



## Reaching Higher Ground

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Avenues to Secure and Manage New Land for Communities Displaced by Climate Change

By Maxine Burkett, Robert R.M. Verchick, and David Flores

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## About the Center for Progressive Reform

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Founded in 2002, the nonprofit Center for Progressive Reform connects a nationwide network of scholars with policymakers and allied public interest advocates. CPR pursues a vision of legal and regulatory policies that put health, safety, and environmental protection before private interests and corporate profit. With rigorous analysis, strategic engagement in public interest campaigns, and a commitment to social welfare, CPR supports thoughtful government action, ready public access to the courts, enhanced public participation, and freer access to information.

## Acknowledgments

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# Reaching Higher Ground

## Avenues to Secure and Manage New Land for Communities Displaced by Climate Change

### Executive Summary

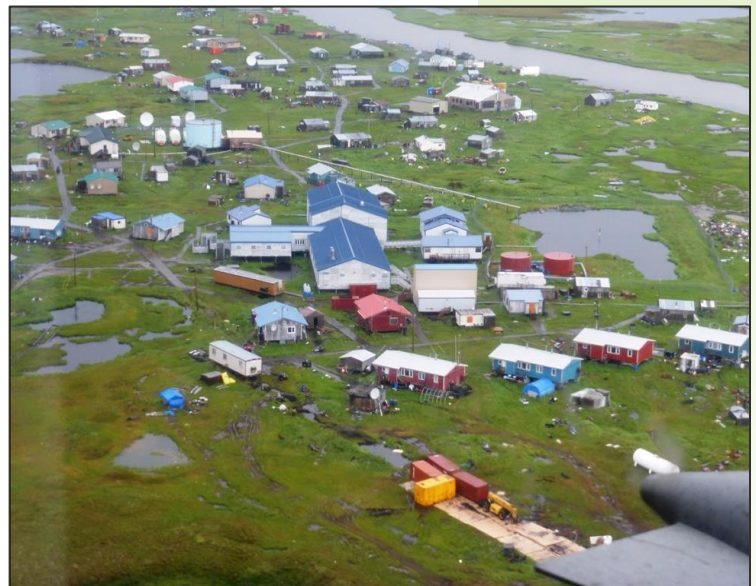
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Millions of Americans are in danger of being displaced by sea level rise before the end of the century. In fact, migration from high-risk areas has already begun in isolated locations across the United States, where people are looking for homes less vulnerable to recurrent flooding, rising tides, melting permafrost, and other effects of global climate disruption. Noted examples that have caught the public's eye and policymakers' attention include the Isle de Jean Charles in the Louisiana Bayou and the Village of Newtok in Alaska, where daily life is becoming more difficult because of changing environmental conditions.

Indeed, most of the people currently dealing with climate change-induced relocation are Native Americans and Alaska Natives living close to coastal resources. As they plan for and undertake their moves, these communities are at the cutting edge of challenging legal and policy issues, particularly those involving land acquisition, governance, rights to evacuated property, and funding.

Community history adds a layer of complexity to all of this. Native Americans and Alaska Natives vulnerable to sea level rise may live close to coasts because of the cultural and economic importance of coastal resources or because the federal government forcibly settled them on tracts of land that were much smaller and more marginal than their original homelands. In this way, the circumstances and options for land acquisition and governance by tribal entities reflect the particularly strained history and political relationship between these communities and the federal and state governments of the United States.

There are three types of tools to acquire and govern land to relocate a community: legal, policy, and corporate. Legal tools include litigation of unresolved claims to land, lawsuits based on theories of negligence or



Alaska Native Village of Newtok.

*Credit: Newtok Planning Group, Department of Commerce, Community, and Economic Development, State of Alaska.*

takings, legislation to effect an exchange for land to serve as a relocation site, and easements or covenants in deeds to individual land ownership. Policy tools include federal assistance programs, such as a federal disaster declaration, grant or loan program, or housing buy-out. Finally, corporate tools include community-based for-profit or nonprofit entities organizing to generate revenue for land acquisition and to distribute and manage communally held land and housing for the benefit of its members.

The following pages outline some of the most promising legal and policy tools to support climate relocation efforts. Residents of threatened communities, policymakers at all levels of government, professional consultants, members of nonprofit organizations, and others seeking to assist in these efforts may carefully study and consider them as they choose their approach. By creatively adapting and combining these tools, it should be possible to develop workable strategies for land acquisition and governance that achieve multiple goals, including protecting people and property in the short term, promoting climate resiliency over the long term, and maintaining important cultural and economic assets.

*Government officials, researchers, and community members are working to understand exactly how climate change will induce or influence human migration, displacement, and relocation of communities. Human **migration** is the movement of people from one location to another for the purpose of permanent settlement and often to obtain desirable living conditions. The impacts of climate change are also a factor in seasonal patterns of human migration. **Displacement** is the forced movement of people from a location due to one or several factors. These factors are often broad categories that include disaster, including the impacts of climate change; political or armed conflict; and development. Finally, **relocation** is the planned process of leaving a fixed settlement for another permanent settlement, which may be induced by one or several factors, including the impacts of climate change.*

Past and ongoing relocation efforts in the United States highlight a number of specific strategies that communities may want to consider for the purpose of acquiring land for relocation. They include the following:

#### **Acquisition Strategies for Any Community**

- Financing for relocation is a critical element. Communities of all types can seek to form corporate entities in order to facilitate acquisition of communal land for relocations. Homeowners' associations and community land trusts are two types of nonprofit corporations that permit private membership, can generate revenues, and are empowered to purchase land.
- Communities of all types can also seek to obtain both government and commercial loans and grants to fund acquisition of land for community relocations. Although current federal funding is inadequate to the need, some grants are available. In addition, most

commercial banks offer loans and financing options for purchase of lands. Nonprofit or tribal lending entities may offer more favorable financing options for communities and tribes seeking loans to purchase land for relocation.

### Acquisition Strategies for Federally Recognized Tribal Communities

- Federally recognized tribes have taken advantage of their sovereign status to generate sizeable tax-exempt revenues to purchase and reclaim their traditional lands. They may also generate revenues through taxation of reservation lands and through tribal business enterprises.
- Federally recognized tribes may also lobby members of Congress to pass legislation that conveys land to the tribe for its relocation. The federal government is the largest landowner in the United States; and Congress has substantial authority over more than 600 million acres.
- Federally recognized tribes may seek to consolidate fractionated lands on existing reservations in order to acquire land suitable for relocations. Tribes can employ estate planning in order to avoid further fractionation of lands that pass from an owner who dies without a will.
- Tribes may also litigate land claims that may serve in part to support acquisition of lands necessary for community relocations. Tribes have litigated against public and private entities in order to reclaim dispossessed lands.

A number of tools have proven useful to communities wishing to retain connections to lands from which they are relocating:

- For some communities, individual and communal ownership of certain fixed resources on prior lands, such as minerals or timber, is critical, because the resources are an important economic asset.
- Communities also have legal avenues to continue access and use of land once they have given up ownership interests in order to complete their relocation. They may seek easements or other non-possessory interests as part of negotiations to sell property or to effect a land exchange.
- In some cases, Native communities may already have legal rights to harvest natural resources or access lands they do not own. Historic treaties between tribes and government often include provisions preserving the right of tribal members to access and use their traditional lands to gather wild foods, hunt, and fish for subsistence.
- Communities that seek legislatively approved land exchanges for relocations can also seek to negotiate rights to land they give up in the exchange.



*While the resources and expertise that federal agencies already provide are critical to evaluating and developing relocation sites, they are insufficient to meet current demands, much less the demands that are on the horizon with millions of other U.S. residents facing the need to relocate.*

Another important factor for communities forced by climate change to relocate is their ability to maintain governance and control over their new sites.

- Communities may need to assert control over individually owned properties in order to coordinate an orderly and predictable relocation. Communities can seek to govern land-use, development, and ownership by placing legal conditions, such as covenants, on property deeds. Community organizations may place conditions in deeds before conveying property to individual members as part of the process of relocation.
- Individual owners can be encouraged to place conditions in their deeds. For example, conservation easements can provide tax benefits to individual owners where communities seek to prohibit undesirable development.
- Communities may include restrictions on how or whether an individual owner may use or convey their property interest. For example, communities may seek to acquire property in the long run by conveying to purchasers only a lifetime ownership interest or by including right-of-first-refusal in the purchase contract.
- Communities can incorporate as cities or towns in order to empower them to control and plan for relocations.
- Tribal governments can exert sovereign authority, including imposition of land-use restrictions, for communally and individually owned land held in federal trust for the tribe.

Community groups cannot find and adopt these solutions alone. They need the support of the federal government, state governments, and nonprofits. While the resources and expertise that federal agencies already provide are critical to evaluating and developing relocation sites, they are insufficient to meet current demands, much less the demands that are on the horizon with millions of other U.S. residents facing the need to relocate. Ramping up resources and expanding policy development now will have the dual benefit of helping some of the most vulnerable communities today while preparing for others' needs in the future.<sup>1</sup> States, too, must protect their residents, and they can respond more quickly. State governments can create new or adapt existing state laws, policies, and programs for land use. States can also fund technical assistance and community-level capacity-building programs. In most cases, states own public lands that they can use for relocation. Nonprofit organizations can work directly with community leaders to show them how to access existing public resources and advocate for crucial new programs for their specific needs.

Climate relocation achieves a vital objective when a community is relocated away from the threat of climate impacts before it is struck by disaster. In the absence of a catastrophic event, successful climate relocation also works to



prevent or mitigate other physical and nonphysical harms to community members. To achieve that, partners must recognize that the process of relocation does not end with the physical move. Rather, the needs of community members must be adequately supported in the long term, and partners must deliver services that are also informed by non-climate social and economic vulnerabilities and non-climate environmental stressors.<sup>2</sup> In addition, successful climate relocation requires a participatory process and meaningful choices for residents.

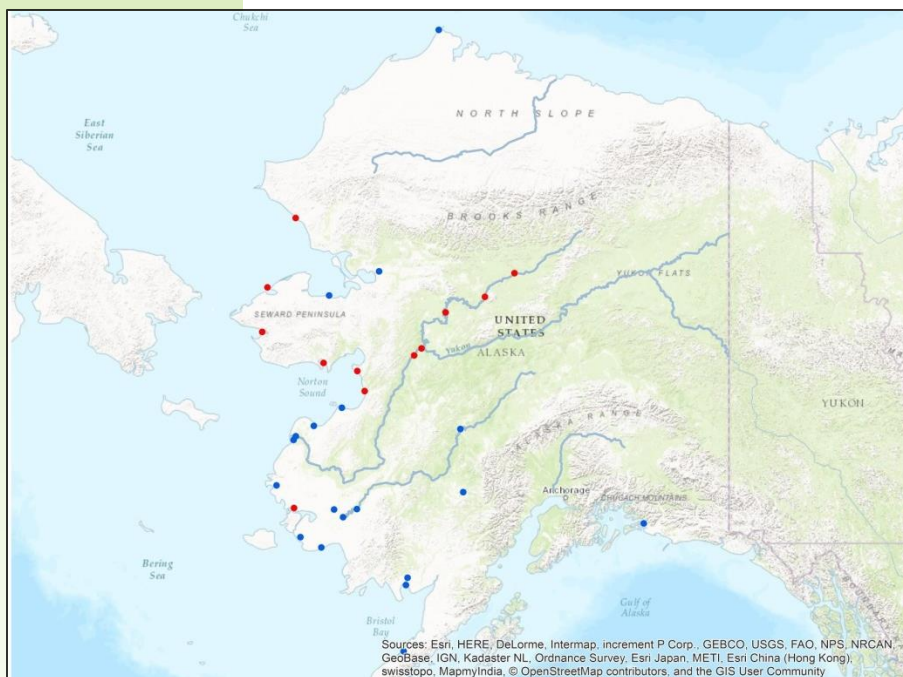
## Introduction

A community facing the prospect of uprooting and moving to higher ground faces many daunting challenges — where to go, who will move and when, what connections can be retained to the places and resources left behind? At the root of many of these questions lie legal and policy issues that people caught up in the transition must explore and adapt to their needs. Many property law and policy tools, as well as government programs have been used successfully in the past to relocate communities. However, with the rapidly growing need for relocation due to climate change, it is necessary to explore new and adapted laws and policies for land acquisition and governance. In doing so, stakeholders will have a chance to consider how property acquisition and governance tools can address existing vulnerabilities within the community, including stressors unrelated to

climate change, such as unemployment, lack of access to public health facilities, or substandard infrastructure.<sup>3</sup>

The first communities to relocate as a direct result of climate change are made up primarily of Native Americans and Alaska Natives, drawing attention to the complexities of large-scale climate-induced migration. The one-time federal relocation grant to the Isle de Jean Charles community in Louisiana and the recent request for federal disaster relief by the Alaska Native Village of Newtok are just the beginning of a wave of climate-induced relocation.<sup>4</sup> Federally recognized Native American and Alaska Native tribal communities already have specific property law

tools for acquisition and governance of land. These tools are the result of many generations of contradictory policies — beginning with programs aimed at forced dispossession, followed by some policies that supported — and many others that hindered — Native communities' efforts to reclaim and govern their homelands. And the tensions arising out of state and federal government decisions on whether to recognize a particular group as a Native community further complicate matters. For example, some states



The location of Alaska Native Villages that are in the process of climate relocation are illustrated in red, while those that are imminently threatened by climate impacts are highlighted in blue.

*Data source: U.S. Government Accountability Office, Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion, June 2009 (available at <http://www.gao.gov/new.items/d09551.pdf>)*

recognize tribal reservations of non-federally recognized tribes but do not cede authority over land use, taxation and other benefits of sovereignty.

This report identifies the legal and policy tools for community acquisition, ownership, and governance of property that can help communities thrive when land is lost or endangered by climate change, including by preserving ownership and connection to the evacuated land. Short summaries of the tools are paired with case studies, highlighting successful (and, sometimes, unsuccessful)

outcomes. No two relocation efforts are alike, so the array of tools provided below are intended to inform discussions about the best approach for particular communities.



Five communities in the contiguous United States are among the first to start the process of climate relocation. However, upwards of 13 million Americans will be at risk of displacement from a projected 0.9m rise in sea levels by 2100. Coastal counties pictured in the figure illustrate the relative risk of displacement. At the darker end of the gradient, some counties could experience displacement of as many as 231,336 individuals.

*Data source: Supplementary Data Table 2, Mathew Hauer, University of Georgia, from Hauer ME, Evans JM, Mishra DR. Millions projected to be at risk from sea-level rise in the continental United States. Nat Clim Change. 2016; advance online publication.*

## *Dispossession: A Legal History of Native Communities and Their Homelands*

The impacts of climate change can pose a heightened existential threat to Native Americans and Alaska Natives because of the place-centered nature of their cultural and religious identities and the particular indicators of tribal community health, such as cultural cohesion and use of natural resources.<sup>5</sup> The historical context of forced relocation of indigenous people in the United States shapes the future relocation opportunities for Native American and Alaska Native communities. There are many challenges, but at the same time, the historical land dispossession produced the unique and powerful treaty rights that some tribes may use to aid relocation efforts. Policymakers must be responsive to the intergenerational burden and harm of dispossession and forced resettlement in native communities.

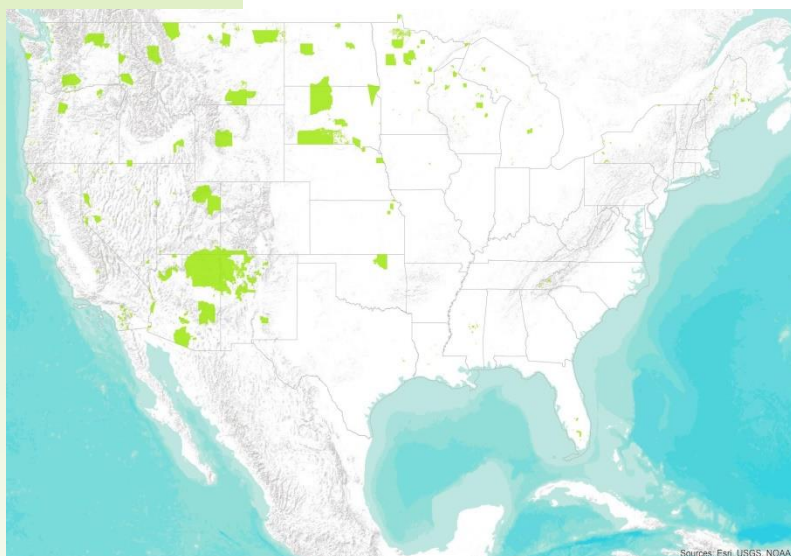
Forced dispossession and displacement of Native Americans and Alaska Natives from their lands began during European exploration and colonization of North America in the 16th century. In those 500 years, well

over a billion acres of land were coerced from tribes under threat of violence, encroachment, and catastrophic epidemic.

In the intervening years, U.S. law and policy have oscillated between constraining and relaxing opportunities for tribes to reclaim, possess, and govern their lands. The federal government also bears a unique legal trust-based responsibility to recognized Native communities, one that is distinct from the ethical or moral responsibility the government has to other vulnerable communities. The federal Indian Trust responsibility includes both a legal fiduciary duty and a “moral obligation” of care. But

because it is largely enshrined in case law of the U.S. Supreme Court,<sup>6</sup> the tools for land acquisition and governance available to federally recognized tribes can be complex and difficult to understand and implement.

The era of allotment, beginning with the passage of the General Allotment Act of 1887, forced communal ownership of lands to individual tribal members.<sup>7</sup> Hundreds of millions of acres of land were taken out of tribal control. Over time, much of the land was either sold to white settlers, or individual ownership interest was severely diminished as the land passed onto multiple heirs. Even today, tribes may not have control over land use in



Extent of federally recognized Native American reservation and off-reservation trust lands.

*Data source: United States Census Bureau, 2016*

some parts of their reservations, which can complicate the process of acquiring and managing land for relocations.

Alaska Native tribes and their land holdings are subject to a corporate system of ownership and organization. The Alaska Native Claims Settlement Act of 1971 settled longstanding land claims by Alaska Native communities by creating a set of regional and local Alaska Native corporations.<sup>8</sup> The act transferred title to land to these corporations, and tribal members serve as shareholders. This arrangement will provide unique opportunities and constraints on how Alaska Native communities may acquire and govern land for relocation.

*For a deeper look at the history of dispossession and its aftermath, see Appendix B.*

### **Federal Recognition of Native American and Alaska Native Tribes**

Federally recognized Native American and Alaska Native tribes (or “federally recognized tribes”) possess distinct political and legal rights that distinguish them from non-federally recognized and non-native communities. After the era of Indian termination of the 1940s through the '60s, many Native American tribes were able to lobby or litigate to reacquire federal recognition of their sovereign status. Still, many tribes were never officially recognized by the United States. Alaska Native entities, while private corporations in structure, can also benefit from federal recognition as unique tribal entities.

Federally recognized tribes are afforded certain legal authorities and opportunities by their status that distinguish them from tribal groups that lack federal recognition. Federally recognized tribes have a constitutional right to self-government and enjoy a government-to-government relationship with the United States. Many tribes have adopted their own forms of government and constitutions and can assert limited sovereign immunity. As a result, recognized tribes may have their own tribal justice systems, laws, and policies that govern ownership and administration of land within the jurisdiction of the tribe. Of special relevance to the issue of climate-induced relocation, federally recognized tribes are able to obtain specific grants or loans for acquisition and administrations of tribal lands from the federal government, where non-federally recognized tribes or non-native communities are ineligible.

Some non-federally recognized tribes have obtained official recognition from the states in which they reside. However, state recognition does not bring the same sovereign status as federal recognition. State-recognized or unrecognized tribes are often incorporated as nonprofit entities. These tribes are subject to the diverse federal and state laws that govern

*Even today, tribes may not have control over land use in some parts of their reservations, which can complicate the process of acquiring and managing land for relocations.*

acquisition and ownership of land by non-native entities. As a result, non-federally recognized tribes are limited by many of the same constraints and opportunities as non-native communities for acquisition of land for relocation.



## Acquisition: Property Tools and Policies for Ownership of Sites to Relocate Communities

Communities faced with the prospect of climate change-induced relocation (or “climate relocation”) are likely to need new land. The communities now grappling with relocation live on low-lying islands and coastal land, but very few own or have access to land at higher elevations that is both in reasonable proximity and suitable for relocation. As a result, Native and non-native communities alike need to develop legal strategies for acquiring new land.

To date, most climate relocation efforts have followed a recognizable progression.<sup>9</sup> First, severe risks turn into actual harm from the impacts of climate change. Coastal erosion and flooding, for example, may damage or destroy such critical infrastructure as roads or sewage systems that were not designed with climate resiliency in mind. Next, careful study of environmental impacts and rigorous climate change projections may suggest that there is only a limited time before the area is entirely destroyed or rendered uninhabitable. Then the focus turns to the emotionally, fiscally, logistically, and legally difficult question of whether to relocate. And if the community can agree to move, they then face the arduous and intensive work of evaluating a prospective relocation site, accessing funding and coordinating development, and managing the relocation of households and their long-term resettlement.

Summarized below are seven tools that communities can employ to acquire new land, including generating money to purchase land, obtaining it by legislative act, and accumulating it through other legal mechanisms like estate planning and litigation. Many tribes have time-tested and multi-faceted strategies for acquisition and consolidation of tribal lands. In the decades that followed the era of termination, federally recognized tribes repossessed more than 7.5 million acres of land, an area equivalent to one-and-a-half times the area of Massachusetts.<sup>10</sup> Those faced with the prospect of climate change-induced relocation may adopt one or even a combination of the strategies described below.



Isle de Jean Charles community of Louisiana.

*Credit: Karen Gabois, licensed under Creative Commons 4.0.*



*Appendix C describes the considerations that go into the process of assessing land for its suitability as a site for relocation.*

### **Generating Revenues to Purchase Lands**

To finance land purchases and coordinate relocation, communities may explore a variety of opportunities for generating revenue. Federally recognized Native American and Alaska Native tribes have taken advantage of their sovereign or corporate status to generate sizeable revenues to purchase and reclaim their traditional lands. They can tax reservation lands, for one, and they can generate revenue through tribal business enterprise. Because recognized tribes are exempt from many federal laws and taxation, tribal enterprise can often generate enough revenue to purchase large tracts. Tribal enterprise is diverse and includes resource extraction, manufacturing, and expert consulting, among other goods and services. Some enterprises, like timber harvesting or mineral extraction, require acquisition of land but can also generate revenues to fund further land purchases. Of course, when considering resource extraction or other development activities, communities need to be mindful of exacerbating the risks and impacts of the climate and environmental factors that drive relocation. Timber and mineral harvesting, for example, run the risk of exacerbating erosion, land subsidence, and minimizing storm barriers, and harvesting timber, especially if not done sustainably, can contribute to climate change itself.

Non-federally recognized tribes or non-native communities can also use corporate entities, such as businesses or community land trusts, to generate funds for relocation.<sup>11</sup>

### *Alaska Native Corporation Helps Relocate Community Displaced by Disaster*

The Alaska Native village of Chenaga was once the longest continuously occupied site in the Prince William Sound region of southern Alaska. For hundreds of years, Chenaga Island was home to a community of Chugach Alutiq natives who relied on rich natural resources and fisheries to sustain their traditional subsistence culture and lifestyle. On March 27, 1964, a tsunami triggered by a massive earthquake suddenly devastated the village. More than a third of the 86 members of the Chenaga community, many of them children, perished. Apart from the community schoolhouse and a one home, the entire village was destroyed. The Chenaga survivors were immediately displaced miles from their historic home to other Alaska villages and towns, such as Cordova and Tatitlek.

Years later, through the passage of the 1971 Alaska Native Claims Settlement Act (ANCSA), the residents of the former Chenaga village collectively recovered legal ownership to more than 76,000 acres of their historic homelands, which originally had been seized by the government. In 1974, the residents formed the Chenaga Corporation, an Alaska Native business corporation that ANCSA requires for acquiring and holding title to the tribe's historic homelands. Former Chenaga residents began planning a new village site in 1977 on Evans Island in Prince William Sound. The Chenaga Corporation and the Chenaga IRA Council, the village's federally recognized tribal government, worked collaboratively with federal partners to fund and build the new village site, named Chenaga Bay. Former Chenaga residents began relocation to their new village in 1984.

Twenty-five years after the tsunami destroyed the village of Chenaga, the Exxon Valdez oil spill devastated Prince William Sound and crippled the vital commercial and subsistence fisheries relied upon by residents of Chenaga Bay. On behalf of the tribal members and shareholders, the Chenaga Corporation later joined the Exxon Valdez Oil Spill Trustee Council Habitat Restoration Program and transferred ownership of a portion of tribal lands to state and federal partners in exchange for \$34,000,000.

Leveraging the compensation and other resources, the Chenaga Corporation has become one of the most financially successful Alaska Native corporations, providing services for lucrative federal contracts and generating billion-dollar revenues in the process. As a result, the corporation has been able to invest a portion of its profits to continue to develop and strengthen the small Chenaga Bay village. Today, the village enjoys reliable energy infrastructure, a medical clinic, an airport and ferry service, restored commercial fisheries, and a state-of-the-art disaster response system.<sup>12</sup>

*While federal funding is widely considered inadequate to meet the existing need, several agency loan and grant programs are available to recognized tribes, including, for example, the HUD Indian Community Development Block Grant Program and the USDA Indian Tribal Land Acquisition Program.*

### Entering Tribal Lands into Federal Trust

Entering land into federal trust can be useful for tribes planning a relocation because it permits communal ownership and control over how the land is used. Recognized tribes have the right to enter landholdings into federal trust for governance and administration by the tribe. Land in federal trust cannot be conveyed to non-native individuals or entities, thus ensuring permanent tribal ownership. Land held in trust is also eligible for specific federal funding opportunities that support tribal development and administration. Recently, federal rules were changed to again permit recognized Alaska Native entities to apply to enter land into federal trust.<sup>13</sup>

### Obtaining Grants and Loans to Purchase Lands

Federally recognized tribes can pursue government and commercial loans and grants to fund land acquisition for community relocations. While federal funding is widely considered inadequate to meet the existing need, several agency loan and grant programs are available to recognized tribes, including, for example, the HUD Indian Community Development Block Grant Program and the USDA Indian Tribal Land Acquisition Program.<sup>14</sup> Federal grants or loans can restrict purchase of land outside of designated reservation areas, which may pose a challenge to tribes that require relocation of communities outside of reservations.

Tribes can also seek commercial loans or grants from for-profit and not-for-profit lending institutions. Most commercial banks offer loans and financing options for real estate purchases. Historically, tribes and their members have had difficulty obtaining commercial loans, partly because lenders face a risk of being unable to recover if a borrower defaults, given that tribal lands are held in federal trust.<sup>15</sup> However, the Bureau of Indian Affairs through its Loan Guarantee Program, along with the Department of Housing and Urban Development (HUD), have provided assistance in the form of loan insurance or interest subsidies to some tribes who do not qualify for conventional financing.<sup>16</sup>

Nonprofit or tribal lending entities may offer more favorable financing options for tribes seeking loans to purchase land for relocation. For example, the Blackfeet Nation has used its own bank to help tribal members obtain loans to purchase land within its reservation.<sup>17</sup> The Indian Land Capital Company, a nonprofit lending institution, was founded specifically to help tribal governments acquire land.<sup>18</sup>

### Obtaining Land Grants or Exchanges through Federal Legislation

Federally recognized tribes can also lobby Congress to pass legislation that conveys land to the tribe for relocation. The federal government is the largest landowner in the United States, and Congress has substantial authority over more than 600 million acres. In Alaska, tribes may need land exchange legislation in order to acquire suitable relocation sites because the

Alaska Native Claims Settlement Act abrogated most outstanding land claims.

Some tribes that had their sovereignty terminated in the mid-20th century have reclaimed some of their lands through legislation that restored federal recognition. Other tribes have obtained land through laws intended to settle longstanding disputes.<sup>19</sup> In 2012, for example, Congress passed the Quileute Indian Tribe Tsunami and Flood Protection Act. The law was intended to settle a longstanding dispute between the tribe and the National Park Service, transferring 785 acres of Olympic National Park to the tribe to help it relocate away from the threat of rising sea levels, coastal erosion, and catastrophic tsunamis.<sup>20</sup>

### *Hoh Indian Tribe Secures Legislation to Recover Homelands for Village Relocation*

The Hoh Indian Tribe, a small and isolated community on Washington's Olympic Peninsula, has successfully obtained lands to relocate its entire tribe away from the hazards of rising sea levels, coastal erosion, and the threat of catastrophic tsunamis. Hoh Village, with only 130 members and 30 households, sits upon a single square mile of tribal reservation wedged between the Hoh River and Pacific Ocean.

The entire reservation, including Hoh Village, also sits within federally designated 100-year flood and tsunami risk zones. All of the homes and tribal facilities are vulnerable to climate change impacts, including sea level rise and storm surge. In fact, flooding and storm surge have already damaged infrastructure and caused extensive coastal erosion, washing

almost a third of the tribe's reservation lands out to sea.

To make matters worse, because the tribe is located within the federal flood zone, it is ineligible for a variety of federal aid programs, exacerbating the tribe's physical and economic vulnerability. The tribe cannot receive federal assistance to construct reinforcements against rising tides and erosion or to build new facilities to address high levels of unemployment (70 percent) and serious shortages in housing and childcare services.

Despite its small size and vulnerability, the tribe has successfully worked with Washington

state officials and federal lawmakers to acquire the land necessary to relocate Hoh Village to higher ground. In 2010, Congress enacted the Hoh Indian Tribe Safe Homelands Act, which puts into trust more than 434 acres of upland non-federal lands acquired by the tribe, as well as a connecting corridor of 47 acres to permit access to the tribe's upland acreage.

The State of Washington has also supported the tribe's effort to relocate, including, for example, transferring ownership of 160 upland acres of state land to the tribe and awarding a grant of \$623,000 to permit the tribe to build an emergency response center that will serve both tribal members and the surrounding community.<sup>21</sup>



Sandbags surround the tribal office of the Hoh Indian Tribe.

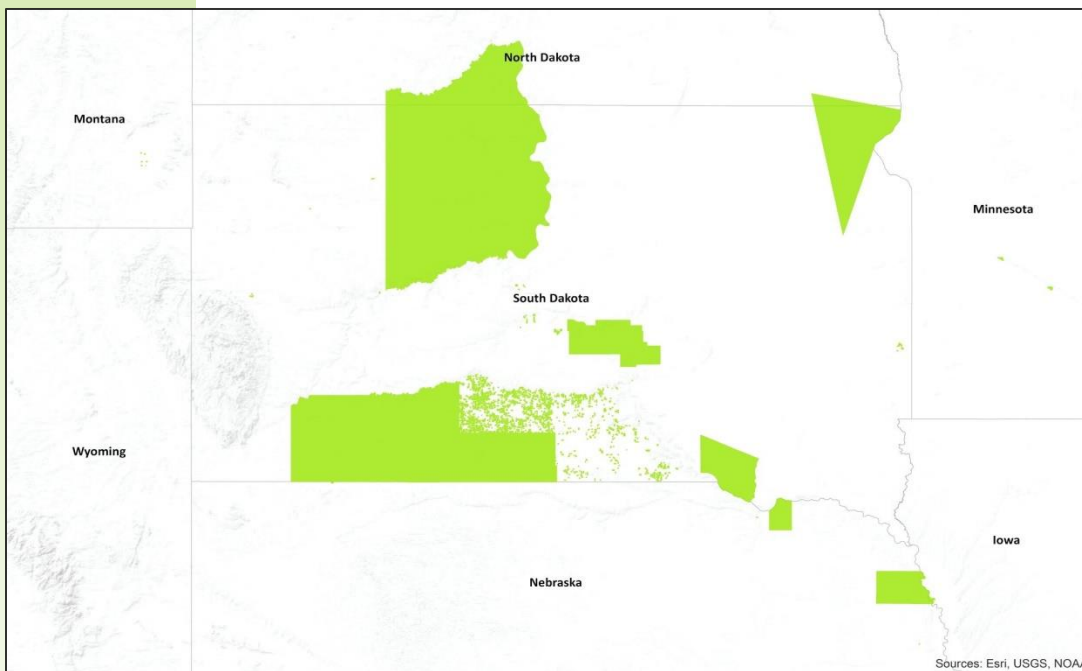
*Credit: AP Images*

### Using Estate Planning and Land Exchanges to Acquire Land

Federally recognized tribes can consolidate fragmented lands on existing reservations using estate planning tools, in order to acquire enough contiguous land suitable for community relocations.<sup>22</sup> The goal is to prevent legal and logistical problems that arise when a landowner dies without a will. An individual Native landowner can create a will that passes complete ownership to a single heir or even the tribal government. The Minnesota Indian Estate Planning Project, for example, is a grant-funded initiative that provides free estate planning services for members of four Minnesota tribes in order to produce wills that will help consolidate tribal lands.<sup>23</sup> Some tribes have also developed exchange systems for limited ownership interests in order to consolidate and make trust lands more useful for tribal members.

*Rosebud Sioux Tribe uses land trust to acquire and consolidate tribal homelands while supporting land use by tribal members*

Many members of the Sicangu Oyate live on the Rosebud Indian Reservation in South Dakota and are enrolled with the federally recognized Rosebud Sioux Tribe. The reservation encompasses the entirety of Todd County, and a third of the tribe's landholdings include off-reservation trust land in four adjoining counties. In all, more than 21,000 people live on nearly 2,000 square miles of the tribe's reservation trust lands. But the Sicangu Oyate lay historical and treaty claim to a much larger area of land.



There are numerous and isolated off-reservation tracts held in federal trust by the Rosebud Sioux Tribe in south-central South Dakota.

*Data source: U.S. Census Bureau, 2016.*

Along with other bands of Lakota, the Sicangu Oyate were guaranteed extensive lands by the Treaty of Fort Laramie of 1868, which ended Red Cloud's War and established the Great Sioux Reservation.

The United States was unwilling to prevent

encroachment by white settlers, breaching the terms of the treaty and causing the Great Sioux War of 1876. Congress passed legislation that reduced the Great Sioux Reservation by half and established the boundaries of the Rosebud Indian Reservation in order to open vast lands to white speculators and homesteaders.<sup>24</sup> The original boundary of the Rosebud Indian Reservation included four counties and a portion of a fifth. With the passage of the General Allotment Act, land sales and seizures greatly reduced the size of the reservation over the following decades.

Despite the staggering loss of land, the Rosebud Sioux Tribe is responsible for one of the longest lasting and most successful efforts to recover and consolidate tribal land. After passage of the Indian Reorganization Act, the tribe had the legal means, if inadequate financial support from the United



States, to govern, reacquire, and consolidate its original treaty lands. In 1943, the tribe chartered the Rosebud Tribal Land Enterprise (RTLE). To address the problem of trust-allotted land with too many owners, the RTLE acquires divided ownership interest from Native individuals in exchange for stock certificates and consolidates the ownership interests in each tract. Tribal members can then exchange the certificates for cash or for consolidated parcels large enough for homes, farming, or businesses.

Starting with 16,000 acres, the RTLE has used loans and revenues from leasing to purchase thousands of acres each year. The RTLE has recovered well over 900,000 acres of the tribe's original 3.2 million-acre reservation, and most parcels are owned in full by the tribe with consolidated interest. The RTLE ensures consolidation of ownership by the tribe and its members by restricting transfer of certificates by tribal members and non-members alike. Members may only transfer certificates to individuals, such as a single heir. Non-members can sell for cash and hold only a lifetime interest in certificates, meaning that ownership reverts to the tribe upon their death. Importantly, the RTLE uses its legal tools and policies to support the continuing cultural connection to and use of tribal homelands by tribal members while disincentivizing sale of individual interest to non-members for quick cash payments.<sup>25</sup>

*Legal claims of negligence or takings against government for failure to prevent climate harm have not been tested but could become a viable tool to assist communities.*

### Reclaiming Land through Litigation

Another way tribes can reclaim lands suitable for climate-induced relocation is to litigate. In instances in which tribes find that such land is subject to historical claims, they may sue public or private entities to reclaim dispossessed lands, including lands conveyed to non-natives in violation of the Indian Nonintercourse Act.

In one example from 1976, the Mashantucket Pequot Tribe filed suit to reclaim 800 acres of reservation land that was sold by Connecticut. The tribe settled with the United States, which provided the tribe \$900,000 to purchase reservation lands.<sup>26</sup>

The *Cobell* class-action settlement is another notable case. The suit alleged that the United States breached its duties through improper management of lands held in trust for tribes and individuals, which was largely the result of federal allotment policy. Congress approved settlement of the case with passage of the Claims Resolution Act of 2010.<sup>27</sup> In part, the settlement provides for a \$1.9 billion fund to purchase fractionated ownership interests from tribal members and return the land to tribal ownership.<sup>28</sup>

### Takings and Negligence Lawsuits Provide Limited Value

When government agencies fail to protect localities from climate destruction, communities can consider negligence or takings lawsuits against the government to hold governments accountable for failing to act. Legal claims, if successful, could provide monetary compensation to community members and property owners that could help finance the purchase or development of new land for relocation.

Legal claims of negligence or takings against government for failure to prevent climate harm have not been tested but could become a viable tool to assist communities.<sup>29</sup> Negligence lawsuits require proof that a legal duty is owed by the government and that the government failed to take reasonable measures to prevent foreseeable harm to residents. These legal elements are complicated by climate factors, including questions of what exactly is reasonable and foreseeable given the scope and uncertainty of social and environmental impacts of climate change.<sup>30</sup> On the takings side, property owners can attempt to sue federal, state, and/or local governments for failing to take action to protect private property through legal claims known as passive takings or inverse condemnation.

Lawmakers and agencies must understand that negligence and takings tools do not present a legitimate alternative to the resources and proactive policies and programs that are needed to assist relocation communities. Rather, the duty to prevent climate harm and disaster, which is implicated by negligence and takings law, should compel government to expand and enhance policies that support land acquisition for relocation communities. Agency partners must work to avoid any situation where a community is

displaced by climate disaster and is then stuck trying to fund land acquisition using litigation. Therefore, negligence and takings should be narrowly employed by relocated communities to obtain compensation that can be used toward paying down the cost of loans used to purchase and develop land for relocation.

As with other litigation strategies, negligence and takings lawsuits are expensive and by no means assured of success. The law of negligence is limited in several significant ways for relocation communities. Significantly, courts do not currently recognize a broad public duty to prevent harm from the impacts of climate change.<sup>31</sup> Another major limitation in this context is the requirement of actual harm. This could force relocation communities to endure a disaster before bringing a successful lawsuit for compensation. The legal tool is further limited by laws that make the government immune to certain types of claims and plaintiffs, which could include certain claims related to climate change. Finally, there is also the possibility that a local government may be the only entity found liable for negligence and be unable to provide needed compensation.

Like negligence, the complexity of climate change impacts makes takings lawsuits difficult to implement.<sup>32</sup> Similarly, takings law typically requires actual harm to property and use before a landowner can bring a lawsuit; however, anticipatory litigation may be possible. Unlike negligence, takings is a constitutional law claim that is not typically prohibited by immunity laws. In some cases, landowners can use takings lawsuits successfully to obtain compensation for government inaction, including one example where a property owner sued a state for failing to adequately prevent water pollution that had ruined use of her lake.<sup>33</sup>

### Using Nonprofit Corporations to Acquire Lands

Non-native or non-federally recognized Native communities can form corporate entities to acquire communal land for relocations. Homeowners' associations and community land trusts are two examples of nonprofit corporations that permit private membership and have legal authority to purchase land.

A homeowners' association is a nonprofit organization created by a residential developer for the purpose of enforcing restrictions on land use and for sharing management of common amenities within the development. It consists of dues-paying homeowner members. The community land trust is also a nonprofit organization created by members who seek to acquire land that is leased to provide affordable housing and is developed to meet the needs of residents.

Such corporate models are valuable tools for a number of reasons. First, they can leverage greater collective bargaining power through their members than individual or unorganized homeowners. For example, many purchasers

can negotiate lower unit costs by coordinating purchase of larger tracts or together can obtain more favorable financing from lenders. Community land trusts, in particular, have been widely adopted because they can lower the cost of residential or commercial property ownership and development through collective ownership of the underlying land.<sup>34</sup> And both types of corporations can generate revenues, including revenues from leasing land to members, which may be used to purchase new lands suitable for relocation.

#### **Obtaining Federal Grants to Acquire Lands through Municipal Governments**

Municipal governments have also taken advantage of federal grant and loan programs that permit acquisition of new property for relocations. The Federal Emergency Management Agency (FEMA) and HUD make grants to state and local governments for post-disaster buyout programs.<sup>35</sup> Buyouts target homes and buildings affected by disasters, especially floods, and provide owners with payments that are greater than what they could obtain in the real estate market. Federally funded buyout programs may be a viable strategy for coordinated relocation of communities.

In order to facilitate successful community relocations, buyout programs can adopt strategies and policies that encourage owners to sell properties in groups and also purchase new homes and businesses in areas designated for relocation. That said, the strategy has significant limitations. Federal funding through the Flood Mitigation and Community Development Block Grant programs, though substantial, must be matched by the municipality, and funds available before serious disasters are limited. In addition, many communities, including some threatened Alaska Native villages facing relocation, are ineligible for these funds because they lack incorporated municipal governments.<sup>36</sup>

## Preservation: Property Tools and Policies to Retain Ownership of Evacuated Sites

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At both an individual and group level, people's identity is deeply rooted in the history of the places they inhabit and the places they have inhabited historically. Relocated communities may need continued access to or ownership of evacuated sites to maintain their identity and overall well-being. For instance, many Native communities identify certain spaces as sacred and engage in place-based ceremonies that are critical to their community identity and well-being. In a more material sense, Native and non-native people and communities often own resources that are important for their economy, such as mineral or timber resources. Different legal regimes are available for both possessory ownership (i.e. owning the land or resources on it) and nonpossessory interests (i.e. having a legal right to access and even use land for specific purposes). Four examples of those regimes follow.

### Possession of Mineral, Timber, and Other Natural Resources

Communities planning for relocation often lack adequate resources to fund their moves while still ensuring future financial stability.<sup>37</sup> For some, retaining ownership of fixed resources such as minerals or timber is critical because the resources are a vital economic asset. Since timber and mineral rights can be split from rights to the land's surface, some communities may be able to abandon, sell, or exchange their land without losing all of the economic utility that goes with it. But this poses challenges where grant money or land exchanges envision full land swaps.<sup>38</sup>

### *Holdouts in Pennsylvania Coal Town Brave Smoldering Soils, Sinkholes, and Toxic Fumes to Keep Homes and Mineral Rights*

It was Valentine's Day 1981, and 12-year old Todd Domboski was walking through his small Pennsylvania coal town when he noticed smoke drifting up from ground below his neighbor's tree. Drawing closer to the curious sight, the ground below Todd suddenly gave way, with steaming mud sucking him up to his head. Todd was lucky enough to grab hold of an exposed tree root long enough for his cousin to hear his cries for help and pull him to safety. Only later did the residents of Centralia learn just how lucky Todd had been, as the sinkhole fell into an abandoned, smoldering mine shaft that released lethal carbon monoxide fumes.



Todd Domboski stands near sinkhole that exposed the underground coal fire in Centralia, Pa.

*Credit: AP Images*

The fire had actually started almost 19 years earlier when a refuse fire was left burning in Centralia's town dump. The fire ignited an exposed seam of coal, starting a slow, hot, and toxic blaze throughout miles of abandoned mine shafts and coal lodes beneath the town. The inferno has burned for nearly 55 years and is expected to continue for hundreds more. Not long after Todd's brush with death, the federal and state

governments began an effort to relocate Centralia's residents, a multi-decade project that would require

\$42 million in federal funding for voluntary buyouts, condemnation, and forced sales.

Hundreds of homes and structures were demolished by the state, and the borough's zip code was literally wiped from the map. As late as 2010, Pennsylvania endeavored to evict a few holdouts, but the remaining residents sued to stay in their homes. A settlement was reached in 2013 allowing the residents the legal right to spend the remaining years of their lives in Centralia. Some report that they still hold regular city council meetings in order to maintain local government and a communal claim to ownership of a billion-dollar lode of coal.<sup>39</sup>

### **Non-Possessory Interests to Evacuated Lands**

Communities also have legal avenues to retain access to and use of land after they have given up ownership interests to complete their relocation. One valuable tool is an easement, which they can obtain when they negotiate the sale or exchange of property. Easements may be useful for conserving the features of sites, for example historic structures, natural resources, or roadways for accessing adjoining parcels or natural areas. They may also be used to ensure continuing access to the land for community members. Other non-possessory reserved interests may include continued access and right to the property for subsistence or cultural purposes. When employing any of these tools, special attention should be given to whether the tool is enforceable; that is, whether it allows them to ask a court for compensation or an injunctive order in the event that a new property owner or agency prevents them from exercising their retained rights.

### **Treaty-Enforceable Rights that Preserve Connections to Evacuated Lands**

In some cases, Native communities may already have legal rights to harvest natural resources or access lands they do not own. Historic treaties between tribes and governments often include provisions preserving tribal members' right to access and use their traditional lands to gather wild foods, hunt, and fish for subsistence. The lands specified in the treaties include, or may be reasonably interpreted to include, the site where the community is located. However, the United States no longer makes treaties with tribes, so the tool is not useful for tribes that do not have historic treaties.

### **Legislated Rights to Preserve Connections to Evacuated Lands**

When pursuing legislation to carry out land exchanges for relocation, communities can negotiate rights to the land they give up in the exchange. Communities that value certain natural resources, like subsurface minerals, may want to offer only surface rights to their land in exchange for a relocation site. Similarly, communities that need access to specific built or natural resources, such as cemeteries or fishing grounds, can negotiate for rights to continued access. For example, in legislation authorizing a land exchange, Newtok negotiated a right to retain access to and use of evacuated community lands for subsistence purposes.<sup>40</sup>



## Governance: Property Tools and Policies to Manage Sites for Relocation

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Most relocating communities will want some governance structure to ensure that the needs and the integrity of the community are maintained during and following relocation. Community governance is especially important for effective management of critical infrastructure, including transportation and water treatment systems. Such governance regimes are also important to communal ownership of land and to effective regulation of individually owned properties for the benefit of the community, and may also be necessary for communities to become eligible for grants, loans, or land exchanges, which may be necessary to acquire relocation sites in the first place.

Three approaches to establishing governance structures through property tools and policies follow.

### Restrictions on Individually Owned Property to Support Relocation

Communities may need to assert control over individually owned properties in order to coordinate an orderly and predictable relocation. Communities can influence land use, development, and ownership by placing legal conditions in property deeds. Individual owners can be encouraged to create similar deed restrictions. One example of a policy that would support relocation efforts is an income tax benefit for individuals who establish conservation easements on their property that prohibit undesirable development (e.g., clear-cutting forests, draining and filling wetlands, development of low-density housing, or polluting industries).<sup>41</sup>

When a community-based organization leads a relocation effort by acquiring new land, it can place conditions in deeds before conveying property to anyone else. This is one way to ensure the relocation effort remains true to strategic plans. Communities can include restrictions on how or whether the individual owner may use or convey a property interest. For example, communities can maintain some level of control over how an individual parcel is used by conveying only a lifetime ownership interest, so that the property ownership reverts to the community after a person dies, or by including a right-of-first-refusal in the purchase contract.

### Governance through Private Nonprofit Corporations

Private nonprofit corporations also provide useful governance models for coordinating orderly and predictable community relocations. Such nonprofit structures as community land trusts and homeowners' associations have been widely adopted to regulate and support communities of all sorts. Communities can adopt their own rules through the nonprofit, including private membership. Community land trusts and homeowners' associations can also be used to acquire and manage ownership of communal property.

Both organizational structures can generate revenues to support community services through membership fees or by leasing land.

### *Communities in Puerto Rico Use Community Land Trust*

Sitting stagnant within the heart of San Juan, Puerto Rico, the Martín Peña Canal connects two of the city's largest water features, the San Juan Bay and San José Lagoon. These waters form part of the San Juan Bay Estuary, one of EPA's designated estuaries of national significance. The Martín Peña Canal, which spans nearly four miles, was once free-flowing, navigable, and fishable, but it is now choked with sediment, dredge spoil, and waste. It is an environmental nuisance and a health hazard. When its surrounding wetlands were destroyed by development, the canal lost almost all of its tidal flushing action and flow, and flooding in nearby communities has become more serious and frequent. The flooding causes raw sewage to inundate homes, resulting in high levels of waterborne illness and disease-carrying pests.

Eight urban villages, with a total of 30,000 residents, are crowded along the canal. Many poor, rural families migrated to the city during the Great Depression and the aftermath of the destructive 1932 San Ciprian Hurricane. They built precarious and poorly constructed homes in marginal mangrove

swamps along the canal. Few of the migrants had legal title to the land, and several thousand homes and businesses were built near the canal without any thought to septic systems. To this day, thousands of homes have no sewage treatment.

For decades, federal and Puerto Rican government agencies explored options to remediate and restore the canal. In 2002, the Puerto Rican government and U.S. Army Corps of Engineers proposed a plan to dredge the canal in order to restore

its natural flow and habitat, and, at the same time, to redevelop and install much-needed infrastructure in the adjoining communities. But the proposed project will require relocating more than 2,300 families located within the project's right-of-way. To address this concern, the agencies conducted more than 700 outreach events and meetings with the communities and local leaders in order to develop a comprehensive development and land use plan – one that accounts for residents' desire for equitable relocation of households within existing communities.



Martín Peña Canal at Israel and Bitumul communities where sewage flows into the channel.

*Credit: U.S. EPA.*

In 2014, community organizations and leaders formed a nonprofit corporation, Group of Eight Communities, Inc. (G-8), to serve as a coalition charged with protecting residents' interests and more effectively engaging public officials. That same year, the G-8 helped win the Legislative Assembly of Puerto Rico's approval of the Martín Peña Canal Special Planning District Integrated Development Act (Puerto Rico Law 489), which established two entities authorized to implement the government's canal and community rehabilitation project. The act chartered the Martín Peña Canal ENLACE Project Corporation (ENLACE) to implement the integrated development and land use plan. The plan includes projects related to housing and infrastructure, among other initiatives to promote social, economic, and cultural development within the designated affected communities. The law also requires ENLACE to engage G-8 in its work.

Law 489 also requires the government to provide legal title to the residents whose dwellings were built on public land, and the act established the Martín Peña Canal Community Land Trust (Trust). The Trust was created to collectively hold ownership to lands in order to help solve the problem of lack of individual legal title to dwellings and to

prevent the unfavorable displacement of residents by the canal rehabilitation project. The member-residents participate in collective decision-making for the Trust. By 2008, members had finalized regulations for operation of the Trust and were able to finally acquire title to occupied public lands from the governments of Puerto Rico and San Juan.

Shortly thereafter, newly elected lawmakers passed Puerto Rico Law 32, which reverted ownership of the lands to the government and repealed the Trust's authority to grant individual ownership to residents. This reversion of ownership had the potential to promote gentrification, which the community had feared all along, by incentivizing residents to sell their prospective ownership stakes to the highest bidders. The Trust lodged a legal challenge to Law 32 in federal courts, which proved unsuccessful.



Martín Peña Canal floods street and homes.

*Credit: U.S. EPA.*



Fortunately, the Trust was able to finally force repeal of Law 32 through political pressure and growing public opposition to the law.

The communities have made the Trust into a private entity in order to avoid



Satellite image of Martín Peña Canal and surrounding communities.

*Credit: U.S. EPA.*

future attempts by lawmakers to retake ownership because doing so would require significant compensation payments by the government. The Trust has worked to help relocate 500 families and is building homes on empty lots to accommodate relocation of as many as 1,000 more households. The Trust's housing work includes planned construction of some 450 environmentally

designed units to house families displaced by the canal project within the same communities.

The Trust has also secured the legal right for some 2,000 households to occupy property through collective ownership of community lands. While the Trust collects rental fees from members to achieve its own financial sustainability, it is able to control rental prices and has first right-of-refusal to purchase homes in order to maintain affordability for community members. Homeowners are also incentivized to maintain and make improvements to their homes because they can enjoy profits from sale of their homes through the Trust. For their tireless efforts and vision, the residents and members of the Trust were awarded the United Nations World Habitat Award for sustainable and equitable housing in 2015.<sup>42</sup>

### **Providing Communities with Self-Determination through Incorporation of Local Government**

Incorporating as a city or town can empower a community to control and plan for relocation. Incorporated local governments can often control land use and provide essential services. Criteria for incorporation vary by state and county but are often a function of the number of people in a given location. Once legally incorporated, communities can set regulations and zoning for land use and development that are more stringent than state or federal laws allow, and they can levy and collect taxes and receive government grants that may support such public services as housing and education.

## Recommendations and Conclusions

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*The federal government needs to provide adequately funded and procedurally appropriate opportunities to acquire and manage land for relocation. Federal agencies have the resources and expertise to match the extent and urgency of the threats to vulnerable communities.*

For communities facing relocation, no single tool or strategy for acquiring and managing land is likely to address all the various issues at stake. It is likely instead that some combination of tools, each deployed in ways mindful of local circumstances, will be required. Each legal opportunity, policy option, or grant program has benefits and limitations based on its particular purpose. The tools for land acquisition and governance also present particular constraints for communities related to the timeline and costs for implementation, which may prove unsuitable for the urgency of climate change-induced relocation. Importantly, non-federally recognized native and non-native communities are not eligible for several of the relocation tools described by this report. As a result, communities of any type may seek to combine multiple tools or adapt others in order to achieve their particular goals and needs for relocation.

The few communities that have made headway in acquiring land for relocation have adopted litigation and legislative strategies. However, other communities may conclude that they are unable to adopt these strategies or that the strategies are not workable for them because of the high costs and modest likelihood of success. Legal and legislative advocacy is typically a costly endeavor requiring work by attorneys and lobbyists, and initial success may also be met by lengthy legal challenges and appeals.

The relocation opportunities presented by the federal government to both native and non-native communities are inadequate. Federal policies and programs for relocation need to be adapted to better serve the many and growing number of communities facing dire threat and actual harm from climate change. Federal technical assistance and grant- and loan-making programs are not adequately funded or designed for current demand by communities challenged by relocation due to prospective climate change catastrophes.

The federal government needs to provide adequately funded and procedurally appropriate opportunities to acquire and manage land for relocation. Federal agencies have the resources and expertise to match the extent and urgency of the threats to vulnerable communities. As the largest landholder in the United States, the federal government also has access to affordable land and land management resources. The critical federal role is likely to grow as more native and non-native communities are threatened by growing climate impacts.

State governments also have a vital role to play in supporting land acquisition and governance strategies for relocation communities. With access to public lands and detailed land use data, states can work with their communities to help identify opportunities to acquire land for relocations. States also have the authority to create or adapt laws, policies, and programs



for land use that can serve the land acquisition and governance needs of relocation communities. States can budget their agency resources to provide communities with technical assistance for site feasibility studies and development. Finally, while federal funding opportunities may support only one portion of the community relocation process, states can direct sustaining support to communities to ensure the long-term success of resettlement.

Nonprofit organizations play a special role in supporting relocation communities with land acquisition and governance. Nonprofit partners are uniquely situated to provide pro bono legal and technical assistance to exclusively serve the best interests of communities. Nonprofits assist by providing unbiased legal and technical interpretation of options for land acquisition and governance for relocation. Nonprofit organizations also provide critical support in building capacity within communities and in empowering and amplifying the voices of community leaders to advocate for access to public and private resources for relocation.

In addressing the need for new and improved tools for land acquisition and governance, government and nonprofit partners should be guided by principles of equity, self-determination, and a duty to protect communities from avoidable harm. Partners should focus on developing policies that compensate for underlying differences in vulnerability, both within and between communities, while taking care to support any community that requires assistance, whatever the scope, to relocate safely and successfully. Government and nonprofits should offer and deliver services that are responsive and informed by a community's culture and its own institutions. Finally, that assistance must be provided through a participatory framework that acknowledges and supports a community's right to determine how and when to relocate.

## Appendix A: Methodology

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The purpose of this report is to broadly survey and analyze the available legal and policy tools for acquiring and managing land for relocation of communities threatened by climate change. To that end, the authors consulted primary sources for information about climate change and its impacts. The authors also consulted primary and secondary sources for documentation and information about communities undertaking relocations due to impacts from climate change, as well as historic community relocations due to other environmental factors. Finally, the authors examined primary and secondary source documentation to identify and characterize the property law and federal policies for communal land acquisition and governance. In doing so, the authors investigated the purpose of each particular law or policy and determined whether and how federally recognized tribes or other communities are eligible to adopt the law or policy.

## Appendix B: Dispossession – A Deeper Look

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### Historical Dispossession of Native American Lands

The United States used a variety of means to undertake and justify dispossession of Native American land. Under the colonialist theories of discovery and conquest, courts denied even the possibility that Native tribes could have held title to their original lands, a view that remains law to this day.<sup>43</sup> For many years, it was the policy of the United States to make treaties with tribes, usually entered into under duress due to violent conflict or illegal encroachment. Often the treaties would require cession of legal title to enormous landscapes in exchange for nominal payments and small, confined reservation areas where tribes were assured protection from encroachment and violence by white settlers. The U.S. Supreme Court also held that treaties made with other nations to acquire land that would become part of the United States effectively extinguished land title held by Native Americans.

Beginning in the 19th century, the United States used a variety of legislative means to dispossess Native Americans of their lands. Legislation forced tribes to leave their land and included, most notably, the Indian Removal Act of 1830, which set the stage for the violent removal of many southeastern tribes to the Territory of Oklahoma along the “Trail of Tears.” The policy of removal continued with the Indian Appropriations Act of 1851, which created the reservation system that served to both forcibly remove tribes from their homelands and then confine them to lands inadequate for their subsistence culture. U.S. policy took another turn with the passage of the Indian Appropriations Act of 1871, which prohibited further treaty-making or recognition of Native American tribes altogether.

### Allotment of Native American Lands Frustrates Tribal Sovereignty

The legacy of dispossession of Native American lands continued with the General Allotment (“Dawes”) Act of 1887. The act extinguished communally held title to reservation lands through grants of title of parcels to individual Native households, which were held in trust by the federal government. After parcels were allotted to each household, the remaining reservation lands were opened to non-native settlers, effectively creating a checkerboard of Native and non-native land parcels that prohibited cohesive Native communities. The immediate impact of allotment was dispossession of hundreds of millions of acres.

Tribal administration and ownership of allotted parcels is also severely complicated by fractionation of ownership. Upon death, title ownership transfers to each of the heirs of an allottee with a will, but the parcel is not divided, which can result in hundreds, even thousands, of common interests in a single parcel. As a result, large swaths of Native American land are unused or ownership interests are sold off to non-natives.

The era of allotment ended with the passage of the Indian Reorganization Act of 1934, but the problems of fractionation and non-native ownership persist today. The Indian Termination policy of the mid-20th century served not only to terminate the sovereignty of Native American tribes but also to dispossess tribes of millions of acres, many of which were sold by the government to non-natives. The Indian Relocation Act of 1956 also drove Native Americans off reservations, and many individuals sold off or lost ownership to reservation lands.

### **Historical Dispossession of Alaska Native Lands**

The historical dispossession of Alaska Natives from their lands resembles that of Native Americans in the lower 48 states. Russian exploration and enterprise in the 18th and 19th centuries were dominated by episodes of catastrophic epidemic, enslavement, and forced displacement of Alaska Natives. The United States purchased Alaska in 1867, and Alaska Native title was largely unsettled by Congress for decades. Alaska Native communities and companies, seeking rich and vast mineral and timber resources, disputed land title through litigation.

Court decisions in the early 20th century held that Alaska Native land claims could only be settled by the United States. The ruling restricted non-natives from acquiring land without involvement of the federal government.<sup>44</sup>

Congress enacted land grants to Alaska Natives to settle some land claims. The allotment policy of individual land ownership was adopted through passage of the Alaska Native Allotment Act of 1906. The Alaska Native Townsite Act of 1926 also allocated land to Alaska Natives residing in villages. The Composite Indian Reorganization Act for Alaska of 1936 extended the policies of communal tribal ownership and reservations and tribal land management of the Indian Reorganization Act to Alaska Natives.

The Alaska Statehood Act of 1958 allowed the state to acquire 105 million acres of unoccupied public lands. The authorization gave rise to numerous land disputes between the state and Alaska Native communities whose land claims had never been settled. The discovery of oil in Prudhoe Bay pressured the United States to resolve longstanding claims to the land underlying a proposed oil pipeline.

The Alaska Native Claims Settlement Act of 1971 extinguished Alaska Native land claims and adopted a corporate governance regime for Alaska Natives. In return, Alaska Natives received 44 million acres of land and total monetary compensation of \$963 million. The Act established formation of 13 Alaska Native regional corporations and over 200 village corporations to hold land title and receive the compensation payments. The regional corporations were granted subsurface mineral rights and village corporations granted surface rights to land. Members of Alaska Native corporations hold shares in the privately held corporations. Native Alaska communities and their lands can be governed by as many as three separate regimes, which include the

village native corporation, the traditional tribal government, and an incorporated municipal government.

## Appendix C: Assessing Suitability of Sites for Relocation

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As part of the process of acquiring land to serve as a relocation site, communities will study a prospective site's suitability for the community both in terms of its feasibility and its long-term sustainability. The few tribal communities that have studied relocation have commissioned both scientific study and community outreach in order to assess site suitability for relocation.<sup>45</sup>

Government agencies serve a critical role as partners to communities for the development and utilization of site suitability assessments for planned relocations. They bring technical expertise and resources that affected communities need in order to collect new data for proposed sites, synthesize existing data, and perform analysis of diverse datasets. For example, technical assistance from federal agencies such as the National Oceanic and Atmospheric Administration (NOAA), the U.S. Environmental Protection Agency (EPA), and the U.S. Geological Survey (USGS) is essential to developing geographically narrowed climate change projections and hydrological models for proposed relocation sites.<sup>46</sup> Agencies can help compile existing community knowledge and should rely on communities' traditional ecological knowledge, wherever possible, to deepen assessment of site conditions.

Site suitability assessment for relocation can examine both physical and nonphysical factors.<sup>47</sup> Communities and relevant agencies will want to consider the logistical factors of relocation, including, for example, the distance and terrain between the relocation site and the community's current settlement. High costs and other factors can hamper the relocation process and limit continued access to the historic settlement. For example, the Alaska Native village of Newtok struggles with high costs in accessing its relocation site for development because, while the distance is not great, travel over open water is treacherous and often restricted by foul weather.

Communities also scrutinize environmental features of the site to determine whether they support development of sustainable community infrastructure.<sup>48</sup> Before costly analysis of infrastructure, a study can consider whether or how quickly the prospective site may be subject to the same climate change impacts that threaten the community in its current location. For example, the Alaska Native village of Kivalina had to abandon plans for relocation to an identified site because community members discovered that it is subject to the same conditions of melting permafrost that threaten to upend homes in the community's current location.<sup>49</sup>

Environmental features of the prospective site must support the critical infrastructure needs of the community, including facilities for water and wastewater treatment, solid waste recycling and disposal, public health, education, housing, energy generation and transmission, and



transportation, among others.<sup>50</sup> The process of monitoring and assessing site suitability should be continuous and not synoptic. Therefore, the planning and implementation of new infrastructure should also be adaptive because climate and environmental factors are dynamic.

Communities can investigate and conduct outreach to members to ensure that a prospective relocation site is suitable for cultural purposes. Many of the Native communities faced with climate change-induced relocation practice traditional subsistence economies. For example, relocation planners in Newtok worked to select a site that not only serves the infrastructure needs of the community but also permits continued access to traditional harvest of berries and fish.<sup>51</sup> Traditional subsistence economies are particularly important, but not exclusive to, Native communities.<sup>52</sup> However, most communities derive ceremonial and ritual purpose from their physical location, whether that is a sacred space or sanctuary or a communal meeting ground.

## Endnotes

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<sup>1</sup> For example, non-native communities on Tangier and Smith Islands in the Chesapeake Bay may face the need to relocate in the coming decades due to sea level rise, storm surge, and land subsidence. See David M. Schulte, Karin M. Dridge and Mark H. Hudgins. (2015) Climate Change and the Evolution and Fate of the Tangier Islands of Chesapeake Bay, USA. Scientific Reports 5, 17890.

<sup>2</sup> Kaswan, Alice, Seven Principles for Equitable Adaptation (May 1, 2013). 13 Sustainable Development Law & Policy 41 (2013); Univ. of San Francisco Law Research Paper No. 2013-18. Available at SSRN: <https://ssrn.com/abstract=2259855>; Also [http://www.progressivereform.org/SustainableDevelopmentIssueAlert\\_Kaswan.cfm](http://www.progressivereform.org/SustainableDevelopmentIssueAlert_Kaswan.cfm)

<sup>3</sup> Kaswan, Alice, Seven Principles for Equitable Adaptation (May 1, 2013). 13 Sustainable Development Law & Policy 41 (2013); Univ. of San Francisco Law Research Paper No. 2013-18. Available at SSRN: <https://ssrn.com/abstract=2259855>; Also [http://www.progressivereform.org/SustainableDevelopmentIssueAlert\\_Kaswan.cfm](http://www.progressivereform.org/SustainableDevelopmentIssueAlert_Kaswan.cfm).

<sup>4</sup> U.S. Department of Housing and Urban Development, HUD Awards \$1 Billion Through National Disaster Resilience Competition, January 21, 2016 (available at [https://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2016/HUDNo\\_16-006](https://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16-006)). Rachel Waldholz, Obama denies Newtok's request for disaster declaration, January 18, 2017 (available at <http://www.alaskapublic.org/2017/01/18/obama-denies-newtoks-request-for-disaster-declaration/>).

<sup>5</sup> See Sarah Krakoff, American Indians, climate change, and ethics for a warming world, 85 Denv. U. L. Rev. 865; See also Jamie Donatuto, Eric E. Grossman, John Konovsky, Sarah Grossman & Larry W. Campbell (2014) Indigenous Community Health and Climate Change: Integrating Biophysical and Social Science Indicators, Coastal Management, 42:4, 355-373, DOI: 10.1080/08920753.2014.923140.

<sup>6</sup> See Seminole Nation v. United States, 316 U.S. 286 (1942).

<sup>7</sup> General Allotment Act, Act of Feb. 8, 1887 (24 Stat. 388, ch. 119, 25 USCA 331)

<sup>8</sup> Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 43 USC 1601-1624)

<sup>9</sup> Robin Bronen. Alaskan Immigration Justice Project. Climate-Induced. Displacement of Alaska. Native Communities. January 30, 2013, Brookings-Bern Project on Internal Displacement (available at <https://www.brookings.edu/wp-content/uploads/2016/06/30-climate-alaska-bronen-paper.pdf>). Also U.S. Government Accountability Office, Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion, June 2009 (available at <http://www.gao.gov/new.items/d09551.pdf>).

<sup>10</sup> Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations at 207 (W.W. Norton & Co. 2005).

<sup>11</sup> Greg Rosenberg & Jeffrey Yuen. Beyond Housing: Urban Agriculture and Commercial Development by Community Land Trusts, April, 2013, Lincoln Institute of Land Policy (<http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-rosenburg-yuen.pdf>).

<sup>12</sup> Chenaga Corporation, Faith Fortitude and Perseverance - The Chenega Story, (<http://www.chenega.com/history>).

<sup>13</sup> U.S. Department of Interior, Land Acquisitions in the State of Alaska 79 FR 76888, January 22, 2015 (available at <https://www.gpo.gov/fdsys/pkg/FR-2014-12-23/pdf/2014-30099.pdf>)

<sup>14</sup> U.S. Department of Housing and Urban Development, Indian Community Development Block Grant Program

([https://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/grants/icdbg](https://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/grants/icdbg)); U.S. Department of Agriculture, Indian Tribal Land Acquisition Program (<https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/native-american-loans/index>).

<sup>15</sup> 25 U.S.C. § 177

<sup>16</sup> U.S. Department of Housing and Urban Development, Section 184 Indian Home Loan Guarantee Program ([https://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/homeownership/184](https://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/184)).

<sup>17</sup> Theresa Carmody, Tribes Building Permanent Homelands, Tribal College Journal of American Indian Higher Education, November 15, 1995 (available at <http://tribalcollegejournal.org/tribes-building-permanent-homelands/>).

<sup>18</sup> Indian Land Capital Company (<http://www.ilcc.net/about-us/>).

<sup>19</sup> Indian Land Claims Settlements are codified at 25 U.S.C. ch. 19.

<sup>20</sup> To provide the Quileute Indian Tribe Tsunami and Flood Protection, and for other purposes., Pub.L. 112-97., enacted Feb 27, 2012 (available at <https://www.govtrack.us/congress/bills/112/hr1162>).

<sup>21</sup> Hoh Indian Tribe, Hoh Indian Tribe Safe Homelands Act ([http://hohtribe-nsn.org/?page\\_id=193](http://hohtribe-nsn.org/?page_id=193)).

<sup>22</sup> U.S. Department of Interior, Indian Land Consolidation Program (<https://www.bia.gov/WhoWeAre/BIA/ILCA/index.htm>). Also Indian Land Consolidation Act of 1983, Public Law 97-459 (96 Stat. 2517).

<sup>23</sup> Indian Land Tenure Foundation, Minnesota Indian Estate Planning Project (<https://www.iltf.org/grants/special-initiatives/minnesota-indian-estate-planning-project>).

<sup>24</sup> 19 Stat. 254, enacted February 28, 1877

<sup>25</sup> U.S. Department of Interior, Rosebud Agency (<https://www.indianaffairs.gov/WhoWeAre/RegionalOffices/GreatPlains/WeAre/Agencies/Rosebud/index.htm>).

<sup>26</sup> Mashantucket Pequot Tribe Indian Claims Settlement Act, Pub. L. 98-134, §1, Oct. 18, 1983, 97 Stat. 851.

<sup>27</sup> Merjian, Armen H. "An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar." Gonz. L. Rev. 46 (2010): 609.

<sup>28</sup> U.S. Department of Interior, Land Buy-Back Program for Tribal Nations (<https://www.doi.gov/buybackprogram/about/>).

<sup>29</sup> Maxine Burkett, Litigating Climate Change Adaptation: Theory, Practice, and Corrective (Climate) Justice, 42 Env'tl. L. Rep. News & Analysis 11144, 11156 (2012)

<sup>30</sup> Maxine Burkett, Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change (2013). 20 George Mason L. Rev. 775 (2013)

<sup>31</sup> Jennifer Klein, Potential Liability of Governments for Failure to Prepare for Climate Change. Sabin Center for Climate Change Law, Columbia Law School, August 2015.

<sup>32</sup> Christopher Serkin, Passive Takings: The State's Affirmative Duty to Protect Property, 113 Mich. L. Rev. 345 (2014)

<sup>33</sup> Litz v. Maryland Dept. of Environment, 131 A.3d 923 (Md. 2016)

- <sup>34</sup> James Meehan, The Community Land Trust As a Social Invention in Affordable Housing, Sept. 2013, Journal of Applied Social Science 8(2):113-133.
- <sup>35</sup> U.S. Department of Housing and Urban Development, Community Development Block Grant Disaster Recovery Program (<https://www.hudexchange.info/programs/cdbg-dr/>); U.S. Department of Homeland Security, Federal Emergency Management Agency, Property Acquisition Handbook for Local Communities ([https://www.fema.gov/media-library-data/20130726-1507-20490-4551/fema\\_317.pdf](https://www.fema.gov/media-library-data/20130726-1507-20490-4551/fema_317.pdf)).
- <sup>36</sup> U.S. Government Accountability Office, Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion, June 2009 (available at <http://www.gao.gov/new.items/d09551.pdf>).
- <sup>37</sup> U.S. Government Accountability Office, Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion, June 2009 (available at <http://www.gao.gov/new.items/d09551.pdf>).
- <sup>38</sup> Section 2(a), Public Law 108–129—NOV. 17, 2003 (<http://uscode.house.gov/statutes/pl/108/129.pdf>).
- <sup>39</sup> Sally Kalson, The New York Times Magazine, Slow Burn In Centralia, Pa., November 22, 1981 (available at <http://www.nytimes.com/1981/11/22/magazine/slow-burn-in-centralia-pa.html?pagewanted=all>).
- <sup>40</sup> Section 3(d), Public Law 108–129—NOV. 17, 2003 (<http://uscode.house.gov/statutes/pl/108/129.pdf>).
- <sup>41</sup> Land Trust Alliance, Income Tax Incentives for Land Conservation (<https://www.landtrustalliance.org/topics/taxes/income-tax-incentives-land-conservation>).
- <sup>42</sup> U.S. Environmental Protection Agency, Ongoing Projects in Caño Martín Peña (<https://www.epa.gov/urbanwaterspartners/ongoing-projects-cano-martin-pena>); G-8 Inc. CAÑO MARTÍN PEÑA, ¿Quiénes somos?, (<https://g8incpr.wordpress.com/%C2%BFquienes-somos/>); Building and Social Housing Foundation, Caño Martín Peña Community Land Trust, (<https://www.bshf.org/world-habitat-awards/winners-and-finalists/cano-martin-pena-community-land-trust/>).
- <sup>43</sup> *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955).
- <sup>44</sup> *United States v. Berrigan*, 2 Alaska 442 (1905); *United States v. Cadzow*, 5 Alaska 125 (1914).
- <sup>45</sup> The Newtok Planning Group has a wealth of technical assessments and site suitability reports available on the “Reports and Studies” section of the Group’s webpage (<https://www.commerce.alaska.gov/web/dcra/PlanningLandManagement/NewtokPlanningGroup.aspx>).
- <sup>46</sup> The U.S. Global Change Research Program, a collaborative interagency climate science initiative, presents regionally-specific climate change projections (<http://www.globalchange.gov/explore>).
- <sup>47</sup> E.g. Community of Newtok and the Newtok Planning Group, Mertavik Relocation Report, August, 2011 ([https://www.commerce.alaska.gov/web/Portals/4/pub/Mertavik\\_Relocation\\_Report\\_final.pdf](https://www.commerce.alaska.gov/web/Portals/4/pub/Mertavik_Relocation_Report_final.pdf)).
- <sup>48</sup> The Newtok Planning Group has a wealth of technical assessments and site suitability reports for infrastructure available on the “Reports and Studies” section of the Group’s webpage (<https://www.commerce.alaska.gov/web/dcra/PlanningLandManagement/NewtokPlanningGroup.aspx>).

<sup>49</sup> National Oceanic and Atmospheric Administration, U.S. Resilience Climate Toolkit, Relocating Kivalina (<https://toolkit.climate.gov/case-studies/relocating-kivalina>).

<sup>50</sup> Infra at 16. Also Quinault Indian Nation, Taholah Village Relocation Master Plan (available at <http://www.quinaultindiannation.com/planning/masterplan.html>).

<sup>51</sup> Community of Newtok and the Newtok Planning Group, Mertavik Relocation Report, August, 2011 ([https://www.commerce.alaska.gov/web/Portals/4/pub/Mertarvik\\_Relocation\\_Report\\_final.pdf](https://www.commerce.alaska.gov/web/Portals/4/pub/Mertarvik_Relocation_Report_final.pdf))

<sup>52</sup> The non-native communities of Tangier and Smith Islands in the Chesapeake Bay, mentioned elsewhere in this report, are supported in large part by the commercial fishing industry.