



**Comments of  
The Association of Village Council Presidents and  
Kawerak, Inc.  
Submitted to the United States Bureau of Indian Affairs  
Responding to the Proposed Elimination of 25 CFR § 170.443(b)  
Federal Register Notice Number 1076-AF45**

**Introduction and Summary**

I am Vivian Korthuis, Chief Executive Officer of the Association of Village Council Presidents (AVCP). The Association of Village Council Presidents (AVCP) is the regional Native non-profit corporation and Tribal Consortium serving the 56 federally recognized tribes of the Yukon-Kuskokwim Delta of Southwest Alaska.

I am Melanie Bahnke, President of Kawerak, Inc. (Kawerak). Kawerak is the regional Native non-profit corporation and Tribal Consortium serving the 20 federally recognized tribes of the Bering Strait Region.

Through this correspondence, AVCP and Kawerak hereby jointly provide their comments to the Bureau of Indian Affairs' proposed action to eliminate the requirement for Tribes to collect and submit certain data in order to keep proposed roads in the National Tribal transportation Facility Inventory (NTTFI), as provided in Federal Register Notice Number 1076-AF45, (Vol. 84, No. 144, July 26, 2019). AVCP and Kawerak strongly support the proposed rule the BIA has published, which would eliminate 25 C.F.R. § 170.443(b), from the Tribal Transportation Program (TTP) regulations.

We thank you for the opportunity to provide our comments, which will summarize our views regarding the proposed change to the regulations and other TTP inventory issues of importance to the tribal governments and Alaska Natives in our respective regions. These comments are being submitted through the BIA consultation email address prior to the September 24, 2019 deadline, and we will be supplementing our comments with our testimony on behalf of AVCP and Kawerak, at the consultation on this issue being held September 10, 2019 in Anchorage, Alaska.

Our comments highlight the following three points:

First, AVCP and Kawerak support the proposed rule eliminating § 170.443(b). Eliminating § 170.443(b) represents the appropriate corrective action by the BIA to help ensure the TTP inventory regulations comply with the statutory requirements Congress enacted in the SAFETEA-LU Transportation Authorization (2005). These requirements have not changed since 2005. Congress reaffirmed them in MAP-21 (2012) and the FAST Act (2015).

Second, the elimination of § 170.443(b) from the TTP regulations should be viewed as a vital first step for the BIA and the Federal Highway Administration (FHWA) to bring the TTP inventory rules back into compliance with the applicable statutory requirements. The BIA and FHWA must also eliminate the "15-mile limitation" in 25 C.F.R. § 170.447, for Alaska tribes not connected to a public road system. As discussed in detail below, § 170.447 is incompatible with the statutory requirements for the inventory.

Third, the BIA should also review and revise the eight requirements set forth in 25 C.F.R. § 170.443(a). The terms of this provision adopted in 2016 require tribes seeking to add new proposed roads to the National Tribal Transportation Facility Inventory (NTTFI) to comply with preconditions not generally associated with the transportation planning process. Meeting these additional requirements will vastly elevate the costs of documenting proposed roads for submission to the inventory. For this reason, tribal governments that have identified new proposed roads in their transportation planning processes will not be able to add them to the NTTFI. As a result, the NTTFI will no longer serve as the *comprehensive* national inventory that Congress directed the Secretary to maintain under 23 U.S.C. § 202(b)(1).

We discuss each of these issues in detail as follows:

#### **1. AVCP and Kawerak support the proposed rule eliminating § 170.443(b)**

AVCP and Kawerak fully support eliminating § 170.443(b) from the TTP regulations for several reasons: the provision is incompatible with Secretary's obligation to maintain a comprehensive national inventory of tribal transportation facilities; its implementation would lay to waste more than a decade of federal and tribal investment in transportation planning; and by removing routes from the NTTFI, the BIA would impede efforts to bring critical transportation access, safety and infrastructure activities to our communities.

#### **§ 170.443(b) is incompatible with Secretary's obligation to maintain a comprehensive national inventory**

Congress, in the SAFETEA-LU Transportation Authorization (2005) (and as reaffirmed in MAP-21 (2012) and the FAST Act (2015), required the Secretary of the Interior to maintain "a comprehensive national inventory" of tribal transportation facilities that are eligible for assistance under the TTP. 23 U.S.C. § 202(b)(1). Through these requirements, Congress directed the BIA to identify tribal transportation needs nationwide, including those of tribal communities in Alaska with limited existing transportation infrastructure.

Importantly, Congress required the Secretary to include proposed roads and primary access routes as part of that comprehensive national inventory (the NTTFI). The terms of that statute are as follows:

"...the Secretary shall include, at a minimum, transportation facilities that are eligible for assistance under the tribal transportation program that an Indian tribe has requested, including facilities that (vii) are primary access routes proposed by tribal governments, including roads between villages, roads to landfills, roads to drinking water sources, roads to natural resources identified for economic development, and roads that provide access to intermodal terminals, such as airports, harbors, or boat landings".

23 U.S.C. § 202(b)(1)(B)(vi).

In this same provision, Congress further established terms for determining the length limitation on proposed primary access routes. It stated that "a proposed primary access route is the shortest practicable route connecting 2 points of the proposed route." 23 U.S.C. § 202(b)(1)(C).

This statutory authority is the basis for the transportation planning and inventory update process as set forth in ACVP and Kawerak's respective FHWA Program Agreements, *See* FHWA PA, Art. III, Sec. 1(D) ("...the Consortium further agrees to carry out a transportation planning process and provide this information to the BIA, with courtesy copies to FHWA, as may be reasonably necessary *for the BIA to maintain an updated NTTFI of TTP eligible facilities per 23 U.S.C. § 202(b)(1)...*").

Furthermore, based on this authority and direction, the BIA practice has been to add proposed roads to the NTTFI if they: (a) were supported by a tribal resolution; (b) addressed documented transportation needs identified through a transportation planning process; (c) were eligible for TTP funding; and (d) would be open to public when built. 25 C.F.R. § 170.443 (2004).

AVCP and Kawerak wish to underscore that the statutory provisions governing the minimum requirements for the NTTFI have not changed since 2005. The proposed roads that were eligible and approved by the BIA to be included in the NTTFI **are, by law, required to remain on the inventory**. The regulatory terms for § 170.443(b) adopted in 2016, however, appear as if they would grant the BIA authority to remove proposed roads from the inventory in contravention of the statutory mandate. By eliminating § 170.443(b) from the Part 170 regulations, the BIA will ensure the Secretary complies with the statutory requirements set forth in 23 U.S.C. § 202(b)(1).

Implementation of § 170.443(b) to remove routes from the NTTFI would waste more than a decade of federal and tribal investment in transportation planning

In accordance with the statutory and regulatory terms and pursuant to our respective TTP Program Agreements with FHWA, AVCP and Kawerak have carried out extensive transportation

planning activities over the past decade to identify and address the most significant transportation access and connectivity needs in our regions.

AVCP carries out transportation planning, design, construction and maintenance activities on behalf of 14 member villages in the Yukon-Kuskokwim Delta region of Southwest Alaska. AVCP has conducted extensive public meetings in villages with tribal members to identify transportation access issues. Through these meetings, tribal members identify and draw their existing routes, which AVCP verifies with topographical mapping applications, including Light Detection and Ranging (LIDAR) remote sensing method. Based on this public engagement process, AVCP has developed Long Range Transportation Plans for each village in our Tribal Transportation Consortium and submitted eligible transportation facilities (including public roads, proposed roads, and primary access roads) to the BIA for inclusion in the NTTFI.

The BIA has approved AVCP's submissions and added more than 1,750 miles of proposed roads to the NTTFI in compliance with the statutory requirements and in compliance with our FHWA Program Agreement.

Kawerak's transportation planning process has engaged each of the 20 member villages in our Tribal Consortium in the Bering Straits Region. Since 2005, Kawerak, through its self-governance Indian Reservation Roads (IRR) Program Addendum and later under its FHWA PA, has carried out transportation planning activities on behalf of its member villages in accordance with applicable law and regulations governing transportation planning and inventory submissions. Kawerak and these tribal governments held public hearings to develop plans to address the transportation needs and project priorities in each of their communities over the long-term. Kawerak's Long Range Transportation Plan facilitates coordination and collaboration with the state transportation planning process.

Kawerak's substantial investment in developing transportation plans and projects has enabled Kawerak to submit 1014 proposed roads to the BIA under the TTP inventory regulations. The BIA has approved these proposed roads for inclusion in the NTTFI in accordance with the TTP regulations and our FHWA PA. The FHWA recognized Kawerak's transportation planning process with a national award for planning excellence.

By virtue of their inclusion in the NTTFI, these proposed roads are eligible to be improved using the allocation of TTP funds that AVCP and Kawerak receive for the benefit of the Alaska Natives residing in the Yukon-Kuskokwim Delta and Bering Straits regions.

By threatening to remove routes from the NTTFI, § 170.443(b) would impede efforts to bring critical transportation access, safety and infrastructure activities to our communities.

Unless eliminated, § 170.443(b) would not only threaten to reverse more than a decade of federal investment in tribal transportation planning, but it would also bring vital transportation access, safety and infrastructure activities to a halt. If a route is not in the NTTFI, federal TTP funding may **not** be spent on any activity associated with that route.

The costs of complying with § 170.443(b) are substantial. Kawerak submitted extensive documentation on November 6, 2017, in order to meeting the § 170.443 requirements. Doing so

required us to devote significant staff resources to collect data and documentation for routes that have already gone through an engaged and participatory transportation planning processes. The cost to Kawerak in terms of human and financial resources expended was significant.

Meanwhile, in preparing the documentation to comply with § 170.443(b) for one of AVCP's proposed routes already in the inventory that would provide surface transportation access through the YK Corridor, has cost AVCP approximately \$4 million. This level of expenditure covered the economic analysis, pre-NEPA review, identifying land owners and potential funding sources. Even after that vast investment, there is still more work to do for AVCP to get to construction. The TTP does not provide adequate resources for AVCP or any tribe to resubmit our proposed roads data all at once.

This duplicative and wasteful exercise has required AVCP and Kawerak to redirect resources and staff time away from our current transportation planning and construction activities and cause significant delays on other priority projects. The harm caused by the implementation of § 170.443(b) would be to the detriment of our organizations, the members of our respective tribal transportation consortia, and to the Alaska Natives and users of the public roads served by our transportation programs.

Even worse, if § 170.443(b) were to remain in place, but the BIA were to conclude that AVCP and Kawerak did not meet the § 170.443(b) requirements, our programs would face the risk that the transportation planning processes in which we already invested could be laid to waste. Without submitting additional documentation to meet the new poorly defined requirements, our proposed roads could be removed from the NTTFI by the BIA. Removal of facilities from the NTTFI would destroy effort and expense carrying out an FHWA-approved transportation planning process that documented the transportation needs in the region and the proposed routes that the BIA approved as eligible for the NTTFI.

For example, if § 170.443(b) were implemented and the BIADOT/FHWA Quality Assurance Team rejected the submitted data supporting the proposed routes, AVCP and Kawerak would no longer be able to carry out route staking (trail staking), such as what Kawerak has underway for routes from Shishmaref to Deering, from Brevig Mission to Wales and/or Koyuk to Buckland. Winter trail marking in the AVCP Region improves approximately 1,100 miles of winter trails to reduce injury and death while traveling between villages. Just this past spring five YK-Delta residents died due to snow machines falling through the ice.

Meanwhile, our respective work on critical access routes, including evacuation roads and new village developments, would stop. In the AVCP Region, the Oscarville Access Project will connect the village of Oscarville to Bethel. Oscarville has no airport, which means residents can only access medical care by boat or ice road. The only other option is a helicopter when these routes are unavailable. Scammon Bay and Chevak need to connect to Hooper Bay to access more advanced healthcare at the Hooper Bay subregional clinic. Expending TTP planning funds for these roads would not be allowed, if the routes were removed for not meeting the 170.443(b) criteria upfront.

Right-of-way activities, such as those associated with Kawerak's work on the road from Golovin to White Mountain would not be carried out and would prevent Kawerak from collaborating with the Alaska Village Electric Cooperative (AVEC) to develop the right-of-way corridor a power line to White Mountain. Rejection of Kawerak's proposed roads inventory would also:

- Eliminate work on extending Gambell's recently constructed Evacuation Road to Savoonga
- Eliminate maintenance on the recently staked 63.3 mile Shishmaref to Cape Espenberg route and maintenance on the new shelter cabin on that route.
- Eliminate work on an evacuation/relocation route for the threatened Village of Shaktoolik.
- Halt work on a regional route (trail) marking project designed to connect all Kawerak's villages to each other and the regional hub of Nome. This "trail staking" project planned as the precursor to a regional road system.
- Halt work on connecting Shishmaref to Kotzebue (intra-regional transportation) via Deering with our regional route-marking program and well as connecting Stebbins and St. Michael to Kaltag in the AVCP region.
- Halt work funded by the Federal Lands Access Program to convert abandoned Adot roads to trails.
- Significantly degrade our villages' abilities to incorporate their route considerations for the Fairbanks to Nome transportation link.

The proposed rule eliminating § 170.443(b) is clearly in the best interest of AVCP, Kawerak, the federal government and the tribal governments and Alaska Natives in our region because it will keep these identified routes in the NTTFI and allow us to work together to establish surface connectivity in our region. Our proposed roads networks will promote safer and more accessible travel for people to reach employment opportunities, access public services (including health care facilities, schools, shopping and airports), participate in familial and social activities (attend school sports and cultural events, church gatherings, weddings, funerals).

Elimination of § 170.443(b) is in the interest of public safety. With road access, the public making these trips will be less likely to get lost, injured or die traveling through remote areas, which burdens the public safety division with search and rescue costs. Furthermore, the connectivity envisioned by this transportation system will greatly reduce costs associated with the transport of freight, fuel and equipment.<sup>1</sup> It will allow for road-based transit options at considerably lower cost than our current reliance upon air transport.

The elimination of 25 C.F.R. §§ 170.443(b) would also ensure the continuation of other important economic development impacts of the TTP in our region. The ability to continue

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<sup>1</sup> See, e.g., U.S. Postal Service Office of Inspector General, *Alaska Bypass: Beyond its Original Purpose* (2011) at page 12 (discussing the substantial cost savings associated with the proposed highway from Fairbanks to Nome, and noting that "[the State of] Alaska estimated that fuel freight, and mail transport costs for the six case study communities would decrease by about \$19.1 million per year if road transportation were used instead of air").

carrying out TTP project activities is critical to sustain the benefits of workforce development stimulated by the TTP. Alaska Natives who participate in Kawerak and AVCP's workforce development activities, such as certified training programs in welding, flagging and commercial driver licenses, gain important on-the-job experience and additional skills from employment on TTP projects.

**2. The BIA must also eliminate § 170.447 from the regulations to bring its TTP inventory rules into compliance with the statutory requirements.**

In SAFETEA-LU, Congress directly addressed length limitations on primary access routes by stating "a proposed primary access route is the shortest practicable route connecting 2 points of the proposed route." 23 U.S.C. § 202(b)(1)(C). Congress has not modified this provision, and it remains in effect. Nevertheless, by promulgating 25 C.F.R. § 170.447 (2016), the BIA has created an arbitrary 15-mile length limitation without any consideration as to whether this length limitation would mean the access road would fail to connect any two points on the proposed route. The 15-mile limitation without consideration of connecting points directly conflicts with the terms of statute and is incompatible with proper transportation planning that ensures connectivity between villages and transportation terminals.

Many primary access routes that Kawerak has submitted and the BIA has approved for the NTTFI are greater than 15 miles in length. AVCP is attaching a map with these comments showing the village connection routes identified by the tribes in our region, as refined by topographical data and LIDAR to find the best alignments. Few of these connecting routes are 15 miles or less. The average route length is 33.26 miles and the longest distance is 153.4 miles.

Kawerak is also attaching a map with these comments showing the village connection routes identified by the tribes in our region, as refined by topographical data and LIDAR to find the best alignments. Few of these connecting routes are 15 miles or less. The average route length is 48.2 miles and the longest distance is 111.9 miles.

Neither Kawerak nor AVCP is aware of guidance from BIA or FHWA as to the BIA's plans for administering § 170.447. Will BIA create an inventory of roads to nowhere by truncating primary access routes longer than 15 miles at an arbitrary location unconnected to any other access point? Will it pretend that primary access routes whose connecting points are greater than 15 miles simply do not exist? Will it remove entire routes or portions of routes from the existing inventory based on this arbitrary regulatory limit?

Based on the terms of the statute, if the shortest practicable route to connect the two points of the primary access route is greater than 15 miles, the route must be included in the NTTFI. Neither the BIA nor FHWA have authority to override the specific terms Congress used to establish length limitations on primary access roads.

If the BIA implements § 170.447 in a manner that removes primary access routes whose length are greater than 15 miles from the NTTFI, as contemplated by § 170.443(b), Kawerak, AVCP and the federal government would lose their investment in transportation planning with respect to those routes. Given the resource limitations of the TTP, Kawerak and AVCP



recognize that completing this transportation system will take many years of sustained investment. Yet, if § 170.447 is implemented to remove or truncate routes, we would be prevented from taking any action on all but a few of our primary access routes. The vast majority of our connecting routes would never be built. The Agencies' regulatory terms in § 170.447 would disenfranchise our tribal communities by preventing them from achieving the transportation connectivity that Congress intended and that other tribal communities in the Lower 48 have already established.

**3. In the interest of maintaining a comprehensive national inventory, the BIA should review and revise § 170.443(a).**

The BIA should review and revise the terms in § 170.443(a) of the 2016 TTP regulations. Before tribes can add new proposed roads to the NTTFI, this provision would require them to demonstrate compliance with several preconditions not generally associated with the transportation planning process. Meeting these requirements will vastly elevate the costs of documenting proposed roads for submission to the inventory. Tribes lack the resources to meet these onerous requirements. For this reason, tribal governments that have identified new proposed roads in their transportation planning processes will not be able to add them to the NTTFI. As a result, the NTTFI will no longer serve as the *comprehensive* national inventory that Congress directed the Secretary to maintain under 23 U.S.C. § 202(b)(1). As currently drafted, § 170.443(a) contains eight requirements that must be met before new proposed roads may be added to the NTTFI.

Kawerak and AVCP recommend that the BIA and FHWA eliminate each of these eight requirements and replace those with terms more appropriately tailored to those associated with an effective transportation planning process. The Agencies have a workable model based on the terms of the former § 170.443 provision adopted through negotiated rulemaking and promulgated in 2004. Under that mechanism, the BIA added new proposed roads to the NTTFI if they: (a) were supported by a tribal resolution; (b) addressed documented transportation needs identified through a transportation planning process; (c) were eligible for TTP funding; and (d) would be open to public when built. 25 C.F.R. § 170.443 (2004). We recommend the BIA and FHWA consider reviewing 25 C.F.R. § 170.443(a) to consider reducing the requirements to be more in line with planning development rather than project development, similar to the former 170.443(a).

**Conclusion**

For the reasons stated above, we ask the BIA to please take the following actions:

- (1) Proceed with the proposed rule that will eliminate §170.443(b) in its entirety.**
- (2) Eliminate the arbitrary 15-mile limitation contained in § 170.447 and revise that provision to conform with statutory terms codified in 23 U.S.C. § 202(b)(1)(C).**
- (3) Revise § 170.443(a) to strike the eight new requirements for adding proposed roads to the NTTFI and revise that section to more effectively align with planning level requirements similar to the former §170.443(a).**

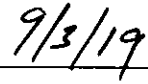


We thank you for your consideration.

Sincerely,



Melanie Bahnke  
President  
Kawerak, Inc.

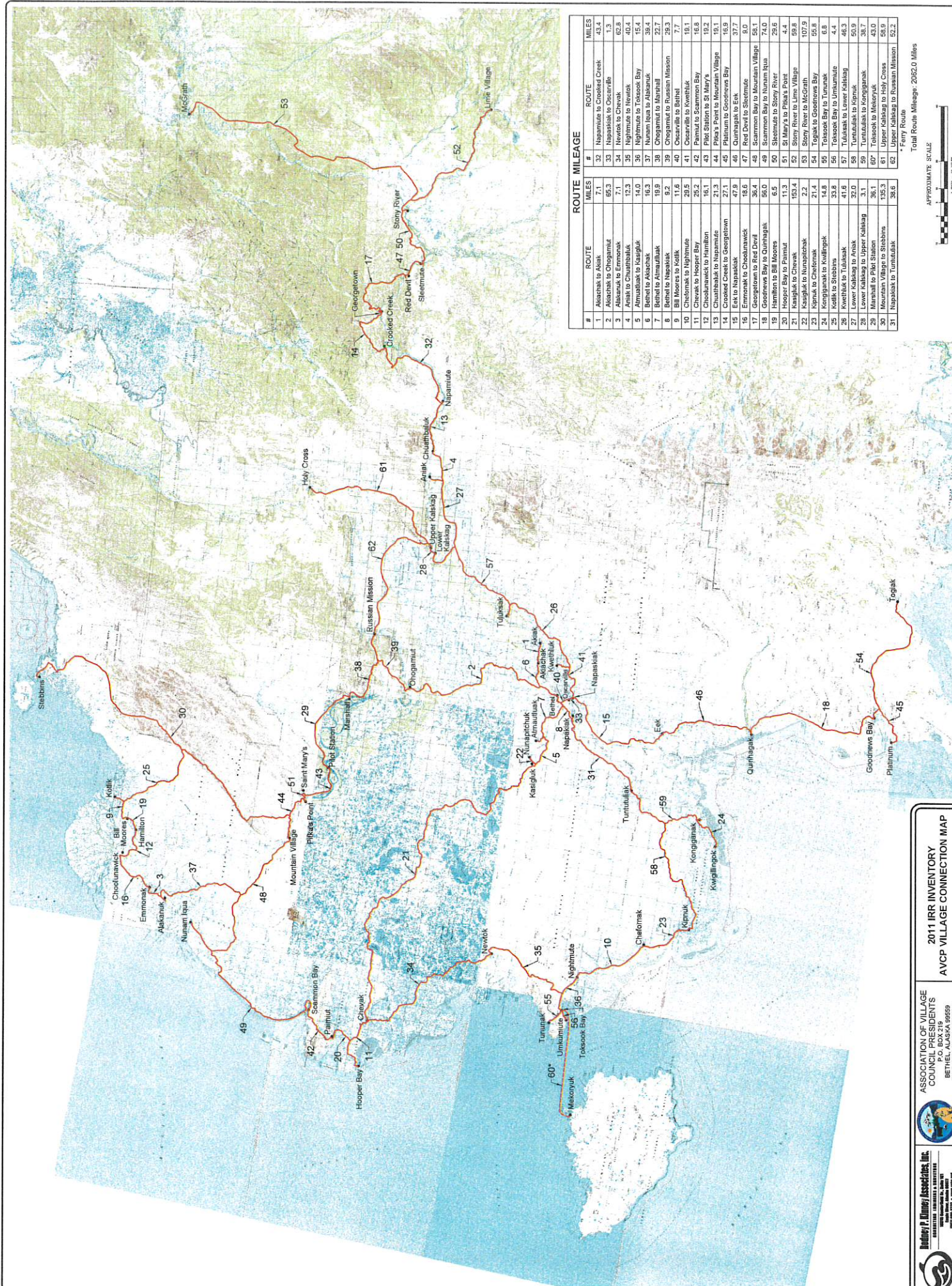
  
Date



Vivian Korthuis  
Chief Executive Officer  
Association of Village Council Presidents

9/3/2019  
Date





ROUTE MILEAGE			ROUTE MILEAGE		
#	ROUTE	MILES	#	ROUTE	MILES
1	Atkasook to Atkasook	7.1	32	Napavak to Crooked Creek	43.4
2	Atkasook to Chignik	65.3	33	Napavak to Ootville	1.3
3	Atkasook to Emmonak	7.1	34	Newok to Chignik	62.8
4	Aniak to Chignik	12.3	35	Newok to Newok	40.4
5	Aniak to Chignik	14.0	36	Newok to Tolosok Bay	15.4
6	Aniak to Atkasook	16.3	37	Nunam Iqa to Atkasook	38.4
7	Aniak to Atkasook	19.9	38	Chignik to Merrill	22.7
8	Aniak to Atkasook	9.2	39	Chignik to Russian Mission	29.3
9	Aniak to Atkasook	39.2	40	Ootville to Merrill	15.1
10	Aniak to Atkasook	39.2	41	Ootville to Merrill	15.1
11	Chignik to Hopper Bay	25.2	42	Chignik to Hopper Bay	16.8
12	Chignik to Hopper Bay	16.1	43	Chignik to Hopper Bay	19.2
13	Chignik to Hopper Bay	21.3	44	Chignik to Hopper Bay	19.1
14	Crooked Creek to Georgetown	27.1	45	Platinum to Goodnews Bay	16.9
15	Eek to Napavak	47.9	46	Quinhagak to Eek	37.7
16	Emmonak to Chignik	18.6	47	Red Devil to Sheldahl	9.0
17	Georgetown to Red Devil	36.4	48	Scammon Bay to Mountain Village	58.1
18	Goodnews Bay to Quinhagak	59.0	49	Scammon Bay to Nunam Iqa	74.0
19	Hamilton to Bill Moore	6.5	50	Sheldahl to Stony River	29.6
20	Hopper Bay to Merrill	11.3	51	St Mary's to Pika's Point	4.4
21	Kaiglik to Chignik	153.4	52	Stony River to Lime Village	99.8
22	Kaiglik to Nunapituk	2.2	53	Stony River to McGrath	107.9
23	Kaiglik to Chignik	21.4	54	Togalak to Goodnews Bay	55.8
24	Kongiganak to Kwillingok	14.8	55	Togalak to Nunam Iqa	6.8
25	Kotik to Stobins	33.8	56	Tolusok Bay to Unumutuk	4.4
26	Kwillingok to Tulukak	41.8	57	Tolusok Bay to Lower Kalelag	46.3
27	Lower Kalelag to Aniak	32.0	58	Tunulak to Kipuk	50.9
28	Lower Kalelag to Upper Kalelag	3.1	59	Tunulak to Kongiganak	38.7
29	Marshall to Pika's Point	36.1	60	Tolusok to Mekoryuk	43.0
30	Mountain Village to Stobins	153.3	61	Upper Kalelag to Holy Cross	58.9
31	Napavak to Unumutuk	36.6	62	Upper Kalelag to Russian Mission	52.3

Ferry Route  
Total Route Mileage: 2662.0 Miles

APPROXIMATE SCALE  
1 inch = 10 miles



