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# FULFILLING CLIMATE JUSTICE AND GOVERNMENT OBLIGATIONS TO ALASKA NATIVE VILLAGES: WHAT IS THE GOVERNMENT ROLE?

E. BARRETT RISTROPH\*

## ABSTRACT

Climate change has had significant impacts on lands and communities across the United States, and particularly on Alaska Native Villages (“ANVs”). These Arctic and sub-Arctic indigenous communities, which are often remote and rural, depend on the land and water for their nutritional and cultural survival. My research draws from 153 interviews and conversations with ANV residents and those who make or influence policy for ANVs, along with local, state, and federal plans and laws relevant to ANVs and climate change. I consider the current and potential role of the federal and Alaskan governments in assisting ANVs and other communities to adapt to climate change, as well as the role that ANVs themselves could take. In the interviews, I found general agreement that the federal and state governments have some responsibility to assist with adaptation. But this responsibility does not mean that a new overarching federal or state law or agency devoted to adaptation would be successful. There are already many laws that can facilitate adaptation and should be better understood and utilized. Also, there are already many agencies and programs related to adaptation that need to be better-coordinated, perhaps by a coordinating entity without a regulatory role. Given the unlikelihood of sweeping change at the state or federal level, it is important for ANVs to exercise a role in their own adaptation. Constraints on this role include laws limiting actions that ANVs can take, and the lack of capacity to carry out large-scale adaptation actions on their own. ANV adaptation may require greater self-reliance as well as partnerships with government and non-government entities who can help ANVs build their capacity.

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## INTRODUCTION

From severe weather to flooding and rising sea levels, climate change has begun to affect the well-being of communities across America.<sup>1</sup> Alaska has experienced distinct impacts, as it is warming far more rapidly than other parts of the United States.<sup>2</sup> Also, Alaska is home to around 41% of the nation's federally recognized tribes,<sup>3</sup> many of which rely on subsistence hunting and fishing.<sup>4</sup> ANVs<sup>5</sup> are grappling with changes in flooding and erosion, changes to the species on which they subsist, melting permafrost, and later formation of ice along their shores each fall—ice that used to serve as a protective barrier from destructive fall storms.<sup>6</sup> Thirty-one ANVs have been described as “imminently threatened” by climate change.<sup>7</sup>

ANVs, along with other communities across the nation, have increasingly turned to state and federal governments for help in the face of flooding disasters and severe storms.<sup>8</sup> In the law review literature, some scholars call for major legal and institutional changes to facilitate

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<sup>1</sup> John Walsh et al., *Our Changing Climate*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 20–21 (Jerry M. Melillo et al. eds., 2014).

<sup>2</sup> F. Stuart Chapin, III et al., *Alaska*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT, *supra* note 1, at 516.

<sup>3</sup> Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017) (updated list from notice published on May 4, 2016).

<sup>4</sup> Elizaveta B. Ristroph, *Alaska Tribes' Melting Subsistence Rights*, 1 ARIZ. J. ENVTL. L. & POL'Y 47, 49 (2010) [hereinafter Ristroph (2010)].

<sup>5</sup> This term refers to the federally recognized tribe as well as its village site. Most residents of an ANV are citizens of the affiliated tribal nation as well as citizens of the United States.

<sup>6</sup> Christopher B. Field et al., *Summary for Policymakers*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY 31 (2014); Chapin III et al., *supra* note 2, at 515–16; Ristroph (2010), *supra* note 4, at 51–58.

<sup>7</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-142, ALASKA NATIVE VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION, BUT FEW QUALIFY FOR FEDERAL ASSISTANCE 13 (2003); U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-551, ALASKA NATIVE VILLAGES, LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION 12–13, 24 (2009).

<sup>8</sup> See Andrew Reeves, *Political Disaster: Unilateral Powers, Electoral Incentives, and Presidential Disaster Declarations*, 73 J. POLITICS 1142, 1142, 1150 (2011); FRANCIS X. MCCARTHY, CONG. RESEARCH SERV., RL34146, FEMA'S DISASTER DECLARATION PROCESS: A PRIMER 13 (2011); BRUCE R. LINDSAY, CONG. RESEARCH SERV., R43537, FEMA'S DISASTER RELIEF FUND: OVERVIEW AND SELECTED ISSUES 1, 1 (2014); R. Steven Daniels, *The rise of politics and the decline of vulnerability criteria in disaster decisions of the United States, 1953–2009*, 37 DISASTERS 669, 673–74 (2013); A. Cavallo, ALASKA DIV. OF HOMELAND SECURITY AND EMERGENCY MGMT. (Jan. 20, 2015); *FEMA Disaster Declarations Summary—Open Government Dataset*, FEMA (Oct. 1, 2018), <https://www.fema.gov/media-library/assets/documents/28318> [https://perma.cc/MLJ3-9VFM].

adaptation, including the establishment of a new agency to lead or coordinate adaptation.<sup>9</sup> In this Article, I consider what role federal, state, and local government should have in facilitating adaptation, and whether there should or could be an overarching adaptation law or agency.

My research involved four approaches, each of which I cover in more detail in a separate article.<sup>10</sup> The first approach was to review literature related to studies of adaptation, studies of Alaska Natives, and commentary on laws. The second approach was to review relevant laws themselves. The third approach involved 153 interviews and interview-like conversations with ANV residents, as well as those outside ANVs who make or influence laws that affect ANVs.<sup>11</sup> The fourth approach was to analyze community plans relevant to the fifty-nine ANVs from which I selected participants, including hazard mitigation plans required by FEMA for certain kinds of disaster assistance<sup>12</sup> and plans related to economic development and land use. I used qualitative content analysis<sup>13</sup> to identify major adaptation actions, relevant laws and agencies, facilitators, barriers, recommendations for change, and other themes that arose from interviews and those conversations that covered interview questions, as well as in community plans.

Research was authorized by the Institutional Review Board of the University of Hawaii, and ethical considerations required keeping the identity of research participants confidential. For this reason, names of

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<sup>9</sup> Victor B. Flatt, *Adapting Laws for a Changing World: A Systemic Approach to Climate Change Adaptation*, 64 FLA. L. REV. 269, 285 (2012) [hereinafter Flatt (2012)]; Victor B. Flatt, *Focus and Fund: Executing Our Way to a Federal Climate Change Adaptation Plan*, 32 VA. ENVTL. L. J. 157, 171–72 (2014); Robin Kundis Craig, “Stationarity Is Dead”—Long Live Transformation: Five Principles for Climate Change Adaptation Law, 34 HARV. ENVTL. L. REV. 10, 39 (2010); Jan McDonald, *The role of law in adapting to climate change*, 2 WILEY INTERDISCIPLINARY REV.: CLIMATE CHANGE 283, 284–86 (2011); Damien Leonard, *Raising the Levee: Dutch Land Use Law as a Model for U.S. Adaptation to Climate Change*, 21 GEO. INT’L. ENVTL. L. REV. 543, 561 (2009); SUSANNE C. MOSER ET AL., RISING TO THE CHALLENGE, TOGETHER 8 (2017) [hereinafter MOSER ET AL. (2017)].

<sup>10</sup> Elizaveta B. Ristroph, *Presenting a Picture of Alaska Native Village Adaptation: A Method of Analysis*, 5 SOC. & ANTHROPOLOGY 762, 762–67 (2017).

<sup>11</sup> These were conversations where participants essentially answered the interview questions, but did not want to be formally interviewed. Interviews and conversations took place between March and June 2016 in-person, in ANVs and at conferences pertaining to ANVs, or by phone calls from Fairbanks to participants’ locations.

<sup>12</sup> 42 U.S.C. § 5165(a) (2018).

<sup>13</sup> MATTHEW B. MILES & A. MICHAEL HUBERMAN, QUALITATIVE DATA ANALYSIS 56–57 (2nd ed. 1994); JULIET CORBIN & ANSELM STRAUSS, BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY (3rd ed. 2007) (providing background on this technique).

participants and ANVs are generally not mentioned in this Article. The differences in the questions answered by different participants (despite starting out with just two questionnaires—one for each set of participants) limited the ability to quantitatively compare responses between different participants. Given this limitation and the subjectivity of my coding, I decided that using inferential statistics was not appropriate.<sup>14</sup> I thus avoid referring to specific numbers of participants in this Article. To give an order of magnitude of the responses I got, I refer to “a few” (about 2 to 5), “several” (about 6 to 10), “a number of” (about 10 to 30), or “many” (more than 30). These categorizations are not statistically significant and should not be interpreted in that manner.

Part II is a literature review of arguments regarding government responsibility for adaptation assistance and how these might apply to ANVs. Part III outlines the failed efforts to build a coordinated adaptation legal framework at the state and federal level, and provides an overview of the uncoordinated adaptation efforts of agencies under existing laws. Part IV lays out key findings regarding how my research participants view the roles of federal, state, and ANV government. I describe the tension between ANVs’ desire for state and federal government assistance and the sense that state and federal agencies already interfere too much with ANV ways of life. In Part V, I discuss the implications of my findings. I argue that a new overarching adaptation law or agency would not be practical, although more coordination is desirable, perhaps in the form of a coordinating entity. Finally, I consider the need for greater ANV self-reliance, as well as the need for partnerships with entities that can aid in a manner that avoids further colonization.<sup>15</sup>

#### I. ARGUMENTS FOR A GOVERNMENT ROLE IN ADDRESSING CLIMATE CHANGE

As the impacts of climate change have increased, researchers have considered what laws and government entities should be doing to facilitate adaptation. This Part summarizes arguments in the law review literature and other literature regarding government responsibility for adaptation, and explains how these arguments may be more nuanced in the context of ANVs.

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<sup>14</sup> See H. RUSSELL BERNARD & GERY W. RYAN, *ANALYZING QUALITATIVE DATA: SYSTEMATIC APPROACHES* 94 (2010); Yan Zhang & Barbara M. Wildemuth, *Qualitative Analysis of Content*, 3–6 (2005), [https://www.ischool.utexas.edu/~yanz/Content\\_analysis.pdf](https://www.ischool.utexas.edu/~yanz/Content_analysis.pdf) [<https://perma.cc/DCJ9-3SJL>].

<sup>15</sup> By colonization, I mean the occupation of Alaska by non-Natives as well as laws and social practices imposed on ANVs.

A. *Appropriate Level of Government*

There is debate in the literature regarding which level of government should assume responsibility for climate change adaptation. Many emphasize the benefits of a local government role, including the greater sense of community ownership and responsibility;<sup>16</sup> the ability to incorporate local knowledge and tailor adaptation to local needs;<sup>17</sup> and the potential for being closer to people and hence more participatory and democratic.<sup>18</sup> But others have pointed out the disadvantages of local control, including the lack of local capacity and resources.<sup>19</sup> There is also concern that local control could result in an unfair distribution of adaptation costs, benefits, and risks by excluding traditionally marginalized actors and vulnerable populations<sup>20</sup> or by imposing negative externalities on other localities.<sup>21</sup>

Some commentators call for an overlapping “polycentric system,” in which each level of government has some authority to prescribe rules for how resources are used, and no single level has primary authority.<sup>22</sup>

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<sup>16</sup> *Policy Guide on Planning and Climate Change*, AM. PLAN. ASS'N 20, 21 (2011), <https://www.planning.org/policy/guides/adopted/climatechange.htm> [<https://perma.cc/7799-8FZT>]; Susanne C. Moser et al., *Wicked Challenges at Land's End: Managing Coastal Vulnerability Under Climate Change*, 37 ANNUAL REV. ENV. & RES. 51, 67 (2012) [hereinafter Moser et al. (2012)]; Flatt (2012), *supra* note 9, at 272; Christopher J. Lemieux et al., *Natural resource manager perceptions of agency performance on climate change*, 114 J. ENVTL. MGMT. 178, 181 (2012); Vicki Arroyo & Terri Cruce, *State and Local Adaptation*, in THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS 569, 579, 581, 585–86 (Michael Gerrard & Katrina Fischer Kuh eds., 2012).

<sup>17</sup> ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 281–82 (2005); Benjamin J. Richardson, *Local climate change law*, in LOCAL CLIMATE CHANGE LAW: ENVIRONMENTAL REGULATION IN CITIES AND OTHER LOCALITIES 12 (2012); Gary P. Kofinas & F. Stuart Chapin III, *Sustaining Livelihoods and Human Well-Being during Social-Ecological Change* 55, in PRINCIPLES OF ECOSYSTEM STEWARDSHIP: RESILIENCE-BASED NATURAL RESOURCE MANAGEMENT IN A CHANGING WORLD 82 (F. Stuart Chapin III et al. eds., 2009); J. Peter Byrne & Jessica Grannis, *Coastal Retreat Measures*, in THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS, *supra* note 16, at 267–68.

<sup>18</sup> See Flatt (2012), *supra* note 9, at 272; Richardson, *supra* note 17, at 12.

<sup>19</sup> Daniel Osberghaus et al., *The role of the government in adaptation to climate change*, 28 ENV. & PLANNING C: GOV'T & POL'Y 834, 837 (2010).

<sup>20</sup> Marcus B. Lane, *Participation, Decentralization, and Civil Society: Indigenous Rights and Democracy in Environmental Planning*, 22 J. PLAN. EDUC. & RES. 360, 368 (2003); OSTROM, *supra* note 17, at 282; Alice Kaswan, *Climate Adaptation and Land Use Governance: The Vertical Axis*, 39 COLUM. J. ENVTL. L. 390, 396–97 (2014).

<sup>21</sup> Kaswan, *supra* note 20, at 395–96; Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENVTL. L. 1159, 1176–77 (2010).

<sup>22</sup> OSTROM, *supra* note 17, at 283; Thomas M Gremellion, *Setting the Foundation: Climate*

For example, Damien Leonard calls for new overarching laws on climate change adaptation that integrate planning between different levels of government, similar to the principle of cooperative federalism carried out through the Coastal Zone Management Act.<sup>23</sup>

Others call for a larger private sector role,<sup>24</sup> noting the need for private citizens to take ownership of adaptation problems,<sup>25</sup> and the need to avoid “moral hazard” where government bailouts reduce incentives for personal responsibility.<sup>26</sup> There is also a view that addressing climate change is both a public and a private responsibility, on which the government must work with nongovernment entities.<sup>27</sup>

### B. *Government Role in the Alaskan Native Village Context*

In this subsection, I explain how state and federal government responsibility may differ for ANVs, given the unique geography of Alaska; the limited capacity of small, remote tribes to orchestrate large-scale infrastructure projects; and the significance of climate justice and colonization.

#### 1. *Alaska’s Distinct Geography and Land Ownership*

Alaska is a vast, sparsely populated state far from the nation’s capital and centers of commerce. Since becoming part of the United States, Alaska has relied on the federal government for support,<sup>28</sup> even while

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*Change Adaptation at the Local Level*, 41 ENVTL. L. 1221, 1231 (2011); Kaswan, *supra* note 20, at 438–39; Yee Huang et al., *Climate Change and the Puget Sound: Building the Legal Framework for Adaptation* 1, 25 (2011), [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1660&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1660&context=faculty_publications) [<https://perma.cc/Z4SA-R6NX>]; J.B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems: Applications to Climate Change Adaptation Law*, 89 N.C. L. REV. 1373, 1396–97 (2011).  
<sup>23</sup> Pub. L. No. 92-583, 86 Stat. 1280, 1285 (1972) (codified as amended at 16 U.S.C. §§ 1451–1464); Leonard, *supra* note 9, at 561.

<sup>24</sup> Peter P. J. Driessen and Helena F. M. W. van Rijswijk, *Normative aspects of climate adaptation policies*, 2 CLIMATE L. 559, 563 (2011).

<sup>25</sup> Moser et al. (2012), *supra* note 16, at 67.

<sup>26</sup> See Osberghaus et al., *supra* note 19, at 836.

<sup>27</sup> Edward P. Weber, *Getting to Resilience in a Climate-Protected Community: Early Problem-Solving Choices, Ideas, and Governance Philosophy*, in COLLABORATIVE RESILIENCE: MOVING THROUGH CRISIS TO OPPORTUNITY 187 (Bruce Evan Goldstein ed., 2011); Stefania Munaretto & Judith E. M. Klostermann, *Assessing adaptive capacity of institutions to climate change: A comparative case study of the Dutch Wadden Sea and the Venice Lagoon*, 2 CLIMATE L. 219, 249 (2011); Edna Sussman, *Case Study: Climate Change Adaptation Planning Guidance for Local Governments in the United States*, 9 SUSTAINABLE DEV. L. & POL'Y 31, 34 (2009); J.E. Innes et al., *Coordinating Growth and Environmental Management Through Consensus Building*, CPS REPORT: A POLICY RESEARCH PROGRAM REPORT 2 (2011).

<sup>28</sup> Scott Goldsmith & Eric Larson, *Federal Spending and Revenues in Alaska*, INST. OF SOC.

resenting the federal government's control over the State.<sup>29</sup> The era when oil brought great profits to Alaska (from the 1970s to the 2000s) seemed to provide a pathway for a larger state role, as well as a role for county-level governments taking in tax dollars from commercial and industrial development.<sup>30</sup> In the current era of low oil prices (the 2010s), the State has relatively limited resources to address large-scale problems not perceived as immediate crises.<sup>31</sup> Aside from the few county-level governments in the State (none of which have climate change adaptation programs), most local governments are small cities or tribes without a tax base.<sup>32</sup>

The private sector in Alaska is relatively small compared to those in other states, with only around 12% of the land held by nongovernment entities.<sup>33</sup> Much of this (about 11% of all Alaska lands) is owned by Alaska Native regional and village corporations; one such corporation is a creation of Congress that is not a tribally owned entity, but is supposed to provide dividends to those tribal members who are shareholders.<sup>34</sup> Native corporate representatives have emphasized that these entities are “for profit”—not charities in a position to address climate change.<sup>35</sup>

## 2. Adaptive Capacity of ANVs

Larger, regional Native Corporations have significant financial resources and skills that could support adaptation.<sup>36</sup> Regional Native

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AND ECON. RES. 1 (2003), <http://www.iser.uaa.alaska.edu/Publications/federalspendingak.pdf> [<https://perma.cc/P45R-QZF7>].

<sup>29</sup> STEPHEN HAYCOX, *BATTLEGROUND ALASKA: FIGHTING FEDERAL POWER IN AMERICA'S LAST WILDERNESS* 181 (2016).

<sup>30</sup> *See id.* at 367; Elizaveta B. Ristroph, *When Climate Takes a Village: Legal Pathways toward the Relocation of Alaska Native Villages*, 7 *CLIMATE L.* 259, 262 (2017) [hereinafter Ristroph (2017)].

<sup>31</sup> Ristroph (2017), *supra* note 30, at 263.

<sup>32</sup> For a list of local governments, *see Community Database Online*, ADCRA, <https://www.commerce.alaska.gov/dcra/DCRAExternal> [<https://perma.cc/VPB9-YPK4>].

<sup>33</sup> *Land Ownership in Alaska*, ALASKA DEP'T OF NAT. RES. (2000), [http://dnr.alaska.gov/mlw/factsht/land\\_fs/land\\_own.pdf](http://dnr.alaska.gov/mlw/factsht/land_fs/land_own.pdf) [<https://perma.cc/SGT6-2WZE>].

<sup>34</sup> 43 U.S.C. §§ 1603, 1606, 1607. Native Corporations are distinct entities from tribes, and not all tribal members within an ANV are shareholders of the Corporations associated with that ANV. Also, a number of shareholders live outside of ANVs and Alaska and may not have a direct interest in the ANV. *See Ristroph* (2010), *supra* note 4, at 76–77.

<sup>35</sup> *Tales of Atlantis*, *THE ECONOMIST* (Sept. 3, 2015), <https://www.economist.com/united-states/2015/09/03/tales-of-atlantis> [<https://perma.cc/23AY-QEZT>].

<sup>36</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-121, *REGIONAL ALASKA NATIVE CORPORATIONS* 13–14 (2012).



non-profit entities, created by the same Congressional Act that established Native Corporations,<sup>37</sup> may also have financial resources and skills to support adaptation. But small, village-based Native Corporations and tribes have relatively limited adaptive capacity.

The term “adaptive capacity” is frequently used in adaptation literature in reference to the ability to adjust, to take advantage of opportunities, or to cope with consequences.<sup>38</sup> For ANVs, “capacity” is broader than adaptation, since small, remote, and cold communities are in a constant struggle just to maintain working infrastructure,<sup>39</sup> let alone navigate the laws and grant opportunities from Western-style agencies many miles away.<sup>40</sup> Indigenous peoples who have adapted to their environments for centuries would seemingly have high adaptive capacity and self-reliance, but this capacity has declined in the face of social, political, economic, and environmental changes related to colonization.<sup>41</sup> For example, most ANVs rely on Native regional non-profit entities to provide training and assistance with village housing, grant-writing, and community planning; federal and state entities provide for roads and education and support environmental management.<sup>42</sup>

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<sup>37</sup> 43 U.S.C. § 1606 (2018).

<sup>38</sup> Roger N. Jones, *Foundations for Decision Making*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, *supra* note 6, at 214; R. Nelson et al., *The vulnerability of Australian rural communities to climate variability and change: Part II—Integrating impacts with adaptive capacity*, 13 ENVTL. SCI. & POL'Y 18, 20 (2010).

<sup>39</sup> Philip A. Loring et al., “Community Work” in a Climate of Adaptation: Responding to Change in Rural Alaska, 44 HUM. ECOLOGY 119, 119 (2016).

<sup>40</sup> Emilie S. Cameron, *Securing Indigenous politics: A critique of the vulnerability and adaptation approach to the human dimensions of climate change in the Canadian Arctic*, 22 GLOBAL ENVTL. CHANGE 103, 110 (2012); Shannon M. McNeeley, *Examining barriers and opportunities for sustainable adaptation to climate change in interior Alaska*, 111 CLIMATIC CHANGE 835, 838 (2012) [hereinafter McNeeley (2012)].

<sup>41</sup> D. J. NAKASHIMA, WEATHERING UNCERTAINTY: TRADITIONAL KNOWLEDGE FOR CLIMATE CHANGE ASSESSMENT AND ADAPTATION 6 (2012); Randall S. Abate & Elizabeth Ann Kronk, *Commonality among unique indigenous communities: an introduction to climate change and its impacts on indigenous peoples*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 4 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013); Sharon Hausam, *Maybe, Maybe Not: Native American Participation in Regional Planning*, in RECLAIMING INDIGENOUS PLANNING 170 (Ryan Walker et al. eds., 2013); Daniel R. Wildcat, *Introduction: climate change and indigenous peoples of the USA*, 120 CLIMATIC CHANGE 509, 509 (2013).

<sup>42</sup> *Alaska Native Language Preservation Advisory Council*, ALASKA DEP'T OF COMMERCE, CMTY. AND ECON. DEV., <https://www.commerce.alaska.gov/web/dcra/AKNativeLanguagePreservationAdvisoryCouncil.aspx> [<https://perma.cc/5SV6-UTZA>].

### 3. Climate Justice and Related Arguments for ANV Assistance

Some commentators have argued that, in the interest of climate justice,<sup>43</sup> ANVs and other indigenous communities are entitled to external assistance.<sup>44</sup> Climate justice is the concept that those who have the most responsibility for greenhouse gas emissions should assist less responsible, more-at-risk populations in adapting to climate change and with low-carbon development.<sup>45</sup> Most ANVs have had minimal greenhouse gas emissions compared to the rest of the United States, yet they are at a greater risk of losing their homes and lifeways than most Americans.<sup>46</sup> Because the American people as a whole have benefited from the United States' historic and current contributions to climate change, the federal government arguably has a responsibility to support the adaptation of America's vulnerable, place-based communities.<sup>47</sup> Likewise, the State of Alaska, which has benefitted from the greenhouse gas-emitting oil and gas industry,<sup>48</sup> arguably has a responsibility to support ANV adaptation.

With ANVs and other Native American tribes, climate justice takes on another angle: A number of tribes were relocated, pushed to the edge of their former domain, or made to settle permanently in places not meant for year-round habitation.<sup>49</sup> There is an argument that because the

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<sup>43</sup> For a discussion of the definition of climate justice, see Tim Forsyth, *Climate justice is not just ice*, 54 GEOFORUM 230, 230–31 (2014).

<sup>44</sup> Elizabeth Marino, *The long history of environmental migration: Assessing vulnerability construction and obstacles to successful relocation in Shishmaref, Alaska*, 22 GLOBAL ENVTL. CHANGE 374, 375–76 (2012); Marissa Knodel, *Conceptualizing Climate Justice in Kivalina*, 37 SEATTLE UNIV. L. REV. 1179, 1206–07 (2014).

<sup>45</sup> Donald R. Nelson et al., *Adaptation to Environmental Change: Contributions of a Resilience Framework*, 32 ANN. REV. ENV'T & RES. 395, 410 (2007).

<sup>46</sup> JONATHAN M. HANNA, NATIVE COMMUNITIES AND CLIMATE CHANGE: PROTECTING TRIBAL RESOURCES AS PART OF NATIONAL CLIMATE POLICY: REPORT, 29 (2007); Peter Van Tuyn, *America's Arctic: climate change impacts on indigenous peoples and subsistence*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES, *supra* note 41, at 268–71.

<sup>47</sup> Thom Brooks, *Climate Change Justice*, 46 PS: POL. SCI. & POLS. 9, 9–10 (2013); Jouni Paavola & W. Neil Adger, *Fair adaptation to climate change*, 56 ECOLOGICAL ECON. 594, 595 (2006); Elizabeth Ann Kronk Warner & Randall S. Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 OTTAWA L. REV. 113, 135 (2013).

<sup>48</sup> ALASKA DEPT OF REVENUE, ANNUAL REPORT (2014); *The Role of the Oil and Gas Industry in Alaska's Economy*, MCDOWELL GROUP (May 2014), [http://www.aoga.org/sites/default/files/news/aoga\\_final\\_report\\_5\\_28\\_14\\_0.pdf](http://www.aoga.org/sites/default/files/news/aoga_final_report_5_28_14_0.pdf) [<https://perma.cc/FZ65-LB49>].

<sup>49</sup> Abate & Kronk, *supra* note 41, at 5–6; James D. Ford et al., *Climate change policy responses for Canada's Inuit population: The importance of and opportunities for adaptation*,

federal government contributed to placing some ANVs in vulnerable locations, the government is responsible for assisting and even relocating those who are willing to relocate.<sup>50</sup> Some have advocated for the establishment of a lead federal or state agency to guide the relocation process.<sup>51</sup>

Aside from climate justice, another argument for federal climate change assistance to ANVs and other Native American tribes relates to the federal trust doctrine. This doctrine stems from case law establishing a federal political responsibility to Native American tribes as “dependent sovereigns.”<sup>52</sup> Since the United States usurped lands and natural resources that tribes needed for their survival, it arguably has a duty to protect these lands and compensate for harm.<sup>53</sup> While the literature seldom discusses the federal trust doctrine in the context of climate change adaptation,<sup>54</sup> this doctrine could be a basis for federal assistance to ANVs with relocation to higher ground and other adaptive actions.

A third argument for assistance to ANVs concerns the extent to which federal (and to some degree, state) laws have limited ANV access to resources needed for adaptation. As a result of the Alaska Native Claims Settlement Act (“ANCSA”), ANVs do not own their traditional lands and waters, and are not free to simply pick up and move wherever they want.<sup>55</sup>

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20 GLOBAL ENVTL. CHANGE 177, 187 (2010); Jamie Kay Ford & Erick Giles, *Climate Change Adaptation in Indian Country: Tribal Regulation of Reservation Lands and Natural Resources*, 41 WM. MITCHELL L. REV. 519, 521 (2015).

<sup>50</sup> Robert J. Martin, *The Village of Kivalina Is Falling into the Sea: Should CERCLA Section 9626(B) Be Available to Move the Village from Harm's Way?*, 2 ENVTL. EARTH L. J. 1, 24 (2012); Jessica Scott, *Move or Wait for the Flood and Die: Protection of Environmentally Displaced Populations Through a New Relocation Law*, 9 FLA. A&M U. L. REV. 369, 381 (2014); Robin Bronen, *Climate-Induced Displacement of Alaska Native Communities*, BROOKINGS 5 (2013), <http://www.brookings.edu/research/papers/2013/01/30-arctic-alaska-bronen> [<https://perma.cc/949S-R2UR>].

<sup>51</sup> 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, 401 (2011); Julie Koppel Maldonado et al., *The impact of climate change on tribal communities in the US: displacement, relocation, and human rights*, 120 CLIMATIC CHANGE 601, 610 (2013).

<sup>52</sup> DAVID S. CASE & DAVID A VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 21 (3rd ed. 2012) (citing *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886), *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

<sup>53</sup> See Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91, 93–94 (2009).

<sup>54</sup> An exception is Kronk Warner & Abate, *supra* note 47, at 119.

<sup>55</sup> See 43 U.S.C. § 1603 (2018). Land ownership by Alaska Native Corporations does not

Nor do they have control over their traditional subsistence resources,<sup>56</sup> which are regulated by state and federal fish and game laws.<sup>57</sup> This has left many ANVs far from the road system and access to material, health, and educational resources enjoyed by their urban counterparts.<sup>58</sup>

#### 4. Colonization Concerns and the Need for Self-Reliance

While there are strong arguments for providing ANVs with adaptation assistance, there is a danger that assistance can have the effect of further “colonizing” ANVs by reducing their ability to make decisions about their own fate<sup>59</sup> and increasing their dependence on government resources.<sup>60</sup> ANVs are still struggling with the impacts of colonization—not only those impacts related to land loss through ANCSA,<sup>61</sup> but also to what Harold Napoleon refers to as a “spiritual, social, cultural and economic storm that was set in motion by historical forces and governmental policies of the last century.”<sup>62</sup> There is a history of “assistance” to ANVs from missionaries, the Bureau of Indian Education, and other proponents of American culture and capitalism that some believe has done more harm than good.<sup>63</sup> For example, Elizabeth Marino suggests that the colonial

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necessarily facilitate relocation. As I stated earlier, while Alaska Native Corporations own a significant amount of Alaska lands, Corporations are separate entities from tribes and can have different goals regarding development and adaptation. Also, corporate lands may not be the most desirable place to relocate.

<sup>56</sup> 43 U.S.C. § 1603 (2018).

<sup>57</sup> 16 U.S.C. §§ 1801, 3101 (2018); ALASKA STAT. § 16.05.255 (2018).

<sup>58</sup> Patricia Cochran et al., *Indigenous frameworks for observing and responding to climate change in Alaska*, 120 CLIMATIC CHANGE 557, 558 (2013); Shannon Michele McNeeley, *Seasons out of Balance: Climate Change Impacts, Vulnerability, and Sustainable Adaptation in Interior Alaska* 6, 11, 13–14, 34–35, 47, 56 (Aug. 2009) (unpublished PhD dissertation, University of Alaska Fairbanks) [hereinafter McNeeley (2009)].

<sup>59</sup> DANIEL R. WILDCAT, RED ALERT!: SAVING THE PLANET WITH INDIGENOUS KNOWLEDGE 39 (2009); Cameron, *supra* note 40, at 104; Marino, *supra* note 44, at 380.

<sup>60</sup> Henry P. Huntington et al., *Demographic and environmental conditions are uncoupled in the social-ecological system of the Pribilof Islands*, 28 POLAR RES. 119, 125 (2009); Henry Huntington et al., *The Changing Arctic: Indigenous Perspectives*, in ARCTIC CLIMATE IMPACT ASSESSMENT—SCIENTIFIC REPORT 91 (2005); McNeeley (2009), *supra* note 58, at 37.

<sup>61</sup> INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER—REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 47 (2015), <https://www.aisc.ucla.edu/iloc/report/> [https://perma.cc/FX9H-WD8H].

<sup>62</sup> Harold Napoleon, *Alaska Natives: Still a people in peril*, ANCHORAGE DAILY NEWS (Oct. 18, 2014), <http://www.adn.com/article/20141018/alaska-natives-still-people-peril> [https://perma.cc/6SU2-WCK9].

<sup>63</sup> THOMAS BERGER, A LONG AND TERRIBLE SHADOW: WHITE VALUES, NATIVE RIGHTS IN THE AMERICAS SINCE 1492 130 (2nd ed. 1999); Lisa Wexler, *Looking across three generations*

history of Shishmaref (a West Coast ANV seeking to relocate) reduced adaptive capacity by discouraging a traditional adaptation strategy of high mobility, excluding local experts from early development decisions, relocating decision-making power over infrastructure outside of the community, and creating a dependence on modern, fossil-fuel-powered Western infrastructure.<sup>64</sup> Climate change adaptation measures that ignore the legacy of colonialism may perpetuate colonialism through Western interventions that do not serve the long-term needs of indigenous communities.<sup>65</sup> Adaptation assistance needs to take place in a manner that avoids interfering with indigenous sovereignty.<sup>66</sup> This concern might be addressed by adhering to the procedural aspects of climate justice, which provide for indigenous community participation in climate change adaptation planning.<sup>67</sup> This engagement is consistent with efforts to “decolonize”<sup>68</sup> interactions with indigenous communities by acknowledging the validity of indigenous lifeways and epistemologies.<sup>69</sup>

Adaptation assistance should also promote self-reliance, which is a cultural value among many Alaskan and Arctic indigenous groups.<sup>70</sup>

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*of Alaska natives to explore how culture fosters indigenous resilience*, 51 *TRANSCULTURAL PSYCHIATRY* 73, 80 (2014).

<sup>64</sup> Marino, *supra* note 44, at 375, 378.

<sup>65</sup> Cameron, *supra* note 40, at 112.

<sup>66</sup> See Kronk Warner & Abate, *supra* note 47, at 127.

<sup>67</sup> Sophie Theriault, *Indigenous peoples and climate change policies: A comparative assessment of indigenous governance models in Canada*, in *LOCAL CLIMATE CHANGE LAW: ENVIRONMENTAL REGULATION IN CITIES AND OTHER LOCALITIES*, *supra* note 17, at 244; Paavola & Adger, *supra* note 47, at 596.

<sup>68</sup> “Decolonize” can have a variety of meanings, from restoring rights to land and resources appropriated through colonization, to acknowledgment of and healing from past wrongdoing, and to recognizing the validity of indigenous language, viewpoints, and lifeways and increasing indigenous participation in government decision making. My use of the term generally refers to the latter meaning related to recognition. See generally Jeff Corntassel, *Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination*, 1 *DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y* 86 (2012); Erich W. Steinman, *Decolonization Not Inclusion: Indigenous Resistance to American Settler Colonialism*, 2 *SOC. RACE & ETHNICITY* 219, 220 (2016).

<sup>69</sup> LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 41, 101 (2nd ed. 2012); Alice J. Kawakami et al., *Improving the Practice of Evaluation Through Indigenous Values and Methods: Decolonizing Evaluation Practice—Returning the Gaze From Hawai'i and Aotearoa*, 4 *MULTIDISCIPLINARY RES. ON HAWAIIAN WELL-BEING* 319, 344 (2007); Kas Aruskevich, *Telling a Story about Indigenous Evaluation: Insights of Practitioners from Australia, Canada, New Zealand, and the United States* 117 (unpublished Ph.D. dissertation, University of Hawaii, Manoa, 2010); Julie Koppel Maldonado, *Facing the Rising Tide: Co-Occurring Disasters, Displacement, and Adaptation in Coastal Louisiana's Tribal Communities* 255 (2014) (unpublished Ph.D. dissertation, American University).

<sup>70</sup> McNeeley (2009), *supra* note 58, at 37; Michael G. Reid et al., *Indigenous Climate*

While self-reliance may mean different things to different ANVs, I use the term to refer to adaptive actions that are within an ANV's authority to take, such as building greenhouses or establishing a local lumber mill to build homes. I do not mean to imply that ANVs should return to an era without electricity, running water, or contact with the outside world.

## II. OUTLINE OF THE PAST AND CURRENT FEDERAL AND STATE ROLE IN CLIMATE CHANGE ADAPTATION

In this Part, I summarize the key existing laws, agencies, and programs relevant to ANV adaptation to changes in flooding, erosion, disasters, and subsistence. I highlight past efforts to form a coordinated adaptation policy at the state and federal levels. I show that there is currently no cohesive adaptation policy, and many agencies are simply researching climate change rather than addressing it. Still, there are a number of uncoordinated efforts by different agencies to facilitate community adaptation to climate change.

I begin with the advance and retreat of national climate change adaptation policy under the Obama and Trump presidencies. In 2009, former President Obama signed Executive Order 13,514, requiring agencies to evaluate climate-change risks and vulnerabilities and establishing a task force to develop policy recommendations.<sup>71</sup> In 2013, former President Obama issued a Climate Adaptation Plan along with Executive Order 13,653, which called for agency adaptation plans and established a new federal interagency, the Council on Climate Preparedness and Resilience (“the Resilience Council”).<sup>72</sup> In response to the 2013 Executive Order, thirty-eight federal agencies submitted adaptation plans.<sup>73</sup> A subsequent executive order established an Arctic Executive Steering Committee to coordinate federal Arctic policies.<sup>74</sup> This Committee formed a coastal

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*Change Adaptation Planning Using a Values-Focused Approach: A Case Study with the Gitga'at Nation*, 34 J. ETHNOBIOLOGY 401, 411 (2014); F. Stuart Chapin & Patricia Cochran, Community Partnership for Self Reliance and Sustainability, Final Report to Communities from the Alaska Native Science Commission and the University of Alaska Fairbanks 2 (2014) (unpublished paper on file with author).

<sup>71</sup> Federal Leadership in Environmental, Energy, and Economic Performance, Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,122, 52,124 (Oct. 8, 2009).

<sup>72</sup> Preparing the United States for the Impacts of Climate Change, Exec. Order No. 13,653, 215 Fed. Reg. 66,819, 66,821–22 (Nov. 6, 2013).

<sup>73</sup> HANNAH CONNERS ET AL., REPORT PROVIDING COMPARISON OF ADAPTATION PLANS SUBMITTED TO THE WHITE HOUSE IN 2014 2 (2015).

<sup>74</sup> Enhancing Coordination of National Efforts in the Arctic, Exec. Order No. 13,689, 80 Fed. Reg. 4191, 4191 (2015).

erosion subcommittee focused specifically on village relocation in Alaska.<sup>75</sup> But, after taking office, President Trump issued Executive Order 13,783 to revoke Obama's Climate Adaptation Plan and Executive Order 13,653.<sup>76</sup> The Trump Administration also removed webpages referring to the Resilience Council.<sup>77</sup> Effectively, there is no active, overarching federal plan, law, or agency dedicated solely to assisting communities with climate change adaptation.<sup>78</sup>

At the state level, there has been a similar advance and retreat of adaptation policy. Governor Sarah Palin formed a Climate Change Sub-Cabinet in 2007 to prepare Alaskan communities for climate change impacts.<sup>79</sup> The Sub-Cabinet formed an Adaptation Advisory Group to recommend adaptation policies and an Immediate Action Workgroup ("IAWG") to address impacts to vulnerable communities.<sup>80</sup> The IAWG identified six communities—all ANVs—in need of immediate action and met with these communities to identify adaptation strategies.<sup>81</sup> In 2008, based on the IAWG's recommendations, the Alaska legislature established the Alaska Climate Change Impact Mitigation Program to provide vulnerable communities with adaptation funding.<sup>82</sup>

In 2010, the Adaptation Advisory Group produced an incremental plan for adaptation called "Alaska's Climate Change Strategy: Addressing Impacts in Alaska."<sup>83</sup> The recommendations concern infrastructure, natural

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<sup>75</sup> *Progress Report on the Implementation of the National Strategy for the Arctic Region*, ARCTIC EXEC. STEERING COMM. 6 (2016), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Progress%20Report%20on%20the%20Implementation%20of%20the%20National%20Strategy%20for%20the%20Arctic%20Region.pdf> [<https://perma.cc/Y8C8-XE8Z>].

<sup>76</sup> Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,094 (Mar. 31, 2017).

<sup>77</sup> Andrew Freedman, *Trump administration begins altering EPA climate change websites*, MASHABLE (Feb. 3, 2017), <https://mashable.com/2017/02/03/trump-epa-climate-website-changes/#7DVq27OZbSql> [<https://perma.cc/8NYC-2BHU>].

<sup>78</sup> MOSER ET AL. (2017), *supra* note 9, at 8.

<sup>79</sup> Alaska Admin. Order No. 238 (Sep. 14, 2007), <https://gov.alaska.gov/admin-orders/238.html> [<https://perma.cc/42VZ-DJEE>].

<sup>80</sup> IMMEDIATE ACTION WORKGROUP, RECOMMENDATIONS REPORT TO THE GOVERNOR'S SUB-CABINET ON CLIMATE CHANGE 1 (2008).

<sup>81</sup> *Id.* at 3.

<sup>82</sup> ALASKA ADMIN. CODE tit. 3, § 195.040 (2018); Robin Bronen & F. Stuart Chapin, *Adaptive governance and institutional strategies for climate-induced community relocations in Alaska*, 110 PROC. NAT'L ACAD. SCI. U.S.A. 9320, 9323 (2013); Sally Russell Cox & Erik O'Brien, *Alaska Division of Community and Regional Affairs, Memo Re Notice of Competitive Grant Solution* (Jan. 12, 2009).

<sup>83</sup> ALASKA CLIMATE CHANGE SUB-CABINET ADAPTATION ADVISORY GROUP, ALASKA'S CLIMATE CHANGE STRATEGY: ADDRESSING IMPACTS IN ALASKA, FINAL REPORT (2010).

systems, economic activities, health, and culture.<sup>84</sup> They generally suggest monitoring and gathering more information, rather than specific adaptation *actions*<sup>85</sup> to change or protect infrastructure and communities.<sup>86</sup> The most far-reaching recommendations call for one or more coordinating entities to liaise between Alaskan communities and agencies working on issues relevant to climate change.<sup>87</sup>

Governor Sean Parnell disbanded the Sub-Cabinet in 2011.<sup>88</sup> The following year, the Alaska legislature ended the Alaska Coastal Management Program (“ACMP”), making Alaska the only coastal jurisdiction in the entire United States to opt out of the Coastal Zone Management Act.<sup>89</sup> The loss of this program is notable for three reasons. First, the ACMP provided for an entity (originally known as the Division of Governmental Coordination, within in the Office of the Governor) to coordinate federal, state, and local review of proposed offshore and coastal projects.<sup>90</sup> This entity could have carried out the coordinating function suggested by the Adaptation Advisory Group. Second, the loss of the program reduced the control of coastal communities (mostly ANVs) over projects that could aggravate or ameliorate climate change impacts.<sup>91</sup> Third, the loss ended the opportunity for funding that could have assisted with climate change adaptation.<sup>92</sup>

When elected in 2014, Governor Bill Walker promised action to address climate change.<sup>93</sup> In 2017, he established a Climate Action Leadership

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<sup>84</sup> *Id.* at 5.

<sup>85</sup> By “adaptation action,” I mean changes in human behavior and measures that change or protect infrastructure, buildings or development, beyond just information gathering and planning.

<sup>86</sup> ALASKA CLIMATE CHANGE SUB-CABINET ADAPTATION ADVISORY GROUP, *supra* note 83, at 12.

<sup>87</sup> *Id.* at 8-5. It is not clear whether the report is calling for one or two coordinating entities.

<sup>88</sup> Rich Steiner, *Gov. Parnell must revive Alaska Climate Change Cabinet*, ANCHORAGE DAILY NEWS (Mar. 7, 2013), <https://www.adn.com/commentary/article/gov-parnell-must-revive-alaska-climate-change-cabinet/2013/03/08/> [<https://perma.cc/F2Z7-39J9>].

<sup>89</sup> Ryan M. Wilson, *Why did Alaska Eliminate the Alaska Coastal Management Program?* (May 2018) (unpublished Masters Thesis, University of Alaska, Fairbanks).

<sup>90</sup> ALASKA STAT. § 46.40.096 (repealed 2011); 16 U.S.C. § 1456 (2018).

<sup>91</sup> The former ALASKA STAT. § 46.40.070 (repealed 2011) allowed coastal districts to create “enforceable policies” that could be incorporated into state law and considered by state and federal agencies during permit approvals.

<sup>92</sup> 16 U.S.C. §§ 1456(a)–(b) (2018).

<sup>93</sup> *Sean Parnell vs. Bill Walker Nonpartisan Candidate Guide For Alaska Governor’s Race 2014*, HUFFPOST (Oct. 17, 2014, 1:53 AM), [https://www.huffingtonpost.com/campus-election-engagement-project/sean-parnell-vs-bill-walk\\_b\\_5987430.html](https://www.huffingtonpost.com/campus-election-engagement-project/sean-parnell-vs-bill-walk_b_5987430.html) [<https://perma.cc/V4LD-TG2T>].



Team charged with developing another plan to address climate change.<sup>94</sup> On September 26, 2018, the Team produced a report with a broad array of unprioritized recommendations pertaining to six areas: Communities and Partnerships (agency and community coordination), Human and Ecosystem Health, Economic Opportunity (including technology to reduce emissions), Clean Energy (a plan to slowly transition to renewables), Outreach and Education, and Investment (in low carbon and energy efficient technology).<sup>95</sup> Governor Walker assembled a Climate Cabinet—a working group of state agencies—which developed a much smaller list of actions the State will take to implement the report.<sup>96</sup> One of the most significant actions adopted pertains to a coordinating agency similar to what the Adaptation Advisory Group recommended in 2010.<sup>97</sup> It is unclear whether the proposed actions will result in administrative and policy change, particularly as Governor Walker is facing re-election in November 2018. Thus, as of this writing, neither the United States nor Alaska has a single, overarching law, agency, or program specifically devoted to climate change adaptation.

The lack of a cohesive federal or state adaptation framework does not mean that there is no framework at all—it just means that there are many agencies and programs separately working on various aspects of adaptation under existing laws. Many of these agencies and programs are dedicated to gathering more information on climate change, rather than actually taking adaptive action based on information available.<sup>98</sup> A key example is the U.S. Global Change Research Program,<sup>99</sup> which issues a National Climate Assessment every four years, and the National Oceanic and Atmospheric Administration's ("NOAA") Climate Program Office,

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<sup>94</sup> Press Release, Bill Walker, Office of the Governor, Governor Walker Appoints Members of Climate Action for Alaska Leadership Team (Dec. 12, 2017), <https://gov.alaska.gov/newsroom/2017/12/governor-walker-appoints-members-of-climate-action-for-alaska-leadership-team/> [https://perma.cc/Y6NU-RQPQ].

<sup>95</sup> *Climate Change Action Plan Recommendations to the Governor*, CLIMATE ACTION FOR ALASKA LEADERSHIP TEAM 5, 10, 14, 18, 27, 32 (2018), [http://climatechange.gov.alaska.gov/wp-content/uploads/sites/11/2018/09/Ak\\_Climate\\_Action\\_Plan\\_brochure\\_final\\_web.pdf](http://climatechange.gov.alaska.gov/wp-content/uploads/sites/11/2018/09/Ak_Climate_Action_Plan_brochure_final_web.pdf) [https://perma.cc/CJ2Q-JXVG].

<sup>96</sup> *State of Alaska Climate Actions by Department*, ALASKA CLIMATE CABINET, <http://climatechange.gov.alaska.gov/wp-content/uploads/sites/11/2018/09/State-of-Alaska-Climate-Actions-by-Department.pdf> [https://perma.cc/3NVQ-3SPS].

<sup>97</sup> *Id.* at 4.

<sup>98</sup> RONALD D. BRUNNER & AMANDA H. LYNCH, ADAPTIVE GOVERNANCE AND CLIMATE CHANGE 63 (2010).

<sup>99</sup> Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 (1990).

which coordinates research on climate change impacts and adaptation but is not in a position to help carry out adaptation actions.<sup>100</sup>

Despite the emphasis on research over action, a number of agencies have facilitated the adaptation of ANVs and other communities through existing laws and programs.<sup>101</sup> For the remainder of this Part, I briefly summarize the main agencies, laws, and programs relevant to ANV adaptation to increased flooding, erosion, and disasters, as well as to reduced opportunities for subsistence.<sup>102</sup>

#### A. *Flooding Disaster Assistance*

One of the key agencies is the Federal Emergency Management Agency (“FEMA”), which is tasked with advising the President, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”), as to whether to declare a disaster after a severe weather event or flood.<sup>103</sup> The Stafford Act provides for disaster prevention funding that can facilitate adaptation and relocation,<sup>104</sup> although much more funding is available *after* a disaster has already occurred.<sup>105</sup>

#### B. *Erosion Assistance*

For slower moving “disasters” related to erosion, the Army Corps of Engineers has played a critical role, with projects that attempt to stabilize Alaskan shorelines.<sup>106</sup> Lesser-known agencies such as the U.S. Department of Agriculture’s Natural Resource Conservation Service have also overseen erosion control programs.<sup>107</sup>

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<sup>100</sup> See *About the Climate Program Office*, CLIMATE PROGRAM OFFICE, <https://cpo.noaa.gov/> [<https://perma.cc/5T79-MHN8>].

<sup>101</sup> Arroyo & Cruce, *supra* note 16, at 569–70.

<sup>102</sup> Although climate change adaptation encompasses many aspects beyond flooding, erosion, disasters, and subsistence, I limit my focus to these key areas.

<sup>103</sup> 42 U.S.C. §§ 5122(1), 5191; 44 C.F.R. § 206.37(c).

<sup>104</sup> 42 U.S.C. §§ 5133, 5170c; 44 C.F.R. § 206.436.

<sup>105</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-515, AN INVESTMENT STRATEGY COULD HELP THE FEDERAL GOVERNMENT ENHANCE NATIONAL RESILIENCE FOR FUTURE DISASTERS 31 (2015).

<sup>106</sup> Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 117, 118 Stat. 2809 (2004) (authorizing Army Corps to assist ANVs with erosion) (revoked by Pub. L. No. 111-8, § 117, 123 Stat. 524 (2009)) (partially replaced by the Energy and Water Development and Related Agencies Appropriations Act, Pub. L. No. 111-85 (2010), § 116, codified at 33 U.S.C. § 2213) (providing similar authority but less funding).

<sup>107</sup> See, e.g., Watershed and Flood Prevention Program, authorized by Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) (codified as amended at 16 U.S.C. § 460(d)

C. *Land and Species Management*

Agencies with responsibility for managing public lands, including the Department of Interior's ("DOI") Bureau of Land Management,<sup>108</sup> U.S. Fish and Wildlife Service ("USFWS"),<sup>109</sup> and National Park Service,<sup>110</sup> as well as the U.S. Forest Service,<sup>111</sup> and, in Alaska, the Department of Natural Resources,<sup>112</sup> have had to address changes in landscape management in light of climate change.<sup>113</sup> Agencies with responsibility for wildlife management, fishing, and hunting, including USFWS,<sup>114</sup> the National Marine Fisheries Service,<sup>115</sup> and, in Alaska, the Department of Fish and Game,<sup>116</sup> have had to determine how to adjust fishing and hunting allocations in response to shifts in species migrations and populations.<sup>117</sup> In particular, USFWS has wrestled with whether to list species as "threatened"<sup>118</sup> due to climate change.<sup>119</sup>

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and scattered sections of 33 U.S.C. and 43 U.S.C.); Watershed Protection and Flood Prevention Act, Pub. L. No. 83-566, 68 Stat. 666 (1954) (codified as amended at 16 U.S.C. §§ 1001–1012); 7 C.F.R. pt. 622; Emergency Watershed Protection Program, authorized by The Flood Control Act of 1950, Pub. L. No. 81-516 (1950) (codified as amended at 33 U.S.C. § 701b-1); Consolidated Farm and Rural Development Act, Pub. L. No. 95-334 (1978) (codified as amended at 16 U.S.C. §§ 2203–2205).

<sup>108</sup> 43 U.S.C. § 1701 (2018).

<sup>109</sup> 16 U.S.C. § 668dd (2018).

<sup>110</sup> 54 U.S.C. § 100101 (2018).

<sup>111</sup> 16 U.S.C. § 1600 (2018).

<sup>112</sup> ALASKA STAT. § 38.05.035 (2018).

<sup>113</sup> U.S. DEPT OF THE INTERIOR, CLIMATE CHANGE ADAPTATION PLAN 2 (2014); NAT'L PARK SERV., NATIONAL PARK SERVICE CLIMATE CHANGE RESPONSE STRATEGY 14 (2010); U.S. FISH & WILDLIFE SERV., RISING TO THE URGENT CHALLENGE: STRATEGIC PLAN FOR RESPONDING TO ACCELERATING CLIMATE CHANGE 5 (2010); U.S. BUREAU OF LAND MGMT., CLIMATE CHANGE: BLM'S RESPONSE (2012); U.S. FOREST SERV., FOREST SERVICE STRATEGIC FRAMEWORK FOR RESPONDING TO CLIMATE CHANGE 6–7 (2008).

<sup>114</sup> 16 U.S.C. § 3101; 50 C.F.R. pt. 100.

<sup>115</sup> 16 U.S.C. § 1801 (2018).

<sup>116</sup> ALASKA STAT. § 16.05.255; ALASKA ADMIN. CODE tit. 5, § 92.001 (2018).

<sup>117</sup> Philip A. Loring et al., *Ways to Help and Ways to Hinder: Governance for Effective Adaptation to an Uncertain Climate*, 64 ARCTIC 73, 79 (2011) [hereinafter Loring et al. (2011)]; McNeeley (2012), *supra* note 40, at 847; *Climate Change Strategy*, ALASKA DEP'T OF FISH & GAME 4 (2010), <https://www.adfg.alaska.gov/static/lands/ecosystems/pdfs/climatechangestrategy.pdf> [<https://perma.cc/TGF7-PZGV>].

<sup>118</sup> 16 U.S.C. § 1533 (2018).

<sup>119</sup> The polar bear listing is an example. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus Maritimus*) Throughout Its Range, 73 Fed. Reg. 28,211 (May 15, 2008); Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear Under Section 4(d) of the Endangered Species Act, 78 Fed. Reg. 11,766 (Feb. 20, 2013).

*D. Community Infrastructure and Planning*

The U.S. Department of Housing and Urban Development (“HUD”), the Bureau of Indian Affairs (“BIA”) (for ANVs), and the Alaska Division of Community and Regional Affairs have considered how to provide funding for new infrastructure to communities affected by climate change and to those seeking relocation. In addition to its standard community block development grant,<sup>120</sup> HUD has provided for post-disaster grants<sup>121</sup> and created a one-time competition for communities seeking to increase their resilience.<sup>122</sup> BIA has assisted communities with funding for new housing<sup>123</sup> as well as with planning.<sup>124</sup> The Environmental Protection Agency, while focused on water and air quality, has similarly assisted ANVs with adaptation planning through its Indian General Assistance Program.<sup>125</sup>

*E. Denali Commission*

In Alaska, the Denali Commission has taken on a large role in the relocation of the village of Newtok<sup>126</sup> and adaptation planning and projects for thirty other villages deemed “imminently threatened” by the Government Accountability Office.<sup>127</sup> Congress established the Denali Commission in 1998 to provide critical utilities, infrastructure, and economic support throughout Alaska, focusing on Alaska’s remote communities.<sup>128</sup> In 2015, former President Obama announced that the Denali Commission would play the lead coordination role to assist ANVs with adaptation.<sup>129</sup>

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<sup>120</sup> Housing and Community Development Act of 1974, 42 U.S.C. § 5301; 24 C.F.R. § 1003 (2009).

<sup>121</sup> 24 C.F.R. § 1003.400 (2009).

<sup>122</sup> Disaster Relief Appropriations, Pub. L. No. 113-2, 127 Stat. 40 (2013); Notice of National Disaster Resilience Competition Requirements, 81 Fed. Reg. 36,557 (June 7, 2016).

<sup>123</sup> 25 C.F.R. § 256.21 (2016); News Release, U.S. Dep’t of Interior, Bureau of Indian Affairs, BIA Grants Will Boost Tribal Preparedness and Resilience to Climate Change (Jan. 14, 2014), [https://www.indianaffairs.gov/sites/bia.gov/files/assets/public/press\\_release/pdf/idc1-024729.pdf](https://www.indianaffairs.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc1-024729.pdf) [<https://perma.cc/TE5Y-L2WP>].

<sup>124</sup> *Tribal Resilience Program*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/bia/ots/tribal-resilience-program> [<https://perma.cc/L8LS-AX4G>].

<sup>125</sup> Indian Environmental General Assistance Program Act of 1992, 42 U.S.C. § 4368(b).

<sup>126</sup> In addition to my interviews, information in this Article on Newtok stems from the legal work I did for Newtok in 2018 to assist with relocation efforts.

<sup>127</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION (2009).

<sup>128</sup> Denali Commission Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended at 42 U.S.C. § 3121).

<sup>129</sup> Emily Russell, *President Obama to Announce Denali Commission as Lead Agency on*

But federal funding never followed the announcement, and Trump's budgets for Fiscal Years 2018 and 2019 proposed eliminating the agency.<sup>130</sup> The Denali Commission has nevertheless persisted, with much of its limited budget (around \$15 million annually),<sup>131</sup> dedicated to climate-change-related planning and projects through its Village Infrastructure Protection Program for the thirty-one imminently threatened communities.<sup>132</sup>

To summarize, although there is no single, overarching law or agency to address climate change adaptation, many laws and agencies have some role in governing, guiding, and assisting adaptation actions.

### III. KEY FINDINGS ON ALASKAN ATTITUDES TOWARD THE GOVERNMENT'S ROLE IN CLIMATE CHANGE ADAPTATION

Thus far, I have discussed the government's actual and potential role in climate change adaptation based on a review of literature and laws. In this Part, I shed light on the human factors relevant to ANV adaptation by summarizing the viewpoints of my research participants and their community plans.

#### A. *Who Should Do What, and Why*

In this Section, I discuss my research participants' views on the appropriate roles of federal, state, and ANV governments, as well as non-government entities, in facilitating climate change adaptation. While the vast majority of my participants suggested that government entities do have a role, there was no consensus on what kind of role each level of government should have. Nearly two-thirds of all participants suggested a need for some sort of external government role beyond that of the ANV government.<sup>133</sup> About one-third of that two-thirds discussing this need for a

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*Community Relocation Project*, KNOM RADIO MISSION (Aug. 28, 2015), <http://www.knom.org/wp/blog/2015/08/28/president-obama-to-announce-denali-commission-as-lead-agency-on-community-relocation-project/> [<https://perma.cc/CH7K-D9XW>].

<sup>130</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN (2018); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, AN AMERICAN BUDGET: MAJOR SAVINGS AND REFORMS (2019).

<sup>131</sup> A \$15 million budget is relatively small for an agency tasked with ANV infrastructure. For example, based on my experience working with ANVs, a single new house in an ANV off the road system can cost between \$350,000 and \$750,000.

<sup>132</sup> Denali Commission Fiscal Year 2018 Draft Work Plan, 82 Fed. Reg. 44,759, 44,761 (Sept. 26, 2017).

<sup>133</sup> This finding is based on interviews conducted with ANV residents and those outside of ANVs who influence ANV planning and policy. See Ristroph, *supra* note 10, for details

government role (two-ninths of all interviewees) were from ANVs.<sup>134</sup> It is noteworthy that no one specifically stated that government should *not* be involved in adaptation.

### 1. Climate Justice and Related Arguments for Assistance

Not one participant specifically referred to the term “climate justice,” but it was indirectly referenced when some, including a few in ANVs, discussed government responsibility for relocation due to forced settlement.<sup>135</sup> About a third of those who discussed government roles noted that ANVs were traditionally nomadic but now are forced to stay in flood-prone areas.<sup>136</sup> A few participants (generally from non-state entities outside of ANVs) referred to the federal trust responsibility to tribes.<sup>137</sup> One participant (from a federal agency) suggested that the trust doctrine makes federal responsibility to tribes clearer than that toward other communities.<sup>138</sup> Another participant (also from a federal agency) suggested that tribes should be viewed as sovereign nations and treated the same as any other nation asking for assistance.<sup>139</sup>

### 2. Feasibility of Federal and State Government Assistance

Despite calls for government-assisted community relocation in the literature, participants had doubts about its feasibility. More than half of all participants (mostly those outside ANVs) discussed this issue, and they offered reasons why such relocation should or could take place.<sup>140</sup> But almost half of these participants (again, mostly those outside ANVs) raised points as to why this relocation might not occur—namely, the expense.<sup>141</sup> As one state official said, “There’s a ‘should’ question—who should? And then there’s a ‘can’ question—who can? The state government can’t. Legislators from the lower forty-eight are not going to be concerned enough about this issue to appropriate funding to move a few people in Alaska.”<sup>142</sup>

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on participants and the manner in which interviews were conducted. Transcripts of interviews are on file with the author but are confidential.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Telephone Interview with research participant from federal agency (Sept. 16, 2016).

<sup>139</sup> Telephone Interview with research participant from federal agency (Sept. 20, 2016).

<sup>140</sup> *See supra* note 133.

<sup>141</sup> *Id.*

<sup>142</sup> Interview with research participant affiliated with Alaska State Legislature, Juneau, Alaska (Mar. 9, 2017).

Lack of political will to address climate change adaptation preemptively for ANVs was the most frequently cited barrier to adaptation and relocation (noted by several ANV participants and a number of those outside of ANVs).<sup>143</sup> A number of participants (mainly outside of ANVs) said that state and federal decision-makers either did not believe in climate change or did not want to believe in it.<sup>144</sup> A few said that these decision-makers would not take any action that could jeopardize fossil fuel production.<sup>145</sup> Some referred to legislative gridlock in Congress, as well as the limited political power of Alaska compared to more populous states and the limited political power of ANVs compared to the more populated urban regions of Alaska.<sup>146</sup>

### 3. Responsibilities of Each Level of Government

Most participants did not articulate the appropriate role for each level of government, although they generally referred to federal agencies rather than other entities as the source of assistance they had received.<sup>147</sup> Federal assistance included Army Corps assistance with erecting flooding and erosion barriers; FEMA disaster assistance; Environmental Protection Agency funds from the Indian General Assistance Program for climate change planning and monitoring; and funds from other agencies to move or build infrastructure or carry out projects.<sup>148</sup>

Several participants (mostly from state government) suggested a specific role for the state, including coordinating with other entities on climate change or taking on a larger role in disaster management.<sup>149</sup> Others said that the state no longer has funding to give, in light of reduced oil revenue, such that funding would have to come from federal government.<sup>150</sup> A few ANV representatives said the federal government was more helpful than the state, and a few referred to the problem of the state not recognizing ANVs as sovereign entities.<sup>151</sup>

Several participants mentioned the need to work with the private sector, particularly Native Corporations.<sup>152</sup> Several said that Native

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<sup>143</sup> See *supra* note 133.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See *supra* note 133.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

Corporations had been helpful with funding or providing land for a potential relocation.<sup>153</sup> A number of participants (half of whom were in ANVs) suggested that Native Corporations should do more, although one who served on a corporation board emphasized their “for profit” nature.<sup>154</sup>

Universities and other non-profit entities have filled in some of the gaps left by state and federal government. Several participants referred to technical and research support that universities had provided through climate change adaptation projects, including climate change planning and researching options to improve food security.<sup>155</sup> Several participants mentioned the importance of Native regional non-profit organizations, while a few suggested that these organizations should be doing more in terms of assisting ANVs with adaptation.<sup>156</sup> A few Native non-profit organizations have a strong focus on climate adaptation as evidenced by their plans and publications.<sup>157</sup> But other Native regional non-profit organizations have very little in the way of climate change programs.

As in the literature, there was a sense among many participants (a third of whom were in ANVs) that a collaborative effort between government entities as well as nongovernment entities is needed to address climate change adaptation.<sup>158</sup> For example, some ANV participants expressed frustration that agencies do not coordinate their meetings in an ANV such that ANV residents must attend multiple meetings with different agencies who may not be aware of each other’s programs.<sup>159</sup> Many participants (a third of whom were in ANVs) referred to the importance of partnerships to leverage resources.<sup>160</sup>

To summarize, most participants did not clearly single out a specific role for each level of government but discussed the unlikelihood

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<sup>153</sup> *Id.*

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

<sup>155</sup> *See supra* note 133.

<sup>156</sup> *Id.*

<sup>157</sup> These include Kawerak, Inc. (a Native regional non-profit organization for the west coast of Alaska), the Aleutians Pribiloff Islands Association, and the Alaska Native Tribal Health Consortium (which provides for the entire state). *See generally Climate Change*, KAWERAK (2018), <http://kawerak.org/tag/climate-change/> [<https://perma.cc/8XRB-5Y2W>]; *Promoting Coastal Resilience and Adaptation in Coastal Alaska*, NORTH PACIFIC FISHERY MGMT. COUNCIL, [https://www.npfmc.org/wp-content/PDFdocuments/conservation\\_issues/BSFEP/LCCCoastalResiliencyWorkshops417.pdf](https://www.npfmc.org/wp-content/PDFdocuments/conservation_issues/BSFEP/LCCCoastalResiliencyWorkshops417.pdf) [<https://perma.cc/BY4S-BT5B>]; *Center for Climate and Health*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM (2018), <https://anthc.org/what-we-do/community-environment-and-health/center-for-climate-and-health/> [<https://perma.cc/C4E6-UYEY>].

<sup>158</sup> *See supra* note 133.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*



of obtaining a great deal of state or federal adaptation assistance as well as the need for collaboration among sources of assistance.

*B. Need for Financial Assistance vs. Greater Autonomy*

In this Section, I consider two different ways in which federal and state government might increase ANV capacity. One way is by providing financial resources that could facilitate adaptation actions. Another is by increasing ANV control over nonfinancial resources that could facilitate adaptation actions, including land and wildlife.

1. Potential for and Drawbacks to More Financial Assistance

Particularly among ANV participants, there is a tension between the need for more financial assistance to carry out adaptation actions, such as relocation, and the desire for more self-reliance or greater jurisdiction over resources that are important to ANVs. While a number of ANV participants referred positively to external assistance and emphasized the importance of asking for help, others shared negative views.<sup>161</sup> Several said that getting help is a long, bureaucratic process with strings attached.<sup>162</sup> Several expressed a sense of helplessness concerning what they perceived as a lack of assistance, and a few suggested that their ANVs were not getting sufficient help because the government could not afford it or did not care.<sup>163</sup> One ANV resident said, "I know funding is limited, but at least give us a fighting chance . . . There are villages here that are going to disappear."<sup>164</sup> A resident from another ANV expressed a similar sentiment: "It shouldn't get to the point where a village is falling into the ocean before you get help."<sup>165</sup>

Despite the desire for more external financial assistance, there is a sense that assistance can be "colonizing" or heavy-handed.<sup>166</sup> Several ANV participants said they felt exploited by their lack of power relative to outside government and researchers, and a few said that the outside

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Telephone Interview with research participant from ANV in southwest Alaska (Oct. 10, 2016).

<sup>165</sup> Telephone Interview with research participant from ANV in southwest Alaska (Aug. 2, 2016).

<sup>166</sup> See *supra* note 133.

government should step back and take cues from the ANV communities.<sup>167</sup> One supporter of indigenous rights from a federal agency conveyed this sense of exploitation:

The US government has been involved, influencing the indigenous peoples' inherent rights and powers for 400 years now . . . . I'm not sure that . . . solutions we come up with . . . are the right solutions. I'm not sure that . . . it's best to leave it up to the policy influences and lobbyists in D.C. but if the federal policy makers took a true listen to ANVs on what their needs are, a better solution could be drawn.<sup>168</sup>

One ANV resident wanted to convey this message to federal and state government: "Leave us alone; let us regulate our own laws."<sup>169</sup> He explained, "They get in there and just screw everything up for us . . . . Everything they tell us to do, we've been doing for 14,000 years. And we can do it for another 14,000 years."<sup>170</sup>

## 2. Potential for Greater ANV Control over Other Resources

Views were mixed on whether ANVs could or should have more jurisdiction over land and subsistence resources or other areas of law to help them adapt. Nearly a third of all participants (mostly outside of ANVs) shared their opinions on this theme.<sup>171</sup> A number of participants (mostly in ANVs) referred to the lack of tribal jurisdiction over land and subsistence resources due to ANCSA, along with federal and state laws regulating subsistence.<sup>172</sup> Nearly half of participants sharing views on jurisdiction suggested that ANVs should have more jurisdiction, yet more than half offered reasons why greater jurisdiction might not be desirable or beneficial.<sup>173</sup>

Similar to reasons expressed in the literature for more local jurisdiction, supporters of greater ANV jurisdiction suggested that it would be essential to adaptation; that a community would be more likely to adhere to a law if it had a hand in creating it; that an ANV would know best how

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<sup>167</sup> *Id.*

<sup>168</sup> Telephone Interview with research participant from federal agency (Sept. 20, 2016).

<sup>169</sup> Interview with research participant from ANV in interior Alaska, Fairbanks, Alaska (Oct. 6, 2016).

<sup>170</sup> *Id.*

<sup>171</sup> *See supra* note 133.

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

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

to manage its own affairs; or that they simply wanted to see less bureaucracy or big government.<sup>174</sup> Of those who offered reasons for not increasing ANV jurisdiction, a few expressed concerns about mismanagement and unfairness, while others believed there was already sufficient tribal control and Native representation or just wanted to see better communication and balance within the existing laws.<sup>175</sup> About two-thirds of those who offered reasons for not increasing jurisdiction said that more jurisdiction would not help due to a lack of tribal capacity, i.e., the ability of an ANV to navigate the federal and state system of laws and grant opportunities.<sup>176</sup>

### 3. Importance of Self-Reliance

Regardless of jurisdiction, about a fifth of all participants (with the majority of these in ANVs) mentioned the need for ANVs to take some sort of role in their own adaptation.<sup>177</sup> Almost the same number of participants emphasized the importance of self-sufficiency (even though I did not directly ask about this) and the need for ANVs to do more on their own given the limitations on outside funding.<sup>178</sup> Participants with this opinion were often older ANV male residents from the generation that was sent to schools run by BIA and forced to speak English.<sup>179</sup> These were people who grew up before the era of big oil profits when there was less financial assistance available from the government.

A few ANV participants said their communities were already self-sufficient or independent, while a number of participants (mostly from outside of ANVs) described ANVs as too dependent on government assistance.<sup>180</sup> The Hydaburg Community Plan,<sup>181</sup> for example, conveys the

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *See supra* note 133.

<sup>178</sup> *Id.*

<sup>179</sup> *See generally* Teresa Evans-Campbell et al., *Indian Boarding School Experience, Substance Use, and Mental Health among Urban Two-Spirit American Indian/Alaska Natives*, 38 AM. J. DRUG & ALCOHOL ABUSE 421 (2012); Cheryl Easley, *Boarding School: Historical Trauma among Alaska's Native People*, NAT'L RES. CTR. FOR AM. INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN ELDERS (2006), [https://www.uaa.alaska.edu/academics/institutional-effectiveness/departments/center-for-advancing-faculty-excellence/\\_documents/boarding-school-historical-trauma-among-alaska-s-native-people.pdf](https://www.uaa.alaska.edu/academics/institutional-effectiveness/departments/center-for-advancing-faculty-excellence/_documents/boarding-school-historical-trauma-among-alaska-s-native-people.pdf) [<https://perma.cc/K22D-JTKM>].

<sup>180</sup> *See supra* note 133.

<sup>181</sup> GT CONSULTING, *Hydaburg Community Action Plan*, WALSH PLAN. & DEV. SERV. 11 (2002), <https://web.archive.org/web/20150610200215/http://www.commerce.state.ak.us/dca/plans/Hydaburg-GCP-2002.pdf> [<https://perma.cc/SQ82-7QFR>].

sensitivity of this issue and the difficulty in distinguishing personal responsibility from the lingering impacts of colonization:

Over time, local, state, and federal actions have diminished the economic sovereignty of the Haida. The once self-sustaining Haida was [sic] forced to try and adopt and live within the standards of the “white man’s” customs and livelihood. Subsistence activities and the ability of the people to engage in barter or trade of customary resources have become restricted and, in some cases, totally disallowed. The changing circumstances have forced the Haida to become more dependent upon outside assistance and have reduced the ability of the Haida to be self-sustaining and independent from the necessity of outside assistance. This affects the well being of all Hydaburg residents, both Native and non-Native.<sup>182</sup>

One ANV resident focused more on the need for personal responsibility, stating: “If people want electricity they have to learn to pay bills instead of running to the bingo halls . . . they have to be responsible . . . Tribes shouldn’t need outside help unless there are events beyond their control.”<sup>183</sup> This individual referred to an elder who said that the government tried to take everything away and figured out that the best way to do this was to throw money at people.<sup>184</sup> “Instead of fighting with us, they give us everything. Now kids get up and go to the store with their [food stamps]. What’s going to happen when this shuts down?”<sup>185</sup> Another ANV commenting on the need for self-reliance said with resignation, “It took generations to become dependent, it’s going to take generations to become independent.”<sup>186</sup>

To summarize, while many within and outside of ANVs recognize the importance of financial resources in supporting adaptation, there is concern that adaptation assistance can have a colonizing effect that reduces self-reliance.

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<sup>182</sup> *Id.* at 11.

<sup>183</sup> Telephone Interview with research participant from ANV in northeast Alaska (Dec. 6, 2016).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Telephone Interview with research participant from ANV in northwest Alaska (Nov. 15, 2016).

C. *Potential for a New Law or Agency*

The preceding Section examined the interplay between the need for assistance to facilitate ANV adaptation and the importance of self-reliance. I now turn to the question of whether a new state or federal law or agency should be established to facilitate adaptation for ANVs and other communities. While my participants expressed a range of views on this subject, the prevailing views leaned against creating a new law or agency and towards better coordination, communication, and better use of existing laws.

1. *Challenges of Creating a New Law*

More than a third of my participants discussed whether there should be a new law.<sup>187</sup> A number of them called for an overarching law to address climate change and/or relocation, while several called for changes to existing laws to direct agency action on adaptation.<sup>188</sup> A few suggested that change should be “bottom-up,” rather than coming from a national law.<sup>189</sup> A number of participants suggested there was no need for a new law.<sup>190</sup> Many of those who discussed this topic had conflicting views, for example, saying that no new laws were needed, yet calling for some sort of mandate for agencies to act.<sup>191</sup>

Many participants offered reasons against having new laws, including resistance to the idea of more laws or bureaucracy that may not serve the particular needs of Alaska and a lack of confidence in laws to address climate change problems in ANVs.<sup>192</sup> One view expressed by a number of participants is that all the necessary laws and plans are already there—they just need to be better implemented.<sup>193</sup> Related views included the need for better cooperation under existing laws and revised interpretations of laws.<sup>194</sup>

Another view is that laws are irrelevant to indigenous lifeways. One ANV resident explained to me that there is no Western law that will

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<sup>187</sup> See *supra* note 133. I only asked those outside ANVs about the potential need for a new law or agency (I asked ANVs more generally what they would like to see the government do or change), but a few in ANVs volunteered their opinions.

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

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

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

<sup>192</sup> *Id.*

<sup>193</sup> See *supra* note 133.

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

protect a hunter out on the land and river—the hunter depends on his own knowledge system to survive.<sup>195</sup> His people understand that “[c]orporations come and go, governments come and go. But the people, and what we do, remains.”<sup>196</sup> Another ANV resident said, “I would venture to say that 90% of our lifestyle is illegal in some fashion or another.”<sup>197</sup> A number of participants suggested that they would do what they needed to continue their lifeways, regardless of the law.<sup>198</sup> This outlook came up more in the context of hunting and fishing where decisions are made at the individual and family level,<sup>199</sup> rather than in the context of flooding and erosion. This outlook suggested a sense that new laws and agencies would be futile as they would not be followed.

One barrier to implementing laws that I observed in the course of my interviews and conversations was the lack of understanding of what the laws actually said. A number of participants, including those from outside ANVs, gave incorrect statements about the law.<sup>200</sup> Those in villages sometimes thought that subsistence laws were more restrictive than they actually were.<sup>201</sup> Those outside of villages were more likely to misunderstand tribal sovereignty and rights.<sup>202</sup> Beyond misunderstanding the laws, many simply do not know the options available under existing laws.<sup>203</sup> As one ANV resident said, “If there are any laws or regulations related to climate change that can and will impact our area we are not aware or have any knowledge of them . . . Are there any laws? We need to get educated by either the state or the federal government [on laws] that will assist us in the long run on climate change.”<sup>204</sup>

This ignorance is not limited to ANV residents. Neither I (prior to this research) nor several of the lawyers I interviewed were aware that laws<sup>205</sup> already provide for uneven land trades between the federal government and villages in order to facilitate relocation. One elder poignantly summed up this lack of capacity among those who should have capacity:

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<sup>195</sup> Interview with ANV research participant from northeast Alaska, Fairbanks, Alaska (Feb. 4, 2017).

<sup>196</sup> *Id.*

<sup>197</sup> Interview with ANV research participant from western Alaska, Nome, Alaska (Jan. 23, 2017).

<sup>198</sup> *See supra* note 133.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *See supra* note 133

<sup>205</sup> 43 U.S.C. § 1621(f) (2012); 16 U.S.C. § 3192 (2012).

“White people are starting to realize that what they’re doing is not right, and they want to right it, but they don’t know how.”<sup>206</sup> In other words, there may be a need to raise awareness of existing laws and programs that facilitate adaptation, rather than inventing new laws.

## 2. Challenges of Establishing a New Agency

A question related to the need for a new law, discussed by more than a quarter of my participants, is the need for a new agency to guide ANVs through the process of adaptation and relocation.<sup>207</sup> Several expressed a desire for a new agency, while a number opposed a new agency, and a similar number were ambivalent.<sup>208</sup> A few emphasized the need to identify one agency to take the “lead” on issues such as relocation, and several noted that the Denali Commission is already serving as an unfunded lead agency for relocation in Alaska.<sup>209</sup>

Regarding the potential responsibilities of a new federal agency, a few referred to the need for a new federal agency to deal with all aspects of climate change (including greenhouse gas mitigation); a few called for a new federal agency to deal with relocation; and a few called for a new bureau within an existing federal agency.<sup>210</sup> Several expressed a desire to revive the Alaska Sub-Cabinet on Climate Change, and almost as many called for a formal federal coordinating agency/task force to coordinate existing agencies (not unlike the Resilience Council under the Obama Administration that none of the participants had heard of).<sup>211</sup> One suggested that a coordinating agency needs bureaucrats, rather than just political appointees, so the agency can keep running though administration changes:

Task forces are filled by political appointees—administrators who come and go—rather than long-term bureaucrats who are going to get things done. Administrators are surrogates for elected politicians and don’t want to make the elected person look bad. Bureaucrats don’t have that worry. The key is getting good bureaucrats.<sup>212</sup>

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<sup>206</sup> Telephone Interview with ANV research participant from interior Alaska (Jul. 15, 2016).

<sup>207</sup> See *supra* note 133.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Conversation with Alaska Native working for a Native non-profit, Anchorage, Alaska (Nov. 28, 2016).

Nearly three-quarters of participants who discussed the potential for a new agency gave reasons why a new agency would not be effective.<sup>213</sup> One legislative staffer said that “getting money is hard enough—starting a new bureaucracy is even harder.”<sup>214</sup> A few expressed concern over too much governance and the need for informal coalitions to avoid bureaucracy.<sup>215</sup>

About half of those who discussed the potential for a new agency suggested that the new agency’s mission would overlap with or duplicate the expertise and missions of existing agencies such as the Denali Commission.<sup>216</sup> Participants described conflicts between different agency rules, difficulties in moving money between agencies, and difficulties in getting agencies (and legislators) to communicate and align priorities.<sup>217</sup> Some offered concerns about “siloeing” and the need to mainstream climate change into all decisions.<sup>218</sup> As one federal agency representative said, “Climate is a consideration. It’s not its own thing. It’s cross-cutting.”<sup>219</sup>

In summary, while a number of participants expressed support for a new overarching law or agency devoted to climate change, many more believed that such a direction would not be practical or helpful to ANV adaptation. Participants referred to the existing laws and agencies, which are uncoordinated, but are already facilitating adaptation actions.

#### IV. DISCUSSION: WHAT CHANGE IS DESIRABLE AND WHAT IS FEASIBLE

In this Part, based on participants’ views as well as my own analysis, I consider the potential for external government, as well as ANVs, to better provide for ANV climate change adaptation in a feasible manner that avoids further colonization.

##### A. *Difficulties of Creating a New Law or Agency*

The majority of my participants suggested that creating a brand-new overarching federal law or agency may not be practical, regardless of how much climate change has impacted ANVs and the need for climate justice.<sup>220</sup> A new legal framework would face many challenges, including the

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<sup>213</sup> See *supra* note 133.

<sup>214</sup> Telephone Interview with Alaska Legislature staff member (Sept. 4, 2016).

<sup>215</sup> See *supra* note 133.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Telephone Interview with Alaska-based manager of federal agency (Aug. 8, 2016).

<sup>220</sup> See *supra* note 133.



reluctance of state and federal government, as well as the public, to accept responsibility for climate change.<sup>221</sup> Even where the need for political change is acknowledged, there is little incentive to pay adaptation costs preemptively, especially when future risks are uncertain and seemingly remote to those in power.<sup>222</sup> Absent a disaster that threatens those with political power, sudden change is unlikely.<sup>223</sup> Congress has not created anything resembling a new agency since the Department of Homeland Security which was fashioned out of existing agencies after the September 11, 2001, disaster.<sup>224</sup>

Even if a new climate change adaptation agency were created, it would face challenges to carrying out its mission. It would have to find a way to integrate its regulations and policies with the ongoing efforts of the Denali Commission, FEMA, the Army Corps, and other major players

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<sup>221</sup> See, e.g., Philip Berke & Ward Lyles, *Public Risks and the Challenges to Climate-Change Adaptation: A Proposed Framework for Planning in the Age of Uncertainty*, 15 CITYSCAPE 181, 184 (2013); Governor Sarah Palin, who established Alaska's Climate Change Sub-Cabinet in 2007, subsequently denied the existence of climate change. Lindsay Abrams, *Sarah Palin: Climate Change Is This Century's Eugenics*, SALON (Oct. 28, 2014), [http://www.salon.com/2014/10/28/sarah\\_palin\\_climate\\_change\\_is\\_this\\_centurys\\_eugenics/](http://www.salon.com/2014/10/28/sarah_palin_climate_change_is_this_centurys_eugenics/) [<https://perma.cc/F7BX-TUNV>]; Governor Walker has called for more oil and gas drilling (which could exacerbate climate change) to raise money for communities needing to relocate. Matt McGrath, *Alaska mulls extra oil drilling to cope with climate change*, BBC NEWS (Oct. 12, 2015), <http://www.bbc.com/news/science-environment-34501867> [<https://perma.cc/H2XA-H6KP>].

<sup>222</sup> Susanne C. Moser, *Navigating the political and emotional terrain of adaptation: Community engagement when climate change comes home*, in SUCCESSFUL ADAPTATION TO CLIMATE CHANGE 290 (Susanne C. Moser & Maxwell T. Boycoff eds., 2013); Berke & Lyles, *supra* note 221, at 182; Kofinas & Chapin III, *supra* note 17, at 72; Munaretto & Klostermann, *supra* note 27, at 220; Johan Munck af Rosenschöld et al., *Institutional inertia and climate change: A review of the new institutionalist literature*, 5 WILEY INTERDISCIPLINARY REVIEWS: CLIMATE CHANGE 639, 639 (2014); Silvia Serrao-Neumann et al., *The Role of Anticipatory Governance in Local Climate Adaptation: Observations from Australia*, 28 PLANNING PRACTICE AND RESEARCH 440, 441 (2013); Susanne C. Moser, *Good Morning, America! The Explosive U.S. Awakening to the Need for Adaptation* PREVENTIONWEB 1, 3 (2009), [https://www.preventionweb.net/files/11374\\_MoserGoodMorningAmericaAdaptationin.pdf](https://www.preventionweb.net/files/11374_MoserGoodMorningAmericaAdaptationin.pdf) [<https://perma.cc/K7MZ-24TW>].

<sup>223</sup> Ahjond S. Garmestani & Melinda Harm Benson, *A Framework for Resilience-Based Governance of Social-Ecological Systems*, 18 ECOLOGY AND SOC. 9 (2013); Barry Smit & Johanna Wandel, *Adaptation, Adaptive Capacity and Vulnerability*, 16 GLOBAL ENVTL. CHANGE 282, 289 (2006); Emily Boyd et al., *Anticipatory governance for social-ecological resilience*, 44 AMBIO S149, S154 (2015).

<sup>224</sup> *Executive Departments*, INFOPLEASE (2018), <https://www.infoplease.com/history-and-government/executive-departments-and-agencies/executive-departments> [<https://perma.cc/G7C6-UTUY>].

in ANV adaptation. It would have to compete with existing agencies and programs for limited funding.

If created at the national level, a new agency might not be able to adequately provide for the unique needs of Alaska: its Arctic terrain; sparsely populated, remote villages; and the large percentage of federally recognized tribes.<sup>225</sup> The Denali Commission may be better suited to addressing these needs. The flexibility of its enabling law and the inclusion of state and federal agency representatives in its governing board have allowed it to play a lead role in coordinating and carrying out adaptation actions in ANVs—most notably the relocation of Newtok.<sup>226</sup> The Commission can combine and transfer different sources of funding available to communities more easily than other agencies can.<sup>227</sup> Also, the Commission has been able to pursue an equitable agenda where communities throughout Alaska are entitled to similar services, regardless of their remoteness.<sup>228</sup>

My research suggests that there is a contrast between calls in the literature for a new legal and institutional framework for climate change adaptation and relocation and what is actually feasible to accomplish. It may be that climate change and the need to adapt is simply one of the latest “wicked problems”<sup>229</sup> to face the legal and planning community, similar in scope to the problems of homelessness and alcoholism that have plagued humanity for millennia.<sup>230</sup> Because I see adaptation as a wicked

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<sup>225</sup> *Alaska Region*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/regional-offices/alaska> [<https://perma.cc/9JVD-HX8V>] (last visited Jan. 11, 2019).

<sup>226</sup> See Yereth Rosen, *Newtok poised to be relocation model for climate-imperiled villages*, ARCTIC TODAY (Mar. 29, 2018), <https://www.arctictoday.com/newtok-poised-relocation-model-climate-imperiled-villages/> [<https://perma.cc/GZ67-DYXT>].

<sup>227</sup> See *About Us, Denali Commission Act of 1998*, DENALI COMM’N, <https://oig.denali.gov/about-us> [<https://perma.cc/SH2S-8EM4>] (last visited Jan. 11, 2019).

<sup>228</sup> *Id.*

<sup>229</sup> C. West Churchman, *Guest Editorial: Wicked Problems*, 14 MGMT. SCI. B141, B141 (1967) introduced the concept of wicked problems as a class of social system problem that are ill-formulated, where the information is confusing, there are many clients and decision makers with conflicting values, and the ramifications in the whole system are thoroughly confusing. Horst Rittel and Melvin Weber, *Dilemmas in a General Theory of Planning*, 4 POL’Y SCI. 155, 160 (1973) distinguished “wicked” problems from relatively “tame” problems, characterizing wicked problems as those for which there is no definite formulation or stopping point where solutions are neither true nor false but just good or bad.

<sup>230</sup> Randall Crane & John Landis, *Planning for Climate Change: Assessing Progress and Challenges*, 76 J. AM. PLAN. ASS’N 389 (2010); Ford et al., *supra* note 49, at 177–78; Brian W. Head, *Evidence, uncertainty, and wicked problems in climate change decision making in Australia*, 32 ENV’T & PLAN. C: GOV’T & POL’Y 663, 664–65 (2014); Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159–60 (2009).

problem, I feel that advocating for an entirely new legal and institutional framework to address it would be as idealistic and unsuccessful as the Eighteenth Amendment (prohibiting alcohol). My suggestions in the following Section for incremental change do not provide an ideal solution to this wicked problem, but they may be more likely to succeed than efforts for wholesale change.

*B. Need for Incremental Change and Better Coordination*

My finding that there is relatively little support (at least among my participants) for a new overarching climate change law or agency does not leave ANVs with nothing in place to facilitate climate change adaptation and relocation. As I outlined earlier in this Article, there are many existing laws that can be used to support adaptation actions,<sup>231</sup> though they are not streamlined and may be unfamiliar to the public.<sup>232</sup> As I discuss elsewhere and in forthcoming articles, there are feasible, incremental changes that could be made to existing laws in a manner that would not require significant political change.<sup>233</sup> In this Section, I briefly summarize key areas for incremental legal change and explore the potential for a coordinating entity.

Based on my assessment of laws and conversations with those in position to make or influence laws, I find that some laws could be changed incrementally without significant political objection. For example, changes could be made to the Stafford Act to better focus on pre-disaster management,<sup>234</sup> and amendments could be made to ANCSA and other laws to ease the procurement of new land for community relocation and construction.<sup>235</sup> Other changes that could be made incrementally include changes

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<sup>231</sup> See also Elizaveta B. Ristroph, *Strategies for Strengthening Alaska Native Village Roles in Natural Resource Management*, 4 WILLAMETTE ENVTL. L. J. 57, 58 (2016).

<sup>232</sup> The Outline of the Current Federal and State Role in Climate Change Adaptation earlier in this Article provides a general sense of how government agencies are already carrying out climate change research and planning and assisting communities with adaptation. See *supra* Part II.

<sup>233</sup> Ristroph, *supra* note 10; Ristroph (2017), *supra* note 30; Ristroph, *supra* note 231; Ristroph (2010), *supra* note 4.

<sup>234</sup> See, e.g., the Interjurisdictional Fisheries Act, 16 U.S.C. §§ 1802, 1861a, 1864; the Marine Mammal Protection Act, 16 U.S.C. § 1371(a); the Stafford Act, 42 U.S.C. §§ 5170, 5170c(a), 5122, 5174(c), 5204, 5305, 5306; 42 U.S.C. § 5306; 44 C.F.R. §§ 206.117, 206.119, 206.432, 206.48.

<sup>235</sup> See, e.g., Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3111, 3114, 3119, 3170, 3192(a), (h); Magnuson-Stevens Act, 16 U.S.C. § 1855 (i)(1)(D); the Clean Water Act, § 404, 33 U.S.C. § 1344; National Environmental Protection Act

to federal laws that assume stationary ecosystems to address rapidly changing wildlands and species threatened by climate change,<sup>236</sup> changes to state and federal laws governing subsistence to improve the ability of fish and game managers to respond to rapid climate change,<sup>237</sup> and to improve ANV representation in resource management decisions that affect their well-being.<sup>238</sup>

Even if federal and state laws remain the same, there is potential for change in the executive branch to better facilitate adaptation. Though it is unlikely that the Trump Administration would make such changes, a future administration could continue the movement of the Obama Administration toward more acknowledgement of climate change in agency planning and programs, and towards more collaboration and coordination. A new administration might create a coordinating entity similar to the existing White House Council on Environmental Quality, which issues regulations and guidance for environmental reviews conducted by all federal agencies under the National Environmental Policy Act.<sup>239</sup> Alternatively, the short-lived Obama-era Council on Climate Preparedness and Resilience,<sup>240</sup> which had no power to issue regulations, could be revived

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(NEPA), 42 U.S.C. § 4332(c); Stafford Act, 42 U.S.C. § 5170c, 5174(c)(4); Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1613, 1621(f); Alaska hunting laws, ALASKA STAT. § 16.05.258(c); Alaska Administrative Order 224 (Jan. 28, 2005), <https://gov.alaska.gov/admin-orders/224.html> [<https://perma.cc/64BZ-PGYR>]; Bureau of Indian Affairs Housing Regulations, 25 C.F.R. § 256.21; FEMA Regulations 44 C.F.R. Pts. 80, 206; ALASKA ADMIN CODE tit. 5, § 99.015.

<sup>236</sup> See, e.g., Endangered Species Act of 1973, 16 U.S.C. §§ 1531(c)(1), 1538; Wilderness Act of 1964, 16 U.S.C. § 1131(a); National Park Service Organic Act, 54 U.S.C. § 100101 (1916); Invasive Species, Exec. Order No. 13,112, 64 Fed. Reg. 6183 (1999); Safeguarding the Nation from the Impacts of Invasive Species, Exec. Order No. 13,751, 81 Fed. Reg. 88,609 (2016). This Article lacks a discussion of the need for laws to be more adaptive, but there is a growing area of law review literature addressing the problems with stationarity in environmental law. See, e.g., Craig, *supra* note 9; Flatt (2012), *supra* note 9; Ruhl, *supra* note 22.

<sup>237</sup> See, e.g., 16 U.S.C. § 1855(i)(2); 16 U.S.C. § 1371(b); 16 U.S.C. § 3113; Alaska hunting laws, ALASKA STAT. §§ 16.05.258, 16.05.940(32)–(33), 16.40.020; 36 C.F.R. §§ 242.10(d)(5)(ii), 242.23–27; ALASKA ADMIN. CODE tit. 5, §§ 92.011, 92.200, 99.021, 99.015, 92.072.

<sup>238</sup> See, e.g., 16 U.S.C. §§ 1852(5)(A), 1861(a); Alaska hunting laws, ALASKA STAT. §§ 16.05.221, 16.05.260, 46.40; Consultation and Coordination With Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (2000); ALASKA ADMIN. CODE tit. 5, § 96.010.

<sup>239</sup> 42 U.S.C. § 4321 (1964).

<sup>240</sup> Using the term “resilience” instead of “climate change” in the name of the entity could allow for it to consider a broader range of issues related to community well-being in the face of climate change. It could also help the entity gain support with those who do not wish to acknowledge climate change. For example, the Trump Administration’s 2018 Draft National Mitigation Investment Strategy refers to “resilience” dozens of times and fails to mention

relatively easily. Given that none of my participants had ever heard of the Council on Climate Preparedness and Resilience, the new entity would need funding to raise awareness of its existence and function. The entity could offer guidance and promote mainstreaming in existing agency programs.

It would be helpful for each federal and state agency to establish a civil servant “point person” to connect with the federal coordinating entity and serve as an ombudsman for public concerns about how that agency addresses climate change. The idea of having a point person in each agency could be feasible even under the Trump Administration, as this was suggested in the Administration’s 2018 Draft National Mitigation Investment Strategy.<sup>241</sup> At the state level, the 2010 recommendation of the Sub-Cabinet regarding coordination could be implemented, whereby a designated person or office of the Governor (perhaps a revival of the previous Division of Governmental Coordination) could serve as a point person among all state agencies.<sup>242</sup>

In summary, while dramatic change is unlikely, it is important for federal and state governments to take incremental and feasible steps forward in addressing climate change adaptation.<sup>243</sup> Some of these steps will require legal change, while many others require changes in practices (agency culture), improved understanding of the law, and the will and mobilization to make a difference. I discuss the need for improved understanding and mobilization further in the next subsection in the context of ANVs.

### C. *Potential for More Local Autonomy*

I now turn to the issue of what change would be desirable and feasible at the ANV level; starting with the question of whether ANVs could get more jurisdiction over resources needed for adaptation. For the reasons suggested by participants in favor of increasing ANV jurisdiction as well as the principle of climate justice, I argue that there *should* be more jurisdiction given to tribes of the lands that surround them and the

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“climate change,” even though much of it relates to climate change adaptation. *Draft National Mitigation Investment Strategy*, FEMA (Jan. 11, 2018), [https://www.fema.gov/media-library-data/1515688801146-ef9a42945d292dc6848dc4390dc0b032/Draft-National-Investment-Strategy-for-Public-Comment\\_Jan2018.pdf](https://www.fema.gov/media-library-data/1515688801146-ef9a42945d292dc6848dc4390dc0b032/Draft-National-Investment-Strategy-for-Public-Comment_Jan2018.pdf) [<https://perma.cc/9XJM-HN6U>].

<sup>241</sup> *Id.* at 29–30.

<sup>242</sup> ALASKA CLIMATE CHANGE SUB-CABINET ADAPTATION ADVISORY GROUP, *supra* note 83, at 8-5.

<sup>243</sup> See Moser et al. (2012), *supra* note 16, at 64.

subsistence resources on which they depend. For example, there *should* be more meaningful subsistence co-management arrangements in which ANVs have some authority for decision-making as opposed to just consultation on decisions made by agencies.<sup>244</sup>

But, as recognized by a number of my participants, what *should* happen may not currently be feasible. I found that, particularly among those outside of ANVs, there is relatively limited support for changing laws to increase ANV jurisdiction. As I discussed above in the context of a new overarching law or agency, there is a great deal of inertia in the laws that currently control ANV jurisdiction over land and wildlife management systems.<sup>245</sup> For example, despite nearly five decades of criticism of ANCSA, and some incremental amendments to adjust it,<sup>246</sup> a new settlement has not emerged to take its place. ANVs lack the political clout to significantly change the existing regime.<sup>247</sup>

At least among those I interviewed, the lack of support for significant change to ANV jurisdiction relates more to concerns about ANV capacity limitations than to resentment or prejudice toward ANVs.<sup>248</sup> The concern about capacity stands out, since, while it has received attention in the context of adaptation needs, it has received relatively little attention in literature discussing decolonization and the need for greater tribal sovereignty.<sup>249</sup>

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<sup>244</sup> *Review of Co-management Efforts in Alaska*, MARINE MAMMAL COMM'N 4–5 (2008), <https://ipcommalaska.org/wp-content/uploads/Marine-Mammal-Commission-Review-of-Co-Management-Efforts-in-Alaska.pdf> [<https://perma.cc/E2J5-HC53>]; Chanda L. Meek et al., *Building resilience through interlocal relations: Case studies of polar bear and walrus management in the Bering Strait*, 32 MARINE POL'Y 1080, 1086 (2008); Laurie Richmond, *Incorporating Indigenous Rights and Environmental Justice into Fishery Management: Comparing Policy Challenges and Potentials from Alaska and Hawai'i*, 52 ENVTL. MGMT. 1071, 1072 (2013); Joseph J. Spaeder & Harvey A. Feit, *Co-management and Indigenous Communities: Barriers and Bridges to Decentralized Resource Management*, 47 ANTHROPOLOGICA 147, 148–49 (2005).

<sup>245</sup> John Sky Starkey, *Protection of Alaska Native Customary and Traditional Hunting and Fishing Rights through Title VIII of ANILCA*, 33 ALASKA L. REV. 315, 318 (2016).

<sup>246</sup> Alaska Land Transfer Acceleration Act., Pub. L. No. 108-452, 118 Stat. 3575 (2004); Pub. L. No. 104-42 (1995); Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980); Pub. L. No. 95-178, 91 Stat. 1369 (1977).

<sup>247</sup> Gary P. Kofinas et al., *Resilience of Athabascan subsistence systems to interior Alaska's changing climate*, 40 CAN. J. FOR. RES. 1347, 1354 (2010); Loring et al. (2011), *supra* note 117, at 79; McNeeley (2012), *supra* note 40, at 841.

<sup>248</sup> See *supra* Part IV.

<sup>249</sup> See, e.g., Cheryl L. Anderson, *Analysis of Integrating Disaster Risk Reduction and Climate Change Adaptation in the US Pacific Islands and Freely Associated States*, CLIMATE ADAPTATION P'SHIP IN THE PACIFIC, 12 (2012), <https://www.pacificrisa.org/wp-content/uploads/2013/02/Anderson-Analysis-of-Integrating-Disaster-Risk-Reduction-and-Climate-Change>

As discussed in the previous Section, I am reluctant to advocate for wholesale change that is unlikely to occur as I would rather suggest practical steps that ANVs and others will be able to accomplish. Self-governance is not a panacea for climate change impacts if ANVs are unable to carry out government functions. Efforts to “decolonize” adaptation and community planning may need to consider the importance of building ANV capacity and self-reliance. There is also a need to build cooperation between ANVs and outside partners to the extent that cooperation supports local capacity and avoids “colonizing” assistance. ANVs should develop a vision of how they want to build their capacity and self-reliance so that efforts to build these assets do not denigrate ANVs’ knowledge and cultures.

#### CONCLUSION

The existence of a moral obligation for government entities to assist ANVs with adaptation does not mean that such assistance is guaranteed in the near future. The reluctance of those outside ANVs to give ANVs more financial support or resource jurisdiction may mean that ANVs have to shoulder more responsibility for their adaptation using resources currently available to them (i.e., increased self-reliance). Some of the views expressed in this Article on the need for more self-reliance are seldom seen in the literature, which tends to refer to the problem of colonization without providing a pathway forward short of complete government reorganization. I argue that complete government reorganization—whether this involves creation of a new climate change agency or meaningful “decolonization”—is unlikely. Thus, it behooves ANVs to draw upon self-reliant traditions and partnerships to implement low-cost community adaptations that do not require significant outside intervention.

Increasing self-reliance is easier said than done given that ANVs have become more and more dependent on outside financial capital and lack the means to directly control the natural capital that has traditionally been a source of resilience. It will be important for ANVs to form relationships with those outside ANVs in a position to help build ANV capacity. Alaska Native Corporations should do more to provide this help, and agencies should take advantage of relatively low-cost methods (i.e., phone calls) to better collaborate with ANVs on adaptation and other community goals.

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-Adaptation.pdf [<https://perma.cc/5AFB-TF5E>]; Cameron, *supra* note 40, at 108; Marcus B. Lane & Michael Hibbard, *Doing It for Themselves: Transformative Planning by Indigenous Peoples*, 25 J. PLAN. EDUC. & RES. 172, 173 (2005); Leonie Sandercock, *Interface, Planning and Indigenous Communities*, 5 PLAN. THEORY & PRAC. 95 (2004).

Even if the federal and state governments decide not to form coordinating agencies at the federal and state levels, agencies and ANVs can still find ways to collaborate. Examples include the Climate Change Water Working Group—an informal federal agency group including NOAA, FEMA, the Bureau of Reclamation, the United States Geological Survey, the United States Environmental Protection Agency, and the United States Department of Agriculture—that collaborates on water management in a changing climate;<sup>250</sup> the Army Corps’ “Silver Jackets” teams, which work in almost every state to share knowledge between state, federal, tribal, and local agencies to reduce disaster risk;<sup>251</sup> and the Newtok Planning Group, an informal organization consisting of about twenty-five state, federal, and tribal entities that voluntarily began collaborating Newtok’s relocation in 2006.<sup>252</sup>

My emphasis on the need for both self-reliance and partnerships suggests that laws alone will not address climate change adaptation. As much as there is a government role in climate change at the federal, state, and ANV level, simply adding a new law will not necessarily change behavior or ensure adaptation action. Any new law or agency would have to interface with the existing “multiple bureaucracies” that relate to climate change adaptation issues. Indeed, there are already a large number of laws, programs, and agencies that play a role in addressing climate change, even though many people are unaware of or seem unable to take advantage of them. Adding a new climate change adaptation law and agency, without addressing problems related to capacity, political will, and coordination, will not resolve the challenges ANVs and other communities face regarding climate change. A more practical way forward should strive for incremental changes to existing laws, better coordination among adaptation efforts through the revival of state and federal coordinating entities, and support that builds ANV capacity while avoiding further colonization.

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<sup>250</sup> *Climate Change Adaptation Plan*, U.S. ARMY CORPS OF ENG’RS 20 (2014), [http://www.usace.army.mil/Portals/2/docs/Sustainability/Performance\\_Plans/2014\\_USACE\\_Climate\\_Change\\_Adaptation\\_Plan.pdf](http://www.usace.army.mil/Portals/2/docs/Sustainability/Performance_Plans/2014_USACE_Climate_Change_Adaptation_Plan.pdf) [<https://perma.cc/2VGM-RPX2>].

<sup>251</sup> *About the Silver Jackets Program*, SILVERJACKETS, <http://silverjackets.nfrmp.us/Home/About-The-Silver-Jackets-Program> [<https://perma.cc/QJ9U-TP2S>] (last visited Jan. 11, 2019).

<sup>252</sup> Bronen & Chapin, *supra* note 82, at 9323.



