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## Initial Assessment of Lead Agency Candidates to Support Alaska Native Villages Requiring Relocation to Survive Climate Harms

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## FORWARD

The 2011 Bering Sea Superstorm battered Kivalina's coastline on November 9, 2011, just a few weeks before attorney Matt Pawa argued *Native Village of Kivalina v. Exxon Mobil*<sup>1</sup> on a sunny morning in San Francisco on November 28. The National Weather Service sent warnings and alerts several days before the storm hit Kivalina. So villagers prepared as best they could, although nothing could be done in the few days before the storm to restore the safe extent of sea ice that buffered the village from prior severe storms. The extratropical cyclone blasted the village with category 3 hurricane-force winds, reigniting conversations about emergency storm shelters. But some villagers felt concerned that with the storm brought a dangerous focus on short-term emergency planning that could distract from the most critical need facing Kivalina—to relocate the entire village out of harm's way to safer ground.

The *Kivalina* plaintiffs are seeking compensation for climate change–related damages, including the potential \$400 million cost to relocate the village away from melting permafrost and eroding coastlines. The plaintiffs argue that dangerous levels of greenhouse gases emitted by the defendants—24 oil, gas, and coal companies—arise to a nuisance under federal common law.<sup>2</sup> Plaintiffs also argue that a handful of the defendants are engaging in conspiracy to promote false scientific debate on climate change.<sup>3</sup> The Northern District of California dismissed the case on standing and political question grounds.<sup>4</sup> The case is now in the hands of the Ninth Circuit. The Native Village of Kivalina awaits a decision on whether it will win its day in court, which could take up to one year. Thirty other villages await similar fates unless coordinated efforts are made to tackle climate change–related relocation more systemically. Six villages, including Kivalina, must relocate within the next 10 years according to the U.S. Army Corps of Engineers.<sup>5</sup>

The *Kivalina* case is unprecedented. Some might call it a long shot. It's unclear how many other Alaska Native Villages will vote to litigate for relocation damages. During oral argument before the Ninth Circuit, one of the presiding judges asked why there are not more cases like this one? The legal bandwidth for cases seeking recognition of climate change harms has been expanding slowly since the Supreme Court decided *Massachusetts v. EPA*<sup>6</sup> and *American Electric*

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<sup>1</sup> *Native Village of Kivalina v. Exxon Mobil*, No. 09-17490 (9<sup>th</sup> Cir. filed Nov. 5, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

<sup>5</sup> GAO, Alaska Native Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance, Report to Congressional Committees, GAO-04-142 (Dec. 2003), available at <http://www.gao.gov/new.items/d04142.pdf>.

<sup>6</sup> 549 U.S. 497 (U.S. 2007).

*Power v. Connecticut*<sup>7</sup> but not enough to include compensating injured plaintiffs for damages—the issue at the heart of climate change. Given the shaky ground upon which its case sits, Kivalina villagers are looking beyond litigation to other adaptation measures, including government-to-government consultations with federal agencies coordinating relocation efforts. That is the topic of this article.

A caution must be given to readers that the article does not include primary source information from Alaska Native villagers faced with relocation. Rather it is a literature review that widely consults agency documents and authorities with respect to relocation delegated by Congress. It must be made clear that the contents of this paper do not represent the views of impacted communities. Thus, this approach to the issue is limited and demands fuller treatment.

If a lead agency is authorized to fund, coordinate, and manage relocation of Alaska Native Villages rendered uninhabitable by climate change, another danger exists. This danger tests the article's main argument that it is critical to the ultimate success and coordination of relocation efforts of Alaska Native Villages that a federal agency be assigned lead authority. A federal lead agency may backfire, stripping the villages of their decision making power, which could be more harmful and destructive to the future of the villages than the climate impacts themselves. Environmental justice attorney, Luke Cole, perhaps best articulated this issue decades back (it's not a new problem). Luke was the founder of the Center for Race Poverty and the Environment and he was the lead attorney on the *Kivalina* case before his tragic death in 2009. He wrote:

The law is dangerous to social movements because it is a cocooning and self-referential game in which its players believe they are important simply because they are playing.... In a very real way, the legal groups are re-creating one of the roots of environmental injustice: the making of decisions by people not affected by those decisions.<sup>8</sup>

Laws and policies promoting and supporting federal agency involvement are critical to a systemic approach to relocation from lands vulnerable from climate impacts. But this legal and policy approach to climate adaptation will surely fail if the end result is that the agency—either intentionally or more likely de facto—regulates people out of existence. At the Alaska Forum on the Environment in Anchorage last February, Ida Hildebrand voiced her concern that Arctic peoples are “being regulated out of our cultures. Our fish. Our waters. Our land.” It is imperative to ensure that climate change doesn't emerge as another excuse for colonialism and conflict.

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<sup>7</sup> 131 S. Ct. 813 (U.S. 2010).

<sup>8</sup> Luke Cole, *Forward: A Jeremiad on Environmental Justice and the Law*, 14 STAN. ENVTL. L. J. ix (1995).

This article is but one guidepost on the path toward the long view of climate adaptation. It clarifies the need for forward-thinking relocation planning in response to slow-onset, creeping environmental changes such as coastal erosion and permafrost melt in addition to sudden events exemplified by the recent storm surge. Relocation frameworks must protect and prioritize community decision-making, respect fundamental human rights,<sup>9</sup> and timely serve communities so that they may remain rich with culture, history, and relationships by promoting and protecting the roots of their spirits and their power.

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*December 2, 2011*

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<sup>9</sup> Robin Bronen, *Climate-Induced Community Relocation: Creating an Adaptive Governance Framework Based in Human Rights Doctrine*, 35 N.Y.U. REV. L. & SOC. CHANGE 357 (2011).

## **EXECUTIVE SUMMARY**

Throughout Alaska’s coastal and river communities, the effects of climate change are imminent threats—not distant projections—for the livelihood of thousands of Alaska Natives. Thirty-one of Alaska’s Native villages are in immediate danger due to flooding and erosion caused by climate change, but few qualify for federal assistance.<sup>10</sup> The villages are largely subsistence hunting, fishing, and gathering communities located in remote rural areas with only basic infrastructure. They require relocation assistance from state or federal government agencies, but often do not qualify for existing programs. Existing agency efforts to assist villages are scattered, and currently no agency has the authority to manage a full-scale relocation of a village. This lack of agency leadership and coordination is a major stumbling block in any relocation effort.<sup>11</sup> If this leadership vacuum is not filled, the threatened Alaska Native villages are likely to receive only haphazard preventative assistance, and the federal government will soon face a much more expensive emergency relocation after flooding, erosion, and storm surges destroy the homes and livelihoods of thousands.

The goal of this report is thus to identify the most appropriate agency or agencies to lead Alaska Native village relocation efforts. A detailed multi-attribute analysis of seven potential lead agencies with experience in relocation efforts was conducted to determine the ideal lead agency. During evaluation, special attention was given to each agency’s past experience working in Alaska and on relocation efforts nationally, its reputation with tribes and Congress, its funding authorization and discretion, its organizational structure and legislative origin, and its relationships with other agencies and private industries related to relocation efforts.

Based on the analysis, this report makes the case for the following agencies to undergo further evaluation for the role of lead agency: (1) U.S. Army Corps of Engineers; (2) Denali Commission; (3) U.S. Department of Commerce Economic Development Agency; (4) Federal Emergency Management Agency; and (5) U.S. Environmental Protection Agency.

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<sup>10</sup> GAO, Alaska Native Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance, Report to Congressional Committees, GAO-04-142 (Dec. 2003), *available at* <http://www.gao.gov/new.items/d04142.pdf>.

<sup>11</sup> “In 2007, the Newtok Planning Group reported that the lack of designated federal and state lead entities to guide, coordinate, and fund assistance impeded village relocation efforts and created uncertainty regarding the fulfillment of environmental analysis requirements under the National Environmental Policy Act,” quoting GAO Alaska Native Villages: Limited Progress has Been Made on Relocating Villages Threatened by Flooding and Erosion, Report to Congressional Requestors, GAO-09-551 (June 2009), pp. 12 [hereinafter “GAO Report 2009”].

Although this recommendation is based on a preliminary analysis that does not include critical input from key villages and agencies, or the possibility of significant restructuring of individual agencies, this report aims to further the recommendations of the 2009 GAO report that Congress “may want to consider designating, or creating, a lead federal entity that could work in conjunction with the lead state agency to coordinate and oversee village relocation efforts.”<sup>12</sup> While further analysis and interviews with affected communities is necessary to make final agency recommendation determinations, the need for new legislation granting authority and appropriations for an agency to take leadership of the Alaska Native village relocation efforts is immediate, clear, and dire.

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<sup>12</sup> GAO Report 2009, *supra* note 2, at 43.



**PART I**  
Introduction to the  
Alaska Native Villages

## **INTRODUCTION TO THE SCIENCE**

The Arctic is currently experiencing rapidly warming temperatures, melting ice and changing ecological landscapes and has been called the “canary in the coal mine”<sup>13</sup> of climate change. Air temperatures have been warming at twice the global rate for several decades and have already increased 2-3°C since the mid-twentieth century in some locations. These changes are leading to an accelerated pace of environmental change<sup>14</sup> and are expected to have significant impacts on Arctic residents, particularly the indigenous communities whose traditions and livelihoods are strongly tied to the ecology and physical conditions of the Arctic.<sup>15</sup>

Modeling scenarios predict a rise in air temperatures of 4-7°C for the region north of 60°N accompanied by a 20% increase in precipitation by 2100.<sup>16</sup> Increased melting of Arctic glaciers, the Greenland ice sheet, and over 10-20% of the current permafrost area; decreased sea ice extent; reduced seasons of sea ice cover; and significant changes in terrestrial biology, including conversion of tundra to boreal forest, are projected to accompany the warming and increased precipitation.<sup>17</sup> The downscaling of global climate models to Alaska indicates that the length of the summer season will increase while the winter season will shorten, leading to later fall freeze-up and earlier spring melting of sea ice.<sup>18</sup> In general, temperature increases will be greater during the winter than the summer months with particularly large increases in Alaska’s interior and northern regions.<sup>19</sup>

These changes are not just a future prospect. The effects of climate change are already evident in Alaska. Permafrost, which covers approximately 80% of the land area in Alaska and the northern barrier islands, is thawing as temperatures rise. The melting is leading to slumping land that threatens the integrity of built infrastructure such as buildings, roads, and underground pipes used for water supply, sewage removal and heating. The sea ice that forms along the western and

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<sup>13</sup> American Association for the Advancement of Science John P. Holdren has said that “[o]ne of the characteristics of global climate change is that the climate changes more rapidly in the far North.” He said that Arctic regions “are like the coal miner's canary, the early warning to the rest of us of the extent to which the Earth's climate is changing,” *quoting* Edward W. Lempinen, *In Arctic Alaska, the Warming Climate Threatens an Ancient Culture*, AAAS NEWS ARCHIVES (Dec. 6, 2006) <http://www.aaas.org/news/releases/2006/1206alaska4.shtml>.

<sup>14</sup> Weller et al., 2005, Anisimov et al., 2007.

<sup>15</sup> McCarthy et al., 2005.

<sup>16</sup> Weller et al., 2005.

<sup>17</sup> Weller et al., 2005, Anisimov et al., 2007.

<sup>18</sup> Scenarios Network for Alaska Planning (SNAP), Preliminary Report to the Governor’s Sub-Cabinet on Climate Change, University of Alaska Fairbanks, School of Natural Resources and Agricultural Sciences, SNRAS Pub. No. MP 2008-06 (2008) 14, *available at* [http://www.uaf.edu/files/snras/MP\\_08\\_06.pdf](http://www.uaf.edu/files/snras/MP_08_06.pdf) [hereafter “SNAP Report”].

<sup>19</sup> SNAP Report, *supra* note 9, at 8.

northern coasts of Alaska is thinning and retreating, leaving the coastline ice-free for a greater portion of the year and rendering the shorelines more vulnerable to waves and storm surges.<sup>20</sup> Sea-ice retreat also threatens the safety and viability of traditional subsistence hunting activities, posing additional challenges to Alaska Natives' food security and cultural traditions. Cultural loss due to changing physical conditions that prevent the practice of traditional hunting, travel and other place-based practices can lead to psychological distress and reduction in communities' ability to adapt to changes in the climate.<sup>21</sup>

These changes pose an especially severe challenge to the 31 Alaska Native villages identified by the Government Accountability Office (GAO) in 2009 as facing imminent threats from flooding and erosion exacerbated by permafrost melting and reduced sea-ice extent. At least 12 of these villages are exploring relocation options in light of these threats (Table I), and the remainder face the prospect of increasing environmental hazards and the need to relocate.<sup>22</sup> Figure 1 shows the location of the threatened villages throughout Alaska.

**Table I. Imminently Threatened Villages**

Akiak	Deering	Koyukuk*	Port Heiden
Alakanuk	Dillingham	Kwigillingok	Saint Michael
Allakaket*	Emmonak	Lime Village	Selawik
Barrow	Golovin*	McGrath	Shaktolik*+
Chefomak	Hughes*	Napakiak	Shishmaref*+
Chevak	Huslia*	Newtok*+	Teller*
Clark's Point	Kivalina*+	Nulato*	Unalakleet*
Eyak (Cordova)	Kotlik	Nunapitchuk	

[\*] Alaska villages that are exploring relocation

+ Alaska villages that are likely to move all at once, as soon as possible<sup>23</sup>

<sup>20</sup> GAO Report 2009, *supra* note 2, at 7–8.

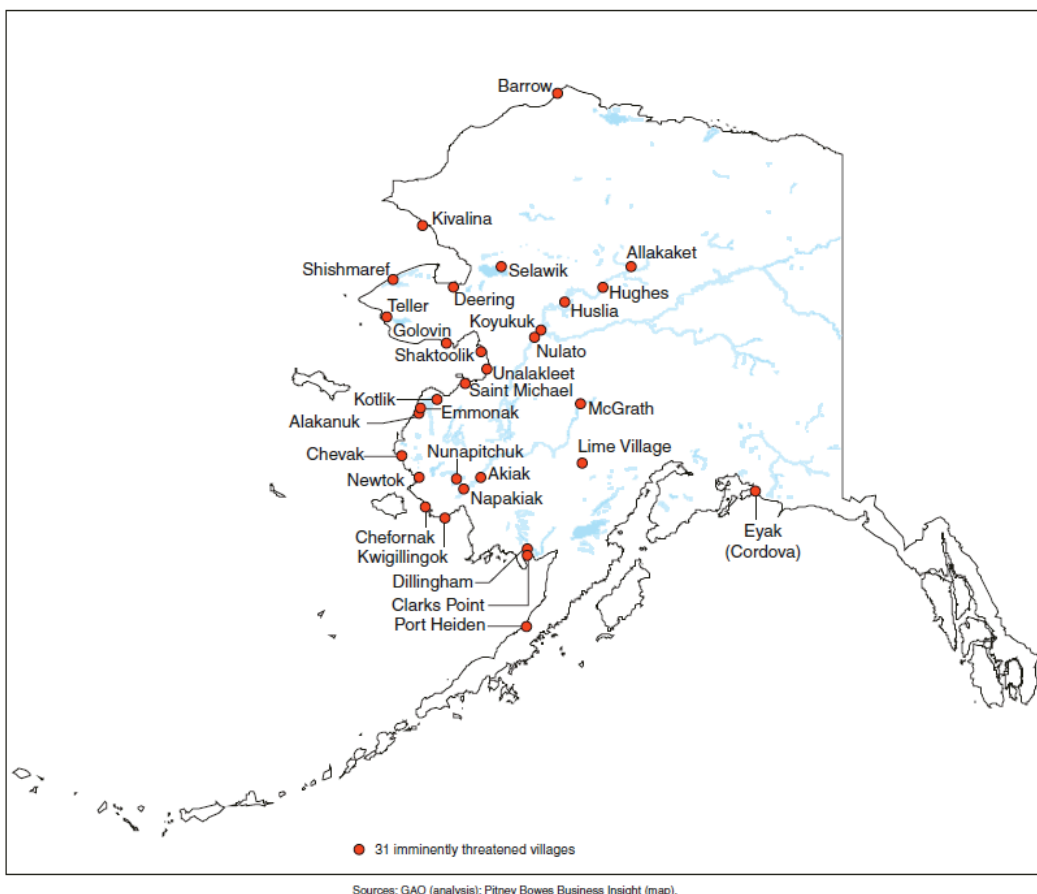
<sup>21</sup> McCarthy et al., 2005.

<sup>22</sup> GAO Report 2009, *supra* note 2, at 12.

<sup>23</sup> *Id.* at 12–18.

## CULTURAL BACKGROUND

Of the approximately 680,000 people who live in Alaska, about 15% are Alaska Natives,<sup>24</sup> many who live on remote parts of the state's 34,000 miles of shoreline or along its 3,000 rivers. Here, Native communities engage in the same subsistence hunting, fishing and gathering activities as their ancestors, often in settlements of a few hundred people with access to minimal infrastructure.<sup>25</sup> Their proximity to the ocean, however, makes them vulnerable to flooding, coastal erosion and melting permafrost – dangers that have become all too real as Arctic temperatures have risen in recent decades. Thirty-one Native Alaska villages are



**Figure 1 Alaska Native villages** The map above shows the geographic location of the 31 imminenty threatened villages.

at immediate risk of becoming uninhabitable.

In large part, the U.S. federal government is responsible for where Alaska Natives decided to build settlements. Alaska became a U.S. territory much later than the

<sup>24</sup> U.S. Census Bureau, Alaska Quick Facts (2009), available at <http://quickfacts.census.gov/qfd/states/02000.html> (last accessed may 17, 2011).

<sup>25</sup> GAO Report 2009, *supra* note 2, at 4–6.

lower 48 states, so the experience of Alaska's Native population is distinct from that of other Native Americans.<sup>26</sup> Alaska's remote location and large size also meant that there was not the competition for land that led to most Native Americans being forced off their ancestral lands and onto reservations in the 19th century. Initially, Alaska Natives were excluded from the jurisdiction of the Bureau of Indian Affairs and left largely to themselves. In the 1890s and early 1900s the U.S. government took direct interest in Alaska Natives and through the Bureau of Education (BoE)<sup>27</sup> allowed administrators and teachers to keep Native Alaskans away from the "corrupting Western influences," including alcohol and prostitution.<sup>28</sup>

At the time, Alaska Natives lived a semi-nomadic life, migrating seasonally to hunt, fish and gather in order to maintain their subsistence lifestyles as their ancestors had for thousands of years. The arrival of non-Native settlers meant the establishment of Western-style towns and mining camps. Some Native Alaskans were drawn there by opportunities to work and to purchase goods.<sup>29</sup> In its effort to keep the Alaska Natives away from the evils offered in the towns and mining camps, the BoE started establishing separate schools for Native children in areas away from the new settlements.<sup>30</sup> Attendance was not compulsory, but people came. The Alaska Natives began to build settlements around the schools and to abandon their migratory ways<sup>31</sup> as they were drawn in by the promise of advantages for their children.

Beginning in the 1920s, Alaska's non-Native population began to grow and encroach on aboriginal lands.<sup>32</sup> Alaska Natives possessed undistinguished aboriginal title to the lands they inhabited, including hunting, fishing and gathering rights on those lands.<sup>33</sup> In 1936, the Indian Reorganization Act was made applicable to Alaska and many Alaska Native tribes reorganized their government structures under its provisions.<sup>34</sup> Because Alaska did not attain statehood until 1959, Alaska Natives largely escaped the Bureau of Indian Affairs's (BIA) termination policy of the 1940s and 1950s.<sup>35</sup> During that time, the Secretary of the Interior established several Indian reservations in Alaska, sparking unease of non-Natives who had an interest in developing those lands.<sup>36</sup>

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<sup>26</sup> The U.S. acquired Alaska from Russia under the 1867 Treaty of Cession.

<sup>27</sup> See Stephen Haycox, "Races of a Questionable Type': Origins of the Jurisdiction of the U.S. Bureau of Education in Alaska, 1867-1885," *Pacific Northwest Quarterly* 75, 1565-63 (October 1984).

<sup>28</sup> Ducker.

<sup>29</sup> Ducker.

<sup>30</sup> Ducker.

<sup>31</sup> Ducker.

<sup>32</sup> Anderson, Robert T., *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *Tulsa L. Rev.* 17, 17 (2007).

<sup>33</sup> *Id.*. See also *Tlingit & Haida Indians of Alaska v. U.S.*, 177 F. Supp. 452, 461-61 (Ct. Cl. 1959).

<sup>34</sup> Anderson, *supra* note 23. See also 25 U.S.C. § 473a.

<sup>35</sup> The Indian Termination Policy was a federal policy to assimilate Native Americans into mainstream society.

<sup>36</sup> Anderson, *supra* note 23.

These interests in development led to an effort to extinguish the aboriginal claims of Alaska Natives. This effort was not successful in the short term. In the Statehood Act, Congress chose to retain the existing system, neither validating nor extinguishing aboriginal title, but reserving the right to settle the claims in the future.<sup>37</sup>

A solution came in 1971 with the passage of the Alaska Native Claims Settlement Act (ANCSA), which extinguished all claims to aboriginal title in Alaska and all claims for past damages for trespass on those lands.<sup>38</sup> In short, ANCSA created a system of regional and local corporations and granted to those corporations land and money. The corporations were granted 44 million acres of land (about 12% of Alaska) and \$962.5 million to distribute among the regional and local corporations and shareholders.<sup>39</sup> Qualifying Alaska Natives could become shareholders in the corporations and receive dividends from them by enrolling their villages in the local corporation system by becoming “at large” shareholders of a regional corporation.<sup>40</sup> Presently, of the 31 immediately threatened villages, all but three are local corporations under this system.<sup>41</sup>

ANCSA did not address Native tribes’ governmental powers, but the Supreme Court clarified the issue in *Alaska v. Native Village of Venetie*.<sup>42</sup> The Court held that the land granted to the corporations by ANCSA was not Indian country and therefore not subject to tribal jurisdiction under federal law.<sup>43</sup> ANCSA also failed to address aboriginal hunting and fishing rights, essential pieces of subsistence living and maintaining the Alaska Natives’ cultures. This oversight was partially remedied in 1984 with the enactment of the Alaska National Interest Land Conservation Act (ANILCA). ANILCA provides priority for residents of rural Alaska to use federal public lands for subsistence purposes.<sup>44</sup> This offers some protection for Alaska Native hunting and fishing rights, but ANILCA also grants the state of Alaska management authority over subsistence on public lands, leaving these rights in the hands of Alaska state officials.<sup>45</sup>

Alaska Native tribes’ unique history with the state of Alaska is critical background to the task of Alaska Native Village relocation. Separate from the tribes’ relationship with the state, the tribes’ relationship to the federal government is also a critical factor when assigning lead agency authority. The federal government owes a special duty to Indian tribes, which informs the

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<sup>37</sup> See Anderson, *supra* note 23, at 27–28. See also Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958), as amended by Pub. L. No. 86-70, § 2(a), 73 Stat. 141 (1959).

<sup>38</sup> 43 USC §1617 (1971); see also Anderson, *supra* note 23, at 31.

<sup>39</sup> McClanahan, A.J. An Overview of ANCSA, Cook Inlet Region, Inc.,

[http://www.ciri.com/content/history/ancsa\\_overview.aspx](http://www.ciri.com/content/history/ancsa_overview.aspx) (last accessed May 18, 2011).

<sup>40</sup> *Id.*

<sup>41</sup> Independent analysis of the list of village corporations at ANCSA.net revealed that all of the immediately threatened villages except Chefornak, Koyukuk, and Nanapitchuk are incorporated.

<sup>42</sup> 522 U.S. 520 (1998).

<sup>43</sup> *Id.*

<sup>44</sup> 16 U.S.C. § 3114.

<sup>45</sup> 16 U.S.C. § 3115(d).

underlying basis for this paper’s argument that primary responsibility for relocation be vested within a federal—versus a state—agency.

Indian tribes are governments with inherent powers that relate to the federal government as sovereign nations.<sup>46</sup> Tribal powers are not “delegated powers granted by express acts of Congress,”<sup>47</sup> but instead are “inherent powers of a limited sovereignty which has never been extinguished.”<sup>48</sup> In *Cherokee Nation v. Georgia*,<sup>49</sup> the Supreme Court characterized tribes as politically independent communities—“domestic dependent nations”<sup>50</sup>—whose “relation to the United States resembles that of a ward to his guardian.”<sup>51</sup> Out of the Court’s classification of tribes as “domestic dependent nations,”<sup>52</sup> a trust relationship emerged, with the federal government acting as a trustee in the tribes’ interest to protect tribes’ sovereign status. The trust relationship between the federal government and Indian tribes, including Alaska Native tribes, assigns special duties to the federal government to protect tribes from state and federal interferences and to take action pursuant to its fiduciary duties to protect tribes.

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<sup>46</sup> *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

<sup>47</sup> 1-4 Cohen's Handbook of Federal Indian Law § 4.01.

<sup>48</sup> 1-4 Cohen's Handbook of Federal Indian Law § 4.01, *citing United States v. Wheeler*, 435 U.S. 313, 322-323 (1978).

<sup>49</sup> 1-4 Cohen's Handbook of Federal Indian Law § 4.01, *citing Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>50</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

<sup>51</sup> *Id.*

<sup>52</sup> *See* Cohen, *supra* note 38.

**PART II**  
**The Agencies**



## ***IDEAL AGENCY***

Alaska Native village relocation is a complex matter, and its oversight requires expertise and resources from many different disciplines. Strong project management skills, technical and engineering skills, experience in administering funding, environmental expertise, and a good working relationship with Native peoples are all necessary for an ideal lead agency. Based on the research conducted for this study, we present a profile for an ideal agency for overseeing Alaska Native village relocation.

### **Leadership**

The ideal agency would be one already in existence whose reputation with Congress, the public and Alaska Natives in particular is positive. A director who possesses a fair degree of independent decision-making authority would lead the agency. Relocation is not a quick process; therefore leadership should also be stable. Long-term tenures (5-8 years) or short-term tenures with seamless transitions between apolitical leaders are preferred in order to maintain a consistent mission for the agency. The ideal agency would have authority to coordinate a relocation project according to the decisions, plans, and priorities of affected villages. The agency would have a permanent presence (headquarters or field office) in Alaska to facilitate good relations with those whom it would be serving.

### **Expertise**

The ideal agency would have experience with relocation and strong engineering project management skills relative to planning, coordinating, scheduling and contracting out of design and construction. To this end, the agency would have good connections with the private sector and incorporate tribal businesses as much as possible. The agency would have in-house expert knowledge of environmental degradation and in particular be familiar with the Arctic North. Again, the ideal agency would leverage the first-hand knowledge of the Alaska Natives. The ideal agency would have the capacity to operate proactively (e.g. disaster avoidance) and reactively (e.g. disaster recovery). Specific tasks required would include: finding and evaluating appropriate sights for relocation; land acquisition and management; preparing an environmental impact statement (if necessary); and technical oversight and management of infrastructure. The ideal agency would have a good collaborative relationship with other federal, state and local agencies and would leverage their expertise wherever possible.

## **Funding**

The ideal agency would be allocated an adequate amount of money by Congress to accomplish the relocation projects. Realistically the funding structure would be such that the lead agency would manage its appropriated funding as well as take advantage of funding available from other agencies with which it works. The lead agency would have jurisdiction over relocation project prioritization and would not require Congressional approval on a case-by-case basis. Funding should be authorized on a greater-than yearly basis (2–5 years) in order to fund relocation projects from start to finish. Similarly, funding should not be attached to legislation that could be repealed mid-project. Finally, Alaska Native villages with and without incorporated municipal governments would be eligible for funding.

## **FEDERAL AGENCIES**

The team elected seven existing federal agencies as primary candidate lead agencies. The process by which this subset was selected is described in Part III of this report. Each candidate agency is introduced below.

### ***A. U.S. ARMY CORPS OF ENGINEERS***

#### **Executive Summary**

The U.S. Army Corps of Engineers (USACE) is an internationally renowned engineering agency whose main civil responsibilities are infrastructure support, water resource management and environmental cleanup.<sup>53</sup> The USACE has been part of recent Alaska Native village relocation efforts, most notably in Newtok, so these communities may be more receptive to the Corps than less familiar agencies. Funding for these efforts came from many sources including the main USACE budget, the USACE Interagency and International Service (IIS), and the Tribal Partnership Program.<sup>54</sup> The USACE has been partnering with private industry since 1988<sup>55</sup> and aids federal agencies in their technical needs through the IIS.

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<sup>53</sup> Richardson, Pat. U.S. Army Corps of Engineers, “Alaska District Projects: Heavy Construction Workload in Military and Civil Works Programs,” *Alaska Business Monthly*, 2010.

<sup>54</sup> Department of the Army Office, Assistant Secretary of the Army (Civil Works). Fiscal Year 2012 Civil Works Budget For the US Army Corps of Engineers. Washington, D.C.: US Army Corps of Engineers, 2012.

<sup>55</sup> Weston, David C. and Edward Gibson Jr., “Partnering-Project Performance in U.S. Army Corps of Engineers,” *Journal of Management in Engineering* 9 (4), (1993): 411.

## Background and Structure

The U.S. Army Corps of Engineers (USACE) is an engineering agency located within the Department of Defense and is a Major Command within the U.S. Army. The USACE operates under the authority of the Chief of Engineers, a military officer, who reports to the civilian Assistant Secretary of the Army for Civil Works. Four Deputy Commanding Generals support the Chief of Engineers. The USACE serves eight distinct geographic divisions. The Alaska District, located within the Pacific Ocean Division (POD) and founded in 1946, primarily conducts military construction, water resources development, and environmental cleanup/restoration activities.<sup>56</sup>

## Recent Activities in Alaska

The following table describes the total USACE civil works budget and the Alaska District civil works budget for 2010 through 2012.<sup>57</sup>

<i>Year</i>	<i>Total USACE Budget</i>	<i>Alaska District Budget</i>	<i>Number of Projects in Alaska</i>
2010	\$4,631,000,000	\$20,768,000	10
2011	\$4,939,000,000	\$30,179,000	15
2012	\$5,125,000,000	\$28,228,000	10

The Tribal Partnership Program (TPP) [not included in state budget above] allows the USACE to initiate investigations “that may include flood damage reduction, environmental restoration, and protection and preservation of natural and cultural resources.”<sup>58</sup> Under the TTP, the Alaska District conducted a \$2 million examination of the erosion risks to the villages of Bethel, Dillingham, Kaktovik, Kivalina, Newtok, Shishmaref, and Unalakleet that was initiated in 2006. Congress authorized the establishment of the Alaska Coastal Erosion (ACE) program in 2006 and provided an initial \$5 million to implement Alaska coastal erosion projects funded at full federal expense in nine villages under Section 117 of the 2005 Energy and Water Development and Related Agencies Appropriations

<sup>56</sup> See Richardson, *supra* note 44.

<sup>57</sup> Department of the Army Office, Assistant Secretary of the Army (Civil Works). 2012. *Fiscal year 2012 civil works budget for the US army corps of engineers*. Washington, D.C.: US Army Corps of Engineers, <http://www.usace.army.mil/CECW/PID/Documents/budget/budget2012.pdf> (accessed 5/10/2011); Department of the Army Office, Assistant Secretary of the Army (Civil Works). 2011. *Fiscal year 2011 civil works budget for the US army corps of engineers*. Washington, D.C.: US Army Corps of Engineers., <http://www.usace.army.mil/CECW/PID/Documents/budget/budget2011.pdf>; Department of the Army Office, Assistant Secretary of the Army (Civil Works). 2010. *Fiscal year 2010 civil works budget for the US army corps of engineers*. Washington, D.C.: US Army Corps of Engineers, <http://www.usace.army.mil/CECW/PID/Documents/budget/budget2010.pdf>.

<sup>58</sup> US Army Corps of Engineers, “Memorandum for Commanders, Major Subordinate Commands and District Commands. Subject: Implementation guidance for section 203 of the water resources development act of 2000, tribal partnership program,” (2000), *available at*: <http://corpslakes.usace.army.mil/employees/cultural/pdfs/section203.pdf>.

Act.<sup>59</sup> On March 11, 2009, the Omnibus Appropriations Act repealed Section 117 of the 2005 Energy and Water Development and Related Agencies Appropriations Act.<sup>60</sup> Section 117 was replaced with Section 116 of the Energy and Water Development and Related Agencies Appropriations Act of 2010. In fiscal year 2010 ACE funding became executable with passage of Section 116. The old authority allowed the district to award coastal erosion projects at 100% federal funding while the new authority will require cost sharing – 65% federal funds and 35% local funds. In 2009 – 2010 the district conducted a \$10.8 million environmental cleanup for Native villages through the Native American Lands Environmental Mitigation Program. In fiscal year 2011 the Alaska district will begin the following civil works projects: Unalakleet Erosion Protection, Bethel Bank Stabilization, Shishmaref Erosion Protection Phase 3, and Kivalina Erosion Phase 2.<sup>61</sup>

### Overview of Section 117

Section 117, enacted as part of the Consolidated Appropriations Act of 2005, authorized the USACE to “carry out structural and non-structural projects for storm damage prevention and reduction, coastal erosion, and ice and glacial damage in Alaska at full federal expense, including relocation of affected communities and construction of replacement facilities.”<sup>62</sup> That section of the law was repealed in the Consolidated Appropriations Act of 2009 and replaced with a Section 116, which provides for the traditional cost share in which the non-federal interest is expected to pay up to 35% of the total cost. It is neither possible for the Alaska Native communities to raise 35% of the total cost, nor are they likely to receive such funds from the State of Alaska or other sources.

### Workforce

The USACE employs 36,000 civilians and 650 military personnel across all 50 states and has a turnover rate of approximately 8%. The size of the USACE is larger than any other agency being considered for lead relocation agency. This ability to handle a large and dispersed workforce will reduce any administrative burden inherited through assuming relocation leadership. The 2010 Federal

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<sup>59</sup> Pub. L. No. 108-447, Div. C, Title I, § 117, 118 Stat. 2944-45 (2004). *See also* “Overview of Section 117” sidebar at 17.

<sup>60</sup> Pub. L. No. 111-8 (2009).

<sup>61</sup> *See* Richardson, *supra* note 44,

<sup>62</sup> Lau, D., “Regional integration team spearheads development of guidance critical to Alaska coastal erosion program” (2010), *available at* [http://www.pod.usace.army.mil/News/NR10\\_05\\_Sec\\_116RIT.pdf](http://www.pod.usace.army.mil/News/NR10_05_Sec_116RIT.pdf).

Employee Viewpoint Survey conducted by the Office of Personnel Management (OPM) found that the USACE respects its own leadership with an overall score of 66% compared to the Government-wide 61% (Human Capital Plan, pg. 16). Other areas where the USACE out-scored the government as a whole were the results-oriented performance culture index, the talent management index and the job satisfaction index. The USACE has a high level of engineering expertise and hires personnel into the following categories: general natural resources management and biological sciences, engineering technical, construction control technical, general engineering, mechanical engineering, electrical engineering, contract specialist, realty and lock and dam operating. A majority of the design and construction are accomplished by contracting the work to private industry firms.<sup>63</sup> The USACE began partnering with the private sector in 1988 and is credited with setting the precedent for partnering between the public and private sectors.<sup>64</sup> In addition to strong private sector partnering skills, the USACE also partners well with other federal agencies. The USACE established the Interagency and International Services (IIS) to provide “technical assistance to non-Department of Defense federal agencies, state and local governments, tribal nations, private U.S. firms, international organization and foreign governments”. Through the IIS the USACE has worked with the Environmental Protection Agency, the Federal Emergency Management Agency and the Department of Housing and Urban Development (FY 2010 Execution Report). The IIS is authorized to support tribal governments under Title 10 US Code Section 3036(d)(2).<sup>65</sup> The IIS funded the Alaska District in fiscal years 2009 - 2010 to install moorings and boat launch ramps at remote sites for the Denali Commission.

The USACE has a history of successful partnering with the private and public sector and can utilize those relationships to successfully lead relocation efforts.

### **Reputation**

Congress must approve all USACE civil works projects. These civil works projects are highly valuable to members of Congress because they bring money and jobs to the state. As a result, USACE has a strong and close relationship with Congress. The good reputation of the USACE in Congress does not necessarily extend to the Executive or to the public. Past attempts to distance Congress from the USACE, such as the Domenici provision during the Clinton administration, banning federal spending on USACE management changes thus effectively

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<sup>63</sup> US Army Corps of Engineers. 2009. *US Army Corps of Engineers Civilian Human Capital Strategic Plan 2009 – 2012*. Washington, D.C.; Human capital plan 2010 addendum., in US Army Corps of Engineers [database online]. Washington, D.C., 10/2010 [cited 05/14/2011], [http://www.usace.army.mil/CEHR/Documents/Human Capital Plan 2010 Addendum\\_1Dec10.pdf](http://www.usace.army.mil/CEHR/Documents/Human%20Capital%20Plan%202010%20Addendum_1Dec10.pdf) (last accessed 5/16/2011).

<sup>64</sup> Glagola, Charles R., and William Malcolm Sheedy. “Partnering on Defense Contracts”. *Journal Of Construction Engineering And Management* (March/April 2002), 10.1061/~ASCE!0733-9364~2002!128:2~127!, <http://www.civ.utoronto.ca/sect/coneng/tamer/Courses/CIV1278/REF/partnering.pdf> (accessed 05/13/11).

<sup>65</sup> *10 USC CHAPTER 305 - THE ARMY STAFF* (02/01/2010).

attempting to vest more oversight over USACE projects in the Executive Branch,<sup>66</sup> have been blocked by Congress. Congressmen also refrain from criticizing another Congressman's USACE project with the expectation that the favor will be repaid. This relationship between Congress and the USACE has been characterized as "pork barrel politics."<sup>67</sup> The USACE has also been accused of fixing data to justify expensive projects that benefit politically influential private firms. The USACE, however, is a hardworking and competent agency.<sup>68</sup> It has made a substantial effort to improve its relationship with Alaska Native Tribes. Beyond the Department of Defense Native American and Alaska Native Policy and the USACE Tribal Policy Principles, the USACE has established the Tribal Nations Community of Practice (TNCOP), which aims to strengthen the partnering relationship between Alaska Native villages and the USACE with regards to water projects. The TNCOP's purpose is to change the culture of the USACE to be more respectful to tribal rights and needs and to enable USACE personnel to incorporate the tribes into decision making.<sup>69</sup> The USACE is a respected engineering agency. While USACE appropriations by Congress have been questioned in the past, USACE's determination to incorporate tribal needs, rights and knowledge into their project management will likely help to ensure that the correct relocation efforts are made with regard to Alaska Native village relocation.

### **Overall Assessment of USACE as Lead Agency**

Overall the USACE is a strong candidate for the role of lead agency for Alaska Native village relocation. The USACE is a large agency with a long history of successful engineering and construction. The primary proficiency of the USACE is engineering and project management. Strong project management skills allow the USACE to successfully coordinate partnerships among private firms and numerous federal, state and tribal agencies. The USACE has experience with relocation efforts and more specifically with Alaska Native relocation efforts. The USACE also has in place policies to develop rapport between itself and Alaska Native tribes.<sup>70</sup> Lastly, the USACE is led by both civilian and military personnel who allow the strengths of both leadership styles to be incorporated into the organization. Despite the attributes of the USACE, some important limitations exist. Although the leadership is mainly apolitical, all civil works projects require Congressional approval. Also, with the recent recession, the Congress is asking the USACE to do more with less money. The USACE is spreading itself thin and

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<sup>66</sup> Jennifer Loven, *Lawmakers Move to Block Army Corps of Engineers Projects*, BRAINERD DISPATCH (May 13, 2000) available at [http://brainerddispatch.com/stories/051300/nne\\_0513000117.shtml](http://brainerddispatch.com/stories/051300/nne_0513000117.shtml)

<sup>67</sup> Hird, John A. 1991. The political economy of pork: Project selection at the U.S. army corps of engineers. *The American Political Science Review* 85 (2): 429-456.

<sup>68</sup> *U.S. Army Corps of Engineers* 2000. , ed. Michael Grunwald, eds. C-SPAN , Washington Journal. Washington, D.C.: C-SPAN, <http://www.c-spanvideo.org/program/157168-1> (accessed 05/01/2011).

<sup>69</sup> US Army Corps of Engineers. *Program management plan: Tribal nations community of practice* (2005).

<sup>70</sup> See USACE Tribal Policy Principles, *available at* [http://www.usace.army.mil/CECW/TribalIssues/Pages/tribal\\_policy.aspx](http://www.usace.army.mil/CECW/TribalIssues/Pages/tribal_policy.aspx)

may be overestimating its capability to manage a growing project list with a shrinking budget.

## ***B. DENALI COMMISSION***

### **Executive Summary**

The purpose of the Denali Commission, a federal agency, is to ensure adequate infrastructure, especially bulk fuel facilities and health clinics, in Alaskan rural communities. It is a coordinating agency that works with other federal agencies, state agencies, and the private sector on projects primarily in communities that have high unemployment and low per capita income. With a small staff and a declining budget (\$58 million in FY2010), the Commission would require a substantial boost from Congress to take on the task of relocating villages endangered by climate change. However, the Commission has indicated that it is “prepared to assist in future relocation”<sup>71</sup> and appears to have the support of both the Alaska Federation of Natives<sup>72</sup> and the Alaska Congressional delegation.

### **Background and Structure**

The Denali Commission, modeled after the Appalachian Regional Commission, is a federal agency designed to meet the infrastructure and economic development challenges in rural communities of Alaska. It was created with the passage of the Denali Commission Act of 1998 (Title III, P.L. 105-277, 42 USC 3121), sponsored mainly by the late Senator Ted Stevens. The Commission’s annual work plans are reviewed and accepted or rejected by the U.S. Secretary of Commerce.

The Commission is made up of seven people: a Federal Co-Chair appointed by the U.S. Secretary of Commerce, a State Co-Chair appointed by the Governor of Alaska, and one representative each from the University of Alaska, the Alaska Municipal League, the Alaska Federation of Natives, the Alaska AFL-CIO, and the Associated General Contractors of Alaska. In addition, the Commission has Advisory Committees on Energy, Health, Transportation, Training, and Economic Development with about seven to ten members each and which review and update policies and guide the Commission. There is a permanent professional staff of 22 involved in community planning, grant administration, and training.

### **Recent Activities in Alaska**

The Commission funds projects in both distressed communities (meeting certain criteria with respect to per capita income and unemployment) and non-distressed communities. The Commission requires that its construction projects receive matching funds from the recipient community or the State of Alaska. The required

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<sup>71</sup> See GAO Report 2009, *supra* note 2, at 47.

<sup>72</sup> Alaska Federation of Natives, 2010 Federal Priorities (2010), <http://www.nativefederation.org/documents/2010afnFedPrior-final-lores.pdf>.

match is 20% for distressed communities and 50% for non-distressed communities. Most of the Inuit villages qualify as distressed. The Commission has identified its targeted beneficiaries as those rural communities with inadequate health facilities and bulk fuel facilities.

The Commission gives priority to federal projects directed at Alaska in partnership with the State of Alaska, other federal government agencies, and local, tribal, corporate, or philanthropic organizations.<sup>73</sup> Projects that provide a variety of matching funds from multiple sources are viewed more favorably than those that do not.<sup>74</sup> The Commission generally does not select individual projects for funding or manage individual projects, but works through existing state, federal, or other appropriate organizations to accomplish its mission. At any one time, the Commission is likely to have several hundred outstanding grant awards and active projects in various stages from inception to completion.

### **Role in Relocation of Alaska Native Villages**

In a letter of response to GAO report 09-551 on the need to relocate certain rural communities, Denali Commission Federal Co-Chair George Canelos wrote that the Commission concurs with the GAO's recommendations, has relevant experience in infrastructure development and government coordination, and is "prepared to assist in future relocation and erosion efforts to the degree deemed appropriate and necessary by Congress."<sup>75</sup> In fact, government coordination is the Denali Commission's strength, and it has extensive experience with partners in a wide variety of federal and state agencies, as well as in tribal and local governments, the private sector, and nongovernmental organizations.

The Denali Commission to date has spent its funds on repairing and replacing aging bulk fuel storage tanks in rural villages (45% of funds) and setting up rural health clinics (29% of funds), with most of the rest of the funds going towards roads and docks, training programs, and community facilities, including elder and teacher housing. It also has designed and implemented projects to provide power generation and transmission facilities, modern communications systems, water and sewer systems, and other infrastructure in rural areas. The Commission's governing statute requires that such services be delivered in the most cost-effective manner practicable, reducing administrative and overhead costs as much as possible.

### **Challenges as Lead Agency**

Federal funding of the Denali Commission has declined steadily and by significant amounts in the last five years – from \$141 million for FY2006 to \$58 million for FY2010. In addition to the federal funding, the State of Alaska

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<sup>73</sup> 66 Fed. Reg. 118 (June 19, 2001), available at <http://www.thefederalregister.com/d.p/2001-06-19-01-15418>.

<sup>74</sup> *Id.*

<sup>75</sup> GAO Report 2009, *supra* note 2, at 64.



sometimes contributes small amounts, such as \$7 million in FY 2007. Senators Begich and Murkowski, both of whom support the Commission, want to establish a more reliable funding stream so that the Commission does not have to depend year to year on federal earmarks.

Although the Commission has the official support of the Alaska Federation of Natives, some in the Alaska Native community see the Commission as a “middle man” without relevant technical expertise and therefore just eating up funds that should be spent in the villages. There have been complaints, for example, that the Denali Commission supported the construction of revetments to abate coastal erosion, and the work was washed away with the first storms.

### **Overall Assessment of Denali Commission as Lead Agency**

*Mission and Structure:* While there was no consideration of moving communities on account of climate change at the time the Denali Commission was created 13 years ago, village relocation falls within the general mission of the agency. Moreover, the Commission structure, with representatives of federal, state, and local government, Alaska Natives, building contractors, organized labor, and academia, is ideally suited for the Commission to play a coordinating role to handle the complexities and the myriad actors involved in moving a whole community.

*Presence in Alaska:* Headquartered in Anchorage, the Denali Commission has the advantage of being a federal agency, yet dedicated to only one state: Alaska. Its mission is essentially rural development, and it therefore has projects almost everywhere in the state including in the most remote communities.

*Alaska Native Experience:* The Denali Commission has a positive reputation with the Alaska Federation of Natives, which has specifically recommended an expanded role for the Commission to include responsibility for managing a flooding and erosion assistance program. The AFN has recommended increased funding for the Denali Commission to meet the energy and infrastructure needs of Alaska Native villages. The Commission also has detractors in the Alaska Native community who see it as bureaucratic and ineffective.

*Technical Competency:* The Denali Commission, like the Appalachian Regional Commission on which it was modeled, was not designed to contain in-house expertise to accomplish its mission, but to be able to mobilize government agencies and nongovernmental organizations to ensure economic opportunities and quality of life in disadvantaged rural communities. The Denali Commission has *access* to technical expertise.

*Funding and Staffing:* Without significant increases in funding and staffing and assurances of a long-term federal commitment, it is difficult to see how the Denali Commission could undertake the complex task of prioritizing villages for

relocation and overseeing the multiple construction projects involved. A new and specially dedicated advisory committee or steering group should be created to guide relocation work, comprising representatives of the U.S. Army Corps of Engineers – Civil Works, U.S. Department of Commerce – Economic Development Administration, U.S. Department of Agriculture – Rural Development, U.S. Department of Housing and Urban Development, Alaska Department of Commerce, Community and Economic Development, University of Alaska Center for Economic Development, Alaska Municipal League, Alaska Federation of Natives, Alaska AFL-CIO, Associated General Contractors of Alaska, and Association of Village Council Presidents.

*Relationships with Key Allies:* The Commission has a high political profile, having been the pet project of Senator Stevens, and many of its supporters as well as its detractors appear to be at least in part politically motivated. Importantly, though, the Commission has the full support of Alaska’s bipartisan Congressional delegation and the state’s premier organization of Alaska Natives, key constituencies that could make it a successful lead agency for the relocation of Alaska Native villages endangered by climate change.

#### ***ALASKA FEDERATION OF NATIVES***

The Alaska Federation of Natives (AFN), formed in 1966, is the largest statewide Native organization in Alaska with a membership that includes 178 villages (both federally recognized tribes and village corporations), thirteen regional native corporations, and twelve regional nonprofit and tribal consortiums that contract and run federal and state programs. AFN is governed by a 37-member board, which is elected by its membership at the annual convention held each October.

From 1966 to 1971, AFN worked primarily to achieve passage of a just and fair land settlement, which resulted in the Alaska Native Claims Settlement Act (ANCSA) being signed into law at the end of 1971.

Today the mission of AFN is to enhance and promote the cultural, economic and political voice of the Alaska native community and to protect Native interests at the state and federal levels.

Its mission statement notes that Alaska Native people began as members of full sovereign nations and continue to enjoy a unique political relationship with the federal government. “We will survive and prosper as distinct ethnic and cultural groups and will participate fully as members of the overall society.” Among the AFN’s major goals are to protect, retain and enhance all lands owned by Alaska Natives and their organizations.<sup>76</sup>

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<sup>76</sup> Alaska Federation of Natives, Annual AFN Convention, <http://www.nativefederation.org/convention/index.php> (last accessed 5/25/2011).

## ***C. U.S. DEPARTMENT OF COMMERCE ECONOMIC DEVELOPMENT ADMINISTRATION***

### **Executive Summary**

The U.S. Economic Development Administration (EDA) is an executive branch agency housed within the U.S. Department of Commerce. The head of the EDA is appointed by the President and thus is subject to political volatility with changing administrations. The EDA is committed to providing economic development opportunities to communities and regions in need via a grant process that relies heavily on contributions from the private sector. It has a history of involvement in economically distressed areas (e.g., New Orleans following Hurricane Katrina) and has also worked in Alaska as part of the Newtok Village relocation project.

### **Background and Structure**

The U.S. Economic Development Administration (EDA) is an executive branch agency housed within the U.S. Department of Commerce. The head of the EDA is appointed by the president and maintains the title of Assistant Secretary of Commerce for Economic Development. The subsequent commission structure includes the Deputy Assistant Secretary of Commerce for Economic Development, the Deputy Assistant Secretary for Regional Affairs and the Chief of Staff. The EDA headquarters are in Washington, D.C. with regional offices across the country; the Seattle Regional office houses the Alaska EDA representative.<sup>77</sup>

The EDA was established in 1965 via the Public Works and Economic Development Act.<sup>78</sup> Originally, the EDA was known as the Area Redevelopment Agency (ARA), and its primary mission focused on raising capital for rural areas to better attract private investment; however, this mission morphed as rural communities argued for better basic infrastructure investment rather than capital alone. The current focus of EDA is on “making communities attractive to business development” and its reach extends to both rural and urban communities within the U.S. and abroad.<sup>79</sup> Its official mission statement reads:

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<sup>77</sup> US Economic Development Administration website, available at <http://www.eda.gov/>

<sup>78</sup> Tracey L. Farrigan and Amy K. Glasmeier. *Economic Development Administration: Legislative History*, <http://povertyinamerica.mit.edu/products/publications/>

<sup>79</sup> *Id.*

“...to lead the federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy.”<sup>80</sup>

The EDA programs include, but are not limited to: Public Works and Economic Development, Economic Adjustment Assistance (EAA), Planning, Technical Assistance, and Research and Evaluation.

### **Funding**

The agency’s funding is dependent on Congressional approval for each fiscal year; however, upon approval, funding allocation is at the discretion of the EDA. When a request for EDA funding is made, the agency requires 50% in matched funding prior to considering the project. This measure is made to ensure that interest in private sector economic development exists. Exceptions to this rule are sometimes made; low income or Native American communities may qualify for 100% funding.<sup>81</sup> Regional projects are awarded if the following two criteria are met: (1) The region is economically distressed based on per capita income level less than 80% of national average or unemployment rate that is greater than 1% of U.S. rate, and (2) the region develops a Comprehensive Economic Development Strategy (CEDS).<sup>82</sup>

The EDA utilizes discretionary funds to facilitate economic development, providing grant assistance to state and local governments, regional economic development districts, and public and private nonprofit organizations. There are several recent examples of EDA assistance including, \$30 million for Iowa flood mitigation efforts in 2010. This money enabled relocation of a wastewater treatment facility, support for design and engineering of a main street and bridge and a new parking garage.<sup>83</sup> The EDA also contributed \$20.9 million to the Gulf region following Hurricane Katrina, which helped to create over 1500 jobs.<sup>84</sup> In terms of relocation efforts, the EDA has the capabilities to assist with planning and infrastructure development, as well as in consultation for long-term economic development. However, it is not able to provide physical or manual assistance, such as construction and rebuilding support. Of the EDA’s many programs, the EAA is structured to “respond flexibly to pressing economic recovery issues and is well suited to help address challenges faced by U.S. communities and

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<sup>80</sup> US Economic Development Administration website, <http://www.eda.gov/>.

<sup>81</sup> Watts, B.R., Erickcek, G.A., Duritsky, J., O’Brien, K., Robey, C. (2009). What Should EDA Fund? Developing a Model for Pre-Assessment of Economic Development Investments. Upjohn Institute Working Papers, *available at*

[http://research.upjohn.org/cgi/viewcontent.cgi?article=1172&context=up\\_workingpapers&seid=1#search="economic+development+administration+reputation](http://research.upjohn.org/cgi/viewcontent.cgi?article=1172&context=up_workingpapers&seid=1#search=)

<sup>82</sup> *Id.*

<sup>83</sup> US Economic Development Administration website, <http://www.eda.gov/>.

<sup>84</sup> Department of Homeland Security, “The First Year after Hurricane Katrina: What the Federal Government Did,” (October 16, 2008), *available at* [http://www.dhs.gov/xfoia/archives/gc\\_1157649340100.shtm](http://www.dhs.gov/xfoia/archives/gc_1157649340100.shtm).

regions.”<sup>85</sup> In terms of Alaska Native village relocation efforts, the EAA would be the best-suited program within the EDA to address the community needs.

### **Recent Activities in Alaska**

The EDA specializes in long-term economic development, investing in critical infrastructure planning—essential aspect to the pragmatic success of Alaska Native village relocation efforts. In fact, part of the EDA’s mission is to empower distressed communities to “develop and implement their own economic development and revitalization strategies.”<sup>86</sup> The mission may at least provide rhetorical support for policies that ensure direct participation from the Alaska Native communities in directing the future economic success of their villages, although reviews of whether EDA grants assist tribes in managing their own affairs are mixed.<sup>87</sup> Furthermore, the EDA’s focus on private investment might provide additional funding for the relocation efforts, which would be useful in times of government cutbacks. As an example, in 2009 the EDA acquired \$25 in private sector capital for every taxpayer dollar invested.<sup>88</sup> Conversely, the EDA’s ability to provide 100% financial assistance to Native communities for economic development projects is also appealing in instances where private sector funding is lacking.

The EDA has also demonstrated a high capacity for collaboration at the state level; it is plausible to envision the EDA joining efforts with the Alaska Department of Commerce, Community and Economic Development (AK DCCED) in relocation efforts. This coupling could provide a better balance of federal and state assistance for dealing with relocation issues and would utilize the existing framework set in place by the state of Alaska.<sup>89</sup> The EDA has demonstrated its willingness to participate in Alaska relocation efforts by contributing \$800,000 to marine infrastructure projects in the Alaska Newtok Village relocation project.<sup>90</sup> Between 1993 and 2002, 31 American Indians and Alaska Natives projects were put into operation by the EDA (out of 59 initial projects). Of the 31 operational projects, half were able to be completed with the

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<sup>85</sup> Section 209 of the Public Works and Economic development Act of 1965, as amended (42 U.S.C. 3149), Catalog of Federal Domestic Assistance, “Economic Adjustment Assistance,” Uses and Use Restrictions (070), *available at* <https://www.cfda.gov/index?s=program&mode=form&tab=core&id=b6288a16987f7dcbff7a5a23d12d99f>.

<sup>86</sup> US Economic Development Administration website, *available at* <http://www.eda.gov/>.

<sup>87</sup> GAO Report, “INDIAN ECONOMIC DEVELOPMENT: Relationship to EDA Grants and Self-determination Contracting Is Mixed” (2004), *available at* <http://www.gao.gov/new.items/d04847.pdf> [hereinafter “GAO Report 2004”].

<sup>88</sup> US Economic Development Administration, 2009 Annual Report, *available at* <http://www.eda.gov/AboutEDA/Annualreport.xml>.

<sup>89</sup> GAO Report 2004, *supra* note 78.

<sup>90</sup> Newtok Planning Group, “A Brief History of the Settlement of Newtok and Village Relocation Efforts,” *available at* [dced.state.ak.us/dca/planning/pub/Newtok\\_History4.pdf](http://dced.state.ak.us/dca/planning/pub/Newtok_History4.pdf).

initial investment; the other half required additional subsidization or failed completely.<sup>91</sup>

### **Challenges as Lead Agency**

The above attributes boost the EDA's potential as a lead agency; however, a long list of changes would need to be implemented to make the EDA an ideal agency. First and foremost, the EDA is subject to the changing political tides in Washington, D.C. In its history, the EDA has suffered large funding cuts and threat of termination as different political parties take over the majority.<sup>92</sup> Because the President appoints the head of the EDA, the appointee is subject to frequent turnover and changing funding priorities. Additionally, the funding stream would drastic inputs devoted to Alaska Native village relocation efforts; currently the EDA devotes less than 3% of its annual budget to Tribes and Alaska Native communities.<sup>93</sup> The EDA provides funding but does not come equipped with construction or rebuilding experience; at minimum, a partnership with an additional organization would be required to implement relocation efforts. The EDA is situated within the Department of Commerce and must also accommodate changing priorities within this larger organization. Although the EDA can be proactive (e.g. when a CEDS proposal is drafted and approved), it can also be quite reactive in its disaster relief efforts, responding to economic distress in dire scenarios.

### **Overall Assessment of the EDA as Lead Agency**

The EDA could fund essential infrastructure projects as part of Alaska Native village relocation efforts; however, it is not within EDA's mandate to implement any of the projects that it funds. Given these and other fundamental limitations, the EDA is not an ideal lead agency for Alaska relocation efforts. The EDA could make an ideal secondary agency given its focus on long-term community growth—a necessary component to village relocation—but only if critical improvements are made. For example, according to a 2004 GAO study, the EDA has underperformed its mission to facilitate tribal self-governance over tribal economic affairs through grants and funding.<sup>94</sup> However, if the EDA were to play a role as a secondary agency, it could assist by providing forward-looking advice to the lead agency on long-term development goals. The EDA could play an important role in ensuring that all projects not only addressed the immediate needs of the community but also secured the village's future economic development according to economic priorities set by the villages themselves. If the EDA was more successful at attracting funds from the private sector, facilitating more tribal control over the tribes' economic affairs, and dispensing

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<sup>91</sup> GAO Report 2004, *supra* note 78.

<sup>92</sup> Farrigan & Glasmeier, *supra* note 69.

<sup>93</sup> GAO Report 2004, *supra* note 78.

<sup>94</sup> *Id.*

more grants to tribes than current activities demonstrate, then the EDA would be a better candidate.

## ***D. BUREAU OF INDIAN AFFAIRS***

### **Executive Summary**

Although the Bureau of Indian Affairs (BIA) can and should play an important role in the relocation of Alaska Native villages, it is not well suited to be the lead agency. It lacks sufficient resources, and its leadership and funding are subject to political pressure. BIA does have some programs, such as the Housing Improvement Program and the Road Maintenance Program, which would be useful to the relocation efforts and have even contributed to efforts so far. BIA's contributions have, however, been minor and piecemeal.

### **Background and Structure**<sup>95</sup>

The Bureau of Indian Affairs (BIA) is a division of the U.S. Department of the Interior, a cabinet-level agency. Along with the Bureau of Indian Education, the BIA is led by a single administrator, the Assistant Secretary of Affairs, who reports to the Deputy Secretary and the Secretary of the Interior. The Assistant Secretary of Indian Affairs is a political appointee who serves at the pleasure of the President, so terms of office tend to be short. The seven people to hold the post (including Acting Assistant Secretaries) before current Assistant Secretary Larry Echo Hawk began his term in 2009 only served two years or less.

The Office of Indian Affairs was formed in 1824 by then Secretary of War John C. Calhoun, who created the agency in the Department of War without Congressional authorization.<sup>96</sup> Congress passed legislation in 1829 to recognize the Office and in 1849 amended the act, transferring the Office to the Department of the Interior.<sup>97</sup> The name was changed to the "Bureau of Indian Affairs" in 1947.<sup>98</sup>

BIA's current mission is to "...enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian Tribes, and Alaska Natives." BIA's workload is broad, providing services (directly or through contracts, grants, or compacts with tribes or tribal organizations) to 1.9 million American Indians and Alaska

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<sup>95</sup> Unless otherwise noted, all information in this section was taken from the BIA Website, <http://www.bia.gov> (last accessed May 17, 2011).

<sup>96</sup> William S. Belko, *John C. Calhoun and the Creation of the Bureau of Indian Affairs: An Essay on Political Rivalry, Ideology, and Policymaking in the Early Republic*, The South Carolina Historical Magazine, Vol. 105, No. 3 (Jul. 2004), at 170–197.

<sup>97</sup> C.L. Henson, *From War to Self-Determination: A History of the Bureau of Indian Affairs*, American Studies Resources Centre, Liverpool JMU, Dec. 15, 2009, <http://www.americansc.org.uk/Online/indians.htm>.

<sup>98</sup> *Id.*

Natives from 565 federally recognized tribes and administering and managing 55 million surface acres and 57 million acres of subsurface mineral estates held in trust for American Indians, Indian tribes, and Alaska Natives. BIA's programs include social services, natural resources management, economic development, law enforcement and detention services, administration of tribal courts, implementation of land and water claim settlements, replacement and repair of schools, repair and maintenance of roads and bridges, repair of structural deficiencies on high hazard dams, and land consolidation activities.<sup>99</sup> BIA's functions are divided among four offices: the Indian Land Consolidation Program, the Office of Indian Services, the Office of Justice Services, and the Office of Trust Services. BIA maintains Regional Offices, as well, including one for Alaska with physical locations in Juneau, Anchorage and Fairbanks. The Alaska Regional Office serves 80,000 tribal members from 229 Tribes.

### **Role in Relocation Efforts**

Most issues relating to Alaska Native village relocation efforts fall under the functions of the Office of Indian Services, which has the responsibility “[to] facilitate support for tribal people and tribal governments by promoting safe and quality living environments, strong communities, self-sufficient and individual rights, while enhancing protection of the lives, prosperity and well-being of American Indians and Alaska Natives.” The Office of Indian Services includes four Divisions: Human Services, Self-Determination, Transportation, and Tribal Government Services.

Within those Divisions exist various programs like the Housing Improvement Program and Road Maintenance Program, which will be useful to relocation efforts in Alaska. The Housing Improvement Program (HIP) “provides grants and technical assistance to replace substandard housing, including housing that is threatened, damaged, or lost due to erosion or flooding.”<sup>100</sup> As of 2009, HIP funds had been granted to Newtok residents to construct three homes, which will eventually be moved to the new village.<sup>101</sup> Creating new roads will also be an essential part of the village relocations, and BIA's Road Maintenance Program, which provides “funding for maintaining roads, culverts, and airstrips to provide a foundation for economic development,” can play a role.<sup>102</sup>

### **Advantages as Lead Agency**

As discussed above, BIA has broad authority to provide services when it comes to federally recognized tribes. Additionally, BIA has a long history of working with Alaska Natives. In fact, BIA has already played a role in Alaska Native village

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<sup>99</sup> U.S. Department of the Interior, Budget Justifications and Performance Information, Fiscal Year 2011: Indian Affairs, *available at* [http://www.doi.gov/budget/2011/data/greenbook/FY2011\\_IA\\_Greenbook.pdf](http://www.doi.gov/budget/2011/data/greenbook/FY2011_IA_Greenbook.pdf) (last accessed May 17, 2011), at IA-GS-3 [hereinafter “U.S. Dep’t of Int. Budget FY 2011”].

<sup>100</sup> GAO Report 2009, *supra* note 2, at 45.

<sup>101</sup> *Id.* at 30.

<sup>102</sup> *Id.* at 45.



relocation efforts, albeit a small one. In addition to the roles that the HIP and Road Maintenance Program have played so far, BIA has, at times, taken a proactive role in protecting Alaska Native villages from the coastal erosion that necessitates relocation. In 2004, BIA installed 200 feet of shoreline protection in Shishmaref, a project that was later extended by the Army Corps of Engineers.<sup>103</sup>

BIA also has a lot of experience working with other agencies. In fact, only 20% of total government funding for Native Americans comes from the Department of the Interior.<sup>104</sup> In practice, BIA often coordinates with other agencies to serve American Indian and Alaska Native communities and fulfill its mission.

### **Challenges as Lead Agency**

The flip side of broad authority is a high workload, as indicated by the broad range of services provided and the number of individuals and tribes served. This high workload remains despite cuts to BIA's resources. The president requested only \$2.5 billion for the FY 2012 Indian Affairs' budget (which includes BIA and BIE), reflecting a 4.5% decrease from FY 2011.<sup>105</sup> Most of those cuts are to construction and road maintenance programs and in community and economic development, the very BIA programs that would be involved in village relocations.<sup>106</sup>

Also, although BIA has participated somewhat in Alaska village relocation efforts so far, that participation has been relatively minor, indicating that BIA is not entirely willing to take a leading role in the project. BIA's minor role so far is also a reflection of the agency's emphasis on self-determination and sufficiency and the resulting highly decentralized nature of the agency with over 90% of appropriations spent at the local level and over 50% of expenditures given directly to tribes and tribal organizations through grants, contracts, and compacts.<sup>107</sup> The result is a piecemeal rather than coordinated approach to the provision of services to American Indians and Alaska Natives.

Most problematic for the prospect of BIA being a lead agency in relocation, however, is its complex relationship with tribes and the resulting reputation it has with Alaska Natives. Having such a long history, BIA has designed and implemented many controversial policies over the years as attitudes toward American Indians and Alaska Natives have evolved. Though Alaska Natives were largely spared from the massive efforts that BIA undertook in the past to relocate

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<sup>103</sup> Army Corps of Engineers, Alaska District, Alaska Village Erosion Technical Assistance Program: An Examination of Erosion Issues in the Communities of Bethel, Dillingham, Kaktovk, Kivalina, Newtok, Shishmaref, and Unalakleet (Apr. 2006), p. 32, *available at* [http://www.housemajority.org/coms/cli/AVETA\\_Report.pdf](http://www.housemajority.org/coms/cli/AVETA_Report.pdf).

<sup>104</sup> U.S. Dep't of Int. Budget FY 2011, *supra* note 90, at IA-GS-1.

<sup>105</sup> U.S. Department of the Interior, Bureau Highlights: Indian Affairs Funding, Fiscal Year 2012 Interior Budget in Brief (2011), *available at* <http://www.doi.gov/budget/2012/12Hilites/BH083.pdf>.

<sup>106</sup> *Id.*

<sup>107</sup> U.S. Dep't of Int. Budget FY 2011, *supra* note 90, at IA-GS-2.

American Indians in the lower 48 states to reservations, they have endured decades of BIA's mission shift from paternalism to assimilation to segregation to today's self-determination. Though today's BIA policies are based on self-determination and inclusion of tribes in decisions, shifting BIA's role from a management to an advisory role,<sup>108</sup> the troubled history and central role in past scandals<sup>109</sup> has given Alaska Natives reason to mistrust the BIA.

### **Overall Assessment of BIA as a Lead Agency**

In short, though BIA can and probably should play an important role in the relocation of Alaska Native villages, it is not well suited to be the lead agency. Most of the attributes that would make BIA a good candidate are negated by other circumstances. Although BIA has broad authority when it comes to federally recognized tribes, it has none if the tribe is not federally recognized. Additionally, this broad authority brings with it a high workload burden, all the more worrisome considering the cuts in resources that the BIA has gone through in the last year. BIA does have some programs that will be useful to the relocation efforts and has even contributed to efforts so far. Additionally, BIA has experience working with other agencies. However BIA's contributions have thus far been minor and part of the piecemeal approach typical of its highly decentralized program structure. Perhaps most importantly, although BIA has a history of dealing with Alaska Natives, its long and complicated past has made its relationship with tribes a contentious one, which would further complicate the relocation effort if BIA were to take the lead.

## ***E. U. S. ENVIRONMENTAL PROTECTION AGENCY***

### **Executive Summary**

The United States Environmental Protection Agency (EPA) is tasked with the environmental regulation of the nation's water, land, and air and general environmental research and outreach. Although it has a positive track record with Native tribes, well-developed relocation policies, and a mandate that could be expanded to include the relocation of Alaska native villages, the EPA lacks the technical construction management skills and proactive mandate necessary for a lead agency. However, its experiences with tribes and relocation efforts will be essential skills upon which any lead agency should draw.

### **History**

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<sup>108</sup> C.L. Henson, *From War to Self-Determination: A History of the Bureau of Indian Affairs*, American Studies Resources Centre, Liverpool JMU, Dec. 15, 2009, <http://www.americansc.org.uk/Online/indians.htm>.

<sup>109</sup> In the 1970s, BIA was involved in the brutal suppression of the American Indian Movement. See Paul Wolf, *COINTELPRO: The Untold Story* (2001), available at <http://www.icdc.com/~paulwolf/cointelpro/coinwcar3.htm>.

President Nixon established the EPA in 1970. The EPA is part of the executive branch of the Federal government, with the administrator appointed by the President and confirmed by the Senate.<sup>110</sup>

### **Responsibilities**

The agency is primarily tasked with setting environmental standards for the water, land, and air based on laws passed by Congress. The EPA assists states and Native American tribes with developing regulations to meet its standards. The agency also has the authority to enforce these regulations against violators and manage cleanup operations. Beyond this role, the EPA also funds and conducts environmental research and educational outreach.<sup>111</sup>

### **Relationships with Native American Tribes**

The EPA has a longstanding relationship with Native American tribes, based on its 1984 Indian policy. This policy, with an “articulated commitment to tribal self-determination” at its core,<sup>112</sup> put tribes on equal footing with states regarding environmental regulation.<sup>113</sup> For example, the EPA treats federally recognized tribes as states for the purposes of managing and implementing selected environmental programs, such as the Clean Water Act (CWA) and the Clean Air Act (CAA).<sup>114</sup>

### **Role in Relocation Efforts**

The EPA is generally involved in relocation efforts in a reactive fashion to protect health and welfare following environmental disasters, specifically contaminated Superfund sites.<sup>115</sup> The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as “Superfund,” enacted by Congress on December 11, 1980.<sup>116</sup>

Relocation efforts under CERCLA are generally temporary during cleanup efforts, although the EPA has guidelines that allow for permanent relocation when necessary or desired by the community.<sup>117</sup> This is a rare occurrence, but when required, the USACE is typically the implementing agency for relocation efforts under the Uniform Relocation Assistance and Real Property Acquisition Policies

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<sup>110</sup> <http://www.epa.gov/history/org/origins/reorg.htm>

<sup>111</sup> <http://www.epa.gov/aboutepa/whatwedo.html>

<sup>112</sup> Grijalva, James M. “EPA’s Indian Policy at Twenty-Five.” *Natural Resources & Environment* 25, no. 12 (Summer 2010).

<sup>113</sup> *Id.*

<sup>114</sup> See U.S. EPA, “Treatment in the Same Manner as a State” (last updated Apr. 4, 2011), available at <http://www.epa.gov/tp/laws/tas.htm>.

<sup>115</sup> <http://www.epa.gov/superfund/community/relocation/tempreloc.pdf>

<sup>116</sup> <http://www.epa.gov/superfund/policy/cercla.htm>

<sup>117</sup> Fields, Timothy. Memorandum to Superfund National Policy Mangers, Regions I-X and Regional Counsels, Region I-X. “Interim Policy on the Use of Permanent Relocations as Part of Superfund Remedial Processes.” OSWER Directive: 9355.0-71P, EPA 540F-98-033. June 30, 1999: 6.

Act (42 U.S.C. Section 4601),<sup>118</sup> which, along with relevant EPA guidelines and policies, serves as the EPA's interim internal policy on permanent relocation.<sup>119</sup>

The EPA pays special attention to the historical wounds left from the Federal government's early relationship with the tribes in its policies regarding permanent relocation in relocation manuals.<sup>120</sup> Most critically, CERCLA mandates the relevant tribal government must concur with any plan to permanently relocate tribal communities. The legislation furthermore requires the EPA, working with the Department of the Interior, to "assure that all benefits of the relocation program are provided to the affected tribe and that alternative land of equivalent value is available and satisfactory to the tribe."<sup>121</sup>

### **Role in Alaska**

The EPA has also played a significant role in upgrading water infrastructure in native villages in Alaska since 1995 through the Alaska Native Villages and Rural Communities grant program from Congress<sup>122</sup> and more recently with Recovery Act funds.<sup>123</sup> However, the agency does not yet have significant involvement with the Alaska native villages beyond this work.

### **Challenges as Lead Agency**

While nearly half its staff consists of scientists and engineers, the EPA does not have extensive experience managing construction efforts. It specializes in assessing and regulating environmental impacts and performing cleanups, not constructing new facilities.

The EPA's mandate under CERCLA is primarily reactive and triggers response to tangible environmental disasters with a clear potentially responsible party (PRP). The most common example is an oil spill, wherein the damages are acute, visible, and the EPA can fine a specific violator for the damages. Relocation of Alaska Native villages from areas impacted by slow onset climate impacts such as coastal erosion caused by cumulative carbon emissions from a multitude of distant sources trigger a host of issues that fall far outside the mandate of EPA's duties under CERCLA. EPA's most important role in protecting rural Alaskan villages from the dangerous threats of climate change is rather in ramping up enforcement of the CWA and the CAA.

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<sup>118</sup> Cook, Michael B. Memorandum to Superfund National Policy Mangers, Regions 1-10. "Process of Handling Appeals of Permanent Relocation Claim Decisions." OSWER Directive: 9355.0-88, EPA. January 29, 2003: 1.

<sup>119</sup> United States Environmental Protection Agency. *Superfund Permanent Relocation Statement of Work Template and User's Guide*. Washington DC: Office of Superfund Remediation and Technology Innovation, Office of Solid Waste and Emergency Response, August 2004, available at <http://www.epa.gov/superfund/community/relocation/modelsov.pdf>.

<sup>120</sup> *Id.*

<sup>121</sup> CERCLA Section 126(b), as cited in Fields, 1999: 9.

<sup>122</sup> <http://water.epa.gov/type/watersheds/wastewater/Alaska-Native-Village-and-Rural-Communities-Grant-Program.cfm>

<sup>123</sup> <http://yosemite.epa.gov/opa/admpress.nsf/0/AF8999E7A8676B06852575EF000276E7>

The challenges faced by the Alaska Native villages and the requirements for a lead agency differ greatly. First, impacts on the health and well being of village members impacted by melting permafrost and coastal erosion are only measurable over long timescales. Second, the PRP for climate-related changes are far from clear, rather being diffuse and debated. Third, and most importantly, a lead agency for relocation efforts must act proactively to plan relocation well in advance of the onset of tangible damages.

Thus in order to act as the lead agency, the EPA would require a new mandate from Congress. This mandate could either significantly amend CERCLA or create a new, related law modified to apply to demonstrable climate impacts such as sea level rise and melting permafrost. Either must provide the EPA with proactive authority based on best available predictions of damages with uncertain PRPs, which is not an uncomplicated task.

### **Advantages as Lead Agency**

The EPA's delegation of duties including the implementation and management of certain environmental laws to states and tribes is an historically effective model of shared power that any lead agency tasked with overseeing relocation in Alaska might seek to emulate. The agency's extensive experience working across agencies, such as with USACE on Superfund relocation efforts, and its generally respectful working relationship with tribes also provides useful templates for other agencies to follow.

The EPA's mandate for permanent relocation under CERCLA, although limited to reactive measures, is based on fundamental principles that support relocation efforts for Alaska Native villages. The National Contingency Plan (NCP), which forms the CERCLA's implementing regulations, mandates that remedial action for Superfund disasters such as relocation (1) protect human health and welfare,<sup>124</sup> and (2) are cost-effective.<sup>125</sup>

The preventative relocation of Alaska Native villages would protect the health and welfare of Native villagers who would otherwise be both left without homes or livelihoods. Furthermore, preventative relocation would likely be far less expensive than emergency evacuation and reactive relocation, which may itself also be traumatizing for the mental health of villagers.

The relocation of Alaska Native villages thus fits within the spirit of CERCLA and NCP's mandates to protect health and welfare in a cost-effective manner, even if relocation from the impacts of climate change is outside the current scope of EPA authority. Primary relocation authority would require a significant regime change for the EPA in order to shift from its current reactive role toward the proactive role necessary for a lead agency.

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<sup>124</sup> CERCLA Section 126(b), *as cited in* Fields, 1999: 9.

<sup>125</sup> Fields, 1999: 4-5. *See also* Section G of this paper, *infra* at 39.

### **Overall Assessment of EPA as Lead Agency**

The EPA should be an integral partner in any relocation efforts for the Alaska Native villages, but it is not as well suited as the USACE to be the lead agency. The EPA already uses the USACE as an implementing partner for its own relocation efforts, so collaboration will not be difficult. The EPA lacks both the broad base of technical construction management skills of the USACE and the proactive mandate of the USACE to protect the welfare of citizens. Despite its limitations, the EPA offers a model for the USACE or another lead agency to follow with regard to tribal relationships and relocation policies, which are grounded in its 1984 Indian Policy. The example of the EPA shows that recognizing the right of tribes to self-determination is essential to establishing healthy working relationships with tribal communities.

## ***F. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT***

### **Executive Summary**

The Department of Housing and Urban Development (HUD) has many of the key characteristics, experience and resources necessary to be the lead agency for Alaska Native village relocation. HUD's experience with project management, infrastructure development, moving and building homes, and funding projects would make it an effective collaborator with the eventual lead in village relocation.

### **Background and Structure**

The Department of Housing and Urban Development (HUD) is situated within the executive branch of the United States federal government as a Cabinet Office under current Secretary Shaun Donovan, sworn in as Secretary in 2009. HUD was created through the Department of Housing and Urban Development Act of 1965 under president Lyndon B. Johnson, following from the previous institution, the House and Home Financing Agency (established in 1949). The president appoints the Secretary of HUD, and thus terms tend to be short (3-4 years or less). HUD's purpose has always been focused on decent and suitable housing for all. Its present overarching mission is to "create strong, sustainable, inclusive communities and quality, affordable homes for all."<sup>126</sup>

Ensuring safe, affordable housing that improve one's quality of life is a broad, multi-faceted objective and is accomplished within HUD by a number of sub-organizations, or programs, spanning a range of responsibilities. These programs are: Community Planning and Development, Federal Housing Administration (FHA), Risk Management and Regulatory Affairs, Multifamily Housing Programs, Healthcare Programs, Public and Indian Housing, Fair Housing and

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<sup>126</sup> HUD FY2010 Annual Performance Report, Secretary's Message, at 2.

Equal Opportunity, Policy Development and Research, Government National Mortgage Association (Ginnie Mae), along with a number of temporary programs, including the American Recovery and Reinvestment Act of 2009 (Recovery Act). Some of HUD's major responsibilities include providing mortgage insurance on loans for purchase or major rehabilitation of homes and condos, mortgage insurance for hospitals and long-term care facilities, affordable housing for low-income families (e.g. voucher programs), providing funding to state and local governments and non-profits to administer programs in community development (e.g. homeless assistance, disaster recovery, infrastructure), and creating and enforcing equal housing policy.

The accomplishment of HUD's mission requires the aforementioned broad base of programs and responsibilities, many of which are directly or indirectly relevant to Alaska Natives or relocation projects. The office of Public and Indian Housing (PIH) within HUD oversees the Office of Native American Programs (ONAP), which is headquartered in Washington D.C. and Denver and has regional offices throughout the U.S., including one in Alaska. ONAP "ensures that safe, decent and affordable housing is available to Native American families, creates economic opportunities for Tribes and Indian housing residents, assists Tribes in the formulation of plans and strategies for community development, and assures fiscal integrity in the operation of the programs,"<sup>127</sup> which builds upon the directive of PIH. ONAP accomplishes this by administering block grant programs for housing and community development to Native Americans, Alaska Natives, and Native Hawaiians that have "established a relationship to the Federal government as defined in the program regulations."<sup>128</sup> These funds are both competitively and formulaically distributed. The existence of restrictions on eligibility introduces a competitive disadvantage to unincorporated tribes in Alaska, sometimes even to an imminently threatened village.<sup>129</sup>

### **Role in Relocation Efforts**

Relocation is not one of HUD's primary tasks or objectives. However, HUD possesses many of the qualities and skills necessary for a relocation project due to its broad mission. Relocation requires expertise in project management and coordination, infrastructure development (engineering), moving homes or building of new homes, and funding mechanisms for these tasks. HUD has the capacity to provide expertise in:

1. Project management: HUD operates place-based programs and has a new effort to collaborate with other Federal agencies in order to streamline

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<sup>127</sup> Office of Native American Programs website:  
[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih), last accessed May 18, 2011

<sup>128</sup> ICDBG website:  
[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/grants/icdbg](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/grants/icdbg), last accessed May 18, 2011

<sup>129</sup> See GAO Report 2009, *supra* note 2, at 26; see also *infra* point number 4 of this paper, at 37.

- projects.<sup>130</sup> HUD also currently contracts with private housing managers and works with state governments and local governments in administering grants.
2. Infrastructure development: HUD's involvement in infrastructure development is chiefly through provision of block grants for community development.
  3. Moving or building homes: HUD's primary experience in moving or building homes stems from its role in acquisition of land for federal projects and subsequent relocation of residents. These projects are not environmentally caused, but do require movement of residents to new locations.
  4. Funding mechanisms: HUD receives and distributes funding through legislation and grants. The American Recovery and Reinvestment Act of 2009 provided HUD with 4 billion dollars, of which 1 billion were for competitive grants,<sup>131</sup> and 242 million of that allocated for the Native American Housing Block Grant.<sup>132</sup> HUD provides a number of block grants for both competitive and non-competitive allocation to communities for their development or rehabilitation. However, 64 Native Alaskan villages, including three imminently threatened villages (Kwigillingok, Lime Village, and Newtok), are ineligible to receive block grant funding through the state.<sup>133</sup> This is because these villages lack incorporated municipal governments, which are the "units of general local government"<sup>134</sup> through which HUD block funds are administered to the state.<sup>135</sup> One of the GAO's recommendations from its 2009 Report is to amend the Housing and Community Development Act of 1974 to "acknowledge the unique governmental structure in the state of Alaska"<sup>136</sup> and allow these 64 unincorporated Native Alaskan villages to be eligible for HUD funding.<sup>137</sup>

HUD has direct experience with relocation in at least two cases. It is a member of the Newtok Planning Group, which is a collaborative effort to relocate the village of Newtok. Newtok is threatened by progressive erosion, permafrost degradation and flooding, and is the Alaska Native village that has made the greatest progress in its relocation efforts.<sup>138</sup> Additionally, the village of Allakaket relocated HUD homes after a flooding natural disaster in 1994, and HUD provided additional homes to the village after the flood. It should be noted however, that this village's migration off the floodplain has not yet completed even after roughly 15 years.<sup>139</sup>

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<sup>130</sup> HUD FY2010 Annual Performance Report, Quick Reference. p 4

<sup>131</sup> American Recovery and Reinvestment Act of 2009, p. 100,  
<http://www.gpo.gov/fdsys/pkg/BILLS-111hr1enr/pdf/BILLS-111hr1enr.pdf>

<sup>132</sup> HUD Notice of Funding Availability Native American Housing Block Grant Program under the American Recovery and Reinvestment Act of 2009, p. 1  
[http://portal.hud.gov/hudportal/documents/huddoc?id=NAHBG\\_NOFA.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=NAHBG_NOFA.pdf)

<sup>133</sup> GAO Report 2009, *supra* note 2, at 26–27.

<sup>134</sup> GAO Report 2009, *supra* note 2, at 26–27, *citing* 42 U.S.C. § 5302(a)(1).

<sup>135</sup> GAO Report 2009, *supra* note 2, at 26–27.

<sup>136</sup> *Id.* at 43. *See also* "Cultural Background," *supra* notes 37–43.

<sup>137</sup> GAO Report 2009, *supra* note 2, at 43.

<sup>138</sup> *See sidebar* in this paper, "Newtok Case Study," at 45–46, and "Newtok: A Relocation Story," Appendix, at 61.

<sup>139</sup> GAO Report 2009, *supra* note 2, at 35.



### **Challenges as Lead Agency**

In some capacity or other, HUD has most of the qualities and experience that would be necessary to lead a relocation project. However, the expertise listed above is spread throughout many disparate sub-organizations, lacking a central focus on relocation, or in some cases, a focus on relocation at all. Additionally, experience with actual relocation is largely in conjunction with the Department of Transportation and is related to relocating residents to already existing housing elsewhere, not because of environment problems, but because of acquisition of land by the federal government (through the Uniform Act).<sup>140</sup> These activities are not focused necessarily in Alaska, or on Native Americans.

The provision of funding mechanisms for housing rehabilitation or construction, and community development is generally a successful enterprise for HUD. However, the Government Accountability Office has recommended that tracking of investments and infrastructure plans be improved.<sup>141</sup> Currently, HUD does not collect data on how funds are used in infrastructure enhancements, focusing only on housing rehabilitation and construction. Although not essential for initiating a relocation project, assessment of effectiveness of funding for a relocation project is necessary for future success.

### **Changes Necessary**

HUD would require a number of changes to develop into a viable lead agency for Alaska Native village relocation. The main issues with HUD are (1) its intimate link with the housing market and as such, the declining state of the American economy, (2) its dependence on legislation to receive funding, (3) its short-term, political leadership, (4) its heavily bureaucratic structure, (5) its trouble with oversight and tracking of allocated funds and effectiveness of grants, and (6) the limited reach of HUD funding to unincorporated Alaska Native tribes and thus its limited experience in adapting its programs to meet the needs of Native Alaskans.

In order to be an effective lead agency, HUD would need to establish a program office that focused solely on relocation. As it stands, HUD has much of the required expertise of a lead agency, but it is spread across a multitude of sub-organizations and programs. Additionally, HUD would need to add an environmental focus to its expertise, drawing on some of its work in disaster recovery. Funding restrictions on unincorporated Alaska Native villages would need to be lifted, so that the most imminently threatened villages were assured funding. Along these lines, funding would have to become most stable, or, a

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<sup>140</sup> Uniform Act:

<http://www.hud.gov/offices/cpd/affordablehousing/training/web/relocation/overview.cfm>, last accessed May 18, 2011.

<sup>141</sup> GAO, Native American Housing: Tribes Generally View Block Grant Program as Effective, But Tracking of Infrastructure Plans and Investments Needs Improvement, Report to Congressional Requestors, GAO-10-326 (February 2010), at 50.

relocation project would need to be fully funded from its commencement, so that situations such as Allakaket do not occur.<sup>142</sup>

### **Overall Assessment of HUD as Lead Agency**

The Department of Housing and Urban Development has many of the key characteristics, experience and resources necessary to be lead agency for Alaska Native village relocation. However, the current mission of HUD is not focused enough, as much of its work is in financial instruments for the housing market and making available and attainable safe, affordable housing nationwide to low-income families. This mission is broad enough to encompass relocation, but too broad to facilitate efficient relocation of Alaska Native villages due to environmental degradation. However, HUD absolutely should be a collaborator with the eventual lead agency, so that the expertise listed above can be leveraged and not duplicated.

## ***G. FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)***

### **Executive Summary**

FEMA's capacity to facilitate relocation falls under the following programs:

- The Hazard Mitigation Grant Program (HMGP), which provides funds following a presidentially declared disaster for communities to implement long-term projects that reduce risks from future disasters;
- the Pre-Disaster Mitigation Program, which provides funds on a competitive basis for projects that reduce a community's risk of disaster and likelihood of future reliance on funding from actual disaster declarations;
- programs for communities participating in National Flood Insurance Program, including the Flood Mitigation Assistance Program, the Repetitive Flood Claims Program, and the Severe Repetitive Loss Pilot Program; and
- post-disaster relocation after presidentially declared disasters under the Public Assistance Program, which can provide for assistance for emergency repair and clean-up; and the Individuals and Households Program, which can provide funds for temporary relocation due to the disaster.<sup>143</sup>

There are several barriers to Alaskan Native villages benefiting from these programs, however. First, the state or local community must pay at least 10% of the costs of funded projects. Second, for funding to be awarded, a favorable cost-benefit analysis is required, even in sparsely populated rural areas. Native villages do not qualify for flood insurance because they do not have the land use authority to pass and enforce a floodplain management ordinance. Nor is there a FEMA-

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<sup>142</sup> Allakaket has only partially moved in 14 years, due to lack of leadership, resources, and funding. See GAO Report 2009, *supra* note 2, at 41.

<sup>143</sup> See GAO Report 2009, *supra* note 2, at 20–22.

approved mitigation plan in most Alaskan Native Villages, an eligibility requirement for FEMA programs. In her testimony before a Congressional committee, Director of FEMA for Region Ten, Susan Reinertson, concluded that, “What is needed to comprehensively address the vulnerabilities faced by the Alaska Native Villages at the highest risk is beyond the scope of our existing pre- and post-disaster programs.”<sup>144</sup>

## **Background and Structure**

The Federal Emergency Management Agency (FEMA) coordinates efforts within the United States to prevent, mitigate, and respond to natural and man-made disasters that are so overwhelming that local and state authorities alone cannot respond sufficiently.<sup>145</sup> FEMA, established somewhat recently in 1979, was created in an attempt to merge various efforts within the country towards responding to various disasters. The agency’s current mission “is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.”<sup>146</sup>

Its parent agency, The Department of Homeland Security, is a member of the cabinet of the executive branch of the federal government. The organizational structure to FEMA is quite complex, with a head administrator who reports directly to the Secretary of Homeland Security. Various Directorates make up the body of the organization, including Recovery, Response, Federal Insurance and Mitigation Administration (FIMA), Logistics Management, Mission Support Bureau, Protection and National Preparedness, and the United States Fire Administration. FEMA divides the country into 10 regions (plus a Pacific Area office), with administrators for each. Alaska is considered part of Region 10.

## **Role in Relocation Efforts**

FEMA has garnered a fair bit of experience in assisting with disaster-related relocations in recent years. After the 1993 Mississippi River flood, the agency elevated, acquired, or relocated 9140 properties in 140 communities under the

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<sup>144</sup> Susan Reinertson, Testimony from Senate Hearing on “The State and Federal Response to Storm Damage and Erosion in Alaska’s Coastal Villages,” (Oct. 11, 2007) *available at* [http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_id=809e5a80-5953-479b-abf0-b8d4c61ecfdb](http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=809e5a80-5953-479b-abf0-b8d4c61ecfdb).

<sup>145</sup> Federal Emergency Management Agency website, [www.fema.gov](http://www.fema.gov) (last accessed May 18, 2011).

<sup>146</sup> Federal Emergency Management Agency, Disaster Emergency Communications Fact Sheet, [http://www.fema.gov/pdf/media/factsheets/2010/dod\\_dec.pdf](http://www.fema.gov/pdf/media/factsheets/2010/dod_dec.pdf).

Hazard Mitigation Grant Program (HMGP), which provides funds following a federal disaster declaration for communities to implement long-term projects that reduce risks from future disasters. Perhaps most famously, FEMA reimbursed individual and families for temporary relocation expenses after 2005's Hurricane Katrina—a lackluster response that was heavily criticized and resulted in the Post-Katrina Emergency Reform Act of 2006.

While FEMA has primarily served the country in responding to disasters, Susan Reinertson (director of Region Ten) testified to Congress in 2007 that there were a few relevant FEMA programs that might be of service to the Alaskan Native Village Relocation.<sup>147</sup> The Hazard Mitigation Grant Program (HMGP), mentioned earlier, provides funds following a presidentially declared disaster<sup>148</sup> for communities to implement long-term projects that reduce risks from future disasters. The Pre-Disaster Mitigation Program provides funds on a competitive basis for projects that reduce a community's risk of disaster and likelihood of future reliance on funding from actual disaster declarations. Programs are also available to assist communities participating in the National Flood Insurance Program (NFIP), including the Flood Mitigation Assistance Program, the Repetitive Flood Claims Program, and the Severe Repetitive Loss Pilot Program. Finally, post-disaster relocation after presidentially declared disasters is possible under the Public Assistance Program, which can provide for assistance for emergency repair and cleanup, and the Individuals and Households Program, which can provide funds for temporary relocation due to the disaster.<sup>149</sup>

### **Challenges as Lead Agency**

There are several barriers to Alaskan Native villages benefiting from the programs already in place at FEMA. Generally speaking, FEMA does not have a lot of resources allocated for mitigation or disaster prevention. Instead, they are awarded emergency funds after a disaster has already occurred. For the funds available for disaster preparedness, a major obstacle is the requirement of state or local community to pay at least 10% of the costs of funded projects. Furthermore, there is a federal requirement for a favorable cost-benefit analysis for funding to be awarded even in sparsely populated rural areas. Native villages do not qualify for flood insurance because they do not have the land use authority to pass and enforce a floodplain management ordinance. A final hurdle preventing Alaskan Native Villages from acquiring FEMA funds is the lack of FEMA-approved

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<sup>147</sup> See Reinertson, *supra*, note 135.

<sup>148</sup> The procedure for declaration of a “presidentially declared disaster” for major disasters under Section 401 of the Stafford Act, 42 U.S.C. § 5170, includes the following initial determination: “All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.” 42 U.S.C. § 5170.

<sup>149</sup> GAO Report 2009, *supra* note 2, at 20–22.

mitigation plan in most of these villages—an eligibility requirement for FEMA programs.

### **Overall Assessment of FEMA as Lead Agency**

FEMA alone cannot act as the lead agency in leading Alaskan Native Village relocation, but should be considered as a secondary agency and play a vital role in villages' migrations. Little is allocated to FEMA's yearly budget until a disaster has already happened, after which emergency funds are made available. Although FEMA has some preemptive mitigation programs in place, such as the Pre-Disaster Mitigation grant program, it is clear that the agency's strengths are in reacting to disasters—not preventing them. In her testimony before a Congressional committee, Region X Director of FEMA Susan Reinertson concluded that, "What is needed to comprehensively address the vulnerabilities faced by the Alaska Native Villages at the highest risk is beyond the scope of our existing pre- and post-disaster programs."<sup>150</sup>

### ***NON-FEDERAL ACTORS***

The team also investigated state and tribal entities but only chose to reflect on a few non-federal actors that seemed most relevant to the study. In addition to the special trust relationship that exists between the federal government and Native tribes, owing to unique federal responsibilities owed to tribes in such circumstances, state and tribal-level agencies were found too disparate and underfunded to support the necessary logistical skills required to manage, coordinate, and fund the entire relocation effort. However, state and tribal entities should be highly integrated into federal relocation efforts, as they have incredible local cultural, environmental, and political knowledge critical to a successful process. The experience of the Newtok, the first and only Alaska Native village to begin serious relocation efforts, is also described.

### ***STATE AGENCIES***

#### **Alaska Climate Change Sub-Cabinet**

The Alaska Climate Change Sub-Cabinet was established in September 2007 by then-Governor Sarah Palin "to advise the Office of the Governor on the preparation and implementation of an Alaska climate change

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<sup>150</sup> See Reinertson, *supra* note 135.

strategy.”<sup>151</sup> Within the Sub-Cabinet, the Immediate Action Workgroup (IAWG) brings together representatives from a number of key federal and state agencies (chaired by representatives from Department of Commerce, Community and Economic Development [DCCED], and the USACE) and has been responsible for “early assessment and development of an action plan addressing climate change impacts on coastal and other vulnerable communities in Alaska.”<sup>152</sup> The IAWG coordinated work relevant to Native village relocation until 2009, when the group recommended that it be phased out in favor of direct interagency cooperation among state agencies. The IAWG 2009 report provided recommendations for relocation, community profiles, summaries on funding for relocation, flooding history, agency profiles, and a list of actions to date.<sup>153</sup> It was the IAWG's recommendation that the DCCED became the state lead agency for relocation. Despite the IAWG's own recommendation to be phased out, as of February 2011, Commissioner Hartig presented the structure of the Sub-Cabinet as still including the IAWG in a key role bringing together many agencies and working directly with tribes and communities.<sup>154</sup>

#### Alaska State Department of Economic Development

The Alaska Department of Commerce, Community and Economic Development (DCCED) is another major actor at the state level for addressing flooding and erosion issues in Alaska Native communities<sup>155</sup>. The Commissioner (head) of the DCCED is appointed by the governor of Alaska and oversees several divisions (e.g. Community and Regional Affairs; Economic Development), agencies (e.g. Alaska Railroad Corporation; Alaska Seafood Marketing Institute) and programs (e.g. Alaska Film Office). The Division of Community and Regional Affairs offers assistance through a grant process, which includes Flood Mitigation Assistance (FMA), and Community Development Block Grants<sup>156</sup>.

The DCCED runs the Alaska Climate Change Impact Mitigation Program (ACCIMP) through its Division of Community and Regional Affairs, and

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<sup>151</sup> Alaska State Government, “Administrative Orders from the Office of the Governor of Alaska-Administrative Order 238,” (Sept. 14, 2007), *available at* <http://www.gov.state.ak.us/admin-orders/238.html>.

<sup>152</sup> Alaska Climate Change Strategy, IAWG webpage, *available at* <http://www.climatechange.alaska.gov/iaw.htm>.

<sup>153</sup> IAWG 2009 Final Recommendations Report, *Recommendations to the Governor's Sub-Cabinet on Climate Change* (Mar. 2009), *available at* [http://www.climatechange.alaska.gov/docs/iaw\\_finalrpt\\_12mar09.pdf](http://www.climatechange.alaska.gov/docs/iaw_finalrpt_12mar09.pdf).

<sup>154</sup> *Id.*

<sup>155</sup> See GAO Report 2009, *supra* note 2.

<sup>156</sup> US Economic Development Administration, “About EDA: Mission,” <http://www.eda.gov/> (last accessed April, 2011).

also serves as the lead state agency for the Newtok Planning Group<sup>157</sup>. The ACCIMP was established by the legislature to aid communities most affected by climate change: Shishmaref, Kivalina, Newtok, Koyukuk, Unalakleet and Shaktoolik. The non-competitive grants are administered following a hazard assessment report. The DCCED's role in ongoing Alaska Native village relocation efforts involves, but is not limited to, financial assistance, public education surrounding mitigation efforts, structure and elevation flood proofing, and implementation of a siren warning system for weather/disaster events<sup>158</sup>. Through these relocation efforts, the DCCED has collaborated with a plethora of federal agencies including USACE, the U.S. Economic Development Administration (EDA) and the Federal Emergency Management Agency (FEMA).

Perhaps most importantly, the Native Village of Newtok (which is the only village in the process of relocating) requested assistance from the Division of Community and Regional Affairs (DCRA), a division of the DCCED.<sup>159</sup> As the DCCED has played a major role in Newtok's relocation efforts through Newtok's request to work with the DCRA, the DCCED's role in Alaska Native village relocation efforts should not be underestimated.

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<sup>157</sup> Alaska Department of Commerce, Community and Economic Development—Division of Community and Regional Affairs, "Grants Section," <http://www.commerce.state.ak.us/dcra> (last accessed May, 2011).

<sup>158</sup> Alaska Department of Commerce, Community and Economic Development. "Village of Kivalina, Alaska: Local Hazards Mitigation Plan," (2007), [http://www.cded.state.ak.us/dcs/planning/nfip/Hazard.../Kivalina\\_HMP.pdf](http://www.cded.state.ak.us/dcs/planning/nfip/Hazard.../Kivalina_HMP.pdf). See also Alaska Department of Commerce, Community and Economic Development. "Village of Newtok, Alaska: Local Hazards Mitigation Plan," (2008), [http://www.commerce.state.ak.us/dca/planning/pub/Newtok\\_HMP.pdf](http://www.commerce.state.ak.us/dca/planning/pub/Newtok_HMP.pdf).

<sup>159</sup> See *Appendix* for more comprehensive treatment of Newtok's relocation efforts.

## ***NEWTOK: A CASE STUDY***

### The Newtok Relocation

The village of Newtok is one of five integrally linked Yup'ik Eskimo villages located in the Yukon Delta National Refuge. For over 2,000 years the ancestors of today's Newtok have nomadically relied on a subsistence-based lifestyle supported by the migrating birds and fish within the refuge. In 1949, the community permanently settled in the Newtok location just north of Nelson Island in order to construct a school. The location was chosen because it was the farthest location upriver that the BIA could navigate to deliver materials to construct the school. However, even at this location the Ninglick River erodes 70 feet from the shoreline per year<sup>160</sup>. The 350-person and 66-household community<sup>161</sup> is currently relocating to escape the encroaching river, permafrost melt, and flooding from storms.

In 1983 the Newtok Traditional Council was granted federal funding and subsequently contracted a study of the erosion caused by the Ninglick River. The study found that within 25–30 years the village would be threatened with flooding and that the cost of holding back the river outweighed the likely costs of relocation. The Newtok Traditional Council and the Newtok Native Corporation began evaluating relocation options shortly thereafter<sup>162</sup>. The land of their chosen site, Mertarvik, about nine miles from the present village was acquired after ten years and a series of background studies.

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<sup>160</sup> Newtok Planning Group, "A Brief History of the Settlement of Newtok and Village Relocation Efforts," [http://www.commerce.state.ak.us/dca/planning/npg/brief\\_history.htm](http://www.commerce.state.ak.us/dca/planning/npg/brief_history.htm) (last accessed May 1, 2011).

<sup>161</sup> Associated Press, *Slowly Newtok prepares to escape erosion*, ANCHORAGE DAILY NEWS, (May 15, 2010), available at <http://www.adn.com/2010/05/15/1280032/slowly-newtok-prepares-to-escape.html>.

<sup>162</sup> Newtok Planning Group, "A Brief History of the Settlement of Newtok and Village Relocation Efforts," [http://www.commerce.state.ak.us/dca/planning/npg/brief\\_history.htm](http://www.commerce.state.ak.us/dca/planning/npg/brief_history.htm) (last accessed May 1, 2011).



In 2002 the Newtok Traditional Council approached Senator Lisa Murkowski,<sup>163</sup> and she subsequently reintroduced Senate Bill 924 to the Senate Energy and Natural Resources Committee for the federal exchange of lands. After the bill became law in 2003, the Newtok Traditional Council exchanged 11,105 acres by the existing Newtok site and 996 acres on Baird Island in order to acquire the 10,943 acres on Nelson Island of the Mertarvik site<sup>164</sup>.

The Newtok Planning Group was created and includes the Newtok Traditional Council, the Newtok Native Corporation, nine state agencies, ten federal agencies, and five regional organizations<sup>165</sup>. The same group meets to identify agency resources, cost-sharing opportunities, and funding gaps and to develop a relocation schedule and a website to centralize the information on relocation.<sup>166</sup>

The Department of Defense's Innovative Readiness Training Program (IRTP) committed to a five-year contract that provides the village of Newtok the equipment and trained personnel for building critical infrastructure at the new location<sup>167</sup>. The Denali Commission, which originally approached the Pentagon, foresees this partnership as one that can be easily duplicated in other villages that need to relocate.<sup>168</sup>

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<sup>163</sup> The Newtok Traditional Council originally approached Senator Frank Murkowski in late 2001 after the Department of the Interior decided it did not have the legislative authority to authorize the land exchange. The land exchange bill was subsequently voted down.

<sup>164</sup> Chuck Kleeschulte, e-mail message to Senator Murkowski's Office, May 10, 2011.

<sup>165</sup> Sally Cox, e-mail message to the Coordinator of the Newtok Planning Group, May 16, 2011.

<sup>166</sup> Newtok Planning Group, "A Brief History of the Settlement of Newtok and Village Relocation Efforts," [http://www.commerce.state.ak.us/dca/planning/npg/brief\\_history.htm](http://www.commerce.state.ak.us/dca/planning/npg/brief_history.htm) (last accessed May 1, 2011).

<sup>167</sup> Kyle Hopkins, "Encroaching river set clock ticking on Newtok." ANCHORAGE DAILY NEWS (Aug. 29, 2009), *available at* <http://www.adn.com/2009/08/29/915958/encroaching-river-set-clock-ticking.html>.

<sup>168</sup> Jamilia George, phone call to Denali Commission, May 9, 2011.

**PART III**  
**Analysis**

## Decision Framework

The goal of this report is to identify the most appropriate federal agency or subset of agencies to be considered for lead Alaska Native village relocation agency. Each candidate agency has multiple attributes—some beneficial and some unfavorable. In order to impartially determine the lead agency across the multiple attributes, the team performed a multi-attribute analysis.

First, the team generated a list of meaningful and measureable indices of performance (IPs) on which all agencies would be evaluated. The team generated the list of IPs prior to conducting a comparative analysis so as to avoid manipulating the IPs and skewing the results.

Next, the team generated a list of alternative lead agency candidates. The team used, as an initial list of alternatives, those agencies identified in the Government Accountability Office (GAO) report titled *Alaska Native Villages Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion* completed in June 2009. The initial list was comprised of the following agencies:

- The Army Corps of Engineers;
- Department of Agriculture’s Natural Resources Conservation Service;
- Department of Commerce’s Economic Development Administration;
- Department of Housing and Urban Development;
- Department of the Interior’s Bureau of Indian Affairs;
- Department of Agriculture, Rural Development Administration;
- Federal Emergency Management Agency;
- National Oceanic and Atmospheric Administration;
- Environmental Protection Agency;
- The Denali Commission;
- Federal Aviation Administration;
- Federal Highway Administration;
- Alaska Climate Change Sub-Cabinet;
- Alaska Department of Commerce, Community and Economic Development;
- Alaska Department of Transportation and Public Facilities;
- Alaska Department of Natural Resources, Division of Forestry;
- Alaska Division of Homeland Security and Emergency Management;
- Alaska Department of Military and Veterans Affairs;
- Alaska Department of Environmental Conservation/ Village Safe Water Program;
- Alaska Department of Education and Early Development;
- Alaska Department of Health and Social Services;
- Alaska Industrial Development and Export Authority/ Alaska Energy Authority;
- Alaska Governor’s Office;

- Association of Village Council Presidents Regional Housing Authority;
- Coastal Villages Region Fund;
- Lower Kuskokwim School District;
- Rural Alaska Community Action Program;
- Yukon-Kuskokwim Health Corporation;
- Alaska Native Tribal Health Consortium;
- Rural Alaska Community Action Program, Inc.; and
- Alaska Federation of Natives.

The team narrowed the list to only include federal agencies, because federal agencies have more capacity to accomplish the substantial coordination and logistics required by the relocations with greater efficiency than the state and local levels of government. Equally as important, the federal government has a legal protectorate duty to safeguard the security of Native Indian tribes.<sup>169</sup>

Next, the team narrowed the list of federal agencies to only include agencies with past relocation experience (in Alaska or elsewhere), or, that have high levels of authority to conduct relocations in Alaska. The final list of candidate lead agencies is (1) the Army Corps of Engineers, (2) the Denali Commission, (3) the Department of Commerce Economic Development Administration (4) the Bureau of Indian Affairs, (5) the Environmental Protection Agency, (6) the Federal Emergency Management Agency, and (7) the Department of Housing and Urban Development.

The candidate agencies were then evaluated according to each IP and aggregated into a matrix. Once the matrix was completed, the agencies were compared such that a lead agency or agencies became apparent. The following sections describe in detail the IPs and the matrix.

## ***INDICES OF PERFORMANCE***

The indices of performance (IPs) are summarized below. In all cases, a checkmark correlates to an attribute of the agency evaluated.

*IP: Hierarchical Independence*<sup>170</sup>

*Description:* Hierarchical independence relates to the levels of bureaucracy above an agency. The further down the hierarchy, the less control the agency has over its structure, culture, budget and programs. An independent agency is more easily able to single-mindedly pursue its goals and objectives without interference than agencies under higher-level influencers.

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<sup>169</sup> See *supra*, notes 37–43.

<sup>170</sup> Boin, Arjen, Sanneke Kuipers, and Marco Steenbergen, “The Life and Death Of Public Organizations: A Question Of Institutional Design?,” 23 GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION, AND INSTITUTIONS 3, 392 (2010).

*Evaluation:*

- X Agency is a (sub)division of an existing organization or operates in another form under direct formal authority of a public organization
- ✓ Agency operates outside the direct influence sphere of any other bureau, administration, commission, or corporation

*IP: Board or Commission Structure*<sup>171</sup>

*Description:* If an agency has a single administrator, he is likely to be politically appointed. By having a board or commission, an agency may be slightly more insulated from the instability in mission caused by leadership turnover.

*Evaluation:*

- X Has no commission, no board, or has a single administrator
- ✓ Is headed by a commission or a board

*IP: Legislative Origin*<sup>172</sup>

*Description:* Legislative origin reflects the nature of an agency's creation. Those agencies created by law will be more durable than those created by departmental or executive order.

*Evaluation:*

- X Created by a departmental or Executive order
- ✓ Created under a reorganization plan or by legislation

*IP: Sunset Clause*<sup>173</sup>

*Description:* Whether an agency has a sunset clause naturally affects the durability of an agency. An agency with a sunset clause may lack the support and attention needed to fulfill its mission.

*Evaluation:*

- X Created with a sunset clause
- ✓ Nothing stipulated in the U.S. Government Manual at the time of its creation

*IP: Worked on an Relocation effort*

*Description:* Whether an agency has previously worked on a relocation effort is a principal indicator of its ability to succeed in leading a future relocation effort. The previous experience will provide the agency the opportunity to learn best practices and also to identify failed practices. Engineering and project management skills will also have been fortified through the prior relocation experience.

*Evaluation:*

- X Never served or served as a minor party
- ✓ Served as a major party or the lead party

*IP: Worked on Alaska Relocation Effort*

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<sup>171</sup> Boin, *supra* note 161, at 393.

<sup>172</sup> *Id.* at 394.

<sup>173</sup> *Id.*

*Description:* Similar to the above IP, past experience on an Alaska relocation effort will indicate future success. In addition, the agency will have acquired location specific knowledge and built a rapport with the communities.

*Evaluation:*

Never served or served as a minor party

Served as a major party or the lead party

*IP: Length of Term of Leadership*

*Description:* The length of term of leadership reflects the stability of the mission and the power of the agency. High turnover in leadership may reduce trust between the leadership and the workforce. Changes in leadership may also allow changes in the structure and mission of the agency which may be influenced by outside forces.

*Evaluation:*

Short-term

Long-term

*IP: Reputation (in Congress)*

*Description:* An agency's reputation in Congress largely describes its ability to obtain funding. As all the agencies being considered are government entities, Congress must approve each agency's budget.

*Evaluation:*

Negative

Positive

*IP: Reputation (with Alaska Natives)*

*Description:* An agency's reputation with the Alaska Native villages is largely based upon the agency's prior experiences working directly with tribes and honoring and respecting tribal wisdom, priorities, and affairs. The agency's prior experience working with tribes will affect the agency's effectiveness in executing the relocations. A poor reputation may result in mistrust and poor communication between the community and the federal agencies. This will slow relocation progress and may ultimately lead to a solution that is not suitable for the Alaska Native villages.

*Evaluation:*

Negative

Positive

*IP: Funding Authorization*

*Description:* Funding authorization relates to how often the agency must receive authorization from Congress. Multi-year authorization is beneficial in that it allows an agency to plan long-term.

*Evaluation:*

Yearly

Multi-Yearly

*IP: Funding Discretion*

*Description:* Funding discretion describes the agency's freedom to choose how to appropriate its funds. A high level of discretion removes the agency's program prioritization from the political environment in the Congress and in the current administration.

*Evaluation:*

- Each project must be approved
- Full appropriation discretion

*IP: Organizational Perspective*

*Description:* The aim of Alaska Native relocation efforts is to avoid a future costly disaster by moving communities out of harm's way. This forward-looking goal requires a forward-looking agency. An agency that promotes a proactive approach to problem solving will be better able to coordinate relocation efforts.

*Evaluation:*

- Reactive
- Proactive

*IP: Demonstrated Willingness to Participate in Relocation Efforts*

*Description:* A high level of motivation will produce a high level of quality. An agency that has demonstrated its willingness to participate in relocation efforts will not only be motivated to achieve results, it will also secure a high standing with Congress and the Alaska Native villages.

*Evaluation:*

- No demonstrated willingness (in word or action)
- Participated in some relocation effort (positively) or publicly stated willingness

*IP: Private Industry Relations*

*Description:* Relocation efforts will require contracting with private industry. An agency that has strong ties with the private sector will be more efficient in leading the relocations.

*Evaluation:*

- Some experience (small % of partnering on projects compared to total agency projects)
- High level of experience (majority of agency projects involve partnering with industry)

*IP: Authority to Work*

*Description:* Authority to work describes an agency's legal right to participate in the relocation efforts. The tasks necessary for relocation must be within the agency's dominion.

*Evaluation:*

- Has no authority
- Has authority

## ***MATRIX***

The team evaluated the list of selected federal agencies according to each of the preceding IPs and aggregated the data into a matrix. An imaginary, ideal agency is included in the matrix to show the maximum possible attributes. If there was not enough information to evaluate an agency for a given IP, the cell was left blank. In this analysis, each IP was given equal weight. The evaluations in the matrix are relative and have no absolute meaning. Upon further investigation, the IPs should be assigned unequal weights to reflect varying levels of IP significance in lead agency selection, in accordance with input from interviews from impacted villagers and communities. If we were to weight the IPs, the total score would be generated from a weighted sum.



## Evaluation Matrix of Candidate Lead Agencies for Alaska Native Relocation Efforts

	Army Corp of Engineers	Bureau of Indian Affairs	Denali Commission	US + AK DCEDAAdministration	EPA	FEMA	Housing + Urban Development	Ideal Agency
Hierarchical Independence	X	X	X	X	X	X	X	✓
Board or Commission Structure	✓	X	✓	X	X	X	X	✓
Legislative Origin	✓	✓	✓	✓	✓	✓	✓	✓
Sunset Clause	✓	✓	✓	✓	✓	✓	✓	✓
Worked on a Relocation Effort	✓	X	✓	✓	✓	✓	✓	✓
Worked on Alaska Relocation Effort	✓	X	✓	X	✓	✓	✓	✓
Length of Term for Leadership	X	X	✓	X	X	X	X	✓
Reputation (in Congress)	✓	✓	✓	✓	✓	✓	✓	✓
Reputation (with Alaska Natives)	✓	X	✓	✓	✓	✓	✓	✓
Funding Authorization	X	X	✓	X	X	X	X	✓
Funding Discretion	X	✓	✓	✓	✓	✓	✓	✓
Organizational Perspective	✓	✓	X	X	X	X	X	✓
Demonstrated Willingness to Participate in Relocation Efforts	✓	✓	✓	✓	✓	✓	✓	✓
Private Industry Relations	✓	✓	✓	✓	✓	✓	✓	✓
Authority to Work	✓	✓	✓	✓	✓	✓	✓	✓
Army Corp of Engineers	X	✓	✓	✓	✓	✓	✓	✓
Bureau of Indian Affairs	✓	X	✓	✓	✓	✓	✓	✓
Denali Commission	✓	✓	X	✓	X	✓	✓	✓
US + AK DCEDAAdministration	✓	✓	✓	X	✓	✓	✓	✓
EPA	✓	✓	✓	✓	X	✓	✓	✓
FEMA	✓	✓	✓	✓	✓	X	✓	✓
Housing + Urban Development	✓	✓	✓	✓	✓	✓	X	✓
Ideal Agency	X	X	X	X	X	X	X	✓
General Experience Working with:								

**PART IV**  
**Evaluation and**  
**Recommendations**

## ***EVALUATION AND RECOMMENDATIONS FOR FURTHER STUDY***

### ***LIMITATIONS OF ANALYSIS***

This is an initial study requiring further research and review. Time was a limiting factor. As the study was limited to eight weeks, the team did not have adequate time to prepare or conduct interviews with key players in either impacted communities or candidate agencies. Therefore, the study is based on a limited literature review only. Because the views of affected Native Alaskan villages are of key importance, phase two of this study should focus on revising this initial assessment to include the perspectives and opinions of the village communities.

More specifically, the weighting scheme should reflect the preferences and knowledge of candidate agencies and impacted villages. While preferences will differ across interested parties, weighting generators exist to synthesize several different schemes into one that will optimize satisfaction of all parties involved. Generation of weighting schemes will require more interaction with the federal, state and local governments and the Alaska Native communities. The study was conducted in Seattle and therefore the team had limited access to community members in Alaska. Thus, input was incomplete.

Of considerable but lesser importance, a large number of agencies required consideration before the list of alternative agencies could be narrowed. This research was time-intensive and reduced the amount of time the team was able to dedicate to the seven candidate agencies. Further investigation might include more detailed investigation into the candidate agencies and consideration of additional agencies at the federal, state, local and tribal level. Additional investigation will also yield more indices of performance (IPs) on which to score the agencies. Supplementary IPs will create a more holistic description of each agency and will present the decision-maker with added tradeoffs to consider. It is recommended that along with additional IPs a corresponding weighting scheme should be generated.

Another limitation of this report was the scope of analysis. This study analyzed the current ability of each agency to succeed as the lead relocation agency. It did not estimate the future capability of agencies after adjustments and increased funding, authorization and/or personnel. The team also did not consider a “multi-agency” in which a combination of agencies would be the lead entity. The matrix presented in this report should be used as a blueprint on which to build and refine.

## ***IDEAL OUTCOMES***

This paper may be used as a framework to help further the process of evaluating the need for a federal agency to take the lead on climate relocation efforts in Alaska. Ideally, the team would have consulted experts working in federal agencies, tribal law, engineering and relocation, as well as Congressional staff, Alaska Natives, state authorities, and others with relevant expertise to refine and adapt the matrix to more closely fit the realities and nuances of the relocation undertaking. The team designed this report for the purpose of laying additional groundwork in preparation for hoped-for (but not yet proposed) legislation that would assign lead authority and appropriate funds to a top candidate federal agency to coordinate Alaska Native village relocation efforts. By applying a structure to the issues involved in selecting an agency for lead relocation authority, the team hopes to provide a framework so that important issues such as funding and authority, human rights, environmental accountability, and sustainability can be holistically assessed.

## ***FURTHER DISCUSSION POINTS***

Areas of future study should consider:

- A further, more robust evaluation of the USACE and the Denali Commission as the two top contenders for lead authority.
- The null alternative, wherein no agency is appointed leadership responsibility. Action as well as inaction has consequences.
- Human rights–based approaches to relocation (see “International Human Rights Law” sidebar below).
- Funding issues: How should lead authority appropriations be financed?
- Public/private partnership profiles: Would a contractual preference granted to Native companies for lead agency contracts seeking relocation services (e.g. construction of new homes) survive constitutional challenges?
- Legal implications and potential legal hurdles under the CWA, NEPA, and other environmental laws?
- Development of local tribal advisory groups and procedures to ensure meaningful tribal participation in lead agency decision-making.
- Reconstruction and Green Building concerns: Practically, what equipment, materials and construction considerations need to be assessed for the reconstruction of villages? Is the lead agency capable of building new communities that maximize appropriate technologies? For example, how will issues concerning reliance on fossil fuels, imported construction materials and appropriate weatherization be addressed?
- Site selection: What roles can the lead agencies play to facilitate and accelerate site selection?
- Whether the definition of a “presidentially declared disaster” could be modified such that creeping vulnerabilities such as permafrost melt and coastal erosion could trigger immediate disaster relief under FEMA.

## *INTERNATIONAL HUMAN RIGHTS LAW*

Locating relocation authority within a federal agency must observe the principles and standards of human rights laws and relocation efforts should be guided primarily by a human rights–based framework.<sup>174</sup>

There is a clear legal basis for action grounded in international human rights laws. The American Convention on Human Rights provides in Article 21 that “[e]veryone has the right to the use and enjoyment of his property” and that “[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”<sup>175</sup> Other instruments, universal and regional, as well as customary international law, affirm the fundamental right that indigenous peoples have to the protection of their land and territory.

In 2007, the United Nations Declaration on the Rights of Indigenous Peoples was approved by the United Nations General Assembly by a vote of 134 member states, in favor, 11 abstaining and four against.<sup>176</sup> Although the United States voted against, it later came to accept the provisions of the declaration. The non-binding text, which mandates that states take action to protect the rights of their indigenous populations, has been cited in numerous policy documents and legal decisions at the regional and international levels, as well as in national legislation and policies, and thus has taken on the character of customary international law.

In the last decade, the Inter-American Court of Human Rights has demonstrated a keen awareness of the relationship between land and culture for indigenous peoples. In *Awás Tingni v. Nicaragua*, the Court stated: “Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”<sup>177</sup>

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<sup>174</sup> Alternatively, should federal agencies fail to prioritize and fund Native Village relocation, and should the 9<sup>th</sup> Circuit Court dismiss the lawsuit filed by the Native Village of Kivalina to recover its costs to relocate (*Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (2009)), then Kivalina—having had its domestic remedies exhausted—could consider filing a petition to the Inter-American Commission on Human Rights for remedies.

<sup>175</sup> American Convention on Human Rights, Nov. 22, 1969, G.A.S. Treaty Ser. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

<sup>176</sup> United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, Oct. 2, 2007, A/RES/61/295.

<sup>177</sup> *The Case of Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No.79 (2001), para. 149.

Citing *Awas Tingni*, the Inter-American Court of Human Rights concluded in *Saramaka People v. Suriname* that “the members of the Saramaka people make up a tribal community protected by international human rights law that secures the right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory.”<sup>178</sup> Finally, for a fuller treatment on the topic of human rights–based climate relocation frameworks, see article by Robin Bronen, *Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine*, 35 N.Y.U. Rev. L. & Soc. Change 357 (2011).

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<sup>178</sup> *The Case of the Saramaka People v. Suriname*, Judgment of November 28, 2007, Inter-Am. Ct. H.R. (2007), para. 96.

**APPENDIX**

## NEWTOK: A RELOCATION STORY

The people of the Alaskan Native Village, Newtok, have lived on their current land for at least 2,000 years. Their lifestyle was nomadic and people survived off fish and migratory birds until the 1949 when the federal government required the youth in the tribe to be enrolled in school. In order to meet with this requirement, the people of Newtok settled onto the farthest upstream location (for protection from the Ninglick River) that still allowed the Bureau of Indian Affairs to deliver materials to build the school.<sup>179</sup> The nearest road is over 400 miles away from Newtok, making the airport and river access lifelines of the subsistence-based community for anything they cannot readily harvest from the natural environment.<sup>180</sup> The village is located just north of Nelson Island along the Ninglick River, which is currently eroding approximately 70 feet annually from the village shoreline. The Newtok Traditional Council, a federally recognized tribe<sup>181</sup>, was the first to recognize the dire situation of the village and initiated the several decade process of relocating the entire village.

At the request of the Newtok Traditional Council, the Ninglick River Erosion Assessment was completed in 1983 finding that between 1957 and 1983 there was annual erosion of 19-88 feet of shoreline. The Assessment estimated that in 25–30 years, both the lives and infrastructure of Newtok would be imminently threatened. The consultants hired by the Newtok Traditional Council and the Army Corps of Engineers determined that the Ninglick River could not be feasibly or sustainably restrained. They estimated that regardless of the cost of relocation it would be less expensive than the continual investment of trying to sustain the current location.<sup>182</sup>

In 1997, the Newtok Native Corporation approached the United States Fish and Wildlife Service (USFWS) about an administrative land exchange to enable relocation. However, the Department of the Interior determined that neither the USFWS nor the Department of the Interior had the legal authority to grant the federal land exchange.<sup>183</sup> In preparation for identifying and communicating the needs of the village, the Newtok Traditional Council hired Arctic Slope Consulting Group to generate the Newtok Background for Relocation Report, a

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<sup>179</sup> Newtok Planning Group, “A Brief History of the Settlement of Newtok and Village Relocation Efforts,” [http://www.commerce.state.ak.us/dca/planning/npg/brief\\_history.htm](http://www.commerce.state.ak.us/dca/planning/npg/brief_history.htm) (last accessed May 1, 2011).

<sup>180</sup> Pikkington, Ed. “The village at the tip of the iceberg.” THE GUARDIAN, (Sept. 28, 2008), available at <http://www.guardian.co.uk/environment/2008/sep/28/alaska.climatechange>.

<sup>181</sup> Immediate Working Group, *Recommendations to the Governor’s Subcabinet on Climate Change*, Washington, D.C.: U.S. Government Printing Office (2009).

<sup>182</sup> Newtok Planning Group, “A Brief History of the Settlement of Newtok and Village Relocation Efforts,” [http://www.commerce.state.ak.us/dca/planning/npg/brief\\_history.htm](http://www.commerce.state.ak.us/dca/planning/npg/brief_history.htm) (last accessed May 1, 2011).

<sup>183</sup> Chuck Kleeschulte, e-mail message to Senator Murkowski’s Office, May 10, 2011.



preliminary geotechnical overview, and the Newtok Transportation Plan with funding from the Army Corps of Engineers and Bureau of Indian Affairs.<sup>184</sup>

The Newtok Traditional Council originally had six different potential sites for location, but eventually decided on Mertarvik in 1993 after 92% of the village voted to relocate there.<sup>185</sup> The chosen site was inside the Yukon Delta National Wildlife Refuge, which is a 26-million-acre expanse that supports an abundance of bird species, one of the primary subsistence food sources for Newtok<sup>186</sup>. Mertarvik, which means “getting water from the Spring” in Yup’ik, is a high-quality site for the relocation from both a technical and land use perspective. Mertarvik has high quality soils, available water, and access to the River enabling water-based deliveries. Additionally, the location within the wildlife refuge enables subsistence hunting, but will have a minimal impact, if any, on animal populations.<sup>187</sup> Additionally, the site for Mertarvik is only nine miles away from the current Newtok village, making it feasible to move buildings so that not all of them must be rebuilt.

In 2001, the village of Newtok approached Alaskan Senator Frank Murkowski requesting he introduce legislation for the federal land transfer into the Senate Energy and Natural Resource Committee. The Senator introduced the bill 924 in 2002, however it failed on the Senate floor. That same year Lisa Murkowski was appointed to Senate and in 2003 she was appointed to the Senate and Natural Resource Committee. She heard the plight of Newtok and took up where Senator Frank Murkowski left off.<sup>188</sup>

Senator Murkowski reintroduced the Senate bill 924<sup>189</sup> to the Senate Energy and Natural Resource Committee. According to the bill, the Newtok Corporation would give up 996 acres on Baird Island and another 11,105 acres by the existing Newtok site in exchange for 10,943 acres on Nelson Island.<sup>190</sup> The bill passed the Senate in June, the House in October, and was signed into law by President George W. Bush on November 18, 2003.<sup>191</sup> The GAO report helped to legitimize the plight of Newtok for Congress, but it also established that Newtok’s need for relocation was not an isolated incident.<sup>192</sup> The necessity of relocating several other Native Alaskan villages beyond Newtok is overwhelming.

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<sup>184</sup> Newtok Planning Group, “A Brief History of the Settlement of Newtok and Village Relocation Efforts,” [http://www.commerce.state.ak.us/dca/planning/npg/brief\\_history.htm](http://www.commerce.state.ak.us/dca/planning/npg/brief_history.htm) (last accessed May 1, 2011).

<sup>185</sup> GAO Report 2009, *supra* note 2.

<sup>186</sup> Newtok Planning Group, “A Brief History of the Settlement of Newtok and Village Relocation Efforts,” [http://www.commerce.state.ak.us/dca/planning/npg/brief\\_history.htm](http://www.commerce.state.ak.us/dca/planning/npg/brief_history.htm) (last accessed May 1, 2011).

<sup>187</sup> Chuck Kleeschulte, e-mail message to Senator Murkowski’s Office, May 10, 2011.

<sup>188</sup> *Id.*

<sup>189</sup> Pub. L. No. 108–129.

<sup>190</sup> Chuck Kleeschulte, e-mail message to Senator Murkowski’s Office, May 10, 2011.

<sup>191</sup> *Id.*

<sup>192</sup> GAO Report 2009, *supra* note 2.

Once the federal land exchange was complete, the Newtok Traditional Council officially gained control of the Mertarvik site, which allowed them to begin soliciting outside help specifically for funding. However, the new community was not eligible to receive funding because it didn't exist yet. But ironically, it still needed funding to be built. At the same time, the current community was no longer eligible for funding because of the imminent plans to relocate.<sup>193</sup> The estimates according to the U.S. Army Corps of Engineers (USACE) for relocating the village were between \$80 million and \$130 million, which could cost up to \$2 million per household.<sup>194</sup> The high price tag was particularly worry to the Newtok Traditional Council, because the Army Corps of Engineers is required to do a cost-benefit analysis on all projects. So the Newtok Traditional Council opposed making the USACE a lead federal agency despite the vital role that it plays with both funding and technical expertise. It is worth noting that the entire state of Alaska is at a disadvantage for cost benefit analysis for federal funding simply because of the low population and overall density.

In 2005, the current Newtok village was flooded and the village itself was completely surrounded by water, making it functionally an island, for several days.<sup>195</sup> In attempts to hasten relocation, the Newtok Traditional Council requested assistance from the Alaska Department of Community and Regional Affairs (DCRA) in 2006.<sup>196</sup> The DCRA created the Newtok Planning Group (NPG) as a starting place. Membership on the NPG is strictly voluntary, with state, federal, and non-profit organizations working together to aid the village of Newtok by pursuing cost sharing and other collaborative efforts. Although the NPG allows for a centralized method of communication, the Newtok Traditional Council itself plays the lead role in planning Newtok's relocation. Sally Cox, the appointed coordinator from the Governor's office, arranges the meetings and meeting spaces for the NPG, but she is strictly a facilitator. At present, the Newtok Planning Group includes the Newtok Traditional Council, the Newtok Native Corporation, 9 state agencies, 10 federal agencies, and 5 regional organizations.<sup>197</sup>

The funding for Newtok's relocation has been gradually secured in a piecemeal fashion from a wide variety of federal and state agencies in addition to other organizations. The Newtok Traditional Council, using funds from a Denali Commission grant of \$26,682,<sup>198</sup> was able to hire HDR Alaska, Inc., to develop

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<sup>193</sup> Kyle Hopkins, "Encroaching river set clock ticking on Newtok," ANCHORAGE DAILY NEWS (Aug. 29, 2009), available at <http://www.adn.com/2009/08/29/915958/encroaching-river-set-clock-ticking.html>.

<sup>194</sup> *Id.*

<sup>195</sup> GAO Report 2009, *supra* note 2.

<sup>196</sup> Sally Cox, e-mail message to the Coordinator of the Newtok Planning Group, May 16, 2011.

<sup>197</sup> *Id.*

<sup>198</sup> Newtok Planning Group, "A Brief History of the Settlement of Newtok and Village Relocation Efforts," [http://www.commerce.state.ak.us/dca/planning/npg/brief\\_history.htm](http://www.commerce.state.ak.us/dca/planning/npg/brief_history.htm) (last accessed May 1, 2011).

the final layout plan in 2007.<sup>199</sup> In 2008, the state of Alaska committed \$3.3 million to the Newtok relocation for construction of the barge, staging area, and evacuation center.<sup>200</sup> The barge was the first priority as it was a prerequisite for delivering the supplies and equipment needed to build the rest of the community.<sup>201</sup> In 2008, a housing market survey, the planning studies for the evacuation center and access road, and a National Environmental Policy Act Review of the relocation (the Environmental Assessment resulted in a Finding of No Significant Impact) were completed.<sup>202</sup>

In 2008, bids for the design and construction of Newtok's evacuation shelter led to the hiring of Aaron Cooke, from the University of Cincinnati. Aaron was working at Cold Climate Housing Research Center in Fairbanks, Alaska, when he learned about Newtok's efforts to relocate. After talking to his supervisor, he set up a meeting and out-competed two other agencies for the job. He found the environmental and financial restraints of the project particularly challenging and was very enthusiastic about maximizing the capabilities of the shelter at a minimal cost.<sup>203</sup>

Also in 2008, the Denali Commission briefed the Pentagon on the Newtok situation in an appeal for assistance from the Department of Defense's Innovative Readiness Training Program (IRTP). The IRTP was created to give military personnel training in conditions akin to those experienced overseas while helping communities in need. The needs of Newtok and of the IRTP aligned, because the isolated and extreme environmental conditions provided a great simulation and it offered resources and personnel to the village. The IRTP agreed to a five-year commitment to help build essential infrastructure for the community, such as the barge and staging area.<sup>204</sup> Overall the military is contributing \$2 million in materials and \$5 million in resources for the shelter, roads, and the airstrip.<sup>205</sup>

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<sup>199</sup> Newtok Planning Group, Community Layout Planning, Division of Community and Regional Affairs Newtok Planning Group, <http://www.commerce.state.ak.us/dca/planning/CommunityLayout.htm> (accessed on May 1, 2011).

<sup>200</sup> Associated Press, "Eroding Alaska villages get mitigation money," MSNBC (June 13, 2008), available at [http://www.msnbc.msn.com/id/25141144/ns/us\\_news-environment/](http://www.msnbc.msn.com/id/25141144/ns/us_news-environment/).

<sup>201</sup> Newtok Planning Group, Barge Landing and Staging Area, Division of Community and Regional Affairs Newtok Planning Group, <http://www.commerce.state.ak.us/dca/planning/BargeLanding.htm> (last accessed on May 1, 2011).

<sup>202</sup> Newtok Planning Group, Evacuation Shelter, Division of Community and Regional Affairs Newtok Planning Group, <http://www.commerce.state.ak.us/dca/planning/EvacuationShelter.htm> (last accessed on May 1, 2011).

<sup>203</sup> M.B. Reilly, "Design and Learning Leadership for the 21<sup>st</sup> Century," University of Cincinnati, (May 20, 2009), available at <http://www.uc.edu/news/NR.aspx?id=10184>.

<sup>204</sup> Kyle Hopkins, "Encroaching river set clock ticking on Newtok," ANCHORAGE DAILY NEWS, (Aug. 29, 2009), available at <http://www.adn.com/2009/08/29/915958/encroaching-river-set-clock-ticking.html>.

<sup>205</sup> Immediate Working Group, *Recommendations to the Governor's Subcabinet on Climate Change*. March 2009. Washington, DC: U.S. Government Printing Office.

In 2009, the Alaskan Department of Environmental Conservation's Village Safe Water Project was granted funding the planning of the sanitation facilities. Once the sanitation and hydrology master plan is completed, Newtok will be eligible for capital construction project funding.<sup>206</sup> As the infrastructure gets laid down bit by bit, it will be easier for Newtok to get funding as the community is built. However, the funding will also be in higher demand as more villages make progress toward their own relocations.

It is important to note that at no time was a federal or state agency ever appointed to lead or take over any part of the Newtok relocation effort. Newtok has certainly benefitted from the relocation planning activities of other threatened village communities, but a major reason that the Newtok relocation has been so effective is because the Newtok Traditional Council took an active role in the village's relocation with a unified voice, to the point where they approached Congress directly about their issue. Although many federal agencies have helped them through various permitting processes and through the submission of reports on Newtok's behalf, a primary reason for the community's success is that Newtok and the Newtok Traditional Council have been at the core of the relocation effort from the very beginning.

## **SUMMARY OF AGENCY INVOLVEMENT**

The summary below reflects agency involvement in Newtok's relocation efforts. The summary is not a fully representative list, but includes the most relevant and active players. The summary lists primary federal agencies, state agencies, as well as other actors for which only minimal information was attained.

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<sup>206</sup> Newtok Planning Group, *Water and Wastewater Infrastructure*, Division of Community and Regional Affairs Newtok Planning Group, [http://www.commerce.state.ak.us/dca/planning/water\\_sewer.htm](http://www.commerce.state.ak.us/dca/planning/water_sewer.htm) (last accessed on May 1, 2011).

<b>Newtok Relocation: Agency Involvement</b>	
<b>FEDERAL</b>	
<b>Agency</b>	<b>Contribution</b>
Bureau of Indian Affairs (BIA)	The BIA helped fund the original background report, geotechnical overview, and Newtok transportation plan in 2003. It also funded 3 houses for the new site through its Housing Improvement Plan.
Denali Commission (The Commission)	The Commission was originally approached for funding and declined as there currently was no community at the time. However, it did provide a mini-grant for the community to draft a layout plan and hire a housing marketing survey intern. The Commission is a member of the Newtok Planning Group.
Department of Defense (DOD)	The DOD, through the allocation of military personnel in the Innovative Readiness Training Program, has supplied resources, equipment, and trained personnel. The estimated benefit to the village is \$2 million in materials and \$5 million in resources, but such figures do not include additional health benefits that become available to the village through the DOD.
U.S Army Corps of Engineers (USACE)	The USACE worked with the Newtok Tribal Council from the beginning of the relocation effort primarily providing expertise and help with studies, such as including geotechnical reports, environmental assessment of shelter and associated features, planning studies for access road and evacuation shelter, National Environmental Policy Act review, Coastal Zone Consistency Determination, Water Quality Certification, wetland delineation, fish studies, aerial mapping, archeological studies, and soil sampling.
U.S. Department of Commerce, Economic Development Administration	The US EDA provided funding in the form of a \$1 million grant for the barge and staging area and \$2 million for the evacuation shelter. It also provided technical grant writing assistance to the Newtok Traditional Council.

(US EDA)	
Senator Murkowski's Office	Senator Murkowski introduced legislation into the Senate (Senate Bill 924) that authorized the exchange of lands between the Newtok Traditional Council and U.S. Fish & Wildlife Service.
<b>(con't below)</b> <b>STATE</b>	
Alaska Department of Commerce, Community, and Economic Development, Division of Community & Regional Affairs (DCCED)	The DCCED assisted Newtok in applying for the Commission's mini-grant Assistance Program to complete its layout planning process. It also worked with HDR Alaska Inc. to develop the layout plan and hosted 2 community-planning workshops.
Alaska Department of Environmental Conservation's Village Safe Water Program (DEC VSW)	The DEC VSW provided funding to develop water and sewer infrastructure and to initiate drilling for geotechnical and groundwater studies. In 2009, it funded the master planning process for the sanitation facilities.
Alaska Department of Military and Veteran's Affairs; Division of Homeland security and Emergency Management (DMVA)	The DMVA funded emergency relocation plans for six communities including Newtok for emergency operations, community evacuation plans, and hazard mitigation.

<p>Alaska Department of Transportation and Public Facilities (AK DOT)</p>	<p>The AK DOT contributed some of the \$200,000 toward the barge facility; appropriated \$300,000 for surfacing material for barge ramp and staging area; completed the permitting process and a topographic survey; received \$1.7 million from state and federal funding for the evacuation road; and finally co-managed the entire barge project with the DCCED.</p>
<p><b>OTHER (Limited Information)</b></p>	
<p>Rural Alaska Community Action Program (RurAL CAP)</p>	<p>RurAL CAP provided one of three interns to help with the housing marketing survey and submitted a grant application on behalf of the Newtok Traditional Council.</p>
<p>HUD and the Department of Agriculture (HUD and FDA)</p>	<p>Both HUD and the FDA provided varying amounts of grants.</p>
<p>Federal Aviation Administration (FAA)</p>	<p>The FAA completed a background review and basic study information for the new airport site.</p>

## **ACRONYMS**

**ACCIMP:** Alaska Climate Change Impact Mitigation Program

**ACE:** Alaska Coastal Erosion program

**USACE:** US Army Corps of Engineers

**AK DCCED:** Alaska Department of Commerce, Community and Economic Development

**ANCSA:** Alaska Native Claims Settlement Act

**ANILCA:** Alaska National Interest Land Conservation Act

**ARA:** Area Redevelopment Agency

**BIA:** Bureau of Indian Affairs

**BoE:** Bureau of Education

**CEDS:** Comprehensive Economic Development Strategy

**CERCLA:** Comprehensive Environmental Response, Compensation, and Liability Act

**CWA:** Clean Water Act

**DCCED:** Department of Commerce, Community and Economic Development

**DCRA:** Alaska Department of Community and Regional Affairs

**DCRA:** Division of Community & Regional Affairs

**DOD:** Department of Defense

**EAA:** Economic Adjustment Assistance

**EDA:** US Department of Commerce Economic Development Administration

**EPA:** United States Environmental Protection Agency

**FEMA:** Federal Emergency Management Agency

**FHA:** Federal Housing Authority

**FMA:** Flood Mitigation Assistance

**GAO:** Government Accountability Office

**HIP:** Housing Improvement Program



**HUD:** Department of Housing and Urban Development

**IAWG:** Immediate Action Workgroup within the Alaska Climate Change Sub-Cabinet

**IIS:** Army Corps of Engineers Interagency and International Service

**IP:** Indices of performance

**IRTP:** Innovative Readiness Training Program

**NCP:** National Contingency Plan

**ONAP:** Office of Native American Programs

**OPM:** Office of Personnel Management

**PIH:** Public and Indian Housing

**POD:** Pacific Ocean Division

**PRP:** potentially responsible party

**RurAL CAP:** Rural Alaska Community Action Program

**TTP:** Tribal Partnership Program

**USACE:** United States Army Corps of Engineers

**USFWS:** United States Fish and Wildlife Service

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