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Roads order is tough to navigate

Outgoing Norton sought to clarify, but critics call policy fraught with potholes

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Outgoing Interior Secretary Gale Norton issued an order last week that she says will clarify the federal government's stance toward ownership claims made by local governments on the old back roads that stretch across the West's public lands.

But some wonder whether the new policy will only muddy the path more.

Norton, who has announced she will step down at the end of the month, says the new policy reflects a recent appeals court decision that tilted power to make such road claims in the states' favor.

Norton's critics, however, maintain that the directive is overly broad and fraught with political and legal land mines that will spawn more litigation. And they predict it will create problems on the ground as Interior's agencies - most notably the Bureau of Land Management and National Park Service - attempt to interpret and implement the new guidelines.

"It could become a real mess," said Ted Zukoski, a Denver-based attorney with Earthjustice.

The 10th U.S. Circuit Court of Appeals ruled last fall that state law, not Interior Department policy, was the ultimate determinant under Revised Statute 2477, an old mining law that granted rights of way across federal land. The statute was repealed by Congress in 1976, but existing claims were grandfathered in - sparking state-federal disputes that have festered ever since, especially in Utah.

In general terms, Norton's order "seems to pretty well track the 10th Circuit ruling, although it still leaves a number of hard questions unanswered," says Bob Keiter, director of the Stegner Center for Land, Resources and the Environment at the University of Utah.

For starters, he noted that Norton has used a regional court decision to frame a new national policy. The 10th Circuit's jurisdiction takes in only six states - Oklahoma, Kansas, New Mexico, Colorado, Wyoming and Utah - plus the portions of Yellowstone National Park extending into Montana and Idaho. The rest of those two states, plus Arizona, California, Oregon, Washington and Alaska - all with real and potential RS 2477 issues - lie in the larger 9th Circuit.

Norton argued in her order that the 10th Circuit ruling, written by Utah Judge Michael McConnell, was "comprehensive and persuasive, and [does] not appear to conflict with any other circuit's decisions." But Keiter believes that analysis could be challenged.

"This is a [court] ruling that is arguably of limited scope," he said.

The other wild card is the states themselves. Each has differing standards for what constitutes a valid right of way.

Utah has one of the more restrictive state laws in that regard, requiring that a county show proof of 10 years of continuous use of a road before 1976 to invoke an ownership claim. Neighboring Colorado, by contrast, requires only proof of some kind of use at some time. On the other side, Nevada has slim case law on the question, but it appears to most resemble the looser Colorado standard.

What does this all mean? Local federal land managers don't know yet.

"Our Washington office will be issuing guidance on how to implement the secretary's policy in the near future," says Kent Hoffman, the deputy director for lands and minerals at the BLM's Utah state office. "Until then, we're continuing with business as usual."

But Denny Huffman, the former manager at Dinosaur National Monument, predicts trouble ahead.

"I was involved with two of the most aggressive counties - Moffat in Colorado and Uintah in Utah - and I can assure you that there were not enough [road] options in the monument to satisfy them and I assure you there won't be in the future. A map that looks like a plate of spaghetti is what they want."

And that gets to the heart of the opposition to the Norton directive: It makes no distinction for right of way claims in national parks, wilderness areas, wildlife refuges and other federally protected areas. If a valid right of way exists, and it preceded the establishment of a protected area, it must be acknowledged.

Norton set aside such areas in a 2003 memorandum of understanding she signed with former Utah Gov. Michael Leavitt to more easily process right of way claims. But Interior Department officials say the 10th Circuit decision has now tied their hands in that regard.

"We can't just unilaterally deprive the rights people have by fiat," says Larry Jensen, a regional solicitor for the Interior Department based in Salt Lake City. But by the same token, he adds, "there have always been private inholdings in the parks. The creation of the park didn't wipe them out. The park manages around the inholdings. This is something we're not unfamiliar with."

The court and new Interior policy maintain that federal managers will still have the ability to manage the land under and around rights of way in protected areas. But environmental groups question to what extent they will be effective once a valid claim is established in such a place. And they may not have to wait long to find out.

Utah and San Juan County are pressing a lawsuit over a right of way claim in Canyonlands National Park. A district court previously upheld the right of the park service to close the Salt Creek road because of streambed damage and other effects caused by motorized vehicles. But the court also ruled that if the county, in the pending complaint, is found to have a valid claim, the closure regulation "will be revisited to ensure it is consistent with the property rights" afforded to the owner.

State and county officials, both here and elsewhere, scoff at the notion that they are out to turn such roads into "superhighways," arguing that the 10th Circuit ruling and the new Interior policy limit them to use under "pre-existing" conditions.

"This doesn't authorize us to build new roads. We can't pave a cow path," said Jeff Comstock, natural resources director for Moffat County, Colo. "What we're interested in is providing continued access to the public. People say this is going to muddy the waters, but it's actually going to create more clarity. It's a nonbinding determination with the courts still there as a last resort. It's a step in the right direction."

It could also well be the start of another round of battles.

"We're going to be taking a very close look at this policy," says Zukoski, the Earthjustice attorney. "We'll also be taking a very close look at any attempt by the Bush Administration to give away trails and jeep tracks and other roads through special public lands. This is far from being a settled issue."

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A new road

Interior Secretary Gale Norton last week unveiled a new policy that redefines the federal government's policy toward backcountry road ownership claims on federal land by state and county governments. Some key elements of the directive:

It repeals the 1997 policy, implemented by former Interior Secretary Bruce Babbitt, that required local governments to show "proof of construction" to claim ownership of a right of way. State law was applied to the claims only to the extent it was "consistent with federal law." The new policy largely follows state law.

The new directive requires federal land managers and county and state officials to consult with one another before altering, upgrading or closing a road. Notification is not required for routine maintenance, provided an agreement is in place.

Federal land managers still have management authority over public land that is under and around a valid right of way.

Disputes over the ownership status of a road that cannot be resolved by the federal and local parties must go to court for a binding determination.