

**SB**

**94**

<TARGET><BILL>SB 94</BILL><SUBJECT>SB  
94</SUBJECT><COMM>STRA28</COMM></TARGET>

# ALASKA STATE LEGISLATURE



## Senator Donald C. Olson

Alaska State Capitol  
Room 508  
Juneau, Alaska 99801-1182  
(907) 465-3707  
sen.donny.olson@akleg.gov

### SPONSOR STATEMENT

#### SB 94 – RIGHTS-OF-WAY

SB 94 limits the scope with which the State can exercise its RS2477 rights-of-way.

Rights-of-way were established in the state under R.S. 2477 through use and development until virtually all federal land in the state was withdrawn when Public Land Order 4582 was issued on January 17, 1969, which placed all federal land in the state in a reserved status. When sec. 706 of the Federal Land Policy and Management Act (43 U.S.C. 1701) repealed R.S. 2477 on October 21, 1976, valid existing rights under R.S. 2477 were preserved. In 1998, the Alaska State Legislature recognized claims to 602 rights-of-way, and the Department of Natural Resources has identified 67 additional R.S. 2477 rights-of-way. A significant number of the claimed R.S. 2477 rights-of-way in the state cross privately owned land. R.S. 2477 rights-of-way that cross private property have resulted in increased trespass to private land, resource damage to the servient estate, and conflicts between the public users, private landowners, and state right-of-way managers, all of which can lead to time-consuming and costly litigation. While providing for the public right to access R.S. 2477 rights-of-way, every effort should be made to minimize the effect on the affected property owners.

SB 94 would minimize this effect by limiting these rights-of-way to 60 feet and restricting their purpose to transportation. It also sets up the conditions for secondary easements for inspection, repair, maintenance and improvements, and the conditions for dispute resolution. The bill also states that realignment of RS2477s will be handled under eminent domain law.

SB 94 also vacates the Copper Center - Valdez right-of-way. This R.S. 2477 right-of-way overlaps a 17(b) easement involving a road and all-terrain vehicle trail that is roughly parallel the Klutina River from the New Richardson Highway to partway around Klutina Lake; the road and trail form a portion of the claimed Copper Center-Valdez right-of-way. The road and trail are also supported by 17(b) easements which were reserved to the public when the federal government conveyed the land underlying the road and trail to Ahtna, Incorporated.

# ALASKA STATE LEGISLATURE

## SENATOR DONALD C. OLSON SENATE DISTRICT T

### *Session*

Alaska State Capitol, Rm. 508  
Juneau, AK 99801  
(907) 465-3707  
Fax (907) 465-4821  
Sen. Donny.Olson@aklegis.gov



### *Interim*

716 W. 4<sup>th</sup> Ave. Ste 530  
Anchorage, AK 99501  
Toll Free 800-597-3707  
(907) 269-0254  
Fax (907) 269-2031

## SECTIONAL ANALYSIS SSSB 94 – Rights-of-Way

### **SECTION 1**

Vacates the Copper Center – Valdez right-of-way for those portions that overlap public easements established by ANSCA.

### **SECTION 2**

Limits R.S. 2477 rights-of-way that crosses private lands

- to the use of the route established on October 21, 1976;
- to a width of 60 feet;
- to transportation purposes.

Grants a secondary easement to R.S. 2477's rights-of-way that cross private land in order to enter, inspect, repair, maintain, & improve the right-of-way:

- to the extent that the routine maintenance and repair may only preserve the condition of the right-of-way as it existed on October 21, 1976;
- and to make necessary improvements to the right-of-way to preserve the transportation use of the right-of-way.

Requires the state to consult with and gain permission of the private landowner prior to making improvements other than routine maintenance and repair.

Allows for mediation if there is a dispute between the private land owner and the state about improvements to the right-of-way.

Requires the state to consult with the private landowner who owns the underlying land if an R.S. 2477 has been damaged beyond repair and is to be realigned.

Defines "routine maintenance and repair".

# FISCAL NOTE

STATE OF ALASKA  
2014 LEGISLATIVE SESSION

Bill Version SS SB94  
Fiscal Note Number \_\_\_\_\_  
( ) Publish Date \_\_\_\_\_

Identifier (file name) SB094SS-DNR-MLW-3-8-14 Dept. Affected Natural Resources  
Title RIGHTS-OF-WAY Appropriation Land & Water Resources  
Allocation Mining, Land and Water  
Sponsor Senator Olson  
Requester Senate Transportation OMB Component Number 3002

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY15 Appropriation Requested	Included in Governor's FY15 Request	Out-Year Cost Estimates				
			FY16	FY17	FY18	FY19	FY20
<b>OPERATING EXPENDITURES</b>	<b>FY15</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>	<b>FY19</b>	<b>FY20</b>
Personal Services	***	0.0	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>***</b>	<b>0.0</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>

FUND SOURCE		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1007	I/A Rcpts (Other)						
1156	Rcpt Svcs (DGF)						
		***	0.0	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

**CHANGE IN REVENUES**

Estimated SUPPLEMENTAL (FY14) operating costs \_\_\_\_\_ (separate supplemental appropriation required)  
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY15) costs \_\_\_\_\_ (separate capital appropriation required)  
(discuss reasons and fund source(s) in analysis section)

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No  
If yes, by what date are the regulations to be adopted, amended, or repealed? \_\_\_\_\_ Discuss details in analysis section.

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Initial Version

Prepared by Brent Goodrum, Director  
Division Mining, Land and Water  
Approved by Joe Balash, Commissioner  
Division Department of Natural Resources

Phone 269-8600  
Date/Time 3/8/14 12:00 PM  
Date 3/8/2014

## FISCAL NOTE ANALYSIS

STATE OF ALASKA  
2014 LEGISLATIVE SESSION

BILL NO. SS SB94

### Analysis

SSSB 94 alters State-owned and historically vested property rights. The bill would limit the size, maintenance and use of R.S. 2477 rights-of-way, effectively relinquishing valuable state property interests with no compensation.

The precise fiscal impacts of this bill are indeterminate because by placing limitations on the State's existing property rights, it curtails public property interests that the State currently holds in trust for the benefit of all Alaskans. In addition, the loss of access and the value of that access to the state would be significant and should the state need to realign a right-of-way, the state would be required to repurchase the land relinquished through its condemnation authority under new AS 19.40.340(d).

The bill seeks to vacate portions of, and significantly alter the State's remaining interests in an R.S. 2477 right-of-way known as RST 633 (the Copper Center to Valdez Trail). That right-of-way and the State's interests in it is currently the subject of ongoing litigation in a case brought by Ahtna, Inc. against the State of Alaska. See *Ahtna, Inc., v. Alaska Dept. of Transp. & Public Facilities, et. al.*, Case No. 3AN-08-6337.

Second, the bill seeks to relinquish State-owned R.S. 2477 property interests which have already historically vested. Today, due to subsequent conveyance of lands which were once federally owned, in many instances R.S. 2477 rights-of-way now continue to exist across private ownership, including Alaska Native corporations. These rights-of-way serve as important legal access to resources and opportunities for all citizens of the State.

This bill would restrict the legal interests that the State presently possesses in R.S. 2477 rights-of-way by, among other things:

1. Narrowing their width;
2. Narrowing the methods and types of use which can occur on them, including limiting the rights-of-way to the mode, method and types of use which occurred as of R.S. 2477's repeal in 1976; and
3. Placing limitations on the State's ability to maintain and improve the rights-of-way.

DNR estimates that the State currently possesses in excess of 20,000 linear miles of codified R.S. 2477 rights-of-way. If uncodified routes were included, this number is likely closer to 26,600 miles. A significant percentage, but not all, of the codified routes are 100 feet in width. Of the acreage subject to a codified RST, at least 50% of that acreage is owned by native corporations or is privately owned. The bill seeks to limit RSTs on these lands to only 60' in width. The loss of right-of-way acreage to the state resulting from the diminished 40' of right-of-way on codified R.S. 2477s would at a minimum equate to 48,500 acres. (20,000 linear miles of codified RSTs x 5,280 ft/mile x 40 ft. width lost, divided by 43,560 s.f./acre x 50%). The loss of value of these routes to the state would exceed \$48.5 million assuming a basic cost of lands along public access of \$1,000 per acre.

# FISCAL NOTE

**STATE OF ALASKA**  
**2014 LEGISLATIVE SESSION**

Bill Version SS SB 94  
 Fiscal Note Number \_\_\_\_\_  
 () Publish Date \_\_\_\_\_

Identifier (file name) SB094SS-DOT-NDAES-3-8-14 Dept. Affected DOT&PF  
 Title Rights-of-Way Appropriation Design, Engineering & Construction  
 Allocation Northern Design and Engineering Services  
 Sponsor Senator Olson  
 Requester Senate Transportation Committee OMB Component Number 2299

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY15 Appropriation Requested	Included in Governor's FY15 Request	Out-Year Cost Estimates				
			FY16	FY17	FY18	FY19	FY20
<b>OPERATING EXPENDITURES</b>	<b>FY15</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>	<b>FY19</b>	<b>FY20</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>FUND SOURCE</b>		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1007	I/A Rcpts (Other)						
1156	Rcpt Svcs (DGF)						
		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>POSITIONS</b>							
Full-time							
Part-time							
Temporary							

**CHANGE IN REVENUES**

Estimated **SUPPLEMENTAL (FY14) operating costs** \_\_\_\_\_ (separate supplemental appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

Estimated **CAPITAL (FY15) costs** \_\_\_\_\_ (separate capital appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No  
 If yes, by what date are the regulations to be adopted, amended, or repealed? \_\_\_\_\_ Discuss details in analysis section.

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Initial version.

Prepared by Connie McKenzie, Special Assistant  
 Division Office of the Commissioner  
 Approved by Mary Siroky, Director  
 Division Administrative Services Division

Phone 465-4772  
 Date/Time 3/7/14 10:00AM  
 Date 3/7/2014

FISCAL NOTE ANALYSIS

STATE OF ALASKA  
2014 LEGISLATIVE SESSION

BILL NO. SS SB 94

**Analysis**

The proposed legislation would vacate the Revised Statutes of the United States (R.S.) 2477 Copper Center-Valdez right-of-way, referred to as RST 633 in statute, for those portions that overlap public easements established in 17(b) easements of the Alaska Native Claims Settlement Act.

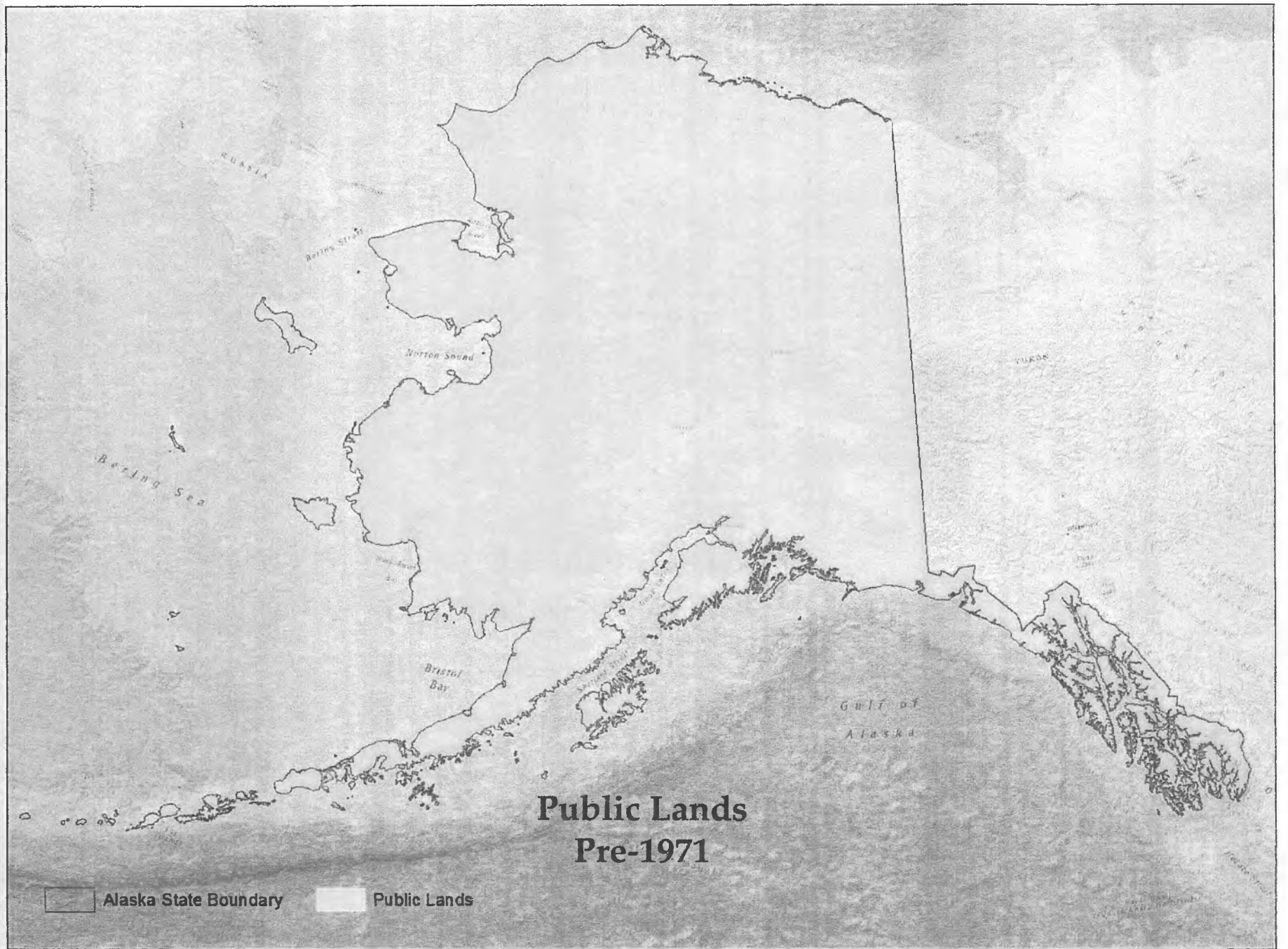
In addition it would add a new section to AS 19.30 that would limit uses and size of R.S. 2477 rights-of-way that cross privately owned land: width not to exceed 60 feet; uses of the route established on October 21, 1976; used for transportation purposes excluding rest areas, parking lots, overnight camping, boat launches, recreation sites, or similar uses.

The proposed legislation would include a secondary easement to enter, inspect, repair, maintain, and improve the right-of-way under certain conditions. It also allows for re-alignment due to damage by natural causes that are beyond repair, but restricting transportation options to pre-1976 uses.

There will be no fiscal impact to the department.

## **Background – Alaska Land Status Prior to 1971**

- During the period of expansion of the Western frontier (1796-1976), the U.S. Government embraced a policy of disposal of the federal lands, transferring them to private individuals, railroads, and states in order to provide a revenue base.

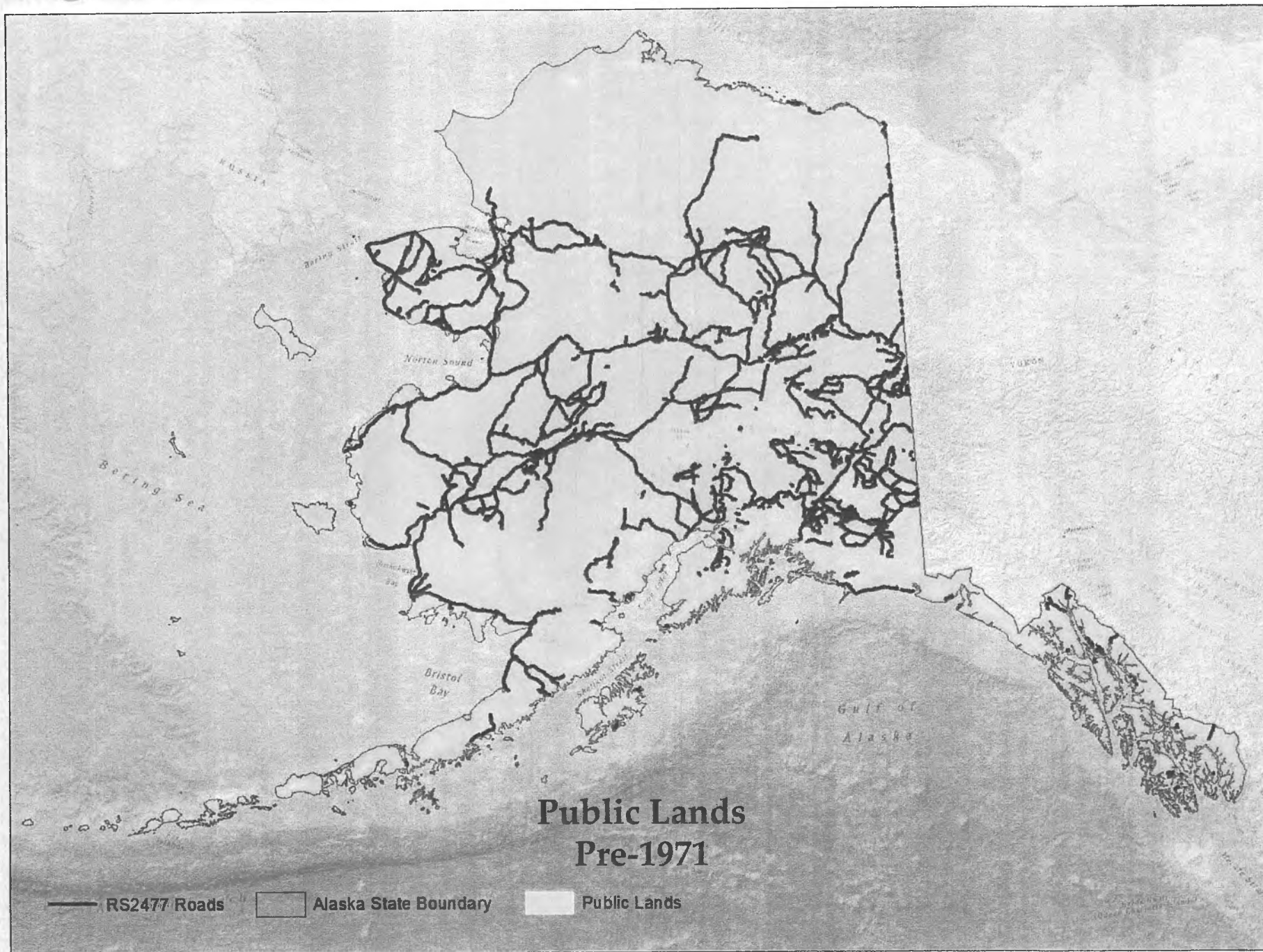


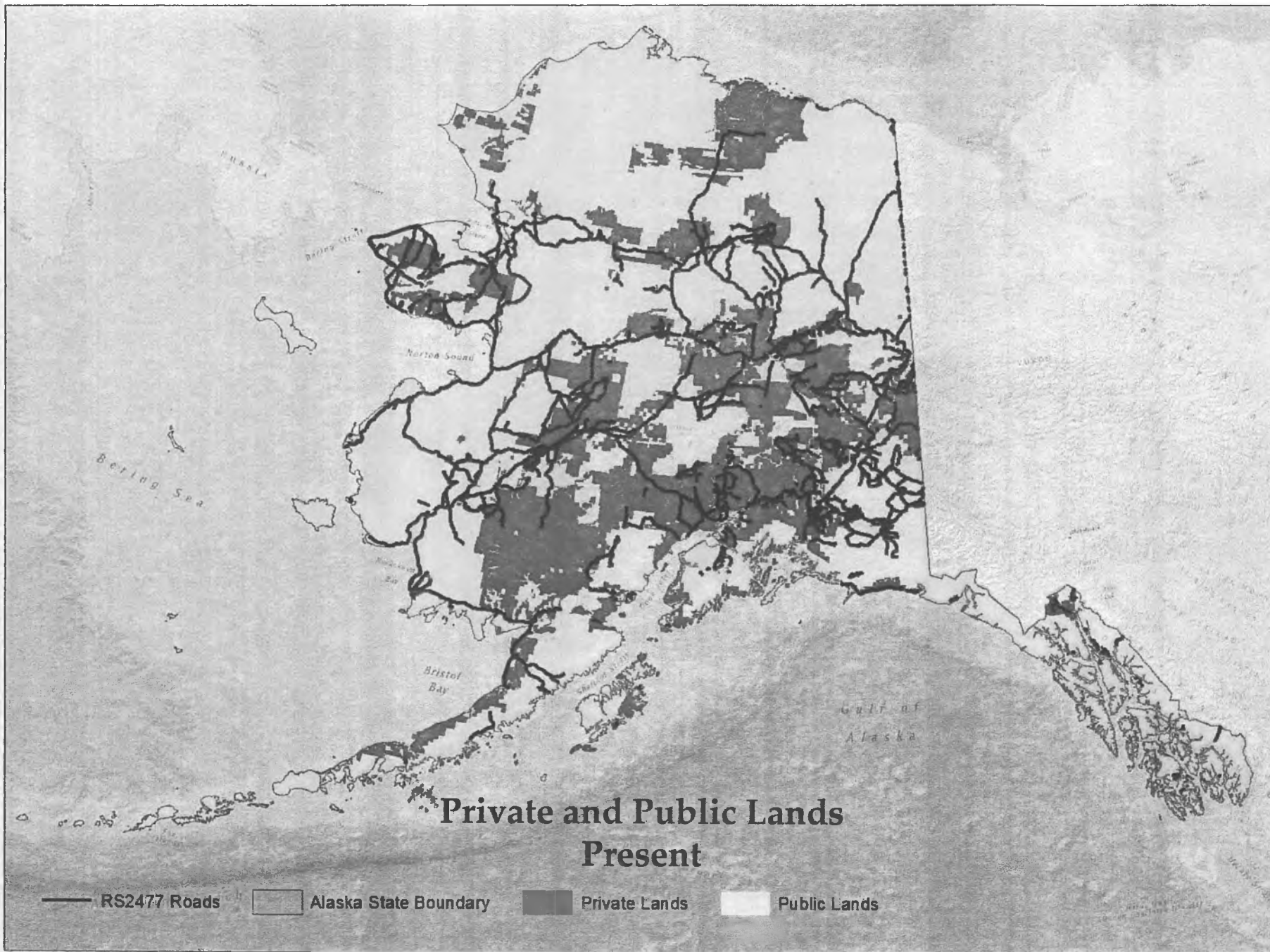
# Legal Definitions

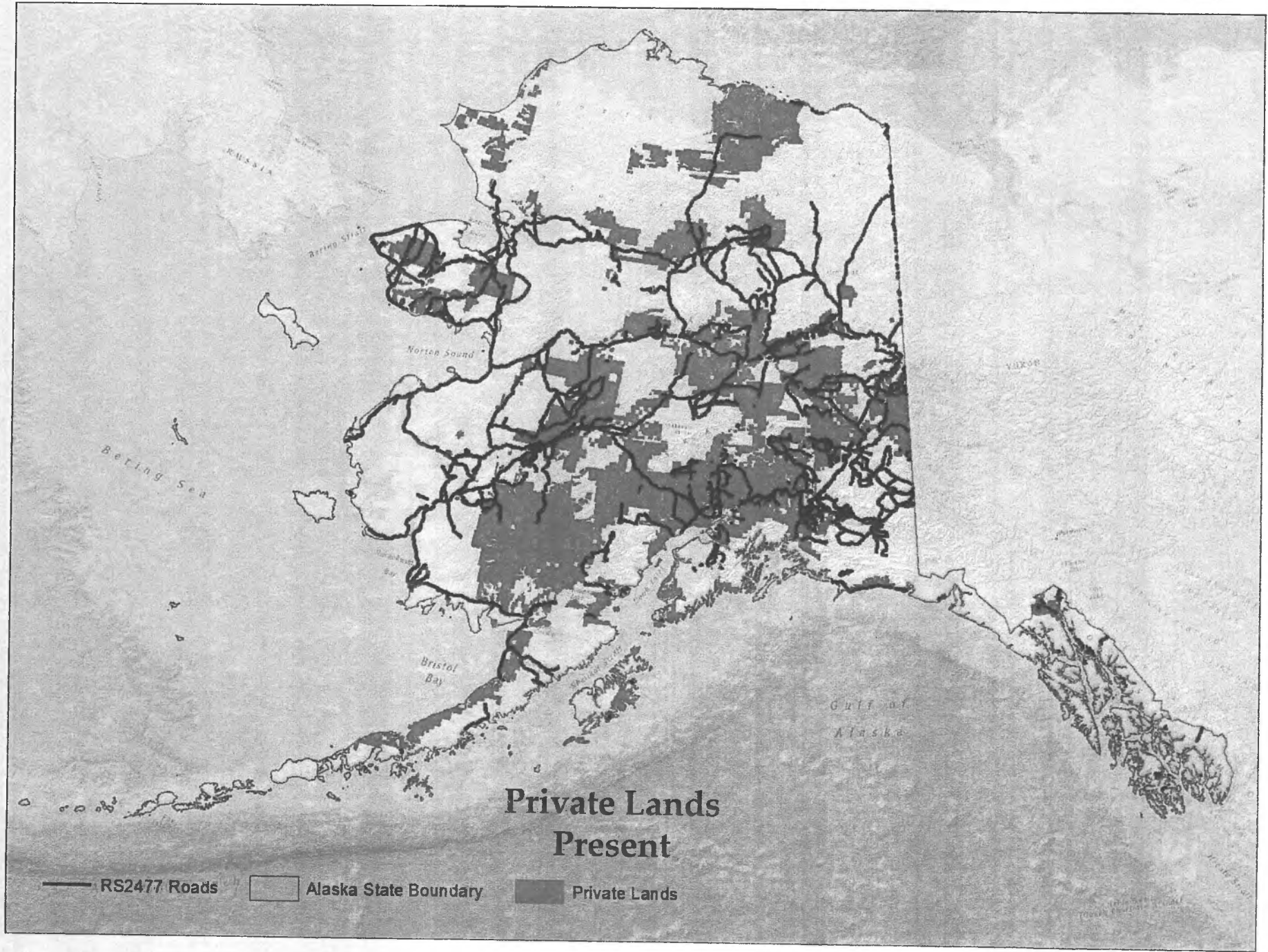
- The statute reads: ***"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."***
- On the ADNR-DML&W website it states: ***"the word highway was historically used to refer to foot trails, pack trails, sled dog trails, crudely built wagon roads, and other corridors for transportation."*** The term highway is defined in state statute AS.19.59.001 (8) ***"as a road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility and right-of-way thereof..."***
- The process of asserting claims under the statute is far from consistent and has been the subject of litigation between the federal government, the States and private landowners.
- The Alaska Legislature instructed in its 1998 law that, while providing for the public's right to use these historic access easements, ***"every effort should be made to minimize the effect on private property owners."***

## Current Alaska Land Status

- 669 - RS2477s in the state – examples range from DeBarr Road in Anchorage and Farmer's Loop Road in Fairbanks to numerous unimproved foot trails, some of which may not be visible with the naked eye or to the prospective purchaser of the property.
- 142 - RS2477s in the Ahtna region.

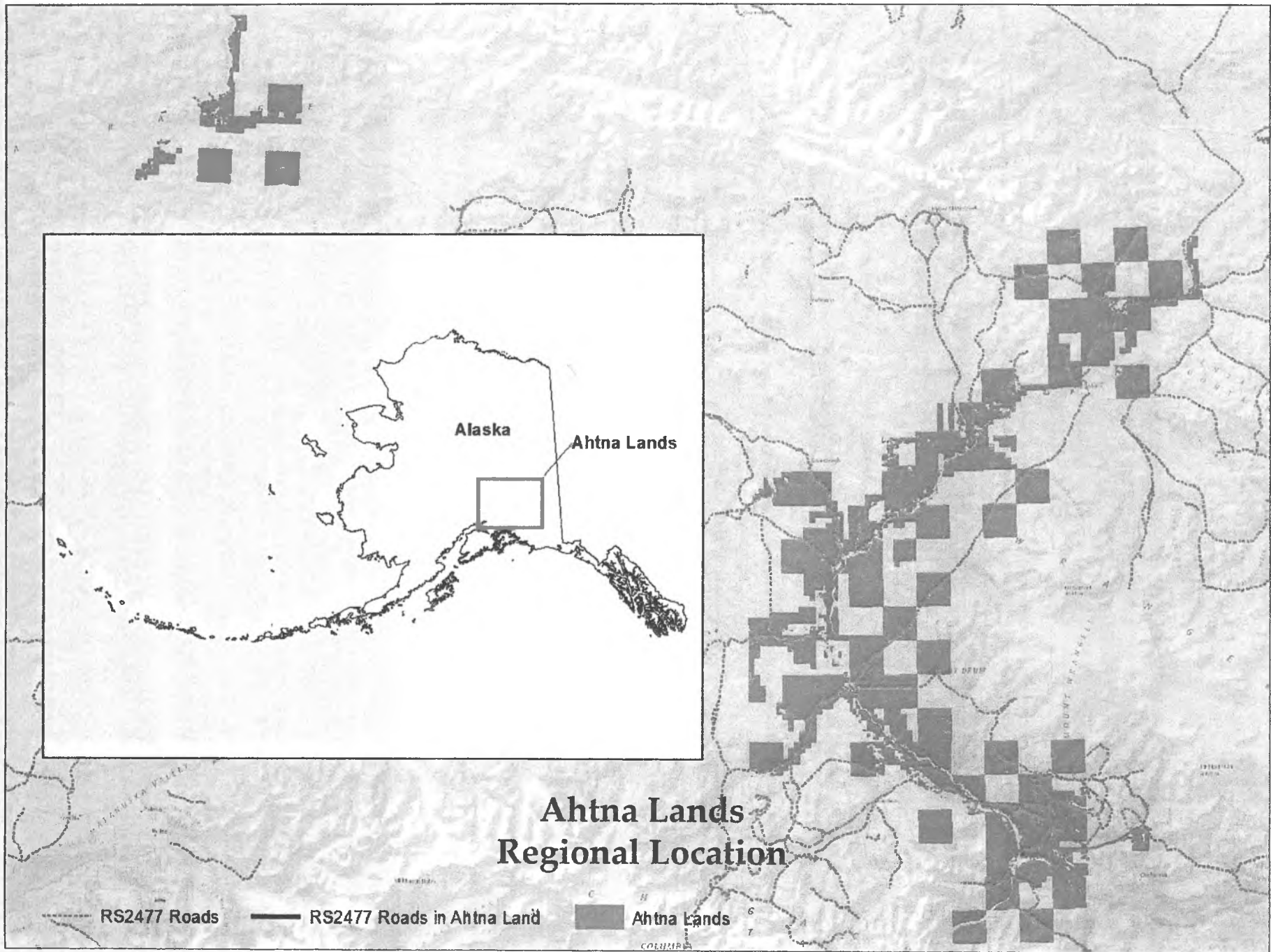






## **Current Ahtna Land Status and RS2477/17(b) Roads**

- Ahtna Lands contain 402 linear miles of RS2477 classified roads.
- Proposed 100' R-O-W will consume 9,406 acres of Ahtna Land.



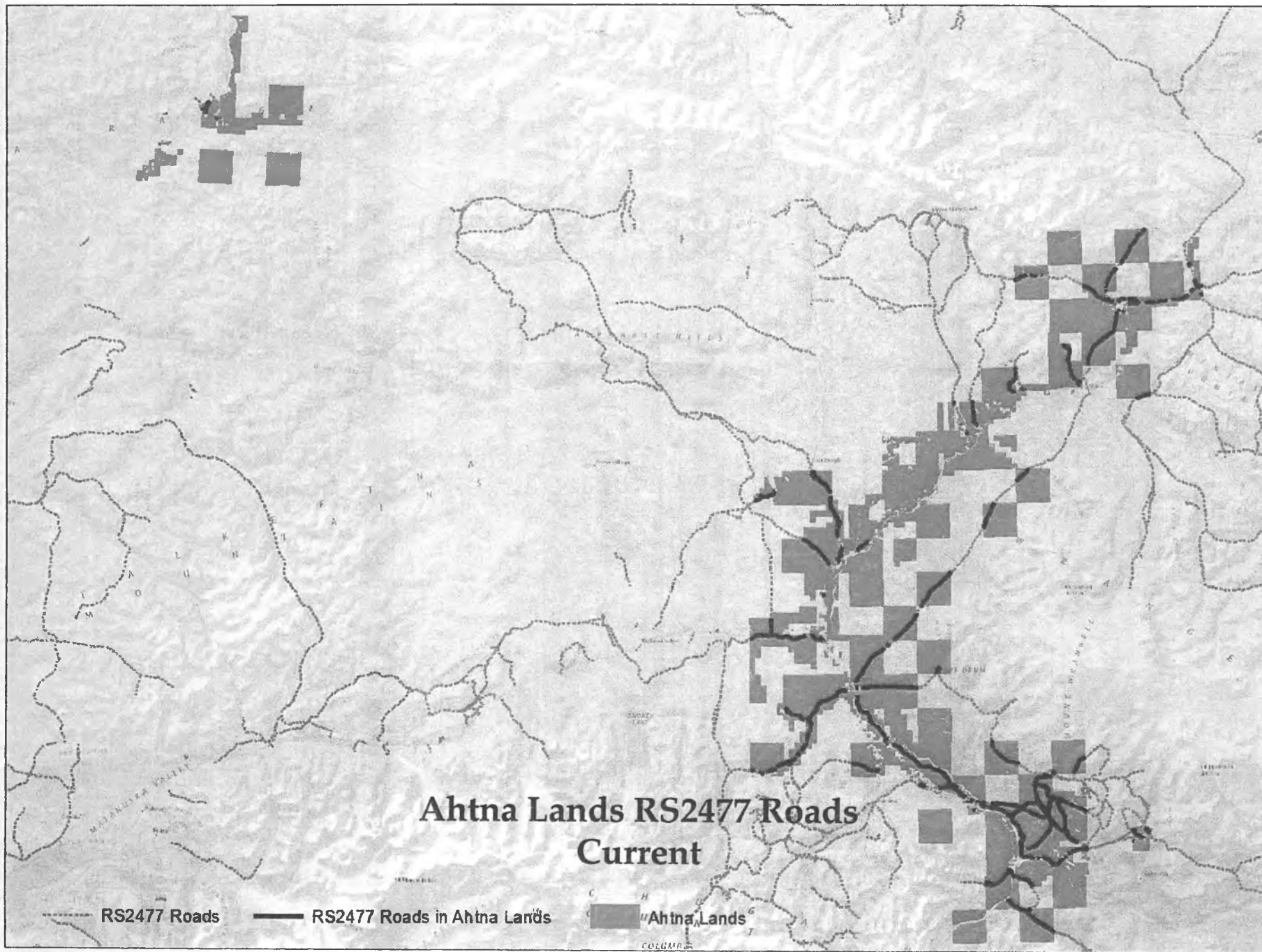
## Ahtna Lands Regional Location

RS2477 Roads

RS2477 Roads in Ahtna Land

Ahtna Lands





# Ahtna Lands RS2477 Roads Current

----- RS2477 Roads

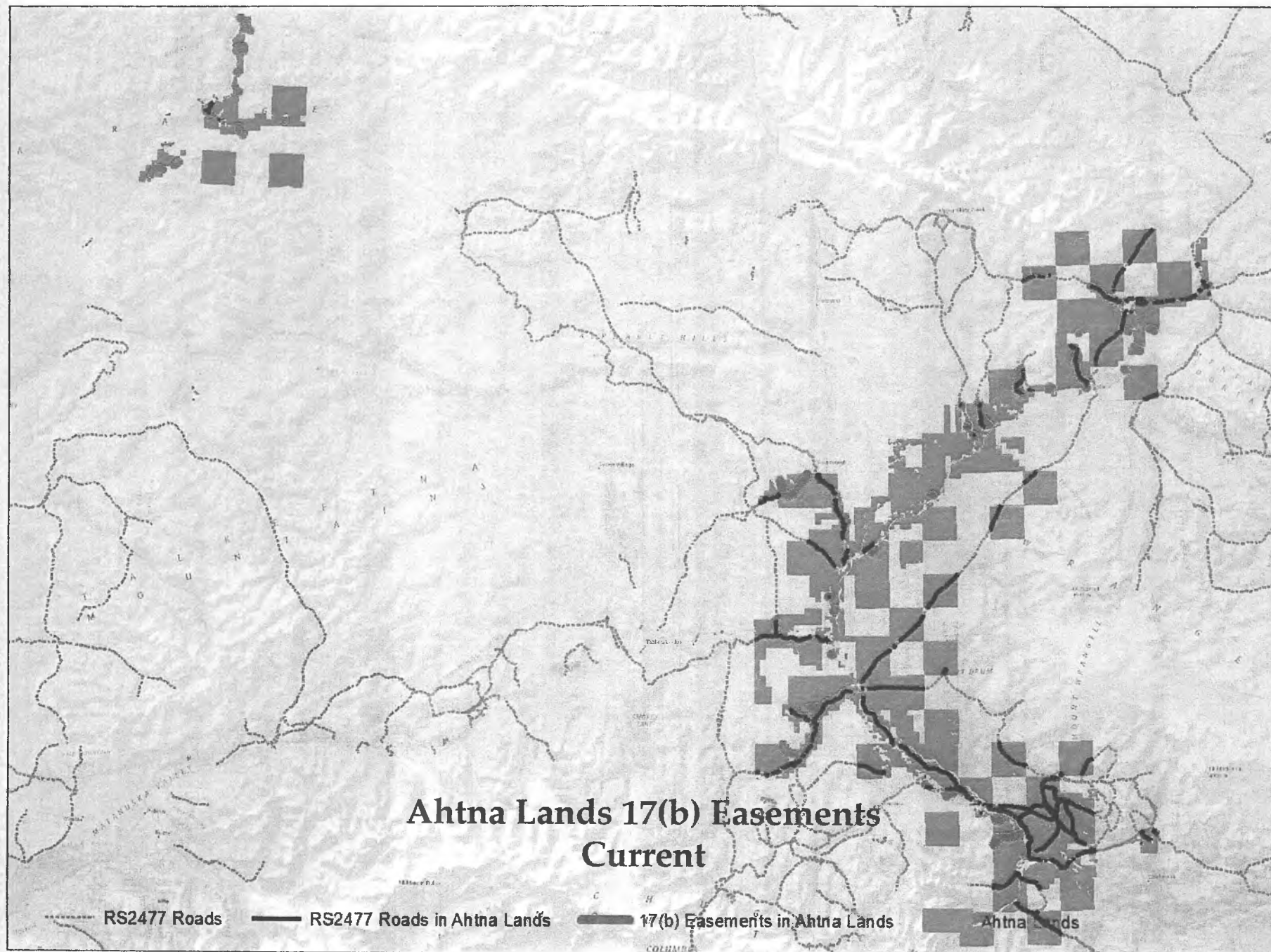
———— RS2477 Roads in Ahtna Lands

■ Ahtna Lands

## Current Ahtna Land Status and RS2477/17(b) Roads

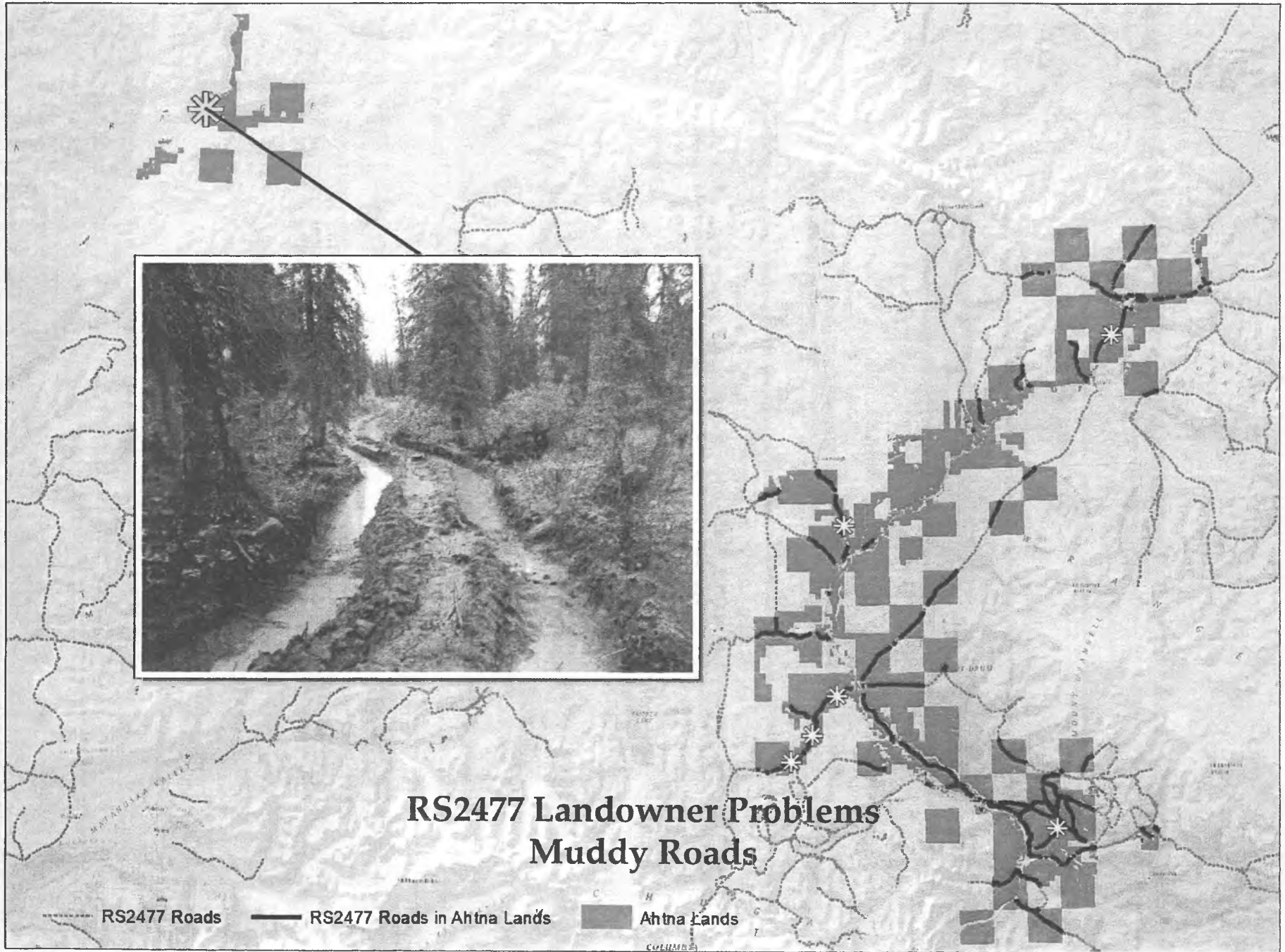
- Ahtna Lands contain 402 linear miles of RS2477 classified roads.
- Proposed 100' R-O-W will consume 9,406 acres of Ahtna Land.
- Ahtna Lands contain over 221 linear miles of 17(b) easements.
- Many are duplicative of existing ANCSA 17(b)'s or approximately 529 miles worth.
- Approximately 98 linear miles of 17(b) easements are duplicative of RS2477 roads in Ahtna Lands.
- 17(b)'s are public easements ranging from 25' – 60' in width.





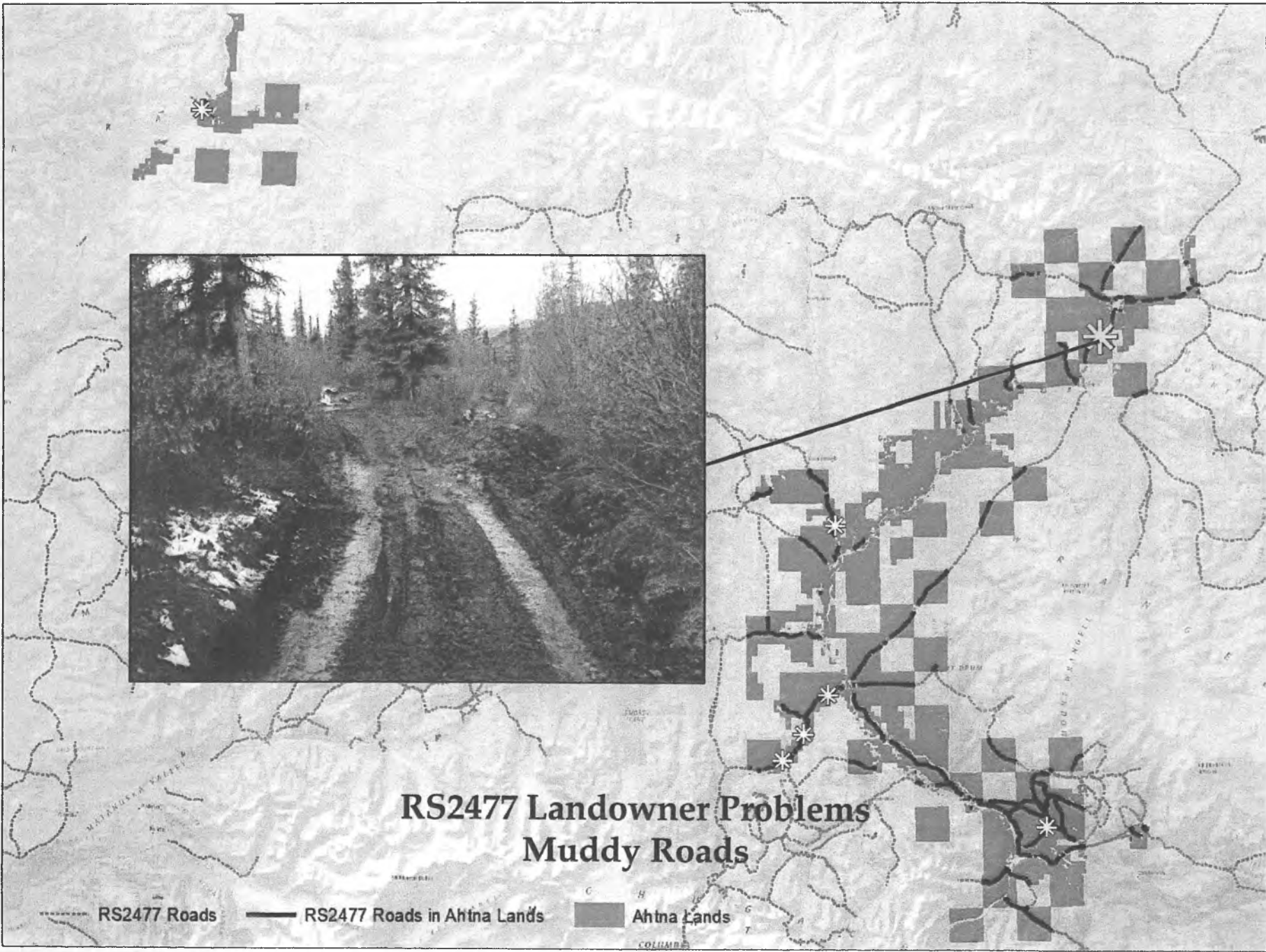
## Problems of RS2477 Roads for Landowners

- RS 2477 R-O-W's are a significant burden on the underlying landowner.



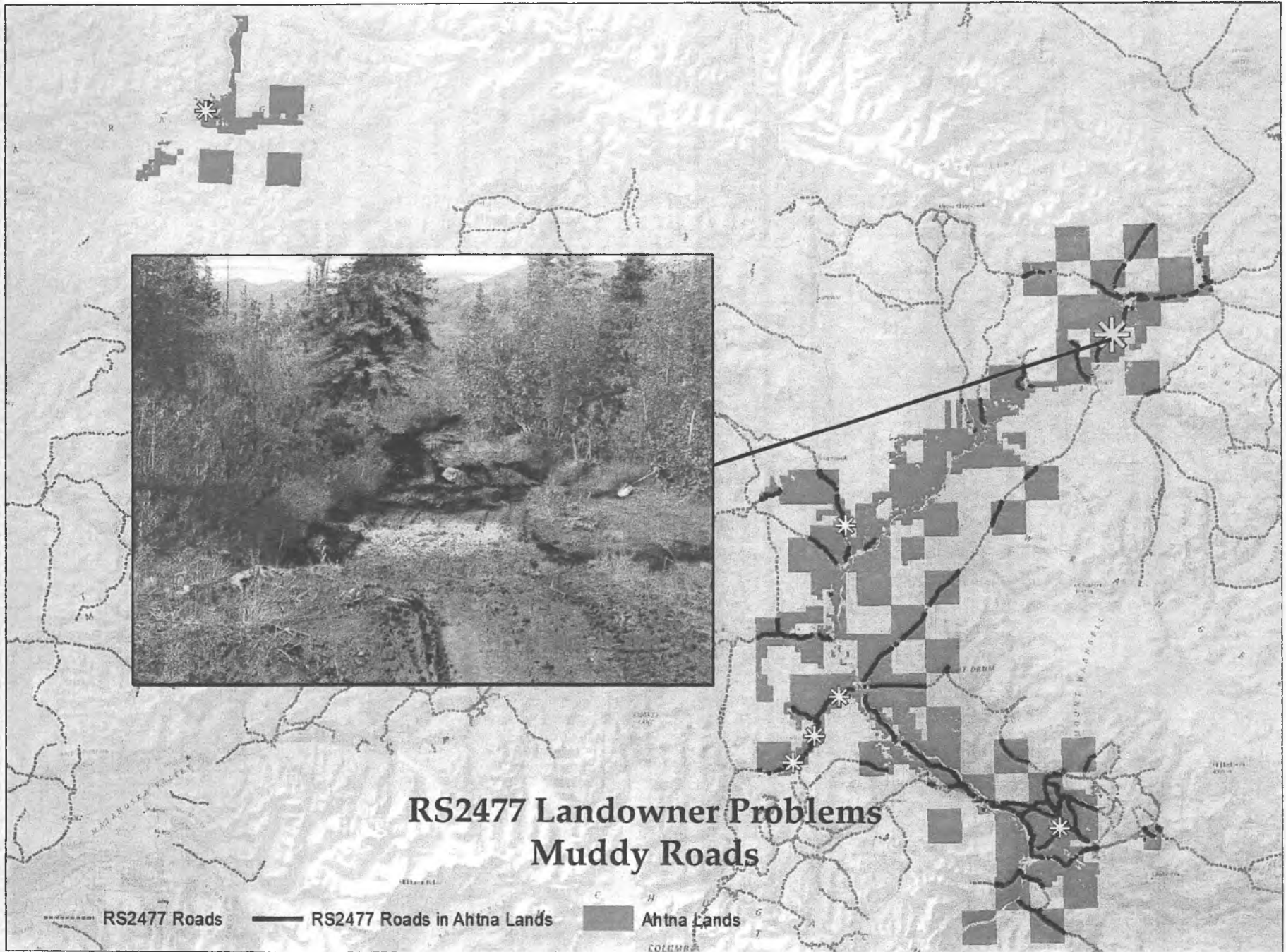
# RS2477 Landowner Problems Muddy Roads

----- RS2477 Roads    ——— RS2477 Roads in Ahtna Lands    ■ Ahtna Lands



# RS2477 Landowner Problems Muddy Roads

----- RS2477 Roads    ——— RS2477 Roads in Ahna Lands    ■ Ahna Lands



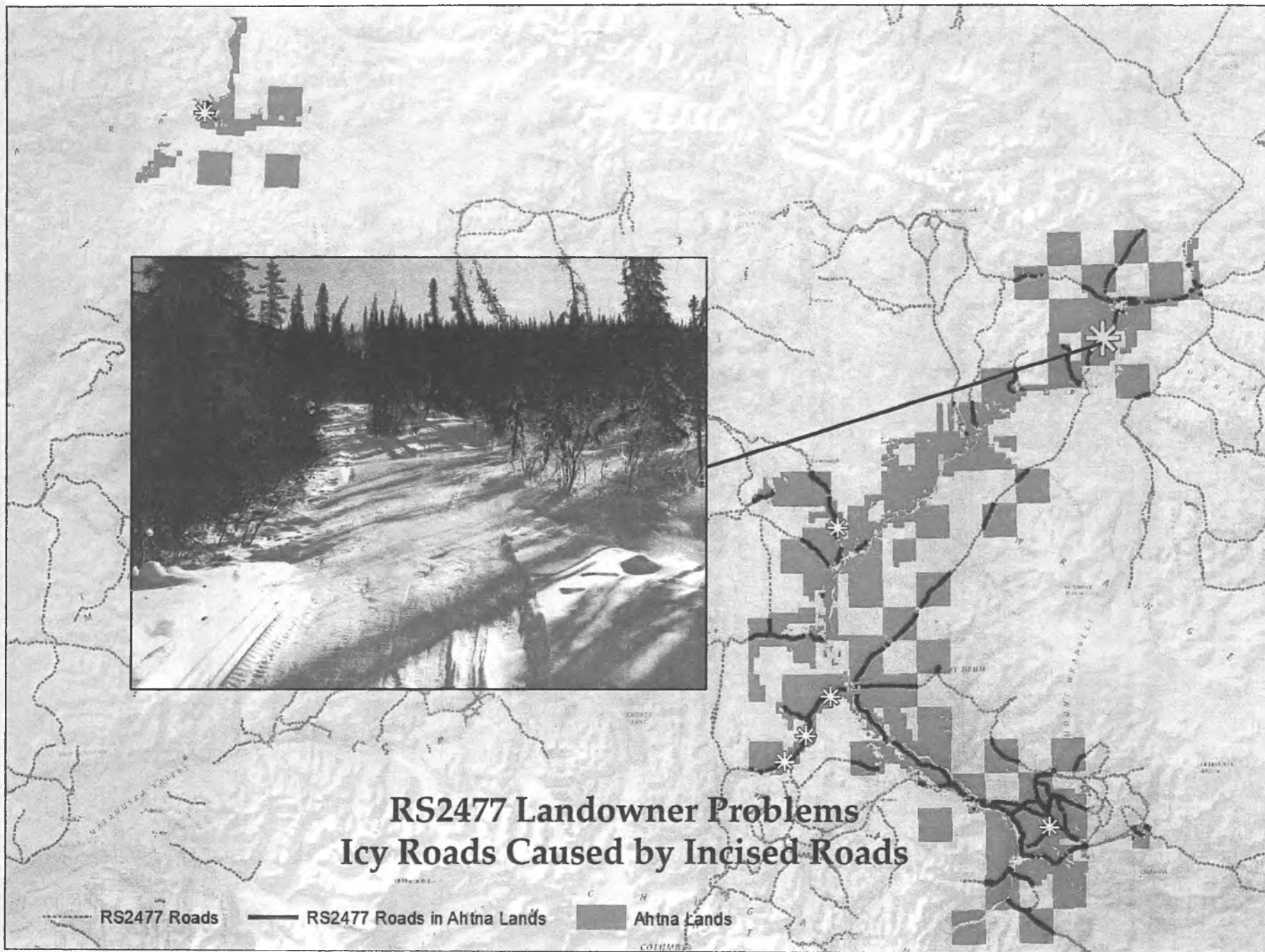


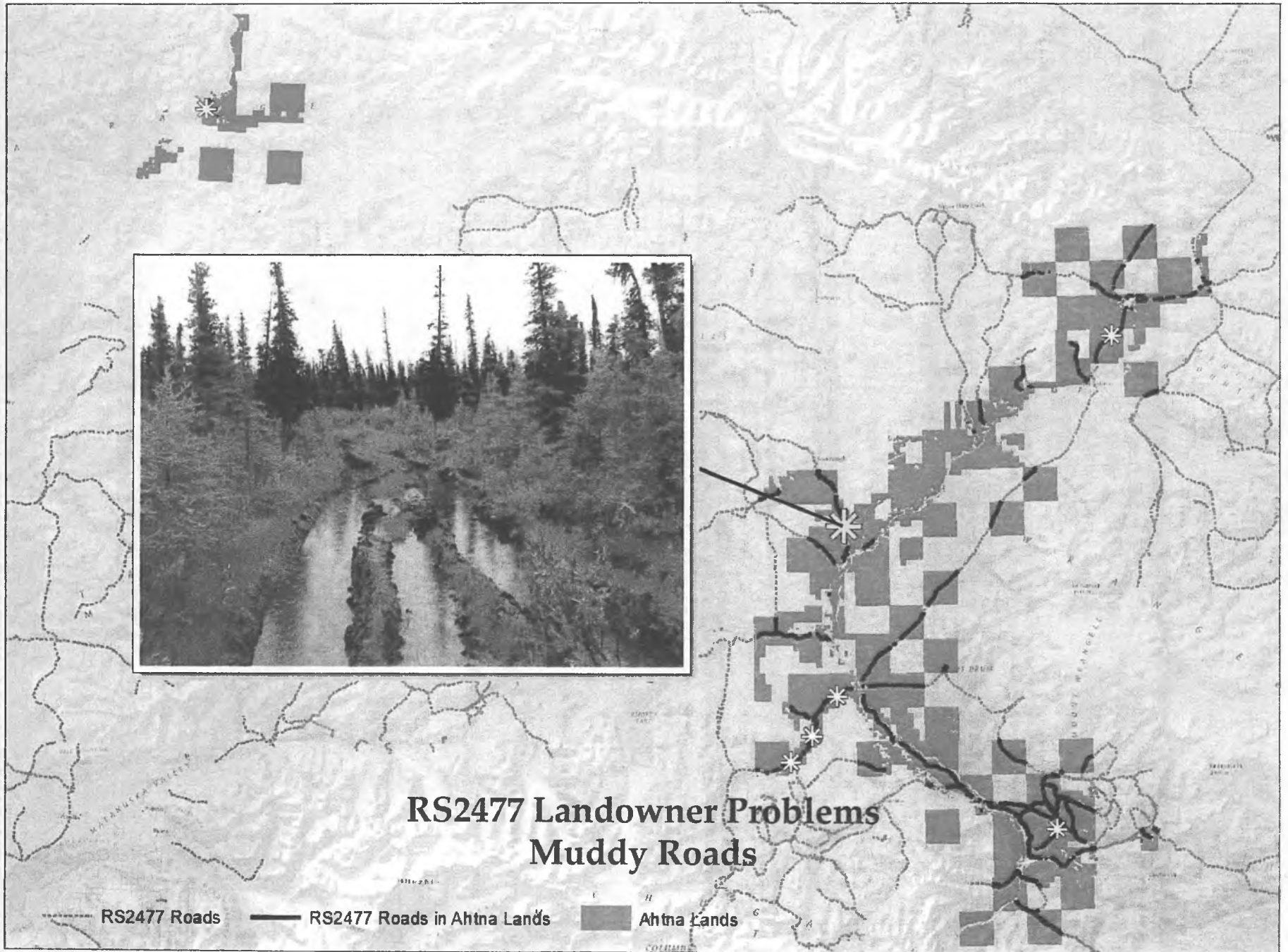
## RS2477 Landowner Problems Icy Roads Caused by Incised Roads

--- RS2477 Roads

— RS2477 Roads in Ahtna Lands

■ Ahtna Lands







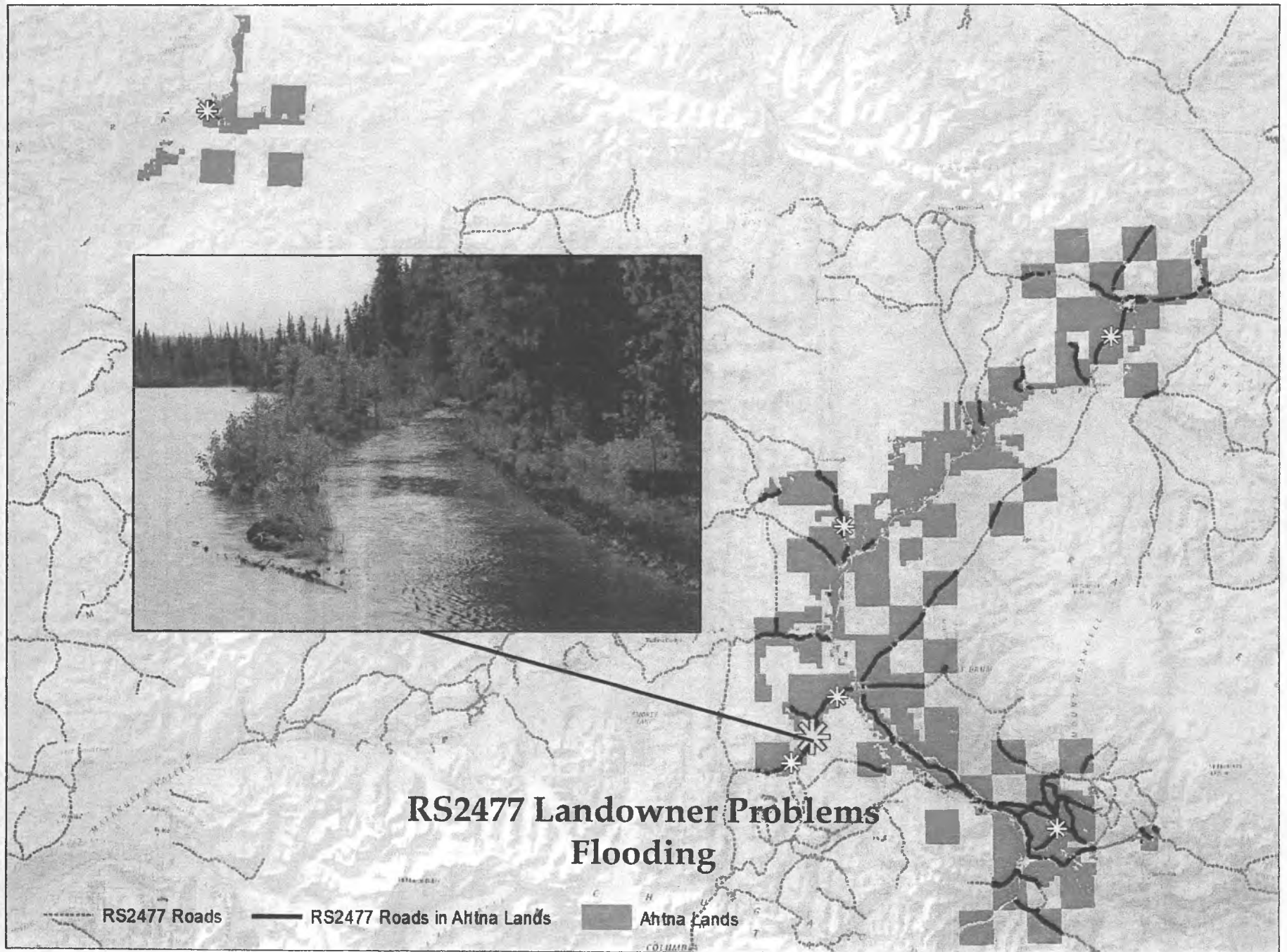
## RS2477 Landowner Problems Trash

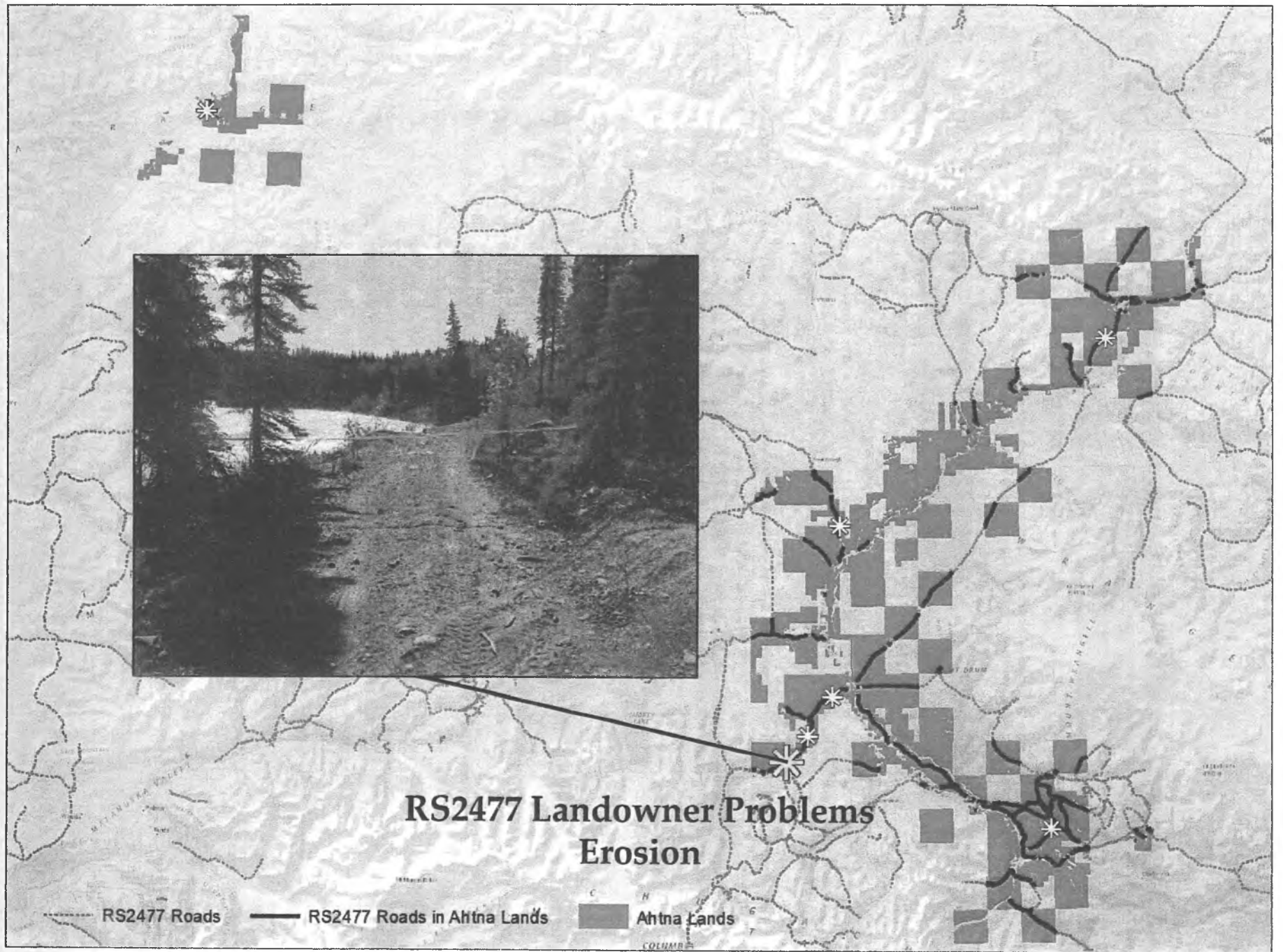
----- RS2477 Roads

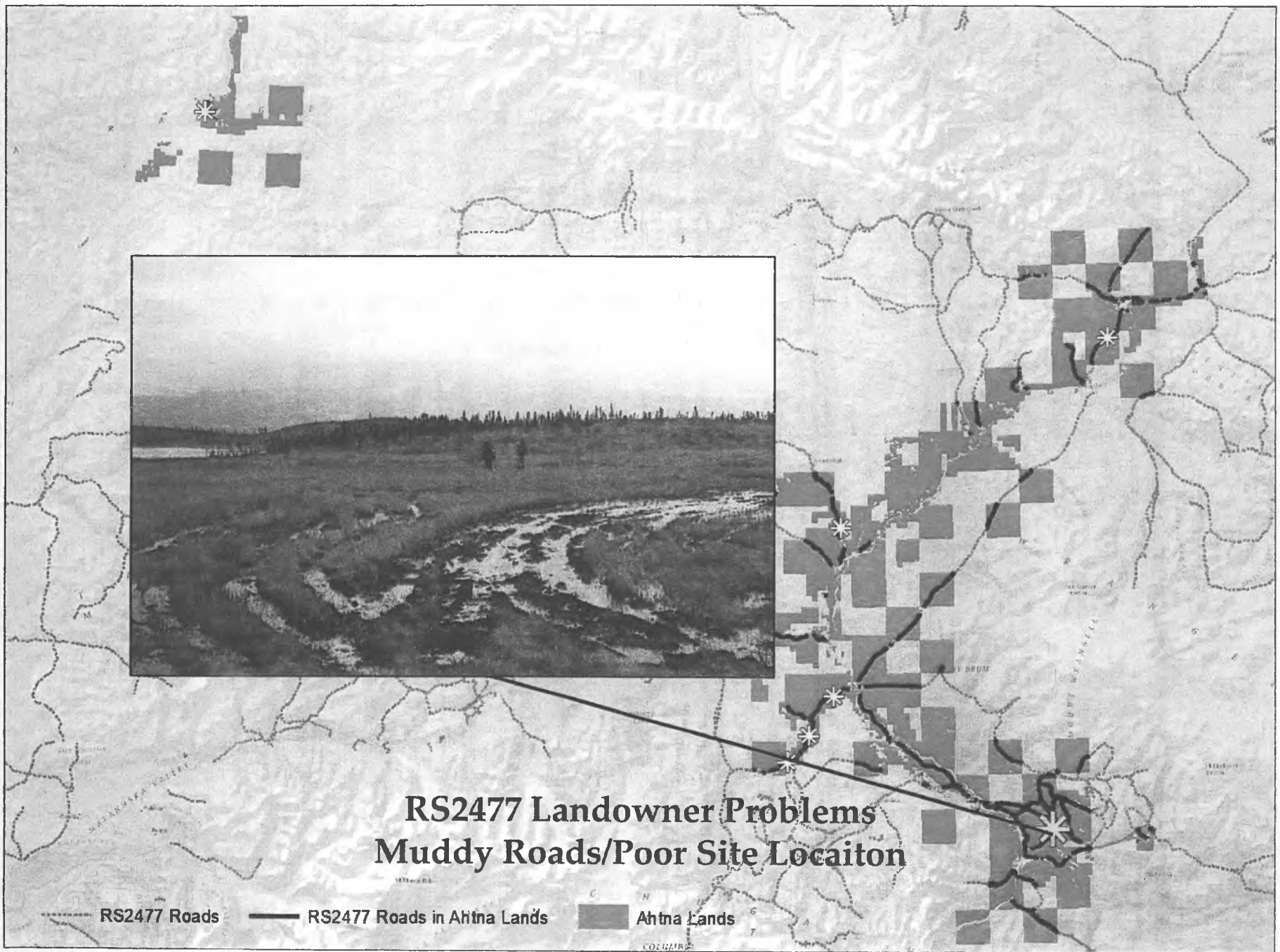
———— RS2477 Roads in Ahtna Lands

■ Ahtna Lands









## Problems of RS2477 Roads for Landowners

- RS 2477 R-O-W's are a significant burden on the underlying landowner.
- The State claims that, in general, RS 2477 R-O-W'S are 100 feet wide and can be relocated as necessary if natural conditions make the route impassable or unsafe.
- The State also claims the right to enter property to perform maintenance and repair work such as paving, leveling, grading, installation of culverts and rip rap, maintenance of drainage ditches, clearing vegetation, and realigning the road.
- The State contends that the public has extensive use rights within the R-O-W that include not only transportation, but also rest stops, pullouts, boat launches, picnic areas, fishing access and campgrounds.
- Particularly troubling is that even if a trail is not presently visible or in use, the State can, without warning, assert title to the R-O-W and, if proven, establish a 100 foot thoroughfare through the property with all the attendant uses and maintenance activities described above.
- The underlying landowner has very little power other than expensive litigation, to interfere with the State's conduct once the RS 2477 R-O-W is established.



Well Maintained RS2477 Road

## Stakeholder Coordination Required to Reach Solutions

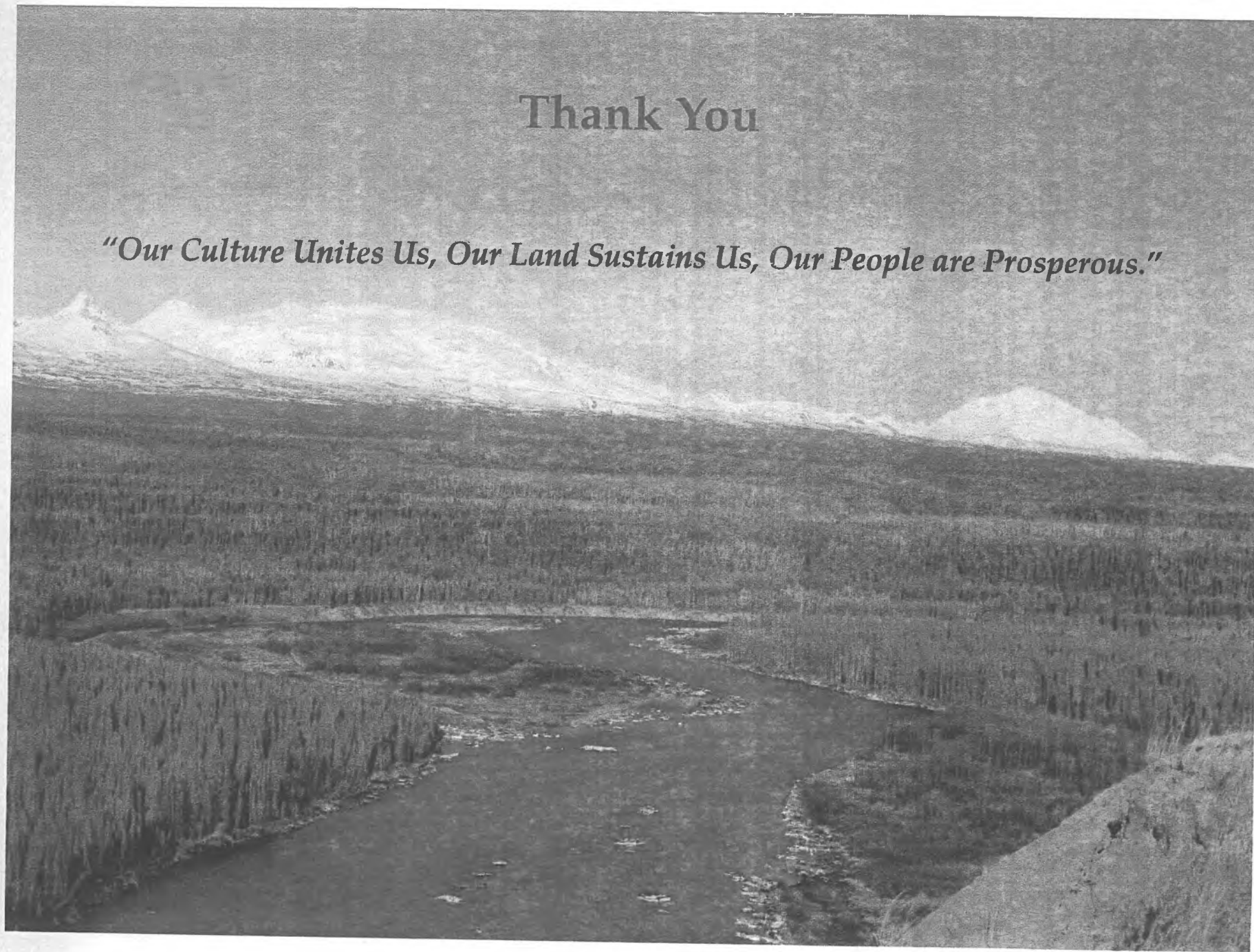


## Stakeholder Coordination Required to Reach Solutions

- Require consultation with the private landowner prior to engaging in anything other than routine maintenance or improvement activities.
- Require consultation with the private landowner prior to realigning damaged segments of the R-O-W and requiring payment of just compensation to the landowner for any additional acreage burdened by the realigned R-O-W.
- The legislation would also specifically vacate the RS 2477 R-O-W along the Klutina Lake Road, effectively ending Ahtna's litigation with the State by utilizing the existing 60 foot wide public easement.

Thank You

*"Our Culture Unites Us, Our Land Sustains Us, Our People are Prosperous."*





March 25, 2014

Senator Dennis Egan  
Chairman of the Senate Transportation Committee  
State Capitol Room 9  
Juneau, Alaska 99801

Re: Department of Law Concerns Regarding SB 94

Dear Senator Egan:

At the hearing before the Senate Transportation Committee on March 20, the Department of Law voiced a number of concerns regarding SB 94 dealing with R.S. 2477 rights-of-way. This letter responds to Senator Fairclough's request that Law provide a white paper discussing its concerns.

**I. SB 94 Relinquishes State Property Interests.**

One of the concerns raised by SB 94 is that it would cause the State to relinquish on a large scale and without compensation R.S. 2477 property interests it currently possesses. From a legal perspective, this would make R.S. 2477 a far less valuable and effective tool to the State of Alaska.

SB 94 would relinquish property interests in four separate ways:

1. narrowing the width of R.S. 2477 rights-of-way across private property from the typical 100' width to a narrower 60';
2. greatly limiting the allowed scope of uses of R.S. 2477 rights-of-way on private property<sup>1</sup>;
3. freezing R.S. 2477 rights-of-way to the condition, mode, and method of use that existed as of the time of its repeal in 1976<sup>2</sup>; and

---

<sup>1</sup> For instance, Klutina Lake Road R.S. 2477 (as discussed below) could no longer be used to access the river for fishing or boat launching.

4. effectively granting private landowners veto authority over the State's maintenance<sup>3</sup> and improvement activities on R.S. 2477 rights-of-way across private property.

The State currently claims in excess of 20,000 linear miles of codified R.S. 2477 rights-of-way. The Department of Natural Resources ("DNR") estimates that today approximately 50 percent of these rights-of-way exist across private land. As discussed in the fiscal note, the limitations and transfer of property interests under SB 94 on private land would likely result in a fiscal impact in the many tens of millions of dollars.

## **II. SB 94 Potentially Violates Requirements Contained in the Alaska Constitution and the Public Trust Doctrine to Preserve Public Resources and Access to Those Resources.**

Another legal concern raised by SB 94 is whether it would violate requirements contained in the Alaska Constitution and the public trust doctrine to preserve public resources and access to those resources.

Article VIII, section 1 of the Alaska Constitution provides: "[i]t is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." Article VIII, section 2 provides: "[t]he legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." The public trust doctrine provides that the State holds certain resources (such as land, wildlife, minerals, and water rights) in trust for public use, and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.

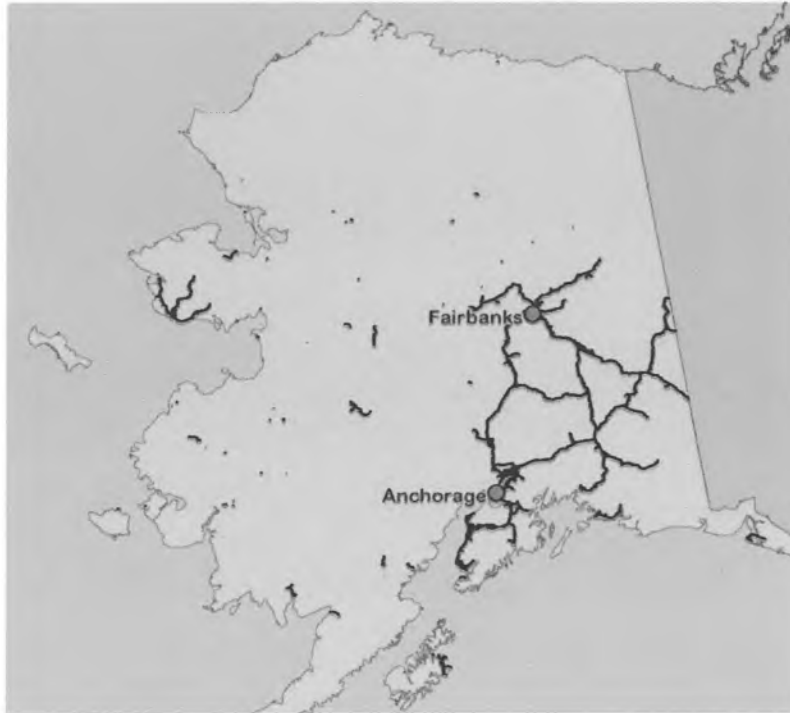
R.S. 2477 rights-of-way are important to both the State and the public. They provide public access to lands and resources, including access for hunting, fishing, and subsistence activities. They enable the State to reasonably manage, maintain, and develop the lands, resources, and opportunities it owns and holds for the public.

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

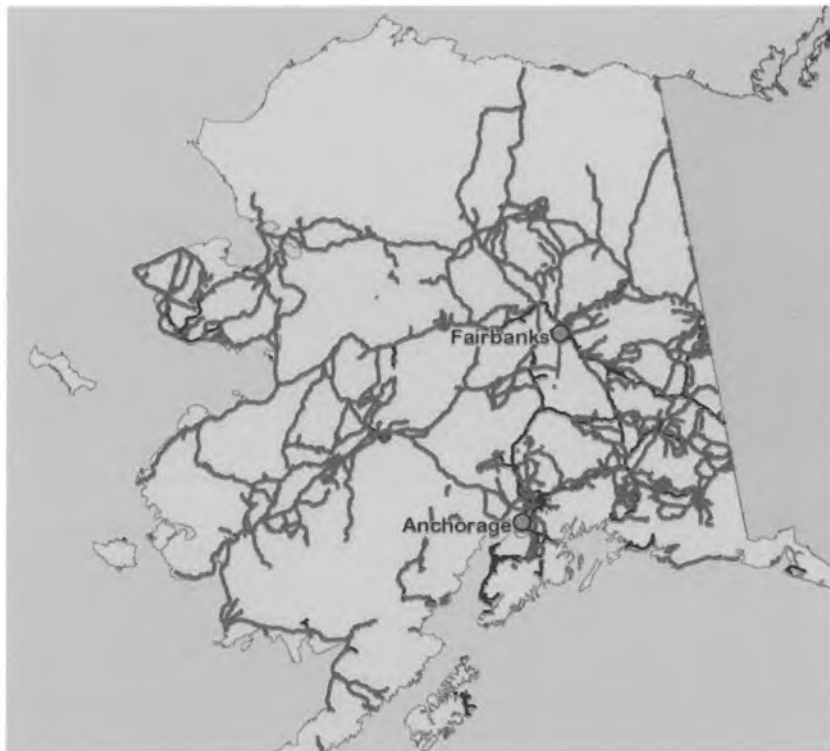
---

<sup>2</sup> Since the vast majority of R.S. 2477 rights-of-way are presently undeveloped, this would likely ensure that these rights-of-way remain undeveloped.

<sup>3</sup> Although SB 94 purports to allow routine maintenance to occur without landowner consent, routine maintenance excludes activities necessary to preserve the condition of the road as it existed after October 1976. *See* Sec. 2(e). Consequently, in many instances, the State's routine maintenance activities will require landowner approval.



The following image depicts public highways in the State after taking into account the over 20,000 linear miles of R.S. 2477 rights-of-way presently claimed.



Due to the importance of R.S. 2477s to the State and its citizens for access to land and resources, it is questionable whether the State would violate the Alaska Constitution

and the fiduciary duties owed under the public trust doctrine by voluntarily ceding its R.S. 2477 property interests as contemplated in the current version of SB 94.

### **III. SB 94 Would Create a Patchwork of Disparate Rights and Interests.**

R.S. 2477 rights-of-way often traverse lands owned by different parties, including federal, State and private land owners. This can occur even within relatively short distances. SB 94 would create a patchwork of disparate rights and interests depending on the underlying property ownership. If the property is private, one set of rules would apply. If it is in State or federal ownership, a completely different set of rules would apply. Depending on the underlying property ownership, the rights-of-way would be subject to different widths, modes of use, and rights and obligations concerning maintenance and improvement. This would create management issues for the State and also impact the ease with which the public can use and rely on the rights-of-way.

### **IV. SB 94 May Promote Litigation.**

SB 94 provides that in the event of a dispute between a private landowner and the State regarding proposed improvements, the dispute will be submitted to mediation. If the parties are still unable to resolve their dispute, suit shall be brought in superior court. Further, no improvements can occur until resolution of the dispute. This provision may cause significant delays in right-of-way maintenance and improvement, and it may promote significant amounts of litigation. SB 94 also requires the State to rely on State condemnation statutes found at AS 09.55.240 - 09.44.460 if the State needs to realign a right-of-way which also may lead to litigation.<sup>4</sup>

### **V. SB 94 Would Abrogate the State's Claims and Defenses in the Klutina Lake Road Litigation.**

SB 94 also would abrogate the State's claims and defenses as presently asserted in *Ahtna, Inc. v. State*, Case No. 3AN-08-6337 CI. In that case, Ahtna, Inc. 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. Beginning in 1898, thousands of miners, after being dropped off in Valdez, attempted to travel over the Valdez Glacier into interior Alaska on this trail.

SB 94 would vacate the State's claimed R.S. 2477 right-of-way where it overlaps with 17(b) easements reserved under the Alaska Native Claims Settlement Act

---

<sup>4</sup> In addition, the Alaska federal district court has recently held that it has no jurisdiction to apply those statutes, via 25 U.S.C. § 357, to Alaska Native allotment lands. The State has appealed that ruling to the Ninth Circuit.

("ANCSA"). 17(b) easements are reserved to the United States during the land selection and transfer process under ANCSA. Because that process is still continuing, 17(b) easements are still being created to this day, but at the earliest, vested contemporaneous with selection and subsequent conveyance to Alaska Native corporations.

In contrast to 17(b) easements, R.S. 2477 was an open congressional grant of public rights-of-way for the benefit of miners, ranchers, homesteaders, and members of the public who had need to travel across public lands. The R.S. 2477 grant by the federal government constituted a standing offer of federal lands for the creation of public rights-of-way. Per Alaska law, the offer could be accepted, prior to its repeal in 1976, by: a) public use for such a period of time and in such a manner as to demonstrate acceptance of the grant; or b) by an action on the part of appropriate public authorities clearly manifesting an intent to accept the grant of a right-of-way. R.S. 2477s do not require court action in order to be created or vest. R.S. 2477 rights-of-way spring into legal existence when all elements have been satisfied for their creation. Acceptance and vesting of an R.S. 2477 right-of-way requires no administrative formalities; no entry, no license, no patent, no deed on the federal side, and no formal act of public acceptance on the part of the states or localities in whom the right was vested.

SB 94 overlooks critical distinctions between R.S. 2477 rights-of-way and 17(b) easements, including:

<b>Issue</b>	<b>17(b) Easements</b>	<b>R.S. 2477 Rights-of-Way</b>
Who Owns/Has the Right to Possess and Manage?	Federal Government	State of Alaska on behalf of the public and in trust for the public.
Is the easement/right-of-way terminable without State action?	Yes	No
Can the easement or right-of-way be moved or realigned as reasonably necessary due to natural occurrences (flooding, erosion, landslides, etc.)?	No, except by written application to BLM, concurrence by both the dominant and servient estates, and lengthy application/approval process (which takes several years). It is presently unknown whether the successful movement/realignment of a 17(b) easement has ever occurred.	Yes, under appropriate circumstances this can occur, as long as it is consistent with the purpose and intent of the right-of-way and as long as it does materially increase the burden to the servient estate.
Do the easements/rights-of-way closely match physical locations of roads and/or historic use on the ground?	Generally speaking, no. Although existing trails are purportedly reserved, 17(b) easements have often been drawn on maps with little or no effort made to ground-truth the 17(b) locations with	Yes. Because R.S. 2477 rights-of-way are generally based on historical use, their location often tracks very closely with where the historic use occurred. There are instances where use has shifted slightly over time and courts have

	actual or historic routes.	confirmed that in some instances, slight adjustments or realignments are acceptable and appropriate.
Are the easements/rights-of-way susceptible to being discontinuous?	Yes. 17(b) easements cannot be created across Alaska Native allotments or non-Native corporation lands. Due to the frequency with which 17(b) easements traverse Native allotment or non-Native corporation lands, 17(b) easements are sometimes discontinuous, which greatly compromises their use and utility. They are also frequently discontinuous because 17(b) easements drawn on maps often do not closely track the location of roads and trails on the ground. Where these locations do not match up, the 17(b) is discontinuous from the physical location of the roadway, thus further compromising the easement's utility.	No. Assuming all other elements are satisfied, R.S. 2477 easements apply to unreserved federal lands. As long as the land was unreserved at the time that acceptance of the R.S. 2477 occurred, it does not matter that the land may now be owned by someone other than the federal government. What is determinative is when the R.S. 2477 was created. As long as its acceptance pre-dates the creation of other legal interests such as homesteads, mining patents, federal reservations, Native corporation conveyances, Native allotments, etc., the law is clear that these interests are subject to the R.S. 2477 as a previously created existing right. <i>State v. Alaska Land Title Association</i> , 667 P.2d 714, 726-27 (Alaska 1983)(By operation of law, land conveyed by the United States is taken subject to previously established rights of way even where instruments of conveyance are silent as to the existence of such rights of way. "No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because the patent contains an implied-by-law condition that it is subject to such a right-of-way.")
What is the scope of use of the easement/right-of-way?	17(b) easements are limited to travel only. Their scope varies depending on the specific language of each particular grant. For instance, with regard to the Klutina Lake 17(b) easement, it was established between 1980 and 1983. It is a variable 25-60 feet wide right of passage from the Richardson Highway to Klutina Lake. In places, it is limited to a "25 Foot Trail" only,	R.S. 2477 rights-of-way support, at a minimum, the uses they sustained from their establishment through modernization and to the present day. <i>Ball v. Stephens</i> , 68 Cal.App.2d 843, 158 P.2d 207, 210 (1945)(An existing right of way recognized as such, primitive at its conception, may evolve from trail to road as frontier conditions give way to modernization. "The route was used first as a trail, later by horse-drawn vehicles, and went through a gradual process of

	available for use by foot, dogsled, animals, snowmobiles, two and three-wheel drive vehicles and small terrain vehicles (less than 3,000 lbs. in Gross Vehicle Weight).	occasional improvement and use until it became a road suitable for automobiles and trucks.”). Such uses may include, subject to State regulation, nearly all modes of travel and may also include rest stops, parking, sight-seeing, camping, picnicking, and boat launching as well as travel to and fro. However, such uses are limited to those occurring within the right-of-way itself.
What is the width of the easement/right-of-way?	Variable. <i>See above.</i> However, generally narrower than a R.S. 2477 right-of-way.	In most instances, R.S. 2477 rights-of-way are 100’ in width per AS 19.10.015 and Department of Interior Order 2665.
What is the legal relationship between 17(b) easements and R.S. 2477 right-of-way?	R.S. 2477 rights-of-way and 17(b) easements exist wholly independent of one another. <i>Doyon, Limited</i> , 181 IBLA 148, 156 (2009). A decision of the Alaska Native Claims Appeals Board held that the existence of an R.S. 2477 right-of-way precluded neither the reservation of an overlapping section 17(b) easement nor the conveyance of the underlying fee. <i>State of Alaska</i> , 5 ANCAB 307, 88 I.D. 629 (1981). Neither easement will enlarge or diminish the other. <i>State of Alaska v. Alaska Land Title Ass’n</i> , 667 P.2d at 726-27.	See middle column.
Can the easement/right-of-way be unilaterally maintained by the State?	No. No existing regulations address maintenance or management of 17(b) easements. However, Department of the Interior Departmental Manual 601, § 4.3(d) suggests that Department of Interior authorization may be required.	Yes, the dominant owner (the State) is legally entitled to perform routine maintenance of the right-of-way without the permission or consent of the servient owner.
Can the Easement/right-of-way be lost through disuse?	Yes. A 17(b) easement may be terminated by BLM on a determination that it is no longer needed for public use. 43 CFR	No. State right-of-way interests cannot be lost or abandoned through non-use. Instead, there must be a positive act on the part of the State to relinquish such

	<p>2650.4-7(a)(13). The State has been required to litigate termination decisions by BLM in the past. The fact that 17(b)s may be terminated by BLM are a major distinction between 17(b)s and RS 2477s.</p>	<p>rights. <i>See</i> AS 38.95.010; AS 19.30.410; Restatement (Third) of Property § 7.4 (Modification and Extinguishment by Abandonment) (“[a] servitude benefit is extinguished by abandonment when the beneficiary relinquishes the rights created by the servitude.”); 62 ALR 5<sup>th</sup> 219 (an easement “cannot be lost by mere nonuse, however long continued, unless accompanied by an affirmative act on the part of the owner of the easement indicating an unequivocal intention to abandon it.”); <i>Safeway, Inc. v. State</i>, 34 P.3d 336, 339 (2001) (land or rights in land acquired by the State can only be vacated by the appropriate State agency); <i>See also, Ahtna, Inc. v. State, Dept. of Transp. &amp; Public Facilities</i>, 296 P.3d 3, 8-9 (Alaska 2013).</p>
--	--	---

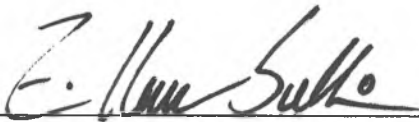
Based on these distinctions, SB 94 would result in the State possessing an easement that is a disparate amalgamation of an ANCSA 17(b) easement and an R.S. 2477 right-of-way with differing widths, scope, and allowed uses. The 17(b) easement would be very restrictive and under federal management and ownership. It could only be used for travel and the current use by the public for access to the river, launching boats, and camping within the right-of-way, would not be allowed.

Finally, several property owners use the Klutina Lake Road R.S. 2477 in order to access their property with highway vehicles. As noted above, the 17(b) easement does not allow highway vehicle use all the way to the lake, but instead, on the last portion of the road preceding the lake it is limited to a “25 Foot Trail” only, available for use by foot, dogsled, animals, snowmobiles, two and three-wheel drive vehicles and small terrain vehicles (less than 3,000 lbs. in Gross Vehicle Weight). Under SB 94 the private property owners at the outlet of Klutina Lake would no longer have highway vehicle access to their property.

Thank you for allowing me the opportunity to raise these issues and concerns regarding SB 94. To the extent you have any questions, or if I can provide anything further, please let me know.

Sincerely,

MICHAEL C. GERAGHTY  
ATTORNEY GENERAL

By:   
Z. Kent Sullivan  
Assistant Attorney General

ZKS

cc: Senator Donald Olson (via email)  
David Scott, staff to Senator Olson (via email)  
Heather Brakes, Legislative Director, Office of the Governor (via email)  
Scott Ogan, Natural Resources Manager, DNR

**CS FOR SENATE BILL NO. 180(FIN)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered: 3/12/98

Referred: Rules

Sponsor(s): SENATORS HALFORD, Green, Leman, Sharp, Torgerson, Wilken, Pearce, Ward, Taylor

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act relating to state rights-of-way."

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 \* **Section 1.** FINDINGS AND INTENT. The legislature finds that former 43 U.S.C. 932  
4 (RS 2477) granted numerous rights-of-way, portions of which cross land held in private  
5 ownership. Among those lands affected by RS 2477 routes are sites important to the culture  
6 and heritage of Alaska Natives. Respect for and preservation of these culturally significant  
7 sites should be afforded careful consideration in determining location and management of  
8 RS 2477 rights-of-way. While providing for the public right to access RS 2477 rights-of-way,  
9 every effort should be made to minimize the effect on the affected private property owners.  
10 Where practicable, that effort should include working with the property owner to re-route a  
11 right-of-way to the area least adversely affected, providing that reasonably comparable access  
12 is preserved.

13 \* **Sec. 2.** AS 19.30 is amended by adding new sections to read:

14 **Article 5. Rights-of-way Acquired under Former 43 U.S.C. 932.**

15 **Sec. 19.30.400. Identification and acceptance of rights-of-way.** (a) The