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SEMIANNUAL REPORT TO THE CONGRESS

FY 2009 (SECOND HALF) AND FY 2010 (FIRST 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: FY2009 (Second Half) & FY2010 (First Half) Semi-Annual Report to Congress
Date: June 22, 2010

This memo is written in response to the above referenced document that was provided to me for review and comment at the end of May 2010. The following is offered.

1. I concur with your choice to produce a semi-annual report after I have had several months to gain my "sea legs" as the new Federal Co-Chair. I appreciate the professional courtesy extended to me with your decision to not submit a FY2009 (Second Half) report either before I started in my position on January 3, 2010, or within weeks of my start.
2. As you are aware, the U.S. Department of Treasury – Office of the Inspector General (DOT-IG) is expected to issue a final report later this summer on the U.S. Senate requested audit of the Commission's transportation program. I am particularly interested in working with you and DOT-IG staff (after the DOT-IG issues their report) on recommended process improvements for the transportation program. In particular, I am interested in extending the DOT-IG recommendations to other Commission programs (i.e. training, health, economic development and energy) – where appropriate. Clearly, Commission staff, our counsel, Commission advisory bodies, and program partners must be part of this dialogue, but the perspective of two different agency Inspector Generals on Commission programs is a unique opportunity to improve the agency's administrative and programmatic processes.
3. In addition, after the DOT-IG report is issued, I want to meet with you to review the 18 recommendations to management that are noted on page 40 of the referenced document. I am interested in exploring if there are common themes between the 18 recommendations you have provided in the past and the recommendations that will be forthcoming from the DOT-IG. Furthermore, as we look forward to the changes necessary for the agency in our second decade of existence your observations and recommendations based on the first decade should be quite useful.
4. I also look forward to working with you, and others, on these three topics discussed in the referenced document: how might the agency accept and/or "manage" non-Federal funding, agency reauthorization (including how the agency might transform in our second decade), and the uncertain legal status of Commission employees.
5. Some specific items I wish to draw your attention to include:
    - The Commission adopted on 11-18-08 a number of programmatic policies including declining community populations – you may wish to note this within the report regarding federal support for small communities.
    - Page 12: the Transportation Advisory Committee does select infrastructure development projects, however, the other four advisory committees provide recommendations, but typically do not select projects.

Thank you for the opportunity to provide you my comments.

May 2010

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 2009 and first half of FY 2010

The discussion below constitutes my report to the agency head and Congress, as required by the Inspector General Act, for both the second half of FY 2009 and the first half of FY 2010. As detailed below, these two reports are combined on this one occasion due to the lengthy absence of an agency head prior to your appointment. However, OIG appropriately briefed OMB, GAO, and congressional oversight staff on pertinent issues during this gap.

OIG has in the past year reviewed a wide variety of matters under the CIGIE inspection standards, which define an "inspection" as follows:

> *An inspection is defined as a process that evaluates, reviews, studies, and/or analyzes the programs and activities of a Department/Agency for purposes of providing information to managers for decisionmaking; making recommendations for improvements to programs, policies, or procedures; and identifying where administrative action may be necessary. Inspections may be used to provide factual and analytical information; monitor compliance; measure performance; assess the efficiency and effectiveness of programs and operations; share best practices; and inquire into allegations of waste, fraud, abuse, and mismanagement. The inspection function at each Department/Agency is tailored to the unique mission of the respective Department/Agency . . .*

Some of these inspections have concluded with published written reports. Others have resulted in expedited oral reports to management as requested, or in OIG requests for authoritative guidance from other oversight officials. These matters are summarized below.

Given the pendency of the agency's potential reauthorization by Congress, OIG has conducted an extensive review of the enabling act that is also discussed below.

INSPECTION: LEADERSHIP GAP FROM LACK OF AN AGENCY HEAD

Though labeled by its unique statute as a "commission," this agency does not actually have a governing board.[1] It lies structurally among independent agencies that are governed by an

[1] The enabling act provides for a panel of part-time "commissioners," who are ex-officio statewide leaders from named organizations that, in most cases, receive grants from the Denali Commission. The statute does not impanel them as a governing

appointed agency head (known as the "federal co-chair").[2] The enabling act provides that the agency head is appointed by the Secretary of Commerce for a fixed four-year term after a congressional process in which the secretary receives nominations from both the House speaker and Senate president.

The term of the agency head expired on October 3, 2009. His successor took the oath of office on February 1, 2010 from a federal judge in Juneau, Alaska. In other words, the Denali Commission lacked an agency head for the first four months of the fiscal year.

Washington is a town of watchful waiting, and appointment gaps are commonplace realities. Enabling statutes are usually crafted with some provision for this contingency. Unfortunately, Denali's statute lacked any of these traditional options. Since only the agency head can obligate agency funds under the enabling act,[3] the Denali Commission discontinued its business of making grants during the four-month gap.

The agency head is not a direct presidential appointment that would be covered by the Vacancies Act. Rather, the appointment seems to be a statutory "hybrid" involving both the Secretary of Commerce and a required process of congressional consultation. As such, the position seems to qualify as one of the "inferior officers" of the Appointments Clause in Constitution art. II, sec. 2, cl. 2. Since no one below the level of a "highly accountable head of a federal department" can appoint an "inferior officer," it would seem a problematic diffusion of the appointment authority for an inferior officer to appoint his own successor on even a temporary basis.[4]

In Denali's enabling act, Congress prescribes a definite fixed term for the agency head and a process by which leadership of both the House and Senate advise the Secretary of Commerce on potential appointees. A running handoff by the incumbent to an "acting," no matter how well intentioned, would seem to circumvent the required congressional consultation and raise a separation-of-powers issue.

Delegation of specific responsibilities is, of course, normal during the life of one's term and, as a general rule, such delegations are presumed to continue into the term of one's appointed successor unless revoked. However, delegation of one's powers *beyond* the term seems legally problematic when there is both a gap and little statutory authority for a *post-term* succession plan.[5] In other words, one can't delegate what one no longer has because one no longer exists.[6]

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board; rather, they recommend to the agency head an annual "work plan" for allocating the appropriation among program areas. The agency head either accepts this guidance on behalf of the Secretary of Commerce or returns it to the panel for revisions.

[2] Examples are discussed in Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Agencies,* 52 Admin. L. Rev. 1111, 1206-1213 (2000).

[3] See Denali Commission Act sec. 305(d).

[4] See *Pennsylvania v. U.S. Dept. of Health and Human Services,* 80 F.3d 796, 805 (3rd Cir. 1996).

[5] Denali Commission Act sec. 303(c) does indeed provide that "[a]ny vacancy in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment." However, when the details of the act are read together, this appears to apply to the limited role of the panel of part-time commissioners rather than to the specific spending controls that other

The outgoing agency head accepted the position, taken by the Justice Department and the Comptroller General with other agencies,[7] that there is no implied holdover period of necessity for a fixed-term appointee. The combination of a fixed term and a lack of authority for a post-term succession plan suggest Congress' intent that, when it's over, it's simply over until the cabinet head reappoints. Any "self-appointment" approach, no matter how well intentioned, would seem to circumvent Congress' intent, since the statute doesn't allow the current agency head to appoint himself (hold over) or his successor (an "acting") on even a short-term basis. To put it another way, the common tradition of "apostolic succession" found in the private sector has no equivalency in the world of federal appointees.

In OIG's review of this matter, we consulted OMB, staff for the Secretary of Commerce, and the Office of Legal Counsel in the Department of Justice.

It lies with Congress to correct this serious deficiency with a statutory clarification.

The four-month gap was problematic for OIG in terms of the process for our semiannual report to the Congress for the second half of FY 2009. The process prescribed by the Inspector General Act envisions a balance in which an agency head has 30 days to comment on a draft, followed by such response in a transmittal letter as the agency head wishes to include for Congress.

Alaskans fond of the Denali Commission expressed concerns about the fairness of a semiannual report issued in the absence of an agency head — particularly a report proposing the serious recommendations concerning reauthorization and statutory overhaul that we detail below. Though less than ideal under the Inspector General Act, OIG agreed to publish this combined report for two semiannual periods after a new agency head was appointed and had a fair period for familiarization with the issues. However, to mitigate noncompliance with the Inspector General Act during the four-month gap, OIG briefed OMB, GAO, and congressional staff on pending issues.

INSPECTION: UNCERTAIN LEGAL STATUS OF DENALI'S EMPLOYEES

Over the past several years, various parties have brought to OIG some personnel issues involving the unsettled legal status of Denali's employees. These inquiries focus on the applicability of the traditional civil service (Title 5) protections for "adverse actions" (firings, demotions, pay reductions) and downsizings (RIFs, furloughs, reassignments).

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sections entrust solely to the agency head. In any event, section 303(c) seems too vague to authorize a wholesale post-term transfer of responsibility to an employee.

[6] See *Laurel Baye Healthcare of Lake Lanier v. NLRB,* 564 F.3d 469, 473 (D.C. Cir. 2009); Comptroller General decision B-218996 (June 4, 1985); Comptroller General decision B-183012 (June 29, 1977).

[7] See Office of Legal Counsel, *Holdover and Removal of Members of Amtrak's Reform Board* (Sept. 22. 2003); Comptroller General decision B-191036 (Aug. 19, 1982); Comptroller General decision B-183012 (June 29, 1977).

And this is an appropriate question to ask OIG, since section 4(a)(2) of the Inspector General Act 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 . . .*

The periodic complaints and requests for "technical assistance"[8] have progressed to an OIG inspection of the issue, with our results now being reported as follows.[9]

Congress devoted much of the Denali Commission Act to various details of how the new agency was to be staffed. For instance, part-time commissioners were to be appointed from particular organizations with specified compensation and travel allowances. An agency head was to be appointed by the Secretary of Commerce through a specified congressional process and for a definite term and rate of pay. Employees could be detailed from other federal agencies with specified benefits. Employees of other agencies were directed to assist the new agency under given parameters. Temporary employees could be hired at specified rates of pay.

Amidst all of this detail, 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.

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). The core of the traditional process of the federal civil service (Title 5) is appeals to the Merit Systems Protection Board (MSPB) and a prescribed system of seniority-focused transfers, "bumping," and layoffs in the event of downsizings.[10]

At first glance, the flexibility of section 306 to "appoint" outside of the civil service system would seem to imply that the agency head also has the flexibility to "un-appoint" as desired (or, to state it most positively, to assemble the perceived "dream team" of talent that will best

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[8] Section 4(a)(4) of the Inspector General Act also directs inspector generals 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 . . .*

[9] OIG does not plan to publish a separate report on this topic.

[10] For instance, see *Parrish v. Dept. of the Interior,* 106 M.S.P.R. 185 (June 20, 2007) ("Separations based on reorganizations such as this generally may be appealed to the Board under RIF regulations published at 5 C.F.R. part 351.") and *Parrish v. Merit Systems Protection Board,* slip op. 2006-3054 (Fed. Cir., Feb. 7, 2007) ("The right to appeal to the Board is a settled part of the procedures and standards governing RIFs generally.").

effectuate the current vision).[11] In other words, this quite-logical interpretation would make employees "at will" for purposes of termination (like most of the private sector).

But the federal case law that interprets such statutes seems to say otherwise.[12] Based upon these legal precedents, OIG now takes the position that Denali employees with at least two years of service have Title 5 civil service protections for adverse actions and reductions-in-force (RIFs) — including the right to appeal to MSPB. Case law also indicates the irrelevancy of any written agreements in which Denali's new hires have agreed to "at will" status as a condition of employment (the right to an MSPB appeal is independent of any agreements).[13]

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.[14] Explicit congressional language is necessary to eliminate the presumed protections.[15] Congressional use of "appoint" (a narrower term than "employ") also supports limited exclusion from civil service protections. While the management of federal agencies would understandably favor "at will" flexibility from a policy perspective, that preference does not change what appears to be the current state of the law for this type of detailed statute.

As the key precedent[16] 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."*

In short, it appears that Denali's statute gives the agency head considerable flexibility in hiring employees — but not in firing them. While the case law could arguably be limited through technical nuances (e.g., a statute mentioning only a particular subdivision of the civil service), the overarching judicial theme seems to favor procedural protections for employees unless Congress has very explicitly said otherwise.

But this question is not an easy one, and a more authoritative resolution would, of course, require one of the following. First, either Denali's management or OIG could request an opinion from the Office of Legal Counsel in the Department of Justice. Second, an aggrieved employee could appeal to MPSB — with jurisdiction decided as a threshold issue. Third, a federal court of appeals could decide the issue in an appeal from MPSB. Fourth, Congress could simply amend Denali's enabling act during reauthorization to clarify the matter.

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[11] Such a position by the Office of Personnel Management is described in *Young v. Federal Mediation and Conciliation Service,* 66 Fed. Appx. 858 (Fed. Cir. 2003).

[12] See 5 USC 7511(a)(1)(C)(ii); *King v. Briggs,* 83 F.3d 1384 (Fed. Cir. 1996); *James v. Von Zemenszky,* 284 F.3d 1310 (Fed. Cir. 2002); *Afshari v. Leavitt,* 2006 WL 3030323 (N.D.W.Va. 2006); *Hamlett v. Dept. of Justice,* 90 M.S.P.R. 674 (2002).

[13] See *Fishbein v. Dept. of Health & Human Services,* 102 M.S.P.R. 4 (2006); *Siegert v. Dept. of the Army,* 38 M.S.P.R. 684, 691 (1988).

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

[15] See *James v. Von Zemenszky,* 284 F.3d 1310 (Fed. Cir. 2002); *Hamlett v. Dept. of Justice,* 90 M.S.P.R. 674 (2002).

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

Recommendation

Cases before MPSB are a common resolution at larger agencies to resolve both performance issues and the need to simply downsize after decreased funding. But given the small size of Denali's workforce (≈ 15 FTEs), OIG encourages management to pursue proactive solutions (alternative dispute resolution) — rather than landmark litigation. We see the following possibilities that management may care to consider: (1) separation and retention agreements permitted by the agency head's statutory flexibility to hire and set pay; (2) an "interchange agreement" (per 5 CFR 6.7) for around a dozen employees to potentially transfer into the general federal competitive service; (3) an "interchange agreement" (per 5 CFR 214.204) for a few high-level employees to potentially transfer as "essentially equivalent" into the senior executive service (SES) at larger agencies; (4) congressional language in either an appropriation or reauthorization that would allow existing employees to "migrate" into the larger federal competitive system; (5) a congressional private bill that proactively settles the potential claims of the few affected employees. We recommend that management consult its counsel and technical experts such as GAO for specific guidance.

While Alaska is geographically isolated from the rest of the federal system, the federal government is the dominant employer in the state.[17] Training for Denali's technical employees has been both extensive and expensive, and it would seem "in the interest of good administration" to retain their skills in the public sector and moot the need for "high maintenance" MSPB appeals.

INSPECTION: DENALI'S LIMITED LEGAL AUTHORITY TO ACCEPT DIVERSIFIED FUNDING

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 OIG has thus sought the proactive guidance of the U.S. Comptroller General on three recent occasions.[18]

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[17] See Neal Fried and Brigitta Windisch-Cole, "The Federal Government in Alaska," *Alaska Economic Trends* (Alaska. Dept. of Labor and Workforce Development, Feb. 2002), pages 3-14.

[18] This is an appropriate approach to such issues under 31 USC 3526(d), 31 USC 3529, and Inspector General Act sec. 4(a)(4).

Problematic funding from other federal agencies

Federal agencies, of course, routinely send grants to non-federal organizations (states, tribes, nonprofits). However, federal agencies are restricted in their ability to "augment" the appropriation that Congress has already provided to another federal player. In other words, transfers between federal agencies have to be authorized by Congress for both the sender and the recipient.

Last fall, federal officials alerted OIG that Denali's management had submitted a grant application to another federal agency for a $1.9 million award under a Recovery Act program aimed at states and nonprofits. While the subject matter fell within Denali's broad mission, the status of Denali as the grantee of another federal agency raised the specter of an unlawful "augmenting" of Congress' appropriation. Nevertheless, Denali's management publicly announced that it had obtained this funding, which it planned to pass through to a nonprofit and the state university.

OIG verified that the "grant" was not simply a misnomer for the interagency administrative services that federal agencies quite commonly, and legally, provide each other under the Economy Act. Since Denali's authority to receive this federal grant seemed questionable,[19] OIG sought the safe harbor of an appropriation law interpretation from the U.S. Comptroller General. Management ultimately "relinquished" its "grant," and thereby mooted the need for the comptroller general's guidance on the immediate issue.

Problematic funding from the State of Alaska

Federal agencies are also restricted in their ability to supplement Congress' appropriation with funding from non-federal sources. While the state government can certainly "match" a Denali grant to a third party, direct funding from the state to support Denali presents this issue.

In another "role reversal" scenario, a state official alerted OIG that Denali's management had signed a standard grant agreement as a grantee of a state department. OIG inspected the state's grant file and found that Denali had indeed accepted $1.58 million in state money under terms that would seem to challenge federal appropriation law (e.g., indemnification, immunity, insurance). While the subject matter again fell within Denali's broad mission, OIG has sought the proactive guidance of the U.S. Comptroller General on the agency's authority to accept grants from the state government (decision pending[20]).

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[19] If Congress wants to include Denali with the states for funding eligibility purposes, Congress certainly knows how to do it. In section 6009 of P.L. 110-246 (June 18, 2008), Congress recently amended the Solid Waste Disposal Act to authorize an annual $1.5 million appropriation to the Denali Commission *and* explicitly provided that *"[f]or the purpose of carrying out this subsection, the Denali Commission shall . . . be considered a State . . .* [emphasis added]."

[20] Pending GAO decision # B-319246 (Subject: *Denali Commission—Authority to Receive State Grants).*

Ironically, federal law appears to restrict the state with the largest savings account – and no general tax on its residents – in any effort to directly fund Denali in its current form. This contrasts with the Appalachian Regional Commission, where Congress mandates an even split of administrative costs between the federal and state governments.

Problematic funding from the private sector

Potential support from private philanthropic foundations presents a similar issue. Again, this source can permissibly send "match" to a grant recipient. However, 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."[21] 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 more focused example would be the defeated donations by Denali's panel of non-federal "commissioners." The enabling act prescribes a panel of ex-officio commissioners from identified statewide organizations, both public and private. They serve on a very intermittent part-time basis, with the statute directing that they be paid at a given daily rate for their attendance at meetings. 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 forces the well-meaning commissioners to pay taxes on "constructive income" that they intended from the start to forego.

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. While Denali retains some legal interest in federally-funded facilities,[22] Congress unfortunately did not authorize the agency to reapply the proceeds after any disposal of the property from a failed project. Again, by statutory default, any proceeds would simply disappear into the general U.S. Treasury as "miscellaneous receipts" rather than reinforce Denali's further efforts.

Problematic congressional funding

Denali has faced funding complications even when Congress has explicitly identified the agency as the destination for a given amount in an appropriation act. In SAFETEA-LU and its supporting appropriations, Congress provided that Denali would receive $5 million annually for small facilities along Alaskan waterways. Construction seasons are limited in rural Alaska, and Denali's implementation of congressional intent was hindered by delays of a year or two

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

[22] See *City of Hydaburg v. Hydaburg Co-Op,* 858 P.2d 1131 (Alaska 1993); *In re Joliet-Will County Community Action Agency,* 847 F.2d 430 (7th Cir. 1988).

between presidential signing and availability of the funds to Denali. After the CFO's efforts to resolve this bureaucratic "speed bump," OIG sought the guidance of the U.S. Comptroller General as to the point in time where such delay rises to the level of a "de facto impoundment" (decision pending[23]).

Recommendation

Denali's current structure was appropriate in the agency's early years when congressional appropriations were expected as the dominant support. However, the above difficulties signal that the agency now needs the legal flexibility to pursue more diversified funding. Denali's position is a difficult one because conflicting federal policies seem to simultaneously encourage and discourage efforts to obtain non-federal contributions.

The ultimate answer lies with Congress. One traditional option would be a requirement in either permanent legislation or appropriations that all federal funding be significantly leveraged by a non-federal "hard match" (the practice with both the Appalachian Regional Commission and the Delta Regional Authority). However, such a solution may not fully resolve Denali's need for funding flexibility and may in practice trigger further debates as to who must pay whom for what (definitional disputes).

OIG thus recommends that Congress go farther and simply sunset the Denali Commission as a federal agency, with simultaneous rebirth as a nonprofit corporation under Alaska state law. Once freed from the federal straitjacket, the new nonprofit can marshal funding from as many sources as possible to advance "bush" Alaska from a local problem to an international asset. Incorporation as a nonprofit under state law will allow Denali this flexibility that it now lacks in the federal system.[24]

One possibility would be for Congress to itself model the agency as the "Denali Consortium," similar to the Alaska Native Tribal Health Consortium. Congress initiated the latter in section 325 of P.L. 105-83, and the entity then organized as a nonprofit corporation under Alaska law.

Other examples would be Congress' initiation of the Legal Services Corporation and the Corporation for Public Broadcasting, both of which are nonprofit creations under the law of the District of Columbia. This nonprofit status was designed to foster each entity's independence in their program choices, a goal that Alaskan beneficiaries of the Denali Commission would presumably appreciate.

But Congress could, of course, still continue to support Denali through annual appropriations to the extent desired – as Congress has long done for the Legal Services Corporation. And the

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[23] Pending GAO decision # B-319189 (Subject: *Denali Commission—Use of Interagency Agreements to Transfer Funds Made Available Through Federal Transit Administration's Appropriation*).

[24] In fact, it is seldom remembered today that there was some initial uncertainty as to whether the Denali Commission was even a federal agency. The agency started with $20 million, three employees, two rooms, QuickBooks, a bank account, private sector accounting principles, and an artistic logo designed and donated by the CFO's spouse.

working relationships with other agencies that Denali has honed over the years should still remain intact and productive.

Yet another possibility would be for the Alaska State Legislature to restart the "Denali Consortium" as a state-chartered nonprofit corporation. The Special Education Service Agency established by Alaska Statute 14.30.600 as a "public organization" is an example of the latter type of entity.

INSPECTION: EVOLVING BALANCE BETWEEN "PARTNERING" AND "CONFLICTS OF INTEREST"

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."

Congress inadvertently created the core problem when it directed by statute that the heads of specific statewide public and private interest groups would serve as the agency's panel of part-time "commissioners." This statutorily-prescribed membership reflected the agency's structure as an experimental collaboration of players from the federal, state, and nonprofit sectors.

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).

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	✓

In contrast to the classic "covert" scenario of American politics, the receipt of Denali grants by the commissioners' organizations has been quite open over the years. From their perspective, they assume that they are "partnering" in a congressionally-prescribed solution — not committing conflicts of interest. For instance, 38% of Denali's FY 2007 funding was awarded as grants to Alaska's state government. And there are certainly examples where commissioners, or

their staff assigned to Denali, have openly signed Denali's grant documents with their home organizations.

In fact, Denali — as recently as 2007 — publicly advertised its grants "award procedure" as *"Resolutions through Commissioners"* in GSA's online *Catalog of Federal Domestic Assistance* required by OMB Circular A-89 (though the statute itself gives the agency head the final authority to issue a grant).

The Department of Justice has determined that the 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 (OGE).[25] 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).

The commissioners potentially represent both their sending organizations and the Denali Commission in separate contacts with members of Congress at various points in time. At OIG's request, the U.S. Comptroller General has issued formal "safe-harbor" guidance on the use of federal funding to pay certain expenses of commissioners and their staffers in this situation.[26]

But the commissioners are only one of eight groups in the labyrinth of parties at Denali that are regulated under various ethics rules: (1) the federal co-chair (agency head) as a Department of Commerce employee; (2) federal employees of the commission itself; (3) employees detailed to the commission under the Intergovernmental Personnel Act; (4) the ex-officio commissioners specified in the enabling act; (5) staff of the ex-officio commissioners; (6) contractors;

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[25] Until Justice's determination of the commissioner's status, Denali's OIG periodically received "tips" of public perceptions that the commissioners were voting grants to their own organizations. This concern was understandable since Denali — as recently as 2007 — publicly advertised its grants "award procedure" as *"Resolutions through Commissioners"* in GSA's online *Catalog of Federal Domestic Assistance* (required by OMB Circular A-89). And, last but not least, two of the commissioners themselves raised the issue in their own conscientious concern for a "safe harbor."

Unfortunately, this was not new material. The *Anchorage Daily News* published its July 12, 2005 story headlined as *"Investigator details dubious spending: Report on Denali Commission chief calls for tighter rules."* The entire 57-page Beltway report was then published on the newspaper's website, including these passages:

> *Recommendations include the recusal of Commission staff, including Commissioners where applicable, from discussion or decisions about funding of organizations with which they have official or personal relationship . . .* [page 25]
>
> *Staff or Commissioners associated with other organizations – re board members, personal relationship – should recuse themselves from input or decisions related to those organizations.* [page 56]
>
> *Aggressive implement [sic] of conflict of interest regulations, including avoidance or appearance of conflicts.* [page 56]

Our subsequent review of this longstanding dispute then diagnosed it as the combination of three factors: (1) Denali's uncertain status as a federal or state agency (an identity crisis that was ultimately resolved); (2) the enabling act's ambiguous role for ex-officio commissioners from named organizations; (3) mixed messages to the commissioners from Denali's own management.

To protect all concerned, in 2006 the agency head and OIG jointly asked the Department of Justice's Office of Legal Counsel for clarification of the ethics regulations applicable to the commissioners.

[26] See *Denali Commission — Anti-Lobbying Restrictions,* GAO comptroller general decision B-317821 (June 30, 2009).

(7) outside parties that serve on advisory committees created by the agency head; (8) members of the statutory Transportation Advisory Committee that are appointed, per the statute, by the state's governor.

The federal co-chair and the commission's own federal employees are subject to the CFR ethics regulations administered by the Office of Government Ethics (OGE). The commission has a designated agency ethics officer (DAEO), who confers with the OGE "desk officer" assigned to the commission. Employees have over the years received training from the DAEO, visiting OGE staff, Department of Commerce ethics staff, GAO (appropriation law restrictions), and visiting staff from the Office of Special Counsel (Hatch Act).

Employees detailed under the Intergovernmental Personnel Act are subject to both the ethics rules of their sending organizations and the federal regulations administered by OGE.

Denali's contractors are subject to the ethics rules of the Federal Acquisition Regulation (FAR), which is interpreted in practice by the contract officers (employed by federal franchise funds) and the Denali employees who are appointed to represent the contract officers onsite as "contract officer technical representatives" (the COTRs).

With the exception of the Transportation Advisory Committee, the advisory committees that select projects are in-house creations of the agency head (the federal co-chair). However, Congress' explicit exemption of the Denali Commission from the Federal Advisory Committee Act (FACA)[27] left some ambiguity as to the ethics regulations applicable to such non-statutory boards. Last year, OIG requested that OGE provide technical assistance to assure legality.[28]

In response, OGE reviewed the details of Denali's project selection processes with Denali's chief operating officer and its designated agency ethics official. OGE found Denali's processes to be acceptable overall, so long as individual members recuse themselves as necessary under the federal ethics rules.

In contrast, though, the ethics rules that apply to the Transportation Advisory Committee (that is, what triggers a "conflict of interest") has been ambiguous due to some statutory idiosyncrasies. SAFETEA-LU[29] states in no uncertain terms that *"[t]he advisory committee shall be composed of nine members to be appointed by the Governor of the State of Alaska . . ."* and that these nine members will include *"the chairman of the Denali Commission."*[30] SAFETEA-LU also states

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[27] See Denali Commission Act sec. 308.

[28] The Inspector General Act authorizes inspector generals *"to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State, or local governmental agency or unit thereof."* See section 6(a)(3). The Act also authorizes inspector generals *"to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of . . . its programs and operations."* See section 4(a)(3).

[29] See P.L. 109-59 sec. 1960 and Denali Commission Act (as amended) sec. 309.

[30] This "chairman" would seem to be the "state co-chairperson" that the governor designates as his or her "commissioner" under section 303(b)(1)(A). In contrast, the remainder of the Denali Commission Act is peppered with continuous references to the

that *"[t]he provisions of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the advisory committee."*

Since congressional delegation of the power to appoint a *federal* committee could present constitutional issues, Congress was arguably intending for the Transportation Advisory Committee to be a *state* — rather than a federal — committee (which would just be another of the many conditions attached to the state's receipt of federal funding).[31] Since this is a panel of nine *state* appointees, the *state's* ethics statute would seem to provide the applicable conflict-of-interest rules in this distinctive situation.[32]

The Denali Commission has by custom paid for the cost of travel and administrative support needed by the Transportation Advisory Committee. This panel unquestionably offers a service to the federal government, and travel payments are allowable under federal "invitational travel" regulations. But the committee is still a *state* entity composed of *state* appointees, and SAFETEA-LU does not *require* that the Denali Commission pay for the committee members' travel and administrative support. The SAFETEA-LU amendments to the Denali Commission Act[33] direct only that the appropriated funding will be applied for *"the costs of planning, designing, engineering, and constructing"* the projects themselves. In other words, section 309 of the Denali Commission Act — literally read — directs the federal co-chair to build projects using the appropriated funding after consulting the list developed by the state's committee.

Resolution of which ethics rules apply to the Transportation Advisory Committee would seem best resolved by a joint agreement among Denali's designated agency ethics official, the desk officer at the federal Office of Government Ethics, and the state ethics attorney (an official in the Alaska Department of Law). Alternatively, the federal co-chair could formally request the Alaska attorney general to issue a public opinion to the state's governor.

However, if no agreement can be reached among the affected entities, OIG remains willing to

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"federal co-chairperson." The governor's appointment of the *federal* co-chair to the committee would pose the logic flaw of the federal co-chair deciding on project recommendations that the panel is making to the federal co-chair (the latter would be advising himself). A court tasked with interpreting section 309 would presumably strive for an interpretation that reconciles all sections of the enabling act as a consistent whole.

[31] A court tasked with interpreting section 309 of the Denali Commission Act would presumably strive for an interpretation that sidesteps potential constitutional problems (Congress is presumed to want only legislation that is constitutionally sound).

[32] More specifically, status of the Transportation Advisory Committee as a state entity is reinforced by the following factors: (1) Section 309 arguably exempts the panel from the Federal Advisory Committee Act because it's a *state* committee rather than a *federal* committee. (2) Distinctive section 309(h) permits the transportation program's funding to be applied to *"the non-federal share of the costs of projects"* selected by the Transportation Advisory Committee (in contrast to the federal norm in which federal funding must be matched with non-federal funding). (3) Section 309(i)(1) permits the State of Alaska to transfer up to 15% of its federal highway funding to the projects selected by the Transportation Advisory Committee (in contrast to the federal norm in which federal entities fund state entities, not vice versa). (4) Since only the state's governor has the authority to appoint this committee, the implied authority to remove for cause (to discipline) would seem to lie only with the state's governor (a "federal" committee whose members were immune from federal oversight would not make sense).

[33] See section 309(a) of the Denali Commission Act.

request an authoritative determination from the Office of Legal Counsel in the U.S. Department of Justice.

INSPECTION: FAMILY RESOURCE CENTER AT TOGIAK, ALASKA (POP. ≈ 800)

Togiak is a small town (pop. ≈ 800) on the seacoast in remote "bush" Alaska. It has both a city government (City of Togiak) and a tribal government.[34]

Over 20 years ago, the City of Togiak (City) acquired a fish plant from a private company that went into bankruptcy. One of the property's buildings was the fish plant's 6,700 square-foot "bunkhouse." The Denali Commission awarded a grant of $851,700 for the City to convert this old bunkhouse into a "family resource center" for various social service providers.

More technically, Denali provided its funding to the State of Alaska which then administered the City's project as a state sub-award. The City matched Denali's grant with $614,000 from three other sources.

OIG reviewed the state's records (in Fairbanks) concerning its monitoring of the City's sub-award. We also physically inspected the resulting facility in Togiak.

Inspection Results

OIG found that the project was successfully completed and that the building was being actively used for the intended public purposes. More specifically, OIG observed that the construction and current use of the family resource center was consistent with the City's grant application, the architect's floor plan, and the monitoring photos submitted to the state.

We found that Togiak's project reflected an efficient use of federal funding. Instead of requesting a new stand-alone building, the City gave its existing facility a new life and reduced its fuel bills. Consolidation of nine social service providers, a child care center, and itinerant lodging[35] unquestionably offered efficiencies of scale in this remote setting. And our physical inspection enabled us to verify that — over three years after the renovation — the facility was being used for the asserted public functions that were the basis for approving the grant application.

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[34] Togiak is an isolated place. No roads, railroads, docks, or power grids connect it with the rest of the state. Year-round transportation is by small propeller airplanes that land on a gravel airstrip. Snow machines are used in the winter and private boats in the ice-free summer. Around 90% of residents are Yupik Eskimos, many of whom harvest local wildlife such as seals, sea lions, whales, and walruses.

[35] The availability of overnight housing is significant to the ability of isolated bush settlements to leverage their local capacity with flown-in services. When the family resource center opened, it was Togiak's only lodging for itinerant workers. There is now also a two-room bed & breakfast in this town of 800.

Though OIG has been critical of local matching efforts elsewhere in the region,[36] conversion of the old fish plant bunkhouse reflected a "barn raising" of funding collaboration[37] from public and private sources. The conversion cost about $1.45 million, with Denali's federal funding of $835,000 representing 58% of the total. In other words, a match of 42% represents a significant effort in this context.

Project's larger significance to Alaska

Though Togiak (pop. ≈ 800) is a very small city by Lower 48 norms, it serves as the hub for a historical constellation of even smaller settlements. Schools are the primary publicly-funded institution in the latter, and their populations move as the schools disappear with their associated support services. The state stops funding a local school when it serves less than 10 students, and the domino effect of vanishing subsidies for utilities and mail planes is part of the lore of migrating bush Alaska.

For instance, nearby Twin Hills (pop. 75) now has only 14 students in its school. Clark's Point (pop. 54) has only 11 students. Ekwok (pop. ≈ 120) has only 22. Aleknagik (pop. ≈ 240) has 33. And Portage Creek (pop. now 7) had a school that closed in 2005. In contrast, much-larger Togiak (pop. ≈ 800) has the largest school (≈ 235 students) in the state-supported school district that includes all of these small settlements.

Federal investment in hubs like Togiak offers an efficient alternative to migrations from tiny settlements into the urban centers at Anchorage (pop. 285,000) and Fairbanks (pop. 98,000). Public preservation of Alaska's rural hubs is a more reasonable expectation for the long term than the continuation of government services in 200+ isolated settlements.

Key Recommendation

OIG's visit appears to be the first time that any Denali official inspected the new facility. While the state charged Denali $16,700 for administering Togiak's sub-award, the state's monitoring did not include any site visits to directly confirm the City's progress and the final result. And Denali's grant conditions did not require it.

While Togiak's project was successfully accomplished, site visits are a key safeguard for detecting any problems at an early stage. We appreciate that the state's grant manager was stationed in Fairbanks which, measured directly, is almost 600 miles away along the north side of the Alaska Range (and would necessitate indirect routing through Anchorage as a practical

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[36] See OIG's inspection report for a Denali project at Manokotak, Alaska at *www.denali-oig.org.*

[37] Our past OIG reports have cautioned Denali's management about the need to leverage federal funding with local effort. For instance, our May 2007 *Semiannual Report to the Congress* stated:

> *The extent to which the Commission's projects should be a shared effort — versus just provided — is a sensitive policy decision that currently varies with the type of facility. Nevertheless, long-run national support may be encouraged to the extent that projects are perceived more as innovative partnerships and community "barn raisings" — and less as seasonal cash injections and entitlements.*

matter). But her state department has a "local government specialist" stationed in Dillingham, which has daily scheduled air service to Togiak from only 70 miles away. Several site visits from this latter official would have been reasonable for the $16,700 that the state charged Denali for administering Togiak's sub-award.

In future awards, Denali should include a grant condition that requires site visits at specified intervals from some representative of the involved state department.

Denali's management has so far not implemented this recommendation.

Comment

Denali's OIG is the smallest of the statutory inspector generals (currently 1 FTE), and we don't pretend to pick the inspected projects at random. We go where the risks are, and Togiak's family resource center illustrates that a community with significant problems can still successfully execute a federal project.

We noted the recent public context of controversy concerning the community's overall capacity to work together. Like the rest of rural America, Togiak has had its share of divisive small-town politics. Around 250 residents voted in the 2008 city government election, which was publicly focused on policy differences between the city and tribal governments. The aggrieved traded accusations of misconduct and requested intervention by a variety of outside agencies (including the state troopers and FBI). And the press actively reported all of this, even in tiny Togiak.[38]

And Alaska's Local Boundary Commission (LBC) publicly reported the following to the Alaska Legislature:

> *In June 2007, residents of Togiak submitted a petition for dissolution of the City of Togiak. In July 2007, LBC staff completed technical review of the petition. In a letter to the petitioner's representative, LBS staff outlined 19 significant deficiencies in the petition and, after concurrence with the LBC Chair, returned the petition to the petitioner. No further action has been taken regarding dissolution of the city.*[39]

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[38] See Mary Lochner, "Monegan to mediate Togiak dispute, *Bristol Bay Times,* May 29, 2008; Mary Lochner, "Togiak mayor tries to oust Ramey from City Council," *Bristol Bay Times,* Oct. 9, 2008; Mary Lochner, "Leadership to change after vote in Togiak," *Bristol Bay Times,* Oct. 16, 2008 (all articles online at *www.thebristolbaytimes.com*).

Togiak's recent internal struggle demonstrates the interconnectedness of even an isolated hamlet with the rest of the nation. The tribal government issued a "banishment order" directing the city government's police chief to leave town. The state government's public safety commissioner then attempted to mediate the local dispute. In the meantime, the governor fired the public safety commissioner (though on unrelated issues). The state legislature then investigated the commissioner's firing, an inquiry which surfaced on the national level as the governor had her run to be the nation's vice-president.

[39] See 2008 Local Boundary Commission Report to the First Session of the 26th Alaska Legislature, page 40.

In early 2009, the Department of Interior OIG issued a public "flash report" that a grant recipient in Togiak (not the city government) had problems implementing a funded road project.[40] Around this same time, Denali's OIG investigated a nebulous "tip" that unspecified Denali funding had been misused by an unspecified recipient in Togiak. While we were unable to get the complainant to identify the specific Denali-funded project of concern, agency records indicated that the family resource center had been Denali's most significant construction project in Togiak.

The City of Togiak has for some years obtained an annual audit of its financial statements from a CPA firm. As part of the CPA's audit of the City for 2007, the CPA issued an "internal control letter" advising the City to make some improvements in its accounting system.[41]

Denali's CFO at one point suspended[42] the overall grant to the State of Alaska (which included sub-awards to Togiak and 11 other communities). The CFO's letter to the state government indicated the following reasons for this administrative action:

> *The reasons for the suspension of funds are due to lateness of financial reporting, inaccuracy of financial reporting, no submissions of quarterly estimates, expenses for grants being charged to other grants, inaccuracy on cash versus accrual on financial reports, and inconsistent information from financial versus program staff at [state's department].*

Despite all of these challenges, the City of Togiak successfully implemented its Denali-funded project to convert an old fish plant bunkhouse into a family resource center.

INSPECTION: CITY HALL AT MCGRATH, ALASKA (POP. ≈ 320)

The City of McGrath (pop. ≈ 320) lies deep in Alaska's interior between the Bering Sea and the mountains of the Alaska Range.[43] The Denali Commission provided grant funding of $50,375 for McGrath to renovate its little city hall (≈ 10,000 square feet) that was built 30 years ago. The city matched this with $16,791 of its own. More technically, Denali provided its funding to the State of Alaska which then administered McGrath's project as a state sub-award.

OIG reviewed the state's records (in Fairbanks) concerning the McGrath sub-award. We physically inspected the resulting facility while in McGrath for other matters.

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[40] See Department of Interior OIG, *BIA Alaska Regional Indian Reservation Roads Program Rife with Mismanagement and Lacking Program Oversight,* Report No. WR-IV-BIA-0001-2009 (Feb. 2009).

[41] All of these audit materials are publicly posted on the State of Alaska website at *www.commerce.state.ak.us/dca/.* While OIG considered these online materials, readers should realize that the City, not OIG, contracted for these audits and that OIG has not attempted to "re-audit" these materials in any way.

[42] In fact, this was only one of seven grants to the State of Alaska that Denali's CFO suspended at the time.

[43] No roads, railroads, or power grids connect McGrath with the rest of the state. It lies near the upriver, barge-accessible end of the long Kuskokwim River, which might be considered analogous to a rural "Route 66" in the Lower 48. Routine access is by small propeller airliners. It is a stop on the annual Iditarod dog sled race.

Inspection Results

OIG's visit appears to be the first time that any Denali official has inspected the renovated facility. We found the city hall's renovation to be a success story that illustrates what committed local leadership can do with a grant that is quite small by federal standards. OIG observed that the remodeled city hall was consistent with McGrath's grant application, progress narratives, and photos.

The state monitored this grant from its office in Fairbanks. OIG reviewed the extensive file maintained there for the McGrath sub-award (literally 7 pounds in weight and approximately 300 pages of paper). The state charged Denali only $1,008 for all of this administration. OIG appears to be the first federal official that has examined this state monitoring file.

McGrath's city manager submitted 10 progress narratives to the state, including around 40 photos. OIG reviewed these progress reports in the state's file and found them to contain detailed descriptions of specific construction activities as well as supporting invoices. We noted that the state's grant administrator rigorously reviewed each narrative and assured adherence to the sub-award's budget. While three time extensions (grant amendments) were accommodated during construction, the file reflects a continuous stream of meaningful, timely communication (and documentation) between the two officials.

The state's sub-award to McGrath reflected an efficient use of federal funding. The continued consolidation of this small town's city council, police, fire, laundromat, water treatment, and even its jail,[44] unquestionably offers efficiencies of scale in this remote setting. And our physical inspection enabled us to verify that — two years after completion of repairs — the facility was being used for the asserted public functions that were the basis for approving the grant application.

Though OIG has been critical of local matching efforts elsewhere in the region,[45] renovation of McGrath's city hall reflected a "barn raising" of community involvement. Unless a task required a specialty contractor, the city manager successfully scheduled local people to accomplish the work. We recognize her talents in coordinating this under the conditions — and without a budget increase (her narratives reflect work in temperatures between 85°F *above* zero and 51°F *below* zero).

Key persons at McGrath showed OIG their renovated city hall with great pride. This included the local nurse practitioner,[46] the mayor, and the president of the tribal corporation.[47] Instead of

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[44] One of Alaska's historical bush challenges has been humane confinement of the dangerous until state troopers can transport them by plane to a state correctional center. See John E. Angell, *Public Safety and the Justice System in Alaskan Native Villages* (Pilgrimage Inc., 1981, ISBN 0-932930-35-2), pages 46-50.

[45] See OIG's inspection reports for Denali projects at Takotna, Sterling Landing, and Red Devil at *www.denali-oig.org*.

[46] The nurse-practitioner is the lead medical provider in McGrath.

requesting a new $1 million+ stand-alone building, the community used less than $70,000 to extend the life of its existing facility and reduce its fuel bills.

Project's larger significance to Alaska

Like our observations above concerning Togiak, the City of McGrath (pop. ≈ 320) serves as the regional center for a historical constellation of much smaller settlements. Schools are the primary publicly-funded institution in the latter, and their populations move as the schools disappear with their associated support services.

For instance, most residents of Telida (pop. now 3) moved down the river to Nikolai (pop. 90) with the departure of the school, clinic, telephone service, and subsidized mail planes.[48] And if Nikolai's school closes, the residents will probably move further down the river to McGrath.

Other area examples with discontinued schools are Lime Village (pop. now 32) and Lake Minchumina (pop. now 17). Takotna's school continues but with only 12 students (10 is the critical threshold for state funding). Even McGrath as the regional center now has only about 45 students, compared to the 130 of a prior decade.

We note again that federal investment in regional hubs like McGrath offers an efficient alternative to migrations from tiny settlements into the urban centers at Anchorage (pop. 285,000) and Fairbanks (pop. 98,000). Public preservation of Alaska's rural hubs is a more reasonable expectation for the long term than the continuation of full government services in a multitude of small isolated settlements.

Key Recommendation

McGrath's facility included its fire department and state trooper, and ironically some delay was experienced from problems in obtaining approval from the state fire marshal (another state law enforcement official).

Construction work on public buildings cannot begin until the state fire marshal has approved the plans. The McGrath project was delayed for around six months due to problems with an incomplete application to the fire marshal. This is significant given that the city's original grant application optimistically projected that construction itself would only take six months.

We did not see the fire marshal's approval in the state's file for the McGrath sub-award (though the state's grant administrator obtained a copy at our request). The grant administrator correctly noted that monitoring for fire marshal approval was not a condition of Denali's grant to the state.

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[47] MTNT, Limited.

[48] Telida's story was told nationally as one segment of the 1996 PBS/Reader's Digest television program *Incredible Journeys Around the World: From the Amazon to the Arctic.*

The fire marshal's linkage to Denali grants is important at several levels that make approval more than just another bureaucratic hurdle.

Destruction of public buildings by fire is now unusual in the Lower 48, where running water and sprinkler systems are the expected norm. But such tragedies are still too common in the remote areas of Alaska off the road system.

Also, widespread summer wildfires are the rule rather than the exception in rural Alaska. We observed two active wildfires from the air during our trip to the McGrath area. One expanse of burned timber ran between the nearby settlements of Nikolai and Telida. The latter, though spared this time, had been almost completely encircled. Summer haze from far distant wildfires is an accepted fact of life in Anchorage on the other side of the Alaska Range.

From the perspective of managing financial risks, destroyed public buildings often trigger replacement at public expense. Further, the state has committed to review public construction plans for fire prevention, and any neglected review may thus subject the state to liability.[49] While the federal government is generally not liable for grantees' mistakes, suits against grantees may raise the disruptive issue as to whether Denali's grants can be charged for grantees' defense costs and court judgments.

Both metaphorically and literally, it's obviously better to prevent fires than to put them out. Denali should include an explicit condition in its grants that the grantee will document the fire marshal's plan approval before construction starts. And Denali should coordinate technical assistance from the Cooperative Extension Service when a community has difficulty in meeting the fire marshal's requirements.

Denali's management has so far not implemented this recommendation.

Comment

We recognize that few inspector generals would visit a location as remote as McGrath, Alaska to inspect the use of only $50,000. However, occasional spot-checking of small grants is desirable since they may easily stay beneath the radar of the four main oversight safeguards.

First, a small grant may be neither material nor sampled by OIG's contract auditor during the routine annual audit of Denali's own financial statements. Second, though the State of Alaska is Denali's largest grantee,[50] an individual grant may not be significant in the state's annual audit of its overall federal funding (not a "major" program for audit purposes). Third, local audits are not required when small towns (like McGrath) receive less than $500,000 in annual federal

[49] See *Angnabooguk v. State,* 26 P.3d 447, 453 n.24 (Alaska 2001); *R.E. v. State,* 878 P.2d 1341 (Alaska 1994).

[50] For instance, the State of Alaska received over a third of Denali's funding in FY 2007.

assistance. Fourth, both a state's department and a small town may lack the benefit of an internal auditor (the case here).

Also, OIG received a referral from federal OMB concerning Denali's accounting for another grant to the same state department that administered the one involved in the McGrath sub-award. OIG ultimately requested a formal determination from the U.S. Comptroller General, which was published in 2008.[51] In discussing the facts, the Comptroller General noted that the problem began with an error by the state government as grantee:

> *In August 2005, Commission staff sent a Financial Assistance Award document to the Alaska Department for signature. The Alaska Department misplaced the award document and, consequently, never returned it to the Commission. After following up with the department in October 2005, Commission staff transmitted a second award document to the department, dated December 2, 2005.*

Given that this additional grant involved the same state department, small sub-awards, and a misplaced grant award for $400,000, OIG considered it among the factors that suggested review of the state's monitoring procedures would be beneficial.

INSPECTION: POLICE AND FIRE STATION AT PORT GRAHAM, ALASKA (POP. ≈ 135)

Port Graham is a small coastal settlement (pop. ≈ 135) south of Anchorage. Port Graham is not incorporated as a city. Rather, the settlement has a tribal government.[52]

Denali awarded a grant of $765,000 for the tribal government to construct a new building (3,600 square-feet) that would house the local police station and volunteer fire department. More technically, Denali provided its funding to the State of Alaska which then administered the tribal government's project as a state sub-award. The tribal government matched Denali's grant with around $84,000 plus the underlying land.

OIG reviewed the state's records (in Fairbanks) concerning its monitoring of the tribe's sub-award. We physically inspected the resulting facility in Port Graham.

Inspection Results: lack of use as a police station

OIG found in our inspection that construction of the building was successfully completed consistent with the architect's floor plan, the sub-award's terms, and the photos submitted with progress reports. But the building's anticipated use as a police station hasn't materialized in practice.

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[51] See *Denali Commission — Overobligation of Apportionment,* GAO comptroller general decision # B-316372 (Oct. 21, 2008).

[52] Access is mainly by small planes (hourly scheduled air service by two carriers) that cross about 30 miles of water to connect with the state highway system at Homer, Alaska. There is a publicly-funded school (14 students, 2 teachers) and a state-maintained gravel airstrip. An aerial photo shows around 70 homes that are clustered within several blocks of the airstrip. There are 72 post office boxes in the little contract post office. The phone book has 66 listings.

An architect designed the tribe a classic American small-town police and fire station. A fourth of the two-story building was designed for a police department, complete with plumbed jail cell, evidence room, firearms storage, cuff bar, investigative record-keeping, and computer work stations with Internet access.

The grant application asserted that there would be three users for a Denali-funded police station: (1) Alaska State Troopers on routine patrol, (2) a local law enforcement official known as a VPSO (trained and supervised by the troopers),[53] and (3) a tribal employee known as a VPO (limited duties under Alaska law).[54]

The Alaska State Troopers are the lead police presence in rural Alaska. OIG consulted that agency's management and the state trooper that has been assigned to Port Graham calls since 2003. The troopers have never used the Denali-funded police station. The assigned trooper periodically calls on Port Graham, and he then stays overnight there on his patrol boat that he ties up to the dock. He was unaware that the tribe even had a police station. And the troopers' database shows that they have had to visit Port Graham less than 20 times over the years since the building was completed back in 2005.

The state trooper who visits Port Graham also has the responsibility for oversight of any VPSOs that tribes establish in his service area. The trooper indicates that Port Graham has not had a VPSO in the years since the new police station opened. In fact, the perception of the Alaska State Troopers is that the tribe has not had any local law enforcement in those years.[55]

All of this is consistent with our inspection observations that the space in question seemed in use for storage rather than daily activity as a police station. It is also consistent with the tribe's aspirations to police itself through traditional social sanctions (tribal court, education, respected chief) rather than Western criminal procedures (arrest, booking, custody).

Alaska law conditions state funding for a local VPSO on the community's provision of *"a place to temporarily hold individuals under arrest."*[56] However, the plumbed jail cell in the new police station has never been used. The tribal chief recognizes that it would be legally problematic to leave a prisoner in an isolated building unless a trained jailer was present. Any confinement of a juvenile would be especially sensitive. In fact, the rationale for including this feature in the application seems uncertain given the existence of a secure room in the clinic and the short flight distance to Homer and Seldovia.

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[53] Village Public Safety Officer.

[54] Village Police Officer.

[55] OIG also consulted the tribal chief, the Chugachmiut corporation (who funds tribes' VPSOs), and the local VPO at the time of the tribe's 2003 grant application (who left before the new police station opened). It appears that a VPSO candidate used the station as his office for some months in 2008, but left before he was able to complete the required training at the state's VPSO academy. This anecdote seems to be the closest that the tribe has come so far to use as a police station.

[56] See 13 AAC 96.040(a)(1)(C).

Inspection Results: uncertain use as a fire station

The extent of use as a fire station (including EMTs) was more difficult for OIG to assess.

We note again that the architect designed the tribe a classic American small-town police and fire station. Three-fourths of the 3,600 square-foot building was designed to serve as the fire station (including EMTs) with a four-vehicle garage, three training areas, a kitchen, and 200 square feet of office space dedicated to "fire prevention."

During our inspection, we observed that the office areas largely appeared to be either unused or dedicated to long-term storage (piles) of items not routinely accessed. The four garage bays were occupied by a small pumper truck needing repairs, a small truck converted to carry a gurney, and a four-wheeler.

Port Graham is understandably sensitive to fire risks. Its fish cannery has dominated the settlement for a century, and that major structure was destroyed by fire in both the 1960s and 1990s. However, fire calls appear to be quite rare in Port Graham. Records kept by the state fire marshal report only two fires in Port Graham since 2000 (one chimney fire and one building fire, with total estimated loss of only $5,000). Both the tribal chief and the fire chief estimate that the 20 volunteers with their aging pumper truck respond to an actual fire call every year or two.

The tribe's clinic is operated by Chugachmiut Inc. We contacted the latter but were unable to determine the number of actual EMT runs with an ambulance, versus overall service calls associated with the clinic. However, the need for ambulance runs is probably limited to some degree by the settlement's compact geography. Almost all residents of tiny Port Graham live within 700 feet of its runway, and the clinic itself lies abeam the runway's southern third. Hourly scheduled air service from two air carriers connects the settlement in 30 minutes with Homer's regional hospital, or at least the physician-staffed clinic at Seldovia (8 miles east of Port Graham). (In fact, during the course of OIG's brief visit, one emergency medevac patient flew out to the Homer hospital for treatment and then back home to Port Graham before we departed.)

OIG does not question the community spirit of the tribal leaders and their volunteer firefighters and rescuers. Local anecdotes indicate that the dedicated group has over the years engaged in significant services, including night aerial medevacs, sea rescue, missing person searches, school presentations, house-to-house safety briefings, and transportation of patients to the clinic. There is also anecdotal support that some EMT training has occurred in the new building since it opened in 2005.

Nevertheless, we left the new building with an overall impression that it currently functions more as a tribal warehouse than as a fire station in active daily use.

Project's larger significance to Alaska

The projected need for this building in little Port Graham was based on predictions in the grant application that didn't materialize. For a century, the town's economic core has been its fish cannery.

The cannery's main plant was destroyed by fire in 1960 and again in 1998. The tribe constructed a modern $4.5 million replacement plant (≈ 15,000 square feet) in 1999 that unfortunately became idle by 2001. Seventy workers worked there during the peak of the new plant's short life.

The tribe incorrectly assumed that its replacement plant would reopen and result in a population increase. Instead the cannery has been idle since 2001, the population has fallen to around 135, and the school now has only 14 students for its five classrooms. (Ten students is the critical threshold for continued state funding.) In fact, less than half of the 300 members of the Port Graham tribe now live there.

Denali provided $29,695 for a feasibility study of options for reopening the cannery.[57] The study discussed various seafood-related possibilities, but Port Graham's dominant facility remains vacant and closed to this day.

OIG notes that the national health care debate suggests a potential retooling of the idle cannery that the tribe may care to consider as an economic opportunity. Consumer options for non-traditional (alternative) medical treatments are increasingly popular, marketed, and lucrative in the Lower 48. The small tribe at Port Graham has a long history with plant remedies, which the tribe continues to actively use today as a medical option.

Packaged herbal remedies from the rain forests of Alaska may be attractive to the national chains that serve this popular niche market in the Lower 48. Port Graham has hourly air freight service to Homer, which is connected by road to the Anchorage airport (one of the busiest air cargo hubs in the nation). The combination of small size, light weight, non-perishable, high markup, and Internet access would seem to support feasible distribution logistics.

Key Recommendations

Denali should consult the Alaska State Troopers prior to funding construction of a rural police station. Just as Denali reviews the staffing capacity for proposed clinics, any applications that involve local jail cells should consider the personnel needed to assure prisoner safety. Denali should also consult the state fire marshal prior to funding construction of a rural fire station.

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[57] Denali issued grant no. 99-DC-2002-E2 to the state, who issued a sub-award to Port Graham's tribe. The tribe arranged for Indian Valley International to issue *A Feasibility Report for a Fish & Meat Processing Venture [at] Port Graham, Alaska* (Sept. 30, 2003). This report is available online at *www.commerce.state.ak.us/dca/plans/PortGraham-FS-2003.pdf.*

Federal construction grants such as this one carry an implied legal promise (continuing federal interest[58]) that the resulting facility will be used for its assumed public purpose. A key safeguard is long-term notice to the community of the property's restricted status. Publicly-recorded land records should thus include an agreement with the sub-awardee as to the range of future permissible uses for a facility.

Some latitude for eventual unanticipated public uses may be acceptable to Denali, as well as some time frame of concern that falls short of perpetuity. In other words, there would be seem to be some point short of forever when a building has fully served out its public life.[59]

But our point is only that Denali needs to explicitly put the public on notice of the boundaries for the agency's continuing federal interest (both duration and type of use) in the land records associated with a funded facility. More specifically, Denali should include a grant condition for publicly recording a Notice of Federal Interest in the land records for a funded facility. This notice should define the parameters of permissible use over time — and the solution for an unneeded, misused, or abandoned building. For instance, a facility's ownership could by advance agreement revert to the local school district if all permitted use was discontinued within the prescribed time frame. Or Denali could agree in advance to release its federal interest after some years have elapsed.

Finally, OIG's detailed inspection report notes that the state charged Denali $15,300 for administration of Port Graham's sub-award. However, the state's "job description" was defined by the very limited expectations that Denali specified in its grant agreement. Though the state was paid $15,300 to administer Port Graham's sub-award, the following five monitoring safeguards were simply not included in what Denali required the state to do: (1) appraisal for contributed land; (2) review of major contract; (3) site visits; (4) review of annual audits; (5) fire marshal approval. OIG's online inspection report[60] details the significance and solutions for each of these safeguards that were missing from the monitoring.

Denali's management has so far not implemented OIG's recommendations.

INSPECTION: COMMUNITY CENTER AT TANACROSS, ALASKA (POP. ≈ 190)

Tanacross is a small Alaskan settlement (pop. ≈ 190) about 70 miles west of the Canadian border. The settlement has approximately 50 households that are clustered around a 14-block

[58] See *City of Hydaburg v. Hydaburg Co-Op,* 858 P.2d 1131 (Alaska 1993); *In re Joliet-Will County Community Action Agency,* 847 F.2d 430 (7th Cir. 1988).

[59] For instance, rigidly insisting that Port Graham must always use its building as a police station is probably unrealistic given that the tribe doesn't have a local police force. On one hand, the tribe's eventual use for education, a library, a teen center, or a museum (merely examples) would seem consistent with the original spirit of the "multi-use" grant program. On the other, simply allowing a private individual to use it for a home or business would not. Gifts or abandonment of funded facilities pose similar issues.

[60] See *www.denali-oig.org.*

town site. There is a publicly-funded school with 17 students, 2 teachers, and a principal.

Tanacross is not incorporated as a city. Rather, the settlement has a tribal government. BIA counted 169 tribal members in 2005 but considered only 124 to actually live in Tanacross.[61]

Tanacross is connected via hard-surface highways to Alaska's two largest cities and to the Lower 48. It also has an airport with a paved 5,000-foot runway. The drive to Fairbanks is 200 miles. And the drive to Anchorage, though scenic, takes a full day.

While Tanacross is less isolated than many Alaskan settlements, the long winters can drop to a harsh 75°F below zero. The average low temperature in January is a "warmer" 22°F below zero.

At various points over the past decade, HUD and the Denali Commission have awarded grants for the tribe[62] to build itself a community center at Tanacross. The awarded grants totaled around $1.5 million, but the tribe has actually received $843,898.

This federal effort has both a troubled history and a troubled result.

The tribe originally asserted that the building would cost just under $670,000, and HUD responded with a $500,000 grant in 2001. Based on the tribe's final grant report in 2004, HUD assumed that the tribe had completed the building and the agency then closed out the grant. HUD was thus surprised to discover in 2006 that the only progress was a concrete foundation (which remains the case to this day).

In 2003, Denali awarded the tribe a grant of $671,424 to continue construction on this building. This grant was passed through the Alaska Native Tribal Health Consortium under Denali's health facilities program. In contrast to HUD's misassumption of completion, Denali's program manager mistakenly assumed for some time that construction had not yet started (it was actually well under way).

In 2004, Denali awarded the tribe a further grant of $349,817 for the building. This grant was passed through the State of Alaska under Denali's program to construct "multi-use" buildings. The state then applied this money to Tanacross' project as a state sub-award.

By June 2005, the tribe determined that the planned building would actually cost $4.4 million. Denali discontinued its funding in view of the confused construction and escalating estimates. However, the state had already paid out $340,098 of Denali's money as a sub-award. Over 70% of this ($253,089) was for two direct payments to a Colorado vendor that delivered structural steel to the construction site.

In July 2009, Denali formally closed out its grant 94-DC-2003-I9 to construct 12 "multi-purpose" (or "multi-use") buildings around the state. OIG learned that construction of the

[61] The small tribe claims 92,000 acres under the Alaska Native Claims Settlement Act.

[62] More specifically, these grants were made to the Tanacross Village Council (the "tribe" for purposes of this discussion).

buildings for at least two of the 12 locations had been started but never completed. One of the uncompleted buildings was at Tanacross.

The state monitored this sub-award from its office in Fairbanks. Denali's OIG reviewed the extensive file maintained there for the Tanacross sub-award (literally 9½ pounds in weight and approximately 500 pages of paper).

OIG then physically inspected the construction site in Tanacross and compared our observations to the architect's floor plan, sub-award terms, payment documentation, and photos submitted with progress reports.

OIG's visit appears to be the first time that any Denali official has inspected the construction site.

Inspection Results

Construction stopped five years ago, and the building has never been completed.

The tribe completed the building's concrete foundation in the fall of 2004. The tribe's November 2004 progress report to the state described the project's status as follows:

> *Foundation is complete. All footings, pilasters, grade beams and anchor bolts are installed. We are ready to receive and erect the building. The steel building has been paid for and arrangements for pick up and shipment are currently under way by our management & procurement contractor, Dihthaad Global Services, LLC.*

In the fall of 2009, OIG visited Tanacross and observed that no further construction has occurred in the past five years. The photos in our online inspection report show the unused foundation today.[63]

Over 70% ($253,089) of the state's Denali-funded sub-award was paid to a Colorado vendor that supplied the structural steel frame for the building. That steel was delivered by truck to Tanacross in April 2005.

It is important to realize that this costly steel was not a raw material that required further processing before use in a building. Rather, the many pieces arrived in Tanacross as a custom-manufactured "kit" ready for assembly as the frame of a specific building (essentially a metallic barn-raising in waiting).

During OIG's visit, we observed the many pieces from this steel purchase to be stacked amidst the weeds on the edge of Tanacross.[64] The collection appears to have been left unused and

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[63] See *www.denali-oig.org*.

[64] A connex (metal storage container) at this same location contains related building materials, such as bales of insulation.

undisturbed as the winters have come and gone over the past 4½ years. The photos in our online inspection report show this field of steel.[65]

The tribe apparently has no plans to use the steel unless a government agency provides further funding. This expectation is not surprising given the tribe's past success in receiving federal grants. The tribe's financial statements for 2003 to 2005 (the years involved in Denali's grants) show that it annually received funding from 12 to 18 types of federal grants during that time period.[66]

In other words, though the $253,089 kit lies in the weeds waiting for assembly, the tribe has no plans to raise its own barn unless paid to do so.

During OIG's visit, the tribe's president[67] indicated that he did not even have a set of the architect's plans for constructing the building. He considers responsibility for the building's lack of completion to lie with prior leaders.

Grant recipients that receive over $500,000 in annual federal funding are required to have an audit by a CPA firm. A summary of these audits appears on a well-known public website offered by the federal system.[68] This public website indicates that the tribe[69] at Tanacross had such audits for its fiscal years 1998 thru 2005. The website notes that the reporting CPA firm for the last audited year (2005) included a "going concern" explanatory paragraph in its audit report.

OIG obtained a copy of the CPA firm's 2005 audit report from the records maintained by the State of Alaska's single audit coordinator. The audit report states in part:

> *[T]he Council's current liabilities exceed current assets by $587,167 including deferred revenue in excess of cash by $110,188. In addition, the Council's liability, if any, for the unpaid debts of Dihthadd Global Services, LLC is not presently determinable. These conditions raise substantial doubt about its ability to continue as a going concern.*

The 2005 financial statements that the CPA audited further indicate that Dihthaad has "ceased operations."

The CPA firm was hired by the tribe — not OIG — and OIG has not attempted to "re-audit" that firm's work. However, the tribe's grant application was premised on use of its subsidiary, Dihthaad, to manage construction of the building funded by Denali. The last audit report filed

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[65] See *www.denali-oig.org*.

[66] The 2003-2005 financial statements are the ones issued for the Tanacross Village Council as reported on the federal government's public online database at *http://harvester.census.gov/fac/*.

[67] More specifically, the current president of the Tanacross Village Council.

[68] See *http://harvester.census.gov/fac/*.

[69] These were audits of the 1998-2005 financial statements of the Tanacross Village Council.

with the federal system is further indication that the tribe is now unlikely to use the funded materials for their intended purpose.

Project's larger significance to Alaska

The national norm for grant-financed buildings is construction by a contractor selected through arms-length competitive bidding. Grant-making agencies assume that the risk of an unfinished project will be minimized by a fixed price and a performance bond (unless the owner requests additional work, or the contractor encounters unforeseen site conditions).

However, the federal government will sometimes allow other approaches, and the state's sub-award to Tanacross was one of them. The grant application was premised on the tribe's use of its own subsidiary company (Dihthaad) and its own local workers ("force account labor"). The motivation was understandable, given the tribe's high unemployment and the struggle with its subsistence (non-cash) economy. BIA's latest online statistics (for 2005) show employment for less than half of the 67 tribal members available for work in Tanacross.

While Denali granted the tribe's wish to do the job themselves, the tribe's assertions of the building's cost grew from just under $670,000 (in 2001) to $4.4 million (in 2005). In the end, the tribe spent over $840,000 in federal funds but obtained only a concrete foundation and a pile of structural steel.

Key Recommendations

Denali retains a reversionary interest in the unused steel that was purchased with a quarter-million federal dollars.[70] However, Denali's enabling act does not authorize the agency to directly dispose of federal property interests and reapply any proceeds to further projects. Congress would explicitly need to add such authority to Denali's legislation.

Denali should thus do an MOU with GSA (the presumed servicer for federal property) to recover the reversionary interest. If GSA decides to do a public sale of the steel as "surplus," the law appears to require deposit of the proceeds into the general U.S. Treasury as "miscellaneous receipts." However, GSA may find that the Department of Defense can use the "excess" steel in military projects down the highway at Fort Greely (100 miles north) or at Gakona (100 miles west). Tanacross also has a mile-long airstrip that could support such logistics. Or, with GSA's technical assistance, Denali could conceivably find a good home for this steel at another grantee.

We further reported that the steel's pricing warranted further scrutiny under federal cost standards. The state committed to the requirements of OMB Circular A-87 as a condition of receiving Denali's money. That rule specifies the permissible purchases ("allowable costs") under a federal grant. One key provision is that the cost for an item be "reasonable" in amount under the circumstances, an analysis that the rule discusses in its Attachment A, section C(2).

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[70] See *City of Hydaburg v. Hydaburg Co-Op,* 858 P.2d 1131 (Alaska 1993); *In re Joliet-Will County Community Action Agency,* 847 F.2d 430 (7th Cir. 1988).

The grant application indicated the tribe's intent to spend $49,000 on the 9,600 square-foot "red iron skeleton" for the building's "superstructure." Yet, at the tribe's request, the state's grant administrator approved payments of $253,089 for this single item, that is, over 70% of the entire amount of the sub-award. In fact, the sub-award's entire budget line for "supplies and materials" was $253,102.

A further red flag occurred when the Colorado attorney general represented customers, including the tribe, in a class-action consumer protection lawsuit brought against the steel manufacturer. The tribe accepted the offered settlement of about $9,000, and the state's grant administrator then forwarded the settlement money on to Denali.

We understand the pressures on a tiny tribe in remote Alaska to accept any cash infusion offered by any branch of government. However, as noted above, Denali retained a reversionary interest in the steel that was purchased with a quarter-million of federal dollars. Neither Denali's staff nor the state's grant administrator apparently understood the need to consult the U.S. Department of Justice regarding the settlement offered by the Colorado attorney general.

Denali should request that GSA consult the Colorado attorney general and assess the extent to which a potential federal claim was compromised by the tribe's acceptance of the offered settlement. Denali should also request GSA's assistance in developing a grant condition that requires immediate notification of any litigation involving a Denali-funded project.[71] Denali should consider issuing this as part of a grants management "common rule" in the Code of Federal Regulations.

Denali's management has so far not implemented OIG's recommendations.

INSPECTION: QUALITY CONTROL OF GRANTEE'S SINGLE AUDITS

Grantees that receive at least $500,000 in federal assistance are required to have an annual "single audit" from a CPA firm. Denali's management has traditionally cited its reliance on grantee single audits as a monitoring control.

Denali's transportation program ("Denali Access") consists of 139 projects, and OIG recently surveyed the expected coverage of single audits for this program.

For 51 of the 139 projects (37%), Denali made its project selections and then routed the funding to either USDOT (30 projects) or the Corps of Engineers (21 projects) for actual implementation. All federal agencies are themselves audited at various levels — but not through the "single audit" process that applies only to non-federal entities. (Such a federal "circle of bureaucracy" raises more efficiency (policy) issues than monitoring issues.)

[71] OIG has previously recommended such a grant condition in our inspection reports for the Buckland power plant (2006) and the Sterling Landing tank farm (2007). These prior reports are available online at *www.denali-oig.org*.

Out of the 139 Denali Access projects, funding for 27 (that is, just under a fifth) was forwarded on to the State of Alaska for implementation. Alaska's constitution provides for an independent state auditor who reports to the legislature (analogous to GAO's comptroller general at the federal level). This "legislative auditor" performs the state government's annual single audit of federal funding.

The remaining 61 of the 139 projects were awarded by Denali Access to city governments (32), tribal organizations (25), a nonprofit (2), and an electric cooperative (2). OIG's review of public databases[72] shows that the grantees for 56 of these 61 projects (that is, all but 5 grantees[73]) have for years obtained an annual single audit from an independent CPA firm as part of their normal accountability to their funders. And a closer look at these audits shows that, with only one exception,[74] the Denali Access funding either appears on the audited schedule of federal assistance or will (unless the CPAs err) be appropriately audited on the schedule for the grantee's fiscal year 2009 or 2010 (often the case with these grants).[75]

These annual single audits – if properly performed by CPA firms – are intended to assure the public how grantees have spent their federal money and whether adequate safeguards ("internal controls") were in place to prevent misuse. However, GAO has cautioned that the quality of such audits by the nation's CPA firms has often been lacking.[76] And Denali's inspector general is part of a national OMB committee that seeks more useful "leveraging" of these audits in federal grant monitoring.[77]

Alaska's most rigorous monitoring of single audit reports is conducted by a state accountant known as the "state single audit coordinator."[78] She conducts a desk review of every audit report involving federal funds passed through a state agency. OIG consults her frequently to understand her process and avoid duplicative monitoring.

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[72] See the Federal Audit Clearinghouse at *http://harvester.census.gov/fac*; State of Alaska single audit coordinator at *http://fin.admin.state.ak.us/dof/ssa/otherinfo.jsp;* State of Alaska financial documents delivery system at *www.commerce.state .ak.us/dca.*

[73] For the 5 projects whose grantees don't routinely get annual audits, the funding for 3 will expectedly be subject to the single audit requirement for the grantee's fiscal year 2009 or 2010. Another of the 5 projects is for $100,000, which is well below the $500,000 threshold of annual federal funding that triggers the single audit requirement. And the fifth is a new (and very small) city government that the state's single audit coordinator is working with on its financial reporting requirements.

[74] OIG reviewed this exception with management, the grantee, and the grantee's CPA. The grantee then issued revised financial statements that included Denali's transportation funding on the schedule of federal assistance. The grantee's CPA then reissued its audit opinion.

[75] Much of the grantee spending is scheduled for 2009 and 2010. The grantees frequently have a fiscal year that differs from that of the federal government, and "single audits" are traditionally completed by CPAs about nine months after the close of the *grantee's* fiscal year.

[76] See GAO, *Single Audit Quality: Actions Needed to Address Persistent Audit Quality Problems,* GAO-08-213T (Oct. 25, 2007).
[77] This is the OMB/AGA Partnership for Intergovernmental Management and Accountability. See George D. Strudgeon, "A Partnership for Stewardship: Removing the Baggage," *Journal of Government Financial Management* (summer 2009), pages 10-13.

[78] See *http://fin.admin.state.ak.us/dof/ssa/otherinfo.jsp.*

Like GAO, Denali's OIG has some concerns about the potential limitations of single audits as a monitoring tool.

For Denali's transportation program, OIG noted a $570,000 award that was not reported on the grantee's audited schedule of federal assistance. OIG reviewed this deficiency with management, the grantee, and the grantee's CPA. The grantee then issued revised financial statements that included Denali's transportation funding on the schedule of federal assistance. The grantee's CPA then reissued its audit opinion.

OIG also noted another grantee's $1 million award that was reflected on the audited schedule but not reported in the public database of the Federal Audit Clearinghouse as required by OMB rules. OIG reviewed this deficiency with management, the grantee, and the grantee's CPA (with the latter agreeing to pursue the matter with the clearinghouse).

We above describe OIG's inspection of Denali's grant for a police and fire station at tiny Port Graham (pop. ≈ 135). OIG found that the Denali-funded expenditures shown in the single audits for 2004 ($561,483) and 2005 ($84,312) together totaled $119,205 less than the $765,000 sub-award that the state's records indicate it sent the tribe. There are a variety of possible explanations for this apparent difference of over $100,000, but the state's grant administrator didn't notice it — and didn't investigate it — because she didn't analyze the single audits issued by the tribe's CPA firm. In fact, the state's grant administrator indicated to OIG that her unit lacks the expertise to review the annual audit reports issued by CPA firms.[79]

We above describe OIG's inspection of Denali's "multi-purpose" grant for a family resource center at Togiak (pop≈ 800). The City of Togiak has for some years obtained an annual audit of its financial statements from a CPA firm. Though these audited financial statements do not explicitly mention Denali, the statements for 2004 and 2005, respectively, report federal revenue of $349,422 and $444,879 for "multipurpose renovation." And the CPA offered this caution to the City in the "management letter" associated with the 2004 audit:[80]

> *During our audit, we noted that all activity related to the multipurpose building renovation had not been recorded on the City's books. Payments made directly to vendors by the State on behalf of the City were not recorded. These expenses were incurred by the City for the renovation project and should be reflected in the*

[79] The state's review of sub-awardees' audit reports was a requirement of Denali's grant agreement, where the state committed to the requirements of OMB Circular A-133 as a condition of receiving Denali's money. Section 400(d) of that rule requires that the state monitor the results of audits that CPAs perform on federal funding that the state passes through to others: In other words, the monitoring of sub-awardee audits is part of the state's responsibility in dispensing Denali's money. Analysis of the two audit reports for 2004-2005 was a reasonable expectation for the $15,300 that the state charged Denali for administering Port Graham's sub-award.

[80] These audit materials are publicly posted on the State of Alaska website at *www.commerce.state.ak.us/dca/*. While OIG considered these online materials, readers should realize that the City, not OIG, contracted for these audits and that OIG has not attempted to "re-audit" these materials in any way.

> *financial records. It is important that all activity be recorded in order to ensure that grant funds are adequately tracked and properly spent.*

Denali's management currently has no regular system in place for reviewing single audit reports — or for assuring that the issuing CPAs are covering Denali's funding in their fieldwork. Denali's CFO and OIG have together met with the Federal Audit Clearinghouse and the state single audit coordinator to understand the potential for better leveraging the existing monitoring tools.

OIG has begun a series of quality control reviews of single audit reports as encouraged by OMB Circular A-133 sec. 400. And Denali's management is sending staff with OIG on these quality control reviews as training that will hopefully enhance management's own capacity for such monitoring.

In fact, under the OMB rules for single audits, the management of awarding agencies is encouraged to alert grantees' auditors as to particular risks that should be considered in planning their fieldwork:

> *The auditor's determination should be based on an overall evaluation of the risk of noncompliance occurring which could be material to the Federal program. . . [A]s part of the risk analysis, the auditor may wish to discuss a particular Federal program with auditee management and the Federal agency . . .*[81]

OIG has encouraged Denali's management to initiate such planning conversations with grantees' CPA firms. OIG has previously arranged such coordination between the state auditor and management of the Denali Commission.[82]

ANNUAL FINANCIAL AUDIT: THE SUCCESSFUL RETURN TO AN UNQUALIFIED OPINION

Federal law and OMB rules entrust OIG with the annual independent audit of the agency's financial statements. Like most OIGs, Denali's inspector general contracts with a CPA firm to conduct this audit.

The CPA firm that audited the FY 2008 financial statements issued a disclaimer. OIG's semiannual report for May 2009 discussed the causes and corrections at length. OIG then briefed GAO, OMB, and congressional oversight staff. In short, OIG assured a meaningful disclosure of the existence and circumstances of the disclaimer to oversight officials.

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[81] OMB Circular A-133, sec. 525 (emphasis added).

[82] The Inspector General Act (5 USC) authorizes inspector generals *"to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of . . . its programs and operations."* See section 4(a)(3).

The CPA firm that audited the FY 2009 financial statements issued an unqualified opinion, which was timely filed with OMB. OIG has briefed GAO, OMB, and congressional oversight staff that the FY 2008 deficiencies have been corrected to OIG's satisfaction, with a return to an unqualified opinion for FY 2009.

OIG also contracted for an expert CEAR review of Denali's FY 2009 financial statements, which was conducted by a panel of CPAs from the Association of Government Accountants in the Beltway.

Management retained the Financial Services Center of the Department of Veterans Affairs to conduct an internal audit of information technology security controls. The franchise fund's contract auditor issued a security controls assessment, risk assessment, system security plan, IT contingency plan, configuration management plan, and privacy impact assessment. The agency head found that this body of work collectively supported the certification and accreditation ("C&A") of the agency's IT system that the agency head approved in August 2009.

The CPA firm that audited the FY 2009 financial statements then conducted a FISMA review, with the results timely reported to OMB. OIG has appreciated the consultations that GAO's assistant director for IT security has periodically provided on FISMA issues.

OIG has retained a CPA firm to audit the FY 2010 financial statements (including the associated FISMA review). The firm's fieldwork is actively under way at this time.

REVIEW OF EXISTING LEGISLATION: THE NEED FOR A MAJOR STATUTORY OVERHAUL

Section 4(a)(2) of the Inspector General Act 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 . . .*

Section 4(a)(4) of the Inspector General Act also directs inspector generals 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 . . .*

OIG has conducted such reviews in the course of our inspections of the agency's projects and processes over the past four years.

Congress' statutory authorization for the Denali Commission expired back in 2008 (though the agency has continued to receive limited annual appropriations and obligate unused no-year funding). OIG does not recommend that Congress reauthorize the Denali Commission without a major overhaul of its enabling statute.

In the **Appendix** to this report, OIG has catalogued 83 potential amendments that Congress should consider in this major overhaul. We have classified these 83 possibilities as follows:

Basic legal structure of the entity *(9 potential changes)*
Funding diversification and flexibility *(24 potential changes)*
Players and personnel *(21 potential changes)*
Processes *(10 potential changes)*
Refined statutory purposes — filling the federal gaps *(19 potential changes)*

However, we discuss below three particular issues of concern to us.

The fundamental flaw of a single-state regional commission

As OIG has written in the OMB-required *2009 Performance and Accountability Report* (the "PAR"), the Denali Commission's "most serious management and performance challenge" at the moment is to justify to Congress why the agency should continue to exist.

This locally-sensitive question is often misinterpreted as a debate over whether Congress should continue to send Alaskans their "fair" share of the federal treasury. However, the question is not whether Alaska should get larger or smaller appropriations (the business of the political process and the state's delegation). Rather, the issue is what value is added by sending Alaska's share *through* a regional commission that serves only a single state (an anomaly in the federal system).

Congress can certainly send its money *directly* from cabinet-level departments to cities, tribes, nonprofits, businesses, and the State of Alaska. For instance, DHHS could directly send its clinic funding to the Alaska Native Tribal Health Consortium. USDA could directly send its rural electrification funding to the Alaska Energy Authority and the AVEC cooperative. And the U.S. Department of Labor could directly fund training grants administered by the state government.

However, over the past decade, Congress has chosen to pass just under a billion dollars through the Denali Commission. Though this support has originated in a variety of appropriations, the funding "food chain" of Exhibit 2 is typical

EXHIBIT 2

DENALI'S TYPICAL FUNDING "FOOD CHAIN"

Congressional appropriation
↓
Cabinet-level department
↓
Denali Commission
↓
Major grantee
↓
Sub-awardee
↓
Project management firm
↓
Contractors
↓
Local employees

for the many facilities that Denali has constructed around the state.

In other words, Alaska's share of the federal pie seems a separate question from whether such money should be filtered through the Denali Commission on its way down to the ultimate beneficiaries.

OMB and CBO have certainly questioned Denali's structure over the years. In preparing the President's budget request to Congress for FY 2010, OMB issued its report of recommended *Terminations, Reductions, and Savings.*[83] Of the 57 "discretionary terminations" on OMB's national list (page 2), three specifically targeted the Denali Commission:

> *Denali Access, Department of Transportation*
> *Denali Job Training, Department of Labor*
> *Denali Commission, Department of Health and Human Services*

However, OMB's criticism of the Denali Commission as "duplicative" and "redundant" did not originate with the current administration. Back in FY 2006, two conditions caused OMB to rate the commission as merely "adequate" in the publicly-reported PART evaluation:

> *The program lacks adequate evaluations that assess program impact.*
>
> *[T]he program's activities are duplicative of other federal programs that address the same needs and provide the same types of assistance.*[84]

The Congressional Budget Office (CBO) is the professional staff agency in Congress that advises the body on budgetary options. In August 2009, CBO issued a report that explicitly identifies elimination of the Denali Commission as an option for the reduction of federal spending.[85] CBO described the argument in support of this option as follows:

> *The federal government provides annual funding to three regional development agencies: the Appalachian Regional Commission (ARC), the Denali Commission, and the Delta Regional Authority. . .*
>
> *The three agencies' programs are intended, among other things, to create jobs, improve rural education and health care, develop utilities and other infrastructure, and provide job training. However, it is difficult to assess whether such outcomes can be attributed to those programs rather than to the work of other governmental and nongovernmental organizations or to market forces and the effects of general economic conditions.*
>
> *An argument in favor of this option is that ending federal funding of the agencies would shift more responsibility for supporting local or regional*

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[83] See "Terminations, Reductions, and Savings," pages 2, 20, 21, 33 in *Budget of the U.S. Government, Fiscal Year 2010* at *www.budget.gov.*

[84] OMB, *Program Assessment of Denali Commission,* at *www.expectmore.gov.*

[85] See Congressional Budget Office, *Budget Options,* vol. 2 (August 2009), sec. 450-5, page 106 at *www.cbo.gov.*

> *development to the states and communities whose citizens benefit most from that development. Another rationale is that Appalachia, rural Alaska, and the Mississippi Delta are three among many needy regions in the United States, and they should not have a special claim to federal support. In that view, any federal development aid they do receive should come from nationwide programs, such as those overseen by the Economic Development Administration.*

CBO above cites the argument for increased state and local contributions. This is a particularly sensitive issue for Denali's defenders since its federal funding hasn't historically been leveraged with state money to the degree found at other major regional commissions.[86]

As discretionary congressional spending continues to contract, the state with the biggest savings account — and the most limited taxes on its citizens — may need to increasingly support the only regional commission that serves a single state. If this is Congress' intent, it will need to specify the expected financial hard-match by non-federal sources in the appropriations for Denali's work.

However, OIG believes that this persistent question requires a more far-reaching and fundamental congressional solution. OIG strongly recommends that Congress consider the potential combination of a regional commission serving Alaska, Hawaii, Guam, Samoa, and the various multi-island former Pacific territories that still have an American affiliation through Insular Affairs at the Department of Interior. While the climates are obviously dissimilar, Denali's lessons-learned in serving small, isolated, road-challenged, ethnically-diverse settlements may be quite transferable to such a "Pacific Commission" (e.g., small clinics and power plants).

The tough question of serviceable size:
Local population that warrants federal support

One of the Denali Commission's most difficult and uncomfortable issues is the size of community that warrants public support (versus self-support).

One measure of management's discomfort is the absence of population data in the 200+ pages of the *FY 2010 Budget Justification* that management offered last year to OMB and congressional staff of the House Committee on Transportation and Infrastructure.

The commission's original strategic plan idealistically aspired that *"[a]ll Alaska, no matter how isolated, will have the physical infrastructure necessary to protect health and safety and to support self-sustaining economic development* [emphasis added]."

This idealism has been challenged by the logistics of serving tiny, often unincorporated settlements that are far from any road system. Given that roughly half of the state's communities have fewer than 300 people, many locations will have an inherently limited capacity to support

[86] Appalachian Regional Commission and Delta Regional Authority.

their own facilities in the years after the commission has given them the key.

This tough issue surfaces throughout Denali's subject areas. For instance, 43 of the 139 projects in Denali's transportation program ("Denali Access") have been for improvements in locations with a population of less than 200 (per the state demographer). Those small settlements are listed in Exhibit 3.

In Denali's program for rural electrification (power plants and fuel tanks), the agency sends most of its funding to two players: (1) the Alaska Energy Authority (a state agency) and (2) the Alaska Village Electric Cooperative (a utility nonprofit). Both serve very small remote settlements and only a fraction of the state's population. For instance, the electric cooperative serves around 50 of the most challenging locations that together represent less than 4% of Alaska's population.

Examples of small settlements with Denali-funded energy facilities are Tenakee Springs (est. pop. 98), Chuathbaluk (est. pop. 95), Sleetmute (est. pop. 92), Atka (est. pop. 90), Hughes (est. pop. 69), Stevens Village (est. pop. 68), Clark's Point (est. pop. 65), Stony River (est. pop. 42), Alatna (est. pop. 41), Takotna (est. pop. 39), Red Devil (est. pop. 36), Nikolski (est. pop. 31), and Lime Village (est. pop. 28).

The issue also arises in Denali's program to construct clinics around the state. Examples of tiny settlements that have received Denali grants to construct clinics are Chitina (est. pop. 100), Sleetmute (est. pop. 92), Egegik (est. pop. 81), Twin Hills (est. pop. 71), Clark's Point (est. pop. 65), Stevens Village (est. pop. 68), Beaver (est. pop. 64), and Alatna (est. pop. 41).

While national lore may abstractly decry construction to "nowhere," the choices are very real, and very serious, for rural families that must go without what most of America takes for granted.

Resolution of this painful issue lies within the discretion of Congress, who may wish to statutorily limit the funded projects to communities with a given population or public school attendance over some time interval.

EXHIBIT 3

SMALL SETTLEMENTS AWARDED DENALI TRANSPORTATION PROJECTS

	POP.
Elfin Cove	30
False Pass	39
Igiugig	40
Takotna	46
Platinum	47
Akhiok*	48
Whale Pass	48
Port Alexander*	51
Clarks Point	54
Stevens Village*	57
Pilot Point	72
Atka	73
Chenega Bay*	76
Manley Hot Springs*	77
Cold Bay	90
Circle	94
Iliamna	95
Tatitlek	102
Chuathbaluk	111
Pelican*	113
Naukati	124
Pitka's Point	126
Diomede	128
Eagle	129
Perryville	133
Port Graham	136
Coffman Cove*	141
Adak	178
Old Harbor	184
Port Lions	190
Mekoryuk	195

Populations per state demographer at community database at *www.commerce.state.ak.us*

* Multiple transportation projects in same community

The need to serve regional commissions
with a consolidated OIG function

Congress has now created statutory inspector generals at approximately 70 federal agencies. Denali has had its own for the past 4½ 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.

There are certain things in life that are not designed to be done alone. The inspector general function is one of them.

In the interest of more effective public oversight, we recommend that Congress consolidate Denali's inspector general function with another OIG.

Alaskan grantees periodically pressure the agency head to discourage Denali's inspector general from writing reports, opening inspections, and consulting oversight regulators such as OMB, GAO, Justice, and congressional staff. The grantees' lack of enthusiasm for an independent onsite OIG is understandable and an expected part of the business.

The role of Alaskan interest groups is obviously to marshal as much federal money as possible for their constituents — and to minimize the bureaucratic strings attached to it. Denali's OIG's is definitely one of those "strings" when we find that a proposed source, or use, of funding would violate federal laws (no matter how well intended). While we may think of ourselves as facilitating "safe harbors" and keeping people out of trouble, the disappointed see OIG as the "Grinch" that keeps stealing Denali's Christmas.

Alaskan grantees have thus over the years campaigned for Denali's onsite inspector general function to be transferred in some fashion to a larger, more distant OIG that could dispatch personnel from the Beltway as needed (or requested). It will surprise these challengers to now read that Denali's inspector general agrees with them — though, of course, for different reasons.

In the 2008 Farm Bill, Congress created three new regional commissions that serve from four to seven states each.[87] 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.*[88]

Denali's inspector general recommends that his function be included in this consolidation.

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

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

We are a force of one at this point and, as shown in Exhibit 4, our accomplishments are quite limited in comparison to the norm of larger OIGs. In our aggressive experiment to leverage a tiny OIG, we have not lacked for technical skills,[89] innovative staffing, 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."

EXHIBIT 4

STATUTORY ACTIVITY STATISTICS SINCE APRIL 1, 2009

(per Inspector General Act sec. 5)

Inspections conducted	13
Reports issued	7
Recommendations to management	18
Recommendations implemented	1
Annual audit of agency financial statements	1
Annual FISMA review	1

But we have tested the outer limits of the envelope in this OIG experiment, and the economies of scale simply make it unrealistic to effectively operate an OIG composed of only a single individual. Public oversight will be better served by consolidation of Denali's OIG with that of the other three regional commissions (which together represent 15 states) created by the 2008 Farm Bill.

EPILOGUE: THE LORE OF THE LAYER

The federal system is populated with many small, specialized agencies. As noted above, the Congressional Budget Office, OMB, and this inspector general have in our publications questioned the efficiency of Congress' only experiment with a single-state regional commission.[90]

Implicitly lurking in the OMB and CBO analyses is the perennial issue of whether it would be more efficient and effective "governance" for any given task to be directly accomplished by a cabinet-level department.

Denali's management traditionally counters with colorful bar charts showing the number of facilities successfully constructed around the state.

However, the three strongest defenses that OIG has heard over the years would be the following:

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

[90] See the "Inspector General's Perspective on Management and Performance Challenges Facing the Denali Commission" in the *2009 Performance and Accountability Report.*

- Rural Alaska is the last chapter in the settlement of the American West, and Congress is simply finishing what it emphasized in the Lower 48 during the New Deal (e.g., rural electrification, public facilities, taming watercourses).

- Congress created the Denali Commission to fill in the gaps that the longstanding federal bureaucratic behemoths couldn't seem to address.

- Congress has long considered Alaska as a remote field station for experiments of every kind, and the Denali Commission serves as the national lab for such "demonstration projects" as Congress thinks will benefit the rest of America.

To the extent that continuation of the Denali Commission is an analytic (versus political) question, these are probably the most compelling arguments in favor of the current form.

There is certainly a time and a place to add layers to get the job done right. Leaner is not always publicly better. This observation on the costs of coordination was made four decades ago, and it remains valid today:

> *To coordinate is not necessarily to simplify. The innovations that have been introduced over the past decade for purposes of coordination have given us a more complicated federal system — one with five, six, or even seven levels of government where three or four sufficed before. . .*[91]

On the other hand, Alaskans sometimes argue that the mere presence of the Denali Commission results in greater overall funding from Congress than would be received in the agency's absence.

EXHIBIT 5 KEY QUESTIONS FROM DENALI'S DECADE AND A BILLION
Are better clinic buildings resulting in better health care?
Are Denali-provided power plants resulting in cheaper "bush" electricity?
Are Denali-provided tank farms resulting in cheaper "bush" fuel?
Is training for construction projects resulting in long-term careers?
Are Denali-provided facilities reducing — versus extending — the dependence on future federal funding?
Has Denali pioneered "silver bullet" solutions applicable to other states?
Do projects function as capacity-building "barn raisings" (versus mere short-term cash infusions)?
Has Denali leveraged rural schools as the major local facility?
Has Denali effectively partnered with the military as the state's largest employer?
Has Denali effectively leveraged federal single audits as a grants monitoring tool?
Has Denali strengthened regional hubs as an alternative to urban migration?
Has Denali pioneered interventions for troubled projects (versus just adding money)?
Is Denali helping coastal communities benefit from the opening of new arctic shipping routes?
Have Denali projects preserved "priceless" qualities of Alaska that are valued by the rest of the nation?

[91] James L. Sundquist & David W. Davis, *Making Federalism Work: A Study of Program Coordination at the Community Level* (1969), page 242.

But whether Congress wants to send additional money to Alaska would seem more a function of the political process and the state's delegation.

In other words, Alaska's share of the federal pie seems a separate question from whether such money should be filtered through a single-state regional commission on its way down to the ultimate beneficiaries.

Alaskans sometimes argue that facilities have been constructed that would still be missing but for Denali's presence on the scene. While there is no question that Denali has built many buildings in many remote places, this also misses the real question.

To draw upon the popular saw, whether a little agency is "doing things right" (correctly moving money) differs from the tougher question as to whether an agency is "doing the right things" (solving long-term public problems).

The most critical public questions may be the dozen or so listed in Exhibit 5. As OIG has looked at Denali's presence (or absence) in places from Red Devil (pop. ≈ 50) to Unalakleet (pop. ≈ 725) to Telida (pop. exactly 3), we've reported our concerns for such questions.[92] Sometimes, Denali's management has been receptive to our recommendations. Sometimes they haven't.

In the context of deciding if and how to reauthorize the Denali Commission, Congress will decide for the nation whether the agency has been answering the right questions.

MIKE MARSH, CPA, MPA, CFE, ESQ.
INSPECTOR GENERAL

[92] Inspector general reports on Denali projects are available online at *www.denali-oig.org*.

APPENDIX TO OIG SEMIANNUAL REPORT

DENALI COMMISSION
OFFICE OF INSPECTOR GENERAL

THE FUTURE OF THE DENALI COMMISSION:
83 POTENTIAL AMENDMENTS FOR MAJOR OVERHAUL OF ENABLING STATUTE

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

BASIC LEGAL STRUCTURE OF THE ENTITY *(9 potential changes)*

Potential statutory amendments that would change, clarify, or reinforce:

Clarified legal status as a *federal* agency
Clarified legal status as an *independent* federal agency
Continuing utility of legal status as a federal regional commission
Continuing utility of legal status as a regional commission that serves only a single state
Potential legal status as a multi-national entity under treaties (cf. St. Lawrence Seaway)
Change of entity's name (e.g., Denali Consortium, Denali Passage Authority)
Fundamental legal form (nonprofit with perpetual existence, federal corporation, government sponsored enterprise, entity subject to end-game sunset, or continuation as a rare single-head agency)
Substantive role of the state government
Substantive role of tribes

IG's recommendation:

Sunset as a federal agency, with simultaneous rebirth as a nonprofit corporation under Alaska state law (examples of PL 105-83 sec. 325 and Alaska Statutes 14.30.600).

FUNDING DIVERSIFICATION AND FLEXIBILITY *(24 potential changes)*

Potential statutory amendments that would change, clarify, or reinforce:

Authority to accept direct non-exchange transfers from any federal or state source for pertinent purposes (grants, augmentation)
Authority to receive and spend direct donations of money from private charitable foundations (versus donations of "property" and "services")
Authority to directly dispose of surplus property and spend the receipts (miscellaneous receipts, offsetting collections)
Reversion of grant-funded property after changed use (reasonable notice and duration of continuing federal interest)
Authority to directly dispose of recovered grant-funded property and apply the proceeds to future grants (offsetting collections)
Minimum levels of hard-cash match from various grantees
Match incentives involving permanent fund dividends
Incentives for collocation of funded projects with existing school buildings
Default access to unused appropriations abandoned by other agencies for pertinent purposes (linkage to CBO monitoring)
Waiver of board member compensation without tax consequences
Statutory presumption of no-year funding for all appropriations
Statutory presumption that transfers of fixed-period appropriations from other agencies are converted into no-year funding upon receipt

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(Continued from prior page)

Authority to collect and spend user fees from services to businesses (e.g., international shippers)
Authority to issue bonds
Authority to guarantee loans
Delinquent taxes as a grantee disqualifier (application of IRS levies to grants)
Authority to incur reasonable official reception and representation expenses
Development of federal insurance partnership to complete grants after contractor failure (cf. vaccines, crop insurance, FDIC)
Authority to select most transparent accounting paradigm (GAAP selection: FASB vs. GASB vs. FASAB)
Congressional expectations for prompt transfers of identified appropriations (defacto deferrals from long delays)
Accounting treatment for intergovernmental transfers (classification as non-exchange expenditures, timing recognition for receipt, point of "obligation" for recording grants)
Inclusion of nominal subrecipients with no funds custody within umbrella single audits of major program partners
Financial audit and PAR frequency every *two* years, with annual CBO reporting of unexpended obligations and unobligated appropriations
Utility of separate FISMA review when systems substantially delegated to federal service center

IG's recommendation:

Implement the above statutory amendments with drafting expertise from Senate Legal Counsel, Congressional Research Service, and GAO.

PLAYERS AND PERSONNEL *(21 potential changes)*

Potential statutory amendments that would change, clarify, or reinforce:

Employee status for adverse action appeals to Merit Systems Protection Board
Employee equivalency status for transfers to other federal agencies
Employee status for collective bargaining
Employee status for whistleblower protection
Clarified role of agency head
Term length for agency head (e.g., 10 years, at-will, removal for cause)
Hold-over authority for agency head to avoid succession gap
Selection and oversight of agency head
Status of agency head as an "inferior officer" under Constitution art. II, sec. 2, cl. 2
Employment of in-house legal counsel
Insurance for certifying officer
Position of rural ombudsman (can fill by IPA detail from stakeholder)
Position of director of innovation (can fill by IPA detail from stakeholder)
Position of director of program evaluation (can fill by IPA detail from stakeholder)
Linkage with university and cooperative extension service
Linkage with U.S. Arctic Research Commission

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

(Continued from prior page)

Linkage with national laboratories
Structure, role, selection, retention, and membership of advisory committees
Structure, role, selection, retention, and membership of overarching statutory board (continuing utility of "ex-officio" appointments)
Informal ad hoc substitutes (alternates, proxies) for personal attendance by appointed members
Continued utility of FACA exemption (interest group representatives vs. SGEs)

IG's recommendation:

Proactively clarify employee status issues to reduce the need for high-maintenance adversarial proceedings.

PROCESSES *(10 potential changes)*

Potential statutory amendments that would change, clarify, or reinforce:

More meaningful public process for annual work plan prescribed by current statute
Alternative procurement process using sound business practices (FAR exemption)
Authority to adopt implementing regulations under the public process of the Administrative Procedures Act
Administrative appeal process for grant applications (versus direct to federal district court)
Relationship of statutory transportation board to panel of commissioners
Program impact evaluation of outcomes (potential percentage of agency budget)
Authority for grant award rulemaking (customized grant conditions and "common rule," override of EO 12866)
Application of Paperwork Reduction Act
Records retention period
Clarification of sunshine law at 42 USC 15911(c) (covered "meetings," grounds for closed meetings, threshold for "deliberations")

IG's recommendation:

Implement the above statutory amendments with drafting expertise from Senate Legal Counsel, Congressional Research Service, and GAO.

REFINED STATUTORY PURPOSES — FILLING THE FEDERAL GAPS *(19 potential changes)*

Potential statutory amendments that would change, clarify, or reinforce:

Distinctive subject-matter core competencies and niches (refine the articulated statutory purposes)
Explicit role in government coordination as a service rather than a byproduct
Multi-state (and international) service structure – versus single state focus

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

(Continued from prior page)

Challenge of serviceable size of funded communities ("micro-settlement" population thresholds) – time interval, linkage with school attendance, counting methodology, state demographer, permanent fund dividends, threshold overrides
Perpetuation of public lessons-learned in Northern problem-solving
Role in demo projects that pioneer national health care delivery paradigm shifts (e.g., dental therapists, telehealth diagnosis, telepharmacy, alternative remedies, alcoholism treatment)
Role of rural clinics as a public health "DEW line"
Role in roadless rural telecommunications development
Model for successful federal collaboration with tribal corporate entities
Recycling of surplus overseas military equipment (e.g., containerized waste-burning generators)
Role in supporting regional hubs as an alternative to urban migration
Role in recycling closed school buildings in vanishing villages
Role in village relocations from coastal erosion and flooding
Brownfield remediation after new construction (relation to military FUD cleanups – joint Denali/DOD funding?)
Role in nuclear battery demo projects (coordination of NRC permitting and local choices?)
Role in fuel cell demo projects
Role in small-scale geothermal demo projects
Role in applied research for North Slope methane hydrate deposit
Role in support infrastructure and services along the integrated-harbors Northwest Passage shipping lane (the "Denali Passage?")

IG's recommendation:

Amend the statute to emphasize any of the above niches that Congress will support with funding.