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Once a road, always a road - new attack on wilderness

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BODY:
At a glance, it looks like the Interior Department is making a technical revision to its procedures for settling obscure old property-rights disputes. In fact, it could be assembling a weapon of mass construction _ a way for developers to build more roads in national parks and monuments.

Here is a prime example of how land preservation and environmental protection are being reshaped in the Bush administration. Avoiding open warfare for the most part, the White House and environmental agencies are opting for under-the-radar attacks _ changing an array of regulations in ways that are hard to understand, or to rally against. Thus the new rules, effective Wednesday, to "streamline" the process for issuing "recordable disclaimers of interest" in cases where century-old disagreements over rights-of-way have created "clouded titles" for roads and fence lines.

Understanding what's happening here requires a journey back to the end of the Civil War and the beginning of the Great Barbecue, when federal policy was to get the West carved up and settled as quickly as possible. Alongside the railroad grants, homesteading rights and free mining permits, Congress adopted a terse provision known as Revised Statute 2477:

"The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

This meant anyone could build a road anyplace on federal land where roads were not specifically prohibited. Because no records were kept, it's not clear how many actual roads were built. But there wasn't much controversy over the law or its application _ or even its repeal, in 1976, as Congress cleaned up various relics of the Barbecue.

In discarding 2477, Congress substituted the kind of permit system reasonable people might expect: If you've got, say, a mining claim on federal land and need to build a road to it, go ask permission (and expect to face an environmental review). But it also grandfathered existing claims to rights-of-way _ and in the 1980s, Western mischief-makers seized on it as a new club to use against federal land agencies.

Utah's state and county governments, for example, claim 10,000 to 15,000 rights-of-way over old wagon trails, cowpaths, creekbeds and such. Most of these are on land that has been designated or proposed for preservation in the national parks or wilderness

systems. Some claimants want to build roads; others just hope to block creation or expansion of parks, monuments and wilderness areas on federal lands in Utah.

Colorado counties have claimed hundreds of similar routes; in one, the apparent objective is to halt the proposed Vermillion Cliffs Wilderness Area. Alaska, no surprise, has the most aggressively creative approach of all, claiming a 100-foot right-of-way along every section line in the state.

While most of the action has been in the West _ because that's where federal land, and its antagonists, are most plentiful _ it's not inconceivable that a 2477 claim could be made almost anywhere there's federal land. Say, to an obliterated logging path in the Boundary Waters Canoe Area Wilderness. Even private land acquired from the federal government could be subject to an old right-of-way claim.

Until now, claimants to such routes had to prove their validity in court. The new rules shift the decisionmaking to the Interior Department's Bureau of Land Management. They also broaden the right to make a claim from actual owners to any "interested party," and grant an unlimited time to file.

Thus, what used to be a public proceeding on a court docket will become an administrative matter. Interior officials say there will be openness in these proceedings, and opportunities for public comment _ but this is the same department that has been trying to settle the Utah claims in closed-door negotiations with state officials.

What happens after a disclaimer is granted? It's anybody's guess. According to John Leshy, Interior's top lawyer during most of the Clinton administration, case law gives federal agencies a murky authority to regulate these rights-of-way, but probably not to prevent their use.

The upshot? Once a road _ or truck track, cattle trail, or creekbed _ always a road. If there's some public benefit in a policy like that, it's invisible from here.