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SEMIANNUAL REPORT TO THE CONGRESS

FY 2010 – SECOND HALF

OFFICE OF THE INSPECTOR GENERAL

DENALI COMMISSION

ANCHORAGE, ALASKA

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Memo

To: Mike Marsh, Inspector General, Denali Commission

From: Joel Neimeyer, Federal Co-Chair, Denali Commission

Subject: FY2010 (Second Half) Semi-Annual Report to Congress

Date: November 19, 2010

This memo is written in response to the above referenced document that was provided to me for review and comment on November 2, 2010. The following is offered.

1. I have enjoyed our opportunities since the last semi-annual report to discuss reauthorization concepts and specific alternative solutions to issues plaguing the Denali Commission. In particular, I am appreciative of your efforts in opening doors to friendly advisors with a myriad of Federal agencies, many who now (through your efforts) stand ready to provide technical assistance on rewriting elements of the agency's reauthorization language.
2. With regard to the report I ask that you include in the Appendix your list of 80 + problems associated with the current Denali Commission Act of 1998, as amended.
3. I am supportive of exploring the concept of a Pacific Regional Authority, and in particular, the common issue of power generation and electrical transmission for Pacific states and territories. However, I suspect that there may not be an appetite for a Pacific Regional Authority at this time.
4. As you are aware, the U.S. Department of Treasury – Office of the Inspector General (DOT-IG) has not yet issued their audit of the Commission's transportation program. When this occurs, I look forward to comparing the DOT-IG findings with your past reports for common issues, and subsequent discussion on how we might address these issues.
5. Lastly, I enjoyed reading your tribute to Mr. Larry Froelich, formerly with the Council of Counsels to Inspectors General.

Thank you for the opportunity to provide you my comments.

MEMORANDUM FOR FEDERAL CO-CHAIR NEIMEYER

From: Mike Marsh, CPA, MPA, CFE, Esq.
Inspector General

Subject: Semiannual report to agency head and Congress for second half of FY 2010

The discussion below constitutes my report to the agency head and Congress, as required by the Inspector General Act, for the second half of FY 2010.

FOCUS OF THIS PERIOD'S REPORT TO CONGRESS

The Denali Commission's statutory authorization expired two years ago. Congressional staff and OMB are considering the future statutory fate of Congress' only experiment with a regional commission that serves a single state (Alaska).

Congress' other six regional commissions each serve from four to 13 states. The single-state Denali Commission (Denali) has a unique statute that has been problematic to implement in practice over its short federal lifespan of just over a decade.

Over the past year, Denali's Office of Inspector General (OIG) has conducted an extensive review of the agency's enabling act — as Congress has encouraged us to do in section 4(a)(2) of the Inspector General Act. That provision directs inspector generals to do the following:

> *to review existing and proposed legislation and regulations relating to programs and operations of such establishment and to make recommendations in the semiannual reports required by section 5(a) concerning the impact of such legislation or regulations on the economy and efficiency in the administration of programs and operations . . .*

We thus cataloged over 80 potential statutory amendments in OIG's last semiannual report to Congress (May 2010). And our OIG reports over the past five years have detailed the difficulties we've observed and the interventions required from other federal agencies (OMB, GAO, DOJ, OGE) to address the statutory ambiguities. Some of these disputes between players and stakeholders have now reached the level that OIG recently introduced management to the Federal Mediation and Conciliation Service as a possible resource.

The potential statutory improvements discussed in our last report to Congress were at the conceptual level. We discussed the issues in depth and we recommended solutions, but we did

not attempt to offer the specific technical language that would be needed to implement those solutions through legislation.

However, after conferring with the agency head, CFO, OMB, and congressional staff, Denali OIG concludes that it would valuable at this point for us to pass on our institutional memory of the missing statutory language that would have made the agency lower maintenance for the federal system. This type of OIG recommendation seems consistent with Congress' encouragement in section 4(a)(4) of the Inspector General Act for us to do the following:

> *to recommend policies for, and to conduct, supervise, or coordinate relationships between such establishment and other Federal agencies, State and local governmental agencies, and nongovernmental entities with respect to (A) all matters relating to the promotion of economy and efficiency in the administration of . . . programs and operations . . .*

Thus, based on five years of experience with a troubled enabling act, Denali OIG offers the potential statutory overhaul in Appendix A for the hypothetical retooling of the Denali Commission into a geographically-expanded "Pacific Regional Authority."

Though there are probably limited fans for expanded regional commissions, we hope that Appendix A will assist in the congressional conversation as to what the public should expect from a reauthorized regional commission (and what geography constitutes a meaningful "region").

It is more realistic, though, to hope that those ultimately sentenced to craft Denali's new language will simply find Appendix A to be helpful input on the options that might prevent future problems with this type of entity.

While it is appropriate under Inspector General Act section 4 for Denali OIG to offer Congress our institutional memory of the statutory issues and possible fixes, this report is obviously no substitute for the seasoned help available to legislators from the House and Senate legal counsels. They're Congress' ghost writers who draft for a living and can, if asked for advice, anticipate deficiencies like those in the Denali Commission Act.

We also note that GAO's enabling act allows it to detail specialists to congressional committees.[1] Further, the Congressional Research Service is preparing an updated study of the regional commissions that policymakers should find valuable.

OIG's hypothetical statutory solution in Appendix A, of course, does not reflect the views of Denali's management — or that of any other federal agency so far as we know.

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[1] See 31 USC 734.

DETAILED ANALYSIS OF OIG'S HYPOTHETICAL STATUTORY SOLUTION IN APPENDIX A

So, to the extent that policymakers would appreciate an OIG "autopsy" of Denali's existing statute, this report will now dissect selected sections of our hypothetical legislative solution (Appendix A) in terms of Denali's *"Historical issue"* and OIG's corresponding *"Suggested remedy."*

Our hypothetical statutory solution assumes that the Denali Commission would be replaced by the new Pacific Regional Authority.

Section 15901(a)(1) — Clarified purpose of replacement entity

Historical issue: The Congressional Budget Office, OMB, and Denali OIG have in our publications[2] questioned the value added by inserting the Denali Commission as an additional layer in the funding "food chain" that flows from Congress to the ultimate beneficiaries.

Questions also sometimes arise over whether regional commissions have the legal status of federal agencies, state agencies, or something else. Previous Denali OIG reports have detailed "high maintenance" struggles with Beltway regulators to resolve the applicability of federal oversight standards in everything from ethics to accounting principles to appropriation laws.[3]

Suggested remedy: Section 15901(a)(1) makes it clear that the Pacific Regional Authority would have a federal purpose beyond "just add money." The new entity would have explicit public responsibilities for spending oversight, coordination (leveraging) of funding from diverse sources, and the application of "silver-bullet" solutions that would otherwise be missed (innovation).

Suggested section 15901(a) also makes it clear that the Pacific Regional Authority is a *federal* agency — and thus unequivocally subject to federal oversight laws on how federal dollars are spent.

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[2] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 35-37, 40-42; Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), pages 17-18; "Inspector General's Perspective on Management and Performance Challenges Facing the Denali Commission" in the *2009 Performance and Accountability Report;* OMB, "Terminations, Reductions, and Savings," pages 2, 20, 21, 33 in *Budget of the U.S. Government, Fiscal Year 2010* at *www.budget.gov;* OMB, *Program Assessment of Denali Commission,* at *www.expectmore.gov;* Congressional Budget Office, *Budget Options,* vol. 2 (August 2009), sec. 450-5, page 106 at *www.cbo.gov.*

[3] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 1-3, 6-13; Denali OIG, *Semiannual Report to the Congress* (May 2009), pages 6-9; Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), pages 7-8; Denali OIG, *Semiannual Report to the Congress* (May 2007), pages 8-9. See also GAO, *Denali Commission—Overobligation of Apportionment,* # B-316372 (Oct. 21, 2008); GAO, *Denali Commission—Anti-Lobbying Restrictions,* # B-317821 (June 30, 2009); GAO, *Denali Commission—Authority to Receive State Grants,* # B-319246 (Sept. 1, 2010); GAO, *Denali Commission—Transfer of Funds Made Available through the Federal Transit Administration's Appropriations,* # B-319189 (Nov. 12, 2010).

Section 15901(a)(2) — Expanded geographic service area

Historical issue: The federal system is populated with many small, specialized agencies. The service area of the existing Denali Commission is limited to Alaska.

The Congressional Budget Office, OMB, and Denali OIG have in our publications challenged the efficiency of Congress' sole experiment with a "regional" commission that includes only a single state.[4]

Suggested remedy: Denali OIG has previously recommended that Congress consider the potential combination of a regional commission serving Alaska, Hawaii, Guam, American Samoa, the Northern Mariana Islands, and the three multi-island former Pacific territories (freely associated states) that receive congressional support through the Department of the Interior and other federal agencies.[5] While the climates are obviously dissimilar, Denali's lessons-learned in serving small, isolated, road-challenged, ethnically-diverse settlements should be transferable to the suggested Pacific Regional Authority.

Section 15901(b) — Board member composition

Historical issue: The most vexing obstacle to the Denali Commission's success has not been a lack of funding. Congress has given the small agency around $1 billion over its short lifespan of a little more than a decade.

However, in Denali's enabling act, Congress experimented with a commission composed of the ex-officio heads of specific public and private entities that play key roles in Alaska. Previous Denali OIG reports have detailed the unintended consequences of a panel populated by the very entities that Denali must fund in order to implement congressional intent (public perception of a "board of grantees").[6]

And these panel members currently serve for an unlimited period of time (no specific term), so long as they hold the ex-officio positions in their sending organizations (thus potentially for life). In contrast, the agency head is appointed for only four years at a time.

In contrast with the other regional commissions, Congress also experimented with a process for appointing the agency head that is a hybrid straddling the executive and legislative branches.

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[4] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 35-37, 40-42; Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), pages 17-18; "Inspector General's Perspective on Management and Performance Challenges Facing the Denali Commission" in the *2009 Performance and Accountability Report;* OMB, "Terminations, Reductions, and Savings," pages 2, 20, 21, 33 in *Budget of the U.S. Government, Fiscal Year 2010* at *www.budget.gov;* OMB, *Program Assessment of Denali Commission,* at *www.expectmore.gov;* Congressional Budget Office, *Budget Options,* vol. 2 (August 2009), sec. 450-5, page 106 at *www.cbo.gov.*

[5] See Denali OIG, *Semiannual Report to the Congress* (May 2010), page 37.

[6] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 10-14; Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), pages 7-8.

A previous Denali OIG report detailed the unintended consequences that this unique arrangement posed when there was a four-month gap between the terms of successive agency heads.[7]

Suggested remedy: Denali OIG recommends that these experiments not be repeated — and that Congress instead try another. Suggested section 15901(b) creates a diverse panel of residents from the governmental units that define the new region. Selection is divided among three cabinet secretaries to reflect their departments' policy specialties. Specific members support the federal tribal coordination goals of Executive Order 13175 (*Consultation and Coordination With Indian Tribal Governments,* Nov. 6, 2000).

With the exception of the agency head, members would be appointed for four years at a time. The agency head would change to a traditional presidential appointment (like the other regional commissions), but with a 10-year term to encourage selection of a long-term, nonpartisan professional administrator. A watch of a decade promotes the institutional memory needed to guide the ideals of section 15901(a)(1) for the agency's enhanced purpose, while short terms may encourage leaders to just move money.

On the other hand, the Beltway is a place of watchful waiting and any 10-year presidential appointment presents the definite possibility that there will be gaps between the terms of agency heads. The suggested provisions of subsections (b)(3) and (b)(4) address this legal need to avoid a public crippling of the agency's work during such leadership voids.

Section 15902(a)(1) — Board's function and subject matter

Historical issue: Previous Denali OIG reports have detailed the statutory ambiguity as to what Congress intended the panel of commissioners to do for the agency.[8] Unlike the other regional commissions, the panel was not established with the authority of a governing board. The only explicit role in Denali's enabling act is for the panel to craft an annual "work plan" of funding recommendations, which the agency head can either accept or return to the panel for revisions.

Attempts to discern a more meaningful (but still legal) role for Denali's commissioners have involved such varied federal resources as GAO, OMB, the Office of Government Ethics, and the Justice Department. Denali's OIG has in recent months coordinated management's introduction to the Federal Mediation and Conciliation Service as a further possibility to resolve this longstanding impasse among the players and stakeholders.

While the legislative history is sparse, the board membership specified in Denali's statute implicitly suggests an attempt to assemble a blue ribbon panel for the creative solutions that

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[7] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 1-3.

[8] See Denali OIG, *Semiannual Report to the Congress* (Nov. 2008), pages 8-9; Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), pages 5-6.; Denali OIG inspection report for Sterling Landing, Alaska (Jan. 2007); Denali OIG inspection report for Takotna, Alaska (Jan. 2007); Denali OIG inspection report for Unalakleet, Alaska (Jan. 2007).

other federal agencies are missing. Previous Denali OIG reports have noted the underuse of the commissioners in this regard, though.[9]

Innovative project selections also require the statutory flexibility to award grants to a variety of entity types.[10] Questions sometimes arise as to whether private business corporations are eligible for the grants received by governmental units and nonprofits.

Suggested remedy: Section 15902(a)(1) makes it clear that the important role of the panel of Authority members is to select the funded projects — nothing more, nothing less. Once a project has been selected, the board's work is done. The federal administrator then has the responsibility for awarding the grant (or cooperative agreement), obligating the funds, monitoring the use, and taking all further steps necessary to implement the selected project.

Denali OIG reports have over the years suggested various untapped solutions to rural problems that the agency might care to pioneer consistent with its mission — both with and without enhanced funding.[11] Section 15902(a)(1) offers more detailed congressional direction than the Denali Commission Act as to the types of projects that the new agency should consider. Section 15902(a)(1) also identifies a wide spectrum of entities to which the Authority can make awards, including private business corporations.

Section 15902(a)(2) — Requirement for recipient match

Historical issue: Since regional commissions exist to assist impoverished (distressed) locations, controversy exists as to whether grant awards should provide full funding — or be "matched" to some degree by funds from other sources (the popular "skin-in-the-game" argument). Further issues exist as to whether recipients can obtain the match from other federal agencies, whether state governments should contribute, and whether applicants can offer "in-kind" contributions (property or services) instead of actual money ("hard match").[12]

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[9] Denali OIG, *Semiannual Report to the Congress* (Nov. 2008), pages 8-9; Denali OIG, *Semiannual Report to the Congress* (May 2008), page 7; Denali OIG, *Semiannual Report to the Congress* (May 2008), page 5; Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), page 7; Denali OIG, *Semiannual Report to the Congress* (May 2007), page 3.

[10] See Denali OIG inspection report for Nikiski, Alaska (Sept. 2008).

[11] See Denali OIG, *Semiannual Report to the Congress* (Nov. 2008); Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), pages 18-19; Denali OIG, *Semiannual Report to the Congress* (May 2007), pages 6-7; Denali OIG inspection report for Chitina, Alaska (Oct. 2008); Denali OIG inspection report for Nikiski, Alaska (Sept. 2008); Denali OIG inspection report for Port Graham, Alaska (Sept. 2009); Denali OIG inspection report for Red Devil, Alaska (Jan. 2007); Denali OIG inspection report for Sterling Landing, Alaska (Jan. 2007); Denali OIG inspection report for Stony River, Alaska (Jan. 2007); Denali OIG inspection report for Unalakleet, Alaska (Jan. 2007).

[12] See Denali OIG, *Semiannual Report to the Congress* (Nov. 2008), pages 6-7; Denali OIG inspection report for Manokotak, Alaska (Sept. 2006); Denali OIG inspection report for Sterling Landing, Alaska (Jan. 2007); Denali OIG inspection report for Takotna, Alaska (Jan. 2007); Denali OIG inspection report for Unalakleet, Alaska (Jan. 2007).

Legislation sometimes takes a hard line of 50-50 that is overridden in practice by complex exemptions for any applicant defined as "distressed," with possible appeal procedures for any applicant initially classified as "non-distressed." In practice, the function of regional commissions is to ration limited federal resources among distressed areas whose needs cannot be fully met. In short, tough choices are made at some level in deciding who gets helped by a regional commission, who gets helped by someone else, and who gets nothing.

Suggested remedy: Section 15902(a)(2) sets a bright line requiring 50% match with no attempt at an exemption program that might be difficult to make meaningful in practice. However, the provision places no restriction on the match's source. In fact, subsection (a)(5) (discussed below) makes it clear that the Authority's grants can include funds from any public or private source — including other federal grant programs. The latter is consistent with other regional commissions in Title 40.

Section 15902(a)(5) — Authority to accept diversified funding

Historical issue: The Denali Commission is an independent federal agency created by Congress, and thus subject to federal restrictions on both the sources and uses of its funding. Though Congress now funds Denali at less than half of its highest appropriations, the agency's statutory form presents a legal straitjacket that frustrates management's pursuit of substitute funding from other sources.

Various federal and state players have alerted OIG to legal issues as Denali's management has become more aggressive and creative in its quest to replace the lost congressional funding. The issues involve the technical application of arcane appropriation laws (not misconduct), and Denali OIG has thus sought the proactive guidance of the U.S. Comptroller General.[13] Denali OIG's prior semiannual report to Congress discusses these technical issues in detail.[14]

Suggested remedy: Section 15902(a)(5) authorizes the new Pacific Regional Authority to assemble funding from any public or private source (including other federal grant programs) for the purpose of grants and cooperative agreements. This provision is consistent with other regional commissions in Title 40.

Section 15902(a)(6) — Authority to proactively condition grants

Historical issue: Previous Denali OIG reports have recommended that the agency enhance its monitoring of grant use through some specific conditions in grant documents and the adoption of

[13] See GAO, *Denali Commission—Authority to Receive State Grants*, # B-319246 (Sept. 1, 2010); GAO, *Denali Commission—Transfer of Funds Made Available through the Federal Transit Administration's Appropriations*, # B-319189 (Nov. 12, 2010). This is an appropriate OIG approach to such issues under 31 USC 3526(d), 31 USC 3529, and Inspector General Act sections 4(a)(4) and 6(a)(3).

[14] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 6-9.

a "common rule" applicable to all grantees.[15] These recommendations remain unimplemented, with Denali's staff sometimes questioning whether they have the statutory authority to impose customized conditions beyond the minimums prescribed by OMB.

Suggested remedy: Section 15902(a)(6) makes it clear that the federal administrator has the authority to adopt such grant conditions, both general and tailored to specific grants, as are deemed necessary for effective oversight.

Section 15902(b) — Federal insurance pilot program

Historical issue: While Denali projects are often successfully implemented, sometimes they are not.[16] Construction can remain uncompleted in small remote places when funding has been exhausted and recourse against the original grantee is not feasible.

Suggested remedy: The federal government insures against some risks that the private insurance market will not address (for instance, vaccines and crop destruction). Section 15902(b) signals congressional intent that the Pacific Regional Authority explore the feasibility of federal insurance that could complete a remote facility when there is a business failure of a grantee or its contractor.

Section 15902(c) — Clarified role in interagency coordination and oversight

Historical issue: Denali has a solid history of addressing rural problems through the "coordination" of funding and technical assistance from multiple sources. Though this is a public value-added for Denali, its enabling statute does not explicitly note this "coordination" role.

Executive Order 13175 encourages certain federal agencies to pursue enhanced "consultation and coordination" with tribal governments. However, the definition of "agency" under section 1(c) of this executive order is ambiguous as to whether regional commissions are included.

Suggested remedy: Section 15902(c) makes it clear that the Pacific Regional Authority would have a federal purpose beyond "just add money." To the extent that Congress directs or other agencies request, the new entity would have the explicit authority to assist in effective monitoring and coordination (leveraging) of grant-related resources from diverse sources.

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[15] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 20, 25; Denali OIG inspection report for Buckland, Alaska (Sept. 2006); Denali OIG inspection report for Chitina, Alaska (Oct. 2008); Denali OIG inspection report for Manokotak, Alaska (Sept. 2006); Denali OIG inspection report for McGrath, Alaska (Sept. 2009); Denali OIG inspection report for Nikiski, Alaska (Sept. 2008); Denali OIG inspection report for Port Graham, Alaska (Sept. 2009); Denali OIG inspection report for Togiak, Alaska (Sept. 2009); Denali OIG inspection report for Takotna, Alaska (Jan. 2007); Denali OIG inspection report for Tanacross, Alaska (Oct. 2009).

[16] See Denali OIG inspection report for Tanacross, Alaska (Oct. 2009).

Section 15902(c) also makes it clear that Congress considers the Pacific Regional Authority to be an "agency" expected to promote the federal tribal coordination goals articulated in Executive Order 13175.

Section 15903(a) — Logistics of meetings

Historical issue: A previous Denali OIG report has questioned the efficiency of flying the panel of commissioners to meetings at remote locations with sparse public attendance.[17] Denali's management has in the past inquired whether the panel of commissioners can make decisions through "notation voting" (sequential circulation of ballots and documents, or staff polling) instead of physical meetings with oral discussions.[18]

In 2005, Congress enacted an open meetings statute specifically for the Denali Commission (42 USC 15911(c)). This limited provision differs from the full Government in the Sunshine Act that applies across the federal system. Denali's special provision has been problematic to apply in practice to meetings of the commissioners.[19] Commissioners frequently wish to confer in closed "work sessions." And at one point the commissioners voted themselves a resolution that attempted to expand their exemptions from public meetings listed in the statute.

Suggested remedy: The new Pacific Regional Authority would serve a geographic area larger than the continental United States. Section 15903(a) offers its members the full spectrum of alternatives to in-person meetings, including notation voting. The section would also include the new agency under the standard open meetings law (5 USC 552b) that applies to other federal agencies.

Section 15903(b) — Quorum and prohibition of proxies

Historical issue: In Denali's enabling act, Congress provided for a commission composed of the ex-officio heads of specific public and private entities that are key players in Alaska. Congress also gave the Secretary of Commerce the authority to appoint a permanent substitute if requested to do by the head of any of the named entities.

In practice, though, the appointed members have sometimes diluted their role by sending ad hoc proxies that they assumed could participate at meetings in their absence. The perception has apparently been that the named entity can send whom it chooses on a meeting-by-meeting basis. But Denali's statute seems to envision traditional non-delegable appointments by a cabinet secretary.

Suggested remedy: Section 15903(b) would make it clear that members of the Pacific Regional Authority *"shall not delegate their meeting participation and voting to proxies."*

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[17] See Denali OIG, *Semiannual Report to the Congress* (May 2008), pages 4-5.

[18] See the Denali OIG inspection report, *Public attendance and notice for Denali Commission meetings* (April 16, 2006).

[19] See Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), page 11, and the Denali OIG inspection report, *Public attendance and notice for Denali Commission meetings* (April 16, 2006).

A majority of a quorum is needed to award a grant (see section 15902(a)(1)). Given the size of the new Authority's board (13) and the multiple appointing officials (4), a quorum must be carefully defined to avoid unintended consequences from unfilled vacancies or pending appointments. For instance, interpretation that a quorum is always 7 out of the full 13 could, in effect, produce a requirement for unanimous or supermajority decisions (if there were only 7 or 8 members actually appointed to the panel at the time). Section 15903(b) anticipates this potential misunderstanding by specifying a quorum as *"a majority of all non-vacant member positions actually appointed at the time of the meeting."*

Section 15903(c) — Board member compensation and travel expenses

Historical issue: Denali's enabling act prescribes a panel of nonfederal, ex-officio commissioners from identified statewide organizations, both public and private. These members serve on a very intermittent part-time basis, with the enabling act directing that they be paid for their work[20] at a given daily rate.[21] While most have historically wished to waive these payments, Denali's statute was not drafted to allow it. Management either implicitly creates a "claim" by failing to pay these fees or potentially forces the well-meaning commissioners to pay taxes on "constructive income" that they intended from the start to forego.[22]

Suggested remedy: Section 15903(c) reflects the necessary language that will permit members of the Pacific Regional Authority to waive payment of compensation and travel expenses if they wish to do so.

Section 15903(d) — Application of federal conflict of interest laws

Historical issue: The most divisive issue at the Denali Commission has for years been the inherent tension between the practical need to "partner" with capable parties and the need to safeguard all concerned from accusations of "conflicts of interest." As discussed at length in prior Denali OIG reports to Congress,[23] application of the federal conflict of interest prohibitions has resulted in difficulties at three levels.

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[20] The statute does not limit this compensation to the time spent at meetings — presumably any time that the appointees spend on Denali issues is to be compensated. Like all federal payrolls, the time should be documented in some reasonable manner.

[21] The Department of Justice has determined that these appointees have the status of "special government employees." Given that they are appointed by the Secretary of Commerce, an open question remains as to whether they are technically employees of the Department of Commerce or of the Denali Commission itself, that is, which entity has the actual legal obligation to pay them.

[22] Given that the statute identifies the heads of specific statewide organizations as the "commissioners," an argument can be made that they receive the statutory payments as agents of the sending organizations rather than as individual taxpayers. Under such an interpretation, the payments are reimbursement to the sending organizations for their executives' time. This open question can be addressed through a request for a "letter ruling" from the Internal Revenue Service as to the correct tax treatment. See Revenue Procedure 2010-4, 2010-1 I.R.B. 122 (Jan. 4, 2010).

[23] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 10-14; Denali OIG, *Semiannual Report to the Congress* (Nov. 2008), pages 8-9; Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), pages 7-8.

First, Congress inadvertently created a problem when its statute directed the heads of specific statewide public and private interest groups to serve as the agency's panel of part-time commissioners. In practice, most of named entities happen to be either recipients of Denali grants or at least the representatives of others who get Denali funding. The panel of commissioners, in effect, functions as a "board of grantees" (see Exhibit 1).

The Department of Justice has determined that these statutory ex-officio commissioners are "special government employees" subject to the conflict-of-interest provisions in the federal ethics regulations administered by the Office of Government Ethics. As a practical matter, this means that most commissioners now take the safe route and recuse themselves from voting on some part of the agency's "annual work plan" (which, ironically, frustrates meaningful discharge of their primary role under the enabling act).

EXHIBIT 1

INTEREST GROUPS REPRESENTED AT DENALI COMMISSION

INTEREST GROUP	STATUTORY EX-OFFICIO ADVISORY COMMISSIONER	DIRECT GRANTEE OF DENALI	REPRESENTS GRANTEES, CONTRACTORS, OR BENEFICIARIES	DIRECT INTEREST GROUP CONTACT WITH CONGRESS
Assoc. Gen. Contractors	✓	✓	Construction contractors	✓
Alaska Municipal League	✓	✓	Small rural cities	✓
Alaska Fed. of Natives	✓	✓	Tribes	✓
AFL-CIO	✓		Construction unions	✓
University of Alaska	✓	✓		✓
Governor	✓	✓	State departments and agencies	✓

Second, Congress amended the Denali Commission Act to add another panel that specializes in the selection of transportation projects. Congress specified that the members of this group are appointed by Alaska's governor. DOJ recently advised that, while the panel is a federal entity, the members represent their sending interest groups and are not subject to federal conflict-of-interest rules.[24]

Presumably, the governor who appoints this statutory panel would have the authority to "un-appoint" them for misconduct. But in the absence of any legal rules against conflicts of interest, any "higher" standard by voluntary consensus would seem problematic as a "cause" for removal. On the other hand, given the statutory silence on the issue, Denali's agency head could potentially fill the void with an implementing regulation adopted under 5 CFR 2638.103 and Executive Order 12866.

[24] This forum of advocates — though legal per DOJ — indeed contrasts with the traditional paradigm which assumes that the scoring of grant applications on their technical merits should be conducted by a *disinterested* expert panel of "peer reviewers."

Whether these members should be something other than unabashed advocates for the interests that send them may simply be a future policy choice left for Congress to decide.

Third, Denali has created some non-statutory advisory panels of experts that assist in the selection of projects in subjects other than transportation. Issues can arise when Denali wishes to award a project to an entity after Denali has requested the same entity to provide a subject matter expert to serve on the advisory board.

Suggested remedy: Section 15903(d) makes it clear that members of the Pacific Regional Authority are subject to the federal conflict of interest law at 18 USC 208. Since the pool of potential members is defined more broadly than for the Denali Commission, the appointing officials should be able to find qualified members who are unconnected to grantees. Ethics regulation of advisory committees is addressed in another section.

Section 15903(f) — Authority for advisory committees

Historical issue: Sections 308 and 309(b)(5) of Denali's enabling act explicitly exempt the commission from the Federal Advisory Committee Act (FACA). Though the overall theme of Denali's statute appears to be management flexibility, there is no legislative history that explains the exemption.

Denali OIG recently conferred with the GSA Committee Management Secretariat that assists and oversees the nation's committees that are subject to FACA. Denali OIG concluded that FACA coverage is a mixture of increased administrative responsibilities and increased access to technical assistance for committee effectiveness. Denali has less than 20 employees at this point, who would be challenged if the full formal procedures of FACA were now required for all of the agency's advisory committees.

Suggested remedy: Instead of a blanket coverage or exemption, section 15903(f) leaves it to the discretion of the federal administrator to establish by administrative directive which, if any, provisions of FACA should be applied to each advisory committee and how 18 USC 208 applies to each committee (in consultation with the Office of Government Ethics).

Section 15904(a) — Legal status of agency head

Historical issue: Though the federal system treats Denali as an independent federal agency, the relationship with its agency head is complex and ambiguous under its enabling act.

On one hand, the agency head is responsible for Denali's financial transactions (sec. 305(d)), personnel matters (sec. 306), acceptance (or rejection) of the annual "work plan" (sec. 304), initiation of commissioner meetings (sec. 303(d)), personal participation as one of the commissioners (sec. 303), and the breaking of any tie votes on the panel (sec. 303(b)).

On the other hand, Denali's enabling act (sec. 303(b)(2)) specifies that its agency head *"shall serve as an employee of the Department of Commerce, and may be removed by the Secretary for cause."* This is consistent with the authority in the same provision for the Secretary of Commerce to appoint Denali's agency head. And section 304 provides that the agency head acts on behalf of the Secretary in reviewing the annual work plan submitted by the panel of commissioners.

Suggested remedy: Section 15904(a) eliminates the complex agency head relationship that exists at the Denali Commission. The head of the Pacific Regional Authority is simply a federal employee of the Authority itself.

Section 15904(b) — Legal status of agency employees

Historical issue: Section 306(c) of the Denali Commission Act gives the agency head the authority to "appoint" personnel "without regard to the civil service laws and regulations." Section 306(c) then goes on to detail that the agency head "may fix the compensation of personnel without regard to" various specified civil service provisions involving classification and pay rates. And section 306 addresses numerous other personnel details.

However, despite all of Congress' attention to detail on certain personnel issues, the enabling act remains silent as to what procedural protections Denali's employees — once hired — have from "adverse actions" and downsizings (RIFs). When Congress specifies particular Title 5 requirements in a detailed statute like Denali's, the case law deems Congress to implicitly intend that the unmentioned Title 5 requirements still remain in effect. As the key precedent states, *"Congress knows how to exempt a civil service position from the protections found in chapters 75 and 77 of title 5 if it so desires."*[25]

Denali OIG's previous report to Congress discusses this uncertainty that troubles both management and employees.[26]

Suggested remedy: Section 15904(b) specifies that, once appointed, the new Authority's employees have the same Title 5 protections as federal employees in the traditional civil service. However, such coverage is a policy choice that Congress can negate through specific language addressing the issue.

A further personnel uncertainty is the extent to which Denali employees can transfer to similar positions in the traditional civil service at much larger federal agencies. Section 15904(b) resolves this by providing for a merit-based personnel system and transferability.

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[25] See *King v. Briggs*, 83 F.3d 1384, 1388 (Fed. Cir. 1996).

[26] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 3-6.

Section 15904(b)(5) — Basic accountability staffing

Historical issue: Alaska players have encouraged the agency head to operate with a reduced staff and use the savings for grants. However, this understaffing is a Faustian bargain that has deprived the Denali Commission of key accountability positions that support compliance with congressional intent.

Instead of employing its own full-time legal counsel, Denali relies upon part-time help from a volunteer lawyer at another federal agency. Both GAO and OPM have recommended to OIG that Denali employ its own counsel.

Denali has eliminated its position charged with evaluating project performance (evaluation & reporting program manager). Denali has not implemented OIG's recommendations for a rural ombudsman to mediate disputes and a director of innovation to pioneer untried solutions.[27]

Suggested remedy: Section 15904(b)(5) requires that the Pacific Regional Authority retain four specific full-time positions to support its accountability for congressional intent. This includes its own full-time general counsel to promote compliance with legal requirements. These positions can be filled through full-time details from other agencies, including details from nonfederal agencies, as authorized by the Intergovernmental Personnel Act (5 USC 3372-3374). The requirement for full-time positions would signal a congressional intent that these key accountability functions not be diluted by shared, part-time, or symbolic arrangements.

Section 15904(c) — Authority for streamlined procurement

Historical issue: Questions periodically arise as to whether Denali's agency head has the legal authority to develop a streamlined procurement process for purchases less than some moderate level ($100,000; $50,000; $10,000).[28] Some balance is desired between the necessary protections against misconduct (favoritism, corruption) and the full panoply of formal procedures that would apply to the purchase of a flock of fighters.

Suggested remedy: Section 15904(c) is not boilerplate; rather, the subsection is designed to clarify agency contracting authority and prevent business disputes. Section 15904(c) authorizes the federal administrator to develop, in consultation with GSA and OMB, *"a simplified procurement process that balances efficiency and sound business practices that protect the public."* The subsection also assures that the federal administrator has the flexibility to enter into a broad spectrum of problem-solving agreements with a broad spectrum of problem-solvers.

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[27] See Denali OIG, *Semiannual Report to the Congress* (May 2007), page 4; Denali OIG inspection report for Chitina, Alaska (Oct. 2008); Denali OIG inspection report for McGrath, Alaska (Sept. 2009); Denali OIG inspection report for Red Devil, Alaska (Jan. 2007); Denali OIG inspection report for Sterling Landing, Alaska (Jan. 2007).

[28] See Denali OIG, *Semiannual Report to the Congress* (Nov. 2007), page 12.

Section 15904(e) — Five year records retention

Historical issue: Denali's management schedules destruction of the agency's grant records for three years after grant "closeout." However, Denali OIG recommends that all agency records of financial transactions and grants be retained for five years.

Three years has indeed been an acceptable minimum for grant *recipients* under the rules that OMB has prescribed over the years.[29] Nevertheless, given today's capacity for electronic archiving, five years seems a reasonable balance between the public's need for later accountability and the agency's desire to periodically clean house. The federal *Financial Audit Manual* (authored by GAO and IGs) states that *"[t]he auditor should retain documents in accordance with the contract or other legal requirements, but not less than 5 years from the report release date (AU 339.32)."*[30] Similarly, the professional standards applied by CPAs state:

> *The auditor should adopt reasonable procedures to retain and access audit documentation for a period of time sufficient to meet the needs of his or her practice and to satisfy any applicable legal or regulatory requirements for records retention. Such retention period, however, should not be shorter than five years from the report release date. . .*[31]

Suggested remedy: Section 15904(e) sets five years as the records retention period for the Pacific Regional Authority.

Section 15904(f) — Authority to accept and use donations

Historical issue: There is an open question as to whether Denali can directly supplement its congressional appropriation with donations of private "money," since the enabling act mentions only contributions of "property" and "services."[32] Whether a foundation's gift of money to Denali would fall within the scope of "property" is simply an unknown under federal appropriation law. And foundations would expectedly shun the risk that a donation with a specific target would instead disappear into the deep void of the U.S. Treasury under the "miscellaneous receipts" default.

A conditional donation is one in which the donor specifies its expectation for use as a condition of giving. In response to an opinion request from Denali OIG, the U.S. Comptroller General recently advised that Denali's enabling act is not currently written to allow conditional

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[29] See 2 CFR 215.53 and OMB Circular A-102 section .42.

[30] GAO/PCIE, *Financial Audit Manual* (July 2008) section 650.60.

[31] *Statements on Auditing Standards* No. 103, AU section 339.32.

[32] The enabling act authorizes Denali to *"accept, use, and dispose of gifts or donations of services or property."*

donations.[33] This effectively negates the possibility of private funding, since few sources would make a gift to an agency without some expectation as to the type of use.

Suggested remedy: Section 15904(f) explicitly authorizes the Pacific Regional Authority to receive and use donations of money in addition to property and services. The same subsection also permits the receipt and use of conditional donations.

Section 15904(h) — Property disposal authority

Historical issue: Congress has over the years provided close to $1 billion for Denali to construct facilities across rural Alaska. While projects are often successfully implemented, sometimes they are not. Previous Denali OIG reports have discussed the legal interests that Denali retains in federally-funded facilities whose use has changed[34] or were never completed.[35]

Congress unfortunately did not authorize Denali to reapply the proceeds after any disposal of the property from a failed project. By statutory default, any proceeds from a recovery would simply disappear into the general U.S. Treasury as "miscellaneous receipts" rather than reinforce Denali's further efforts. In other words, Denali's existing statute provides a disincentive to use agency resources to pursue recoveries.

Suggested remedy: Section 15904(h) authorizes the Pacific Regional Authority to directly dispose of federal property interests and reapply the proceeds to further projects.

Section 15904(i) — Continued availability of transferred funding

Historical issue: Transfer of funds between federal agencies is, of course, routine and acceptable so long as authorized by federal appropriation law and consistent with congressional direction. Denali has historically been named in other agencies' appropriations, which then requires coordination between the financial bureaucracies of a cabinet department and the Treasury before the money is actually available to Denali.

As detailed in our last Denali OIG report to Congress,[36] Denali has faced funding complications even when Congress has explicitly identified the agency as the destination for a given amount in an appropriation act. Construction seasons are limited in rural Alaska, and Denali's implementation of congressional intent has sometimes been hindered by delays of a year or two between presidential signing and actual availability of the funds to Denali.

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[33] See GAO, *Denali Commission — Authority to Receive State Grants,* # B-319246 (Sept. 1, 2010) at *www.gao.gov.*

[34] See discussion of this issue in Denali OIG inspection report for Port Graham, Alaska (Sept. 2009).

[35] See Denali OIG inspection report for Tanacross, Alaska (Oct. 2009); Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 24-25, 29-30.

[36] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 8-9.

At the request of Denali OIG, the U.S. Comptroller General reviewed this difficulty and reached the following conclusion:

> *Funds appropriated to FTA for the Denali Commission should be transferred to the Commission as a nonexpenditure transfer. FTA does not have an oversight role in administering the funds and should not delay transferring the funds in order to prepare an IAA [interagency agreement] to facilitate monitoring of their use. Funds become available to the Commission when Treasury transfers the funds to the Commission's account.*[37]

Suggested remedy: Section 15904(i) assures that bureaucracy's transfer delays will not defeat the availability of funding for the purpose intended by Congress.

Section 15904(j) — Consolidated inspector general function

Historical issue: Congress has now created statutory inspector generals at approximately 70 federal agencies. Denali has had its own for the past five years. Denali is the smallest of these federal OIGs, with only 1 FTE at this point (that is, the inspector general himself). We're also geographically the most remote OIG, with our sole office in Alaska and long trips to the Beltway to meet with congressional staff, regulators, and experts when a trip is what it takes to get the job done.

Nevertheless, there are certain things in life that are not designed to be done alone. And the inspector general function is one of them.

In the interest of more effective public oversight, we have previously[38] recommended that Congress consolidate Denali's inspector general function with that of the three new regional commissions created in the 2008 Farm Bill.

We are a force of one at this point and, as shown in Exhibit 2, our accomplishments are quite limited in comparison to the norm of larger OIGs. In our aggressive experiment to leverage

EXHIBIT 2

STATUTORY ACTIVITY STATISTICS
SINCE APRIL 1, 2010

(per Inspector General Act sec. 5)

Annual audit of agency financial statements	1
Annual FISMA review	1
Inspection reports	1
Statutory reviews (*IG Act sec. 4a*)	1
Meetings with OMB, GAO, and congressional staff (*IG Act sec. 4a, 6a*)	26
Technical assistance to agency (*IG Act sec. 4a, 6a*)	8
CPE classes on federal oversight (56 hours) (*IG Act sec. 6f*)	5
Office move	1

[37] See GAO, *Denali Commission—Transfer of Funds Made Available through the Federal Transit Administration's Appropriations,* # B-319189 (Nov. 12, 2010).

[38] See Denali OIG, *Semiannual Report to the Congress* (May 2010), pages 39-40.

a tiny OIG, we have not lacked for technical skills,[39] training courses, understanding of the agency and its Alaska, and generous technical assistance from other OIGs and oversight officials such as OMB and GAO back in the Beltway. And we are aware that many small organizations have over the years benefited from a lone "internal auditor."

But we have tested the outer limits of the envelope in this OIG experiment,[40] and the economies of scale simply make it unrealistic to effectively operate an OIG composed of only a single individual.

Suggested remedy: In the 2008 Farm Bill, Congress created three new regional commissions that serve from four to seven states each.[41] Congress included the following provision for a consolidated inspector general function:

> *Appointment of Inspector General.—There shall be an Inspector General for the Commissions appointed in accordance with section 3(a) of the Inspector General Act of 1978 (5 U.S.C. App.). All of the Commissions shall be subject to a single Inspector General.*[42]

These other three regional commissions together represent 15 states. Section 15904(j) would include the Pacific Regional Authority within their consolidated OIG function created by 40 USC 15704(a).

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[39] Denali's inspector general is a CPA, MPA, certified fraud examiner (CFE), and lawyer.

[40] The 2008 study by the Project on Government Oversight (POGO) stated:

> *The number of staff members in IG offices ranges from less than one (a part-time assistant) to hundreds. Of course, size alone is not absolutely determinative of an IG's ability to accomplish the mission. However, experts consulted by POGO believe that any IG office with fewer than six staffers is incapable of being effective and truly independent of its parent agency; the IG must rely on the agency for too much in the way of resources, whether administrative, legal, or otherwise. . .*

See POGO, *Inspectors General: Many Lack Essential Tools for Independence* (Feb. 26, 2008), page 19, at *www.pogo.org.*

[41] See P.L. 110-246, secs. 15301, 15731-15733 (40 USC 15301, 15731-15733).

[42] See P.L. 110-246, sec. 15704 (40 USC 15704).

LARRY AND LINCOLN: SOME THOUGHTS ON THE LATE LARRY FROEHLICH
(founder of the Council of Counsels to Inspectors General)

Congress has created statutory inspector generals at approximately 70 federal agencies since the 1960s. The individuals appointed to these positions have come and gone over the years. But one constant through these decades has been the availability of specialized legal advice from a federal lawyers' network known as the Council of Counsels to Inspectors General (CCIG). Larry Froehlich founded this important support for IGs, and we sadly lost Larry to cancer several months ago.

A few of Larry's colleagues recently discovered my Alaskan business card in his desk. They were apparently curious about the far reaches of Larry's influence and asked if I would pen my perception as to how Larry's life work mattered much to many over the long term — really the best for which any of us can hope to be remembered out of our careers.

I grew up where Abraham Lincoln grew up — the rural farm towns of central Illinois along the old Route 66. The local lore is that Lincoln the Lawyer christened the little town of my youth with a watermelon-smashing ceremony — long before his much-shorter presidential watch as Lincoln the Legend. And there is even a statue of a young studying Abe in front of the local college, inscribed with the hopeful "I will prepare myself; someday my chance will come."

Whatever the prestige or notoriety of the craft, good lawyering is nothing more or less than a service offering solutions to problems big and small. Lincoln was a master of such practical problem-solving, and they still make lawyers like that — though not enough of them. Larry was my Lincoln, as I've struggled up here in Alaska as the smallest (1 FTE), and most remote, of the federal OIGs.

Larry never made it to Alaska, though he talked about it during my frequent returns to the Beltway (where all but three of the nation's federal IGs are stationed). He was sympathetic to my limited abilities to police federal spending as a force of one, and always knew an expert in the ranks of the CCIG whose help we could tap to enable me to persist in fighting the good fight for yet another day. Often the expert was Larry himself, such as the time when he brought his years of experience with IG subpoenas to bear on drafting an example for me — right down to importing the Denali Commission logo into the template (I was never able to reverse engineer how he did the latter detail, though). Again, like Lincoln, Larry had an impressive professional repertoire of practical solutions to problems big and small. And he shared this repertoire with all of us, big and small.

In fact, between the lawyers of the CCIG and the lawyers at GAO, it seemed unlikely that I could ever face an IG frustration that the "old bulls" hadn't treated before. They'd seen it all over their days of lawyering their way through the world of public accountability.

But practical lawyers are realists and Larry cautioned me that any OIG requires some minimal "critical mass" of employees necessary to execute the function in practice. Only the fictional Sgt. Preston of the Yukon could hope to single-handedly patrol the "Crown's" national interests across the vast remote northland. My last two semiannual reports have thus candidly recommended consolidation of Denali's OIG with that of other regional commissions.

There are certain things in life that aren't designed to be done alone, and I let Larry know of my acceptance of his wisdom on this when I said goodbye to him for the last time in June. He could no longer speak at this point, and I don't know what his further advice to me would have been on IGs in Alaska. I did know that I'd now lost my Lincoln, and I felt the void as I rode the Metro back in a place that — compared to Alaska — seems to get too dark too soon when it should be the brightest time of the year.

But I later remembered that Lincoln the Lawyer was the practical problem-solver for even professional goodbyes. I visited the old Illinois train station where he bid farewell to his friends and clients before he went east to become Lincoln the Legend. He publicly told them that "I now leave, not knowing when, or whether ever, I may return . . ." He privately told his law partner to continue to include him in the law firm's name, noting that "If I live I'm coming back some time, and then we'll go right on practicing law as if nothing had ever happened." (And that practical little goodbye speech to the public is now posted everywhere from the Washington National Cathedral to the local steakhouse in Lincoln, Illinois.)

On the other hand, the dialect of a prominent Alaskan tribe simply doesn't have a word for goodbye. "We don't use that word. We always think you're coming back . . ."[43] In Larry's final days, one of the lawyers inspired by Larry contacted me with assurance that his tradition of practical problem-solving would be available on her watch as I needed it. She would try to fill his shoes — and so I suggest that the craft that we can pass on to our understudies never really says goodbye.

MIKE MARSH

INSPECTOR GENERAL
DENALI COMMISSION

[43] "There is No Word for Goodbye" in Mary TallMountain, *The Light on the Tent Wall* (Univ. of Cal., 1990), page 63.

APPENDIX A
TO OIG SEMIANNUAL REPORT

DENALI COMMISSION
OFFICE OF INSPECTOR GENERAL

POTENTIAL NEW CHAPTER 5 IN SUBTITLE V OF TITLE 40

(Per Inspector General Act sections 4(a)(2) and 4(a)(4))

Title 40: Public buildings, property, and works
Subtitle V: Regional economic and infrastructure development
Chapter 5 [new]: Pacific Regional Authority

SEC. 15901. PACIFIC REGIONAL AUTHORITY.

(a) ESTABLISHMENT
(1) IN GENERAL
There is established the Pacific Regional Authority (referred to in this chapter as the "Authority") as a independent Federal agency to facilitate oversight, leveraging, coordination, capacity, and innovation in the use of Federal funds for basic public infrastructure in remote distressed areas of the Pacific region.
(2) DESIGNATION OF REGION
The region of the Pacific Regional Authority shall include —
(A) Alaska
(B) Hawaii
(C) Guam
(D) American Samoa
(E) Commonwealth of the Northern Mariana Islands
(F) Federated States of Micronesia
(G) Republic of the Marshall Islands
(H) Republic of Palau
(b) COMPOSITION
(1) MEMBERS
The Authority shall be composed of 13 members, appointed as follows:
(A) a Federal administrator appointed by the President, by and with the advice and consent of the Senate.
(B) 2 members appointed by the Secretary of Agriculture, including—
(i) a resident of Alaska; and
(ii) a resident of Hawaii.
(C) 2 members appointed by the Secretary of Commerce, including—
(i) a resident of Alaska; and

(ii) a resident of Hawaii.

(D) 2 members appointed by the Secretary of the Interior, including—

(i) an Alaskan Native; and

(ii) a Native Hawaiian.

(E) 6 members appointed by the Secretary of the Interior, including—

(i) a resident of Guam;

(ii) a resident of American Samoa;

(iii) a resident of the Commonwealth of the Northern Mariana Islands;

(iv) a resident of the Federated States of Micronesia;

(v) a resident of the Republic of the Marshall Islands; and

(vi) a resident of the Republic of Palau.

(2) TERMS

The Federal administrator shall be appointed for a term of 10 years and may be reappointed. All other members shall serve a term of 4 years and may be reappointed.

(3) VACANCIES

(A) Except as provided in subparagraph (B), a vacancy in the Authority shall be filled in the manner in which the original appointment was made. Any member vacancy other than the Federal administrator shall not affect the powers of the Authority to conduct its business.

(B) A Federal administrator may serve after expiration of that Federal administrator's term until a successor has taken office. If the Federal administrator's position becomes vacant before or after the expiration of a term, an acting Federal administrator shall serve pursuant to the Vacancies Reform Act (5 USC 3345) until a successor has taken office.

(4) DATE FOR INITIAL APPOINTMENTS

The appointments of the members of the Authority shall be made no later than October 1, 2012. If the appointment in (b)(1)(A) has not occurred by October 1, 2012, the Secretary of the Interior shall appoint an interim Federal administrator.

SEC. 15902. PURPOSE AND POWERS.

(a) GRANTS AND COOPERATIVE AGREEMENTS

(1) IN GENERAL

The Authority may, by a majority vote of a quorum make grants to and participate in cooperative agreements with States (including all entities designated at 15901(a)(2)), local governments, Indian tribes, public organizations, nonprofit organizations, and private business corporations for projects that develop the region's —

(A) basic public facilities, including remediation of the sites of replaced facilities;

(B) remote transportation infrastructure;

(C) employment-related training;

(D) modern communications systems;

(E) basic health care facilities;

(F) small-scale power generation, fuel logistics, and transmission facilities, including demonstration projects of new technologies and energy sources of any kind;

(G) collaboration on Federally-funded research that is in the national interest; and
(H) coastal facilities which are necessitated in remote communities by the opening of polar shipping routes.

After approval by a vote of Authority members, the Authority will act through the Federal administrator to award the grant or cooperative agreement.

(2) RECIPIENT MATCH

The Authority may contribute not more than 50 percent of a project or activity cost eligible for financial assistance under (a)(1) from amounts appropriated to carry out this chapter.

(3) RECIPIENT MAINTENANCE OF EFFORT

Funds may be awarded by the Authority for a program or project under (a)(1) only if the Authority determines that the level of governmental financial assistance provided under a law other than this chapter, for the same type of program or project in the region, will not be reduced as a result of funds made available by this chapter.

(4) NO RELOCATION ASSISTANCE

The grants and cooperative agreements awarded under (a)(1) may not be used to assist a person or entity in relocating from one area to another.

(5) FUNDING SOURCES OF GRANTS AND COOPERATIVE AGREEMENTS

Amounts for grants and cooperative agreements under (a)(1) may be provided entirely from appropriations to carry out this chapter, in combination with amounts available under other Federal grant programs, or from any other public or private source.

(6) GENERAL AND SPECIFIC CONDITIONS

The Federal administrator may by administrative directive issue a "common rule" of general conditions applicable to the Authority's grants and cooperative agreements. The Federal administrator may attach specific conditions to individual grants and cooperative agreements as necessary for effective oversight.

(b) FEDERAL GRANT INSURANCE DEMONSTRATION PROJECTS

The Authority shall collaborate with the Risk Management Agency of the U.S. Department of Agriculture in the development of a Federal insurance pilot program for the completion of grant-funded construction after the business failure of a grantee or contractor. The Authority, acting through the Federal administrator, shall apply the resulting pilot program to selected grants as a demonstration project to aid in further development of such insurance.

(c) GOVERNMENT COORDINATION AND COLLABORATION

The Authority shall, as authorized, able, and requested, coordinate the effective delivery, leveraging, and oversight of grants and cooperative agreements within the region. The Authority shall facilitate the tribal collaboration process of Executive Order 13175, entitled "Consultation and Coordination With Indian Tribal Governments" (November 6, 2000), within the region.

SEC. 15903. MEETINGS.

(a) IN GENERAL

The Authority shall meet at the call of the Federal administrator not less than annually. The members may conduct business via in-person meetings, audio conferences, video conferences, or

notation voting based on the circulation of documents. The Authority's meetings are subject to section 552b of title 5, United States Code. Subsection 15911(c) of title 42, United States Code is repealed.

(b) QUORUM

A quorum consists of a majority of all non-vacant member positions actually appointed at the time of the meeting. Members shall not delegate their meeting participation and voting to proxies.

(c) COMPENSATION; TRAVEL EXPENSES

Members other than the Federal administrator may be compensated at a rate not to exceed the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during the time such member is engaged in the performance of the duties of the Authority. Members may be allowed travel expenses, including per diem in lieu of subsistence, at rates not to exceed those authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Authority. Members may waive any or all of their compensation and travel expenses.

(d) CONFLICTS OF INTEREST

Members are subject to section 208 of title 18, United States Code.

(e) FEDERAL ADMINISTRATOR VOTE

The Federal administrator shall only vote to break a tie in the voting by other members.

(f) ADVISORY COMMITTEES

The Federal administrator is authorized to establish by administrative directive (1) such advisory committees as are necessary, (2) which, if any, provisions of the Federal Advisory Committee Act (5 USC App.) shall apply to a particular committee, and (3) in consultation with the Office of Government Ethics, the extent to which 18 USC 208 shall apply to a particular committee.

SEC. 15904. ADMINISTRATION, ACCOUNTABILITY, AND OVERSIGHT.

(a) AGENCY HEAD

The Authority shall be headed by the Federal administrator, who may by administrative directive adopt rules governing the conduct of business and the performance of duties of the Authority. The Federal administrator shall be compensated at the annual rate prescribed for a level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(b) PERSONNEL

(1) IN GENERAL

Employees of the Authority are Federal employees in the excepted service. The Federal administrator may, without regard to the civil service laws and regulations, classify, appoint, and compensate such employees as may be necessary to enable the Authority to perform its duties. Employees of the Authority are otherwise subject to the requirements and protections of civil service laws and regulations, including the disciplinary and nondisciplinary appeal procedures for adverse actions, performance actions, and reductions in force.

(2) PERFORMANCE SYSTEM

The Federal administrator shall implement an established merit-based performance appraisal system approved by the U.S. Office of Personnel Management.

(3) INTERCHANGE WITH FEDERAL CIVIL SERVICE

Employees appointed under (b)(1) may be appointed to positions in the Federal competitive civil service at other agencies in the same manner that employees in the Federal competitive civil service are considered for transfer to such positions.

(4) DETAIL OF FEDERAL EMPLOYEES

Any Federal employee may be detailed to the Authority with or without reimbursement, and such detail shall be without loss of seniority, pay, or other employee status.

(5) BASIC ACCOUNTABILITY STAFFING

To support the Authority's accountability for congressional intent, the Federal administrator shall employ each of the following full-time positions as part of the Authority's staffing —

(A) a general counsel
(B) a rural ombudsman
(C) a director of program evaluation
(D) a director of innovation

However, the Federal administrator may elect to fill any of these positions through full-time details of employees from other Federal agencies or full-time details of employees from nonfederal entities under sections 3372 and 3374 of title 5, United States Code.

(c) PROCUREMENT

(1) IN GENERAL

The Authority, acting through the Federal administrator, may make payments necessary to carry out the purposes of the Authority. In consultation with the General Services Administration and Office of Management and Budget, the Federal administrator may by administrative directive establish a simplified procurement process that balances efficiency and sound business practices that protect the public.

(2) CONTRACTS AND OTHER AGREEMENTS

The Authority, acting through the Federal administrator, may enter into and perform such contracts, leases, and interagency agreements as are necessary to carry out Authority duties, including any contracts, leases, or interagency agreements with —

(1) any department, agency, or instrumentality of the United States;
(2) any State (including a political subdivision, agency, or instrumentality of the State);
(3) any government designated in 15901(a)(2) (including its political subdivision, agency, or instrumentality);
(4) any local government;
(5) any Indian tribe in the region; or
(6) any person, firm, association, or corporation.

(d) OFFICES

The Authority may establish and maintain a central office and field offices at such locations as the Authority may select, including a government relations office in the District of Columbia.

(e) RECORDS RETENTION

(1) IN GENERAL

The Authority shall retain its financial records of receipts and payments for a minimum of five years after the fiscal year in which the transaction occurs.

(2) GRANT RECORDS

The Authority shall retain its grant records for a minimum of five years after the closeout of a grant.

(f) DONATIONS

The Authority may accept, use, and dispose of gifts or donations of money, services, and real, personal, tangible, or intangible property. Conditional gifts may be accepted if approved by the Federal administrator, provided that the principal of and income from any such conditional gift shall be held, invested, reinvested, and used in accordance with its conditions, but no gift shall be accepted which is conditioned upon any expenditure not to be met therefrom or from the income thereof unless such expenditure has been approved by Act of Congress.

(g) RECEPTION AND REPRESENTATION

The Authority may use available funds for reasonable official reception and representation expenditures.

(h) DISPOSAL OF PROPERTY

The Authority may dispose of surplus, excess, or recovered real and personal property, including grant-funded property subject to a Federal reversionary interest. The Authority may retain and spend the proceeds from property disposals.

(i) TRANSFER OF FUNDS FROM OTHER FEDERAL AGENCIES

(1) Subject to paragraph (2), for the purposes of this chapter, the Federal administrator may accept transfers of funds from other Federal agencies if the funds are used for the purposes for which (and in accordance with the terms under which) the funds are specifically authorized and appropriated.

(2) The transferred funds shall remain available until expended and may, to the extent necessary to carry out this chapter, be transferred to and merged by the Federal administrator with the appropriations for the Authority.

(j) INSPECTOR GENERAL

For purposes of appointment of an inspector general, the Authority shall be included with the regional commissions that are subject to a single inspector general under subsection 15704(a) of title 40, United States Code.