

THE ROAD GOES EVER ON AND ON: A PATH THROUGH THE WILDERNESS OF R.S. 2477 LITIGATION IN ALASKA

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ABSTRACT

Seeking to encourage people to settle the public domain, the federal government established the R.S. 2477 right of way, a grant to construct highways over land in the public domain. There are now thousands of miles of highway across the Western United States constructed pursuant to the authority in R.S. 2477, but most of these rights of way were never documented by any formal process. Alaska has made it a priority to document existing R.S. 2477 rights of way in an effort to manage and develop public lands. Identifying existing R.S. 2477 rights of way is essential for economic development, but the State's aggressive litigation strategy threatens the rights of private property owners, the integrity of land allotments under the Alaska Native Claims Act, and federal conservation efforts in Alaska. After examining the history of R.S. 2477, Alaska's litigation strategy, and how these rights of way conflict with interests of Native Corporations and federal wilderness and conservation efforts, this Note offers possibilities for resolving the conflict over R.S. 2477 rights of way in Alaska.

I. INTRODUCTION: DOGSLEDS, DIPHTHERIA, AND THE DEPARTMENT OF NATURAL RESOURCES

Located two degrees below the Arctic Circle, the former goldrush boomtown of Nome was isolated.¹ During winters when the Bering Sea froze over, the only path across the frozen landscape was the Iditarod trail, a dogsled trail of roughly 1,000 miles winding over the mountains to the sea at Seward.² In January 1925, after a series of mysterious deaths

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1. GAY SALISBURY & LANEY SALISBURY, *THE CRUELEST MILES* 4–5 (2005).

2. *See id.* at 3 (“By early November, the Bering Sea would be frozen over until the following spring. . . . leaving the town cut off from the world save for one route: a dogsled trail that linked the town through the Interior of Alaska to

among young children, the only doctor in the city diagnosed a three-year old boy with diphtheria.³ Although he previously requested a new shipment of diphtheria antitoxin, it never arrived.⁴ Without the antitoxin, the population in the surrounding area faced an imminent risk of epidemic and a possible mortality rate of 100 percent.⁵

The doctor sent urgent telegraphs across Alaska seeking assistance.⁶ After hearing of the need, an Anchorage surgeon discovered some 300,000 vials of the antitoxin.⁷ The board of health rapidly organized a dogsled relay to transport the serum across the state.⁸ Despite whiteout conditions and temperatures reaching sixty degrees below Fahrenheit, more than twenty mushers and 150 dogs traveled 674 miles in five and a half days to deliver the serum and save the city of Nome.⁹

The “Great Race of Mercy” has been celebrated in popular culture¹⁰ and commemorated in the Iditarod Trail Sled Dog Race.¹¹ The Iditarod is an annual dogsled race retracing the roughly 1,100 miles from Anchorage to Nome.¹² The race attracts between 50-100 participants from all over the world.¹³ The increasing popularity of the Iditarod and the historic significance of the trail led to the dedication of portions of the Seward-to-

the ice-free ports in the southeast.”).

3. *Id.* at 35–39.

4. Jennifer Houdek, *The Serum Run of 1925*, LITSITE ALASKA, (Sept. 24, 2019, 12:03 PM), http://www.litsitealaska.org/documents_litsite/SERUM%20RUN%20of%201925.pdf.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *See, e.g.*, BALTO (Universal Pictures 1995). It should be noted that although Balto received extensive media attention and a statue in Central Park, many mushers considered Leonhard Seppala and his lead dog, Togo, to be the true heroes of the run. SALISBURY & SALISBURY, *supra* note 1, at 246–48. He and Togo traveled farther than other teams on the relay and on the most dangerous route. *Id.* Seppala stated in his memoir “it was almost more than I could bear when the ‘newspaper’ dog Balto received a statue for his ‘glorious achievements.’” *Id.*

11. Affidavit of Bryan Taylor at *41, *Dickson v. State*, No. 3AN-12-07260 CI, 2016 WL 5625397 (Alaska Super. June 14, 2016). The first Iditarod Trail race was organized by Dorothy Page in 1967 as part of Alaska’s centennial celebration. *Id.* at *40.

anniversary of the purchase of Alaska by the United States. *Id.* The race was a way to honor the Alaskan tradition of dogsled racing, as snowmobiles increasingly replaced teams of dogsleds as a primary form of transportation. *Id.* The annual Iditarod Trail Sled Dog Race in its current form began in 1973. *Id.* at *43.

12. Susan H. Butcher, *Iditarod Trail Sled Dog Race*, BRITANNICA.COM, <https://www.britannica.com/sports/Iditarod-Trail-Sled-Dog-Race>.

13. *Id.*

Nome trail system as the Iditarod National Historic Trail.¹⁴

The State of Alaska has made it a priority to preserve public access to historic trails, such as the Iditarod.¹⁵ In a recent case, the State successfully defended an attempt to restrict access to a portion of the Historic Iditarod Trail.¹⁶ The dispute began in 1983, after the State sent Benjamin Cowart a letter informing him that the Historic Iditarod Trail crossed his property.¹⁷ Cowart responded by placing a metal post reading “NO TRESPASSING” in the middle of the pathway.¹⁸

The case eventually went to trial in 2016.¹⁹ After a 27-day bench trial, the superior court found that the Historic Iditarod Trail crossed the property on a R.S. 2477 right of way.²⁰ A right of way gives people the right to travel on a route, regardless of who owns the underlying land.²¹ A R.S. 2477 right of way is a grant from the federal government, which gave people the right to construct highways over land in the public domain.²² The grant was intended to encourage people to settle the public domain, and it was largely successful.²³ Across the Western United States, thousands of miles of highways were constructed across the public domain pursuant to the authority in R.S. 2477.²⁴ However, most of these rights of way were never documented by any formal process.²⁵ Now that most of the public domain has been settled, state governments have started trying to document the existence of R.S. 2477 rights of way to ensure that the public has access to the roads and trails that were

14. National Parks and Recreation Act of 1978, Pub. L. No. 95–625, § 551, 92 Stat. 3467, 3512-13 (codified at 16 U.S.C. § 1244(a)(7) (2012)). This was one of the first four national historic trails created. Affidavit of Bryan Taylor at *45–46, *Dickson v. State*, No. 3AN-12-07260 CI, 2016 WL 5625397 (Alaska Super. June 14, 2016).

15. See *infra* Section III(A).

16. *Dickson v. State*, No. 3AN-12-07260 CI, 2016 WL 5625397, at *31 (Alaska Super. June 14, 2016).

17. *Dickson v. State*, 433 P.3d 1075, 1079 (Alaska 2018).

18. *Id.*

19. See Jerzy Shedlock, *Mat-Su landowners battle state over access to historic Iditarod Trail*, ANCHORAGE DAILY NEWS (Sept. 28, 2016), <https://www.adn.com/mat-su/article/mat-su-homestead-owners-battle-state-over-public-access-itarod-trail/2016/01/14/>.

20. *Dickson v. State*, No. 3AN-12-07260 CI, 2016 WL 5625397, at *31 (Alaska Super. June 14, 2016).

21. See *Right of Way*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/right-of-way>.

22. Lode Mining Act of July 26, 1866, Ch. 262, § 8, 14 Stat. 251, 253 (codified as 43 U.S.C. § 932 (1925), Revised Statute 2477) (thus abbreviated as “R.S. 2477”), repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94579, § 706(a), 90 Stat. 2743, 2787 (1976).

23. U.S. DEP’T OF THE INTERIOR, REPORT TO CONG. ON R.S. 2477, 1 (1993).

24. 43 U.S.C. § 932 (repealed 1976).

25. *Id.*

constructed on these rights of ways.²⁶

The State of Alaska has made it a priority to document existing R.S. 2477 rights of way, so it can “reasonably manage, maintain and develop the lands, resources and opportunities it owns and holds for the public.”²⁷ Although Alaska is the largest state in the country, it has fewer public roads than Connecticut.²⁸ To develop more roads or provide public access to land that can only be reached by remote trails, the State needs to clarify that the right of way given in R.S. 2477 actually exists.²⁹ The R.S. 2477 routes provide a transportation network between rural communities and “create significant entrepreneurial, recreational, and tourism opportunities.”³⁰ In 1998, after years of researching R.S. 2477 rights of ways, Alaska passed a statute documenting the existence of hundreds of potential R.S. 2477 rights of way.³¹

Many of these potential rights of way, however, provide public access to a path that crosses privately owned land.³² One citizen expressed concern that asserting title to these rights of way could have a “profound effect on adjacent land holders . . . [including] many native corporations and other private land owners who look to the integrity of their lands for the protection of important subsistence habitat as well as economic development consistent with local goals.”³³ These concerns continue to remain true twenty years later. Ultimately, any vision of Alaska’s future development must take into account the complex history and preexisting claims to land.

Identifying existing R.S. 2477 rights of way is essential for economic development, but the State’s aggressive litigation strategy threatens the rights of private property owners, the integrity of land allotments under

26. See Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 525 (2005) (“Since its repeal, however, R.S. 2477 has become a flashpoint in the ongoing battle for control over western public lands and the resources they harbor.”).

27. KENT SULLIVAN, R.S. 2477 WHAT IT IS, WHY IT IS IMPORTANT TO ALASKA, & RECENT DEVELOPMENTS 4 (2013).

28. *Id.* at 3.

29. Birdsong, *supra* note 26, at 533.

30. H.R.J. Res. 60, 19th Leg., 2d Sess. (Alaska 1996).

31. ALASKA STAT. ANN. § 19.30.400 (West 2018) (“The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. . . . The rights of way listed in (d) of this section have been accepted by public users and way.”).

32. See, e.g., *Hearing on S. B. 180 Before S. Res. Comm.*, 1998 Leg., 20th Sess., (Alaska 1998) (statement of Kristin Shelton) (“A great many assertions would have a profound effect on adjacent land holders.”).

33. *Id.*

the Alaska Native Claims Act, and federal conservation efforts in Alaska. Part II will trace the history of R.S. 2477 from its origin as a tool for developing the Western United States to a main focus of the controversy over land control. Part III will focus on R.S. 2477 litigation in Alaska by detailing the State's litigation strategy and demonstrating how these cases work in practice. Part IV will examine how these rights of way conflict with the interests of Native Corporations and federal wilderness and conservation efforts. Part V will examine possibilities for resolving the conflict over R.S. 2477 rights of way in Alaska in a way that balances private ownership interests with the need for continued economic development in Alaska.

II. HOW THE WEST WAS PAVED: 19TH-CENTURY MINING LAW MEETS 21ST-CENTURY DEVELOPMENT

After the Civil War, the federal government encouraged settlement of the Western United States by granting rights of way for various purposes, most commonly for railroad construction.³⁴ In 1866, Congress passed the Lode Mining Act, which authorized various rights of ways and mining rights.³⁵ Section 8 provided a simple grant for highway construction: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."³⁶

This simple grant has been understood as an offer "to legitimize existent miners' and homesteaders' access routes that had developed across the public domain during the expansion of the western frontier."³⁷ The grant also encouraged the further construction of roads to reach undeveloped natural resources in the west.³⁸ One federal judge described the statute as a necessary corollary to the grant of mineral or homesteading rights:

One need but to raise their eyes, when traveling through the West to see . . . where some prospector has found a stake or broke his heart or a homesteader has found the valley of his dreams and laboriously and sometimes at very great expense built a

34. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216-01 (proposed Aug. 1, 1994).

35. Lode Mining Act of July 26, 1866, Ch. 262, § 8, 14 Stat. 251, 253 (codified as 43 U.S.C. § 932 (1925), R.S. 2477), repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94579, § 706(a), 90 Stat. 2743, 2787 (1976).

36. *Id.*

37. Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 PACE ENVTL. L. REV. 485, 487 (1994).

38. *Id.*

road to conform to the terrain.³⁹

If the right of access to the natural resources was not protected and could be revoked at will by the federal government, the mining claim and investment would be “a delusion and a cruel and empty vision.”⁴⁰

Public lands are “lands that are open to settlement or other disposition” under United States land laws.⁴¹ The grant in R.S. 2477 excludes any land subject to a valid claim or right of another.⁴² Thus, a R.S. 2477 right of way could only be created on purely public lands.⁴³ Once someone claimed the land as private property, a public right of access under R.S. 2477 could not be created across the land.⁴⁴ The rights of way grants also do not apply to public lands reserved for public uses, such as a National Park, National Forest, or Wilderness refuge.⁴⁵

Creating a R.S. 2477 right of way required “no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.”⁴⁶ The R.S. 2477 right of way came into “existence automatically if a public highway was established across public land in accordance with” state law.⁴⁷ Because what constitutes a highway can vary in different states, there must be something more to signify that a R.S. 2477 right of way has been created for it to have legal significance.⁴⁸ There must either be an explicit act by state authorities or public use for enough duration to prove that the right of way has been created.⁴⁹

The extent of public use necessary to prove the existence of a R.S. 2477 right of way “depends upon the character of the land and the nature of the use.”⁵⁰ In making this determination, courts consider evidence of

39. *United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty.*, 220 F. Supp. 328, 331 (D. Nev. 1963).

40. *Id.*

41. *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961).

42. *Id.*

43. *Id.* (“The term ‘public lands’ means lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler.”).

44. *Id.*

45. Leroy K. Latta, Jr., *Public Access over Alaska Public Lands As Granted by Section 8 of the Lode Mining Act of 1866*, 28 SANTA CLARA L. REV. 811, 829-30 (1988) (footnotes omitted).

46. *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005), *as amended on denial of reh’g* (Jan. 6, 2006).

47. *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996).

48. *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961).

49. *Id.*

50. *Fitzgerald*, 918 P.2d at 1020.

use and evidence of the route's definite character.⁵¹ A party must "demonstrat[e] actual, substantial, and interested public use or evidence of the definiteness of the route."⁵² The route must be more than "a dead end road or trail, running into wild, unenclosed and uncultivated country."⁵³ It must connect definite endpoints.⁵⁴ The party asserting the right of way has the burden of proving its case by clear and convincing evidence.⁵⁵ If the right of way exists, "it may be used for any purpose consistent with public travel."⁵⁶

Thousands of miles of highways across the Western United States were constructed pursuant to the grant authorized by R.S. 2477.⁵⁷ The R.S. 2477 rights of way did not become controversial until almost a century later.⁵⁸ In the 1970s, the focus of federal land management policy shifted from development to conservation with the passage of the Federal Land Policy and Management Act of 1976 (FLPMA).⁵⁹ The FLPMA repealed R.S. 2477, but it expressly preserved rights of way that existed at that date.⁶⁰

Because establishing R.S. 2477 rights of ways did not require approval by the federal government or documentation of land records, there are few official records of them.⁶¹ Furthermore, parties rarely had incentives to challenge these rights of ways prior to the 1976 repeal of R.S. 2477, except in disputes between private landowners and would-be road users seeking to cross land under the guise of an R.S. 2477 right-of-way.⁶² The Department of the Interior proposed regulations to create a formal process to claim R.S. 2477 rights of ways, but the efforts were ultimately

51. Price v. Eastham, 75 P.3d 1051, 1056 (Alaska 2003).

52. Mitchell R. Olson, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 ENVTL. L. REV. 289, 302 (1997).

53. *Hamerly*, 359 P.2d at 125.

54. Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 414 (Alaska 1985) ("This is not the sort of 'dead end road or trail, running into wild, unenclosed and uncultivated country' that we held insufficient for the purposes of § 932 in *Hamerly*. Rather, the road connects two essential transportation

55. Dickson v. State, 433 P.3d 1075, 1083 (Alaska 2018).

56. *Dillingham*, 705 P.2d at 415.

57. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216-01 (proposed Aug. 1, 1994).

58. Birdsong, *supra* note 26, at 527.

59. See Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216-01 (proposed Aug. 1, 1994) ("With the passage of FLPMA, Congress determined that lands managed by the Bureau of Land Management should be retained in public ownership and managed according to the principles of multiple use and sustained yield, while preventing unnecessary or undue degradation of the lands.").

60. *Id.*

61. U.S. DEP'T OF THE INTERIOR, REPORT TO CONGRESS ON R.S. 2477, 1 (1993).

62. S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005), *as amended on denial of reh'g* (Jan. 6, 2006).

blocked by Congress.⁶³ Consequently, there are no complete federal records of how many of these potential R.S. 2477 rights of way exist.⁶⁴ Although the exact number is unknown, there could be thousands of claims for these rights of ways.⁶⁵ This uncertainty interferes with federal land management initiatives⁶⁶ and impedes the ability of state and local governments to plan for economic development.⁶⁷

Resolving whether these R.S. 2477 rights of way exist has become a major issue in Western states.⁶⁸ The R.S. 2477 litigation is part of a broader trend of backlash against federal land policy that emphasizes conservation.⁶⁹ State governments view R.S. 2477 as a guarantee of access across and to federal lands that allow them to maintain road infrastructure and provide for economic development.⁷⁰ After federal land policy shifted from development to conservation in the 1970s, state governments increasingly sought to gain ownership of federal lands.⁷¹ In the 1970s, Nevada led the Sagebrush Rebellion, during which many states

63. Michael S. Freeman & Lusanna J. Ro, *RS 2477: The Battle over Rights of way on Federal Land*, 32 COLO. LAW. 105, 106 (2003).

64. Birdsong, *supra* note 26, at 531.

65. *Id.* See *infra* Part IV for more detail on how R.S. 2477 rights of way impact federal land management initiatives.

66. See Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216-01 (proposed Aug. 1, 1994) (“The ability of Federal agencies to meet their statutory obligations is compromised if claims are not identified with finality. For example, land use planning to provide for orderly and responsible decisionmaking [sic] on Federal lands is adversely affected if previously unnoticed or unused R.S. 2477 rights of way can be claimed for an indefinite period.”).

67. Birdsong, *supra* note 26, at 532–33. See also Bader, *supra* note 37, at 487–88 (“The problem today for federal lands managers and state planners is the uncertainty regarding which rights of way were accepted prior to the repeal of R.S. 2477 and what limits were placed on those accepted. R.S. 2477 contained no clear mechanism for notifying the federal government of right of way acceptance.”); Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216-01 (proposed Aug. 1, 1994) (“This uncertainty can cloud the title of Federal, State, local, private, and Indian or Alaska Native lands with possible unrecorded restrictions and interfere with the ability of property owners and land managers to manage or plan for uses of the land. The uncertainty also leaves claimants with undefined and unrecorded rights and the potential for confusion in trying to use or enforce those rights.”).

68. See Birdsong, *supra* note 26, at 524 (“Since its repeal, however, R.S. 2477 has become a flashpoint in the ongoing battle for control over western public lands and the resources they harbor.”).

69. See *id.* at 529–30 (“In short, FLPMA gave R.S. 2477 claimants an impetus property rights, they might limit federal regulatory measures that would

70. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216-01 (proposed Aug. 1, 1994).

71. Lucas Satterlee, Note, *Pristine Solitude or Equal Footing? San Juan County v. United States and Utah’s Larger Bid to Assert Control over Public Lands in the Western United States*, 92 DENV. U. L. REV. 641, 647 (2015).

passed bills seeking the return of federally managed public lands.⁷² In the 1990s, many counties sought to regain control of land through the County Supremacist movement.⁷³

State control over lands and assertion of R.S. 2477 claims has also threatened the interests of private property owners and impedes federal conservation efforts.⁷⁴ Environmental groups view it as a weapon to destroy existing and potential wilderness areas because such preserves must be roadless.⁷⁵ Private landowners fear that it will “undermine their private property rights by allowing strangers to drive vehicles across their ranches and homesteads.”⁷⁶ These fears have driven litigants “to the historical archives for documentation of matters no one had reason to document at the time.”⁷⁷ This race to the archives is further complicated because the R.S. 2477 statute had no formal process to allow people “claiming R.S. 2477 rights of way [to] solicit binding determinations from the Interior Department as to their existence and validity.”⁷⁸ Thus, the question of whether these rights of way exist has largely been left to private litigation.⁷⁹

III. CHARTING A PATH TO THE FUTURE: R.S. 2477 RIGHTS OF WAY IN ALASKA

The R.S. 2477 litigation in Alaska is uniquely tied to the State’s history and land development.⁸⁰ Because of the vast amount of undeveloped public lands in Alaska and the lack of an extensive highway system, identifying existing R.S. 2477 rights of way is a priority for the Alaska government.⁸¹ Yet, establishing the existence of one of these rights of way through private litigation is a complicated, fact-intensive exercise.⁸² This Section describes how the unique history and

72. *Id.*

73. *Id.*

74. Birdsong, *supra* note 26, at 532.

75. Satterlee, *supra* note 71, at 644.

76. *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 742 (10th Cir. 2005), *as amended on denial of reh’g* (Jan. 6, 2006).

77. *Id.*

78. 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKMAN, PUB. NAT. RESOURCES L. § 15:19 (2d ed. 2019).

79. *See, e.g.*, Birdsong, *supra* note 26, at 536 (“[S]everal states and counties have actively pursued strategies to assert R.S. 2477 rights through suits to quiet title.”).

80. *See generally* ALASKA DEP’T OF NAT. RES. DIVISION OF MINING, LAND & WATER, FACT SHEET TITLE: R.S. 2477 RIGHTS OF WAY (2013).

81. *Id.*

82. *See* SULLIVAN, *supra* note 27, at 5–6 (explaining the Alaska Department of Natural Resource’s strategy for moving forward with R.S. 2477 claims).

development of Alaska's land has led to the increasing importance of R.S. 2477 rights of way. The Section then uses *Dickson v. State*⁸³ to demonstrate how complex and expensive it can be to clarify the existence of these rights of way through litigation.

A. Importance of R.S. 2477 in Alaska

Prior to statehood, nearly all of the land in Alaska was in the public domain under federal control.⁸⁴ The Alaska Statehood Act of 1958 allotted 104 million acres of land and accompanying mineral rights to the state.⁸⁵ It also disclaimed any right to Native Title.⁸⁶ After oil fields were discovered in the 1960s, however, the State began asserting claims to the land.⁸⁷ This dispute led to a land freeze in 1969, which withdrew all unreserved public lands in Alaska from any disposition and reserved them for the determination of the rights of Alaska Natives.⁸⁸ Thus, the opportunity to establish new R.S. 2477 rights of way in Alaska ended in 1969.⁸⁹ While this predated the large influx of population in Alaska in the late 1970s and 1980s following construction of the Trans-Alaska pipeline, these rights of way are still important to preserve access to historic trails.⁹⁰

One reason preserving these rights of way is so important is the lack of developed roads in Alaska and lack of land management plans that address "the need for essential public access for commerce, industry, subsistence, and recreation."⁹¹ Rural communities in Alaska still heavily rely on "cross-country trails, used by snowmachines [sic], dogsled teams, and four wheel all-terrain vehicles."⁹² The image below shows existing roads in Alaska.⁹³ The figure on the top shows the Alaska Highway System as it exists today.⁹⁴ The image on the bottom shows the State of Alaska with potential R.S. 2477 routes.⁹⁵

83. *Dickson v. State*, 433 P.3d 1075 (Alaska 2018).

84. U.S. DEP'T OF THE INTERIOR, REPORT TO CONGRESS ON R.S. 2477 3 (1993).

85. 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKMAN, PUB. NAT. RESOURCES L. § 13:11 (2d ed. 2019).

86. James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, 53 ROCKY MTN. MIN. L. INST. 12-13 (2007).

87. *Id.* at 12-15.

88. *Id.* at 12-16.

89. ALASKA DEP'T OF NAT. RES. DIVISION OF MINING, LAND & WATER, *supra* note 80.

90. Latta, *supra* note 45, at 813.

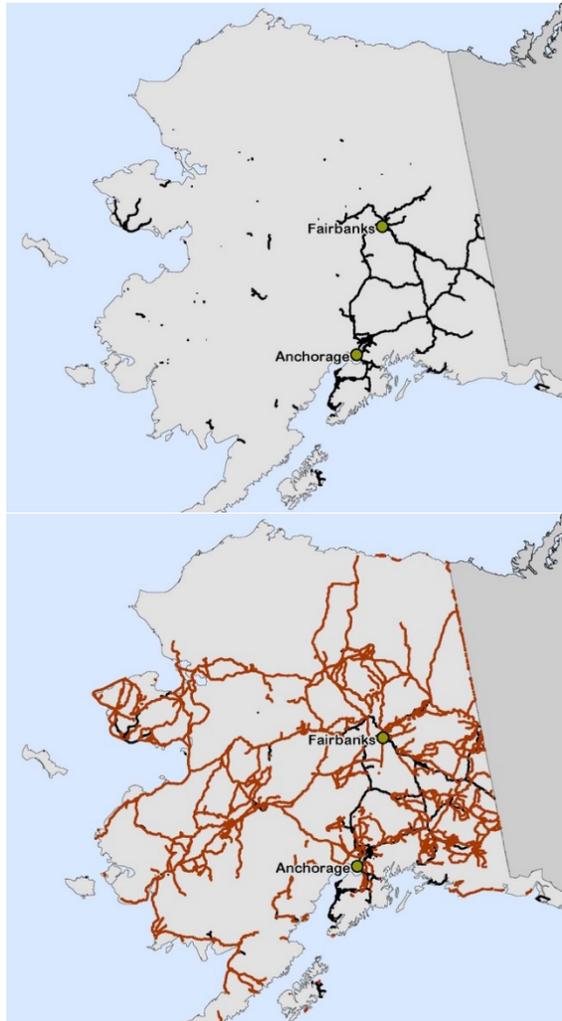
91. *Id.* at 812.

92. ALASKA DEP'T OF NAT. RES. DIVISION OF MINING, LAND & WATER, *supra* note 80.

93. SULLIVAN, *supra* note 27, at 3-4.

94. *Id.* at 3.

95. *Id.* at 4.



Alaska has approximately 1,400 historical trails that could potentially qualify as existing R.S. 2477 highways.⁹⁶ These were created by Alaska Natives, early homesteaders, miners, farmers, and the federal Alaska Road Commission to cross state lands, homesteads, Alaska Native land, and national parks, preserves, monuments and wildlife refuges.⁹⁷ For decades, the Alaska Department of Natural Resources (DNR) and Department of Law have worked to research, document, and secure title

96. Latta, *supra* note 45, at 813–14.

97. *Id.*

to the State's R.S. 2477 rights of ways.⁹⁸ In the early 1990s, the Department of Natural Resources researched more than 1,000 trails and identified 659 trails that qualified as R.S. 2477 rights of way.⁹⁹

The State of Alaska has made identifying existing R.S. 2477 rights of way an important goal.¹⁰⁰ In 2011, the State hired an assistant attorney general dedicated to developing an R.S. 2477 prosecution strategy.¹⁰¹ The State also conducted meetings with representatives in Utah to discuss the State's R.S. 2477 litigation strategy.¹⁰² The DNR's Public Access Assertion and Defense Unit has conducted trail investigations to document the location of routes using GPS, photography, and observations, as well as "reconnaissance level archeological surveys, conducted by professional historians and archeologists, which document historic physical evidence associated with a route."¹⁰³

Acquiring ownership interest in these claims continues to be a priority for the State.¹⁰⁴ The 2020 budget included a goal to "take definitive steps through state administrative process or litigation to clarify state ownership interests, the existence or location of routes or status, scope and validity of at least 5 proposed or recognized R.S. 2477 rights of way."¹⁰⁵ The State's strategy for resolving R.S. 2477 claims includes applying for permanent rights of way via FLPMA, seeking disclaimers of interest regarding the federal government's interest in the right of way, pursuing confirmation of the rights of way through the federal land management plan process, and initiating quiet title actions.¹⁰⁶ The State has carefully picked R.S. 2477 claims to bring that will create the strongest precedents.¹⁰⁷

B. Proving the existence of an R.S. 2477 in Alaska

To prove that an R.S. 2477 exists, the State must show "(1) that the alleged highway was located 'over public lands,' and (2) that the character

98. SULLIVAN, *supra* note 27, at 5.

99. ALASKA STAT. ANN. § 19.30.400 (West 2018).

100. See, e.g., ALASKA DEP'T OF NAT. RES. DIVISION OF MINING, LAND & WATER, *FAQs About the RS 477 Project*, <http://knikriver.alaska.gov/mlw/trails/rs2477/faqs.cfm> ("The State of Alaska believes it is important to preserve historic public access across these lands not only for present needs, but for potential future uses as well. Therefore, RS 2477 is an important access tool towards this goal.").

101. SULLIVAN, *supra* note 27, at 5.

102. *Id.*

103. *Id.*

104. See generally STATE OF ALASKA DEP'T OF NAT. RES. MINING, LAND & WATER COMPONENT BUDGET SUMMARY (2019).

105. *Id.* at 3.

106. SULLIVAN, *supra* note 27, at 6.

107. *Id.*

of its use was such as to constitute acceptance by the public of the statutory grant.”¹⁰⁸ Alaska defines a highway as a “road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right of way thereof.”¹⁰⁹ An R.S. 2477 can be as simple as a rudimentary trail.¹¹⁰ The trail, however, must be more than a “dead end road or trail running into wild, unenclosed and uncultivated country.”¹¹¹ To determine whether public use was sufficient, the court should consider “the character of the land and the nature of the use.”¹¹² Thus, “what might be considered sporadic use in another context would be consistent or constant use in Alaska.”¹¹³

The fact-intensive nature of litigating these claims was demonstrated by the prolonged battle over access to portions of the Iditarod trail in *Dickson v. State*.¹¹⁴ The dispute, which began in the 1980s, resulted in a 27-day bench trial with a total of twenty witnesses, including five experts.¹¹⁵ Establishing that the route existed required extensive evidence, including aerial photos from the 1930s, topographic maps, expert testimony from land surveyors, and testimony from lay witnesses who used the trail in the 1950s-60s.¹¹⁶ The Alaska Supreme Court concluded that the Historic Iditarod Trail was established over the property before the land was homesteaded and taken out of the public domain in 1958.¹¹⁷ This was heralded as a victory for the State and for the public.¹¹⁸ If the State had not defended the existence of the R.S. 2477 right of way, the 1,000-mile historic Iditarod trail would have had a major chunk missing that the public could not use.¹¹⁹

Defending public access to this right of way was costly though.¹²⁰

108. *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961).

109. ALASKA STAT. ANN. § 19.59.001(8) (West 2018); *see also* 48 U.S.C. § 321(d) (repealed 1959) (providing similar definition).

110. *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1020 (Alaska 1996).

111. *Hamerly*, 359 P.2d at 124–25.

112. *Fitzgerald*, 918 P.2d at 1020.

113. *Id.* (citing *Shultz v. Dept. of Army*, 10 F.3d 649, 655 (9th Cir. 1993), *withdrawn and superseded on reh’g by Shultz v. Dep’t of Army*, 96 F.3d 1222 (9th Cir. 1996)). Although the opinion was later withdrawn, *Shultz* is the leading Ninth Circuit opinion on R.S. 2477. The reasoning in the opinion was adopted in subsequent Alaska state court cases prior to the withdrawal. Thus, it is still frequently cited.

114. *Dickson v. State*, 433 P.3d 1075 (Alaska 2018).

115. *Id.* at 1081.

116. *Id.* at 1079–81.

117. *Id.* at 1085.

118. *Shedlock*, *supra* note 19.

119. *Id.*

120. *See* Appellants’ Opening Brief, *Dickson v. State*, 433 P.3d 1075 (Alaska 2018), No. S-16468, 2017 WL 3815884, at *49–50 (asserting legislative testimony indicates that litigation against appellants was intended to set precedent in order

The Alaska Department of Law and Department of Natural resources allegedly spent \$1 million on this case.¹²¹ The State's million-dollar defense strategy is likely to deter private parties from bringing these claims in the future, especially with the risk of adverse attorneys' fees awards.¹²² In *Dickson*, the State was originally awarded approximately \$225,000 in attorneys' fees from the appellants.¹²³ On appeal, the appellants argued that the award could chill litigants' ability to access the courts and contended that the State chose their case as a test case.¹²⁴ The supreme court explained that there was unusual evidence that the State devoted resources to this case for precedential effect and concluded it would be unfair to impose the expense of this strategy on a test case.¹²⁵ Additionally, the size of the award could deter other litigants from bringing claims.¹²⁶

Determining whether an R.S. 2477 exists is a fact-intensive exercise that "requires a road-by-road analysis of historical land records and surveys, maps, federal mining and grazing surveys, and affidavits attesting to the route's use, if any of these documents even exist."¹²⁷ Most private plaintiffs cannot spend millions of dollars documenting the existence of these claims. They do not have access to lidar technology or photogrammetrists. They cannot compete with the resources of the Department of Natural Resources, which employs an assistant attorney general dedicated to defending these claims.¹²⁸ They cannot compete with

to save state resources).

121. *Id.* at *50.

122. *See Dickson*, 433 P.3d at 1089-90 (recognizing most private parties would be deterred by attorneys' fees award of over \$200,000 and noting evidence of State's strategic selection of cases in hopes of creating favorable precedents).

123. *Id.* at 1089.

124. Appellants' Opening Brief at 50, *Dickson*, 433 P.3d 1075 (No. S-16468).

125. *Dickson*, 433 P.3d at 1089-90; *see also* Appellants' Opening Brief at 49-50, *Dickson*, 433 P.3d 1075 (No. S-16468) ("DNR confirmed it selected this case as one of the 'initial claims to prosecute' as part of its broader litigation strategy for securing RS 2477 easements. . . . In 2013 Legislative testimony, former DNR manager Scott Ogan and AAG Kent Sullivan stated that DNR pursued claims against Appellants because it was less expensive than suing all private property holders along the HIT and Homestead Road."). The State sought but did not obtain a punitive award of \$1,000,000 for attorneys' fees. *Id.* at 50.

126. *Dickson*, 433 P.3d at 1089. (Alaska Civil Rule 82(b)(3)(I) allows the courts to vary awards from the calculation otherwise prescribed by Rule 82(b)(2) if the award is "so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts.") (quoting ALASKA R. CIV. P. 82(b)(3)(I)).

127. Hillary M. Hoffmann, *Signs, Signs, Everywhere Signs: The Wilderness Society v. Kane County Leaves Everyone Confused About Navigating a Right-of-Way Claim Under Revised Statute 2477*, 18 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 3, 9 (2012).

128. SULLIVAN, *supra* note 27, at 5.

the field work and historic analysis that the DNR's Public Access Assertion and Defense Unit and Office of History and Archeology have conducted.¹²⁹ Moreover, locating and deposing witnesses with first-hand knowledge of the trails gets increasingly difficult as time goes by.¹³⁰ The latest that these rights of ways could have been created was in 1969, but many of these trails are centuries old.¹³¹ The expense of tracking down witnesses who can attest to a rudimentary trail created in the early 20th century could deter private property owners from challenging the State's efforts to identify these rights of ways.

III. BOUNDARIES: CONFLICTS CAUSED BY OVERREACHING R.S. 2477 CLAIMS

The State's aggressive litigation strategy and expansive definition of the scope of R.S. 2477 rights of way threaten the interests of private property owners, Alaska Native corporations, and federal land management initiatives.

A. Threats to Private Property Owners

Challenging the existence of an R.S. 2477 is an expensive, fact-intensive exercise that could deter private property owners from bringing these claims.¹³² While there is a valid argument for public access, not everyone wants the public traipsing over their land.¹³³ The right to exclude others is one of the core elements of property.¹³⁴

States and local governments have increasingly tried to expand the definition of what constitutes a R.S. 2477 right of way.¹³⁵ The Alaska legislature defined "highway" to include a "highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel,

129. *See, e.g., id.*

130. *Id.* at 6-7.

131. *Id.* at 6.

132. *See Hoffmann, supra* note 127, at 9 ("To this day, a determination of

analysis of historical land records and surveys, maps, federal mining and grazing surveys, and affidavits attesting to the route's use, if any of these documents even

unrecorded R.S. 2477 routes cross federal lands, only piecemeal surveys and lists that are difficult to access or verify.").

133. *See generally, e.g., Dickson v. State*, 433 P.3d 1075 (Alaska 2018).

134. *E.g., THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 4* (Dennis Patterson ed., 2010).

135. *See, e.g., Sarah Krakoff, Settling the Wilderness*, 75 U. COLO. L. REV. 1159, 1176-78 (2004) (demonstrating attempts by state and local governments to take advantage of unclear definitions for R.S. 2477 rights of way).

drainage structure and other similar or related structure or facility.”¹³⁶ Because the definition of highway is so broad, an R.S. 2477 right of way can be found for something as simple as a rudimentary trail.¹³⁷ This has led to a trend of increasingly overreaching R.S. 2477 claims.¹³⁸ States and local governments have increasingly declared impassable geographic features to be highways under state law.¹³⁹ For example, some Utah counties claimed that an R.S. 2477 right of way existed in slot canyons and slick-rock domes.¹⁴⁰

Another issue is the State of Alaska’s expansive view of the scope of the R.S. 2477 right of way. The scope of a right of way “refers to the bundle of property rights possessed by the holder of the right of way.”¹⁴¹ This includes both the physical boundaries of the right of way, as well as what uses are permitted.¹⁴² The scope becomes an issue when the state wants to use the right of way in a manner that is incompatible with the surrounding lands.¹⁴³

Because the parameters of the right of way are regulated by state law, the boundaries extend to 100 feet wide.¹⁴⁴ Alaska decisions have stated that an R.S. 2477 right of way came “into existence automatically if a public highway was established across public land in accordance with the law of Alaska.”¹⁴⁵ Furthermore, under Alaska law, highways are 100 feet

136. ALASKA STAT. § 19.59.001(8) (West 2018); *see also* 48 U.S.C. § 321(d) (repealed 1959) (provided similar definition).

137. *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1020 (Alaska 1996) (citing *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 414 (Alaska 1985)).

138. *Ahtna, Inc.’s Opposition to State of Alaska’s Motion for Summary Judgment on the Existence of an R.S. 2477* at 38, *Ahtna, Inc. v. State*, No. 3AN-08-06337 CI, 2019 WL 4178676 (Alaska Super. June 11, 2019).

139. *Id.* (citing *Wilderness Soc’y v. Kane Cty.*, 632 F.3d 1162, 1192 n.7 (10th Cir. 2011) (Lucero, J., dissenting)).

140. *Krakoff*, *supra* note 135, at 1177–78. (“[C]ounties have asserted thousands of R.S. 2477 claims, many of which challenge even the most generous definition of ‘highway’ and some of which—such as slot canyons and slick-rock domes—audaciously mock the term.”). *Id.*

141. *Bader*, *supra* note 37, at 508 n.112 (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1079 n.9 (10th Cir. 1988), *overruled by* *Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992)).

142. *Bader*, *supra* note 37, at 508.

143. *Id.*

144. *See Dickson v. State*, 433 P.3d 1075, 1084 (Alaska 2018) (referring to Alaska Statute § 19.10.015 and federal land orders to determine 100-foot width); *see also* *The State of Alaska’s Motion for Partial Summary Judgment Regarding Right-of-Way Width* at 8, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-6337 CI) (“The Alaska Supreme Court and the Tenth Circuit have unequivocally held that state law controls determination of an R.S. 2477 right-of-way’s scope. The width of any R.S. 2477 rights-of-way at issue in this case are governed by AS 19.10.015(a).”).

145. *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996) (citing *Shultz v. Dep’t of Army*, 10 F.3d 649, 655 (9th Cir. 1993), *withdrawn and superseded on reh’g*

wide.¹⁴⁶ The State has the authority to maintain a R.S. 2477 right of way. Thus, the State could claim a R.S. 2477 exists over a rudimentary 2-foot trail. The State could then bulldoze that land and construct a 100-foot-wide highway over that land.¹⁴⁷ For private property owners, this could threaten their ability to sell their land, another important property right. People may not want to purchase the land if the state could potentially build a highway over it.

The State of Alaska has also argued for expansive definitions of the uses covered by the scope of the right of way.¹⁴⁸ In *Ahtna v. State*, the State argued that the R.S. 2477 right of way also gave the public the right to incidental public uses such as camping and boat launches.¹⁴⁹ Increasingly overreaching claims for rights of ways and broad definitions of the scope of R.S. 2477 threatens the ability of private property owners to manage their own lands.¹⁵⁰ It prevents property owners from exercising their core property right to exclude others from the land.¹⁵¹

B. Threats to Alaska Native Corporations

These overreaching R.S. 2477 claims particularly impact the ownership interests of Alaska Natives.¹⁵² Although Alaska Natives could claim their lands through aboriginal title, these claims were not resolved prior to statehood.¹⁵³ Aboriginal title is created by the “exclusive use and

by *Shultz v. Dep’t of Army*, 96 F.3d 1222 (9th Cir. 1996)).

146. ALASKA STAT. § 19.10.015(a) (West 2018) (“[A]ll officially proposed and existing highways on public land not reserved for public uses are 100 feet wide.”).

147. See *Dickson*, 433 P.3d at 1084–85 (“RS 2477 vests rights of travel in the public at large. ‘If there is a public road on [a private owner’s land], it may be used for any purpose consistent with public travel.’” (quoting *Dillingham Commercial* see also *Ahtna, Inc.’s*

First Amended Complaint at 3, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI). The State of Alaska contended that the road was subject to a R.S. 2477 right of way. *Id.* at 4. In 2007, the State performed road maintenance, removed an Ahtna fee station, and cut trees and shrubs out to 100 feet in width. *Id.* at 7.

148. See Order Granting *Ahtna, Inc.’s* Motion for Partial Summary Judgment at 2, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI).

149. *Id.*

150. See, e.g., *Ahtna, Inc.’s* First Amended Complaint at 3, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI) (“The State . . . continued to trespass on Ahtna’s lands, to destroy Ahtna property and to irreparably interfere with Ahtna’s right to manage and use its lands for commercial and recreational purposes.”).

151. See, e.g., *Dickson*, 433 P.3d at 1079 (stating that property owner posted signs to prevent people from accessing trails that crossed his land).

152. Many cases involving R.S. 2477 involve Alaska Native land owners trying to protect their land rights against the State’s R.S. 2477 claim. E.g., *Alaska Dep’t of Nat. Res. v. United States*, 816 F.3d 580 (9th Cir. 2016); *Mills v. United States*, 742 F.3d 400 (9th Cir. 2014); *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI).

153. *Linxwiler*, *supra* note 86, at 7.

occupancy since time immemorial of lands by groups of aboriginal peoples.”¹⁵⁴ In the Alaska Statehood Act in 1959, the State disclaimed any ownership of land held by Alaska Natives.¹⁵⁵ After oil fields were discovered in the 1960s, the State began asserting claims to land owned by Alaska Natives.¹⁵⁶ This dispute led to the land freeze in 1969, which withdrew all unreserved public lands in Alaska from any disposition and reserved them for the determination of the rights of Alaska Natives.¹⁵⁷

At this point in time, Alaska Natives possessed fee title to only 500 acres of the state’s 375 million acres.¹⁵⁸ As a result of the inability to hold title to the land, many of the benefits of Alaska’s economic development did not accrue to Alaska Natives.¹⁵⁹ While advocating for a proper settlement of Alaska Native land claims in 1969, William Hensley argued that this disadvantage was true during “the gold rush period, the period of copper, tin and other minerals, and it will be true of the oil era, unless a change is brought about through federal legislation.”¹⁶⁰

Congress passed the Alaska Native Claims Settlement Act (ANCSA) in 1971 to resolve Alaska Natives’ title to the land.¹⁶¹ Rather than resort to tribes, reservations, and litigation, Congress established thirteen regional corporations and 225 village corporations and then conveyed to these corporations ownership of 40 million acres of land and close to \$1 billion.¹⁶² One of the most significant results of ANCSA is the economic success of ANCSA corporations: “revenues of nearly \$5 billion, employment of 12,000 persons statewide and 3,000 Natives, distributing dividends of nearly \$120 million, and constituting seven of the top 10 Alaska-owned corporations.”¹⁶³

The R.S. 2477 litigation threatens the ownership interests and continued success of Alaska Native corporations. Many of the R.S. 2477 claims the State has brought have involved rights of way over land owned by Alaska Natives.¹⁶⁴ For example, Ahtna, Inc. was mired in litigation for

154. *Id.*

155. *Id.* at 10.

156. *Id.* at 11.

157. *Id.* at 12.

158. William Iggiagruk Hensley, *Why the Natives of Alaska Have a Land Claim*, speech given in France (1969), in *THE ALASKA NATIVE READER* 192, 197 (Maria Shaa Tláa Williams ed., 2009).

159. *Id.*

160. *Id.*

161. See Alaska Native Claims Settlement Act, 43 U.S.C. § 1601(a) (2012) (“[T]here is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims.”).

162. Linxwiler, *supra* note 86, at 2-3.

163. *Id.* at 49.

164. *E.g.*, Alaska Dep’t of Nat. Res. v. United States, 816 F.3d 580 (9th Cir. 2016); Mills v. United States, 742 F.3d 400 (9th Cir. 2014); Ahtna, Inc. v. State, No.

a decade with the state over access to Klutina Lake Road.¹⁶⁵ Ahtna owns the land underlying the 25-mile Klutina Lake Road, pursuant to private acquisitions and federal conveyances in ANCSA.¹⁶⁶ The entire route is within a 60-foot-wide federal easement.¹⁶⁷ This easement was created pursuant to section 17(b) of ANCSA, which provided for public easements across selected Native corporation lands.¹⁶⁸

In 2007, the State cleared portions of the trail, cutting trees and shrubs out to 100 feet in width and removing one of Ahtna's fee stations in the process.¹⁶⁹ The State contended that the road and 17(b) easement were subject to a superior, preexisting 100-foot-wide R.S. 2477 right of way.¹⁷⁰ The State also contended that the R.S. 2477 right of way included "numerous spurs and arterials that would open up public access and recreation to the Klutina River" including "pullouts, public boat launches, campgrounds, picnic areas, fishing access sites, and trails."¹⁷¹ The superior court rejected this argument and concluded that an R.S. 2477 right of way did not include the right to "incidental public uses such as camping and boat launching."¹⁷² The court explained that R.S. 2477 "conveyed the right to pass over the land, and nothing more. It did not grant easements for recreational uses unrelated to 'travel between two

3AN-08-06337 CI, 2019 WL 4178676 (Alaska Super. June 11, 2019).

165. Press Release, Alaska Dep't of Law, State and Ahtna Agree to 100-ft Right-of-way (May 16, 2019), www.law.state.ak.us/press/release/2019/051619-Klutina.html.

166. Ahtna, Inc.'s First Amended Complaint at 3, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI). Furthermore, "[p]rior to the enactment of ANCSA, and since time immemorial, the Ahtna Athabascans held an unextinguished claim of aboriginal title to the Klutina River drainage through their exclusive use and occupancy of the land." *Id.* at 5.

167. *Id.* at 3.

168. *Id.*; see generally Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216-01 (proposed Aug. 1, 1994) ("For rights-of-way in Alaska, Congress has provided

corporation lands pursuant to Section 17(b) of the Alaska Native Claims Settlement Act (ANCSA) and the Transportation and Utility Corridor system process under Title XI of ANILCA."); *17(b) Easements*, BUREAU OF LAND MGMT.,

information/alaska/17b_easements (last visited Sept. 24, 2019) ("17(b) easements are rights reserved to the United States . . . when the BLM conveys land to an Alaska Native corporation under the Alaska Native Claims Settlement Act (ANCSA). . . . The purpose of most 17(b) easements are reserved [*sic*] to allow the public to cross private property to reach public lands and major waterways." (footnote omitted)).

169. Ahtna, Inc.'s First Amended Complaint at 7, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI).

170. *Id.* at 4.

171. *Id.* at 5.

172. Order Granting Ahtna, Inc.'s Motion for Partial Summary Judgment at 2, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI).

definite points.”¹⁷³

Proving the existence of an R.S. 2477 does not create ownership of the land, only a right of use.¹⁷⁴ The court noted that the State’s position lacked any meaningful limits on the scope of the right of way:

[B]ecause it seemingly extends to any uses incident to backcountry travel, the State’s view could include within a right-of-way gas stations, lodges, hotels, automotive repair shops, and retail establishments. . . . RS 2477 granted only the right to pass over public land. It did not—and cannot now, 40 years after its repeal—convey the right to develop that land for recreational and commercial purposes.¹⁷⁵

The court concluded that the right of way only permitted ingress and egress, not boat launches, camping, or day-use sites.¹⁷⁶

In May 2019, after more than a decade of litigation, Ahtna and the State reached an agreement that the R.S. 2477 right of way existed and settled the case.¹⁷⁷ The settlement stipulated that the State could still appeal the previous ruling that the scope of the right of way was limited to driving on the road.¹⁷⁸ The State plans to appeal the ruling to determine whether the right of way grants the public the right to camp, launch boats, and park without paying Ahtna an access fee of \$15.¹⁷⁹

The dispute over Klutina Lake Road demonstrates the State’s expansive view not only of the scope of use over the right of way but also of the definition of highway.¹⁸⁰ The Ahtna people have occupied the land in the Klutina River Drainage for hundreds of years.¹⁸¹ The State’s main argument for public use was that the trail was used by prospectors to

173. *Id.* at 3 (quoting *Shultz v. Dep’t of Army*, 10 F.3d 649, 658 (9th Cir. 1993), *opinion withdrawn and superseded on reh’g*, 96 F.3d 1222 (9th Cir. 1996)).

174. *Id.* (citing *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 454 (Alaska 1985) (rejecting argument that operation of R.S. 2477 gave City of Dillingham fee simple ownership over the right of way)).

175. Order Granting Ahtna, Inc.’s Motion for Partial Summary Judgment at 5, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI).

176. *Id.*

177. Zaz Hollander, *State Gets Right of Way in Agreement with Native Corporation over Klutina Lake Road*, ANCHORAGE DAILY NEWS (May 16, 2019), <https://www.adn.com/alaska-news/rural-alaska/2019/05/16/state-gets-right-of-way-in-agreement-with-native-corporation-over-klutina-lake-road/>.

178. *Id.*

179. *Id.*

180. See Ahtna, Inc.’s Opposition to State of Alaska’s Motion for Summary Judgment on the Existence of an R.S. 2477 at 38, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI) (arguing that finding a highway in this case would essentially define highway out of the statute).

181. The State of Alaska’s Answer, Affirmative Defenses, Counterclaims & Cross-Claims Regarding Second Amended Complaint at 3, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI).

access the Valdez Glacier during the 1898 gold rush.¹⁸² During that time period, however, the trail at issue “was wildly inconvenient and dangerous, so much so that most prospectors turned back without having reached their various destinations and the route was abandoned within months of being explored.”¹⁸³ Ahtna contended that “it is unlikely that any prospector used the glacier route—let alone a specific route across Ahtna’s property—more than once, since virtually every prospector had left the area before the winter of 1898.”¹⁸⁴ To establish an R.S. 2477 right of way over this trail would mean recognizing “a public highway over a glacier trail that was universally conceded to be impassable by man, declared commercially an impracticable route at any season and immediately abandoned.”¹⁸⁵

Despite questionable evidence that the trail should qualify as a public highway recognized under R.S. 2477, the State successfully gained control of the right of way in the recent settlement.¹⁸⁶ The State’s assertion of ownership over the right of way threatens “to irreparably interfere with Ahtna’s right to manage and use its land for commercial and recreational purposes.”¹⁸⁷ The State had authority to maintain the road within the confines of the 60-foot easement provided under ANCSA.¹⁸⁸ The State continues to aggressively pursue R.S. 2477 claims over land belonging to Native Corporations and expand the definition of what qualifies as a public highway and what scope of use accompanies the existence of a R.S. 2477.¹⁸⁹ These claims threaten the ability of Native Corporations to effectively manage their lands.¹⁹⁰

182. Ahtna, Inc.’s Opposition to State of Alaska’s Motion for Summary Judgment on the Existence of an R.S. 2477 at 44–45, *Ahtna*, 2019 WL 4178676 (No. 3AN-08-06337 CI).

183. *Id.* at 40.

184. *Id.* at 44.

185. *Id.* at 38 (internal quotes and footnotes omitted).

186. Hollander, *supra* note 177.

187. *Ahtna*, Second Amended Complaint at 8, *Ahtna Inc. v. State*, 2019 WL 4178676 (No. 3AN-08-6337 CI) (Alaska Super. Ct. June 11, 2019).

188. *Id.* at 8.

189. *See, e.g.*, *Mills v. United States*, 742 F.3d 400, 403 (9th Cir. 2014) (asserting R.S. 2477 claim over trail that crossed land belonging to Doyon Limited and Hungwitchin Corporation); *Alaska Dep’t of Nat. Res. v. United States*, 816 F.3d 580, 582 (9th Cir. 2016) (asserting R.S. 2477 claim over land belonging to two Alaska Natives).

190. *See Ahtna*, Second Amended Complaint at 8, *Ahtna Inc. v. State*, 2019 WL 4178676 (No. 3AN-08-6337 CI) (Alaska Super. Ct. June 11, 2019).

C. Threats to Federal Land Management Initiatives

State attempts to assert control over lands through R.S. 2477 claims also interfere with federal land management and conservation efforts.¹⁹¹ The FLPMA, which repealed R.S. 2477, enacted a comprehensive plan for federal land management that restricted use and access of some federal lands.¹⁹² As part of this comprehensive plan, federal land management agencies such as the Forest Service, the National Park Service, and the Bureau of Land Management are required to adopt long-term planning documents to establish how federal lands can be used.¹⁹³ Potential R.S. 2477 rights of way on federal land limit the ability of federal agencies to pass regulations restricting public access to areas for conservation purposes.¹⁹⁴

A series of ongoing disputes in southern Utah demonstrates how R.S. 2477 claims can conflict with federal land management policy. The federal government controls approximately 1.6 million acres in Kane County, including the Grand Staircase-Escalante National Monument, the Paria-Vermillion Cliffs Wilderness, Moquith Mountain Wilderness Study Area, and Glen Canyon National Recreation Area.¹⁹⁵ In 2005, Kane County claimed ownership of the R.S. 2477 routes in these areas and “aggressively and openly flouted the government’s authority over them, engaging in a systemic replacement of federal management signs with Kane County signs.”¹⁹⁶ The Kane County signs opened the road to all vehicle travel, which conflicted with the federal policy that restricted off-highway vehicle travel.¹⁹⁷ In response, the Wilderness Society and Southern Utah Wilderness Alliance filed a complaint alleging that Kane County’s actions violated the Supremacy Clause.¹⁹⁸ The district court agreed and ordered Kane County to remove the signs that remained on federal lands.¹⁹⁹ The Tenth Circuit affirmed on appeal, but then dismissed for lack of prudential standing on rehearing en banc.²⁰⁰

The State of Alaska has also challenged federal land management initiatives by claiming the existence of R.S. 2477 rights of ways. Alaska

191. See Bader, *supra* note 37, at 486 (“R.S.2477 has the potential to thwart effective management of much of the country’s national parklands, designated wilderness areas, and wildlife refuges.”).

192. Birdsong, *supra* note 26, at 530.

193. *Id.* at 532.

194. *Id.*

195. Hoffmann, *supra* note 127, at 20.

196. *Id.* at 30.

197. *Id.*

198. *Id.* at 23.

199. *Id.* at 24–25.

200. *Id.* at 28–30.

filed a quiet title action to claim six rights of way that crossed federal land in the Chicken Ridge area.²⁰¹ Part of the State's rationale for pursuing this action was the Bureau of Land Management's restrictions on access to the rights of way.²⁰² The Bureau of Land Management prohibited public access without first obtaining expensive environmental assessments and permits.²⁰³ Former Alaska Governor Parnell described the case as "an important step in countering federal overreach with regard to State-owned property interests and in protecting the livelihoods of our residents."²⁰⁴

The disputes between state and federal land management tend to come down to conservation versus development of the land.²⁰⁵ Conservation groups argue that the majority of the R.S. 2477 claims "'are illegitimate assertions meant to undermine federal protected areas, thwart wilderness protection' and to make these areas available to mining, oil and gas, and off-road vehicle interests."²⁰⁶ Asserting R.S. 2477 claims could threaten effective management of national parklands, wilderness areas, and wildlife refuges.²⁰⁷ Recognizing R.S. 2477 rights of ways in areas that would otherwise be roadless could prevent the federal government from categorizing the land as protected wilderness.²⁰⁸ This could keep the lands permanently open to mining, oil, and gas development.²⁰⁹

This problem is particularly salient in Alaska, which "contains 75% of America's total national park system acreage, 90% of the total area within the wildlife refuge system, and approximately 70% of all federal

201. SULLIVAN, *supra* note 27, at 10.

202. *Id.* at 11.

203. *Id.*

204. *Id.*

205. See, e.g., Satterlee, *supra* note 71, at 646 ("The [federal] conservation ethic was greeted with especially little fanfare in western states where large amounts of public land remained under federal control. . . . From the perspective of local residents, environmentalists from far away had carved a dominant position of influence in federal land policy decisions, creating an underlying bias in favor of preservation over development.") (internal quotes and footnotes omitted).

206. Freeman & Ro, *supra* note 63, at 106.

207. Bader, *supra* note 37, at 486.

208. Birdsong, *supra* note 26, at 530-31 (opponents of conservation efforts "could attempt to foreclose designation of additional public lands as protected 'wilderness' by asserting and validating R.S. 2477 claims. . . . Because WSAs and statutory wilderness areas must both be roadless, gaining recognition of valid R.S. 2477 highways in WSAs carries for wilderness opponents the dual hope of precluding the statutory wilderness designation of 'roaded' lands and freeing

(footnotes omitted).

209. *Id.*

lands classified as wilderness.”²¹⁰ Out of Alaska’s 375 million acres, nearly ninety percent are public lands.²¹¹ This wilderness provides direct and indirect economic benefits to Alaska.²¹² For example, one study found that the use of Alaska’s two National Forests generated revenues from Alaska residents of \$162.1 to \$247.8 million per year.²¹³ In contrast, the estimated value of selling the entirety of Alaska’s wood products would only amount to approximately \$37.3 million.²¹⁴ Furthermore, “the benefits of preserving wilderness have the potential to grow over time since the increasing scarcity of wilderness makes each remaining hectare more valuable.”²¹⁵

The vast amount of wilderness land in Alaska is largely a result of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA).²¹⁶ ANILCA doubled the size of the National Park and National Wildlife Refuge Systems and tripled the size of the National Wilderness Preservation System in Alaska, establishing over 104 million acres of conservation in total.²¹⁷ ANILCA, like ANCSA, also included a provision for securing rights of ways across federal lands.²¹⁸ Asserting an R.S. 2477 right of way could be a way to circumvent the more rigorous standards for securing access under ANILCA Title XI.²¹⁹ This could allow road development without taking into account the potential environmental impact of the road.²²⁰

The R.S. 2477 rights of way threaten the conservation scheme enacted under ANILCA and the preservation of the vast wilderness in Alaska. Ultimately, threats to Alaskan wilderness conservation threaten Alaska’s economy.²²¹ While there are legitimate benefits to preserving public access to historic trails and ensuring development of future roads,

210. Bader, *supra* note 37, at 486 n.4.

211. E. Barrett Ristorph & Anwar Hussain, *Wilderness: Good for Alaska Legal and Economic Perspectives on Alaska’s Wilderness*, 4 WASH. J. ENVTL. L. & POL’Y 424, 463 (2015).

212. *See id.* at 444–57 (detailing economic impacts of wilderness, including jobs from commercial fishing industry, revenue from recreational use of forests, value of subsistence harvest, and ecological services).

213. *Id.* at 445.

214. *Id.* at 447.

215. *Id.* at 443–44.

216. *Id.* at 434.

217. *Id.* at 463.

218. *Id.* at 465.

219. *Id.*

220. *Id.*

221. *See, e.g.,* John C. Rupple, *The Transfer of Public Lands Movement: The Battle to Take “Back” Lands That Were Never Theirs*, 29 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 1, 39 (2018) (“In Alaska and the eleven contiguous western states where most public lands are located, the recreation economy generates over 2.1 million jobs and \$17.3 billion in state and local government tax revenue.”).

these projects must be pursued in conjunction with broader federal land management schemes.

IV. A PATH FORWARD

The confusion about how to resolve title to remaining R.S. 2477 rights of way has lingered for decades, despite attempted solutions from Congress, administrative agencies, state legislatures, and both state and federal courts. Although many solutions have been suggested, few have been successful. This Section will review some previous suggestions that have failed to resolve the crisis and explore some new solutions that may prove to be successful.

In 1993, the Department of the Interior proposed an administrative process to resolve R.S. 2477 claims.²²² The claims would have been adjudicated by the agency with authority over the lands.²²³ The agency would also have the authority to interpret the statutory requirements of R.S. 2477.²²⁴ This rule was expressly rejected by Congress in 1995.²²⁵ In 2003, the Bureau of Land Management (BLM) implemented its authority to issue administrative disclaimers of federal interests in land.²²⁶ These enable the BLM to adjudicate R.S. 2477 claims as applications for recordable disclaimers of federal interest.²²⁷ This allows the federal government to deal with rights of way that they have no intention to assert claims over. However, this only covers R.S. 2477 claims that cross federal land.

Another solution would be to provide uniform federal definitions for the statutory terms of R.S. 2477. Leaving the definitions of highway and public use to state law has led to inconsistent results and overly broad definitions.²²⁸ Federal courts could also establish rules to limit the scope of R.S. 2477 rights of ways.²²⁹ This proposal would require states to prove that the improvement of an R.S. 2477 right of way is “necessary for the ability of the state to achieve its compelling objectives” before making any changes that are incompatible with surrounding lands.²³⁰

222. Birdsong, *supra* note 26, at 541.

223. *Id.*

224. *Id.*

225. *Id.* at 542.

226. *Id.* at 543.

227. *Id.*

228. *See, e.g.,* Bader, *supra* note 37, at 492 (“Under R.S. 2477, each state must

acceptance by public use. The lack of available sources coupled with varying fact patterns from individually adjudicated cases has prevented the evolution of

229. *Id.* at 508-14.

230. *Id.* at 510.

While a broad federal response could bring clarity, this resolution seems unlikely. Despite decades of R.S. 2477 conflicts, Congress has never addressed the issue.²³¹ It could amend FLPMA and provide a statutory framework to guide resolution in the courts or create an administrative framework to resolve R.S. 2477 claims.²³² In February 2017, Senator Jeff Flake introduced a bill “to achieve judicial and administrative efficiency for, and to reduce the costs typically associated with, resolving right of way claims under R.S. 2477.”²³³ This bill died in committee.²³⁴

State legislative solutions have also been controversial. In 2014, Alaska Senate Bill 94 proposed changes to R.S. 2477 recognition.²³⁵ It provided that a R.S. 2477 right of way “that crosses land owned by a private landowner is limited to the uses of the route established on October 21, 1976, and may not exceed a width of 60 feet.”²³⁶ Additionally, the right of way could “be used only for transportation purposes and may not be used for rest areas, parking lots, overnight camping, boat launches, recreation sites, or other similar uses.”²³⁷ This bill also died in committee.²³⁸ These adjustments would have assuaged many of the concerns brought up by the Ahtna litigation and other private landowners.

Courts continue to be the primary avenue for resolving R.S. 2477 disputes.²³⁹ Bringing thousands of suits for these claims, however, is impractical. One unique solution is happening in Utah. The Federal District court for the District of Utah established a “Bellwether” process for a more efficient way to process the 12,500 ongoing claims.²⁴⁰ The parties have stipulated to and the court has approved fifteen rights of way within Kane County that “exemplify remaining legal issues regarding the determination of R.S. 2477 rights of way.”²⁴¹ These claims will be tried during an expedited trial in February 2020.²⁴²

The path of least resistance would be to seek rights of way through

231. Hoffmann, *supra* note 127, at 9.

232. *Id.*

233. Historic Routes Preservation Act, S. 468, 115th Cong. (2017).

234. *Id.*

235. Sen. B. 94, 28th Leg. (Alaska 2013).

236. *Id.*

237. *Id.*

238. *Id.*

239. See Birdsong, *supra* note 26, at 546 (“In the absence of the exercise of

to date has fallen exclusively on the federal courts.”).

240. *Bellwether Initiative and Trial*, UTAH’S PUBLIC LANDS, (last visited Sept. 26, 2019) <https://publiclands.utah.gov/uncategorized/bellwether-initiative-and-trial/>.

241. *Id.*

242. *Id.*

other mechanisms. Congress specifically provided for rights of way in Alaska through section 17(b) of the Alaska Native Claims Settlement Act (ANCSA) and the Transportation and Utility Corridor system process under Title XI of ANILCA.²⁴³ The State can also apply for rights of way under Title V of the Federal Land Policy and Management Act.²⁴⁴ While these provisions may not cover all of the existing R.S. 2477 trails, the State should follow these procedures for rights of way that cross federal and Native lands to avoid conflict with the comprehensive land management schemes in ANCSA, ANILCA, and FLPMA.

Validating the remaining R.S. 2477 rights of way could be resolved through a formal state identification and recording mechanism and an expedited court process similar to the Bellwether Initiative in Utah. This expedited process would provide legal standards to guide the determination of what potential R.S. 2477 rights of way are valid. The State could also develop a formal process for negotiating with property owners who are resistant that retains the right of public access while avoiding decades of litigation. Finally, the State should establish limitations on the scope of the R.S. 2477 rights of way, since the potentially expansive scope is what most threatens the interests of property owners. The State of Alaska has already taken the initiative to identify potential R.S. 2477 rights of way and resolve the lingering confusion caused by the statute's informal grant. Now it must find a path forward to validate these claims in a comprehensive, clear way without entangling private citizens and Native Corporations in litigation for decades.

V. CONCLUSION

While many of the R.S. 2477 rights of way provide necessary public access through trails reaching remote areas or the construction of modern highways, it cannot be used as a catch all for every attempt to gain state control over land management. R.S. 2477 has been viewed by many state governments as a shortcut around the more stringent mechanisms for establishing rights of way under federal land regulations. Trying to resolve R.S. 2477 rights of way claims through private litigation has led to more conflict and uncertainty. Basing land development off of an obscure, 20-word statute from 1866 with no formal mechanism for recording the rights of way has led to a wilderness of conflicting interpretations, competing interests, and confusion. Although preserving public access to R.S. 2477 rights of ways is important for economic development, these

243. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39216-01 (proposed Aug. 1, 1994).

244. *Id.*

goals must be pursued comprehensively and in connection with broader land management policies in Alaska, including ANCSA and ANILCA. Ultimately, any vision for Alaska's future must consider the complex history of the land, balance the competing interests of the State, private property owners, Alaska Natives, and the federal government, and merge those into a comprehensive path forward.