

# Navigable Waters and RS 2477

CACFA Presentation 8/12/13



# Public Access Assertion and Defense Unit (PAAD)




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# Statewide Access Issues

- ◆ Navigability
- ◆ RS 2477
- ◆ ANCSA 17(b) Easements
- ◆ Reviewing federal plans for access issues



# Defending Title to State Submerged Lands

- ◆ During ANCSA Conveyance Process
  - ◆ Recordable Disclaimers of Interest
  - ◆ Resolving disputes of ownership
  - ◆ Navigability Determinations
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- A stylized, dark teal silhouette of a mountain range is positioned in the bottom right corner of the slide, extending from the right edge towards the center.



# Why is it important

- ◆ Resource development
- ◆ Transportation
- ◆ Hunting and gathering
- ◆ Economic well being of state



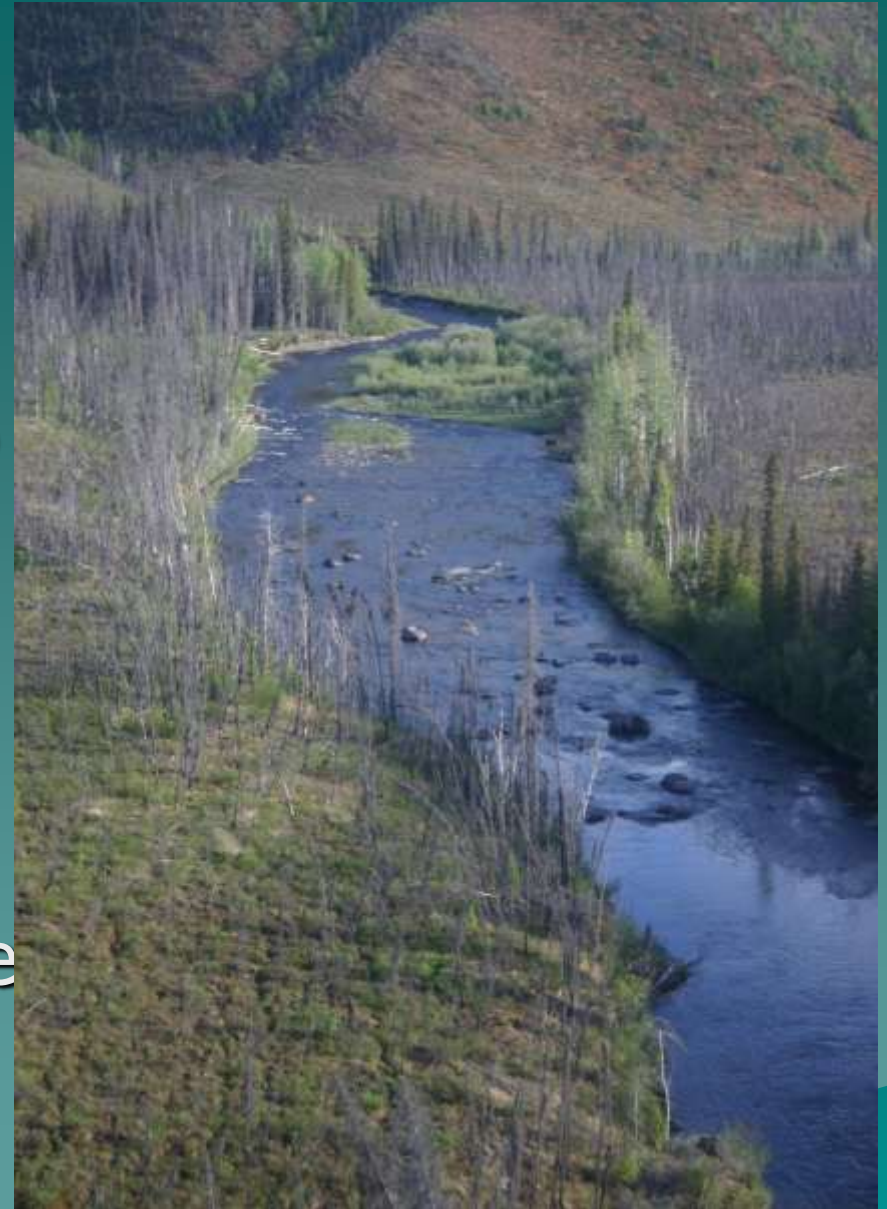
# Equal Footing Doctrine

- ◆ All states are admitted to the union on equal footing with the other states, including the 1953 Submerged Land Act, which granted the title to the submerged lands beneath Navigable waters



# Is it Navigable?

- ◆ Submerged lands
- ◆ Tidelands
- ◆ Shorelands
- ◆ Public Trust or Title





# Whose land is it?





# Case Law

- ◆ Daniel Ball
- ◆ Utah (Salt Lake)
- ◆ Kandik/Nation
- ◆ Gulkana
- ◆ PPL Montana  
(susceptibility confirmed)



# Title Navigability

- ◆ **AS 38.04.062.**  
**Identification of State Submerged Land.**
- ◆ **(g)** In this section,
- ◆ **(1)** "navigable water" means water that, at the time the state achieved statehood, was used, or was susceptible of being used, in its ordinary condition as a highway for commerce over which trade and travel were or could have been conducted in the customary modes of trade and travel on water; the use or potential use does not need to have been without difficulty, extensive, or long and continuous; (Daniel Ball)



# Public Trust Navigability

Public Trust Doctrine providing that shorelands, submerged and submersible lands are preserved for public use, including but not limited to, navigation, fishing, and recreation; and the State of Alaska, as trustee for the people, bears responsibility of preserving and protecting the right of the public to the use of waters for those purposes.






# Art VIII Sec 14 Access to Nav Waters



- ◆ Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

# How to Assert and Defend Ownership

- ◆ Research and Field Verification
  - ◆ Determining Navigability and Ordinary High Water Line
  - ◆ Title Research
  - ◆ Recordable Disclaimers of Interest
  - ◆ Possible Litigation – Quiet Title Action
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# Recordable Disclaimers of Interest

- ◆ Cost effective (\$50K) (QTA cost upwards of \$1 mil.)
- ◆ Alaska has the only successful RDI process in the US
- ◆ 20 Recorded RDIs
- ◆ May be an alternative solution for RS 2477 litigation
- ◆ Need clear criteria for Navigability





# Ordinary High Water Mark



- ◆ The ordinary high water mark (OHWM) is the boundary between **non-tidal waters** and adjoining uplands.

# Quiet Title Actions

- ◆ “Quiet” other claims to our title
- ◆ Expensive
- ◆ Time consuming
- ◆ Uncertain outcome
- ◆ Necessary when no other option exists



# Current Issues/Litigation

- ◆ Mosquito Fork
- ◆ Kotsina River
- ◆ Lemon Creek
- ◆ Skagway
- ◆ Sturgeon/Nation River





# Mosquito Fork

- ◆ State Mining Claim
- ◆ Wild and Scenic River
- ◆ Non Nav by Feds
- ◆ Filed Complaint
- ◆ BLM Denied
- ◆ Discovery Phase
- ◆ Floated, Hydro



# Public Trust Doctrine Rights

- ◆ Public Trust versus Title Navigability
- ◆ Public Trust Doctrine also applies to public waters



# Kotsina River

- ◆ In the case of braided streams and delta areas where there can be several stream channels or the channels frequently shift naturally, the stream bed is defined as lying between the outer OHWM of the most distant channels.





# Lemon Creek

- ◆ Tidelands held in trust for future state
- ◆ pre-statehood patents issued.
- ◆ Conflicts over gravel ownership



# Skagway

- ◆ Mining gravel in State navigable river bed
- ◆ Filling riverbed behind flood dykes
- ◆ Settlement agreement reached
- ◆ Perfecting conditions of settlement




# Sturgeon/Nation River

- ◆ Adjudicated
- ◆ Smallest
- ◆ Excellent History
- ◆ Reserved Water Rights Doctrine
- ◆ ANILCA did not include state lands





# Elements of Research

- ◆ Was it historically used or susceptible for Travel, Trade and Commerce?
  - ◆ What types of vessels were typically used at statehood?
  - ◆ Physical Characteristics
  - ◆ Is it in its natural and ordinary condition?
  - ◆ Locating and deposing witnesses
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# OHA Archeological Team

- ◆ Office of History Archeology is a key partner supporting our litigation with history and archeological research



# What Kind of Boat Before Statehood?

- ◆ Native Skin Boats
- ◆ Gulkana Type Guide Rafts
- ◆ Poling boats
- ◆ Freight canoes
- ◆ Tunnel Boats
- ◆ Outboard motors with mechanical lifts






# Historic Poling Boat



# What needs to change?

- ◆ Need BLM to articulate minimum standards of navigability criteria
  - ◆ Improve RDI process to increase output
  - ◆ Begin to make some of the navigability decisions based upon physical characteristics (susceptibility)
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# R.S. 2477

What is it , Why is it Important to  
Alaska, and Recent Developments

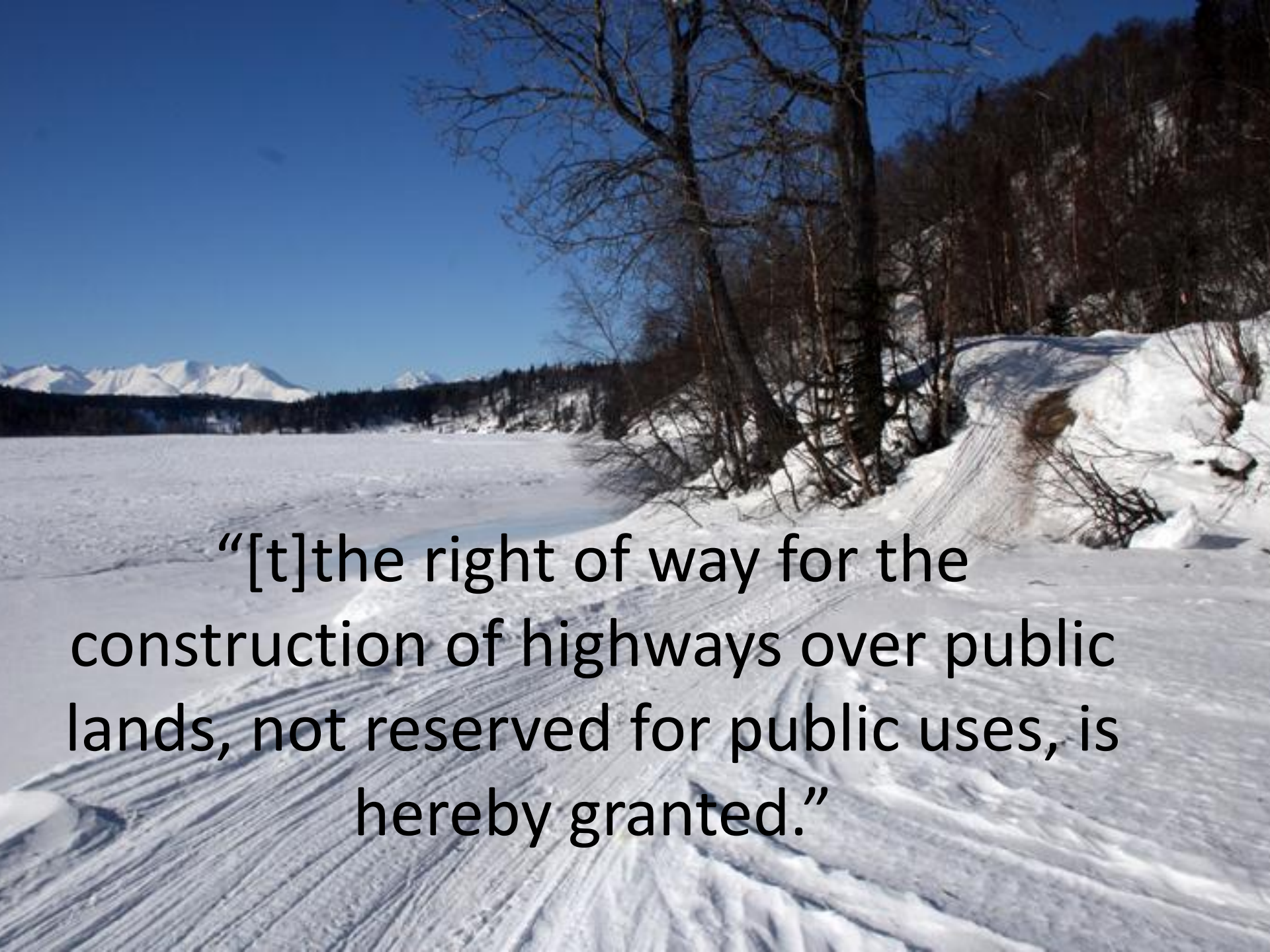


# What is an R.S. 2477?

- Derives from Section 8 of the 1866 Mining Law
- Self executing grant
- Perfected by use or acts of acceptance by public authorities





A winter scene featuring a wide, snow-covered field in the foreground with visible tracks. To the right, a line of bare, dark trees stands against a clear blue sky. In the background, a range of snow-capped mountains is visible under the bright sky.

“[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”



A photograph of a dirt road winding through a forest. The road is light-colored and curves to the right. The forest is dense with green trees and foliage. The sky is visible in the distance, showing a mix of blue and white clouds.

# Do they still exist?

- Federal Land Policy Management Act repealed R.S. 2477 in 1976; however valid existing rights were protected
- 1993 Secretary of Interior Bruce Babbitt affirms R.S. 2477s as valid existing rights
- Perfected from 1866 until 1969
- Exist on federal lands, and also on state and private lands acquired from federal government



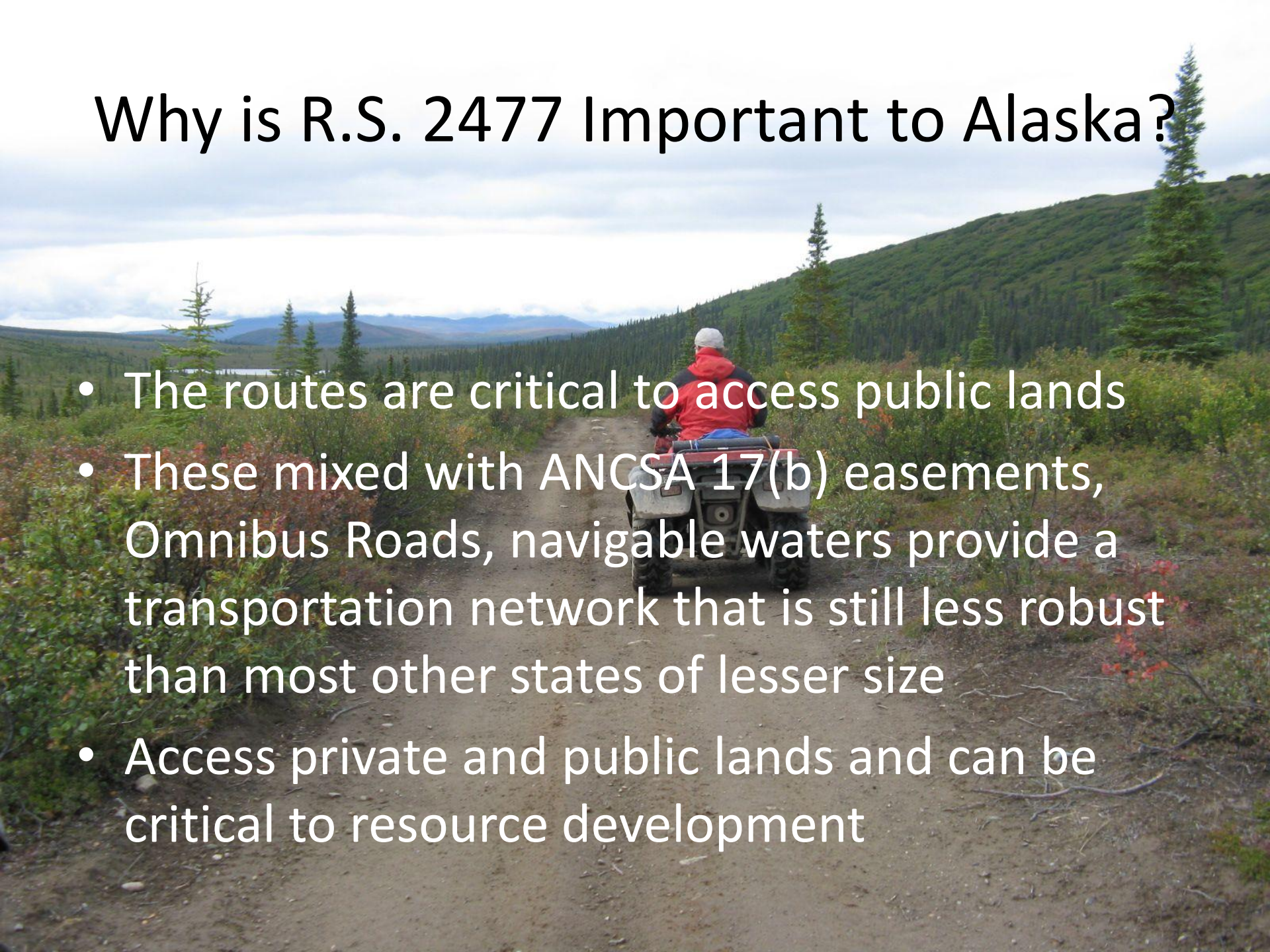
# Examples of Well Known R.S. 2477s

- Dalton Highway
- Farmers Loop Road in Fairbanks
- DeBarr Road in Anchorage
- Klutina Lake Road near Copper Center
- Iditarod Trail
- Chilkoot Trail



# Why is R.S. 2477 Important to Alaska?

- The routes are critical to access public lands
- These mixed with ANCSA 17(b) easements, Omnibus Roads, navigable waters provide a transportation network that is still less robust than most other states of lesser size
- Access private and public lands and can be critical to resource development

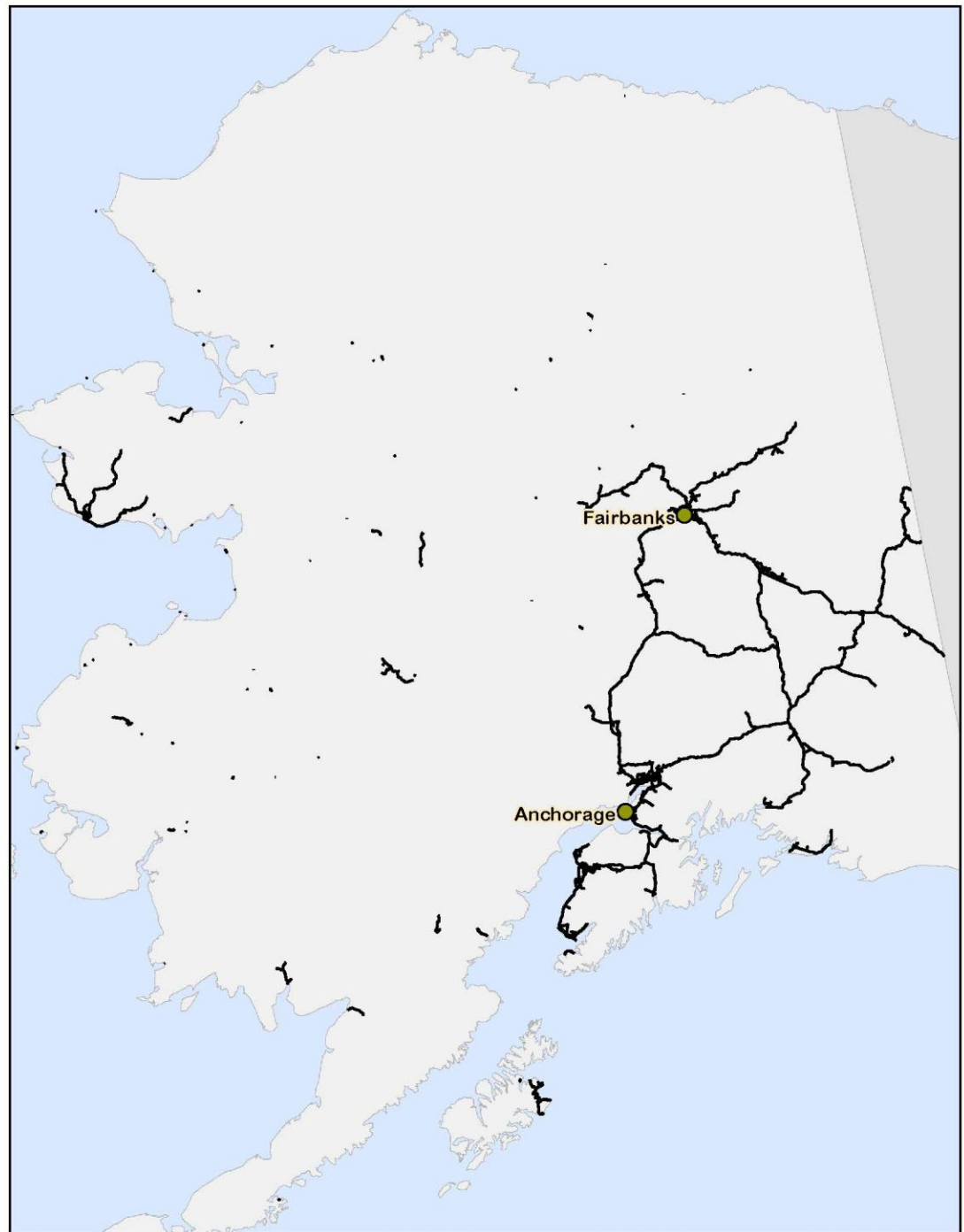


# 17(b) Access

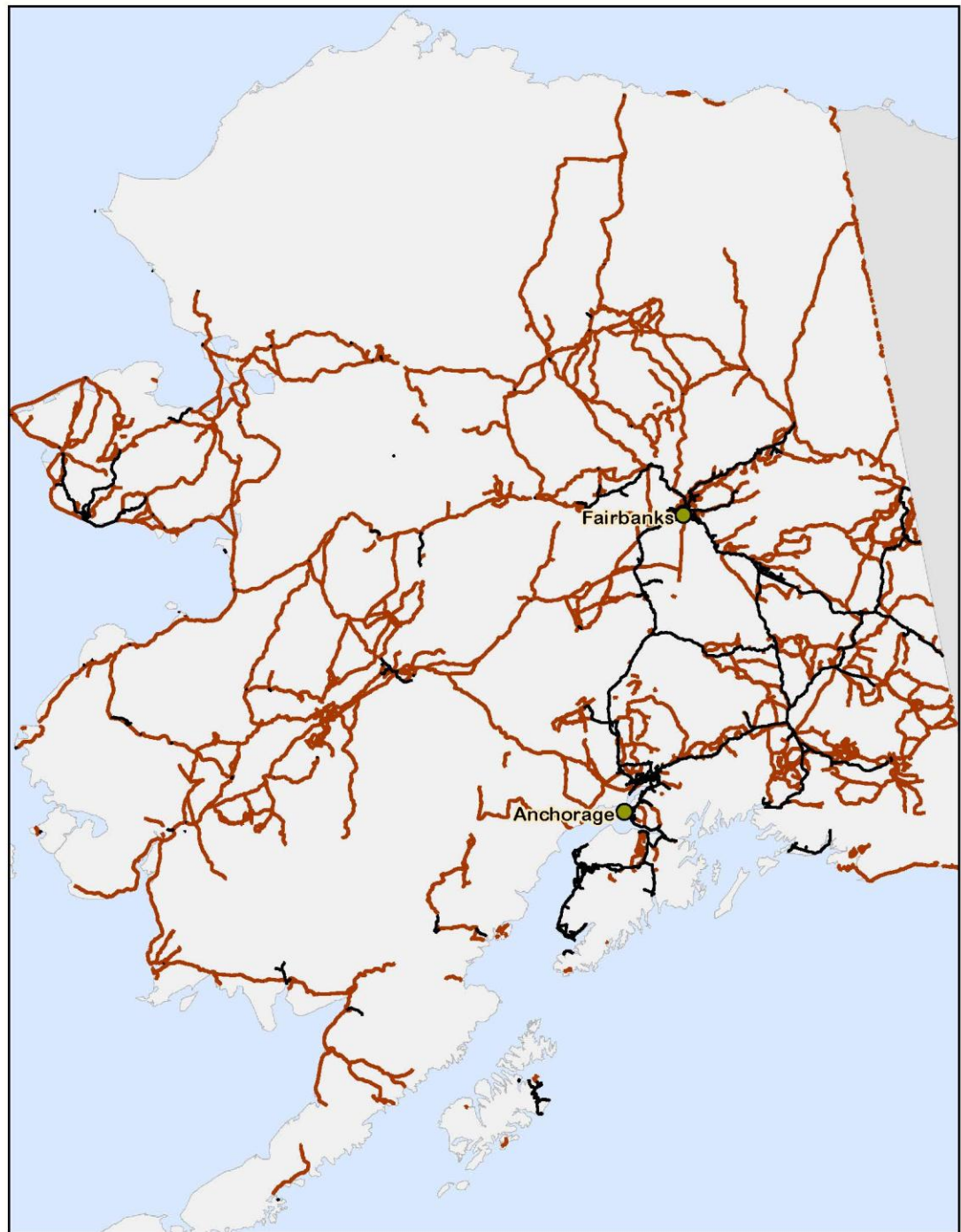
- State policy to assert 17(b) on top of existing R.S. 2477
- Managed by Federal Government
- Review ANCSA Native land title conveyances to assure public access to public lands and waters
- 17(b) are usually limited to ATV and smaller, thus not as useful as R.S. 2477
- 17(b) are not valid across Native Allotments



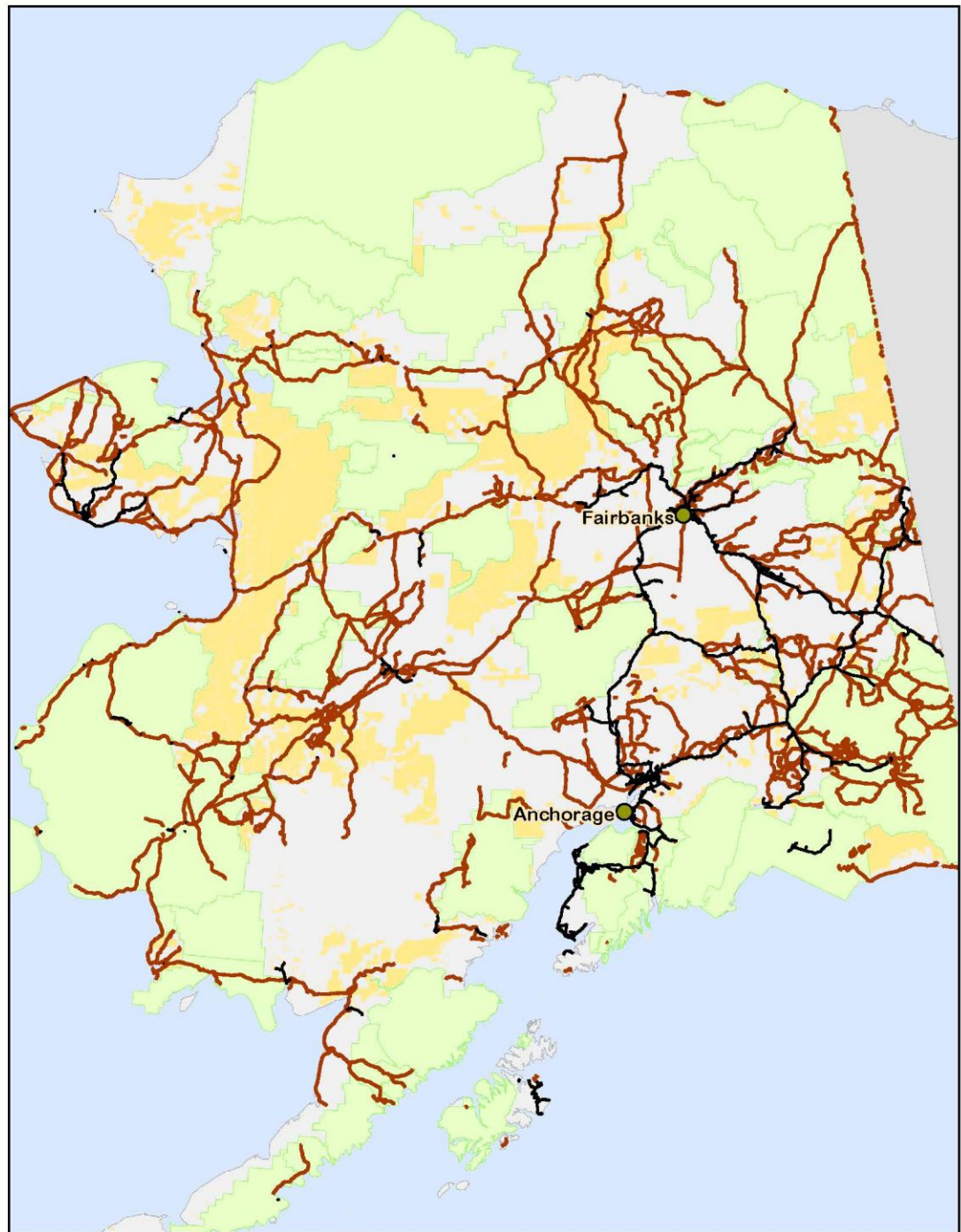
State  
Highway  
System  
without R.S.  
2477s



# State Highway System with R.S. 2477s



State  
Highway  
System with  
R.S. 2477s  
over federal  
areas





# Recent Alaskan Efforts

- Hired Assistant Attorney General dedicated to R.S. 2477 work
- Coordinated with State of Utah
- Developed diversified strategy for further R.S. 2477 assertion
- Significant field work and historical analysis of routes across Alaska, very fact specific
- Careful selection of initial litigation

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# Recent Legal Developments

- Obtained judgment in State Superior Court against private land owner blocking R.S. 2477
- Defending public use of historic Iditarod Trail across private land (State Superior Court)
- Defending validity and public use of Klutina Lake Road across native corporation and other private land
- Asserted six R.S 2477s in the Fortymile Region near Chicken, Alaska (Federal District Court)

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# Fortymile Litigation

- Approximately 65 miles of roads and trails
- Filed against Federal Government and private land owners
- Provides access for miners, hunters, trappers, recreationalists and subsistence users
- Includes portions in Wild and Scenic River Corridors

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# Why this area chosen?

- BLM failed to recognize State's interest
- BLM imposed significant management restrictions on use of rights-of-way
- High current use and significant public interest, with good witnesses
- Recent proposed Eastern Interior Draft Resource Management Plan sought to eliminate some motorized use of these State owned rights-of-way

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# The Long Road Ahead

- R.S. 2477s do not provide all access needed but is a key element to preserve access
- Need to get the Federal Government to recognize these valid existing rights without court decisions and not fight their existence and use on multiple fronts
- Must be willing to address all parties crossed by R.S. 2477s, not just the federal government
- Litigation is not the preferred action
- Increasing efforts to work with land owners to resolve issues in a constructive way

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