U.S. Loosens Its Policy on Building Roads in Parkland

The action by the Interior Department, though not legally binding, makes it easier for counties to claim rights of way.

By Bettina Boxall and Julie Cart
Times Staff Writers

March 23, 2006

Guidelines issued by Interior Secretary Gale A. Norton on Wednesday will make it easier for counties to lay claim to old trails and closed roads they would like to open across federal lands in the West, including national parks in Southern California.

In one of her final actions before leaving her post next week, Norton issued a policy dealing with right-of-way claims under a Civil War-era law that county officials in several Western states have tried to use to circumvent federal land-use restrictions on motorized access.

Norton's memo gives Interior officials nationwide latitude to grant rights of way to counties and other claimants and even approve road construction and improvements.

For a definitive legal ruling, claimants would still have to go to court. Though the policy does not bar claims in national parks and wilderness areas, Interior officials insisted that land managers would not allow destructive road building or improvements.

"Even if you have a right of way, that doesn't mean you can take a two-track and turn it into a two-lane road," said Dan Domenico, special assistant to Interior's solicitor.

"We still have the duty and obligation to protect federal lands surrounding and underlying the right of way."

But environmentalists said the secretary's guidelines amounted to an invitation to counties and other entities to claim everything from hiking trails to dry stream beds and start using them as roads.

"The barriers to [these] claims have been lowered to practically nothing," said Ted Zukoski, a Denver-based attorney with Earthjustice who was involved in a major court case on the matter. "The bar is so low that it has the effect of telling everyone: 'We're open for business. Make a claim.' "

The controversy is rooted in an 1866 law intended to give miners access to their stakes and cattlemen a way to move their herds by granting them rights of way over federal land. Congress repealed the law in 1976 but allowed claims for routes already in existence.

Claims in national parks and wilderness areas would have to be based on uses in existence before those areas were protected.

In 1997, then-Interior Secretary Bruce Babbitt put all but the most pressing claims on hold. But

that didn't quiet the controversy.

In Utah, three southern counties asserted their right to control roads and trails within national parks, monuments and other federal land. San Juan County claimed a 10-mile stretch of stream bed in Canyonlands National Park, contending that a rocky trail in Salt Creek Canyon — once open to four-wheel-drive traffic — was a "highway" the National Park Service had no right to close.

The route provides the only vehicular access to Angel Arch, one of the park's most famous geologic formations.

Another claim was made by officials in Kane County for rights of way in the Grand Staircase-Escalante National Monument, managed by the federal Bureau of Land Management.

Ruling in a lawsuit that stemmed from the Utah actions, the U.S. 10th Circuit Court of Appeals last year said the BLM could recognize local rights-of-way claims but did not have the authority to make final legal determinations.

Citing that ruling, Norton said Wednesday that agencies under her purview — which include the BLM and U.S. Park Service — could recognize rights of way as long as they adhered to state laws.

In San Bernardino County, which has inventoried 5,000 miles of roads and tracks said to be in use on federal lands before 1976, officials said they hoped the new policy would settle at least some of the controversy.

"The county is asserting rights of way … to protect the access for county residents and agencies to be able to get where they need to go in the desert," said Brad Mitzelfelt, chief of staff for Board of Supervisors Chairman Bill Postmus, whose district includes large federal holdings in the Mojave Desert.

Mitzelfelt said the county would press claims only on the most heavily used routes, not all 5,000 miles. The old roads and trails cross BLM land as well as the Mojave National Preserve, where he said locals have lost access since its creation in the 1990s.

Larry Whalon, the preserve's chief of resources, said expanding the road system and upgrading certain roads would expose remote cultural and historical sites to increased human traffic and potential vandalism. He cited Ft. Paiute, a crumbled adobe Army post, as among the places that would be vulnerable.

"If that road were to be improved, you'd have a lot more easy access, and that could be a problem," Whalon said. "Even though it's been vandalized, it's not been completely ruined."

Utah officials hailed Norton's policy as a way to settle the claims in a more consistent manner.

"We think this memorandum is absolutely appropriate. We think the guidelines make life easy

for everybody," said Lynn Stevens, chair of the San Juan County Commission and Utah's public lands policy director. "It creates consistency. That's not to say we don't have issues with aspects of it. But insofar as it embraces the 10th Circuit's decision, we are not opposed to it."

But Mark Squillace, director of the Natural Resources Law Center at the University of Colorado at Boulder, said the policy created a situation of "legal limbo" because federal agencies would be making right-of-way decisions that weren't binding.

"No one really knows if they will be meaningful," he said.