

Attn: Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street NW, MIB-4660-MS
Washington, DC 20240



Re: **Bureau of Indian Affairs Proposed Action to Eliminate the requirements of 25 C.F.R. § 170.443(b) Federal Register # 1076-AF45**

Dear Ms. Appel:

Please consider this correspondence the Maniilaq Association's comments in response to the Federal Register Notice referenced above in which the United States Bureau of Indian Affairs (BIA) is proposing to eliminate the requirements of 25 C.F.R. § 170.443(b). We strongly support this proposed action. We have been provided a copy of Kawerak, Inc.'s written testimony on this issue (enclosed). We are in support of the BIA's proposed action for the same reasons described in the testimony and ask that our comments be considered together with that testimony and made a part of the record.

We stand united with our partner tribes and tribal organizations across Alaska in expressing concerns about the potential devastating effect implementation of 25 C.F.R. § 170.443(b) could have on transportation infrastructure development in the State. This is especially true in rural areas where proposed roads that have already been approved and are in the National Tribal Transportation Facility Inventory are vital to the continued operation and success of Tribal Transportation programs.

We are also in support the elimination of the arbitrary 15 mile limitation for primary access routes in 25 C.F.R. § 170.447, and revision of 25 C.F.R. § 170.443(a) requirements to be more in line with planning development rather than project development, similar to the prior 443(a) requirements.

Maniilaq Association is a nonprofit consortium of the twelve (12) federally recognized tribes of northwest Alaska. Headquartered above the Arctic Circle in the town of Kotzebue, we provide health, social, and tribal government services to our member tribes and approximately 8,500 people spanning a 38,000 square mile area (about the size of Indiana). The villages we serve are accessible only by airplane year-round weather permitting, and by boat in summer and snow machine in winter; no villages are connected by road at this time.

Thank you for your consideration of this matter.

Quyana – thank you,

Tim Gilbert
President/CEO

MANIILAQ ASSOCIATION | P.O. BOX 256 | KOTZEBUE, AK 99752 | 1.800.478.3312

Kotzebue Qikiqtagruk, Ambler Ivisaappaat, Buckland Nunatchiaq, Deering Ipnatchiaq, Kiana Katyaak, Kivalina Kivaliniq,
Kobuk Laugviik, Noatak Nautaaq, Noorvik Nuurvik, Point Hope Tikigaq, Selawik Akuligaq, Shungnak Isinnaq

**Kawerak President Melanie Bahnke
Testimony Provided to the US Bureau of Indian Affairs
Regarding Proposed Elimination of 25 CFR § 170.443(b)
Federal Register #1076-AF45**

Introduction

My name is Melanie Bahnke. I am the President of Kawerak, Inc. Thank you for the opportunity to provide my comments on behalf of Kawerak regarding BIA's proposed action to eliminate regulatory provision 25 CFR 170.443(b).

Through its Self-Governance Compact with the Department of the Interior and its Tribal Transportation Program Agreement with the Federal Highway Administration, Kawerak carries out transportation planning, design, construction and maintenance activities on behalf of its member tribes in a service area roughly the size of West Virginia. Since 2005, Kawerak has submitted extensive documentation to the BIA to ensure eligible transportation facilities in our region are included in the National Tribal Transportation Facility Inventory (NTTFI). The BIA has approved these submissions and added more than 1000 proposed roads to the NTTFI in compliance with statutory requirements and as required under Kawerak's TTP agreements with the Department and FHWA.

The 25 CFR 170 regulations were enacted during the previous Administration, on December 7, 2016. As the new regulations in 25 CFR 170 were being considered, Kawerak strongly opposed adoption of 25 CFR 170.443(a) and (b) and 447. Kawerak voiced its opposition in meetings and consultation such as the one we are having today. These regulations were adopted over our objection. We have continued to voice our concern and objection to the implementation of these regulatory provisions. Through its Federal Register notice, the BIA announced in July, its proposed action to eliminate 25 CFR 170.443(b). We are thankful that the BIA and leadership at the Department of Interior are working to address tribal concerns regarding these regulations. We are here today to provide our strong support for this proposed action by BIA. We have submitted our written comments in a joint effort with the Association of Village Council Presidents. We have also submitted comments from our tribal partners in other regions of Alaska in support of our effort and the BIA's proposed action. So you have our written comments which are more comprehensive and provide more detail than I intend to today.

Our comments are primarily directed at the proposed elimination of 170.443(b). However, because the requirements of 443(a) and 447 are also of great concern and interconnected with what the requirements are for inventory submission and approval, we are also providing additional comments regarding these two other provisions.

25 C.F.R. § 170.443(b)

First, some context. Kawerak has been submitting proposed roads into the BIA inventory for many years, since 2005. These routes were not just created out of thin air. Over a decade of planning engaging each of the 20 member villages in our consortium in the Bering Strait region was involved in this process. Public hearings were held to develop plans and address transportation needs and priorities in each community. Kawerak's Long Range Transportation Plan was developed as a result, in coordination and collaboration with the State of Alaska transportation planning process. Our investment in developing these plans and projects enable us to submit 1014 proposed roads to the

BIA under the existing Tribal Transportation Program inventory regulations. These were vetted and approved and are eligible to be improved using the allocation of TTP funds Kawerak receives for the benefit of Alaska Natives residing in the Bering Strait region.

The new 25 CFR 170.443(b) regulation includes onerous requirements regarding the treatment of proposed roads and primary access routes in the NTTFI. § 170.443(a) requires that for any new proposed road to be added to the NTTFI, it must be supported with documentation meeting eight new requirements. Meanwhile, § 170.443(b) requires that proposed roads ***already approved by the BIA and currently included in the NTTFI*** must also comply with these new requirements. Its terms suggest that BIA may remove non-compliant proposed roads from the NTTFI. Once a proposed road is removed from the inventory, it is not eligible for assistance under the TTP.

Removal of routes already submitted by Kawerak and approved as eligible and included in the NTTFI, would waste more than a decade of federal and tribal investment in transportation planning.

Removal of such routes would also be devastating to vital transportation access, safety and infrastructure activities in our region moving forward. If a route is not in the inventory, federal TTP funding may not be spent on any activity associated with that route. Our work on critical access routes, including evacuation roads and new village developments, would come to a halt.

Loss of the ability to continue our work in our region will have real world health and safety consequences. We would no longer be able to carry out route staking including winter trail marking, which is critical to reducing injuries and death while traveling between villages. With road access, the public making these trips will be less likely to get lost, injured or die traveling through remote areas. Furthermore, the connectivity envisioned by these transportation systems will greatly reduce costs associated with the transport of freight, fuel and equipment. It will also open up the possibility of road based transit options and reduce reliance on air transport.

In addition to the real world devastating effects 443(b) could have in our region, this regulatory provision is not compatible with the statutory provisions governing minimum requirements for the inventory, that have not changed in the Transportation Acts since 2005, including in the latest, FAST Act. Kawerak's proposed roads that were eligible and approved by the BIA to be included in the NTTFI are therefore, by law, required to remain in 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 this statutory mandate. We believe doing so would be in violation of the statutory requirements. By eliminating 170.443(b) from the regulations, the BIA would ensure that it is complying with the statutory requirements enacted and still required by statute.

The BIA's proposed action to eliminate 170.443(b) makes sense. As I have described, going back and eliminating proposed roads from our inventory, would be throwing away a decade of hard work with tribes in developing long range plans to improve transportation infrastructure in this region. There would be a catastrophic effect on Kawerak's ability to improve and maintain transportation facilities in this region. This will have real world effects on health, safety and welfare directly and economic impacts indirectly. And this regulatory provision is not compatible with the statutory requirements in place. For these reasons we strongly support the BIA's proposed action to eliminate 170.443(b) from the Tribal Transportation regulations.

25 C.F.R. § 170.443(a)

We would also like to take this opportunity to request that the BIA also review and revise its similar requirements for inventory submission applicable to new submissions, in 443(a). We object to these requirements for many of the same reasons I have already mentioned. The requirements tribes must meet will vastly elevate the costs of documenting proposed roads for submission to the inventory. Tribes lack the resources to meet these onerous requirements. The NTTFI will likely no longer be a comprehensive national inventory that Congress directed the Secretary to maintain (23 USC 202(b)(1)). We recommend that the BIA and FHWA eliminate the eight requirements in 443(a) and consider the model used previously for 443(a) adopted through the negotiated rulemaking process in 2004. Under the former provision, the BIA added new proposed roads 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 the public when built. Consider reducing the current eight requirements to be more in line with planning development rather than project development, similar to the former 170.443(a).

25 C.F.R. § 170.447

170.447 imposes an arbitrary 15 mile length limitation on “primary access routes.” This was done without any consideration of whether an access road would connect to any two points on a proposed route. Many routes Kawerak has submitted and the BIA has approved for the NTTFI are greater than 15 miles in length. There is no known guidance from the BIA as to how they would implement this regulatory provision. Will they create an inventory of roads to nowhere by limiting primary access routes longer than 15 miles to an arbitrary location unconnected to any actual access point? Will the BIA say that primary access routes whose connecting points are greater than 15 miles simply do not exist? Will the BIA remove whole sections and entire routes from the inventory based on this arbitrary limitation? The effect of any such decisions would again be devastating for Kawerak and transportation infrastructure in the Bering Strait region and elsewhere. The BIA should eliminate this arbitrary requirement. In SAFETEA-LU, Congress directly addressed length limitation on primary access routes by stating 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 remains in effect and has not been modified by Congress. Based on the terms of the statute, if the shortest practicable access route to connect the two points of a 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 to primary access roads. 170.447 should be eliminated as it is contrary to the law.

In summary, we respectfully submit our strong support to eliminate 25 CFR 170.443(b). We request the BIA consider revising 170.443(a) to more effectively align with planning level requirements similar to what was required previously by the former 443(a). And we request that BIA eliminate entirely 170.447’s arbitrary 15 mile limitation for primary access routes.

Thank you.

