been built now that the pipes were outside his land; maintenance issues and whether Officer 5's agreement to investigate the possibility of moving some sections of the pipe had been acted upon; agreements in lieu of servitudes regarding maintaining pipes under the motorway and whether the Department could be responsible for pipes outwith the boundaries of the motorway; should the Department assume ultimate responsibility for a particular water main but delegate the maintenance; the First Underpass - the difference between assuming responsibility for pipes under the motorway and the pipes located within the underpass; the Second Farm Overbridge - the validity of Firm C's position that there would have been no bridge but for the motorway; and whether owners of the Third Farm were being regularly chased up.

23 January: Officer 4 sought advice and help from the consultant engineer in obtaining further information from Firm A about the amount of pipes within local authority land that could be re-laid into Mr C's land and its cost, time limit for repairs for pipes within the motorway boundary, and information from the Council confirming the procedure regarding maintaining pipes within a local road.

6 February: Firm C wrote to Officer 5 referring to their previous correspondence and expressing Mr C's concern that no significant progress had been made since the meeting of 14 February 2002.

11 February: Officer 4 e-mailed the Project Engineer seeking a response to his request for help and information made on 23 January.

13 March: Firm A wrote to the Department enclosing a full set of the Estate's water mains drawings, which showed whether they were within

the Estate, the Department's land, motorway boundary, local road boundary, and land owned by others.

1 April: Officer 4 produced a briefing note of a meeting on outstanding land issues held on 27 February. He apologised for the delay in circulating them, which was due to pressure of work. The note commented that Officer 5 believed that Mr C's case should be referred to the Lands Tribunal because it was unlikely that agreement would be reached between the two parties through discussion. The meeting noted that they believed all water pipes had now been located. Officer 5 was to continue to issue reminders to the owners of the Third Farm. All other action points remained the same.

4 April: Officer 5 wrote to Firm C in response to their letters of 29 January and 6 February. He said that, following the meeting in February 2002, a considerable amount of work had been undertaken to clarify the Department's position, which was set out in his letter of 15 July 2002. However, it was clear from Firm C's response of 19 November that the position between both parties diverged on important issues, to the extent that it may not be possible to reach agreement through discussion and negotiation. He suggested it might be appropriate to refer the issue to the Lands Tribunal for Scotland but stressed that the Department's deliberations on the issues were still ongoing. He would contact Firm C when these had been completed and invited Firm C to contact him if they so wished.

16 June: Officer 5 minuted Officer 4 about Officer 2's recollection that the Department had made a commitment to locate the pipe to the First Farm's water trough into Mr C's land. He said he appreciated Officer 4 was still checking this but that if they had made the commitment then the Department should honour it.

19 June: Officer 4 e-mailed Officer 5 saying it was difficult to find copies of notes of meetings held between Mr C and Officer 2 in 1991 referring to the commitment the Department had made about the First Farm water main. He had also asked Firm A to check their records.

20 June: Officer 5 wrote to Firm C saying that work continued on outstanding issues and he had drafted a letter dealing with them. However, he could not yet issue it as the Department was seeking to confirm information that had recently arisen about the agreement over the water pipes serving the First Farm's water trough.

15 July: File note by Officer 2 regarding his recollection of agreements made between Mr C. and the Department about accommodation works. The Department had agreed to install a new water supply where Mr C's fields were severed by the new M74 scheme and needed a water supply. To avoid a situation that had previously arisen where the Estate did not have control of its own private supply because the pipes were within the verge of the old A74 trunk road and outwith the Estate's land, any such new supply was to be put on land owned by the Estate. Where the motorway completely severed a field supply, it was agreed that if there was a local water supply pipe close by then a metered branch connection would be instated into the field. If this proved impracticable, consideration would be given to taking Mr C's supply under the motorway in a duct which could extend from field to field, although this was not common practice. Under such circumstances, it was common for the roads authority to assume responsibility for the duct and the landowner the pipe.

22 August: Officer 5 e-mailed departmental officials referring to Officer 2's file note and said that if it was possible to relocate the First Farm's water main then the Department should do so at its cost.

1 September: Officer 5 e-mailed Officer 3 about the First Farm's water trough and pipes under the First Underpass. Referring to the First Farm's water troughs, he repeated his point that the Department should honour any agreements it had made. He wondered why the pipe had not been put into Estate land. Unless the Department could show there had been a further agreement with Mr C not to locate the water pipe into estate land, then Mr C's objection appeared reasonable. The practicalities and cost of relocating the pipe should be investigated. Turning to the pipes under the First Underpass, Officer 5 said it was reasonable that Mr C's position regarding the placing of pipes under the First Underpass would have

mirrored the position he took on the First Farm's water main and the Department's position would also have been the same. If the Department had indeed arranged with Mr C to put the new supply pipes in land owned by the Estate and the Department to maintain the pipe which passes under the motorway, then placing the pipe in the local road under the motorway could be seen as the Department avoiding its responsibility under the arrangement with Mr C. The placing of the pipe benefited the Department in that it would be maintained by Mr C (although he would be compensated for that) but it may not have been in accordance with the spirit, if not the letter, of the agreement. The Department may wish to consider whether it should accept responsibility for maintenance of the pipe in the local road so far as the motorway boundary extended downwards. This further raised the question of whether the land which housed the pipe between the railway and local road should be declared surplus, which would comply with the agreement whereby a new supply pipe would be put on land owned by the Estate.

16 September: Firm A e-mailed the Department saying that 'as-built' drawings had been made but the fact that the actual locations of the agreed accommodation works differed from these drawings was the contractor's responsibility.

In a further e-mail, Firm A said that it may be possible to move further towards the Estate's position regarding the First Farm's water mains. However, they did not consider that there was anything more that could be done about the position of the pipes at the First Underpass.

23 October: The amendment agreement between the Department and the Company releasing the surplus land at the Second Underpass from the Operation and Maintenance land boundary was completed.

24 October: Officer 5 wrote to Firm C asking for further information about the situation relating to the First Farm's water main, including information about additional water troughs that the main may serve.

31 October: Firm C responded to Officer 5 saying that Mr C did not know the First Farm's water main served other water troughs and asked

the Department to confirm where the additional water troughs were situated and to whom they belonged, particularly as the Estate was paying for the supply.

17 November: Officer 5 wrote to Officer 4 asking the Department to confirm the position regarding the water troughs.

Officer 5 wrote to Firm C saying he was clarifying with the Department the points they raised in connection with the water mains serving other properties.

19 November: Firm C wrote to Officer 5 saying no progress had been made since their letter of 19 November 2002 to the Department and they requested the Department respond to them urgently about the outstanding matters.

2004

31 March: Officer 5 wrote to Firm C about the matters outlined in his letter of 15 July and Firm C's report of 19 November 2002. He said the Department would not take on the responsibility of maintaining the Estate's water pipes outwith the motorway boundary. Referring to the pipes within the motorway boundary and which lie within a road maintained by the Department, Officer 5 said that if Mr C thought it appropriate, the Department would grant a consent under section 61 of the Roads (Scotland) Act 1984 for the placing of the pipes in the road. His department could not, however, instruct the local authority to grant a servitude for the water pipes within the local public roads. He reiterated his view that there was no requirement to enter into a separate formal agreement on the maintenance of the pipes within the motorway boundaries. Officer 5 said the Department's investigation into the arrangements for water supply pipes at the First Farm revealed an oral agreement whereby any new water supply to be installed would be located in Estate land where possible. To accommodate the agreed arrangements, Officer 5 proposed an alternative route through Estate land. However, the fact that the existing supply served two other water troughs had confused matters. Mr C was asked to confirm whether or not these troughs were within Estate land; if so, the matter would have to be

considered further. On the water main, Officer 5 said the department intended to instruct The Company to carry out the maintenance of the Estate's water main where it lay within the motorway boundary on behalf of the Department as the roads authority responsible for it. Referring to the pipes under the First Underpass, the oral agreement over the placing of the water supply pipes in Estate land at the First Farm did not apply to the pipes at the First Underpass; the Department was not liable for maintenance of this water main. However, it was accessible for maintenance which could be explained and shown to Mr C at the location in a further meeting. The Department had agreed that an area of land large enough to house the water pipe in the land occupied by Network Rail should be declared surplus and returned to Mr C. Mr C should confirm if the proposals were acceptable. On the Second Farm Overbridge, the Department would not meet legal costs arising from rationalising land between the two private landowners except as part of a compensation claim. Nor was the Department liable for Mr C's legal costs in connection with proposed arrangements. The agreement of one of the owners of the Third Farm has not been forthcoming on the proposals. On the Department's position on the Overbridge itself, Officer 5 could provide a separate letter confirming the Department's position together with an extract of the relevant part from the Side Road Order but would not grant a formal undertaking. The land at the Second Underpass has been released from The Company and could be declared surplus and returned to Mr C. However, it remained uncertain over who owned the solum of the road; Mr C was asked to show his title if he was the owner. If agreement could not be reached on outstanding matters, Officer 5 said the most appropriate body to resolve matters of compensation and the accommodation works was the Lands Tribunal. However, he proposed a further meeting between the Department and Mr C to resolve as many matters as possible in the first instance.

May: Firm C responded to Officer 5's letter of 31 March. They said that Mr C had accepted that the Department would not maintain the Estate's water pipes outwith the motorway boundary and that repairs on pipes within the boundary would be done on an "as soon as reasonably practicable" basis but asked for further definition and a legal document outlining the Department's responsibility for maintenance. Furthermore,

Mr C continued to request a servitude regarding pipes under roads belonging to the local authority. Mr C had confirmed that an oral agreement had been made on the water supply pipes at the First Farm (and that the two other water troughs were on Estate land) but he had not agreed the route of the water pipe. Mr C had also confirmed that the Department's proposals on the land occupied by Network Rail were acceptable and proposed a way forward on the issue of the Second Farm Overbridge (he had discovered that Mr F still owned the small area of land relating to the old boundary and was willing to sell the land to Mr C). Regarding the land at the Second Underpass, Firm C said Mr C was unsure about who owned the solum of the road although past dealings with the Water Board suggested that the road had formerly belonged to Mr C. The land also seemed to be occupied but not by Mr C. Mr C said that a further meeting would be constructive and requested that this take place as soon as possible.

19 May: Officer 5 acknowledged Firm C's letter and said he would write further once he had received proposed dates for a meeting from the Department.

9 August: Officer 5 minuted Officer 3 saying that the Department should arrange a meeting as a matter of urgency.

1 September: A departmental internal e-mail shows that the meeting had been arranged for 13 September.

September: Officer 5 e-mailed Firm C asking if 28 September was a suitable for the meeting.

21 September: Officer 5 e-mailed Firm C postponing the meeting.

26 October: A meeting was held between Mr C, Firm C and officials from the Department, Firm A and the valuation office. The following was agreed:

The First Farm: an alternative route was discussed; where the pipe lay in the verge, the Department would move it into Estate land; the

Department would confirm whether the pipe is ducted; where the pipe is ducted, and where possible, the Department would install chambers on Estate land; the Department was liable for maintaining the water pipe where it fell within the motorway boundaries; the Department would send its proposals on Initial Target Response Times relating to repairs to the pipe to Mr C to consider and draft a legal document covering maintenance of it for approval by Mr C.

The water main: The Department agreed to make the same provisions for the water main as they had for the pipe at the First Farm.

The pipes under the First Underpass: Mr C would be responsible for maintaining the water pipe under the Underpass (the cost of which may be offset by compensation); the Department would arrange an area of land along the length of the pipe to allow maintenance to be declared surplus and carry out other related activities.

The Second Farm Overbridge: The Department would check the position on compensation with Firm B and contact Mr and Mrs D and the Trust regarding access, servitudes and transfer of ownership of land, produce plans and agree a limit on Mr C's legal costs in connection with the proposed arrangements.

Land at the Second Underpass: The Department would declare the land surplus and prepare draft plans for approval; given that Mr C did not require the road, a servitude right of access would be granted by the Department instead.

20 December: The District Valuer met with Firm B to discuss compensation issues relating to the issues discussed at the meeting held on 24 October.

24 December: Firm A e-mailed the Department saying they had progressed some of the action points which had arisen from the meeting held on 24 October.

2005

10 May: Mr C wrote to my Investigator that Firm C had been unable to progress outstanding issues with Officer 5 because they had not reached an agreement over fees. Firm C had had no response from Officer 5 since February.

GLOSSARY

Individuals

Mr C	Complainant
Mr F	Previous owner of the Third Farm
Mr and Mrs D	Current owners of the Third Farm
Officer 1	Department official involved at an early stage
Officer 2	Department official involved at an early stage
Officer 3	Case officer responsible for Mr C's case
Officer 4	Departmental project administrator
Officer 5	Solicitor advising the Department

Companies

Firm A	Consulting engineers for the motorway scheme
Firm B	Chartered surveyors acting for the Estate
Firm C	Solicitors acting for the complainant
The Company	Company awarded a design, build, finance, and operate (DBFO) contract in respect of the motorway in 1997

Locations

The Estate	The land which Mr C manages. It lies mostly to the west and south west of the motorway but also includes land to the east of the motorway
The First Farm	A farm owned by the Estate and lying to the west of the motorway
The Second Farm	A farm owned by the Estate and lying to the east of the motorway. Since the building of the motorway, it has shared an access (a bridge over the motorway) with another farm (the Third Farm) which is not owned by the Estate
The Third Farm	A farm not owned by the Estate which is close to the Second Farm but to the west of the motorway
The Fourth Farm	A farm owned by the Estate and lying to the east of the motorway