

# **R.S. 2477**

## **What it is, Why it is Important to Alaska, & Recent Developments**



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## **What is R.S. 2477?**

RS 2477 derives from Section 8 of the Mining Law of 1866. This law was later re-designated as Section 2477 of Revised Statutes of 1878, a/k/a R.S. 2477. The statute simply provided:

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

The grant is self-executing. It arises automatically when a public highway is established across public lands in accordance with the laws of the state in which it is located. Historically, the term “highway” included foot trails, pack trails, sled dog trails, crudely constructed wagon roads and other corridors of transportation. AS 19.45.001(9) defines highways as including roads, streets, trails, walks, bridges, tunnels, drainage structures and other similar or related structures or facilities.

In Alaska, these rights-of-way were perfected by simple use or acts of acceptance by public authorities. The Federal Land Policy Management Act (“FLPMA”) repealed R.S. 2477 in 1976; however, valid existing rights were protected. R.S. 2477s were established in Alaska through use or development until virtually all federal land in Alaska was withdrawn in 1969. R.S. 2477 includes historic routes which exist not only on federal lands (including present day Bureau of Land Management (“BLM”), Park Service and Forest Service lands), but also on former federal lands which are now held by the State or owned by private parties. The Alaska legislature has recognized over 600 of these rights-of-way in statute.

While R.S. 2477 was originally enacted to further development, particularly in the west, after the passage of FLPMA federal land managers became increasingly focused on conservation. Federal land managers appear to have difficulty reconciling current land management strategy emphasizing conservation with the fact that rights established under R.S. 2477 continue to exist. In many cases, federal land managers refuse to recognize these State-owned rights-of-way until specifically instructed to do so by a court.

Examples of well-known R.S. 2477 routes in Alaska include:

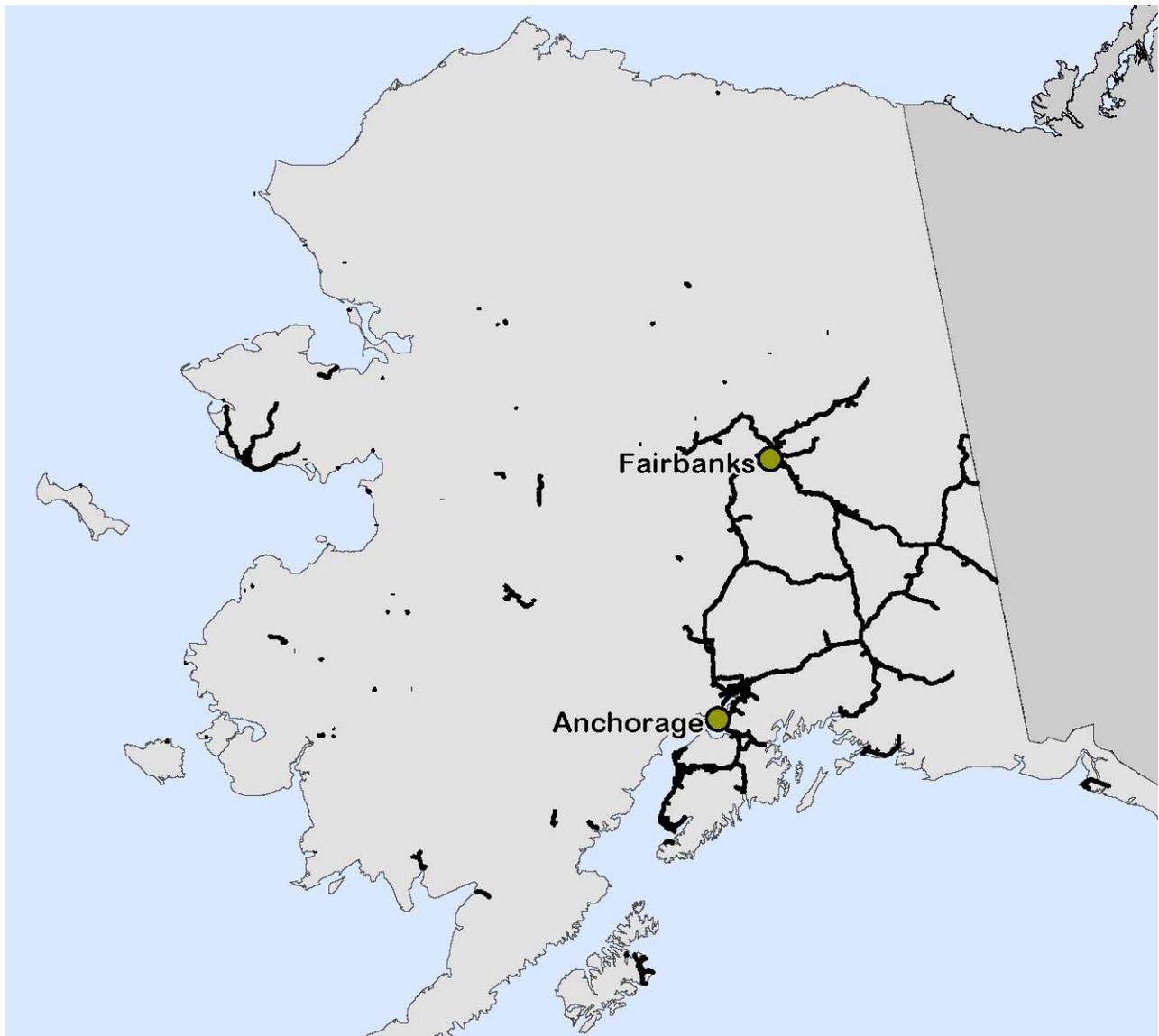
- the Dalton Highway
- Famers Loop Road in Fairbanks
- DeBarr Road in Anchorage
- the Klutina Lake Road near Copper Center
- the Iditarod Trail, and
- the Chilkoot Trail

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

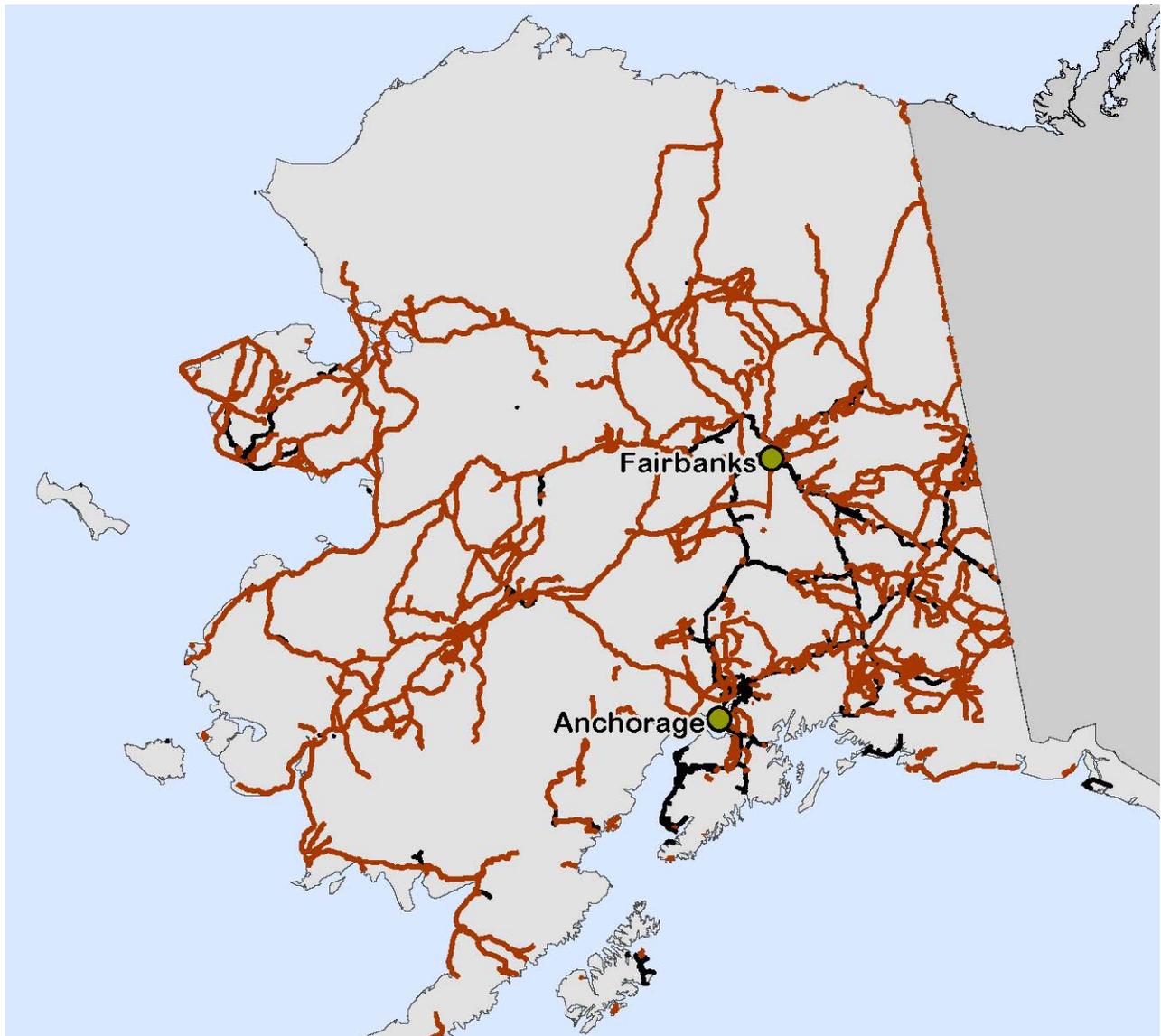
Alaska, the largest state in the country, actually has fewer public roads than Connecticut, the third smallest state in the country.

- Alaska – 16,302 miles
- Connecticut – 21,020 miles

Below is an image depicting the Alaska Highway System, within much of the State, without taking into consideration R.S. 2477 rights-of-way:



Below is the same image taking into account presently known R.S. 2477 routes:



R.S. 2477 rights-of-way are critical to:

- preserve public access to lands and resources
- enable the State to reasonably manage, maintain and develop the lands, resources and opportunities it owns and holds for the public
- maintain State sovereignty and preserve State's rights

## Recent Developments

The Alaska Department of Natural Resources (“DNR”) and the Department of Law (“Law”) have worked for many years to document and secure title to the state’s R.S. 2477 rights-of-way. DNR’s case files vary in quantity and type of information used to support the R.S. 2477s. In some instances, further historic research and field work would be helpful concerning certain routes. In 2011, the legislature authorized a \$599,000 increment to DNR for fiscal year 2012 to clear clouds to state title and resolve long festering access issues. In furtherance of prosecuting a R.S. 2477 strategy within the State, DNR and Law have:

- **Hired an Assistant Attorney General Dedicated to R.S. 2477 Work:** In December 2011, Law hired an attorney dedicated to R.S. 2477 issues. That attorney has assisted in further developing and implementing an R.S. 2477 prosecution strategy with DNR.
- **Conducted Peer-to-Peer Meetings with Utah Representatives:** In September 2011, representatives from the State of Utah travelled to Alaska to meet with representatives from Law and DNR regarding the states’ mutual interests in prosecuting R.S. 2477 claims. In December of that same year, representatives from DNR and Law travelled to Utah to conduct an in depth review of Utah’s approximately 15 year history prosecuting and litigating R.S. 2477 claims. The Alaskans met with numerous representatives from the Utah attorney general’s office and county officials and viewed many of the most contentious of Utah’s R.S. 2477 routes. During this time Utah and the counties filed notices of intent to sue on over 18,000 separate R.S. 2477 rights-of-way. The Alaskans also noted the unique differences and challenges facing each state.
- **Performed Significant Field Work and Historical Analysis of R.S. 2477 Routes and Claims Across the State:** Since May of 2011, DNR’s Public Access Assertion and Defense Unit and the Office of History and Archeology have conducted field work, including: 1) trail investigations, which document the location and condition of routes using GPS, photography, and staff observations; and 2) reconnaissance level archeological surveys, conducted by professional historians and archeologists, which document historic physical evidence associated with a route.
- **Developed a Specific Strategy for Moving Forward with Regard to R.S. 2477, Including:**
  - **Careful selection of initial claims to prosecute.** Due to the very fact-intensive nature of R.S. 2477 claims and the relative lack of legal precedent, it is crucial to carefully pick strong R.S. 2477 claims to

initially prosecute. It is critically important to establish a successful approach with federal agencies, Native corporations and private stakeholders as well as legal precedent. This will save considerable time, effort, and expense in asserting future R.S. 2477 claims. Failure on the initial claims prosecuted could have a far-reaching and very detrimental effect on the entire R.S. 2477 program.

- **Multi-Faceted approach to resolution of claims.** Each R.S. 2477 claim has unique facts and circumstances. What works best for one will not necessarily work best for all. Long-term success may be best achieved through a variety of different means. Rather than looking solely at litigation to resolve these claims, it is in the state's best interest to simultaneously pursue resolution of R.S. 2477 claims through a variety of different means, including:
  - + applications for permanent or long-term rights-of-way via FLPMA;
  - + seeking recordable disclaimers of interest regarding the federal government's interest in the right-of-way at issue;
  - + pursuing right-of-way confirmation via the federal land management plan process; and
  - + initiating federal and state court quiet title actions.
  
- **Systematic Revamping and Supplementing of R.S. 2477 Claim Files and Needed Documentation in Order to Aid in Assessment and Prosecution.** Currently, many of DNR's R.S. 2477 case files lack information needed to properly evaluate the merits of each case and potentially litigate them. In many cases, the missing information includes, among other things, detailed witness contact information and accounts of both present and historical use, together with aerial photography documentation. Files also need to be digitized using a Geographic Information System in order to aid in data overlay and efficient analysis.
  
- **Preservation of Key Witness Testimony.** First hand witness testimony is critical to prevail in R.S. 2477 disputes. R.S. 2477 was largely unavailable for creating rights-of-way in Alaska after the issuance of Public Land Order 4582 in 1969. As a result, a witness to right-of-way use who was 10 years old in 1969 is now approximately 54. Further, many of the state's R.S. 2477 rights-of-way have histories long preceding 1969. Unless Alaska immediately seeks to identify and

preserve key witness testimony, such testimony will be forever lost. This will make prosecution of R.S. 2477 claims more difficult than they already are. Petitioning for and conducting pre-litigation depositions will help to preserve such testimony.

### **Recent Legal Developments**

#### ***State v. Lonewolf, (State Superior Court)***



- Private landowner blocked R.S. 2477 right-of-way near Chickaloon
- Blocked the right-of-way with vehicles and also by felling trees across the roadway
- Hundreds of nails were also placed in the roadway
- The State succeeded in getting a temporary restraining order and preliminary injunction preventing the landowner's continued interference with the roadway
- The court ultimately recognized the roadway across the owner's property as a valid R.S. 2477 right-of-way and entered judgment against the landowner in March of this year.

*Dickson v. State*, (State Superior Court)



- Private landowners sued the State seeking to prevent use of a portion of the historic Iditarod Trail near Knik
- The case continues to be actively litigated

***Ahtna, Inc. v. State, (State Superior Court)***



- Ahtna sued the State claiming that the Klutina Lake Road near Copper Center is not a valid R.S. 2477 right-of-way
- Klutina Lake Road is a portion of the historic Valdez to Copper Center Trail, one of Alaska's most historically rich R.S. 2477 rights-of-way
- This case continues to be actively litigated

*State v. United States, et al.*, (Federal District Court)



- A significant number of R.S. 2477 rights-of-way exist in the historic mining area of the Fortymile Region near Chicken, Alaska
- Many of these rights-of-way were created not long after gold was first discovered in the area in 1874
- The six rights-of-way asserted by the State in this case total approximately 65 miles of roads and trails, and cover a geographic area of approximately 400 square miles
- They have long and rich histories, dating back more than one hundred years
- At least two of the six rights-of-way were part of the original Valdez to Eagle, All-American route
- All of the rights-of-way continue to serve as important access for miners, hunters, trappers, recreationalists and subsistence users
- Despite an obligation to manage federal lands subject to the State's valid existing rights, including in areas such as Wild and Scenic River Corridors, the federal government has not been doing so in many instances

- BLM has failed to recognize the State's interest in any of the rights-of-way asserted in the complaint
- BLM has also imposed significant management restrictions on use of the rights-of-way including:
  - the need to obtain and pay thousands of dollars for environmental assessments and permits before using the State-owned rights-of-way
  - the need to obtain and post bonds prior to using the State-owned trails
  - erecting a gate preventing use by the public
  - notifying the BLM at least five business days before using the trail and requiring a BLM employee to accompany the user on the first spring and summer moves along the right-of-way
  - limiting travel to only a few trips per year
- In its recently proposed Eastern Interior Draft Resource Management Plan and Environmental Assessment, BLM has also sought to further limit and, in some cases, eliminate the public's motorized use of these State-owned rights-of-way
- In addition to the federal government, numerous private property owners are also named in the case
- While the federal government owned the property at the time these rights-of-way were created, private parties now possess interests in the some of the lands including state and federal mining claims and Native allotments
- Due to the fact that the case is a quiet title action, the State has sought to name as defendants all persons and entities whose property interests might be affected by a court determination involving the rights-of-way
- This includes many of the miners in the area whose claims are crossed by the rights-of-way
- Despite technically being named as defendants, the vast majority of the defendants who have been named are supportive of the State's actions in seeking to preserve their access rights
- Governor Parnell has said that "[T]his case is an important step in countering federal overreach with regard to State-owned property interests and in protecting the livelihoods of our residents"
- All defendants in the case have now been served and the United States recently filed its answer