Law and Policy for
Adaptation and Relocation Meeting

Tuesday, September 3 – Wednesday September 4, 2019

National Center for Atmospheric Research, Boulder, CO

A. Overview of Meeting

Problem Statement

Drs. Elizabeth Marino, Alessandra Jerolleman, and Julie Maldonado, in partnership with the [Rising Voices: Climate Resilience through Indigenous and Earth Science](#) program,[1] convened a meeting with a leading group of legal experts and disaster scholars to better understand the legal parameters, limits, and possibilities related to community-led relocation within the United States in response to erosion, repetitive flooding, ecological shift and deterioration, and/or other outcomes related to climate change. In this meeting, held September 3-4, 2019 at the National Center for Atmospheric Research in Boulder, CO, we were particularly interested in organizing our collective thoughts to better understand what primary set of research questions would shed light on the legal possibilities for community-based relocation, and what data sets are necessary to answer those questions. All participants had some experience with communities who had in the past, or were currently, organizing to expand community sites, or to relocate, because of land loss and increasingly incurred risk due to ecological shift. The group was focused on site expansion or community-led relocation of tribal communities, as these are among the communities first and foremost experiencing forced displacement due to climate and other stressors, and among those who have been taking leading, innovative actions for site expansion or whole community resettlement to maintain their cultures, sovereignty, and self-determination.

Because of the extensive history of researchers and government agents participating in extractive research and theft of community knowledge broadly, and Indigenous knowledges in particular, we set out ethical guidelines for all meeting participants. These include acknowledging the following: a) all research done with, or referencing, communities should be returned to communities in accessible ways in perpetuity; b) that research should be use-inspired and not done for the sole purpose of furthering theory, intellectual ideas, or academic publication; c) that all protections regarding data sovereignty and intellectual property ownership laid out by [the United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP) be followed; and d) that non-Indigenous researchers remain open to protocols and property-right considerations advanced by their Indigenous colleagues that are atypical within academic and Western scientific discourses. For additional guidelines meeting participants were asked to follow, please see the [UCAR/NCAR Participant Code of Conduct](#) and the [Rising Voices Ethics Guidelines](#).

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[1] Rising Voices is co-administered by the University Corporation for Atmospheric Research / National Center for Atmospheric Research (UCAR|NCAR) and the Livelihoods Knowledge Exchange Network ([LiKEN](#)) in partnership with Haskell Indian Nations University, the Indigenous Peoples' Climate Change Working Group, and NOAA's Office for Coastal Management.

Meeting Goals

We understand that there is a significant amount of policy, scholarship, and community-led work which has suggested that, in order to adequately address climate change-driven relocation, new governance frameworks, a climate change mitigation task force, and new funding streams need to be developed. We agree that these are worth pursuing. Our work stands alongside these goals, outlining what is possible today without substantial changes in legislation, policies, or regulations; and recognizing that even with the creation of new governance frameworks, several existing policies are still likely to apply. This work fulfills three important tasks: first, knowing what is possible now may be a much needed stop gap for communities who experience crisis while new governance, policy, and funding structures are being developed; second, examining pre-existing governance and policy frames will highlight critical challenges that may likely apply to new frameworks as well; and, third, a deeper understanding of what is possible under existing policies and regulations will inform their best use in the event that these policies and regulations remain in place.

The primary goals of this meeting were to: 1) develop a better understanding of the specific legal and policy impediments to community relocations; 2) plan for a series of future gatherings with a slightly larger group, including identifying who else might be brought to the table; 3) begin work towards an eventual conceptualization of the key areas of law and policy, resulting in future products for dissemination such as issue briefs, a white paper, or tools communities could use to navigate the complex policy landscape surrounding relocation; and, 4) prepare an agenda for a broader, collaborative project which will unfold over the next 3-4 years among Drs. Jerolleman (Jacksonville State University) and Marino (Oregon State University), Annie Weyiouanna (Shishmaref Native Corporation), Sigvana Topkok (Kawerak), Dr. Julie Raymond-Yakobian (Kawerak) and the participants of this meeting - to the extent that they are able.

Key Assumptions

The meeting was organized with four primary assumptions in mind:

1. It is challenging to relocate communities as communities and not as individuals.
2. The economic cost/benefit model disadvantages many communities such as rural communities or those communities experiencing the frequent burdens of repetitive or layered disasters.
3. It is more difficult to fund relocation as a proactive adaptive strategy, outside of a disaster as defined by the Stafford Act.
4. There is no existing policy mechanism to ensure the continued sustainability of a resettled community.

Meeting Participants

The ideas, conceptual models, and research questions that appear in the remainder of this proceedings report were developed in partnership during the meeting, and were rooted in the vast knowledge sets and personal experiences of participants. We want to acknowledge their intellectual work by listing participants below.

Patty Ferguson-Bohnee, Clinical Professor of Law, Arizona State University
Ava Hamilton, Arapaho filmmaker, welcomed us and led the land and history acknowledgement
Alessandra Jerolleman, Assistant Professor of Emergency Management, Jacksonville State
      University
Eli Keene, Associate Energy and Infrastructure, Clifford Chance
Liz Koslov, Assistant Professor of Urban Planning and Environment and Sustainability, UCLA
Heather Lazrus, Project Scientist, National Center for Atmospheric Research; Founder and Co-
      Director, Rising Voices
Julie Maldonado, Associate Director, Livelihoods Knowledge Exchange Network; Co-Director,
      Rising Voices
Elizabeth Marino, Assistant Professor of Anthropology and Sustainability, Oregon State
      University –Cascades
William Nicholson, attorney, author, and expert on emergency management and homeland
      security
Jean Tanimoto, Coastal Management Specialist, NOAA Office for Coastal Management
Bill Thomas, Senior Advisor for Island, Indigenous and International Issues, NOAA Office for
      Coastal Management
Meghan "Sigvanna" Topkok, Staff Attorney, Kawerak (regional non-profit corporation for the
      Bering Strait Region); City Council Member, Nome, Alaska
Melissa Villarreal, Graduate Student of Sociology, University of Colorado, Boulder

We also wish to acknowledge Kukuya Marguerita Nogueras Vidal, Coalition of Indigenous Taino People, United, who organized gifts for our participants. Special thanks to Ava Hamilton, Arapaho filmmaker, for the welcome and land and history acknowledgement.

B. Important Concepts and Summary of Discussions

Key Concepts

As part of Day One, we asked participants to discuss concepts that were critical to understanding collective relocation in response to ecological shift. These concepts are outlined below, along with highlights from the discussions that ensued following the presentation of those concepts.

1. **Community-led Relocation**

Community-led relocation indicates that decision-making be located within a recognized community group. We discussed how community should be engaged from visioning and planning through implementation, and beyond relocation or site expansion to ensure success in the aftermath of physical resettlement. We discussed that communities are not only bound geographically, but through relationship and practice, and we queried where and if there were legal definitions of community.

2. **Voluntary Buyouts**

A suite of programs that act as the primary mechanism for promoting relocation away from hazards as an adaptive strategy in the US. The vast majority of buyouts are post-disaster and require a disaster declaration. Some important features of buyouts for this project are that: a) they are not a mechanism for relocation, but are a payment for property and therefore have no protocol for resettlement associated with them; b) are typically funded at 75% federal funding, 25% state and/or local funding; c) currently demand for buyouts exceeds availability; d) how buyouts are distributed to individuals is highly variable, e.g., in Alabama it has been done by lottery, and after Hurricane Sandy in New York, buyouts were the result of community and neighborhood organization; e) buyouts may be distributed through various agencies, including buyouts funded by the Department of Housing and Urban Development (HUD), buyouts funded by the Federal Emergency Management Agency (FEMA), and the United States Department of Agriculture (USDA) – all have variable restrictions and opportunities.

We also recognized that buyouts are an increasingly popular mechanism for responding to repetitively flooded properties, as defined by the National Flood Insurance Program. Because buyouts are likely to be a more frequently used funded mechanism for incentivizing relocation, we agreed that our group was tasked, in part, to analyze whether and how buyouts were distributed (often inequitably), which includes understanding if and how buyouts exclude communities who want to move as a group and not as individuals.

3. Bureaucratic and Administrative Discretion

We understand bureaucratic discretion (as defined in Lipsky[2] 1969) to include the discretion that individual agency workers or groups of individual agency workers have as they are making decisions - in particular in this case, decisions made in response to a disaster. It is a goal of this project to use case study analysis to understand the parameters of bureaucratic discretion when responding to disasters that warrant consideration of relocation or site expansion as a possible strategy for adaptation.

During our expert meeting, more attention was paid to administrative discretion (sometimes also referred to as bureaucratic discretion, as used by Weingast and Moran 1983). By administrative discretion we mean the latitude that federal and state agencies have to interpret and carry out legislation and regulations. It was widely agreed that agencies have broad discretion when it comes to interpretation and implementation, as well as administrative lattitude to develop policy-making processes (Boyer[3] 1960). Understanding the relationship between Congressional law-making and agency interpretation is a wide area of legal study. Also noted was that the process through which administrations make decisions regarding discretion is often unrecorded and/or unpublished.

Also discussed was understanding that bureaucratic and administration action is practically carried out because of administrative precedent. There are two things to note about this in application to the project at hand. First, it is critical to understand precedent across case studies in order to provide a range of decision-making and action. Second, it is critical to understand the distance between what is possible under the Code of Federal Regulations (CFR), and how agencies are implementing the programs in practice. The distance between regulation and discretion may hold promise for creative application of the law in ways that benefit communities who need to relocate.

4. Code of Federal Regulations

Agencies, such as FEMA, create regulations through the process of rule-making that govern how the policy mandates set forth by legislative statutes will be implemented. These regulations, after going through the rule-making process which includes a public comment period, are then published in the Federal Register and the Code of Federal Regulations. Agency personnel rely on the regulations in the day to day implementation of the various programs governed by the regulations. Agencies also publish guidance documents based upon what is contained within the Code of Federal Regulations, but intended for a wider audience and provide examples of how the regulations might be interpreted in practice.

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[2] See Lipsky, Michael (1969). Toward a Theory of Street-Level Bureaucracy (IRP Discussion Papers No. 48-69) (p. 45). Madison, WI: Institute for Research on Poverty (IRP), University of Wisconsin
[3] See William w. (1960). Policy Making by Government Agencies. Midwest Journal of Political Science, Vol. 4 (3), pp. 267-288; https://www.jstor.org/stable/2108978.

5. Inequity Around Buyouts and Disasters

There is an increasing amount of research which suggests that buyouts are primarily benefiting middle income White families following a disaster. There is also evidence that in the context of post-Harvey buyouts in Texas were a mechanism to facilitate White flight out of increasingly LatinX neighborhoods. In both cases, recipients are predominantly White, middle income families, and the decision making process behind the development of the local programs are opaque and largely based on cost-benefit analyses which disproportionally affect low-income communities (Siders[4] 2018). Research has shown that some potential grant recipients may choose not to accept a buyout, even if they might otherwise qualify, due to a desire to remain within their community of neighbors. If buyouts are a mechanism which will be increasingly used to fund incentivized relocations away from risk, our group asked whether buyout policies could be reconceptualized or if bureaucratic discretion could implement buyouts in ways that allow for community-led and community-wide relocation as opposed to incentivizing individual property-owners only. We hypothesize that buyouts deployed in a community-wide manner would increase the equitability of buyouts, increase the diversity of communities and individuals who benefit from buyouts, and ensure protected economic classes are treated fairly under the law. However, even community-based relocation would not address the inherent limitations of the buyout funding program, which do not allow for assistance for the relocation of properties that are of lesser value or in a state of disrepair due to a history of underinvestment in infrastructure and repeated damages. Without substantive revisions buyouts also do not give aid to renters or owners who cannot prove title.

6. Sovereignty

Federally recognized tribes are considered sovereign nations under US federal law. Even though tribes pre-date the US federal government, they are considered domestic dependent nations in most cases.

7. Federal Recognition

Federal recognition is a complex topic which involves many distinct Acts of Congress, Supreme Court decisions, and regulatory action. During the treaty making eras, which officially began in the US with the ratification of the Constitution, and is generally thought to have ended in 1871, tribes were recognized as separate and sovereign nations with whom the US government entered into negotiations. In 1934, the Indian Reorganization Act allowed tribes to set up their own government systems and sets of laws; however, the US Department of the Interior primarily used anthropologists' assessments to identify recognized tribes and in some cases multiple tribes were put together under one designated tribal entity. In other cases, tribes were completely left out of the assessment. Discussion of the 1994 Federally Recognized tribes list was deferred, which affected which tribes are considered federally-recognized today. This has shown to be a significant detriment for some tribes to locate.

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[4] See Siders, A.R. (2018) Social justice implications of US managed retreat buyout programs. Climatic Change 152:239–257. https://doi.org/10.1007/s10584-018-2272-5

8. Site Expansion

Site expansion is language that has emerged specifically around and from Kigiqtamiut residents in Shishmaref, Alaska. Site expansion is used to indicate that the tribe maintains control over their island, even in the case of new infrastructure and residency within a new site on the mainland. This has multiple implications: 1) it means that adaptation to the risk of repetitive flooding may take the form of moving back and forth between community sites - one on the mainland and one on the island; 2) even in the event of relocation off of the island, the tribe and, in the case of Shishmaref, the Shishmaref Native Corporation, would retain rights over the island; 3) because the language of adaptation does not include abandoning the current town/village, there should not be disinvestment from the current site. The latter is increasingly important as relocation is likely to take many years, or even decades, and so continued investment in the current site is necessary. Participants also noted that the Inuit ancestors of those currently residing in Shishmaref were, like many other Alaska Native communities, semi-nomadic, using various parts of the coast at different times of the year. While Sarichef Island had been inhabited by the ancestors of Shishmaref's native residents, there was no permanent settlement until about 100 years ago, when the US Government and Lutheran Church built churches and schools across Alaska, forcing them to enroll their children in the schools under threat of having them removed from the family. The term "expansion" also recognizes their (as well as other Alaska Native communities) cultural roots as people who were adapted to a large area where they migrated inland as well as up and down the coast in response to dynamic seasonal environmental changes.

9. Coastal Retreat

Coastal retreat is one of two big picture options for communities who live along the coast - the other being adapting in place via elevating structures, putting in sea wall infrastructure and levies, etc. Coastal retreat is often linked with ideas regarding zoning to prohibit future development along coasts and is considered a multi-year process and strategy that can be applied in large metropolitan areas as well as smaller communities. Planned relocation, which is concerned with moving as well as resettling, is not synonymous with coastal retreat in the literature and distinct groups of scholars often use one or the other.

10. Individual Agency

The concept of individual agency stems from the fields of psychology and sociology. It describes the ability of an individual to control and determine their own actions, including the purpose and degree of effort to be expended. In the context of community relocation, agency is limited by the inability to choose to act collectively as well as the limitations inherent in making a choice between poorly understood, non-ideal options while under high stress. However, individuals are never simply passive actors, but their range of choices can be constrained.

Case Examples

As a jumping off point for discussion, we provided participants with a series of brief case studies of both completed and ongoing community resettlement and relocation efforts. The case studies provide a basic overview of: the overall project and community; information on the timeline and process, including funding mechanisms; community participation mechanisms and challenges; outcomes; and key lessons.

The case examples presented were:

- Gays Mills, Wisconsin
- Chelsea, Iowa
- Shishmaref, Alaska
- Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw (in Louisiana)
- Quinault Indian Nation (in Washington)

Issues and Challenges that Emerge Across the Case Studies

1. **Program and Funding Timelines:**

Across all of the case studies there are challenges for community members due to the different timelines in place across the different funding mechanisms. As a result, families and individuals received assistance at different points in time, making decision-making more challenging for the community as a whole. In these cases, as in most federally funded projects, the timelines were consistently much longer than people expected or desired. The lengthy processes led to mission drift and in some cases led families to withdraw. The fact that most of these resettlement efforts took place in the context of disaster recovery also presented additional challenges as community members were dealing with the recovery while making decisions in the context of uncertainty.

2. **Community Engagement**

All of these cases illustrated the difficulty of having full and complete community engagement throughout these types of processes. As recipients of funding, communities and individuals are often treated as though they should simply be grateful to receive assistance and not be critical. This can limit the ability for true engagement, and can also create situations where agency members feel upset when community members do engage and make requests. In all of these cases individuals were treated as individuals and not as community members, with the onus put onto the community to understand the legal mechanisms and the repercussions. A further difficulty stems from the conflicting visions within the community, as well as between the community and the agencies. In many cases, community members are unable to make their voices heard when there isn't one monolithic position. Finally, turnover in agencies makes it difficult to build trust and relationships, which are critical to an equitable relocation process.

3. Larger Structural Challenges:

Although these case studies focused on particular efforts to move communities in response to flood risk, it is not possible to separate the current risk from the structural racism, historical traumas, and colonial legacies that have created the risk. Another structural issue is the inability of current engagement mechanisms to fully place communities in the lead.

4. Tracking of Long Term Outcomes:

Across all of the cases in which the effort had been completed, it is not clear where all of the persons that accepted assistance relocated to. It is also not clear whether the final beneficiaries of the resettlement were the initial community members for which the relocation was intended, and that even "successful" efforts have not resulted in an entire relocation. Instead, checkerboard patterns are often a result.
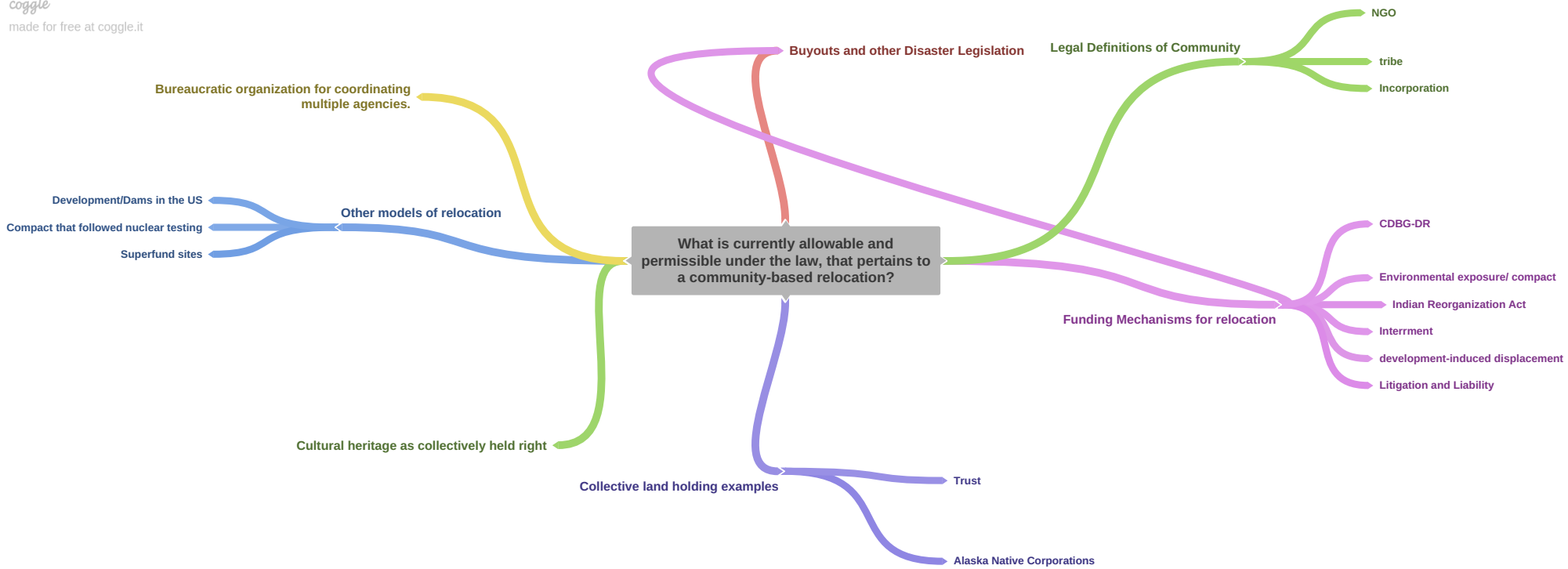
5. Lack of a Funding Mechanism

The various cases draw upon a diverse set of funding mechanisms, with some cases providing more clarity than others regarding the exact mix of resources utilized. Across the developing resettlement effort it is clear that agency representatives don't always fully understand their own funding mechanisms, much less how to combine with mechanisms from other agencies. As a result, funding sources are cobbled together to fund as much as possible, with varying levels of success. Typically, the costs are also considered to be far too high when taken on a house-by-house basis.

Lessons that Emerge Across the Case Studies

1. Incentives and mechanisms are needed to allow agencies to invest time and resources into building relationships with the community
2. The key metrics should not just be how quickly money is spent, or that it be spent in strict accordance to the regulations, but should instead be the public good that emerges, and who defines the "public good" is a bottom-up as opposed to top-down process.
3. Media plays a role in facilitating or hindering the process and shaping public perception, in ways that can be detrimental or potentially lucrative.
4. Sustained funding is needed to support these efforts, including long term sustainability.

Mapping exercise rendered from notes taken during the meeting

What is currently allowable and permissible under the law, that pertains to a community-based relocation?

Buyouts and other Disaster Legislation

Legal Definitions of Community
- NGO
- tribe
- Incorporation

Bureaucratic organization for coordinating multiple agencies.

Other models of relocation
- Development/Dams in the US
- Compact that followed nuclear testing
- Superfund sites

Funding Mechanisms for relocation
- CDBG-DR
- Environmental exposure/ compact
- Indian Reorganization Act
- Interrment
- development-induced displacement
- Litigation and Liability

Cultural heritage as collectively held right

Collective land holding examples
- Trust
- Alaska Native Corporations

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Regulations that Shape Relocation

- [Stafford Act](#), and amendments
- [Coastal Zone Management Act](#)
- [National Flood Insurance Act](#), and amendments
- [National Historic Preservation Act](#)
- [Native American Graves Protection and Repatriation Act](#)
- [Uniform Relocation Act](#)
- Regulations governing HUD/FEMA/USDA Buyouts
- State Laws
- Regulations governing US Army Corps of Engineers
- Emergency Powers
- [Emergency Management Assistance Compact](#)
- HUD Community Development Block Grants-Disaster Recovery (CDBG-DR)
- [Comprehensive Environmental Response, Compensation, and Liability Act of 1980](#) (Superfund)
- Land Trust

Key Challenges

- How do we retain enough consensus so people can move together and also individuals can individually decide to remain in place?
- How to develop community-led protocol that maintains the community-led nature as others come in for support?
- Communities trying to piecemeal money, are there funding mechanisms that could look at a relocation and resettlement that was not so piecemeal?
- Is it possible to utilize discretion to accomplish the goals of a community?

Needed Data

- Case Law on: inverse condemnation, permitting, administrative discretion, brownfields, passive takings, damages for losses, trust responsibility, etc.
- Information on previously funded projects that: interpreted community differently, permitted assistance for those who had left, were outside of the context of a disaster, etc.
- What precedent or examples are there from toxic-driven relocation?
- In the past how have ecosystem and social benefits been valued and taken into consideration for the purposes of benefit cost modeling?
- What have been the long term outcomes of buyouts?

Key Areas of Inquiry
- Is there a limit on Community Development Block Grants?
- What recourse does a community have if they feel that a grant is being mismanaged or the funds are being appropriated towards another end?
- What other models are there for group relocations?
- Can cultural heritage be claimed as a human right?
- How much flexibility is there in buyout programs?
- What land ownership models can be considered?
- Is it possible to assign liability for the 'taking' of adaptive capacity from government actions (i.e. forced remaining in place)?
- Can the breach of Trust responsibility be used in some way?
- What models are there for reparations?
- In what cases is tolling of a statute of limitations allowed?
- Can the model from the Consolidated Grants to Insular Areas (44 CFR Part 304) be utilized in some way?
- Is there a mechanism in 44 CFR Section 9 Wetlands to argue that the Tribes should retain control of lands that are abandoned, but are wetlands?

Conclusion and Next Steps

Meeting participants spent a lot of time working together towards the development of a better understanding of the specific legal and policy impediments to community relocations. In order to do this, participants began by considering the key assumptions as well as looking at a series of case studies that illustrated the challenges of community relocation in practice, even when it has been considered to be successful.

Although participants did consider who else might be engaged in the future, the gathering itself focused primarily on creating a model that could be utilized for future work. This model will inform follow-up gatherings of these, and other, experts, further development of key sub-questions, identification of further resources, the identification of additional partners, and eventually collaboration in developing tools that could be useful for communities. Future work will also include enhancing and further developing the case studies, as well as the creation and dissemination of written products beyond this initial proceedings. Throughout this process community members and research partners will work iteratively to ensure that products and recommendation accurately represent the needs and perspectives of the community.