

The Long Road Ahead

R.S. 2477 in Alaska – A story of
litigation, legislation, and call for
respect of Alaska Native lands

Presented by
Gregory F. Dorrington, Attorney at Law
Jermain, Dunnagan & Owens, P.C.
gdorrington@jdolaw.com

Overview of Presentation

- R.S. 2477 Primer
- State of Alaska's "R.S. 2477 Project"
- Brenwick-Craig Road / Klutina Lake Road Litigation
- Litigation Twists and Turns
- Pending Legislation (SB 94 / HB 194)
- Q & A

R.S. 2477 Primer

- Mining Act of 1866 (July 26, 1866)
 - Section 8 of the Act later codified in the Revised Statutes as section 2477

THIRTY-NINTH CONGRESS. Sess. I. Ch. 262, 268. 1866.

Sec. 8. *And be it further enacted,* That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

- Grant remained in effect for 110 years

Self-Executing Grant

- ROW automatically comes into existence if accepted
- No formalities needed
 - No applications
 - No permits
 - No recording
 - No official acknowledgment from Feds
- R.S. 2477 ROWs exist or not as a matter of historic fact
- Legal existence is confirmed in court

FLPMA

- Federal Land Policy & Management Act (October 21, 1976)
- FLPMA § 706(a) repealed R.S. 2477
- FLPMA § 701(a) preserved all valid R.S. 2477 ROWs existing as of the date of repeal
- Had the effect of “freezing” the rights as they were in October 1976
- Ability to accept R.S. 2477 ROWs in Alaska likely ended on **December 14, 1968**. PLO 4582 withdrew federal land statewide. Known as the “Land Freeze.”

How to Accept an R.S. 2477 ROW

- “Public Lands” Requirement
 - Determined at the time of acceptance
 - Does aboriginal title preclude R.S. 2477?
- Methods of Acceptance (borrow state law)
 - Official Action by Public Authority
 - Public Use
- Scope of ROW – borrow state law

Acceptance by Public Use

- Use as a "Highway"
- "Sufficient" Public Use takes into account:
 - **Extent/Frequency** of use
 - **Duration** of use
 - **Nature** of use
 - **Character** of the land
 - **Definite Character** of the route
- Termini Requirement
- Route must be Necessary or Convenient to Public

Key Public Use Cases in Alaska

- *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961).
- *Dillingham Comm. Co. v. City of Dillingham*, 705 P.2d 410 (Alaska 1985).
- *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996).

ANCSA

- Land conveyed is subject to valid existing rights (43 U.S.C. § 1613(g))
- Even if those existing rights are not recorded or otherwise identified
- Most land selections were made without any knowledge of whether State-claimed R.S. 2477s crossed the property

The State of Alaska's "RS 2477 Project"

- 1980s/1990s – DNR researched and identified R.S. 2477 trails
 - Over 650 trails identified, traversing thousands of miles of Alaska terrain
- 1998 – Legislature enacted AS 19.30.400
 - Codified the State's claim to trails identified by DNR
- 2010s – Litigate
 - Dep't of Law hires R.S. 2477 attorney
 - Initiates and defends litigation involving R.S. 2477s

PAAD Unit

(Public Access Assertion & Defense)

- Mission: "Protecting Alaska's future through the assertion and defense of access to Alaska's public lands and waters."
- Preserve public access to public lands for:
 - Resource development
 - Hunting
 - Fishing
 - Recreation
- Has attempted to start recording R.S. 2477 ROWs it has identified

PAAD is Seeking Information from the Public

Firefox Request For Trail Use Information
dnr.alaska.gov/mlw/trails/paad/index.cfm

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Alaska Department of Natural Resources
Mining, Land & Water search

Natural Resources State of Alaska

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Natural Resources > Mining, Land & Water > Trails > Request For Trail Use Information

Request For Trail Use Information

The State of Alaska Public Access Assertion and Defense needs your assistance to help preserve public access on Alaska roads and trails!

Do you have personal knowledge of historical use of any secondary or primitive road or trail in Alaska before 1968? If you have this knowledge, please share that information with us:

Alaska Trail Use Information Form

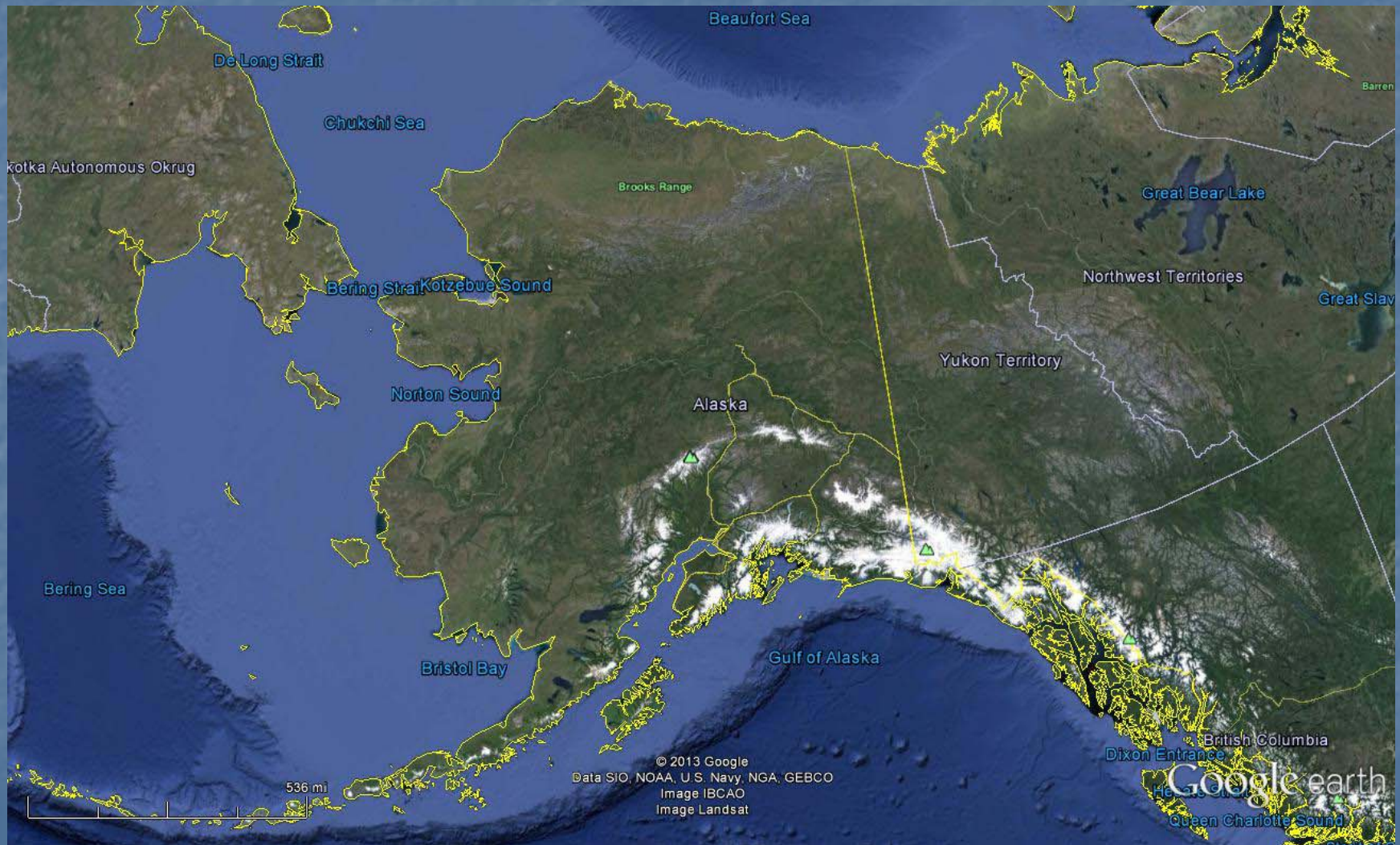
A sample of the information that we need is described below:

1. Local name of the trail, if established.
2. Provide the best trail description possible from one point to the next. Useful information would include section, township, range, meridian, USGS quadrangle map coordinates, survey or other geographical descriptions.
3. Let us know if you have any supporting documentation such as photographs or maps that you would like to share with us. We may ask you to send a copy via mail or email.

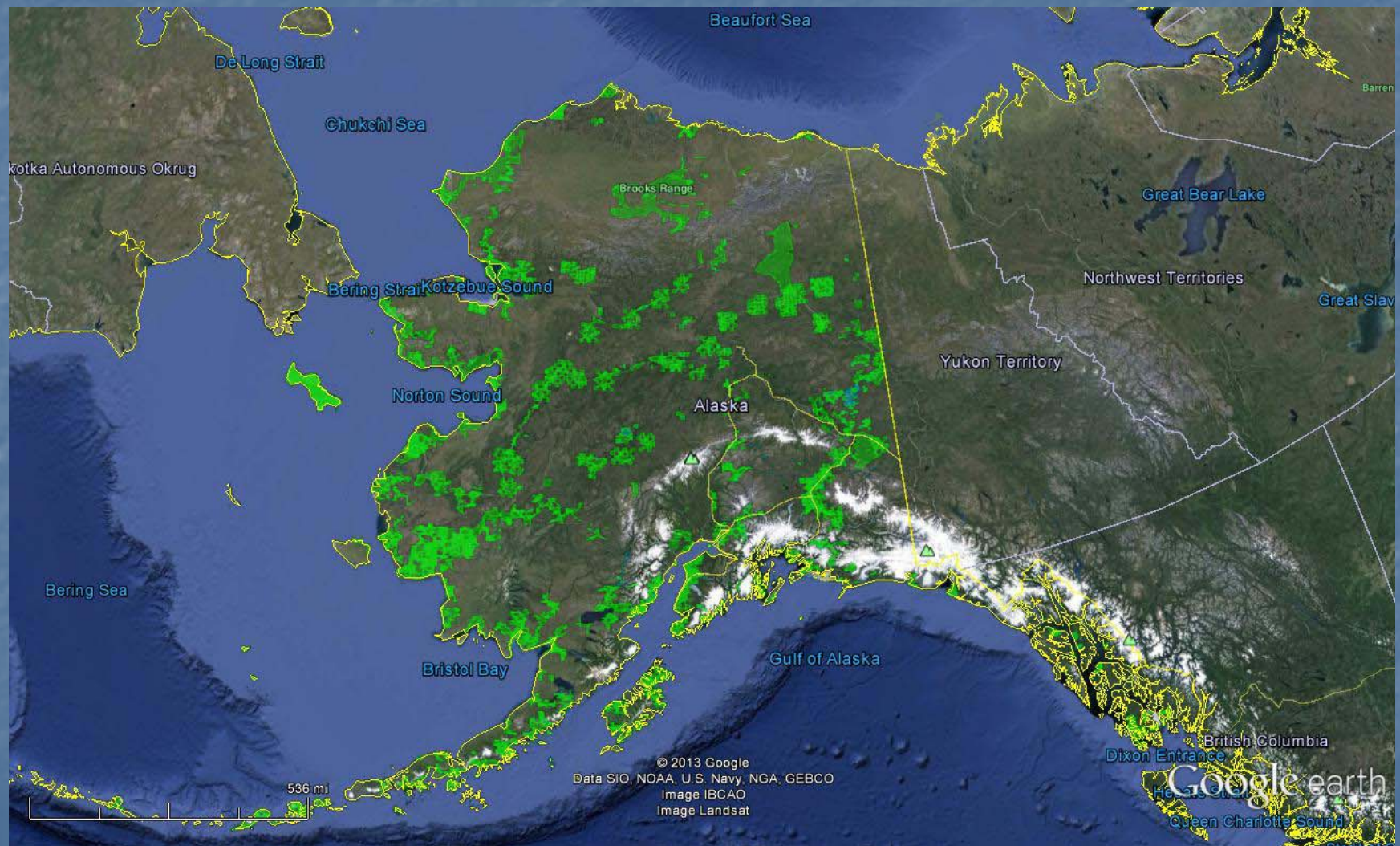
Trails and Public Access

- 17B Easements
- Easement Atlases - Public Access
- Iditarod Trail Easement Project
- Rex Trail Management Program
- RS2477 Trails
- Navigability Program - Submerged Lands
- Public Easements - New Regulations

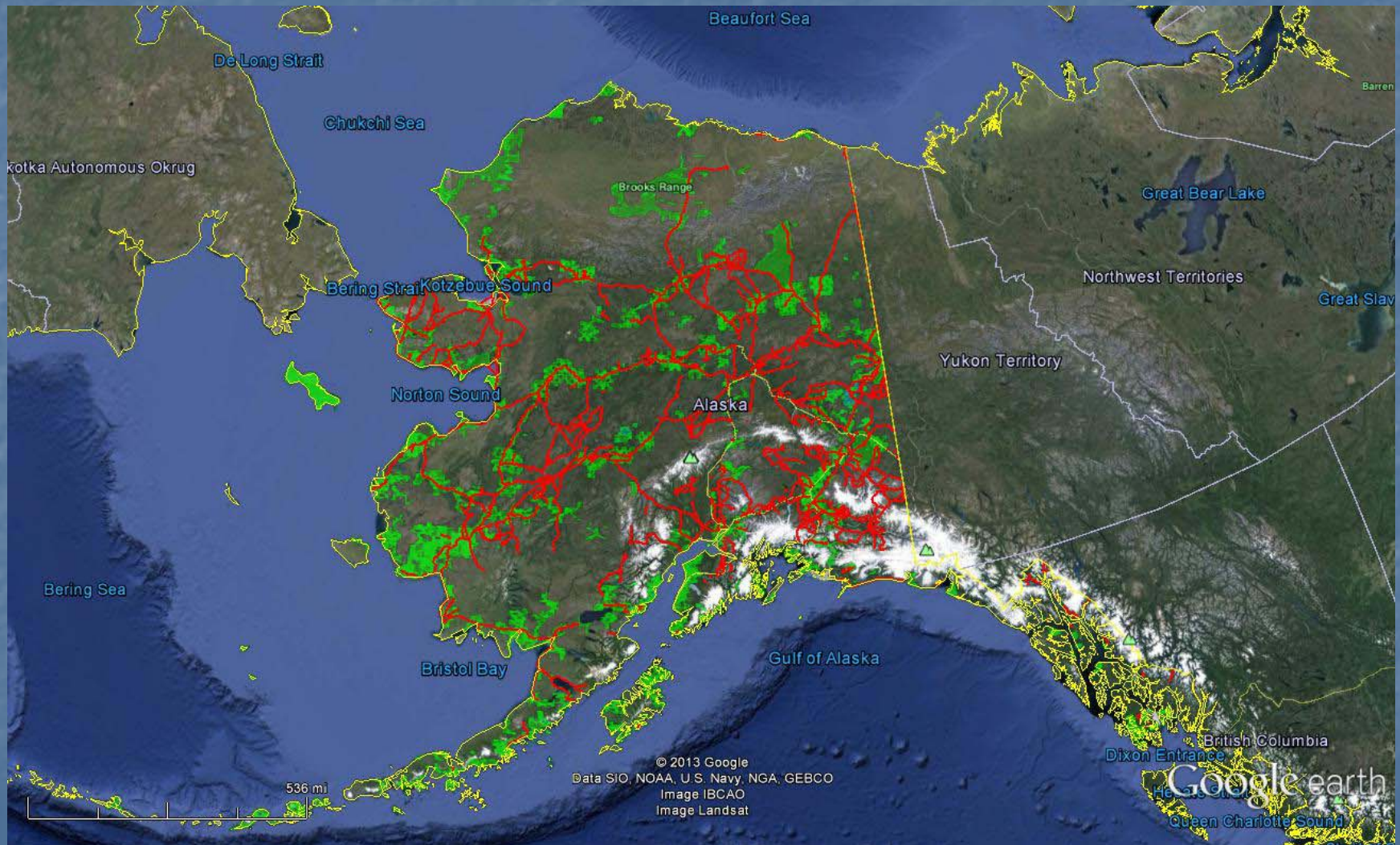
Alaska State Highways



ANCSA Lands



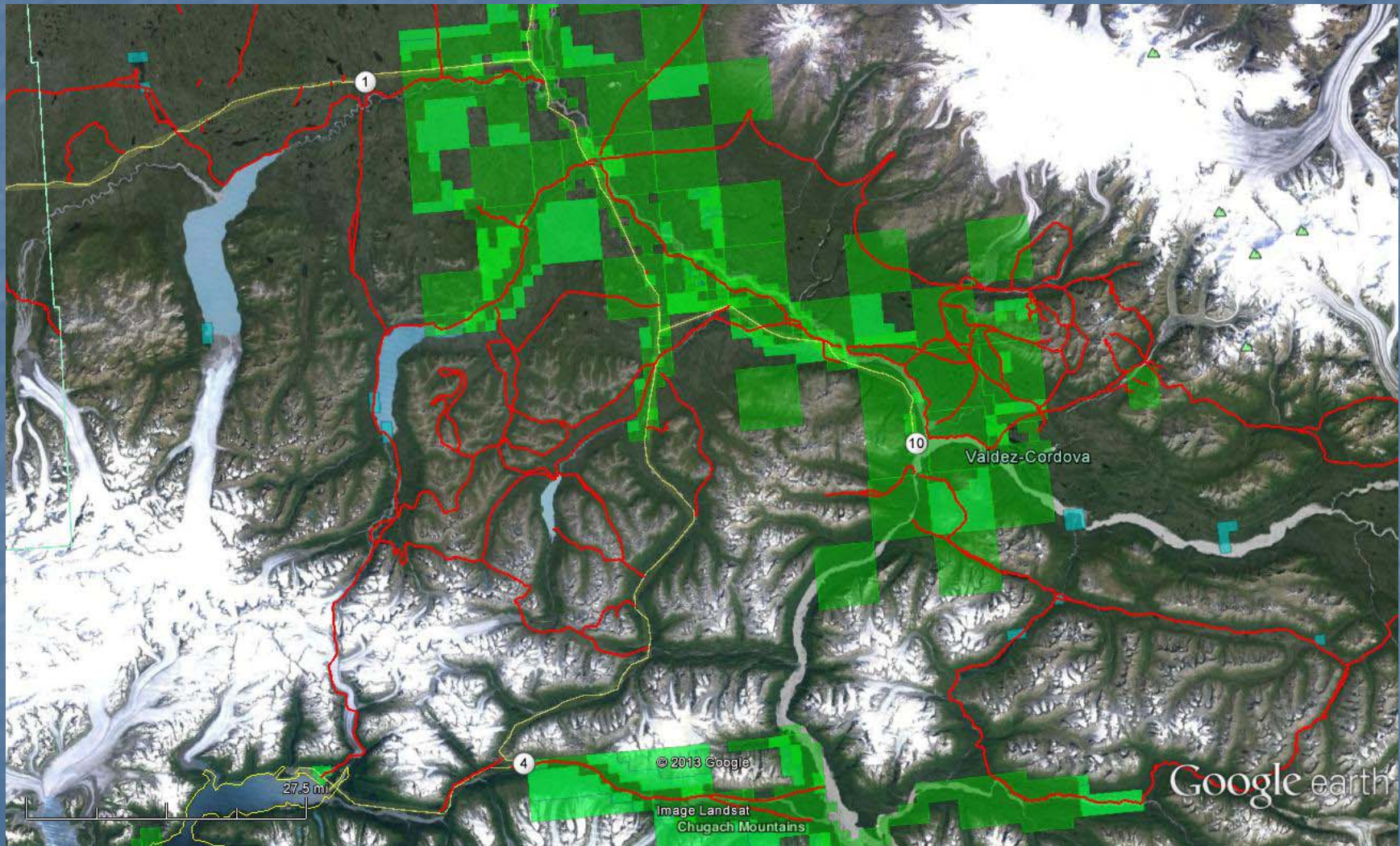
State's Claimed RS 2477 ROWs



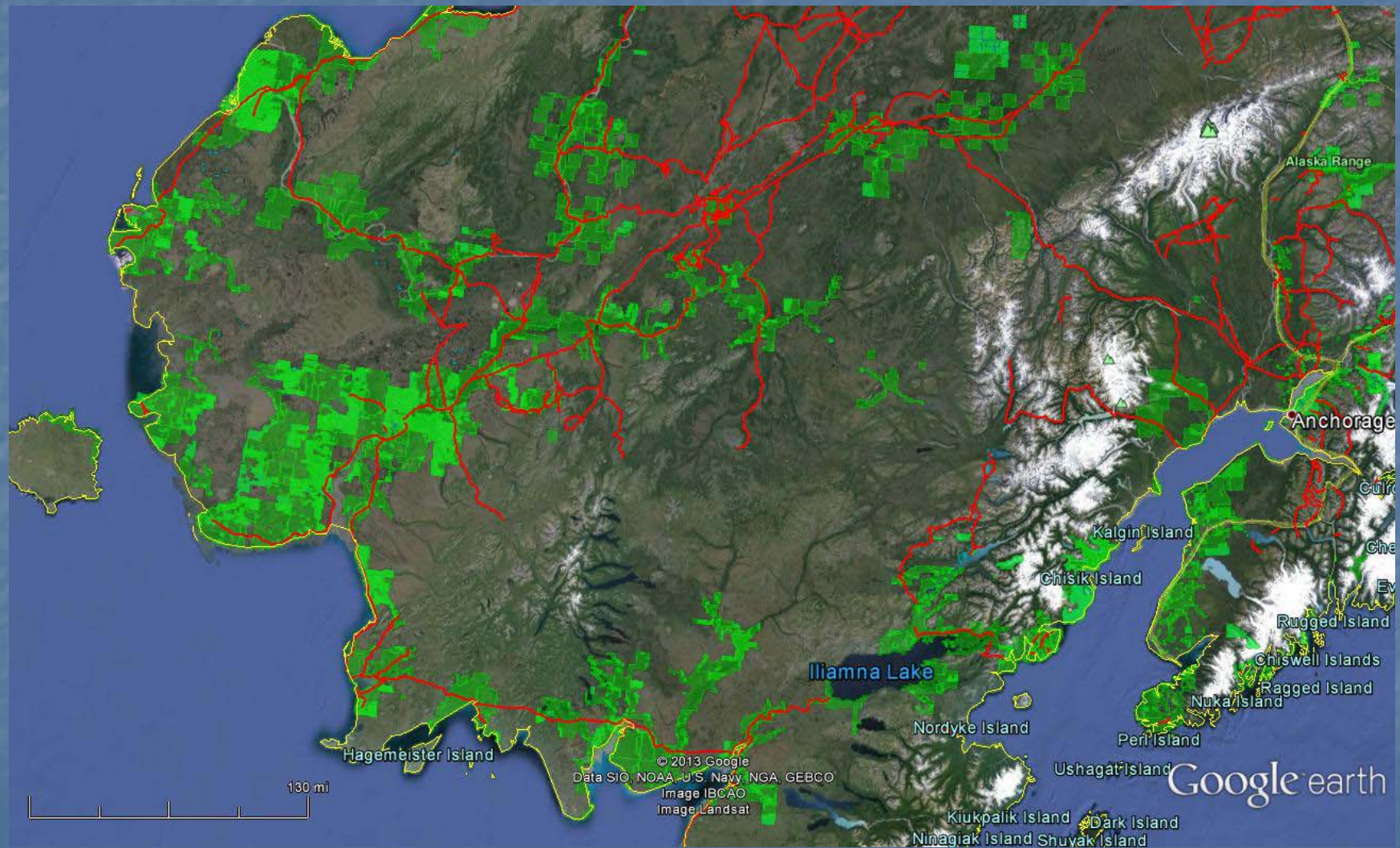
CIRI, Chugach, Ahtna Regions



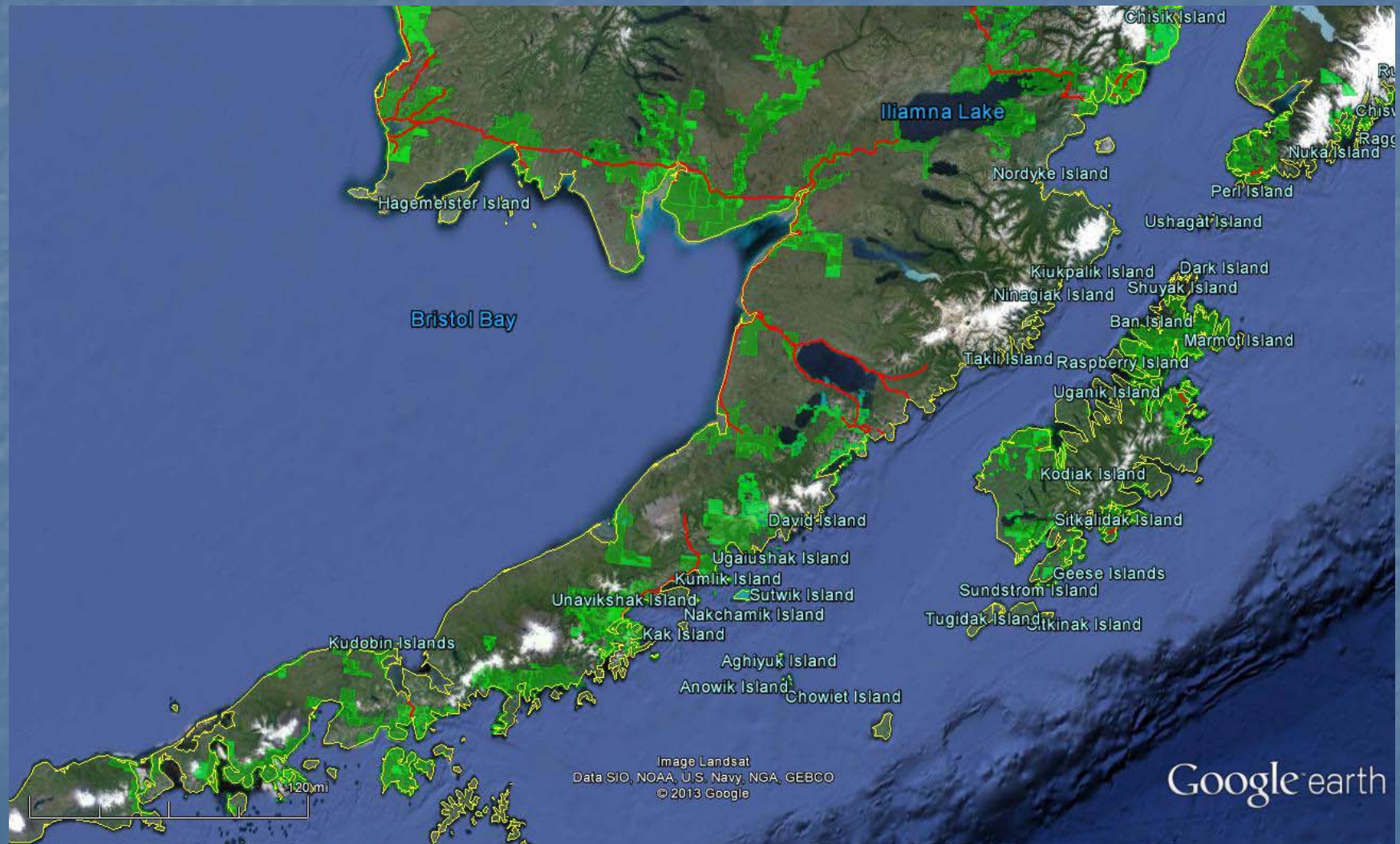
Klutina Lake / Brenwick-Craig Road



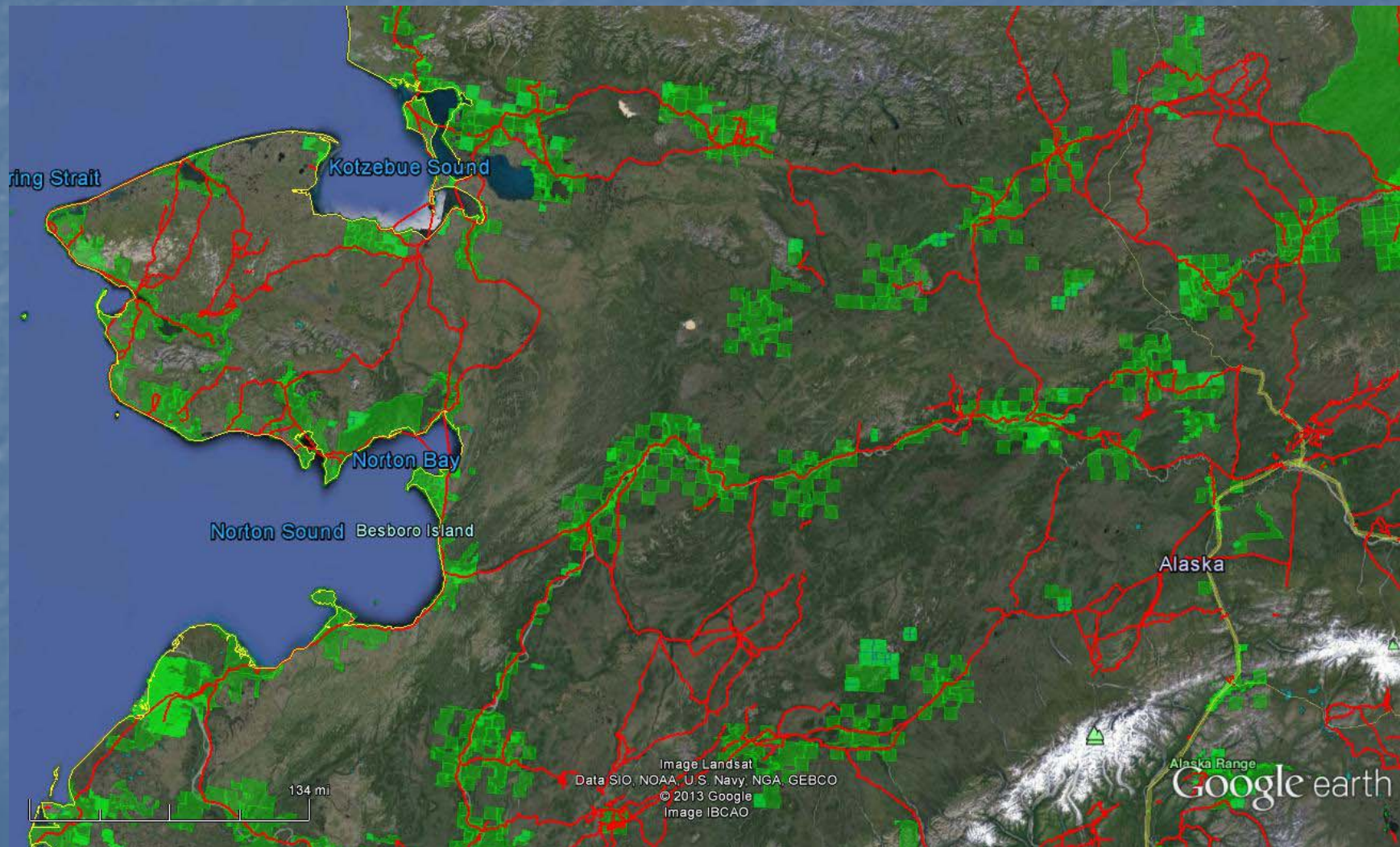
Bristol Bay, Calista, CIRI Regions



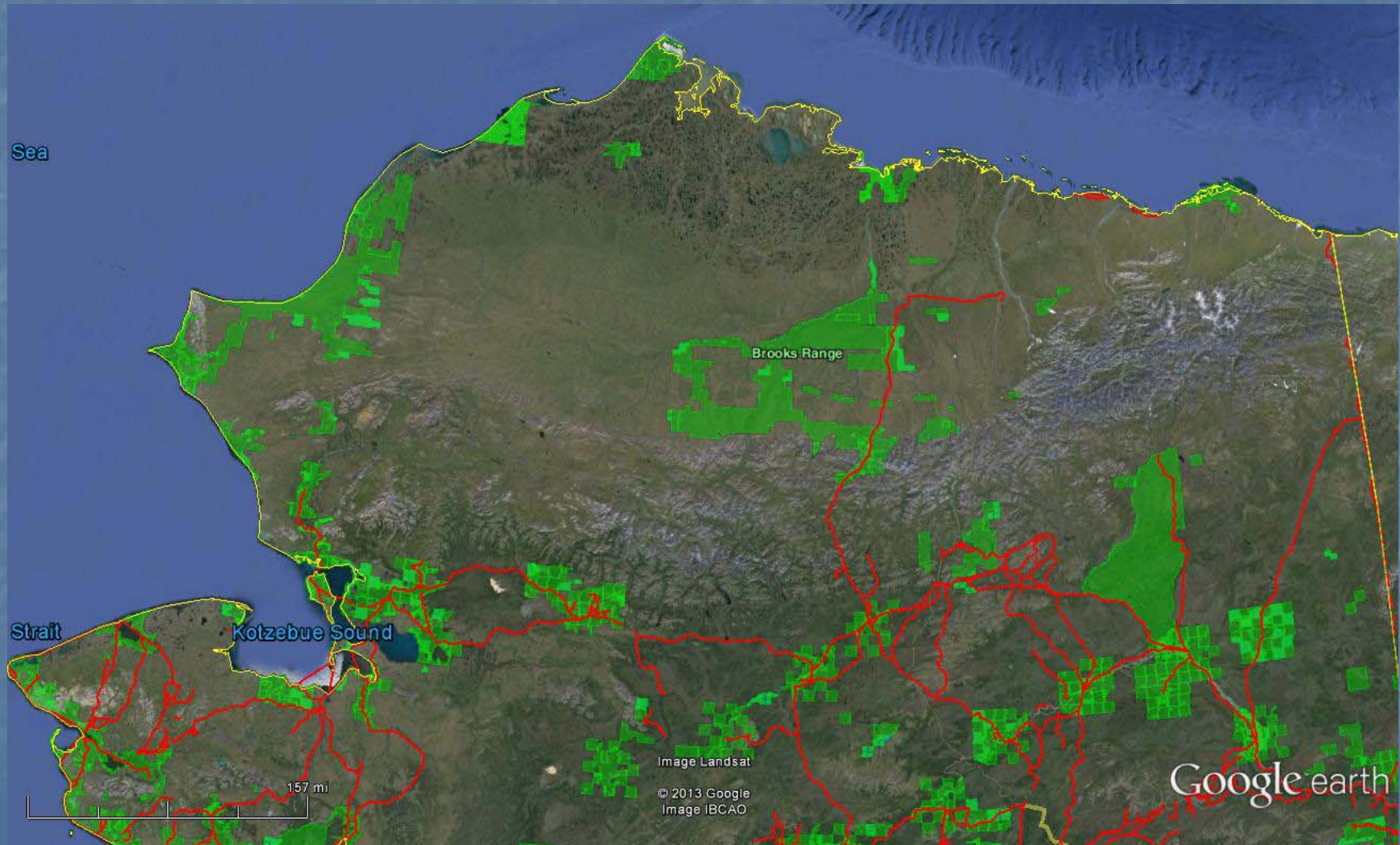
Aluet, Bristol Bay, Koniag Regions



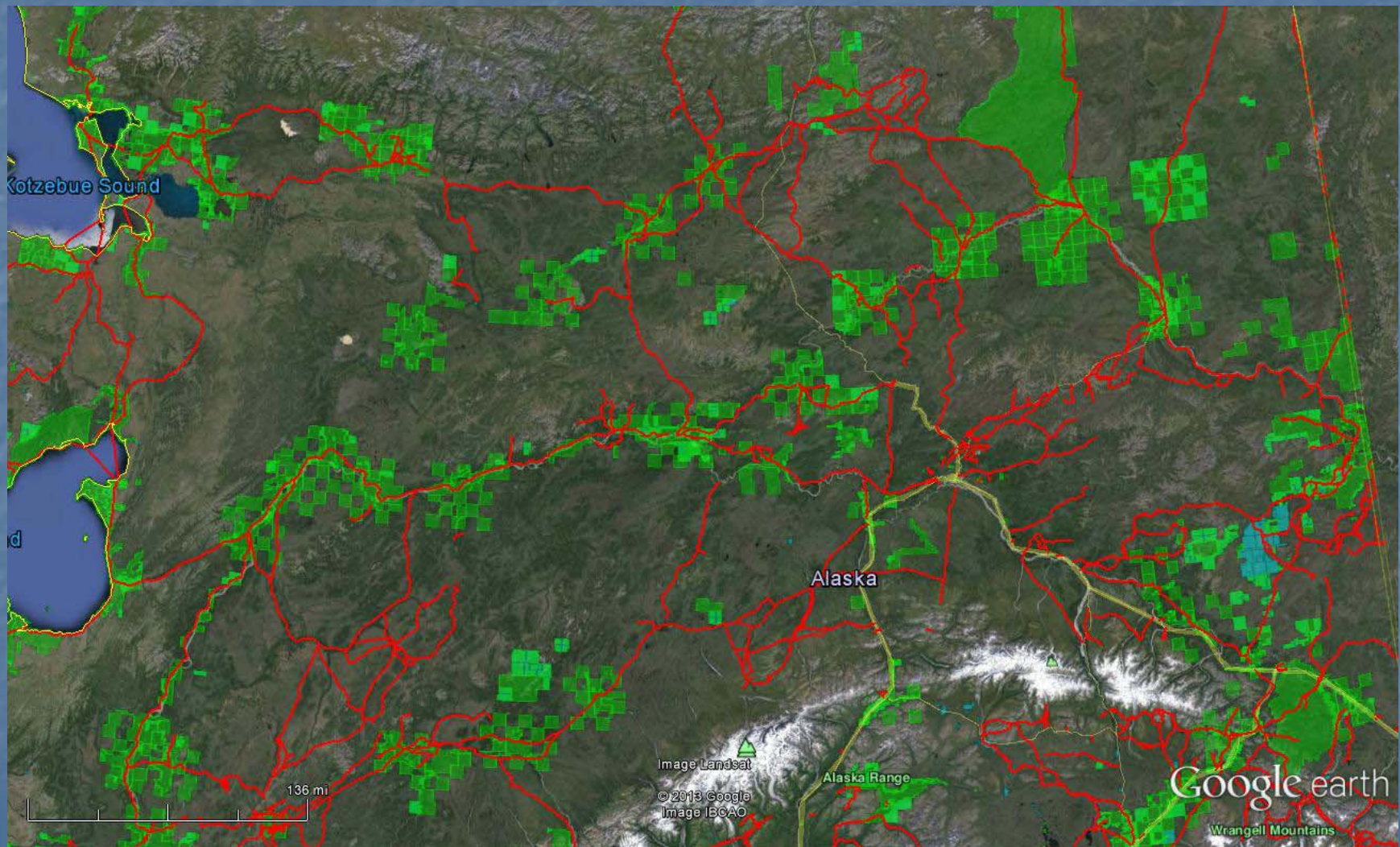
Bering Strait, NANA, Doyon Regions



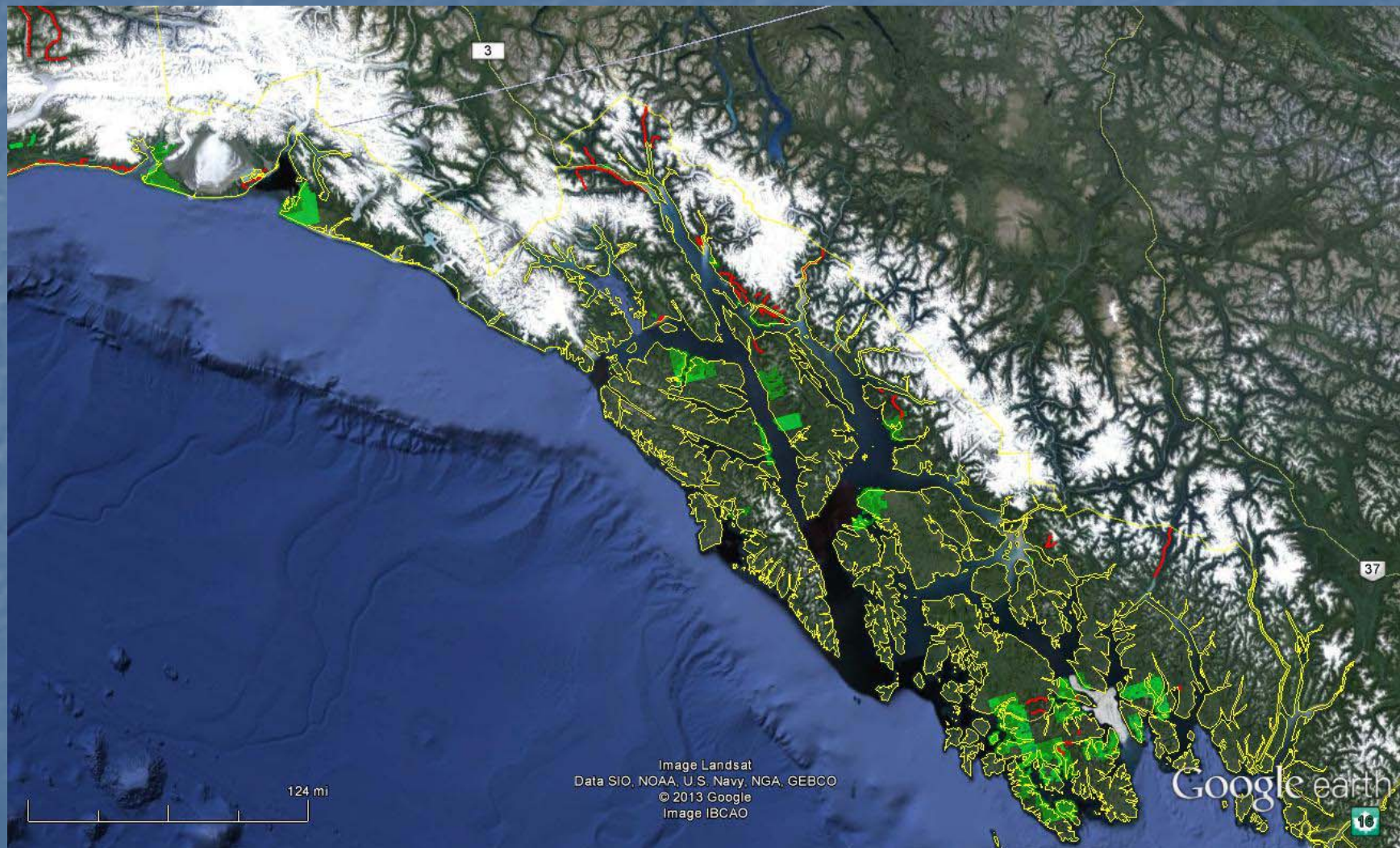
Arctic Slope, NANA, Doyon Regions



Doyon Region



Sealaska Region



Ahtna, Inc. v. State, et al.

~ An R.S. 2477 Case Study ~



Brenwick-Craig Road

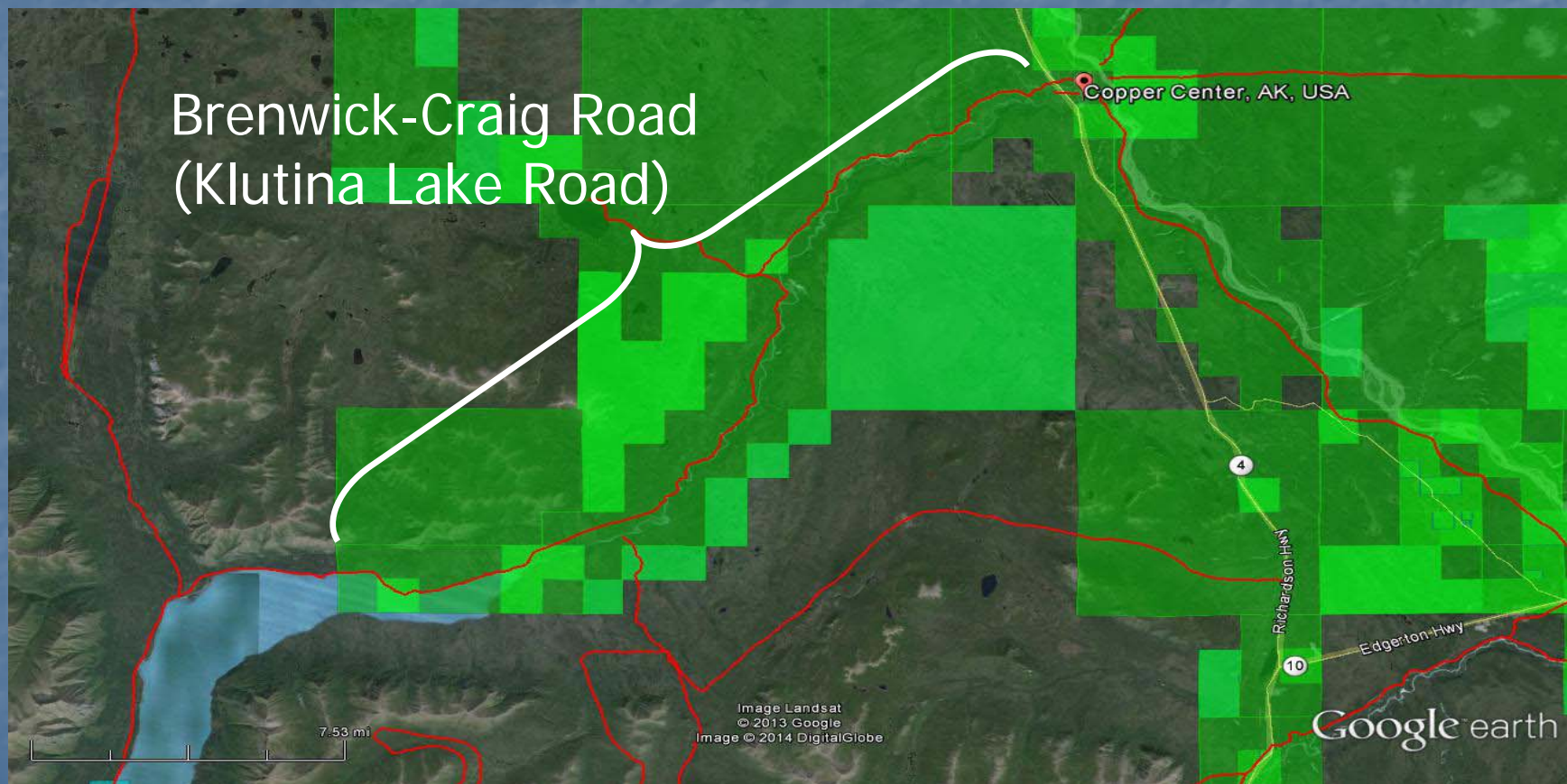


Photo Tour of the Road















17(b) Easement / Trespass Claim

AA-6658-A

BOOK 10 PAGE 291
Klutina Recording District

NOW KNOW YE, that there is, therefore, granted by the UNITED STATES OF AMERICA, unto the above-named corporation the surface estate in the land above described, TO HAVE AND TO HOLD the said estate with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said corporation, its successors and assigns, forever:

EXCEPTING AND RESERVING TO THE UNITED STATES from the lands so granted:

■ 60 Foot Easement

h. (EIN 11 C3, C5, D1, D9, L) An easement sixty (60) feet in width for an existing road from the Copper Center area in Sec. 12, T. 2 N., R. 1 W., Copper River Meridian, southwesterly to site EIN 10a C5, on the Klutina River near Klutina Lake. The uses allowed are those listed above for a sixty (60) foot wide road easement.

60 Foot Road The uses allowed on a sixty (60) foot wide road easement are: travel by foot, dogsled, animals, snowmobiles, two and three-wheel vehicles, small and large all-terrain vehicles, track vehicles, four-wheel drive vehicles, automobiles, and trucks.

■ Interim Conveyance 346 (July 18, 1980)

■ Use Restrictions Expressly Noted

INTERIM CONVEYANCE NO.

346

DATE JUL 18 1980

17(b) Continued

■ 1 Acre Site

(EIN 10a C5) A one (1) acre site easement upland of the ordinary high water mark in Sec. 19, T. 1 S., R. 2 W., Copper River Meridian, on the left bank of the Klutina River adjoining the west end of airstrip EIN 10 C5. The uses allowed are those listed above for a one (1) acre site.

One Acre Site The uses allowed for a site easement are: vehicle parking (e.g., aircraft, boats, ATV's, snowmobiles, cars, trucks), temporary camping, and loading or unloading. Temporary camping, loading, or unloading shall be limited to 24 hours.

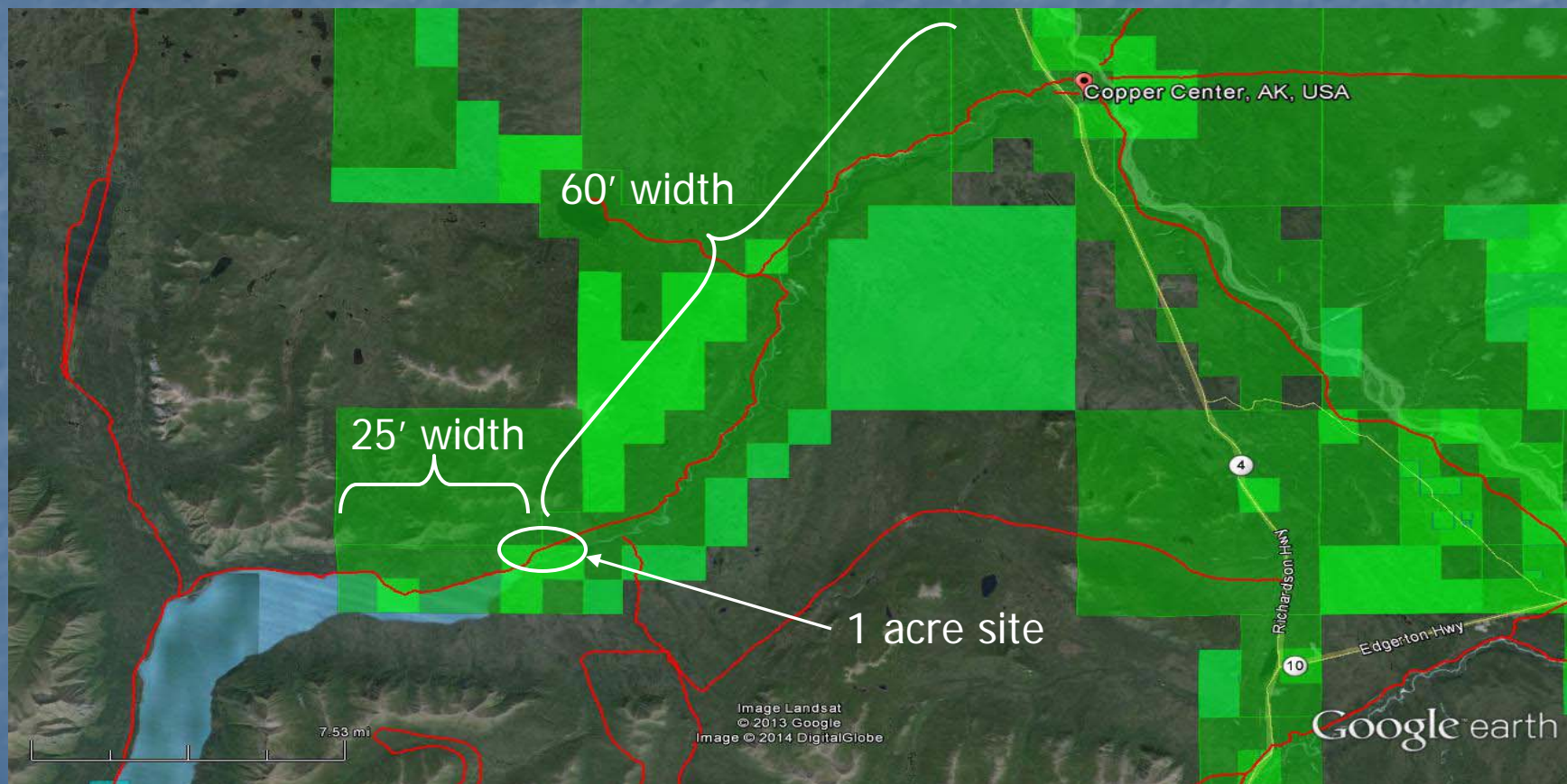
■ 25 Foot Easement

(EIN 21 E) An easement for an existing access trail twenty-five (25) feet in width from site EIN 10a C5 in Sec. 19, T. 1 S., R. 2 W., Copper River Meridian, southwesterly to public lands. The uses allowed are those listed above for a twenty-five (25) foot wide trail easement.

25 Foot Trail The uses allowed on a twenty-five (25) foot wide trail easement are: travel by foot, dogsled, animals, snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. Gross Vehicle Weight (GVW)).

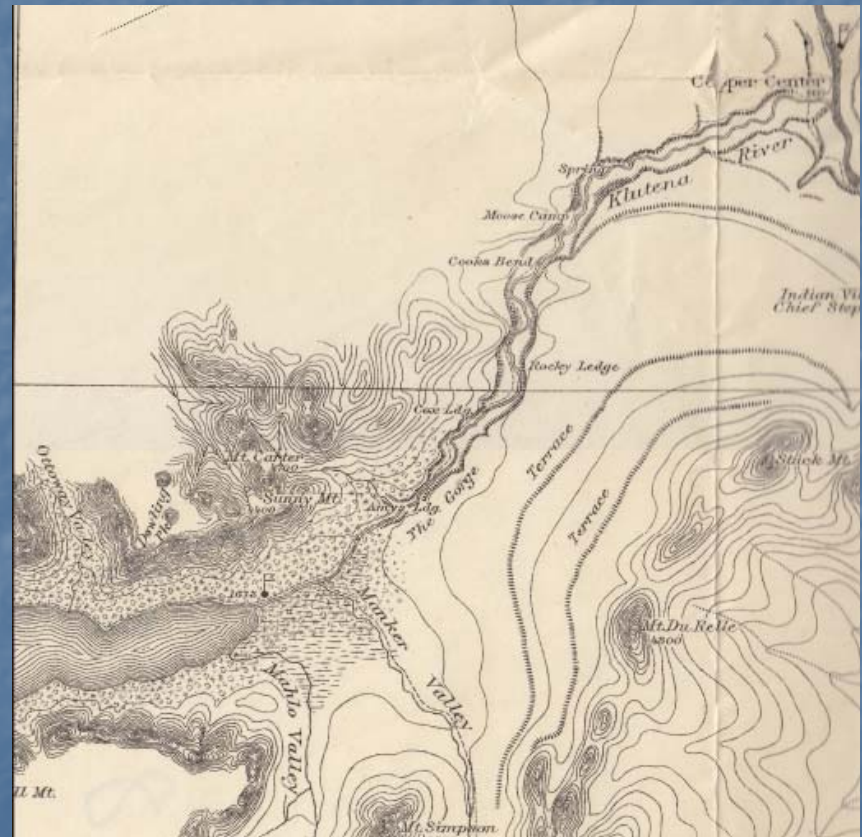
■ Limitations on Use

Brenwick-Craig Road



R.S. 2477 Counterclaim: Historical Use Theory

- 1898-1899 – “All American” Route to Klondike gold fields



R.S. 2477 Counterclaim: “Modern” Construction & Use Theory

- 1960s - Brenwick-Craig Road Construction
 - Leonard Brenwick & Oscar Craig constructed the Road to reach Native Allotments at the Lake
 - State funded a portion of road construction and subsequent maintenance work
- Subsequent use of road by general public
 - Travel to river, lake, private allotments
 - Sightseeing, berry-picking, camping
 - Boat launching, fishing, hunting

17(b) vs. R.S. 2477

17(b) ROW

- Federal owned
- More restrictions
- Narrow width (25-60')
- Point to point travel
- Emergency stopping
- Restrictions on development and use

R.S. 2477 ROW

- State owned
- Fewer restrictions
- Broad width (100')
- Allows for stopping/recreating
- Public use w/in ROW
- No restrictions on development

Initiation of Suit



Litigation Twists & Turns

- Road Sloughing (erosion)
- Joinder of Private Landowners
- State's Claim to 41 Spurs & Arterials
- Cultural Resources Investigation

Litigation Twists & Turns: Road Sloughing



Road Skirts the Bluffs



View Downriver



Relocation of ROW Temporary Bypass Easements



Results in Multiple Routes



Additional burden to Ahtna land



Additional Acreage Impacted



Litigation Twists & Turns: Joinder of Private Landowners



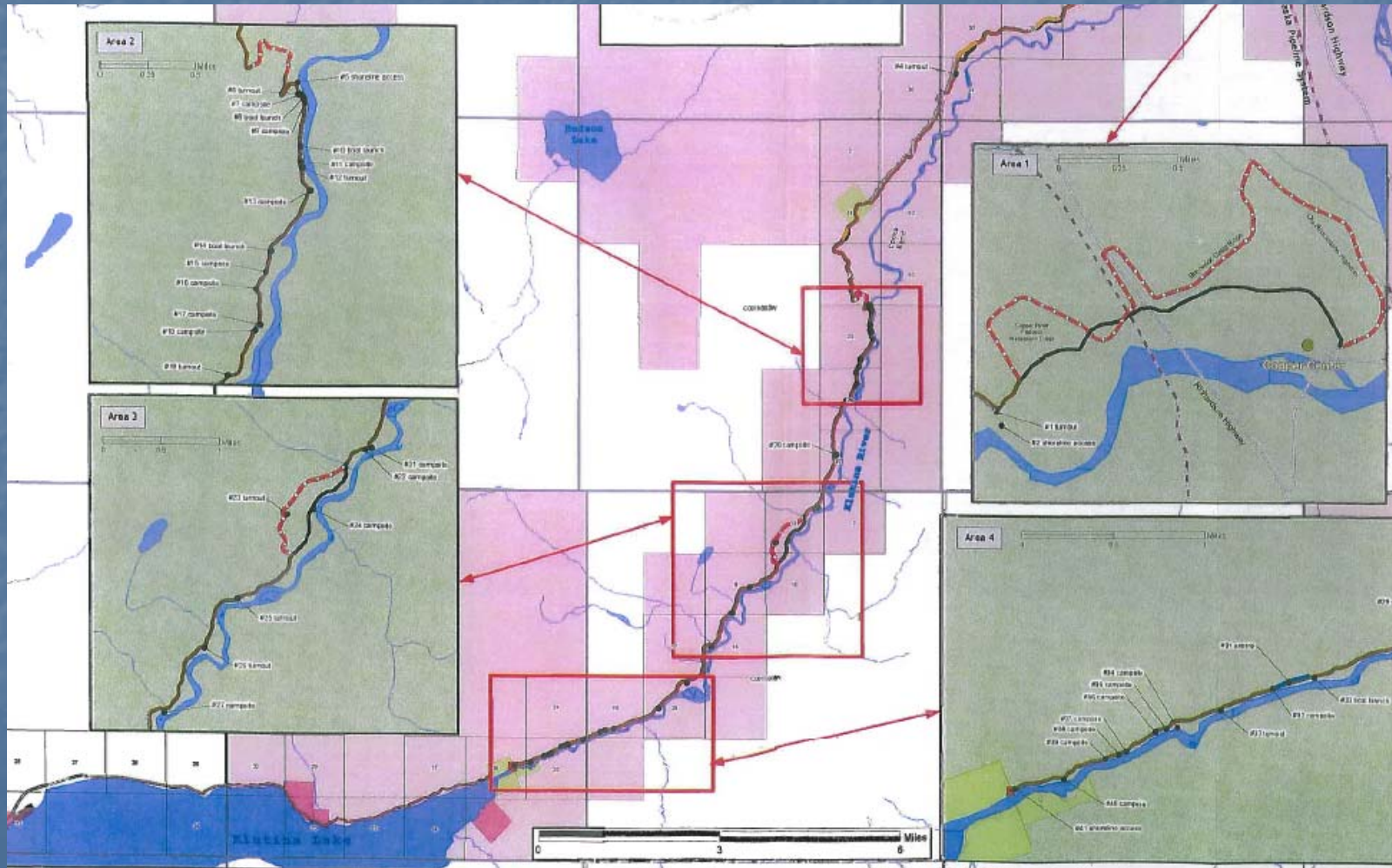
Private Landowner's Gate



Impact of Joinder

- Preserve jurisdiction
 - Court determination that landowners are necessary and indispensable parties
 - Also join all "unknowns"
- New layer of complexity to case
- State's cross-claim re: gate
- Increase costs
- Potential for delay

Litigation Twists & Turns: Spurs & Arterials



The State's Claim

- 41 “spurs & arterials” – Recreational Amenities
 - Campsites, pullouts, day-use sites, picnic areas, boat launches, fishing/river access points, scenic overlooks
- Exist outside scope of alleged Road ROW
- Claim that these sites were used by pioneers
 - Part and parcel with use of the Road/Trail
- R.S. 2477 ROWs or Secondary Easements
- Significant burden to Ahtna lands
 - Greater than 1 site per mile
 - Develop for public use (Kenai River North)

Litigation Twists & Turns: Cultural Resources Investigation



Purpose

- Inventory historical artifacts
- Link evidence of historical use with claimed locations of spurs & arterials
- Evaluate evidence
- Delineate boundaries of claimed sites



Upper Klutina R. Boat Building



- 1898-1899
- Pioneers constructed boats to float the Klutina River

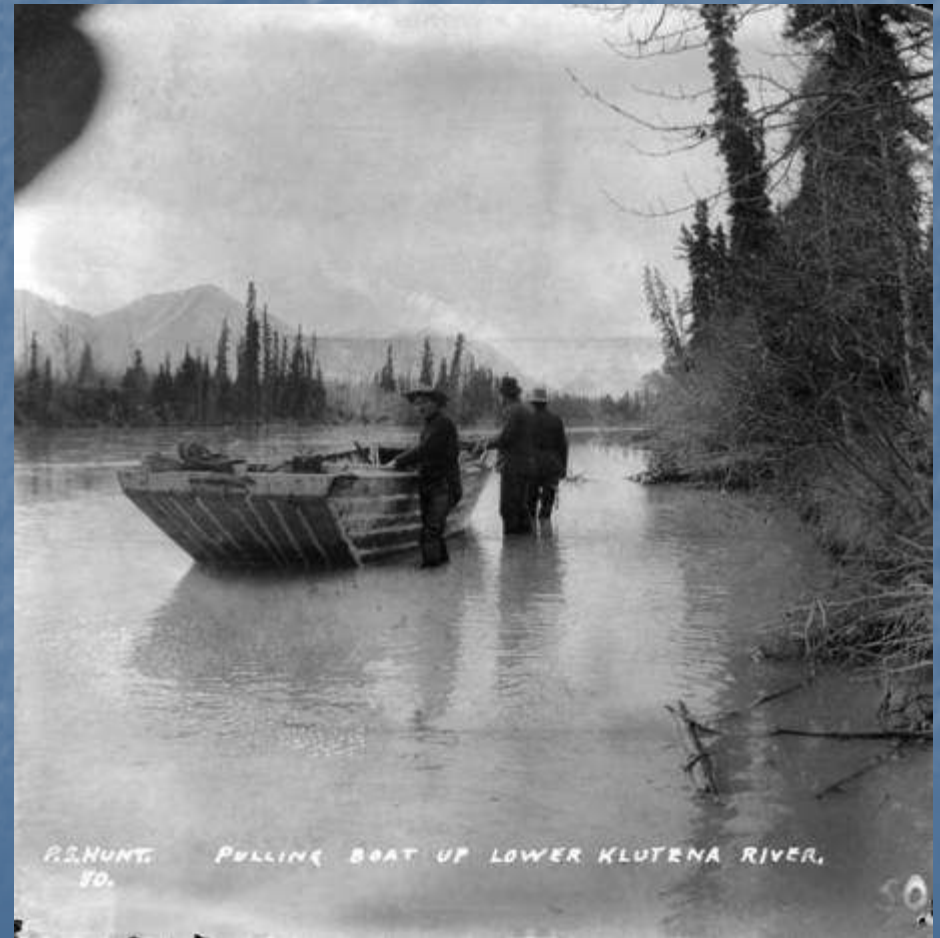






Water Navigation

- Most pioneers used the river to go from Klutina Lake to Copper Center
- Pack more goods
- Move much faster
- However, rapids were dangerous



P. HUNT. PULLING BOAT UP LOWER KLUTENA RIVER.

"Klutena City" Camp

- Outlet of Lake
- Temporary Settlement



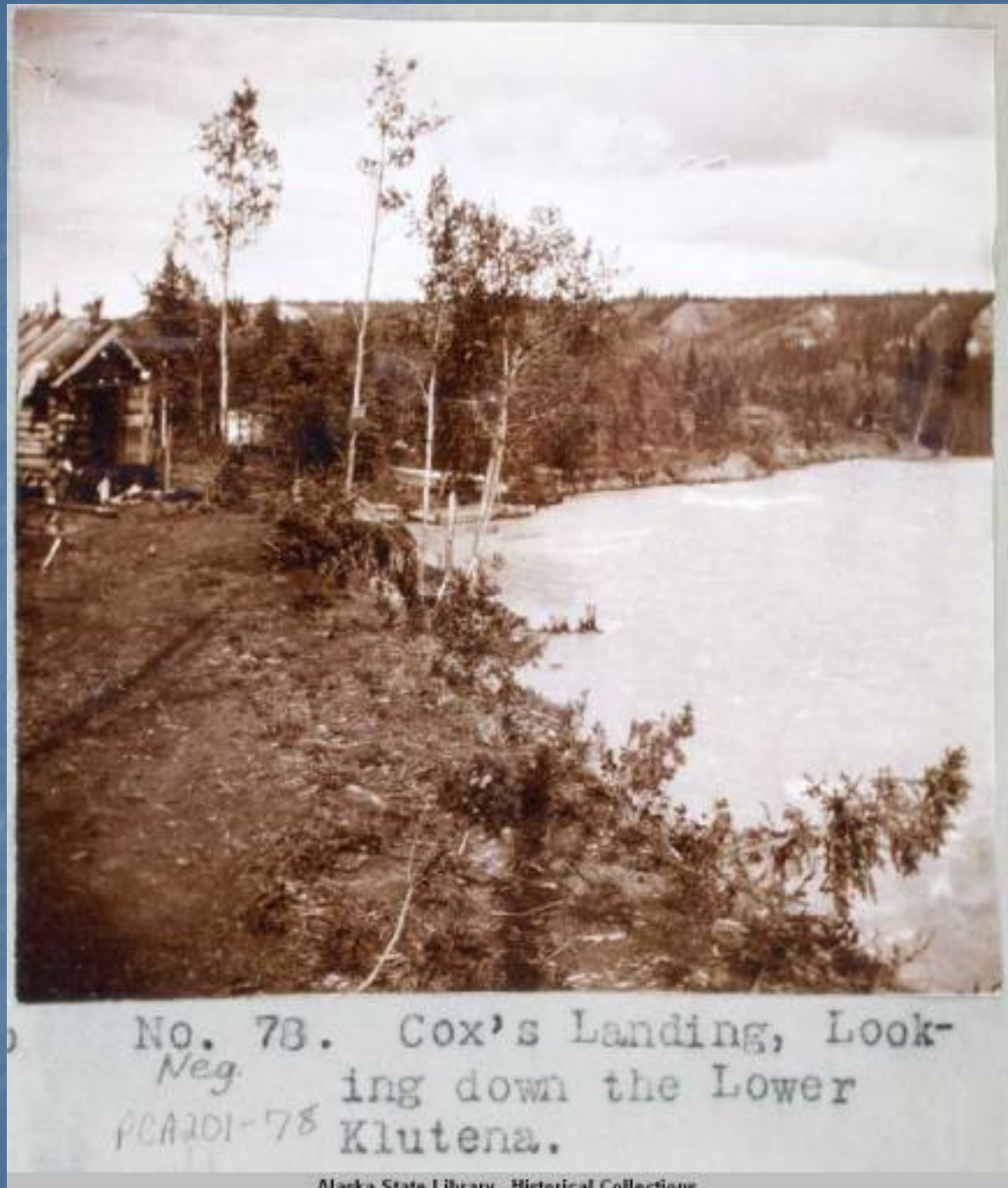
"Ameys Landing" (1898)



- Temporary settlement just before 1st set of rapids
- Hesitant prospectors stopped to survey rapids
- Major turnaround point

Cox's Landing (1898)

- Another pull-out
- Temporary settlement
- Cache site



No. 78. Cox's Landing, Looking down the Lower Klutena.
Neg.
PCA201-78

Experts Utilized

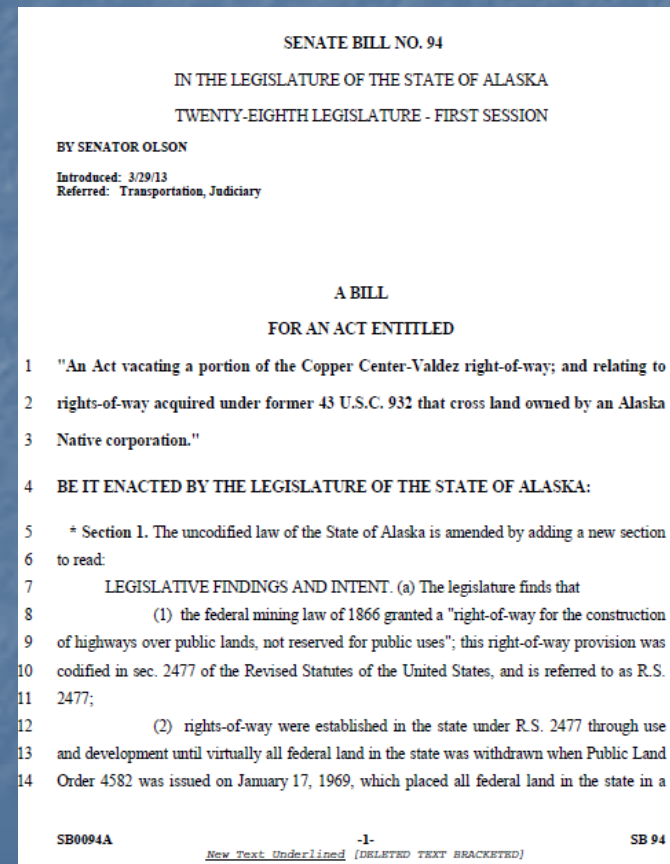
- Archaeologist
- Anthropologist
- Linguistic Anthropologist
- Historian
- Surveyor
- GIS

Trial

- Settlement appears unlikely (at this point)
- Motions practice to limit issues for trial
- Trial to take place in 2015 or 2016

Proposed Legislation

- Senate Bill 94
 - Sen. Olson
- House Bill 194
 - Rep. Foster
- Both bills referred to committee



What Would the Legislation Do?

Resolve R.S. 2477 Issues on ANCSA Land

- Limit width to 60 feet max, or established usage
- Limit use to transportation purposes only
- Limit State authority to improve or develop ROW
- Consultation with ANC before road work
- Consultation with ANC before any realignment of ROW
- Payment of just compensation for any additional acreage burdened

What Would the Legislation Do?

- Vacate the State's interest in the claimed R.S. 2477 ROW along Klutina Lake Road to the extent it overlaps with 17(b) easement
- Result = Terminate Litigation between Ahtna and the State

AFN Support

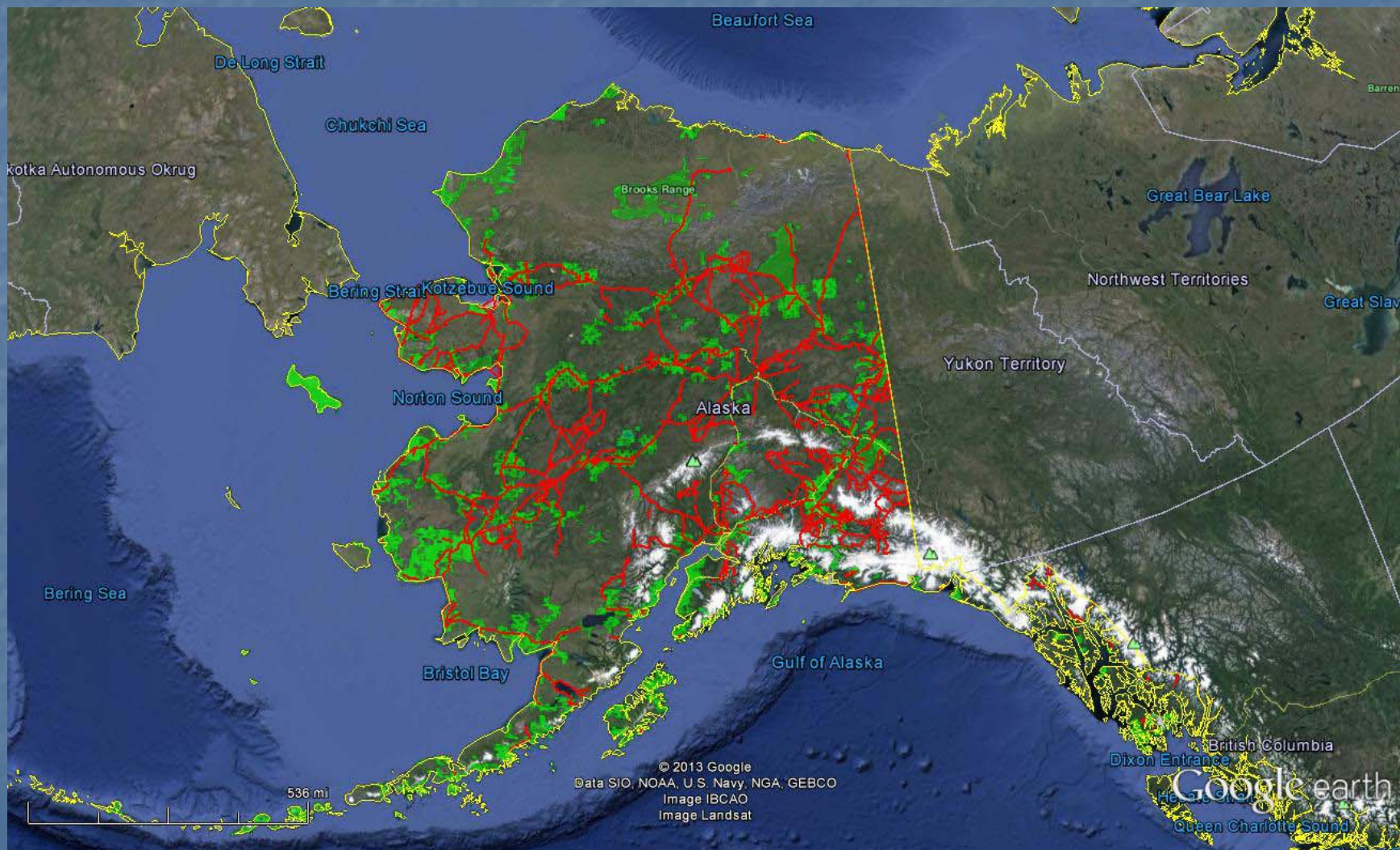
- January 2014
 - AFN Resolution supporting Ahtna's legislative efforts
 - Committed to securing passage of the bill
- Important for ANCs to work together
 - Contact legislators
 - Provide comments and testimony



ALASKA FEDERATION OF NATIVES
BOARD OF DIRECTORS
RESOLUTION 14-1

- TITLE:** A RESOLUTION IN SUPPORT OF AHTNA'S STATE LEGISLATION SENATE BILL 94, "AN ACT VACATING A PORTION OF THE COPPER CENTER-VALDEZ RIGHT-OF-WAY; AND RELATING TO RIGHTS-OF-WAY ACQUIRED UNDER FORMER 43 U.S.C. 932 THAT CROSS LAND OWNED BY AN ALASKA NATIVE CORPORATION."
- WHEREAS:** Ahtna has been engaged in litigation with the State of Alaska ("State") over 26-miles of undeveloped road that stretches from the Richardson Highway to the outlet of Klutina Lake, which is often referred to as the "Brenwick-Craig Road," and
- WHEREAS:** All 26-miles of the Brenwick-Craig Road ("Road") lies within land conveyed to Ahtna, Inc., in accordance with the Alaska Native Claims Settlement Act ("ANCSA"); and
- WHEREAS:** The Klutina River drainage is an important subsistence use area for Ahtna shareholders and has been used by the Ahtna People for millennia; and
- WHEREAS:** Ahtna recognizes the Road as a 60-foot wide 17(b) public easement reserved by the federal government under ANCSA, limited to point-to-point transportation and emergency stopping; and
- WHEREAS:** The State contends that the Road is part of a much larger 100-foot wide RS 2477 right-of-way ("ROW") that runs unimpeded from Copper Center to Valdez for a total of approximately 103 miles; and

R.S. 2477 ROWs are a Statewide Issue for All ANCs



Thank you!

If you have any questions or comments, please contact me:

Gregory F. Dorrington
3000 A Street, Suite 300
Anchorage, AK 99503
(907) 563-8844

gdorrington@jdolaw.com



Jermain Dunnagan & Owens, P.C.
ANCHORAGE, ALASKA