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Title
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Journal
UCLA Journal of Environmental Law and Policy, 40(2)

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Publication Date
2022

DOI
10.5070/L540259339

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ADDRESSING CLIMATE IMPACTS IN ALASKA NATIVE TRIBES:
Legal Barriers for Community Relocation due to Thawing Permafrost and Coastal Erosion

Ekrem Korkut, Lara B. Fowler, Kathleen E. Halvorsen, Davin Holen, E. Lance Howe, Guangqing Chi

Abstract

Rural communities in Alaska—predominantly Alaska Native Tribes—are at the forefront of climate change impacts and climate justice concerns in the United States. According to the 2019 Alaska statewide threat assessment report, 29 communities are currently experiencing significant climate change-related erosion. Further, 38 communities face significant flooding, and 35 have major problems with thawing permafrost. Some Alaska Native communities have explored community relocation to adapt to these impacts. Because federal law does not recognize gradual environmental impacts like thawing permafrost and coastal erosion as disasters, these communities are ineligible for disaster funding and struggling with how to adapt to the very urgent—albeit less immediate—issues that they face.

This article analyzes the challenges of Alaska Native Tribes attempting to access federal assistance for community relocation. While some posit that the federal trust responsibility for Tribal Nations might help leverage federal help with community relocation, the status of Alaska Native lands creates further complications because the 1971 Alaska Native Claims Settlement Act (ANCSA) extinguished almost all claims of aboriginal title and reservations in Alaska. General access to federal disaster funding and programs may be another avenue for assistance; however, the limited definition of "disaster" and overly burdensome requirements for federal programs mean that many Alaska Native communities are left to struggle on their own.

In response to these challenges, this article explores possible solutions to help these communities with their relocation efforts. It examines the newly adopted Building Resilient Communities and Infrastructure Program as a potential funding opportunity for community relocation efforts, along with

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programs focused on climate justice. Finally, the article concludes by proposing the expansion of a state role in helping coordinate federal grant programs on behalf of Alaska Native Tribes and the funding of resilience officers by the federal government at regional Alaska Native organizations to navigate requirements for community relocation grant programs.

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This paper was supported in part by the Nat'l Science Foundation (Award # 1927827), the USDA Nat'l Institute of Food and Agriculture and Multistate Research Project #PEN04623 (Accession #1013257), and the Eunice Kennedy Shriver Nat'l Institute of Child Health and Human Development (Award # P2C HD041025).

Table of Contents

Introduction 187
I. Illustrating the Challenge of Community Relocation 190
II. The Legal Status of Alaska Native Tribes 193
A. *Federal Authority and Tribal Nations* 194
B. *Trust Responsibility* 195
C. *The Evolution of Federal Law and Alaska Natives* 199
III. Legal Barriers for Alaska Native Community Relocation 203
A. *Native Village of Kivalina v. ExxonMobil Corp. (2012)* 204
B. *Legal Barrier I: Limited Definition of Disaster under the Stafford Act* 205
C. *Legal Barrier II: Meeting the Requirements of FEMA, HUD, and BIA Grant Programs is a Challenge for Alaska Native Tribes* 206
1. Hazard Mitigation Assistance Grants 207
a. Hazard Mitigation Grant Program, After A Disaster 207
b. FEMA Flood Mitigation Assistance Grant 209
c. Building Resilient Infrastructure and Communities

(BRIC) 210
2. Department of Housing and Urban Development's Grant Programs 213
3. Department of the Interior's Bureau of Indian Affairs 217
IV. Other Federal and State Efforts 219
A. *Denali Commission* 219
B. *State of Alaska's Efforts* 220
V. Recommendations 223
A. *Relocation, but to where?* 223
B. *Amendment of Federal Law and Regulations* 224
C. *State of Alaska* 226
Conclusion 227

Introduction

Rural communities in Alaska—predominantly Alaska Native Tribes—are at the forefront of climate change impacts and climate justice concerns in the United States due to natural hazards, including thawing permafrost and coastal erosion. Because thawing permafrost and coastal erosion are not categorized as "disasters" under federal law, community relocation and managed retreat are challenging given current limitations in law and policy and lack of coordination. Updating federal law to recognize these kinds of environmental phenomena as disasters, systematically examining different federal programs, and finding ways to coordinate responses at both the federal and state level could go a long way in supporting Alaska Native Tribal efforts to adapt to climate change.

Alaska is experiencing more rapid warming due to climate change than any other state; the resulting impacts are predicted to threaten many rural communities.[1] According to the 2019 Alaska statewide threat assessment report, 29 communities are currently experiencing significant climate change-related erosion, 38 communities face significant flooding, and 35 communities have major problems with thawing permafrost.[2] This report noted that "in many instances, the impacts of erosion, flooding, and thawing permafrost amplify one another to form a combined threat known as "usteq,"[3] which means "catastrophic land collapse" in Yup'ik, the Indigenous language of western Alaska where permafrost is prevalent.[4]

1. U.S. Gov't Accountability Off., GAO-20–488, A Climate Migration Pilot Program Could Enhance the Nation's Resilience and Reduce Federal Fiscal Exposure 27 (2020) [hereinafter GAO (2020)].

2. Univ. of Alaska Fairbanks Inst. of N. Eng'g et al., Statewide Threat Assessment: Identification of Threats from Erosion, Flooding, and Thawing Permafrost in Remote Alaska Communities VII (2019).

3. *Id.* at 1–1.

4. Alexandra Tempus, *When Climate Change Comes to Your Doorstep*, N.Y. Times (Aug. 31, 2021), https://www.nytimes.com/2021/08/31/opinion/when-climate-change-comes-to-your-doorstep.html [https://perma.cc/XC87-Q87N]; *see* Robin Bronen et al., *Usteq:*

Thawing permafrost is a particular challenge. Permafrost is "ground where soil temperature remains at or below 0°C for continuously for at least two years and is widely distributed in high-latitude and high-altitude regions."[5] Ground instability resulting from permafrost degradation is damaging and destroying houses and general infrastructure such as roads, schools, water storage facilities, and sewage treatment facilities.[6] Lack of reliable access to water and sewage service leads to a greater incidence of contagious and respiratory diseases, skin infections, and tooth decay.[7] Permafrost thawing is predicted to continue increasing in the Arctic.[8] Because permafrost is highly resistant to erosion, when permafrost degrades, the erosion process accelerates.[9] In addition, climate change-related sea-level rise and associated flooding are also contributing to Alaskan coastal erosion.[10]

However, impacts from gradual processes like thawing permafrost and erosion are not recognized by federal disaster law. The primary law governing disaster relief in the U.S., the Stafford Act,[11] recognizes damage from a single major event like a severe storm or earthquake. Except for drought, the Stafford Act does not include more gradual environmental impacts like thawing permafrost and coastal erosion despite possible damage to property and infrastructure and risk of injury, disease, and loss of life. Because these impacts are not included in the Stafford Act definition, many Alaska Native Tribes do not qualify for Stafford Act relocation assistance and other potentially relevant programs.

Community relocation is the wholesale relocation of a community's housing and public infrastructure to another safer location[12] when protection

Integrating Indigenous Knowledge and Social and Physical Sciences to Coproduce Knowledge and Support Community-Based Adaptation, 43 Polar Geography 188–205 (2020).

5. Donglin Guo & Huijun Wang, *CMIP5 Permafrost Degradation Projection: A Comparison Among Different Regions*, 121(9) J. Geophysical Resch. Atmospheres 4499 (2016) (citing Siemon W. Muller, Permafrost or Permanently Frozen Ground and Related Engineering Problems (J. W. Edwards, Ann Arbor, 1947)).

6. United Nations Env't Programme, Policy Implications of Warming Permafrost 14–15 (2012).

7. Yereth Rosen, *For Some Alaska Villages, the Lack of Modern Water and Sewer Service Means More Health Risks*, Arctic Today (Nov. 30, 2021), https://www.arctictoday.com/for-some-alaska-villages-the-lack-of-modern-water-and-sewer-service-means-more-health-risks [https://perma.cc/9UEN-8R65].

8. M. Oliva & M. Fritz, *Permafrost Degradation on a Warmer Earth: Challenges and Perspectives*, 5 Current Opinion in Env't Sci. & Health 15 (2018).

9. United Nations Env't Programme, *supra* note 6, at 5.

10. Shawn Archbold, *Permafrost Melt, Rising Seas, and Coastal Erosion Threaten Arctic Communities*, New Security Beat (Nov. 5, 2019), https://www.newsecuritybeat.org/2019/11/permafrost-melt-rising-seas-coastal-erosion-threaten-arctic-communities [https://perma.cc/9Z4Z-LTWD].

11. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100–707, 102 Stat. 4689 (1988) (codified in scattered sections of 42 U.S.C.).

12. Robin Bronen, *Climate-Induced Community Relocations: Using Integrated Social-Ecological Assessments to Foster Adaptation and Resilience*, 20 (3) Ecology & Soc'y, no. 36,

of that infrastructure is no longer assured. If implemented prior to a disaster, community relocation can be a critical risk reduction tool to protect lives and infrastructure.[13] A similar concept to community relocation is "managed retreat," which is "the purposeful, coordinated movement of people and assets out of harm's way."[14] While categorizing thawing permafrost and coastal erosion as disasters under the Stafford Act would help secure federal assistance, Alaska Native Tribes would still need to meet difficult programmatic requirements to be eligible for federal funding for community relocation or other measures to protect their communities and infrastructure. Because there are no federal or state approaches to address the problem, some Alaska Native Villages (ANVs) have struggled to find the necessary assistance to address the climate impacts that they face. Considering the impending climate impacts, as well as taking into account notions of environmental justice, updating federal and state laws and finding ways for systematic and more streamlined assistance for Alaska Native Tribes is critical.

Alaska Native Tribes refers to ANVs and Alaska Native groups, which are both defined in 43 U.S.C. § 1602. While ANVs are composed of 25 or more people who are Alaska Native, Alaska Native groups are defined as a community composed of fewer than 25 Alaska Natives.[15] To cover both, this Article uses the term Alaska Native Tribes.

This paper examines the issues faced by Alaska Native Tribes in responding to these climactic challenges in several ways. Part I illustrates the varied experiences of three rural Alaska communities where services are provided by an Alaska Native Tribal Government: Chevak, Kivalina, and Newtok. In addition, the community relocation efforts of the Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw in Louisiana are explored to illustrate what has happened with the first "climate" relocation in the U.S. Each of these communities is facing severe climate change impacts and has taken a different approach to address these problems. Part II reviews the legal status of Alaska

(2015, at 1) (citing Abhas J. Jha Et Al., Safer Homes, Stronger Communities: A Handbook For Reconstructing After Natural Disasters 77 (2010), http://hdl.handle.net/10986/2409); *see also* Nicholas Pinter, *The Lost History of Managed Retreat and Community Relocation in the United States*, 9(1) Elementa: Sci. of Anthropocene, Aug. 23, 2021, at 1, https://doi.org/10.1525/elementa.2021.00036 [https://perma.cc/39GM-Q89D].

13. Bronen, *supra* note 12.

14. A.R. Siders, *Managed Retreat in the United States*, 1 One Earth: Perspective 216 (2019).

15. "'Native village' means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives." 43 U.S.C. § 1602 (c). "'Native group' means any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality." 43 U.S.C. § 1602 (d).

Natives, compares their status to Tribal Nations in the Lower 48, and discusses the role of federal trust responsibility and how it might be used to aid in Native community relocation efforts. Part III focuses on the legal barriers impacting Alaska Native Tribes seeking federal funds for relocation and how programs like the Biden Administration's Justice40 might help. Part IV summarizes other federal and state efforts. Finally, Part V recommends how the federal government and the State of Alaska could help Alaska Native Tribes facing significant and imminent threats to their communities. Because of the critical and imminent threat from melting permafrost and coastal erosion, changes are needed at both the federal and state levels to ensure timely and effective opportunities for adaptation by Alaska Native Tribes.

I. Illustrating the Challenge of Community Relocation

While many Alaska Native Tribes are facing climate-related impacts, only a few have explored relocation; those that have tried faced significant barriers to accessing assistance. In 2009, 12 out of 229 tribes were exploring relocation.[16] In 2017, the Alaska Institute for Justice, a non-profit organization, was working with 15 ANVs on community relocation efforts.[17] Other Alaska Native Tribes facing environmental hazards have not yet decided on relocation, or may not have agreed that relocation is the best strategy. This Part provides four examples of communities that have relocated in the past or are trying to relocate now, including three ANVs and one indigenous community in Louisiana.

The first example of an Alaska Native Tribe that relocated already and may need to do so again is the Chevak Native Village. Chevak, a Cup'ik community with a unique cultural and linguistic identity, is a community with about 200 homes and a population of about 1,014.[18] The village is located midway between the Yukon and Kuskokwim rivers in the Yukon-Kuskokwim Delta and about eight miles inland from the Bering Sea. Chevak is facing major problems associated with thawing permafrost and coastal erosion; however, community members are hesitant to relocate because they already relocated in the 1930s and in 1950.[19] Current issues may not yet be severe enough to prompt another relocation effort.

16. U.S. Gov't Accountability Off., GAO-09–551, Alaska Native Villages, Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion (2009) [hereinafter GAO (2009)]. Another author indicated eleven ANVs were exploring relocation in 2021. These were Kivalina, Shishmaref, Shaktoolik, Allakaket, Golovin, Hughes, Huslia, Koyukuk, Nulato, Teller, and Unalakleet. *See* Pinter, *supra* note 12, at 4–5.

17. *Climate Change*, Alaska Institute For Justice, http://www.akijp.org/policy-and-research/climate-change [https://perma.cc/H6FU-E6MK] (last visited Oct. 25, 2021).

18. Salote Soqo, *Encroaching Erosion a Looming Threat to Chevak Native Village*, Unitarian Universalist Serv. Comm. (Aug. 7, 2017), https://www.uusc.org/encroaching-erosion-looming-threat-chevak-village [https://perma.cc/CBG8–8YVG].

19. *Id.*

A second example is Newtok, which has been trying to relocate for more than 30 years. A Yup'ik community dependent on subsistence resources, Newtok is located on Alaska's west coast and has about 400 residents. The village is losing about 80 feet of land each year from thawing permafrost, river erosion, and storm surge.[20] As of December 2019, Newtok had received about $64 million from federal agencies, the State of Alaska, and other organizations.[21] An additional $150 million might be needed to complete the relocation, exceeding Newtok's financial resources.[22] Along with insufficient funds, no federal agency has the authority to coordinate relocation.[23] There is an informal organization known as the Newtok Planning Group made up of 25 state, federal, tribal, and non-governmental agencies working to voluntarily coordinate Newtok's relocation.[24] The U.S. Fish and Wildlife Service provided a relocation site, Mertarvik, in a land exchange in 2003.[25] Currently, about half of Newtok's population has moved to Mertarvik,[26] leaving the other half of the population vulnerable.

A third example is Kivalina, a Iñupiat village, home to roughly 400 residents living in around 90 households.[27] Kivalina is a federally recognized tribe and a unified municipality incorporated under Alaska law in 1969. It is located on a barrier reef island in the Chukchi Sea, 100 miles north of the Arctic Circle.[28] Climate change-induced rapid warming melted sea ice that had protected the Kivalina coast. In 1992, the village voted to relocate due to the threat of flooding, erosion, and storms.[29] By 2003, the island lost about half its livable space,[30] and the village is now severely overcrowded due to this loss. Multiple families live together in small houses with no water or sewage systems in

20. GAO (2020), *supra* note 1, at 13.

21. *Id.* at 17.

22. *Id.* at 53.

23. *Id.* at 39.

24. Robin Bronen & F. Stuart Chapin III, *Adaptive Governance and Institutional Strategies for Climate-Induced Community Relocations in Alaska*, 110 PNAS 9320, 9322 (2013).

25. Pub. L. No. 108–129.

26. Julia Ilhardt, *'It was Sad Having to Leave': Climate Crisis Splits Alaskan Town in Half*, The Guardian (June 8, 2021), https://www.theguardian.com/environment/2021/jun/08/it-was-sad-having-to-leave-climate-crisis-splits-alaskan-town-in-half [https://perma.cc/J9TD-YW4Z].

27. Elisabetta Scuri, *Kivalina, Photos of the Alaskan Village That Could Be Gone by 2025*, Lifegate (Jan. 7, 2020), https://www.lifegate.com/kivalina-alaska-photos [https://perma.cc/2FKD-PW3J].

28. Anna V. Smith, *Tribal Nations Demand Response to Climate Relocation*, High Country News (Apr. 1, 2020), https://www.hcn.org/issues/52.4/indigenous-affairs-justice-tribal-nations-demand-response-to-climate-relocation [https://perma.cc/B4KS-7QYF].

29. Alaska Institute for Justice, Rights *of Indigenous People in Addressing Climate-Forced Displacement*, Complaint Submitted to the UN Special Rapporteurs 33, (2020), https://www.uusc.org/wp-content/uploads/2020/01/Complaint.pdf [https://perma.cc/J78H-6TJ6] [hereinafter AIJ, Complaint].

30. *Id.* at 32.

their homes.[31] However, Kivalina has not yet found funding to relocate nor a firm location to move to, and the community is still seeking relocation assistance from federal and state agencies. While Kivalina brought a novel lawsuit against oil companies for climate change-related damages,[32] this lawsuit was dismissed by the courts and is discussed further below.

The last example is from outside of Alaska: the Isle de Jean Charles band of Biloxi-Chitimacha-Choctaw Indians of Louisiana.[33] While not a federally recognized tribe, they are seen as the first U.S. community to relocate due to climate change.[34] The community is located on Isle de Jean Charles, Louisiana, an island in southern Terrebonne Parish, 80 miles southwest of New Orleans.[35] Decades of storms, erosion, and flooding reduced the size of the island.[36] From 1955 to 2015, the island shrank by 98 percent from 22,400 acres to 320.[37] According to Chief Albert Naquin, with each hurricane, community members slowly moved away.[38] It has taken more than 20 years for the Isle de Jean Charles community to begin federally-funded relocation.[39] In 2016, the community received a grant of $48 million from the U.S. Department of Housing and Urban Development (HUD) as a result of the HUD's National Disaster Resilience Competition.[40] In January 2019, Louisiana paid $11 million to buy a 515-acre tract of farmland in Terrebonne Parish for a new community site.[41] Currently, only approximately 80 of 700 total tribal citizens live on the island, while others form a diaspora in nearby communities.[42]

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31. *Id.* at 48.

32. *See infra* note 138.

33. Andrew J. Yawn, *As Gulf Swallows Louisiana Island, Displaced Tribe Fears the Future*, The Daily Advertiser (Apr. 23, 2020), https://www.theadvertiser.com/in-depth/news/2020/02/27/isle-de-jean-charles-louisiana-climate-refugees-resettlement/2448973001 [https://perma.cc/76T2-UMEE].

34. Carol Davenport & Campbell Robertson, *Resettling the First American 'Climate Refugees,'* N.Y. Times (May 2, 2016), https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html [https://perma.cc/8NBD-EUUA].

35. GAO (2020), *supra* note 1, at 17.

36. Kezia Setyawan, *Isle de Jean Charles Residents' New Homes Fared Well After Hurricane Ida. Most of Their Current Homes Did Not*, Houma Today (Sept. 27, 2021), https://www.houmatoday.com/story/news/2021/09/27/isle-de-jean-charles-and-residents-new-homes-face-drastically-difference-consequences-hurricane-ida/8345926002 [https://perma.cc/P9TB-WBPX].

37. State of Louisiana, Division of Administration Office of Community Development Disaster Recovery Unit, National Disaster Resilience Competition 105 (2015), http://www.coastalresettlement.org/uploads/7/2/9/7/72979713/ndrc_pii_final_eximg-w_highlights.pdf [https://perma.cc/E4FL-Z99B].

38. Darren Simon, *Tribal Chief on Isle de Jean Charles Says It's Time to Leave*, nola.com (June 25, 2019, 12:27 PM), https://www.nola.com/news/article_5bf9fcdd-c9c9–57f7-a7db-5ca000b2b468.html [https://perma.cc/8UJB-2MBN].

39. GAO (2020), *supra* note 1, at 39.

40. State of Louisiana, *supra* note 37, at 115.

41. GAO (2020), *supra* note 1, at 19.

42. AIJ, Complaint, *supra* note 29, at 4.

These four examples illustrate the many challenges associated with community relocation in Alaska and beyond: different kinds of impacts, community willingness to relocate, a place to relocate to, funding, and coordination of relocation efforts. While community relocation is challenging in general, relocation of Alaska Native Tribes is complicated by their legal status, a situation explored in Part II.

II. The Legal Status of Alaska Native Tribes

Alaska Natives are impacted by laws and regulations that are distinguishable from those applicable to Tribal Nations in the continental U.S. Shortly after purchasing what is now Alaska from Russia in 1867 through the Treaty of Cession, the U.S. ended treaty-making with Tribal Nations in 1871.[43] Unlike Tribal Nations in the continental U.S., the U.S. government has no treaties with Alaska Native Tribes.[44] However, federal courts "have long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statutes or executive order unless Congress has provided otherwise."[45] In 1971, the Alaska Native Claims Settlement Act extinguished almost all claims of "aboriginal" title in exchange for 44 million acres of land and the $962.5 million Alaska Native Fund.[46] Since the incorporation of Alaska, there have been a myriad of changes in federal and state laws that generally affect Tribal Nations and directly affect Alaska Native Tribes. As a result, Alaska Natives face somewhat different legal dynamics than other Tribal Nations in the continental U.S. This Part outlines general federal dynamics with Tribal Nations, the federal trust relationship in general, and then the evolution of law for Alaska Native Tribes. Finding a way to navigate these convoluted dynamics is critical, however, given the current and impending challenges raised by a swiftly changing climate.

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43. 25 U.S.C. § 71; Univ. of Alaska Fairbanks, *Early Foundations of Federal Indian Law*, Federal Indian Law for Alaska Tribes, https://uaf.edu/tribal/academics/112/unit-1/earlyfoundationsoffederalindianlaw.php [https://perma.cc/P23F-JGEQ] (last visited Aug. 23, 2022).

44. *Univ. of Alaksa Fairbanks*, *supra* note 43.

45. Daniel I. Rey-Bear & Matthew L. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 Mich. J. Env't. & Admin. L. 397, 402 (2017) (quoting Parravano v. Babbitt, 70 F.3d 539, 545 (9th Cir. 1995)).

46. 43 U.S.C. §§ 1603 & 1605 (1971). Metlakatla opted out of ANCSA and is a reserve; Venetie and Arctic Village chose the title to the former Venetie Reservation. Meghan Sullivan, *Alaska without ANCSA? Look to Metlakatla*, Alaska Public Media, (November 17, 2021), https://www.alaskapublic.org/2021/11/17/alaska-without-ancsa-look-to-metlakatla [https://perma.cc/MY4A-TDSW]; *Venetie*, Tanana Chiefs Conference, https://www.tananachiefs.org/about/communities/venetie [https://perma.cc/L2L9-KX7V] (last visited April 19, 2022, 10:08 AM).

A. *Federal Authority and Tribal Nations*

In general, the U.S. federal government has a distinctive relationship with Tribal Nations.[47] Under the Commerce Clause, Congress has the plenary power to "regulate Commerce with foreign nations, and among the several States, with the Indian Tribes."[48] This gives Congress the exclusive power to regulate affairs and trade with Tribal Nations.[49] The Supremacy Clause, Article VI, Clause 2, established that federal laws are "supreme law of the land," preempting contrary provisions of state law.[50] Together, these comprise Congress's "plenary power" over Tribal Nations, giving Congress full or "complete" power in this area.[51] At this point, Tribal Nations—and their tribal sovereignty—can be recognized by an act of Congress, through administrative procedure, or by judicial action;[52] however, only an act of Congress can terminate Tribal recognition.[53] Being federally recognized allows Tribal Nations to have a government-to-government relationship with the federal government.[54] It also provides the right to receive certain services from the federal government,[55] as they are protected by a special trust responsibility between the federal government and Tribal Nations.

47. There are a number of different terms for Tribal Nations: Indians, Indian Tribes, American Indians, and so on. For the purposes of this paper, we are using the broad term "Tribal Nations" except when a term is used in a court case or otherwise quoted. *See generally* National Conference of State Legislatures, Federal and State Recognized Tribes (2020) https://www.ncsl.org/legislators-staff/legislators/quad-caucus/list-of-federal-and-state-recognized-tribes.aspx [https://perma.cc/6CVH-GXG9].

48. U.S. Const. art. I, § 8, cl. 3.

49. Univ. of Alaska Fairbanks, *U.S. Constitution and Congress*, Federal Indian Law for Alaska Tribes, https://www.uaf.edu/tribal/112/unit_1/usconstitutionandcongress%20.php [https://perma.cc/J5HD-4W5S] (last visited Oct. 30, 2021).

50. Jay B. Sykes & Nicole Vanatko, Cong. Rsch. Serv., R45825, Federal Preemption: A Legal Primer 1 (2019).

51. David S. Case & David A. Voluck, Alaska Natives and American Laws 20 (3rd ed. 2012).

52. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103–454, § 103(3) Stat. 4791.

53. *Id.* § 103(4).

54. Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200–05 (Feb.1, 2019); Univ. of Alaska Fairbanks, *General Principles of Federal Indian Law*, Federal Indian Law for Alaska Tribes, https://www.uaf.edu/tribal/112/unit_4/generalprinciplesoffederalindianlaw.php [https://perma.cc/SSA4-MF39] (last visited Mar. 16, 2021).

55. Univ. of Alaska Fairbanks, *Federal Recognition of Alaska Tribes and Relations with the State of Alaska*, Federal Indian Law for Alaska Tribes, https://www.uaf.edu/tribal/112/unit_4/federalrecognitionofalaskatribesandrelationswiththestateofalaska.php [https://perma.cc/2D6E-V2YT] (last visited Mar. 15, 2021).

B. *Trust Responsibility*

The federal trust responsibility may be important for Tribal Nations in the Lower 48 in seeking modern-day assistance with community relocation; however, this trust responsibility may not be a useful tool for lands set aside by the Alaska Native Claims Settlement Act (ANCSA). This Subpart addresses the trust responsibility for Tribal Nations in general, whereas the Subpart C addresses how this differs for Alaska Natives.

The federal trust responsibility arose from three seminal U.S. Supreme Court cases known as the Marshall Trilogy.[56] In *Johnson v. M'Intosh*, the Supreme Court indicated that although tribes were the rightful occupants of the lands they occupied, exclusive title to these lands belonged to the United States.[57] The Court held that Tribal Nations did not have the power to transfer land to anyone other than the U.S. government.[58] In *Cherokee Nation v. Georgia*, the Court said Tribal Nations could not be categorized as foreign nations, but rather that they were "domestic dependent nations,"[59] and their relation to the U.S. was similar to "a ward to his guardian."[60] In *Worcester v. Georgia*, the Court recognized Tribal Nations retained sovereignty against states for the first time. The Court said that the laws of states (in this case, Georgia) had no force in the territory of Cherokee Nations because the Tribal Nations had always been considered as distinct and independent political communities.[61] The Court reinforced that Tribal Nations were subject only to the authority of the federal government.[62] Professor Matthew L.M. Fletcher indicated that these cases and subsequent Congressional acts established two aspects of a trust relationship: "[f]irst, the federal government owes a duty—moral, ethical, or political—to Indians and Indian tribes in all of its actions . . . [s]econd, certain statutes create a trust duty toward Indians and Indian tribes similar to that of a common law trustee-beneficiary relationship."[63]

The Marshall Trilogy and subsequent decisions also established canons of construction for interpreting treaties, federal laws, executive orders, and federal regulations related to Tribal Nations.[64] There are three main canons of

56. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); Worcester v. Georgia 31 U.S. (6 Pet.) 515 (1832).

57. *Johnson*, 21 U.S. at 574.

58. Matthew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. Rev. 627, 631 (2006) (citing *Johnson*, 21 U.S. at 573).

59. *Cherokee Nation*, 30 U.S. at 17.

60. *Id.*

61. *Worcester*, 31 U.S. at 561. However, the Supreme Court later left the holding that "the laws of a [State] can have nor force within reservation boundaries." Nevada v. Hicks, 533 U.S. 353, 361 (2001).

62. *Worcester*, 31 U.S. at 561.

63. Fletcher, *supra* note 58, at 659.

64. Univ. of Alaska Fairbanks, *Treaties*, Federal Indian Law for Alaska Tribes, https://www.uaf.edu/tribal/112/unit_1/treaties.php [https://perma.cc/RC5C-L5NR] (last visited Feb. 22, 2021).

construction: "ambiguities in treaties must be resolved in favor of the Indians, Indian treaties must be interpreted as the Indians would have understood them, and that Indian treaties, agreements, and laws must be construed liberally in favor of the Indians."[65]

The Supreme Court and the Ninth Circuit, which includes Alaska, have struggled to interpret the scope of the federal trust responsibility over time. Some argue that the trust responsibility is too vague and ambiguous to be enforceable.[66] Subsequent cases illustrate this dilemma while incorporating some of the canons of construction. In a 1942 case, *Seminole Nation v. United States*, the Supreme Court said that the U.S. "has charged itself with moral obligations of the highest responsibility and trust."[67] In that case, the federal government paid funds promised under a treaty with the Seminole Nation to the Tribal government instead of individuals, despite knowing that Tribal government officials were misappropriating these funds.[68] The Court found a breach of trust responsibility because the U.S. government, "as something more than a mere contracting party," knew that the fiduciary, the Seminole General Council, intended to misappropriate the money.[69] The government had a "distinctive obligation of trust" in "its dealings with dependent and sometimes exploited people."[70]

Another case, *Pence v. Kleppe*, highlighted the importance of providing due process to Tribal members if a Tribal member is denied an application for a tribal program. In this case, the Secretary of Interior denied Alaska Natives' applications for land allotments under the Alaska Native Allotment Act.[71] The Alaska Natives said that the process used by the Interior Secretary to deny their claims lacked a notice of rejection or oral hearing, violating their due process rights.[72] They asked for an oral hearing before rejection of an allotment application.[73] In upholding their request, the Ninth Circuit indicated that "statutes passed for the benefit of dependent Indian tribes and communities are to be liberally construed in favor of Indians" and "[a] permissive statutory term . . . is not by itself to be read as a congressional command precluding judicial review."[74] The Ninth Circuit then found that the Alaska Native applicants

65. *Id.* A fourth canon of construction is that "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." 1 Neil J. Newton, Felix Cohen, Robert Anderon, Cohen's Handbook of Federal Indian Law § 2.02 at 114 (2019).

66. Fletcher, *supra* note 58, at 659; *see* also, Case & Voluck, *supra* note 51, at 23.

67. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

68. *Id.* at 295.

69. *Id.* at 296.

70. *Id.*

71. Case & Voluck, *supra* note 51, at 247 (citing Pence v. Kleppe, 529 F.2d 135, 137 (9th Cir. 1976)).

72. *Pence*, 529 F.2d at 137–38.

73. *Id.* at 138.

74. *Id.* at 140 (citing Rockbridge v. Lincoln, 449 F.2d 567, 570–71 (9th Cir. 1971)).

had a sufficient property interest in the government benefit, the Secretary may not arbitrarily deny such applications, and the applicants should have received due process protection.[75] Based on this case, one set of commentators concluded that arbitrary denials of most Native statutory benefits should receive judicial review unless explicitly precluded by Congress.[76]

An example of how these due process requirements play out in human service programs for Tribal members comes from *Fox v. Morton*.[77] The 1921 Snyder Act provided statutory authority for the Bureau of Indian Affairs (BIA) human service programs for Tribal members and was expanded to cover Alaska in 1931.[78] In *Fox v. Morton*, the issue was whether participants in a Tribal Work Experience Program (TWEP) were entitled to an oral hearing before BIA terminated the program as a whole because program funds were gone.[79] Because the program was under the Snyder Act and provided general assistance to eligible Indians, the Ninth Circuit said that Snyder Act programs had to also be liberally construed in favor of Tribal members.[80] The court said "summary termination of TWEP deprived appellants of due process rights, which could have been secured by a properly conducted hearing."[81] In a later case, *Lincoln v. Vigil*, the Supreme Court limited the *Fox* decision by deciding that the Indian Health Service (IHS) could terminate a pilot program without a hearing "where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds . . . ."[82] The Court added that "a lump-sum appropriation reflects a congressional recognition that an agency must be allowed to shift funds within a particular appropriation account so that agency can make necessary adjustments for unforeseen developments and changing requirements."[83] The Court also said that the trust relationship cannot limit the agency's discretion to reorder the agency's priorities "from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide."[84] This could be viewed as another limitation on the scope of trust responsibility.

In a later case, the Ninth Circuit affirmed a district court decision holding that the government had a trust responsibility to provide health care for a premature Native baby when a County (a sub-division of the state) refused

75. *Id.* at 141–42.
76. Case & Voluck, *supra* note 51, at 248.
77. 505 F.2d 254 (9th Cir. 1974).
78. Act of November 2, 1921, 42 Stat. 208 (1921) (codified as amended at 25 U.S.C. § 13).
79. Case & Voluck, *supra* note 51, at 249.
80. 505 F.2d at 255.
81. *Id.* at 256.
82. Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (citing *In re* LTV Aerospace Corp., 55 Comp. Gen. 307, 319 (1975).
83. *Lincoln*, 508 U.S. at 192.
84. *Id.* at 195.

to pay for the child's medical treatment.[85] The Ninth Circuit held that the "burden of vindicating its position that [the applicant] was legally entitled to County funds must fall upon the federal government, not upon indigent Indians."[86] The Snyder Act, the Indian Health Care Improvement Act, and the trust responsibility required the federal government to provide health care for Native Americans.[87] The court added "if the County continues to deny responsibility, the IHS must pay since County funds are not actually available. Any other result is inconsistent with the trust doctrine."[88]

Why do these cases matter? Whether a federal trust responsibility exists is a threshold question, and what that responsibility covers is a secondary question. Case and Voluck, treatise authors of *Alaska Natives and American Laws*, said that "if the interests at stake are group rather than individual or if they can't be identified with some statutory or regulatory requirement, then it is less likely courts will find the trust responsibility alone sufficient to impose federal obligations."[89] Other legal scholars indicated that "the federal-Indian trust relationship fits into the broader field of trust law and fiduciary relationship insofar as some breaches of the duties are actionable, subject to limits imposed on claims against the United States."[90] Further, they observed that "for this type of breach, the Supreme Court has affirmed money damage awards against the United States for breach of [trust law and] fiduciary duties to Indians in certain circumstances."[91] For example, in *United States v. Mitchell*,[92] the Supreme Court said that "Congress had not created a money-mandating trust duty in the General Allotment Act and thus, the United States was not required to pay money damages for any mismanagement of the commercial timber on the reservation."[93] However, in *United States v. Mitchell II*, the Court held that because plaintiffs cited timber management statutes that were relatively clear in establishing fiduciary obligations in the management and operation of Indian lands and resources, the federal government was liable for damages sustained for forest resource management on allotted Reservation lands.[94]

If applied to the current situation with Alaska Native Tribes and climate impacts, the cases discussed above might imply that sole trust responsibility will not be enough—without supporting laws or regulations—to force the

85. Case & Voluck, *supra* note 51, at 250 (citing to McNabb for McNabb v. Heckler, 628 F. Supp. 544, 549 (D. Mont. 1986), aff' d, McNabb v. Bowen, 829 F.2d 787, 793–795 (9th Cir. 1987)).

86. McNabb for McNabb v. Bowen, 829 F.2d 787, 793 (9th Cir. 1987).

87. Case & Voluck, *supra* note 51, at 251.

88. *McNabb*, 829 F.2d at 794.

89. Case & Voluck, *supra* note 51, at 258.

90. Rey-Bear & Fletcher, *supra* note 45, at 410.

91. *Id.*

92. 445 U.S. 535 (1980).

93. *Significant Indian Cases*, U.S. Dep't of Just., https://www.justice.gov/enrd/significant-indian-cases [https://perma.cc/HX4W-FHNZ] (last updated May 12, 2015).

94. United States v. Mitchell, 463 U.S. 206, 226 (1983).

federal government to provide funding for community relocation. However, some argue that, unlike seeking monetary damages, when a tribe seeks injunctive and declaratory relief under the Administrative Procedure Act, "premising a claim on a statute or some other source of express law" is not required.[95] One commentator said a showing of a trust responsibility in history, statutes, regulations, or in treaties—even in the absence of specific trust language—would be enough to seek declaratory relief to force the government to relocate Tribal communities facing climate change-related hazards.[96] This seems to be an open question. Even if this argument were valid, the legal status of Alaska Native Claims Settlement Act lands might create further complications. The next Subpart discusses ANCSA and other related laws in more detail.

C. *The Evolution of Federal Law and Alaska Natives*

In Alaska, laws and policies for Alaska Native Tribes have often differed over time from those in the continental U.S. The 1871 Treaty of Cession provided the rights of citizens to inhabitants who remained in Alaska "with the exception of uncivilized native tribes."[97] Article 3 stated that "the uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes" living in the United States.[98] The 1871 Treaty led to numerous questions about citizenship, recognition, landownership, subsistence rights, and human services. The 1971 Alaska Native Claims Settlement Act (ANCSA) and the 1980 Alaska National Interest Lands Conservation Act (ANILCA) were important developments addressing a number of these questions but then in turn raising more complications that affect the implementation of federal hazard mitigation programs.

Citizenship and recognition of Alaska Natives Tribes is one area of change over time. In 1924, the Indian Citizenship Act granted citizenship to all American Indians and Alaska Natives who had not already become citizens of the United States.[99] In 1936, Congress expanded sections of the Indian Reorganization Act to include Alaska Natives.[100] The expansion allowed Alaska Natives

95. Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resource*, 39 Tulsa L. Rev. 355, 365 (2003); *see* Scott W. Stern, *Rebuilding Trust: Climate Change, Indian Communities, and a Right to Resettlement*, 47 Ecology L. Q. 179, 228 (2020).

96. Stern, *supra* note 95, at 230. "Thus, it would seem that the scope of the government's trust duty is to do everything 'possible' to protect and preserve the Indian communities threatened by climate change, including, naturally, their relocation." *Id.* at 235.

97. Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, Russ.-U.S., art. III, *concluded* Mar. 30, 1867, 15 Stat. 539, 542.

98. *Id.*

99. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (1994)).

100. *See* Kyle E. Scherer, *Alaska's Tribal Trust Lands: A Forgotten History*, 38:1 Alaska L. Rev. 37, 42 (2021); Act of May 1, 1936, ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 5119 (2018)); Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5129 (2018)).

to organize their governments under federal constitutions and to create federally chartered businesses or cooperatives.[101] In 1993, the Bureau of Indian Affairs included Alaska Tribes on the List of Federally Recognized Tribes,[102] which Congress confirmed in 1994 with the Federally Recognized Indian Tribe List Act.[103] Currently, there are 229 federally recognized tribes in Alaska.[104] As mentioned earlier, federal recognition provides eligibility for a Tribal Nation for certain services and to apply for different federal grant programs.

Land ownership is another important issue for Alaska Native Tribes. In 1884, the Alaska Organic Act provided that "Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."[105] In 1906, the Alaska Native Allotment Act granted Alaska Natives[106] unappropriated and non-mineral land up to 160 acres.[107] In 1971, ANCSA ended this practice. Similarly, land allocation through the 1926 Alaska Native Townsite Act[108] was abandoned in 1976 with the Federal Land Policy and Management Act. In 1936, the Indian Reorganization Act allowed the Secretary of Interior to take land in trust for Alaska Native Tribes.[109]

The 1971 Alaska Native Claims Settlement Act (ANCSA) fundamentally reshaped Alaska Native land ownership and governance. ANCSA extinguished aboriginal claims to land and aboriginal hunting and fishing rights but did not include any arrangement for subsistence rights.[110] Except for the Annette Islands Reserve, ANCSA also terminated all reservations, which are set apart for tribal and federal jurisdiction.[111] ANCSA then placed Alaska Native lands under the possession of Alaska Native Corporations with

101. Case & Voluck, *supra* note 51, at 28; 25 U.S.C. §§ 5119, 5124.

102. 58 Fed. Reg. 54364, 54368–69 (Oct. 21, 1993).

103. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103–454, 108 Stat. 4791, 4792–93 (1994).

104. *Federal and State Recognized Tribes*, National Conference of State Legislatures (last updated Mar. 2020), https://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#ak [https://perma.cc/WTK9-MQ9Z].

105. Alaska Organic Act, ch. 53, 23 Stat. 24, 26 (1884).

106. Act of May 17, 1906, ch. 2496, 34 Stat. 197 (codified as amended at 43 U.S.C. § 270–271 (1970), *repealed by* ANCSA.

107. Univ. of Alaska Fairbanks, *Early Alaska Native Land Cases and Acts*, Federal Indian Law for Alaska Tribes, https://www.uaf.edu/tribal/112/unit_2/earlalaskanativelandcasesandacts.php [https://perma.cc/6UN2-NGBB] (last visited Feb. 23, 2021). "While only 80 Allotments were approved between 1906 and 1960, today there are some 13–15 thousand Native Allotments in Alaska. They are primarily located around the villages and in hunting and fishing use areas." *Id.*

108. Act of May 25, 1926, ch. 379, 44 Stat. 629.

109. 1 Cohen's Handbook of Federal Indian Law § 4.07, fn. 573 (2019); 25 U.S.C. § 5108.

110. 43 U.S.C. § 1603.

111. 43 U.S.C. § 1618.

Alaska Native shareholders by creating 12 regional for-profit Alaska Native corporations[112] and over 200 village, group, and urban corporations.[113] The 13th corporation—created in 1975 for "at large" shareholders who lived outside of Alaska—was dissolved in 2013.[114] Currently, the remaining 12 Corporations own about 45.5 million acres of land.[115] Importantly, "the stock in the regional and village corporations is inalienable unless the Native shareholders in each corporation vote to remove the alienability."[116] In *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court said that " . . . a federal set-aside *and* a federal superintendence requirement must be satisfied for a finding of a 'dependent Indian community'"[117] and "the Tribe's ANCSA lands do not satisfy either of these requirements."[118] The Court held that because ANCSA placed Alaska Natives' lands under the ownership of regional and village corporations—private business corporations—it also ended federal supervision over Alaska Native lands.[119] After this decision, it is not likely that the federal trust responsibility exists for ANCSA lands.[120]

Alaskan subsistence rights are also subject to a different legal regime than elsewhere in the U.S. A federal decision reinforced subsistence fishing rights for Tribal Nations in the lower 48 states. In 1974, Judge George Boldt issued what is known as the Boldt Decision reaffirming the rights of Tribal

112. The Univ. of Alaska Fairbanks, *Alaska Native Claims Settlement Act (ANCSA) 1971*, Federal Indian Law for Alaska Tribes, https://www.uaf.edu/tribal/112/unit_3/alaskanativeclaimssettlementactancsa1971.php [https://perma.cc/JQT8–26K6] (last visited Mar.1, 2021).

113. *Id.* The twelve regional corporations include Ahtna, Incorporated, the Aleut Corporation, Arctic Slope Regional Corporation, Bering Straits Native Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach Alaska Corporation, Cook Inlet Region, Inc., Doyon, Limited, Koniag, Incorporated, NANA Regional Corporation, and Sealaska Corporation.

114. The 13th Regional Corporation was created in 1975 to ensure Alaska Native people not permanent residents of Alaska could enroll in an Alaska Native regional corporation. It was involuntarily dissolved by the State of Alaska in 2013 when its registered agent resigned. *About the Alaska Native Claims Settlement Act*, ANCSA Regional Association, https://ancsaregional.com/about-ancsa [https://perma.cc/P4FN-3FCL] (last visited Nov. 29, 2021).

115. Case & Voluck, *supra* note 51, at 172.

116. *Id.* at 343; 43 U.S.C. § 1606(h).

117. Alaska v. Native Vill. Of Venetie Tribal Gov't, 522 U.S. 520, 530 (1998) ("We, therefore, must conclude that in enacting § 1151(b), Congress indicated that a federal set-aside *and* a federal superintendence requirement must be satisfied for a finding of a "dependent Indian community"—just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted.").

118. *Id.* at 532.

119. *Id.* ("After the enactment of ANCSA, the Tribe's lands are neither 'validly set apart for the use of the Indians as such,' nor are they under the superintendence of the Federal Government.").

120. Case & Voluck, *supra* note 51, at 111 ("After the Supreme Court's holding in Venetie, the federal government's trust responsibility to land after ANCSA is most likely confined to restricted Native allotments and Native townsite lots, a few parcels of trust land remaining in southeast Alaska, and the Metlakatla Indian Reservation on Annette Island.").

Nations in Washington State to fish in usual and accustomed places.[121] In the mid-1850s, representatives of the U.S. Government concluded different treaties with Northwest Tribal Nations.[122] Judge Boldt held the treaties were not "a grant of rights to the treating Indians, but a grant of rights from them, and a reservation of those not granted."[123] In other words, "the tribes had an original right to fish, which they extended to white settlers. It was not up to the state to tell the tribes how to manage something that had always belonged to them."[124] Because there are no treaties, the Boldt decision does not extend to Alaska Native Tribes.

Federal subsistence rights are regulated differently in Alaska. In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), which "placed over 104 million acres of Alaska land into national parks, preserves, refuges, monuments, wilderness and wild and scenic river areas."[125] ANILCA Title VIII regulated subsistence rights in Alaska and granted rural residents who live in close proximity to ANILCA-designated lands priority for subsistence hunting and fishing on federal lands and waters.[126] In 1986, Alaska adopted a similar arrangement on state lands.[127] In 1989, the Alaska Supreme Court decided that the rural preference under state law for subsistence uses violated equal access provisions of the Alaska Constitution, specifically Article VIII, §§ 3, 15, and 17.[128] As a result, the federal government has managed subsistence activities on federal land since 1992 and the State of Alaska manages subsistence opportunities on State and private lands "including land owned by Native corporations" with no priority to rural residents.[129] This creates another unique situation for Alaska Native Tribes compared to Tribal Nations in the continental U.S.[130]

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121. Walt Crowley & David Wilma, *Federal Judge George Boldt Issues Historic Ruling Affirming Native American Treaty Fishing Rights on February 12, 1974*, History Link (last updated Aug. 24, 2020), https://www.historylink.org/file/5282#:~:text=On%20February%2012%2C%201974%2C%20Federal,tribes%2C%20which%20enrages%20other%20fishermen [https://perma.cc/Y9HD-TYNX].

122. United States v. Washington, 384 F. Supp. 312, 330 (W.D. Wash. 1974).

123. *Id.* at 407.

124. Crowley & Wilma, *supra* note 121.

125. Univ. of Alaska Fairbanks, *Tribal Hunting and Fishing Rights: Subsistence (ANILCA 1980)*, Federal Indian Law for Alaska Tribes, https://www.uaf.edu/tribal/112/unit_3/tribalhuntingandfishingrightssubsistenceanilca1980.php [https://perma.cc/UZX8-XQEU] (last visited Mar. 15, 2021).

126. *Id.*

127. *Id.*

128. McDowell v. State of Alaska, 785 P.2d 1, 9 (Alaska 1989).

129. Case & Voluck, *supra* note 51, at 300, 304, 310.

130. There are fundamental differences in tribes' ability to manage land and wildlife populations. For example, the White Mountain Apaches can manage deer and elk populations and the tribe sells access/hunting privileges to outsiders. This generates significant revenue for the tribe. *See* Stephen Cornell & Joseph P. Kalt, *Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development*, 29 J. OF

Finally, human services and other federal programs necessitated by the federal trust responsibility[131] may also differ for Alaska Native Tribes. The 1971 Alaska Native Claims Settlement Act (ANCSA) addressed this duty of the federal government for Alaska Native Tribes because of the special status of Alaska Native lands.[132] ANCSA § 2(c) indicates that the Secretary of the Interior must conduct a study of all federal programs designed to benefit Tribal Nations and report to Congress with recommendations for the future management of these programs.[133] This provision implies that Alaska Natives would continue to benefit from federal Indian programs after the enactment of ANCSA; therefore, ANCSA did not terminate the federal programs in Alaska.[134] In 1976, Congress added a new § 29, stating that payments and grants under ANCSA shall not be deemed to substitute any governmental programs otherwise available to Alaska Natives as citizens of the U.S. and the State of Alaska.[135] In 1988, Congress further clarified this by adding a new paragraph to § 29 stating that Alaska Natives are eligible for all Federal Indian programs on the same basis as other Tribal Nations.[136] In 2021, the U.S. Supreme Court reinforced this, finding that even Alaska Native corporations, which are not federally recognized tribes, are considered "Indian Tribes" under the Indian Self-Determination and Education Assistance Act (ISDA) in a case focused on whether they were eligible for COVID-19 related relief under the CARES Act.[137]

Taken together, the plenary power of Congress, the federal trust responsibility, and how all of this might play out in Alaska given these changes over time creates a very complicated picture on addressing critical climate change impacts to Alaska Native Tribes. These dynamics are further complicated by limitations under laws meant to address disasters.

III. Legal Barriers for Alaska Native Community Relocation

Alaska Native Tribes seeking community relocation have faced different barriers in accessing funding for their relocation efforts. One significant court case limited the courts as a way forward, indicating that political or legislative support would be necessary; however, such political or legislative support is limited. Challenges include the Stafford Act's limited definition of "disaster," the barrier of meeting requirements of federal disaster relief

Socio-Economics 443–70 (2000).

131. 1 Cohen's Handbook of Federal Indian Law § 5.04 (2019) ("Carrying out its trust responsibility is often the motivating factor for legislative initiatives, and it is the source of persuasive arguments by tribes urging passage of legislation or seeking oversight of executive agencies.").

132. *See* Case & Voluck, *supra* note 51, at 235.

133. *Id.* at 263.

134. *Id.*

135. *Id.* at 264.

136. *Id.*

137. Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2452 (2021).

programs—burdensome for many Alaska Native Tribes—and increasing environmental justice concerns.

A. *Native Village of Kivalina v. ExxonMobil Corp. (2012)*

After this important case holding that the Clean Air Act displaced both damages and injunctive relief claims under federal nuisance law,[138] courts are unlikely to be an option for seeking damages for relocation. In 2008, the Alaska Native Village of Kivalina sued 24 oil, energy, and utility companies to recover damages from greenhouse gas (GHG) emissions, claiming public nuisance.[139] Kivalina alleged that these companies' emissions led to climate impacts that eroded sea ice next to the village, necessitating relocation.[140]

The district court dismissed the suit, and the Ninth Circuit affirmed, but on different grounds.[141] The district court held plaintiffs could not sue under a theory of public nuisance because global warming is a political question.[142] The district court also found that Kivalina's injury was not fairly traceable to the companies because "the sources of greenhouse gases are undifferentiated and cannot be traced to any particular source."[143]

Although the Ninth Circuit affirmed the dismissal, it stated that Kivalina's claims were displaced by the Clean Air Act under the *AEP* case.[144] In *AEP*, the Supreme Court held the Clean Air Act displaced any federal common law right to seek abatement of GHG emissions.[145] The *Kivalina* plaintiffs tried to distinguish their case from *AEP* by claiming they sought damages for harm caused by past emissions whereas the *AEP* plaintiffs sought injunctive relief to prevent future emissions;[146] however, the Ninth Circuit held that the Clean Air Act displaced both damages and injunctive relief claims under federal nuisance law.[147] The Ninth Circuit noted that Kivalina did have an avenue of relief: "Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law."[148] The Supreme Court denied Kivalina's petition for a writ of certiorari without comment on May 23, 2013.[149]

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138. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).
139. Native Vill. of Kivalina v. Exxon Mobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).
140. *Id.*
141. *Native Vill. of Kivalina*, 696 F.3d at 858 (9th Cir. 2012).
142. *Native Vill. of Kivalina*, F. Supp. 2d at 871–77.
143. *Id.* at 880.
144. Am. Elec. Power Co. v. Conn., 564 U.S. 410 (2011).
145. *Id.* at 424.
146. *Native Vill. of Kivalina*, 696 F.3d at 857.
147. *Id.* at 858.
148. *Id.*
149. Native Vill. of Kivalina v. Exxon Mobil Corp., 569 U.S. 1000 (2013).

While the legislative and executive branches may be the source of relief, they have so far failed to provide a functional solution for Alaska Native Tribes seeking assistance.

B. *Legal Barrier I: Limited Definition of Disaster under the Stafford Act*

While the Kivalina case highlights the need for political or legal action, federal law creates several stumbling blocks, including the definition of a "disaster."[150] Under the Stafford Act, the President has the authority to declare a major disaster or emergency.[151] Such a declaration enables the President to access funds and disaster relief assistance allocated by Congress.[152] The declaration mainly helps states receive funding from the federal government during an emergency/disaster while implementing their responsibilities to aid their citizens.[153] In the U.S., the Federal Emergency Management Agency (FEMA) is responsible for coordinating hazard mitigation and disaster relief.[154]

An emergency declaration can be used for any occasion or instance when the President deems federal assistance is needed "to save lives and protect property and public health and safety, or to lessen or avert the threat of a catastrophe."[155] Except in limited circumstances, assistance for a single emergency may not exceed $5 million.[156] A second type of declaration is for a major disaster. A major disaster is defined as:

> any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.[157]

Except for drought, the definition of disaster under the Stafford Act does not cover gradual geophysical processes like erosion or thawing permafrost. Even if these events met the statutory definition of "disaster," the President

150. 42 U.S.C. §§ 5170, 5191.

151. *Id.*

152. *Id.* § 5193(b)(1); *The Stafford Act Explained*, FindLaw, https://consumer.findlaw.com/insurance/the-stafford-act-explained.html [https://perma.cc/283N-QZGD] (last updated March 31, 202).

153. FindLaw, *supra* note 152.

154. *See* 42 U.S.C. § 5191; *see also* 44 C.F.R. § 206.37 (2020).

155. 42 U.S.C. § 5122(1).

156. 42 U.S.C. § 5193(b); Fed. Emergency Mgmt. Agency, U.S. Dep't of Homeland Sec., Fact Sheet: Disaster Declaration Process (2011), https://www.fema.gov/pdf/media/factsheets/dad_disaster_declaration.pdf [https://perma.cc/98PW-SAL6].

157. 42 U.S. C. § 5122 (2).

has ultimate discretion and decision-making authority to declare major disasters and emergencies under the Stafford Act.[158]

Post-disaster recovery funding provides temporary housing assistance to individuals and households whose homes are damaged as a result of the disaster;[159] however, this assistance does not provide funding for rebuilding communities in a new site.[160] Similarly, the Public Assistance Program provides funding for debris removal, emergency protective measures, and the restoration of disaster-damaged, publicly owned facilities, and the facilities of certain Private Non-Profit (PNP) organizations.[161] Unless a disaster declaration exists, the Public Assistance program would not be available.

There have been 32 federal disasters declared in Alaska since 1953, but none has related to erosion or thawing permafrost.[162] Both the Obama and Trump administrations denied requests by Kivalina and Newtok for a federal disaster declaration for permafrost thawing and coastal erosion; both said that a disaster declaration under the Stafford Act was not appropriate to address the situation.[163] The denial indicated that Kivalina's request "did not identify damage to any facilities that are eligible for assistance under the Stafford Act."[164] While other federal hazard mitigation grant programs might help address this gap, their requirements are difficult to meet.

C. *Legal Barrier II: Meeting the Requirements of FEMA, HUD, and BIA Grant Programs is a Challenge for Alaska Native Tribes*

In general, communities are largely on their own in finding a way to relocate or effectuate managed retreat. The lack of an "institutional framework or agency with the authority to relocate the entire public and private infrastructure of a community and rebuild livelihoods in a new location to protect them from climate change-induced hazards" makes it difficult for a community

158. *Id.*; Jennifer J. Marlow & Lauren E. Sancken, *Reimagining Relocation in a Regulatory Void: The Inadequacy of Existing US Federal and State Regulatory Responses to Kivalina's Climate Displacement in the Alaskan Arctic*, 7 Climate L. 290, 302 (2017).

159. 42 U.S.C. § 5174.

160. Robin Bronen, *Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine*, 35 N.Y. U. Rev. L. & Soc. Change 356, 366 (2011) [hereinafter *Adaptive Governance Framework*].

161. 42 U.S.C. § 5172.

162. Marlow & Sancken, *supra* note 158, at 303.

163. Rachel Waldholz, *Obama Denies Newtok's Request for Disaster Declaration*, Alaska Public Media (Jan. 18, 2017), https://www.alaskapublic.org/2017/01/18/obama-denies-newtoks-request-for-disaster-declaration [https://perma.cc/WH8M-EB3K]; Fed. Emergency Mgmt. Agency, Preliminary Damage Assessment Report: Native Village of Kivalina – Severe Storms, Flooding, and Persistent Erosion, https://www.fema.gov/sites/default/files/2020–03/PDAReportDenial-KivalinaVillage.pdf [https://perma.cc/8BD5-BYW8] [hereinafter Preliminary Damage Assessment].

164. Preliminary Damage Assessment, *supra* note 163; *See* 44 CFR § 206.33 for the Preliminary Damage Assessment (PDA) process.

to relocate on its own.[165] Because of the limitations under the Stafford Act discussed above, many Alaska Native Tribes must piece together different FEMA, U.S. Housing and Urban Development (HUD), and U.S. Bureau of Indian Affairs (BIA) grants to find potential funding for community relocation. This Part details potential programs and challenges in using them.

1. Hazard Mitigation Assistance Grants

There are three FEMA hazard mitigation assistance grant programs that could be used for community relocation by Alaska Native Tribes.[166] Hazard mitigation is defined as "any sustained action taken to reduce or eliminate long-term risk to people and property from natural hazards and their effects."[167] FEMA defines natural hazards as "environmental phenomena that have the potential to impact societies and the human environment."[168] Funding for mitigation activities is generally given "nationally on a competitive basis based on cost-benefit ratios."[169] Applying for and receiving these competitive grants is difficult for Alaska Native Tribes because their low populations in remote locations increase the cost of moving while the benefit ratio is relatively low compared to a more urban area.[170]

a. Hazard Mitigation Grant Program, After A Disaster

The Hazard Mitigation Grant Program (HMGP) is available after a presidentially declared disaster. It is accessible for "hazard mitigation measures which the President has determined are cost effective and which significantly reduce the risk of, or increase resilience to future damage, hardship, loss or suffering . . . ."[171] Because permafrost thawing and erosion do not fit within the statutory definition of disaster, this grant would not be available for Alaska Native Tribes.[172] If the Stafford Act re-defined disaster, the assistance could be used for, but not limited to, "structural hazard control or protection projects, construction activities that will result in protection from hazards, retrofitting of facilities," "development of . . . mitigation standards,

165. Bronen & Chapin III, *supra* note 24, at 9320.

166. "As a result of amendments by the Disaster Relief and Recovery Act of 2018, the Pre-Disaster Mitigation program is replaced with the new Building Resilient Infrastructure and Communities Program (BRIC) program." *Pre-Disaster Mitigation (PDM) Grant*, Fed. Emergency Mgmt. Agency, https://www.fema.gov/grants/mitigation/pre-disaster [https://perma.cc/6AF5-Y4CK] (last visited Nov. 29, 2021).

167. Fed. Emergency Mgmt. Agency, Hazard Mitigation Assistance Guidance 1 (2015), https://www.fema.gov/sites/default/files/2020–07/fy15_HMA_Guidance.pdf [https://perma.cc/DBB9-Y64X] [hereinafter Hazard Mitigation].

168. *Natural Hazards*, Natural Risk Index, Fed. Emergency Mgmt. Agency, https://hazards.fema.gov/nri/natural-hazards [https://perma.cc/89R5-D4Z3] (last visited Jan. 13, 2022).

169. Bronen & Chapin III, *supra* note 24, at 9321; 42 U.S.C. 5133(f).

170. Bronen & Chapin III, *supra* note 24.

171. 42 U.S.C. § 5170c.

172. 42 U.S.C. § 5122(2).

development of comprehensive mitigation programs" and "property acquisition or relocation"[173]

FEMA has discretion in awarding HMGP grants. The funding amount is subject to a sliding scale formula: "up to 15% of the first $2 billion of estimated aggregate amounts of disaster assistance, up to 10% for amounts between $2 billion and $10 billion, and up to 7.5% for amounts between $10 billion and $35.333 billion."[174] A state with an approved Enhanced State Mitigation Plan is eligible for up to 20 percent for estimated aggregate amounts of disaster assistance not to exceed $35.333 billion.[175] While FEMA can contribute up to 75 percent of the cost, the 25 percent non-federal cost share is required.[176]

This program has several barriers for Alaska Native Tribes beyond the need for a disaster declaration. For example, Alaska Native Tribes may not have the required funding for cost sharing and will need a Presidential waiver.[177] Another requirement for HMGP is to have a local or tribal mitigation plan updated every five years, which may not exist or be up-to-date;[178] however, an exception to the local or Tribal mitigation plan requirement may be granted in extraordinary circumstances when justification is provided.[179] Even if such an exception is granted, a tribal or local mitigation plan must be submitted to and approved by FEMA within 12 months of an award to that community.[180]

As with other FEMA programs, HMGP assistance is awarded on a competitive basis for cost effective mitigation activities.[181] Because relocating an Alaska Native Village would benefit only a relatively small number of people in remote rural locations, it is unlikely to meet cost efficiency requirements when compared to urban applications, which benefit more people. The local mitigation plan must include a cost benefit review of the proposed mitigation projects.[182] While the U.S. Government Accountability Office (GAO) has recommended including social and environmental factors in cost benefit analyses for projects requested by Alaska Native Tribes, this recommendation has never been adopted.[183]

173. 44 C.F.R. § 206.434(d). The property acquisition or relocation measures are regulated under 44 C.F.R. Part 80.

174. Hazard Mitigation, *supra* note 167, at 4; 42 U.S.C. § 5170c (2012); 44 C.F.R. § 206.432.

175. 44 C.F.R. § 206.432(b)(2).

176. 42 U.S.C. § 5170c(a).

177. *See* 42 U.S.C. § 5170(c); Marlow & Sancken, *supra* note 158, at 305; Sandy Recovery Improvement Act, Pub. L. No. 113–2 § 1110 (2013).

178. 44 C.F.R. § 206.434 (b); 44 C.F.R. § 201.7(4). In 2009, only 33 Alaska Native Villages had a hazard mitigation plan. Marlow & Sancken, *supra* note 158, at 305.

179. Hazard Mitigation, *supra* note 167, at 45.

180. *Id.* at 45–46.

181. 42 U.S.C. 5133(f).

182. 44 CFR § 201.6(c)(3)(iii).

183. U.S. Gov't Accountability Off., GAO-04–142, Alaska Native Villages: Most are Affected by Flooding and Erosion but Few Qualify for Federal Assistance, 5, 41 (2003) [hereinafter Alaska Native Villages].

b. FEMA Flood Mitigation Assistance Grant

Another important federal program that is meant to help in similar circumstances is the Flood Mitigation Assistance program; however, it is also not likely to be helpful to Alaska Native Tribes. The Flood Mitigation Assistance (FMA) was adopted to reduce or eliminate claims under the National Flood Insurance Program (NFIP).[184] The NFIP is a voluntary program to provide federal flood insurance in exchange for local regulations to prevent development in floodplains.[185] To participate in the NFIP, an individual must live in a community that has adopted ordinances satisfying minimum requirements limiting development within Special Flood Hazard Areas, areas designated as at risk from flooding.[186] If a community is enrolled in the NFIP, FMA grants can be used for flood hazard mitigation projects, including relocating individual homes.[187] In addition, all structures in the project sub-application must be insured under the NFIP.[188]

Again, there are challenges for Alaska Native Tribes with this program.[189] Although participation in the NFIP is possible if they had jurisdiction to enforce flood ordinances, ANCSA extinguished tribal jurisdiction over lands;[190] therefore, tribes in unincorporated boroughs or municipalities are not eligible for NFIP programs.[191] In 2021, only 16 of 144 environmentally threatened communities in Alaska participated in the NFIP.[192] One commentator recommended amending NFIP eligibility under 42 U.S.C. § 4022 (2018) to allow Alaska Native Tribes without land jurisdiction to participate in the NFIP "if they exercise their sovereignty over tribal citizens to control their citizens' building in floodplains."[193] In addition to land jurisdiction, there are other salient issues. For example, Alaska Native Tribes often do not have enough resources or the administrative capacity needed to administer the NFIP

184. Hazard Mitigation, *supra* note 167, at 5.

185. 44 C.F.R. § 59.2; 42 U.S.C. §§ 4001–4129.

186. Elizaveta B. Ristroph, *Avoiding Maladaptation to Flooding and Erosion: A Case Study of Alaska Native Villages*, 24 Ocean & Coastal L.J. 110, 122 (2019) [hereinafter Ristroph I].

187. 42 U.S.C. § 4104c.

188. *Individual Flood Mitigation Projects - Applying for Flood Mitigation Assistance's Swift Current Initiative*, Fed. Emergency Mgmt. Agency, https://www.fema.gov/grants/mitigation/floods/swift-current/individual-flood-mitigation-projects [https://perma.cc/T8DX-GG78] (last visited May 31, 2022).

189. Ristroph I, *supra* note 186, at 123; 44 C.F.R. § 59.1.

190. Ristroph I, *supra* note 186, at 123.

191. *Id.*

192. Div. of Cmty & Reg'l Affs., *DCRA Program Analysis Environmentally Threatened Communities* (Feb. 8, 2021), https://storymaps.arcgis.com/stories/ef0e3cb3b47945bfb8baf2e6cf7b4a71 [https://perma.cc/TDC2–7YNR].

193. Ristroph I, *supra* note 186, at 133.

requirements.[194] In addition, NFIP premiums are often prohibitively expensive for tribal members.[195]

For Alaska Native Tribes that are enrolled in the NFIP, there are further barriers to FMA funding. First, applicants and any sub-applicants must have a Hazard Mitigation Plan by the application deadline. Second, the cost share for this program is 75 percent federal / 25 percent non-federal,[196] though FEMA may contribute up to 100 percent for severe repetitive lost properties and up to 90 percent for repetitive lost properties.[197] Third, to be eligible for an FMA grant, the relocation projects must be "cost effective."[198] A project is considered to be cost effective if the benefit-cost analysis (BCA) is 1.0 or greater.[199] As with other programs, it would be hard for Alaska Native Tribes to meet this requirement given their low populations and high construction costs in remote rural communities.[200] Together with limited NFIP enrollment and jurisdictional issues, these barriers make pursuing FMA funding incredibly difficult for Alaska Native Tribes.

c. Building Resilient Infrastructure and Communities (BRIC)

A more recently adopted program—the Building Resilient Infrastructure and Communities (BRIC)—might offer some solutions.[201] The BRIC program replaced the Pre-Disaster Mitigation (PDM) grant program—the competitive FEMA grant program previously used for property acquisition and structure relocation.[202] The PDM program had been designed to assist communities in "implement[ing] a sustained pre-disaster natural hazard mitigation program to reduce overall risk to the population and structures from future hazard events."[203] In fiscal year (FY) 2020, FEMA delivered $178.1 million for the PDM grant program and $597.1 million for HMGP.[204] PDM funding was subject to congressional appropriations.[205] In contrast, the BRIC

194. *Id.*

195. U.S. Gov't Accountability Off., GAO-13–226, Flood Insurance: Participation of Indian Tribes in Federal and Private Programs 17 (2013).

196. Dep't of Homeland Sec., The Department of Homeland Security (DHS) Notice of Funding Opportunity (NOFO), fiscal year 2021 flood mitigation assistance 8 (2021) [hereinafter DHS Flood Mitigation].

197. *Id.* at 8–9.

198. 44 C.F.R. § 79.6(d).

199. DHS Flood Mitigation, *supra* note 196, at 18.

200. Elizaveta B. Ristroph, *When Climate Takes a Village: Legal Pathways toward the Relocation of Alaska Native Villages*, 7 Climate L. 259, 280 (2017) [hereinafter Ristroph II].

201. 42 U.S.C. § 5133.

202. *See* Hazard Mitigation, *supra* note 167, at 4.

203. *Id.*

204. Fed. Emergency Mgmt. Agency, Hazard Mitigation Assistance Division Year in Review: Calendar Year 2020 2 (2021), https://www.fema.gov/sites/default/files/documents/fema_hma-2020-year-in-review-summary_031821.pdf [https://perma.cc/HC6W-S9H2] [hereinafter FEMA, Year In Review].

205. Hazard Mitigation, *supra* note 167, at 4.

grant program has automatically a 6 percent set aside of the assistance FEMA provides under major declared disasters. While available funding for the PDM program in 2019 was $250 million, the BRIC program had $500 million for BRIC in 2020 and $1 billion for 2021.[206] FEMA awards most grants after a national competition.

Like the PDM program, the BRIC program provides federal funds for hazard mitigation activities "with a recognition of the growing hazards associated with climate change, and of the need for natural hazard risk mitigation activities that promote climate adaptation and resilience with respect to those hazards."[207] Only disasters faced by states, territories, and federally recognized tribal governments with a major disaster declaration under the Stafford Act in the seven years prior to the application period start date are eligible to apply for the BRIC grant.[208] Because of numerous natural and COVID-19 major disaster declarations, all states, federally recognized tribes, and territories currently meet this criteria for the FY 2021 grant cycle;[209] however, this might not be the case after the major disaster declarations for the pandemic are lifted.[210] This would make it more difficult for communities facing climate change impacts, like Alaska Native Tribes, to receive funding if Alaska did not experience a recent Stafford Act defined natural disaster.[211]

To be eligible for BRIC, applicants must have a FEMA-approved State or Tribal Hazard Mitigation Plan. In addition, sub-applicants must have a FEMA-approved Local or Tribal Hazard Mitigation Plan under 44 CFR Part 201 by the application deadline. Mitigation projects must include a Benefit Cost Analysis (BCA), derived from the project's total benefits divided by its total cost.[212] The cost share is 75 percent federal / 25 percent non-federal;[213] however, economically disadvantaged rural communities are eligible for a more favorable cost-sharing system: up to 90 percent percent federal / 10

206. FEMA, Year In Review, *supra* note 204, at 10.

207. Dep't of Homeland Sec., The Department of Homeland Security (DHS) Notice of Funding Opportunity (NOFO) Fiscal Year 2021 Building Resilient Infrastructure And Communities 3 (2021), https://www.fema.gov/sites/default/files/documents /fema_nofo-fiscal-year-2021-building-resilient-infrastructure.pdf [https://perma.cc/VK8Z-5CAS] [hereinafter DHS BRIC (2021)].

208. Dep't of Homeland Sec., The Department of Homeland Security (DHS), Notice of Funding Opportunity (NOFO), FY 2020 Building Resilient Infrastructure and Communities 16 (2020) https://www.fema.gov/sites/default/files/2020–08/fema_fy20-bric-notice-of-funding-opportunity_federal-register_August-2020.pdf [hereinafter DHS, BRIC (2020)].

209. DHS, BRIC (2021), *supra* note 207, at 9.

210. Diane P. Horn, Cong. Rsch. Serv., IN11515, FEMA Pre-Disaster Mitigation: The Building Resilient Infrastructure And Communities (Bric) Program 2 (2021).

211. *Id.*

212. DHS, BRIC (2021), *supra* note 207, at 21.

213. *Id.* at 12.

percent non-federal.[214] The BRIC program also allows funding for relocation efforts.[215]

While still new, the BRIC program has not yet been implemented in Alaska for relocation purposes. In 2020, there were 10 applications for relocations nationwide under the program.[216] However, applications focused on the relocation of individual structures rather than community relocation; there was only one application from Alaska.[217] This is an area where coordinated effort and leadership in Alaska may be critical in accessing funding, particularly given the increased focus on meeting under-served community needs.

The inability of under-served communities to access potential funding is receiving federal attention. The Biden Administration adopted the "Justice40 Initiative" with the goal of delivering "at least 40 percent of the overall benefits of relevant federal investment in climate and clean energy to disadvantaged communities."[218] The administration identified 21 priority programs for the implementation, including the BRIC and FMA grant programs.[219] Factors used to name a community "disadvantaged" include, among others: "low income, high and/or persistent poverty; high unemployment and underemployment; racial and ethnic residential segregation; distressed neighborhoods; . . . disproportionate environmental stressor burden and high cumulative impacts; limited water and sanitation access and affordability; disproportionate impacts from climate change; access to healthcare," and also areas within Tribal jurisdictions.[220] Classification of Alaska Native Tribes as under-served communities may open up these programs as avenues for funding for Alaska Native Tribes.

214. *Notice of Funding Opportunity for Fiscal Year 2021 Building Resilient Infrastructure and Communities Grants*, Fed. Emergency Mgmt. Agency (Aug. 9, 2021), https://www.fema.gov/fact-sheet/notice-funding-opportunity-fiscal-year-2021-building-resilient-infrastructure-and#1 [https://perma.cc/J267-P8TL].

215. DHS, BRIC (2021), *supra* note 207, at 22.

216. *Hazard Mitigation Assistance (HMA) Annual Grant Cycle Submissions Summary*, Fed. Emergency Mgmt. Agency (last updated Feb. 3, 2022), https://www.fema.gov/fact-sheet/hazard-mitigation-assistance-hma-annual-grant-cycle-submissions-summary [https://perma.cc/5DRW-XTUX]; *Building Resilient Infrastructure and Communities FY20 Subapplication data*, Fed. Emergency Mgmt. Agency, https://www.fema.gov/sites/default/files/documents/fema_bric-dashboard-data_fy20.csv [https://perma.cc/DC3Z-JH4T].

217. *Building Resilient Infrastructure and Communities*, *supra* note 216 (subgrant ID EMS-2020-BR-040–0001); *Building Resilient Infrastructure and Communities FY 2020 Subapplication Status*, Fed. Emergency Mgmt. Agency (last updated Dec. 13, 2021), https://www.fema.gov/grants/mitigation/building-resilient-infrastructure-communities/after-apply/fy-2020-subapplication-status [https://perma.cc/LL7F-FQN5].

218. *See* Exec. Order No. 14,008 - *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg., 7619 (Feb. 1, 2021), https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/.

219. Off. of Mgmt. & Budget, Exec. Off. of the President, M-21–28, Memorandum for the Heads of Department and Agencies, Interim Implementation Guidance for the Justice40 Initiative (2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21–28.pdf [https://perma.cc/N6N5-KZLR].

220. *Id.* at 2–3.

Further, on November 15, 2021, President Biden signed the Infrastructure Investment and Job Act, releasing $1.2 trillion to tackle the climate crisis and increase U.S. resilience to extreme weather and climate change.[221] The Act makes additional federal funding available to FEMA. Specifically, it provides $700 million per year for the FMA program grant between 2022 and 2026.[222] It also provides $1 billion for the BRIC program over five years, in addition to funding the BRIC program would otherwise receive.[223] The increase in the amount of federal funding could make it possible for Alaska Native Tribes to cover more expenses for their community relocation efforts.

2. Department of Housing and Urban Development's Grant Programs

Another potential set of applicable programs comes through the U.S. Department of Housing and Urban Development (HUD), which has offered limited funding critical to the Alaska examples provided in Part I above. These include the Community Development Block Grant (CDBG), the Indian Community Development Block Grant (ICDBG), the Indian Housing Block Grant (IHBG), and the Native American Housing Block Grant (NAHBG). Like with the FEMA programs, each of these programs offers some potential and many limitations for Alaska Native tribal efforts to manage climate impacts.

HUD's Community Development Block Grant (CDBG) can be used for acquisition, demolition, and disposition of real property for persons of low and moderate income;[224] however, most of this funding is focused on urban areas: approximately 70 percent of CDBG funds are allocated to entitlement communities, defined as (i) principal metropolitan cities, (ii) other cities with populations of 50,000 or greater, and (iii) urban counties with populations of 200,000 or greater.[225] The remaining 30 percent is distributed to states, which allocate to communities that do not qualify for the 70 percent grant.[226] Even then, this funding is available for municipalities or townships that have powers like municipalities.[227] Availability of HUD CDBG funds may be limited for Alaska Native Tribes if they have not been incorporated as a municipality. Another requirement for this grant program is to have a flood insurance

221. *Infrastructure Deal Provides FEMA Billions for Community Mitigation Investments*, Fed. Emergency Mgmt. Agency (Nov. 15, 2021), https://www.fema.gov/press-release/20211115/infrastructure-deal-provides-fema-billions-community-mitigation-investments [https://perma.cc/5L87-K23Q].

222. *Id.*

223. *Id.*

224. 42 U.S.C. §§ 5301 et seq.

225. Joseph V. Jaroscak, Cong. Rsch. Serv., R46733, Community Development Block Grants: Funding and Allocation Processes (2021).

226. *Id.*

227. 24 C.F.R. § 570.3(1).

program in Special Flood Hazard Areas.[228] Both the rural nature and lack of flood insurance are barriers for Alaska Native Tribes.

CDBG funding has been helpful for community relocation. In 2016, HUD provided a $92 million award to Louisiana with $48.3 million allocated for the relocation of the Isle de Jean Charles community, the fourth example in Part I.[229] HUD provided this funding out of the $1 billion in CDBG available for disaster recovery and long-term community resilience through the National Disaster Resilience Competition.[230]

In FY 2021, HUD allocated $3.45 billion in funding for the CDBG.[231] One percent of CDBG funds are set aside for the Indian Community Development Block Grant (ICDBG) program.[232] The ICDBG program provides funding for the acquisition of real property, housing rehabilitation, construction of new housing (under limited circumstances), infrastructure construction, and economic development projects.[233] Eligible applicants are "any Indian tribe, band, group, or nation, including Alaska Indians, Aleuts, and Eskimos, and any Alaska Native Village . . . which is considered an eligible recipient under Title of the Indian Self-Determination and Education Assistance Act."[234] To be eligible for funding, structures in 100-year floodplains must have flood insurance,[235] which many Alaska Native Tribes lack; however, there are the exemptions for imminent threat grants.[236] An imminent threat is defined as "a problem which if unresolved or not addressed will have an immediate negative impact on public health or safety."[237] There are two types of grants under the ICDBG: single purpose grants, which are awarded on a competitive basis, and the imminent threat grants.[238] For example, Newtok has received about $1.4 million imminent threat grants for two houses and funding for the evacuation center.[239] For FY 2021, ten Alaska Native Villages or tribal governments received approximately $7.47 million under the ICDBG single purpose grants for various projects including to replace a potable water distribution system, to

228. Ristroph II, *supra* note 200, at 282 n.136 (citing to 24 C.F.R. § 570.605).

229. State of Louisiana, *supra* note 37, at 115.

230. Jessica R. Z. Simms et al, *The Long Goodbye on a Disappearing, Ancestral Island: A Just Retreat from Isle de Jean Charles*, 11 J. Env't Stud. & Sci. 316, 317 (2021).

231. Consolidated Appropriations Act, Pub. L. No. 116–260, 134 Stat. 1182 (2021).

232. 42 U.S.C. § 5306.

233. 42 U.S.C. § 5305; 24 C.F.R. § 1003.201.

234. *Community Development Block Grant Program for Indian Tribes and Alaska Native Villages*, Grants. Gov, https://www.grants.gov/web/grants/view-opportunity.html?oppId=335356 [https://perma.cc/P7EV-GUNA] (last visited Sept. 2, 2021).

235. 24 C.F.R. § 1003.605(a).

236. Ristroph II, *supra* note 200, at 282.

237. 24 C.F.R. § 1003.605(b). The definition of imminent threat is in 24 C.F.R. § 1003.4.

238. 24 C.F.R. § 1003.100.

239. Elizaveta B. Ristroph, *Navigating Climate Change Adaptation Assistance for Communities: A Case Study of Newtok Village, Alaska*, 11 J. of Env't Stud. and Sci. 329, 334 (2021) [hereinafter Ristroph III].

build an access road to a new landfill, to build a community center, and to rehabiliate twenty-five housing units.[240]

There is a potentially sizable amount of funding available through the ICDBG, though available funding is limited for each individual project. For FY 2021, the federal government allocated about $76 million.[241] Maximum funding per project was $4 million and the minimum is $500,000.[242] For FY 2021, HUD also allocated $280 million for the ICDBG – Imminent Threat with varying grant ceilings of $3.45, $1.725, and $1.035 million respectively. These allocations are based on the amount of funds each Tribal Nation received under the Indian Housing Block Grant under the American Rescue Plan Act of 2021;[243] however, ICDBG-Imminent Threat funding in 2021 was required to only be used to prevent, prepare for, or respond to COVID-19,[244] limiting applicability to climate-related concerns.

A second program is the Indian Housing Block Grant (IHBG) Competitive Grant Program. This program provides grants for affordable housing activities on Tribal Nation reservations and areas.[245] Only a federally recognized Indian Tribe or a tribally designated housing entity (TDHE) or a state recognized Tribe funded under the Indian Housing Program by the United States Housing Act of 1937 (USHA) is eligible for this grant.[246] In FY 2021, estimated total program funding is $95 million for an expected 20 awards.[247] The award ceiling is $5 million and the award floor is $500,000.[248] For FY 2021,

240. FY 2021 Indian Community Development Block Grant Funding Opportunity Number: FR-6500-N-23, U.S. Dept. Hous. & Urb. Dev. (May 26, 2022), https://www.hud.gov/sites/dfiles/PA/documents/ICDBG-Competitive-Awards-2022.pdf [https://perma.cc/76FT-9E2H].

241. Grants.Gov, *supra* note 234.

242. *Id.*

243. American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 243 (Public Law 117–2) [hereinafter ARP].

244. ARP § 11003(a)(2). "Currently set at $450,000 for projects in areas that have not received a Presidential Major Disaster Declaration and $900,000 for areas that have received a Presidential Major Disaster Declaration." U.S. Dept. of Housing & Urb. Dev., Indian Community Development Block Grant - American Rescue Plan Act (ICDBG - ARP) Implementation Notice 21 (2021), https://www.hud.gov/sites/dfiles/OCHCO/documents/2021–22pihn.pdf [https://perma.cc/B7D9-J5VZ].

245. 25 U.S.C. 4101; *Indian Housing Block Grant (IHBG) - Competitive Grant Program*, U.S. Dept. of Housing & Urb. Dev,https://www.hud.gov/program_offices/spm/gmomgmt/grantsinfo/fundingopps/fy21_ihbg [https://perma.cc/8ML2-PDWM] (last visited Sept. 14, 2021) [hereinafter U.S. Dept. of Hud, IHBG].

246. *Indian Housing Block Grants*, Benefits.Gov, https://www.benefits.gov/benefit/844 [https://perma.cc/5A4Y-STMG] (last visited Nov. 30, 2021).

247. *Indian Housing Block Grant (IHBG) - Competitive Grant Program*, Grants.Gov, https://www.grants.gov/web/grants/search-grants.html?keywords=ICDBG [https://perma.cc/G44Z-F9W5] (last visited Nov. 30, 2021).

248. U.S. Dept. of Housing & Urb. Dev, Indian Housing Block Grant, Notice Of Funding Opportunity 11 (2021), https://www.hud.gov/sites/dfiles/SPM/documents/IHBG_CompetitiveGrantProgramDEADLINEUPDATED.pdf [https://perma.cc/3Z5Q-4M5R]

HUD indicated it would prioritize "new construction projects, rehabilitation projects, acquisition of existing housing units that increase housing stock and necessary affordable housing-related infrastructure projects that will enable future construction or rehabilitation."[249] To be considered, the applicant must receive at least 75 out of 102 points; HUD will award grants in order based on the score received.[250] Factors to determine point allocation include possessing managerial and technical staff, the need/extent of the problem, soundness of approach, leveraging resources, comprehensiveness and coordination, and preference points.[251] For FY 2020, two entities from Alaska, the Hydaburg Cooperative Association and Tagiugmiullu Nunamiullu Housing Authority, received $1,893,691 and $4,292,814 respectively under this grant.[252]

A third program is the Native American Housing Block Grant (NAHBG). This is also known as the IHBG Formula Grant, but it is different from the IHBG Competitive Grant Program mentioned above. The NAHBG was established by the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA) to provide assistance for affordable housing related activities for low income families residing on reservations and other tribal areas.[253] Although every federally recognized Tribe, Alaska Native Tribe or tribally designated housing entity (TDHE) is eligible for this funding without a competition, the grant amounts are determined annually based on the tribe's current assisted housing stock and/or housing need.[254] To receive funding, an annual Indian Housing plan must be submitted to and approved by HUD as well as an Annual Performance Report (APR) after the program year ends.[255] Eligible activities include new construction, rehabilitation, infrastructure, and various support services.[256] Generally, only families whose incomes are below 80 percent of the median income are eligible for the grant.[257] The program also requires recipients to have the administrative capacity to undertake the affordable housing activities proposed.[258]

[hereinafter U.S. Dept. of Hud, IHBG NOFO].

249. U.S. Dept. of Hud, IHBG, *supra* note 245.

250. U.S. Dept. of Hud, IHBG NOFO, *supra* note 248, at 60.

251. *Id.* at 29–30.

252. *FY 2020 Competitive Indian Housing Block Grant (IHBG) Awards*, U.S. Dep't. of Hous. & Urb. Dev.Hud, https://www.hud.gov/sites/dfiles/PIH/documents/HUD_IHBG_Competitive_Awards_4.12.21.pdf [https://perma.cc/G5EC-7PDX] (last visited Jan. 13, 2022).

253. Anthony Walters, *Native American, Alaska Native, and Native Hawaiian Housing Programs*, in Advocates' Guide: A Primer on Federal Affordable Housing & Community Development Programs 5–38 (2018).

254. 25 U.S.C. §§ 4103, 4152.

255. Cong. Rsch. Serv., The Native American Housing Assistance and Self-Determination Act of 1996 (Nahasda): Background and Funding 10 (2015).

256. Walters, *supra* note 253, at 5–39. Formula current assisted stock "measures pre-NAHASDA housing stock developed under the 1937 Housing Act programs that the tribes continue to operate." Cong. Rsch. Serv., *supra* note 255, at 10.

257. Walters, *supra* note 253, 5–39; 25 U.S.C. § 4103 (14).

258. 24 C. F. R. § 1000.6 (1998).

Again, this program offers some funding to address Alaska Native tribal needs for managing climate impacts. Of the $647 million allocated for IHBG formula funding in FY 2021,[259] Chevak was awarded $665,425, Newtok was awarded $233,821 and Kivalina was awarded $380,259.[260]

3. Department of the Interior's Bureau of Indian Affairs

In addition to FEMA and HUD grants, the Bureau of Indian Affairs provides funding to federally recognized tribes through several programs. These include a Tribal Transportation Program,[261] the Housing Improvement Program,[262] and the Indian Self-Determination and Education Assistance Act.[263] Although BIA funding is limited, it does not require a non-federal cost share and can be used as a match for other grants.[264]

The Tribal Transportation Program (TTP) is a part of the Federal Aid Highway Program but managed jointly by the BIA and the Federal Highway Administration.[265] The TTP provides "safe and adequate transportation and public road access to and within Indian reservations, Indian lands, and Alaska Native Village communities."[266] The program received $505 million funding in FY 2020.[267] Funds are awarded via a statutory formula based on "a tribe's FY2011 funding share, tribal population, road mileage, and average funding for FY2005 through FY 2012.[268] For example, in FY 2020, Chevak received $674,207.84, Newtok $511,709 and Kivalina $162,078.83, respectively.[269]

The BIA's Housing Improvement Program (HIP) provides funding for home repair, renovation, replacement and new housing construction for federally recognized tribes.[270] A member of a federally recognized tribe is eligible

259. Consolidated Appropriations Act, 2021 (Pub. L. No. 116–260).

260. Dep't Of Hous. And Urb. Dev., Fiscal Year 2021 IHBG Allocations (2021), https://www.hud.gov/sites/dfiles/PA/documents/IndianBlockGrantChart.pdf [https://perma.cc/P59M-TVJQ].

261. 23 U.S.C. § 201, *et. seq.*; 25 C.F.R. §§ 170.1–942.

262. 25 U.S.C. § 13; 25 C.F.R. Part 256.

263. 25 U.S.C. § 5301 *et seq.*; *See* Ristroph III, *supra* note 239, at 334.

264. Ristroph III *supra* note 239, at 334; *see* 25 C.F.R. §§ 256.29, 1000.405.

265. *Tribal Transportation Program*, U.S. Dep't. of Interior, Indian Aff., https://www.bia.gov/regional-offices/great-plains/indian-reservation-roads-program [https://perma.cc/E4PT-8ZGU] (last visited Oct. 13, 2021).

266. *Tribal Transportation Program*, Off. of Tribal Transp., U.S. Dep't. of Transp. (last updated Feb. 9, 2021), https://highways.dot.gov/federal-lands/programs-tribal [https://perma.cc/6QHP-J34B].

267. *Id.*

268. William J. Mallett, Cong. Rsch. Serv., Highways And Highway Safety On Indian Lands 6 (2016).

269. *Tribal Shares and Planning Funds under the FAST Act*, Office of Tribal Transportation- Finance, U.S. Dep't. of Transp., https://highways.dot.gov/federal-lands/programs-tribal/finance [https://perma.cc/WE5D-Q736] (last updated May 21, 2021).

270. 25 C.F.R. § 256.5; *Housing Improvement Program*, U.S. Dep't. of the Interior https://www.bia.gov/bia/ois/dhs/housing-improvement-program [https://perma.cc/9RMW-7B7T] (last visited Oct. 13, 2021).

for HIP assistance if their income does not exceed 150 percent of the U.S. Department of Health and Human Services (DHHS) Poverty Guidelines, they have substandard housing, have no other resources for housing assistance, and live in an approved tribal service area.[271] HIP funds are allocated based on a priority ranking and point system to identify those applicants most in need of housing assistance.[272] HIP has again provided a limited source of funding for community impacts in Alaska. In 2020, Newtok received funding to construct two small two-bedroom houses, which were around $150,000 each.[273] Going forward, this program may provide more funding. While the annual funding amounts for the HIP for FY 2020 and FY 2021 were $10,008,000 respectively, the American Rescue Plan Act appropriated an additional $100 million for 2021.[274]

Finally, the BIA has a Tribal Climate Resilience Program (TCRP) to support federally recognized tribes and tribal organizations for projects about tribal resilience, ocean and coastal management, and planning.[275] In 2021, BIA provided more than $13.84 million to dozens of federally recognized tribes and tribal organizations to conduct resilience training and workshops, conduct vulnerability assessments and draft adaptation plans, ocean and coastal management, and address planning for relocation, managed retreat, and protect-in-place.[276] The program has a competitive funding process.[277] Of the 135 total awards, 60 were awarded to Alaska Native Tribes; however, award amounts are generally very limited. For example, Kivalina received $141,440 for erosion protection analysis and design, and Chevak received $148,312 for permafrost vulnerability assessment and $145,071 for riverine erosion assessment.[278]

The Bipartisan Infrastructure Deal provided $466 million in funding for the BIA.[279] Of this, $216 million is allocated for "[t]ribal climate resilience,

271. 25 C.F.R. § 256.6; U.S. Dep't. of the Interior, Indian Affs., *Housing Improvement Program*, https://www.bia.gov/bia/ois/dhs/housing-improvement-program [https://perma.cc/9RMW-7B7T] (last visited Oct. 13, 2021).

272. Housing Improvement Program, 80 Fed. Reg. 69589, 69590 (Dec. 10, 2015) (to be codified at 25 C.F.R. pt. 256).

273. Ristroph III, *supra* note 239, at 334.

274. Personal Communication to Ekrem Korkut from the Bureau of Indian Affs., Freedom of Information Act Request (Dec. 9, 2021) (on file with author).

275. *BIA Announce Tribal Climate Resilience Grants Totaling $13.84 Million Awarded for FY 2021*, Bureau of Indian Affs., (Sept. 24, 2021), https://www.bia.gov/news/bia-announces-tribal-climate-resilience-grants-totaling-1384-million-awarded-fy-2021[https://perma.cc/4Q4Q-S369].

276. *Tribal Climate Resilience Program 2021 Funding Awards Summary*, Bureau of Indian Aff. (Sept. 16, 2021), https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/tcrp/2021_Award_Summary_.pdf [https://perma.cc/3SQN-66TC].

277. *Id.*

278. *Id.*

279. *Bipartisan Infrastructure Deal Makes Historic Investments in Tribal Infrastructure and Climate Resiliency*, U.S. Dep't. of the Interior (last updated Nov. 10, 2021), https://www.doi.gov/pressreleases/bipartisan-infrastructure-deal-makes-historic-investments-tribal-

adaptation and community relocation planning, design and implementation of projects which address the varying climate challenges facing Tribal communities across the country."[280] How much might go to Alaska Native Tribes is unclear.

Taken together, these federal programs offer a piecemeal mix of opportunities for funding that are lamentably caveated by numerous restrictions and limitations. While FEMA, HUD, and BIA programs do allow for some funding to address Alaska Native tribal needs, these resources are greatly limited by regulations, cost benefit requirements, other limitations, and funding amounts. Despite recommendations from the U.S. Government Accountability Office on how to modify these programs to address Alaska Native tribal needs,[281] Congress has so far failed to act. While there are other federal and state efforts to manage climate change impacts for Alaska Native Tribes (see below), there are significant opportunities to closely examine existing federal programs and refine them to meet critical and timely needs, especially given the calls under Justice40 to address critical climate and justice needs.

IV. Other Federal and State Efforts

In addition to these federal programs, there are other federal and state programs addressing climate impacts in Alaska. For example, the U.S. government has focused on climate change impacts in Alaska through the Denali Commission, created in 1998. The State of Alaska has also adopted various efforts to protect Alaska Native Tribes from climate change impacts including creating the Alaska Climate Change Impact Mitigation Program (ACCIMP) and designating the Department of Commerce, Community, and Economic Development (DCCED) as the lead agency to coordinate the relocation assistance. Each of these efforts is described below.

A. *Denali Commission*

Congress established the Denali Commission in 1998 to "provide critical utilities, infrastructure, and economic support throughout Alaska, focusing on Alaska's remote communities."[282] The Commission's broad authority allows it to coordinate relocation efforts. In 2015, the Obama Administration asked the Denali Commission to coordinate federal, state and tribal resources to address the impacts of climate change in Alaska's remote communities.[283] In

infrastructure [https://perma.cc/GGF4–8P53].

280. *Id.*

281. *See* Alaska Native Villages *supra* note 183.

282. Elizaveta B. Ristroph, *Fulfilling Climate Justice and Government Obligations to Alaska Native Villages: What is the Government Role?*, 43 Wm. & Mary Env't. L. & Pol'y Rev. 501, 519 (2019); Denali Commission Act of 1998, Pub. L. No. 105–277, 112 Stat. 2681 (codified as amended at 42 U.S.C. § 3121).

283. FACT SHEET, *President Obama Announces New Investments to Combat Climate Change and Assist Remote Alaskan Communities*, White House (Sept. 2, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/09/02/fact-sheet-president-obama-announces-new-investments-combat-climate [https://perma.cc/92HY-3Z94].

the same year, the Commission created a new Village Infrastructure Protection (VIP) program focused first on the 31 communities identified as immediately threatened by erosion, flooding and permafrost degradation by the 2009 GAO Report 09–551.[284] The VIP program's goal is to mitigate these impacts with respect to safety, health and the protection of infrastructure.[285] By 2019, the VIP program received $39.6 million of the Denali Commission's appropriated funds. This included a one-time $15 million allocation of funding, used in Mertarvik, the relocation site for Newtok.[286] The program also provided $7 million to Kivalina, Shaktoolik, and Shishmaref for, among other actions, "detailed flood studies, protective berm designs, setting up engineering 'term' contracts to advance specific resilience projects, design of new bulk fuel facilities, evacuation road match funding . . . relocation of threatened graves, making improvement to community evacuation centers and evacuation routes, moving threatened homes."[287] In 2021, the Commission received $18.1 million[288] and for FY 2022, the Commission requested the same from Congress.[289] While the Commission directly recognizes the need for coordination and implementation, like other programs, the amount of funding is severely limited compared to the need. Although the Denali Commission has devoted almost one-third of its funding to the VIP program, it is estimated that the need for the VIP program is in the hundreds of millions.[290] Again, while the program may exist, the funding is woefully insufficient to address the needs of the affected communities.

B. *State of Alaska's Efforts*

The State of Alaska has also focused on climate impacts affecting Alaska Native Tribes. Before a federal disaster can be declared, there must be a state or tribal disaster declaration.[291] Alaska's definition of disaster is similar to the federal disaster definition.[292] Alaska defines "disaster" as "the occurrence or imminent threat of widespread or severe damage, injury, loss of life or property, shortage of food, water, or fuel resulting from (A) an incident *such as*

284. Denali Commission, Village Infrastructure Protection Program 2 (2019), https://www.denali.gov/wp-content/uploads/2019/03/VIP-fact-sheet-web.pdf [https://perma.cc/ZXK7-KU8F] [hereinafter Denali Commission, VIP].

285. Denali Commission, Strategic Plan Fy 2018–2022 12 (2017), https://www.denali.gov/wp-content/uploads/2018/03/Denali_Commission_FY2018_-_2022_Strategic_Plan_-_Final_Executed_document_-_10–4-17.pdf [https://perma.cc/WLR8-HLEB].

286. Denali Commission, VIP, *supra* note 284; Ristroph III, *supra* note 239, at 333.

287. Denali Commission, VIP, *supra* note 284.

288. Denali Commission, Congressional Budget Justification Fiscal Year 2022 5 (2021), https://secureservercdn.net/198.71.233.52/02e.11d.myftpupload.com/wp-content/uploads/2021/06/Budget-Justification-2022-Final.pdf [https://perma.cc/2RGA-833Q].

289. *Id.*

290. Denali Commission, VIP, *supra* note 284.

291. Elizaveta B. Ristroph, *Improving Justice and Avoiding Colonization in Managing Climate Change Related Disasters: A Case Study of Alaska Native Villages*, 7(2) Am. Indian L.J. 97, 105 (2019); 42 U.S.C. § 5170(b) [hereinafter Ristroph IV].

292. *Adaptive Governance Framework*, *supra* note 160, at 367.

storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, avalanche, snowstorm, prolonged extreme cold, drought, fire, flood, epidemic, or riot."[293] The text does not limit the incident to these enumerated events because of the words "such as." To date, however, Alaska has not used this provision to declare a disaster resulting from thawing permafrost or coastal erosion faced by Alaska Native Tribes.

Even if Alaska recognized thawing permafrost and coastal erosion as disasters, funding would still be limited. Generally, funding provided by the State is no more than $500,000 per incident to prevent an incident that "poses a direct and imminent threat of sufficient magnitude and severity," and no more than $1 million to respond to a state-declared disaster.[294] For example, the governor declared a public health disaster due to COVID-19 and released $1 million in funding to respond to the outbreak.[295]

In 2006, Newtok Village asked for assistance from the Division of Community and Regional Affairs (DCRA) within the Alaska DCCED with its relocation process.[296] As a result, DCRA organized the Newtok Planning Group to coordinate assistance for Newtok's relocation effort.[297] As described briefly in Part I, the Newtok Planning Group is an informal group of representatives from federal, state, tribal and non-profits agencies. As a result of these discussions, Newtok Village applied for different grants and was able to secure the necessary funding to start their relocation process. After this experience in

293. Alaska Stat.. § 26.23.900(2)(A) (italics added).

294. *Id.* § 26.23.020(h), (i). Although there are exceptions to this rule: "(k) The governor may expend more than $500,000 of state funds to cope with an incident under (h) of this section or more than $1,000,000 of state funds to cope with a disaster under (i) of this section under the following circumstances:

(1) if the legislature is in session, the legislature approves a financing plan to cope with the incident or disaster that identifies the amount in excess of the expenditure limits that is to be expended from state funds; or

(2) if the legislature is not in session, either

(A) the governor convenes a special session of the legislature within five days after declaring the condition of disaster emergency or within five days after providing a financing plan to cope with an incident to the legislature and the legislature convenes in special session and approves a financing plan to cope with the incident or disaster that identifies the amount in excess of the expenditure limits that is to be expended from state funds;

(B) the presiding officers of both the house of representatives and the senate agree that a special session should not be convened and so advise the governor in writing." *Id.* § 26.23.020(k).

295. Off. of Governor Mike Dunleavy, State of Alaska, Declaration of Public Health Disaster Emergency (2021), https://covid19.alaska.gov/wp-content/uploads/2021/01/01.15.21-Disaster-Declaration.pdf [https://perma.cc/6CME-2TBN].

296. *Newtok Planning Group*, Alaska Dep't Cmty. Com. Econ. Dev., Div. of Cmty. & Reg'l Affs. (last updated June 10, 2021) [hereinafter Alaska Dcced, *Newtok*], https://www.commerce.alaska.gov/web/dcra/planninglandmanagement/newtokplanninggroup.aspx [https://perma.cc/Q274-SUQ2].

297. *Id.*

Newtok, Alaska designated DCCED as the lead agency to coordinate relocation assistance in 2008.[298]

In 2008, the State of Alaska also adopted the Alaska Climate Change Impact Mitigation Program (ACCIMP) to provide technical assistance and funding to immediately threatened communities because of climate change impacts.[299] The six eligible communities categorized as imminently threatened by the effects of climate change included Kivalina, Koyukuk, Newtok, Shaktoolik, Shishmaref, and Unalakleet.[300] The program allocated non-competitive funding to these six communities (between $10,000 and $50,000 for hazard impact assessments, and up to $150,000 for planning services), and the program administered other funding through a competitive grant process (again between $10,000 and $50,000 for hazard impact assessments, and up to $150,000 for planning services);[301] however, the Alaska Climate Change Sub-Cabinet's Immediate Action Work Group (IAWG), which shaped the creation of ACCIMP, became dormant in 2011.[302]

At this point, DCRA provides assistance to environmentally threatened communities together with the Denali Commission, the Alaska Native Tribal Health Consortium, and other state and federal agencies.[303] Such assistance includes local planning and access to the local government resource DCRA offers.[304] Currently, DCRA focuses on 27 communities ranked highest in combined threat in the 2019 Statewide Threat Assessment Report.[305] DCRA also formed the Kivalina Inter-Agency Planning Work Group to coordinate resources and technical assistance to Kivalina from state and federal agencies, regional organizations, and local governments.[306] This work group was estab-

298. GAO (2009), *supra* note 16, at 40.

299. *Community Resilience Programs*, Alaska Dep't Cmty. Com. Econ. Dev., Div. of Cmty. & Reg'l Affs., https://www.commerce.alaska.gov/web/dcra/CommunityResilienceandClimateAdaptationPrograms.aspx (last modified Apr. 5, 2022) [https://perma.cc/3359-SYUP].

300. 3 Alaska Admin. Code § 195.040 (2022).

301. *Id.*

302. Robin Bronen, Climate-Induced Displacement of Alaska Native Communities 18 (Brookings-LSE, 2013) https://www.brookings.edu/wp-content/uploads/2016/06/30-climate-alaska-bronen-paper.pdf [https://perma.cc/A7EC-82TJ] [hereinafter Climate-Induced Displacement]; Ristroph II, *supra* note 200, at 269.

303. *Assistance to Environmentally Threatened Communities*, Alaska Dep't Cmty. Com. Econ. Dev., Div. of Cmty. and Reg'l Affs., https://www.commerce.alaska.gov/web/dcra/PlanningLandManagement/EVCs.aspx [https://perma.cc/3N2Q-75C7] (last visited Oct. 8, 2021).

304. *Id.*

305. *Id.*; *See generally* Univ. of Alaska Fairbanks Inst. of N. Eng'g, *supra* note 2 at A-10.

306. *Kivalina Inter-Agency Planning Work Group*, Alaska Dep't Cmty. Com. Econ. Dev., Div. of Cmty. and Reg'l Affs., https://www.commerce.alaska.gov/web/dcra/PlanningLandManagement/KivalinaInter-AgencyPlanningWorkGroup.aspx [https://perma.cc/FR8L-WY6R] (last visited Oct. 8, 2021).

lished during the development of the Kivalina Strategic Management Plan between 2014 and 2016.[307] DCRA formed similar work groups for Shaktoolik and Shismaref.[308]

While these planning efforts are necessary, they are insufficient to meet the needs of the Alaska Native Tribes. Below are a number of recommendations on how to meet these critical needs in a more timely manner.

V. Recommendations

This paper has reviewed critical challenges for Alaska Native Tribes facing chronic and critically damaging environmental hazards like thawing permafrost and coastal erosion in Alaska. This Part summarizes critical questions and then recommends how these concerns might be addressed to ensure both climate resilience and environmental justice.

A. *Relocation, but to where?*

First, a community wishing to relocate needs somewhere to go. According to ANCSA § 22(f), the Secretaries of Interior, Defense, Agriculture, or the State of Alaska can exchange lands with the corporations organized by Native Groups, Village Corporations, Regional Corporations, and other municipalities to affect land consolidations or to facilitate the management of land or development of land, or for other public purposes.[309] Federal lands constitute 61.3 percent of land ownership in Alaska;[310] therefore, the federal government has the authority to execute land exchanges.[311] ANCSA § 17(d)(1) also allows the Secretary of the Interior to withdraw federal public lands for review and to determine "which lands should be included in the conservation system, which lands should be made available for use under the public lands laws, and which lands should be made available to the State and Alaska Natives for land selections."[312] Although these withdrawals were intended to be temporary, many of them are still under the control of the federal government.[313]

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307. *Id.*

308. *Shaktoolik Inter-Agency Planning Work Group*, Alaska Dep't Cmty. Com. Econ. Dev., Div. of Cmty. and Reg'l Affs., https://www.commerce.alaska.gov/web/dcra/PlanningLandManagement/ShaktoolikInter-AgencyPlanningWorkGroup.aspx [https://perma.cc/7TTC-TMQD] (last visited Nov. 6, 2021); *Shishmaref Inter-Agency Planning Work Group*, Alaska Dep't Cmty. Com. Econ. Dev., Div. of Cmty. and Reg'l Affs., https://www.commerce.alaska.gov/web/dcra/PlanningLandManagement/ShishmarefInter-AgencyPlanningWorkGroup.aspx [https://perma.cc/Q5XD-3GJT] (last visited Nov. 6, 2021).

309. 43 U.S.C. § 1621 (f).

310. Ristroph II, *supra* note 200, at 284., fn. 146 (citing Laura A. Hanson, Carla N. Argueta, & Carol Hardy Vincent, Cong. Rsch. Serv., Federal Land Ownership: Overview and Data 7 (2017)).

311. *See id.* at 277, 285.

312. Complaint for Declaratory and Injunctive Relief at 3, State of Alaska v. Haaland (D. Alaska 2022), 2022 WL 772968.

313. *Id.*

A second option, discussed by E. Barrett Ristroph, author of numerous articles about the climate change impacts on Alaska Native Tribes, is relocating to nearby land owned by the village corporation. If an Alaska Native Tribe has a good relationship with the village corporation, this option would be a smoother process.[314] For example, the Native Village of Nuiqsut relocated on its own between 1972 and 1973 with funding from Arctic Slope Regional Corporation in 1974;[315] however, Alaska Native Corporations point out that because they are for profit, it is not appropriate for them to support Alaska Native tribal relocation efforts.[316] With that said, they are not prohibited from doing so.[317]

A third option is "'conglomerated co-relocation,' where several Alaska Native Tribes collectively relocate to a new site (or adjacent sites connected by roads)."[318] Through this kind of relocation, tribes could share their infrastructure. Some examples of this relocation are "pooling resources through a regional tribal housing authority, merging village corporations" with each other or regional corporation, "or forming an 'umbrella' to provide services."[319] One disadvantage of conglomerated co-relocation is competition among Alaska Native Tribes, especially with regard to subsistence resources.[320] Residents of rural communities harvest resources from traditional lands and waters, which has occurred for generations through a process of cooperation and reciprocity with others in their community. Consolidation of communities into a new area would disrupt this pattern, leading to complications including cultural loss, discrimination, economic marginalization, and social isolation.[321] Subsistence rights need to be grandfathered and protected in the new site.[322]

B. *Amendment of Federal Law and Regulations*

There are at least three potential changes to federal laws and regulations that could be made to significantly help Alaska Native Tribes. First, as mentioned above, because of the limited definition of disaster in the Stafford Act, the Act should be amended to include slow gradual environmental changes

314. Ristroph II, *supra* note 200, at 274.

315. *Nuiqsut*, Arctic Slope Regional Corporation, https://www.asrc.com/about/our-communities (last visited April 18, 2022) [https://perma.cc/75AJ-VEMH].

316. Ristroph II, *supra* note 200, at 282.

317. *Id.* at 283.

318. *Id.* at 276.

319. *Id.*

320. *Id.* at 277; *see* also Eli Keene, *Lessons from Relocations Past: Climate Changes, Tribes, and the Need for Pragmatism in Community Relocation Planning*, 42 Am. Indian L. Rev. 259, 271 (2017). (The Army Corp sees collocation as detrimental to community identity and fears it may then be perceived as a "forced" process). Keene, at 271.

321. Victoria Herrmann, The United States' Climate Change Relocation Plan: What Needs To Happen Now 5 (2017), https://www.atlanticcouncil.org/wp-content/uploads/2017/08/The_United_States_Climate_Change_Relocation_Plan_web_1030.pdf [https://perma.cc/Y7KF-DQZF].

322. Ristroph II, *supra* note 200, at 287.

that cause damage, injury, loss of life, property and infrastructure.[323] This would allow the President to declare coastal erosion and thawing permafrost as a disaster and release necessary federal funding for Alaska Native Tribes. This would also open eligibility for other existing programs. One may argue that broadening this definition would increase the number of disaster declarations beyond what FEMA could afford.[324] In order to prevent this enormous demand, traditional knowledge from Alaska Natives could be used. For example, incorporating the definition of "usteq" would set a threshold to claim a disaster declaration.[325]

Second, there is a significant need for community-based relocation that is supported by a clear coordinated federal leadership. An institutional framework should be created similar to voluntary acquisitions or hazard mitigation grants.[326] As one commentator noted, "rather than just buying and demolishing a handful of individual homes," FEMA can protect whole communities from future disasters by implementing community relocations.[327] In 2020, the U.S. Government Accountability Office recommended that Congress establish "a pilot program with clear federal leadership to identify and provide assistance to communities that express affirmative interest in relocation as a resilience strategy."[328] Officials from the Denali Commission, FEMA, HUD, and NOAA indicated to the GAO that it was not clear who should lead relocation efforts.[329] They noted the lack of a clear federal leadership "has limited the ability of Alaska Native Villages to navigate federal program requirements, pool federal funding sources, and secure technical assistance for relocation planning and implementation."[330] Many large cities, counties, and boroughs now have resilience officers who provide the expertise to effectively plan mitigation and adaptation strategies and secure federal funds for these activities. A potential solution would be for federal agencies to fund resilience officers at Alaska Native Regional Non-Profit Corporations to assist with navigating federal requirements for funding.

A third area to consider is addressing cost-benefit and matching requirements. It is difficult for small and remote Alaska Native Tribes to meet the

323. Climate-Induced Displacement, *supra* note 302, at iv.

324. Ristroph II, *supra* note 200, at 288.

325. *See* Bronen et al., *supra* note 4, at 201.

326. Dr. Bronen recently proposed a framework for a relocation framework and its components. *See* Robin Bronen, *Rights, Resilience and Community-Led Relocation: Creating a National Governance Framework*, 45 Harbinger -N.Y.U. Rev. L. & Soc. Change 25 (2021), https://socialchangenyu.com/harbinger/rights-resilience-and-community-led-relocation [https://perma.cc/8SAK-8Q46].

327. Christopher Flavelle, *US Flood Strategy Shifts to Unavoidable Relocation of Entire Neighborhoods*, N.Y. Times (Aug. 26, 2020), https://www.nytimes.com/2020/08/26/climate/flooding-relocation-managed-retreat.html [https://perma.cc/Y5TV-ZBRE].

328. GAO (2020), *supra* note 1, at 45.

329. *Id.* at 38.

330. *Id.* at 38–39.

cost benefit requirement. To pass muster, social—for example, cultural values and traditional kinship ties—and environmental factors (ecosystem services) should be considered.[331] In addition, the non-federal cost share should be waived for Alaska Native Tribes.[332] If this is not possible, the State of Alaska should lend support to Alaska Native Tribes. Although the BRIC program allows a 10 percent non-federal cost share for economically disadvantaged rural communities, this amount might be still difficult to meet for some Alaska Native communities. Like BIA grant programs, FEMA hazard mitigation assistance grants should be eligible for being used as a match for applications for other grants. The Justice40 Initiative may help by providing extra points to disadvantaged communities when such a community applies for a federal grant program related to climate change and clean energy, including BRIC and FMA grant programs. The success of this initiative will be seen in FY 2021 when the federal agencies announce awardees for the first time after the Justice40 Initiative became effective. Taken together, finding ways to coordinate and leverage existing and expanded funds is critical to address climate impacts to Alaska Native communities.

C. *State of Alaska*

Changes at the federal level could be matched by changes by the State of Alaska. Many Alaska Native Tribes lack the technical expertise to relocate their communities. Pooling federal funding from multiple sources could be challenging; this, in turn, could depend on dedicated staff to identify appropriate federal programs and ensure requirements are met.[333] Alaska Native Tribes are often understaffed, reacting to disruptions from a changing climate such as coastal inundation and erosion, and lack the capacity to effectively plan mitigation and adaptation strategies.[334] As noted above, the Division of Community and Regional Affairs (DCRA) within the Department of Commerce, Community, and Economic Development (DCCED) has a trusted working relationship with environmentally threatened communities such as Newtok. A long-term solution would be to provide increased capacity at DCRA to navigate through different FEMA and HUD programs to expedite funding from these agencies and provide expertise and assistance to environmentally threatened communities. The know-how gained by the DCRA through the Newtok Planning Group or other inter-agency working groups could be transformed into a permanent body with dedicated staff. Funding should exist permanently

331. Ristroph IV, *supra* note 291, at 110.

332. *See* 42 U.S.C. § 5170(c).

333. U.S. Gov't Accountability Off., GAO-20–127, A Strategic Investment Approach for High Priority Projects Could Help Target Federal Resources (2019), https://www.gao.gov/assets/gao-20–127.pdf [https://perma.cc/4CLD-S82C].

334. U.S. Gov't Accountability Off., GAO-22–104241, Federal Agencies Could Enhance Support for Native Village Efforts to Address Environmental Threats 32 (2022).

rather than on a project basis. Such staff could prepare local or tribal mitigation plans when needed and apply to FEMA, HUD, or other federal programs on behalf of Alaska Native Tribes seeking relocation assistance.[335] Similarly, DCRA staff could prepare environmental impact statements (EIS) or environmental assessments (EA) for any necessary reviews under the National Environmental Policy Act (NEPA). By expanding DCRA's role or a similar division within the Alaska DCCED, each Alaska Native Tribe does not have to spend its resources and time to learn different federal funding resources. Pooling necessary staff in DCCED will increase the expertise and will make it easier to apply to programs for every community.

If DCCED did not fit these needs, another agency that could be designated for the relocation assistance is the Division of Homeland Security & Emergency Management (DHS & EM) within the Alaska Department of Military and Veteran Affairs, which prepared an HMGP application on behalf of the Newtok Village in 2015.[336] Regardless, better coordination, staffing, and dedicated funding within the State of Alaska is also critical.

Conclusion

There are many Alaska Native Tribes immediately threatened by flooding, coastal erosion, and/or thawing permafrost. Some of these communities are currently seeking community relocation; however, many federal programs are not available because what are seen as more gradual environmental changes are not categorized as disasters. Moreover, the lack of a federal framework for community relocation projects makes it extremely difficult for communities to find and secure necessary funding. These concerns can be addressed. Amending the federal Stafford Act to categorize thawing permafrost and coastal erosion as a disaster, building a framework for community relocations, and revising benefit cost analysis and matching requirements for federal grant programs for economically disadvantaged Alaska Native Tribes are all potential actions that can be taken now. Leveraging the Justice40 Initiative may be a way to focus on the critical justice needs facing Alaska Natives.

State action is also critical. Until the federal government acts on these time-sensitive issues, putting together different federal program grants seems to be the only path to follow to start such relocation projects; however, applying and going through the federal grant programs requires technical expertise. Where it exists, the federal government should fund resilience officers at regional Alaska Native organizations to assist the tribes they serve with navigating federal requirements for funding. Parallel to this, the State of Alaska

335. HMGP and the BRIC program can be used to receive funding for the preparation of local or tribal mitigation plans. *See* Grant Programs Directorate, Federal Emergency Management Agency et al., Newtok Village: Tribal Hazard Mitigation Plan Update (2015), https://www.commerce.alaska.gov/web/Portals/4/pub/2015_Newtok_HMP.pdf [https://perma.cc/ALH6–55GC].

336. *Id.*

should design a body or designate dedicated staff within DCCED to apply for federal grant programs on behalf of those communities if requested by them. The staff can also prepare local or tribal mitigation plans, provide support for NEPA reviews, or put together documents that might be needed to apply for these programs. The staff would gain expertise by preparing applications for different ANVs for different grant programs. In this way, Alaska Native people could live in safer communities resilient to climate change impacts.