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Road guidelines raise questions

By SAM BISHOP News-Miner Washington Bureau

Thursday, March 23, 2006 - WASHINGTON--New federal guidelines for recognizing historic roads and trails are drawing expected criticism from environmental groups, but representatives of Alaska's state government and mining industry aren't entirely pleased with the policy either--for much different reasons.

Secretary of the Interior Gale Norton, who plans to leave office at the end of the month, released the guidelines Wednesday.

The policy tells Interior Department agencies, such as the Bureau of Land Management and National Park Service, how to work with local or state governments that claim rights of way across federal lands under 1873's Revised Statute 2477. Congress repealed the law in 1976, but grandfathered any rights of way set before then.

Norton's guidelines endorse the assertion that any route on which people crossed unreserved public lands before 1976 is a potential "public highway," even if no construction occurred. Her guidelines also say agencies must look to state laws for definitions of such highways.

That much encourages supporters of more access to federal lands, but dismays environmental advocates.

"On the positive side, the guidelines rely heavily on state law," said John Katz, head of Gov. Frank Murkowski's Washington office. "In addition, they make it clear that mechanical construction is not necessary to establish a right of way under RS 2477."

"Many rights of way in Alaska have been established by traditional means--by foot traffic, dog sleds, snowmachines," Katz said. "So it's gratifying to note that the guidelines seem to recognize that reality."

That's not a positive development to Kristen Bregel of The Wilderness Society.

"Counties and states will be able to actually maintain these off-road vehicle tracks and trails," she said in a news conference Wednesday.

That's true even if the tracks and trails cross federal parks, refuges, wilderness areas and wilderness study areas, she said.

However, Norton's guidelines also say the rights of way across unreserved land can't be used for anything beyond their pre-1976 uses. And if the land being crossed was reserved before that year as, for example, a park or military reservation, the same restriction applies as of the date of reservation.

"Any uses that go beyond those occurring on Oct. 21, 1976, or an earlier date of reservation must be authorized under another provision of law," Norton's new guidelines said. Those other provisions of law would require an extensive public and environmental review process.

So an old trail used for snowmachine or dog sled traffic between villages in Alaska might qualify as a public right of way under Norton's guidelines, but it will stay a trail unless someone goes through a major federal process to develop a road.

That's a far more restrictive policy than Murkowski's administration has sought in recent negotiations with Norton.

"The guidelines would confine the width of a right of way to that area actually used," Katz said. "By contrast, we think that state statutory law should govern the width of a right of way, and in Alaska this might expand the width significantly in certain circumstances."

Under the "most relevant" state law, public highways in Alaska are 100 feet wide, Katz said.

Steve Borell, president of the Alaska Miners Association, said he also was encouraged by Norton's recognition that state law should describe a right of way and that the right of way can be established without construction.

"That's good. That's been the case throughout history," he said.

The secretary's assertion that the rights of way can't be used for anything beyond their original uses didn't fit his view of the law, though.

"I'm going to guess that that's going to be something that's debated in court for a long time," he said. "RS 2477 had no such restriction on usage."

Norton's guidelines, though, are based on a decision from the 10th U.S. Circuit Court of Appeals last fall in the case of the Southern Utah Wilderness Alliance v. BLM.

The court reasoned that an RS 2477 right of way "is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a certain way."

Therefore, "the scope of an RS 2477 right of way is limited by the established usage of the route as of the date of repeal of the statute," the court ruled.

Norton, in a memo to her assistant secretaries, said the new policy should apply nationwide and not just in the 10th Circuit's region.

"Though SUWA v. BLM is a 10th Circuit decision, its analysis and holdings are comprehensive and persuasive, and do not appear to conflict with any other circuit's decisions," she said. "The department should therefore apply its principles nationwide, keeping in mind that one of the most important of those principles is that state law generally must be used to assess RS 2477 claims."

Brengel said Norton had no good reason to turn the court's views into national policy.

"This is her choice. She did not have to put out this policy today," Brengel said.

She and other participants in the news conference said the policy was also developed without public input.

Dennis Huffman, a retired national park superintendent, noted that Congress told the Interior Department several years ago that it could not develop new rules or regulations concerning RS 2477. He said he believes Congress did so to ensure any process would be open.

"This is not," he said.

Sen. Ted Stevens, R-Alaska, placed the ban on new regulations as a rider on an appropriations bill in 1997 to stop the Clinton administration from implementing its proposed rules. The rider remains in effect.

Norton said her new policies are nonbinding guidelines, so she didn't violate Stevens' rider when developing them.

Katz agreed.

"What these guidelines are is internal direction by the secretary to her employees and there's nothing that requires that that be subject to public review," Katz said. "However, in several places in the guidelines, they refer to the need for public involvement" in any specific proposals to recognize rights of way.

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