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## Erosion-Induced Community Displacement in Newtok, Alaska and the Need to Modify FEMA and NEPA to Establish a Relocation Framework for a Warming World

Ashley Rawlings

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## **Cover Page Footnote**

She would like to thank her family and friends for encouraging her throughout law school, with special thanks to Professor Randy Abate who was a source of continuous support and provided a wealth of knowledge on environmental justice issues.

# Erosion-Induced Community Displacement in Newtok, Alaska and the Need to Modify FEMA and NEPA to Establish a Relocation Framework for a Warming World

*Ashley Rawlings*<sup>†</sup>

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## I. INTRODUCTION

Located 400 miles from the nearest road,<sup>1</sup> the small indigenous community of Newtok, Alaska consists of 354 Yup'ik Eskimos,<sup>2</sup> often referred to as Alaskan Natives. The Natives of Newtok have lived near the Bering Sea coast for more than 2,000 years, engaging in traditional subsistence activities of fishing and hunting.<sup>3</sup> The Natives are inextricably tied to the land. They have a history of traveling with the migration of fish and game, and structuring their lives around the fishing, hunting, and berry-collecting seasons.<sup>4</sup> Decades ago, the village relocated between the Newtok and Ninglick Rivers as the animal migration patterns changed,<sup>5</sup> to an area encompassing one square mile.<sup>6</sup>

The Natives' existence in Newtok is in a state of emergency as climate change has stormed in over the past decades.<sup>7</sup> Climate change is impacting many federally recognized indigenous tribes in Alaska with 86 percent of Alaska Native villages affected by flooding and erosion.<sup>8</sup> The impacts affecting Newtok are attributed to rising temperatures, which cause thawing permafrost,<sup>9</sup> loss of sea ice, and sea level rise.<sup>10</sup> When the

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1. Anna York, *Alaska Village Stands on Leading Edge of Climate Change*, THE UNIV. OF N.C. AT CHAPEL HILL, <http://unc.news21.com/index.php/stories/alaska.html> (last visited Nov. 3, 2014) [hereinafter UNC].

2. NEWTOK PLANNING GROUP, RELOCATION REPORT: NEWTOK TO MERTARVIK 6 (Aug. 2011), available at [http://www.commerce.state.ak.us/dcra/planning/ngp/pub/Mertarvik\\_Relocation\\_Report.pdf](http://www.commerce.state.ak.us/dcra/planning/ngp/pub/Mertarvik_Relocation_Report.pdf). [hereinafter *Relocation Report*].

3. *Newtok Village Relocation History Part One: The Qaluyarmiut - People of the Dip Net*, STATE OF ALASKA DEP'T OF COMMERCE, COMMUNITY, AND ECON. DEV., [http://commerce.state.ak.us/dnn/dcra/planninglandmanagement/newtokplanninggroup/newtokvillage\\_relocationhistory/NewtokHistoryPartOne.aspx](http://commerce.state.ak.us/dnn/dcra/planninglandmanagement/newtokplanninggroup/newtokvillage_relocationhistory/NewtokHistoryPartOne.aspx) (last visited Sept. 25, 2014) [hereinafter *People of the Dip*].

4. *Impossible Choice Faces America's First Climate Change Refugees*, NAT'L PUB. RADIO (May 18, 2013), <http://www.npr.org/2013/05/18/185068648/impossible-choice-faces-americas-first-climate-refugees>.

5. Mark Dowie, *Relocating Network*, ORION MAGAZINE (2010), <http://www.orionmagazine.org/index.php/articles/article/5928#>.

6. U.S. ARMY CORPS OF ENG'RS, ALASKA DIST., ALASKA VILLAGE EROSION TECHNICAL ASSISTANCE PROGRAM 26 (2006), available at [http://www.housemajority.org/coms/cli/AVETA\\_Report.pdf](http://www.housemajority.org/coms/cli/AVETA_Report.pdf) [hereinafter *Assistance Program*].

7. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-142, ALASKA NATIVE VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION, BUT FEW QUALIFY FOR FEDERAL ASSISTANCE 3 (2003) [hereinafter GAO 2003 Report].

8. *Id.* at 2.

9. Permafrost is soil or rock that remains frozen for at least two consecutive years. Much of today's permafrost formed anywhere between 150 to 10,000 years ago. *What is Permafrost?*, INT'L PERMAFROST ASSOC. (2014), available at <http://ipa.arcticportal.org/resources/what-is-permafrost>.

10. *Id.*

Ninglick River overtook the Newtok River, the land buffer between the village and the Ninglick was lost; now, the Ninglick is moving closer to Newtok due to recurrent floods and the resulting erosion.<sup>11</sup> As a result of the problems caused by climate change, flooding, and erosion, the majority of Newtok is projected to be underwater by 2017.<sup>12</sup> The cost to relocate the village is estimated to cost between \$80-200 million.<sup>13</sup> Despite enormous cost, the villagers have decided to relocate to Mertarvik.<sup>14</sup> However, Newtok does not have the financial ability to fund the relocation and is unable to qualify for the majority of federal grants due to the stringent federal cost-sharing requirements, which are geared towards mitigation. The result leaves Newtok with few avenues to seek relocation assistance.<sup>15</sup>

Two solutions that would assist Newtok in obtaining funding involve the Federal Emergency Management Agency (FEMA). FEMA standards as set forth in the Stafford Act, which offer the Natives no hope of acquiring funding for relocation attributable to climate change, must be amended to create a FEMA cost-sharing exception. Additionally, FEMA's only current relocation initiative requires a natural disaster declaration; therefore, FEMA standards as set forth in the Stafford Act must be amended to create a community relocation grant program. The inevitable relocation, combined with the imminent threat of flooding and continued erosion, has placed significant obstacles in Newtok's path of obtaining FEMA grant funding to improve existing infrastructure.<sup>16</sup> The majority of the FEMA grant programs require recipient cost-sharing and a federal disaster declaration.<sup>17</sup> However, Newtok is ineligible for the majority of FEMA funding programs because Newtok is unable to pay the hefty cost-sharing requirement needed for project consideration and construction,

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11. *Relocation Report*, *supra* note 2.

12. *Assistance Program*, *supra* note 6.

13. See U.S. ARMY CORPS OF ENG'RS ALASKA DIST., STUDY FINDINGS AND TECHNICAL REPORT: ALASKA BASELINE EROSION ASSESSMENT 10 (Mar. 2009), available at [http://www.climatechange.alaska.gov/docs/iaw\\_usace\\_erosion\\_rpt.pdf](http://www.climatechange.alaska.gov/docs/iaw_usace_erosion_rpt.pdf) (Army Corps' estimated cost is \$95-125 million).

14. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION 28 (2009) [hereinafter GAO 2009 Report].

15. *Id.* at 37-38.

16. *Relocation Report*, *supra* note 2, at 7.

17. The Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288 (codified as amended at 42 U.S.C. §§ 5121-5208 (2006)) [hereinafter Stafford Act] (describing when and how the federal government will fund pre- and post-disaster projects).

and recurrent floods and erosion are not one-time disasters that qualify as a federal disaster declaration.<sup>18</sup>

A third solution that would help accelerate Newtok's relocation would be to amend the National Environmental Policy Act (NEPA) to mandate a lead state agency in addition to a lead federal agency. NEPA mandates that a relocation project be evaluated with the help of a lead federal agency to ensure the project is environmentally sound.<sup>19</sup> While there are many individual organizations assisting Newtok in the form of project grants and project assistance, there is not one agency that is taking the lead.<sup>20</sup> At any given time, nearly twenty agencies are involved in the funding and relocation process.<sup>21</sup> However, because there is no lead federal agency to head the evaluation, it places an additional hurdle in Newtok's path to relocation: acquiring a lead federal agency and funding.<sup>22</sup> Various state agencies, such as the Department of Commerce, have helped tribes acquire funding, but no state agency is prepared to handle all climate change project requests, calling attention to the dire need of a lead state agency to work with the NEPA appointed federal agency.<sup>23</sup>

Part II of this paper examines how climate change is impacting the Newtok community and causing an imminent need for relocation. Part III reveals how the existing legal framework fails to provide a remedy to Newtok's predicament. Part IV proposes three possible remedies to assist Newtok Village. First, the existing FEMA grant guidelines should be modified to create a cost-sharing exception where social and environmental factors are evaluated to potentially waive the cost-sharing requirement. Second, the existing FEMA grant guidelines should be modified to establish a community grant relocation program to shift the focus away from mitigation when it is an inappropriate remedy. Finally, NEPA should be amended to appoint a lead state agency to monitor the progress of a lead federal agency appointment. Any of the three proposed remedies, creating a FEMA cost-sharing exception, a FEMA community

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18. GAO 2009 Report, *supra* note 14, at 38-39. Newtok is eligible for the Pre-Disaster Mitigation Program, which provides funding to states and tribes for mitigation projects; however, eligibility for this grant requires a disaster mitigation plan and a cost-benefit analysis. *Id.*

19. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f) (1970) [hereinafter NEPA].

20. See *Assistance Program*, *supra* note 6; GAO 2009 REPORT, *supra* note 14, at 38.

21. *Newtok Planning Group*, STATE OF ALASKA DEP'T OF COMMERCE, COMMUNITY, AND ECON. DEV., <http://commerce.alaska.gov/dnn/dcra/PlanningLandManagement/NewtokPlanningGroup/NewtokVillageRelocationHistory/NewtokHistoryPartFour.aspx> (last visited Sept. 30, 2014).

22. GAO 2009 Report, *supra* note 14, at 42-43.

23. *Id.* at 40.

relocation grant program, or amending NEPA to require a lead state agency, could save Newtok from a dismal fate.

## II. THE IMMINENT RELOCATION OF NEWTOK DUE TO CLIMATE CHANGE INDUCED EROSION.

### A. *The History of the Newtok Alaskan Natives*

Flooding and erosion have laid siege on the coastline of Newtok, Alaska in a traditional and remote Yup'ik Eskimo village. Located on a lowland plain within the Yukon Delta National Wildlife Refuge near the Bering Sea, and between the Ninglick and Newtok Rivers,<sup>24</sup> villagers known as the Qaluyaarmiut, or "dip net people," have lived in the area for over two thousand years.<sup>25</sup> The ancestors of the Yup'ik first arrived in Alaska approximately eleven thousand years ago when they migrated from Siberia.<sup>26</sup> All of the current residents speak Yup'ik and maintain a traditional lifestyle based around family and subsistence hunting and are inextricably linked to nature and the land upon which they live.<sup>27</sup> Traditionally, men lived in community houses known as qasgiq's<sup>28</sup> and women and young children lived in ena's.<sup>29</sup>

As part of the Refuge, Newtok is surrounded by a variety of birds, fish, mammals, and berries.<sup>30</sup> Over the decades, Natives relocated to different home sites across the coastline or established summer camp locations to preserve their subsistence lifestyle by following the migration patterns of wildlife.<sup>31</sup> When a consistent food source was found, the villagers would settle in that location temporarily and make driftwood houses for shelter and to store their harvested foods.<sup>32</sup> Newtok was one

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24. See Immediate Action Workgroup, Recommendations Report to the Governor's Subcabinet on Climate Change 17 (Apr. 2008), [http://www.climatechange.alaska.gov/docs/iaw\\_rpt\\_17apr08.pdf](http://www.climatechange.alaska.gov/docs/iaw_rpt_17apr08.pdf) [hereinafter IAW 2008 Recommendations].

25. *Id.*

26. RICK HILL ET AL., NAT'L GEOGRAPHIC, INDIAN NATIONS OF NORTH AMERICA 131 (2010).

27. *Relocation Report*, *supra* note 2.

28. All males lived in qasgiq's, which are a semi-subterranean men's house made out of animal parts. This is where boys learned how to be men by learning from their elders. Qasgiq's also served as large community centers and were the sites of ceremonies and dances. See *Cultures of Alaska: Yup'ik and Cupik*, ALASKA NATIVE HERITAGE CENTER, <http://www.alaskanative.net/en/main-nav/education-and-programs/cultures-of-alaska/yupik-and-cupik> (last visited Nov. 3, 2014).

29. *Id.* Ena's were smaller residences than qasgiq's and had space for women to cook.

30. *People of the Dip*, *supra* note 3.

31. *Id.*

32. Dowie, *supra* note 5.

such migratory settlement when, in 1949, the Natives moved to the current site across from the Newtok River.<sup>33</sup>

The migratory history of the Yup'ik changed when the Federal Bureau of Indian Affairs (BIA) mandated that the villagers send their children to BIA schools in other cities or states or build their own schools.<sup>34</sup> Due to their regional ancestral ties, the villagers opted to remain in the region, and in 1958, the BIA built the Newtok School.<sup>35</sup> During the summers, the villagers would make a temporary move by dogsled to a camp at Nilikluguk.<sup>36</sup> There, they hunted salmon and herring, and searched for berries, always returning to Newtok for the winter.<sup>37</sup> However, the semi-nomadic tradition that the Yup'ik had maintained for so long ended.<sup>38</sup> The summer camp was abandoned in the 1970s due to landslides that altered the shoreline and impacted the seasonal movement of fish and game.<sup>39</sup> This is just one example where creating a community relocation grant program and mandating a lead state agency would assist communities as soon as need arises instead of ignoring an imminent threat and allowing it to fester for decades.

The establishment of the BIA school, paired with the end of the decades old seasonal migration, led to a more modern community. Newtok now has amenities such as a clinic, post office, and updated wooden houses<sup>40</sup> connected by boardwalks to various community buildings.<sup>41</sup> However, the remoteness of Newtok is not forgotten when a small airplane makes a landing to distribute supplies needed to survive in the Arctic.<sup>42</sup> Despite its remote coastal location, residents remain mobile by traveling via snowmobile, all-terrain vehicle, or boat. Unfortunately, however, climate change has caused a negative disruption to the traditional Yup'ik

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33. HILL ET AL., *supra* note 26, at 133. However, the Natives would continue to relocate during the spring months.

34. Dowie, *supra* note 5. See also Suzanne Goldenberg, *America's first climate change refugees*, THE GUARDIAN, May 30, 2013, <http://www.theguardian.com/environment/interactive/2013/may/13/newtok-alaska-climate-change-refugees>.

35. *People of the Dip*, *supra* note 3.

36. HILL ET AL., *supra* note 26, at 133.

37. Mary C. Pete, *Subsistence Herring Fishing in the Eastern Bering Sea Region*, ALASKA DEP'T OF FISH & GAME (Feb. 1991), <http://www.subsistence.adfg.state.ak.us/download/Technical%20Papers/tp192.pdf>.

38. HILL ET AL., *supra* note 26, at 133.

39. Pete, *supra* note 37. See also GAO 2003 Report, *supra* note 7, at 9 (stating that because Alaska Natives are inextricably tied to the land, they have "few adaptive strategies, and their traditional way of life is becoming increasingly vulnerable.").

40. *Id.* At this time, qasgiq's and ena's were abandoned altogether.

41. UNC, *supra* note 1.

42. *Id.*

way of life in Newtok, forcing Natives to modify their way of life to adapt to the ever-changing landscape.<sup>43</sup>

### *B. Climate Change Erodes Newtok*

The National Aeronautics and Space Administration (NASA) estimates that Arctic sea ice could be gone by the end of this century.<sup>44</sup> The lack of sea ice and the overall thinning of sea ice make coastlines vulnerable to erosion and flooding.<sup>45</sup> Over the past five decades, extreme changes have occurred in the landscape surrounding Newtok. The Arctic Climate Impact Assessment warned “climate change could have potentially devastating impacts on the Arctic . . . particularly those indigenous peoples whose livelihoods and cultures are inextricably linked to the Arctic environment and its wildlife.”<sup>46</sup> A report by the Intergovernmental Panel on Climate Change found that these climate changes are “very likely,” with 90 percent certainty, human-made.<sup>47</sup>

In the decades after the Natives settled in Newtok, they became aware that the bank of the Ninglick River was eroding.<sup>48</sup> The City of Newtok requested and received state funding for an assessment of the erosion problem and an evaluation of alternatives for erosion control to protect several miles of the Ninglick riverbank.<sup>49</sup> In 1983, the Ninglick River Erosion Assessment was conducted; the erosion assessment included sets of aerial photographs dated 1957, 1974, 1977, and 1983.<sup>50</sup> This assessment determined that between 1957 and 1983, the north bank of the Ninglick

43. *Relocation Report*, *supra* note 2.

44. *The Arctic Perennial Sea Ice Could Be Gone by End of the Century*, NASA (Oct. 23, 2003), [http://www.nasa.gov/vision/earth/environment/Perennial\\_Sea\\_Ice.html](http://www.nasa.gov/vision/earth/environment/Perennial_Sea_Ice.html). See generally James E. Overland & Muyin Wang, *Future Regional Arctic Sea Ice Declines*, 34 *GEOPHYSICAL RES. LETTERS* L17705 (2007) (forecasting that Bering Sea ice will decrease by more than fifty percent by the end of the century), available at <http://onlinelibrary.wiley.com/doi/10.1029/2007GL030808/pdf>.

45. Arctic wide, the September sea ice is fifty percent less than in 1980 and the existing ice is thinner. See U.S. DEPT. OF COMMERCE, NAT’L OCEANIC AND ATMOS. ADMINISTRATION, *REGIONAL CLIMATE TRENDS AND SCENARIOS FOR THE U.S. NATIONAL CLIMATE ASSESSMENT 14* (Jan. 2013), available at [http://www.nesdis.noaa.gov/technical\\_reports/NOAA\\_NESDIS\\_Tech\\_Report\\_142-7-Climate\\_of\\_Alaska.pdf](http://www.nesdis.noaa.gov/technical_reports/NOAA_NESDIS_Tech_Report_142-7-Climate_of_Alaska.pdf) [hereinafter National Climate Assessment].

46. *Arctic Climate Impact Assessment*, CAMBRIDGE UNIVERSITY PRESS 659 (2005) available at [http://www.acia.uaf.edu/PDFs/ACIA\\_Science\\_Chapters\\_Final/ACIA\\_Ch12\\_Final.pdf](http://www.acia.uaf.edu/PDFs/ACIA_Science_Chapters_Final/ACIA_Ch12_Final.pdf).

47. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 3* (Susan Solomon et al. eds., 2007), available at <http://www.slvwd.com/agendas/Full/2007/06-07-07/Item%2010b.pdf>.

48. *Newtok Planning Group*, STATE OF ALASKA DEP’T OF COMMERCE, CMTY. AND ECON. DEV., <http://commerce.state.ak.us/dnn/dcra/planninglandmanagement/newtokplanninggroup/newtokvillagerelocationhistory/newtokhistoryparttwo.aspx> (last visited Sept. 27, 2014) [hereinafter *Early Efforts*].

49. *Id.*

50. *Id.*

River had eroded at an average annual rate of nineteen to eighty-eight feet, depending on the upstream or downstream location, and that if the erosion could not be slowed, community structures would be endangered within twenty-five to thirty years (calendar years 2008-2013).<sup>51</sup>

Among its earliest attempts to combat erosion, in 1987, the villagers placed a \$750,000 sandbag wall along the riverbank.<sup>52</sup> However, this attempt was futile as it did nothing to stop the erosion.<sup>53</sup> Ultimately, the Governmental Accountability Office (GAO) concluded that seawalls will not protect the Newtok coastline against the rapid rate of erosion.<sup>54</sup> Erosion is not the only problem plaguing Newtok; the thinning of sea ice is further endangering the Natives' way of life.

Contributing to the thinning of sea ice is the Alaskan climate, which has warmed 3.1°F from 1949 to 2008, causing sea ice to thin dramatically.<sup>55</sup> During the summer months between 1979-2006, Bering Sea ice decreased thirty-nine to forty-three percent each year from the spring, attributed to increasing temperatures.<sup>56</sup> The remaining Arctic sea ice amounted to just sixty-six percent of the sea ice that was present in 1979.<sup>57</sup> The effects of melting sea ice were felt in 1996 when the Newtok River was overtaken by the Ninglick River.<sup>58</sup> Because of its precarious position along two rivers, the loss of this land buffer caused Newtok to bear the brunt of decades of storms and floods.<sup>59</sup> Severe floods in 2004 and 2005 caused Newtok to be surrounded by water for days and led to

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51. *Id.*

52. GAO 2003 Report, *supra* note 7, at 34.

53. *Id.*

54. GAO 2009 Report, *supra* note 14, at 34.

55. Brooke Stewart, Changes in Frequency of Extreme Temperature and Precipitation Events in Alaska 9 (2011) (M.S. thesis, University of Illinois at Urbana-Champaign), available at [https://www.ideals.illinois.edu/bitstream/handle/2142/24093/Stewart\\_Brooke.pdf?sequence=1](https://www.ideals.illinois.edu/bitstream/handle/2142/24093/Stewart_Brooke.pdf?sequence=1).

56. Arctic wide, the September sea ice is 50 percent less than in 1980 and the existing ice is thinner. See NATIONAL CLIMATE ASSESSMENT, *supra* note 45.

57. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30, [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf). See also Julienne C. Stroeve et al., *The Arctic's Rapidly Shrinking Sea Ice Cover: A Research Synthesis*, 110 CLIMATIC CHANGE 1005 (2012) (describing how the western part of Alaska is experiencing thinner and younger sea ice).

58. *Newtok Village Relocation History*, NEWTOK PLANNING GROUP, STATE OF ALASKA DEP'T OF COMMERCE, <http://commerce.alaska.gov/dnn/dcray/planninglandmanagement/newtokplanninggroup/newtokvillagerelocationhistory/NewtokHistoryPartThree.aspx> (last visited Sept. 28, 2014) [hereinafter *Relocation History*].

59. *Id.*

Newtok's inclusion in two federal disaster declarations, DR-1571-AK<sup>60</sup> and DR-1618-AK.<sup>61</sup>

The severe floods created other problems as well. The Newtok River was used as a sewage disposal site, but because of the loss of the riverbank, the waste has no way to exit the River.<sup>62</sup> The waters of the Newtok River are stagnant and when flooding occurs, the water impedes on the village, causing a threat to villagers' health and safety.<sup>63</sup> A 2006 survey, conducted by the Yukon Kuskokwim Health Corporation, found that the potency of Newtok's drinking water was inadequate and the community had "high levels of contamination" from honey bucket waste.<sup>64</sup> The decline in Newtok's infrastructure led to the hospitalization of 29 percent of Newtok infants with lower respiratory illnesses.<sup>65</sup>

Newtok faces additional problems that stem from soil erosion. One such problem involves the Newtok River, which is only navigable at high tide, restricting villagers' access to their subsistence hunting, homes, facilities where fuel and necessities are delivered, and the landfill.<sup>66</sup> As many as sixty buildings have been abandoned because of their location near the shore.<sup>67</sup> The melting of permafrost, frozen anywhere from centuries to millenia ago, also causes the infrastructure of anything built on top of it to tilt or collapse— as did the Newtok landfill and barge landing.<sup>68</sup> Warming temperatures lead to melting sea ice, which accelerates warming because it means there are fewer ice caps to reflect the sun's rays,<sup>69</sup> and causes sea levels to rise, which leads to erosion eating away at Newtok's shoreline.<sup>70</sup> Increased melting also causes the thawing of permafrost; when this happens, methane is released from the permafrost and warming accelerates.<sup>71</sup> The constant melting also makes it difficult to

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60. *Federal Disaster Funds Ordered For Alaska to Aid State Local Govt. Storm Recovery*, FEMA (Nov. 16, 2004), <https://www.fema.gov/news-release/2004/11/16/federal-disaster-funds-ordered-alaska-aid-state-and-local-government-storm>.

61. *President Declares Major Disaster for Alaska*, FEMA (Dec. 10, 2005) <https://www.fema.gov/news-release/2005/12/10/president-declares-major-disaster-alaska>.

62. *Relocation History*, *supra* note 58.

63. *Id.*

64. *Relocation History*, *supra* note 58.

65. Stanley Tom, *Presentation to Immediate Action Workgroup*, NEWTOK TRADITIONAL COUNCIL (2007), [http://www.climatechange.alaska.gov/docs/Newtok\\_6NOV07bww.pdf](http://www.climatechange.alaska.gov/docs/Newtok_6NOV07bww.pdf).

66. *Relocation History*, *supra* note 58.

67. UNC, *supra* note 1.

68. *Relocation History*, *supra* note 58. See *Permafrost*, ALASKA PUB. LANDS INFO. CTR., <http://www.alaskacenters.gov/permafrost.cfm> (last visited Nov. 5, 2014).

69. *Arctic Climate Impact Assessment*, *supra* note 46, at 34, available at [http://www.acia.uaf.edu/PDFs/ACIA\\_Science\\_Chapters\\_Final/ACIA\\_Ch02\\_Final.pdf](http://www.acia.uaf.edu/PDFs/ACIA_Science_Chapters_Final/ACIA_Ch02_Final.pdf).

70. GAO 2009 Report, *supra* note 14, at 12.

71. *Id.*

determine when the ice is thick enough for travel. This uncertainty impacts the way native peoples use the land and water, and affects their connection to their village when engaged in subsistence activities; it also jeopardizes their safety.<sup>72</sup>

In 2003, the GAO reported that most of Alaska's more than two hundred Native villages were affected to some degree by flooding and erosion, with thirty-two facing imminent threats and four requiring relocation. Newtok was one of the four.<sup>73</sup> The 2003 GAO report prompted Congress to order the Army Corps of Engineers (Corps) to assess the threat and estimate relocation costs for the most at risk villages.<sup>74</sup> The Corps was given authority to conduct an Alaska erosion baseline study to coordinate, plan, and prioritize responses to erosion in Alaska Native village communities.<sup>75</sup> The assessment, completed in 2006, set timeframes before the villages would be lost to erosion.<sup>76</sup>

A similar assessment involved the Corps' evaluation of aerial images of Newtok and revealed alarming statistics about erosion. Aerial images of the shoreline, taken between 1954 and 2003, were evaluated and it was determined that average rates of erosion along the Ninglick River varied from thirty-six feet to over eighty-three feet per year, depending on the up or downstream location.<sup>77</sup> Specifically, the shoreline in front of the village was eroding at sixty-eight feet per year.<sup>78</sup> The Corps' study also revealed that the land was in imminent danger of being lost to flooding and erosion, and projected that Newtok had ten to fifteen years—between 2016 and 2021—before it would be fully lost to erosion. The cost to relocate was projected to be between \$80-200 million.<sup>79</sup> However, in 2006, the Corps estimated it would cost over \$90 million in future erosion protection to stay in Newtok, which would include a mile-long erosion retaining wall.<sup>80</sup>

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72. NATIONAL CLIMATE ASSESSMENT, *supra* note 45, at 21.

73. GAO 2009 Report, *supra* note 14, at 12.

74. *Id.* at 1.

75. Consolidated Appropriations Act, Pub. L. No. 108-447, Div. C, Title I, § 117, 118 Stat. 2944-45 (2004).

76. *Assistance Program*, *supra* note 6 (predicting that Newtok had ten to fifteen years before the community would have to relocate, at a cost of \$80-130 million).

77. UNC, *supra* note 1.

78. *Id.* See also Notice of Intent To Prepare a Draft Programmatic Environmental Impact Statement for Community Relocation, Newtok, AK, 70 Fed. Reg. 20113-14 (Apr. 18, 2005) (explaining how the Corps intended to, and ultimately prepared, a draft environmental impact statement to evaluate the feasibility of erosion protection measures) [hereinafter Notice of Intent].

79. See *Assistance Program*, *supra* note 6. GAO 2009 Report, *supra* note 14, at 10. GAO 2003 Report, *supra* note 7, at 7-8.

80. The \$90 million future erosion protection price tag was the most expensive of the seven villages discussed in the report, highlighting the need for relocation versus mitigation; Kaktovik had the second highest cost at \$40 million. See *Assistance Program*, *supra* note 6.

Ultimately, the conclusion among the various agencies involved was that stopping the erosion would be too expensive and relocation was the most viable option.<sup>81</sup>

To address the cumulative effects of melting permafrost and thinning sea ice, the Newtok Traditional Council (Council) began the relocation process by analyzing potential relocation sites.<sup>82</sup> In 1996, the villagers selected a location nine miles southwest of Newtok called Mertarvik.<sup>83</sup> That land, however, was under the control of the U.S. Fish and Wildlife Service (USFWS).<sup>84</sup> The Council hired a consultant to develop relocation plans through funding provided by the BIA and the Corps.<sup>85</sup> Reports were prepared that detailed the relocation, evaluated alternatives, and requested government assistance.<sup>86</sup> In 2002, the Corps analyzed the site and determined it was feasible for development.<sup>87</sup> Given that Newtok was deemed an “imminently threatened” village, the USFWS exchanged the land with the Natives in 2003 and established Mertarvik as property of the villagers.<sup>88</sup>

Co-location was also discussed as a relocation option. The Corps evaluated the option of moving Newtok to an existing community;<sup>89</sup> however, Newtok elders do not want to co-locate with any other village, citing likely destruction of their culture and identity.<sup>90</sup> Regarding the issue of co-location, the principal of the Newtok School stated, “[w]e would forget who we are.”<sup>91</sup> Echoing the concern over destruction of culture and the need for a relocation remedy, a Native civic leader from the village of Shishmaref stated, “[i]f we don’t get assistance for relocation, then we face elimination by dissemination and dispersal. People will be forced to relocate by themselves, as individuals or families, not as a community of people. If that happens, we lose our culture and traditions.”<sup>92</sup> This perspective rings true for Newtok as well, and highlights the need for a

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81. UNC, *supra* note 1.

82. UNC, *supra* note 1.

83. *Id.*

84. *Assistance Program*, *supra* note 6.

85. UNC, *supra* note 1.

86. *Id.*

87. *Assistance Program*, *supra* note 6.

88. LAND EXCHANGE—ALASKA NATIVE VILLAGE CORPORATION, Pub. L. 108-129, 117 Stat. 1358 (Nov. 17, 2003).

89. *See Assistance Program*, *supra* note 6 (stating that co-locating to a nearby community would cost an estimated \$76 million).

90. Dowie, *supra* note 5.

91. *Id.*

92. *Id.*

FEMA cost-sharing exception and a FEMA community relocation grant program.

To move forward with relocation, in 2006, the Council requested relocation assistance from the Department of Commerce, Community, and Economic Development (DCCED).<sup>93</sup> To implement the coordination for relocating Newtok, the Newtok Planning Group was assembled to provide a forum for the then-ten federal agencies and nine state agencies to pool expertise, leverage resources, and develop a relocation plan.<sup>94</sup> The goal of the Newtok Planning Group has been partially fulfilled in that the planning led to the construction of an access road, three homes, and several buildings at Mertarvik.<sup>95</sup> However, a full relocation has been encumbered with delays due to federal and state laws, which limit the accessibility of project funding and require specific evaluations to be conducted by a non-existent lead federal agency.

### III. THE DOMESTIC LEGAL FRAMEWORK'S FAILURE TO ADDRESS NEWTOK'S PREDICAMENT

#### A. Federal Protections of Tribal Rights

The United States has a trust responsibility to tribes, often referred to as the "federal trust doctrine," which includes a duty to manage tribal lands and resources and protect tribal sovereignty.<sup>96</sup> Many treaties, statutes, regulations, and court cases reference this federal trust relationship. In 1787, the federal trust doctrine was created via the Northwest Ordinance.<sup>97</sup> This doctrine holds that "[t]he utmost faith shall always be observed towards the Indians, their lands, and property shall never be taken from them without their consent."<sup>98</sup> The federal government deems this relationship as a government-to-government relationship.<sup>99</sup> It is a widely accepted principle that "Indians . . . have an unquestionable right to the lands they occupy;"<sup>100</sup> however, Alaska was once Russian territory, resulting in numerous legal enactments affecting Alaskan tribes.

In 1867, the Treaty of Cession between Russia and America stated that dependent Natives should be "maintained and protected [by the

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93. *Planning Group*, *supra* note 21.

94. *Id.*

95. *Id.*

96. See generally NELL JESSUP NEWTON ET. AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1 (2006).

97. Northwest Ordinance of 1787, *microformed on* M332, Fiche 9, (Nat'l Archives).

98. *Id.*

99. Indian Tribal Justice Support Act, 25 U.S.C. §§ 3601-3631, 3601(1) (2012).

100. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

United States] in the free enjoyment of their liberty, property, and religion.”<sup>101</sup> Prior to western involvement, Natives held aboriginal title to the majority of Alaskan land.<sup>102</sup> Native tribes were classified as uncivilized and thus not eligible for treaty protection, which led the federal government to enact protections for these tribes.<sup>103</sup> In 1884, Congress declared that Natives should not be disturbed in their land possession, but it was up to Congress to determine how Natives could acquire title to the land.<sup>104</sup>

Alaska followed the federal approach in the Alaska Organic Act, which permitted Indians to continue to use their land, but reserved the right to enact future legislation.<sup>105</sup> In 1906, in an attempt to civilize the Natives, the Alaska Native Allotment Act was passed, which allotted 160-acre homesteads to Eskimos and Indians.<sup>106</sup> Townships were awarded to Natives in 1926 by the passage of the Alaska Native Townsite Act.<sup>107</sup> By 1932, Natives were deemed to have the same status as Indians in the rest of the United States and were subject to the same laws and regulations governing the Indians.<sup>108</sup>

Although cases upheld the protection of Natives in the “use or occupation” of their lands,<sup>109</sup> this protection extended only to the use of the land, not to the title of the land.<sup>110</sup> The Indian Reorganization Act was passed in 1934 and created six Alaskan reservations.<sup>111</sup> These townships were overseen by the BIA until 1971, when the Alaska Native Claims Settlement Act (ANCSA) was enacted.<sup>112</sup> This Act ended aboriginal title, awarded the Natives forty million acres, settled the Natives’ claims to the

101. 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, U.S.-Russia, art. 3, June 20, 1867, 15 Stat. 539.

102. Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203 (codified as amended at 43 U.S.C §§ 1601-1629h (2000) [hereinafter ANCSA]. Aboriginal title refers to an Indian’s right of occupancy gained by occupying and using the land continuously and exclusively, but which can be extinguished by purchase, conquest, or declaration.

103. 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, *supra* note 101.

104. H.R. Rep. No. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2193.

105. The Organic Act of May 17, 1884, 23 Stat. 24 Sec. 8. (1884).

106. Alaska Native Allotment Act of 1906, Pub. L. No. 171, 34 Stat. 197 (1906) (formerly codified at 43 U.S.C. §§ 270-1 to 210-3 (1970)) (repealed by 43 U.S.C. §1617).

107. Alaska Native Townsite Act, Pub. L. No. 69-280, 44 Stat. 629 (1926), (formerly codified at 43 U.S.C §§ 733-37, *repealed by* Sec. 703(a) of the Federal Land Policy and Mgmt. Act (1976), 90 Stat. 2789).

108. Status of Alaska Natives, 53 I.D. 593, I Ops. Sol. 303, 310 (1932).

109. *Id.*

110. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 27 (1955).

111. Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934).

112. Alaska Native Settlement Claims Act, 43 U.S.C. 1601(b) (1971) [hereinafter ANSCA].

land rights, and established Native village corporations, such as the Newtok Native Corporation and regional corporations.<sup>113</sup> Establishing Native village corporations meant that village residents must organize through the government as a for-profit or a nonprofit corporation before the village could receive land patents or benefits.<sup>114</sup> This meant that natives had more protection than just the right to use and occupy land. However, ANCSA dispossessed Natives of 320 million acres of traditional lands.<sup>115</sup> Natives were paid nearly \$1 billion in funds and mineral revenues.<sup>116</sup> Native villages were not designated as tribes until 1993.<sup>117</sup> The federal government's obligation to protect tribal sovereignty and manage tribal resources includes the duty to acknowledge when a tribe can no longer be maintained in its traditional land and a subsequent duty to advocate for tribal relocation. With the federal government on Newtok's side, advocating for Newtok's relocation, the government agencies described below are obligated to assist in the effort.

### *B. Federal Disaster Programs*

Before Alaska became a state, the federal government monitored erosion on Alaskan waterways.<sup>118</sup> A 2004 congressional report acknowledged that there is no single federal or state agency assigned to assist or coordinate relocation efforts for any threatened indigenous community.<sup>119</sup> There are several domestic disaster preparation and recovery programs; however, despite their level of need, tribes have trouble satisfying the programs' strict qualification guidelines.<sup>120</sup> Currently, there is no federal entity that prioritizes and grants assistance based on level or length of need or severity of future harm.<sup>121</sup> This fact means that agencies prioritize projects based on their individual criteria, which does not guarantee that the neediest villages move to the top of the funding line.<sup>122</sup>

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113. 43 U.S.C. §§ 1611, 1613, 1618 (2012).

114. ANCSA, *supra* note 112, §§ 1606-1607.

115. See JAY H. BUCKLEY, WILLIAM CLARK: INDIAN DIPLOMAT 229 (2012) (describing the acquisition and distribution of Indian lands).

116. ANCSA, *supra* note 112, §1605.

117. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54364-01 (Oct. 21, 1993). Newtok Village is a federally recognized tribe and is therefore eligible to receive services of the BIA. For the full list of federally recognized tribes. See 79 Fed. Reg. 4748-02 (Jan. 29, 2014).

118. Dowie, *supra* note 5.

119. H.R. Conf. Rep. No. 108-792, at 858 (2004).

120. GAO 2009 Report, *supra* note 14, at 22-24.

121. *Id.* at 36-38.

122. GAO 2009 Report, *supra* note 14, at 32.

### 1. Federal Emergency Management Agency

The Federal Emergency Management Agency (FEMA) is the nation's lead domestic disaster preparation agency.<sup>123</sup> FEMA receives its authority to provide most of its federal disaster response activities from the Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).<sup>124</sup> The goal of FEMA is to enhance the efforts and available resources of state and local governments in reducing the damage that results from major disasters.<sup>125</sup> All of the enumerated FEMA disasters typically are one-time events.<sup>126</sup> FEMA defines "major disaster" 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.<sup>127</sup>

A mitigation program provides funding for mitigation planning and projects with the goal of reducing risk to people and buildings, which, in turn, reduces dependence on the government when disaster strikes.<sup>128</sup> The purpose of mitigation activities is to protect people from natural hazards by reducing the impact of a future disaster; therefore, mitigation projects can be started before, during, or after a disaster.<sup>129</sup> There are five disaster mitigation programs and two disaster recovery programs that can be utilized in conjunction with state resources.<sup>130</sup>

The FEMA mitigation grants programs are virtually unattainable for communities seeking funding for non-natural disasters due to their specific qualification criteria. The Hazard Mitigation Grant Program provides funds to states and tribes to reduce the risk of future damage caused by natural disasters.<sup>131</sup> However, there must be a federal disaster declaration and a disaster

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123. Stafford Act, *supra* note 17.

124. *Id.*

125. Stafford Act, *supra* note 17.

126. *Id.* § 5122.

127. Buckley, *supra* note 115.

128. *What is Mitigation?*, FEMA, <http://www.fema.gov/what-mitigation> (last visited Nov 2, 2014).

129. *National Mitigation Framework*, FEMA 2-3 (2013), [http://www.fema.gov/media-library-data/20130726-1914-25045-9956/final\\_national\\_mitigation\\_framework\\_20130501.pdf](http://www.fema.gov/media-library-data/20130726-1914-25045-9956/final_national_mitigation_framework_20130501.pdf).

130. Stafford Act, *supra* note 17, § 5133.

131. Stafford Act, *supra* note 17, § 5165.

mitigation plan in place to qualify for funding.<sup>132</sup> The Pre-Disaster Mitigation Program provides funding to states and tribes for mitigation projects.<sup>133</sup> However, there must be a disaster mitigation plan and a cost-benefit analysis in place.<sup>134</sup> When conducting a cost-benefit analysis, a state prioritizes all of the submitted projects statewide and reviews projects for cost effectiveness; a one-time natural disaster is more likely to be approved for funding than a recurrent problem attributed to side effects of climate change.<sup>135</sup>

The Flood Mitigation Assistance Program provides funding to states and communities for developing flood plans or to fund projects to reduce flood damage.<sup>136</sup> However, the recipient must be a participant in the National Flood Insurance Program (NFIP) and there must be a flood mitigation plan.<sup>137</sup> The Repetitive Flood Claims Program provides funds to reduce flood damages to individual properties that have suffered repeat flood damage.<sup>138</sup> However, this program also requires that the recipient be a participant in the NFIP and have a mitigation plan in place.<sup>139</sup> Lastly, the Severe Repetitive Loss Pilot Program provides funds to homeowners insured under a flood insurance policy that have suffered repeat flood damages.<sup>140</sup> Once again, this is another grant program that requires a cost-effective project and participation in the NFIP to be considered.<sup>141</sup>

The disaster recovery programs are the Public Assistance Program and the Individuals and Households Program.<sup>142</sup> The Assistance Program provides aid for project-based activities such as replacing infrastructure, but there must be a federal disaster

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132. *Id.* § 5133.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Flood Mitigation Assistance Program Guidance*, FEMA 1, [http://www.fema.gov/media-library-data/20130726-1621-20490-5792/fma\\_08\\_guidance\\_final\\_10\\_30\\_2007.pdf](http://www.fema.gov/media-library-data/20130726-1621-20490-5792/fma_08_guidance_final_10_30_2007.pdf) (last visited Oct 30, 2014).

137. *Id.*

138. *Repetitive Flood Claims Grant Program Fact Sheet*, FEMA, <http://www.fema.gov/repetitive-flood-claims-program/repetitive-flood-claims-grant-program-fact-sheet> (last visited Oct. 30, 2014).

139. *Id.*

140. *Severe Repetitive Loss Program*, FEMA, <https://www.fema.gov/severe-repetitive-loss-program> (last visited Oct. 31, 2014).

141. *Id.*

142. *Public Assistance Guide*, FEMA, <https://www.fema.gov/public-assistance-local-state-tribal-and-non-profit/public-assistance-guide-1> (last visited Oct. 31, 2014).

declaration to qualify.<sup>143</sup> The Households Program provides assistance that cannot be obtained through insurance or small business loans, such as temporary housing assistance, unemployment funds, and counseling services.<sup>144</sup> This grant program requires a federal disaster declaration.<sup>145</sup>

The GAO noted that Alaskan tribes such as Newtok have a difficult time qualifying for assistance under the FEMA programs because few have state approved mitigation plans, participation in the NFIP is rare, and federal disaster declarations are typically not granted for recurring floods and have never been granted for erosion.<sup>146</sup> Four of the five grant programs require tribes to share costs with FEMA: the tribe must assume up to 25 percent of the project's costs.<sup>147</sup> The threat of flooding and erosion hinders Newtok's ability to receive aid because improving the current location is deemed wasteful and ineffective in a cost-benefit analysis. Newtok has a mitigation plan in place and can apply for the mitigation grant programs; however, FEMA also determines approval based on the cost-effectiveness of a project.<sup>148</sup>

There are several hurdles facing Newtok in the FEMA grant selection process. First, Newtok's low population and remote setting equates to high construction costs and is a likely disqualifier when a project is being analyzed for cost effectiveness.<sup>149</sup> Second, there has not been a state or federal disaster declaration issued for the erosion occurring in Newtok, which is a specific requirement in several of

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143. *Public Assistance: Eligibility*, FEMA, <http://www.fema.gov/public-assistance-eligibility> (last visited on Nov. 1, 2014).

144. *Assistance to Individuals and Households Fact Sheet*, FEMA, <https://www.fema.gov/public-assistance-local-state-tribal-and-non-profit/recovery-directorate/assistance-individuals-and> (last visited Nov. 2, 2014).

145. *Id.*

146. GAO 2009 Report, *supra* note 14, at 23-24. *See also* U.S. Dep't of Homeland Security, Written Testimony of FEMA for a Senate Homeland Security & Governmental Affairs Subcommittee on Emergency Management field hearing titled "Extreme Weather in Alaska: State and Federal Response to Imminent Disasters in the Arctic" (2013), *available at* <http://www.dhs.gov/news/2013/09/13/written-testimony-fema-senate-homeland-security-governmental-affairs-subcommittee> [hereinafter *Written Testimony*] (stating that minor erosion management issues may be eligible for a FEMA disaster mitigation program grant, but that FEMA does not provide assistance for projects due to severe erosion or for major flood control projects).

147. *Process for Tribal Governments to Request a Presidential Declaration*, FEMA 2-3, <http://www.fema.gov/media-library-data/1383327496567-40cdf22f56b2fb2f0b7eb0472c7f3f2/Overview+-+Disaster+Declaration+Request+Process+for+Tribal+Governments.pdf> (last visited Nov. 2, 2014) [hereinafter *Tribal Process*].

148. GAO 2009 Report, *supra* note 14, at 21-22.

149. *Tribal Process*, *supra* note 147.

the FEMA grants mentioned.<sup>150</sup> Third, another hurdle standing in the way of Newtok's grant approval is the type of disasters for which declarations are typically made: of the thirty-two federal disaster declarations in Alaska since 1953, fifteen of these declarations were for flooding disasters, but none for erosion issues.<sup>151</sup> Furthermore, only four of the fifteen declarations resulted in funding to Alaska Natives.<sup>152</sup> Finally, four of the five FEMA mitigation programs require participation in the NFIP. Unincorporated villages like Newtok are not eligible to participate in the NFIP and are unlikely to have any form of flood or homeowner's insurance based on Newtok's precarious location.<sup>153</sup> Despite the challenges Newtok faces, there are no plans in place to declare Newtok a disaster area.<sup>154</sup>

## 2. The National Environmental Protection Act

NEPA requires federal agencies to review the environmental effects of proposed actions and comply with NEPA's approval framework.<sup>155</sup> Agencies would conduct a detailed environmental analysis of the relocation and determine its environmental impact.<sup>156</sup> If more than one federal agency is involved, as in Newtok, a lead agency must supervise the evaluation.<sup>157</sup> Additionally, a federal, state, local, or tribal agency that has special knowledge of or experience with the environmental issue can act as a cooperating agency.<sup>158</sup> Once the roles are filled, the evaluation process begins. The evaluation consists of determining whether a detailed

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150. GAO 2009 Report, *supra* note 14, at 23. State governors can request a presidential disaster declaration by detailing the severity of the disaster and requesting federal assistance. See 42 U.S.C. § 5170 (2012). FEMA then recommends to the President whether the declaration should be issued. 44 C.F.R. § 206.36 (2014).

151. GAO 2009 Report, *supra* note 14, at 23.

152. *Id.*

153. *Flood Insurance Requirements for Recipients of Federal Disaster Assistance*, FEMA, <http://www.fema.gov/library/viewRecord.do?id=3323> (last visited Nov. 2, 2014).

154. See Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1394 (2006) (codified as amended in various U.S.C. sections). In 2006, Congress passed the Post-Katrina Emergency Management Reform Act, which established a catastrophic disaster response framework. Although the goal was to strengthen the federal government's response to natural disasters, the Act did not change the Stafford Act's disaster definitions and its goal of rebuilding communities in the same location. More importantly, the Act did not provide a framework for funding or directing community relocation. Thus, neither federal emergency response framework is able to assist Newtok because each Act does not address the relocation of an entire community.

155. NEPA, *supra* note 19.

156. *Basic Information*, NEPA, <http://www.epa.gov/compliance/basics/nepa.html> (last visited Nov. 2, 2014) [hereinafter *Basic Information*].

157. NEPA, *supra* note 19, § 4332.

158. *Basic Information*, *supra* note 156.

environmental analysis is needed. If an analysis is necessary, an environmental assessment is prepared.<sup>159</sup> If the undertaking would significantly harm the environment, an environmental impact statement is prepared and the Environmental Protection Agency must review and comment on each impact statement.<sup>160</sup>

The lack of a lead federal agency to evaluate its relocation plan places Newtok in the position of playing a waiting game. Currently, there is no lead agency to supervise the Newtok relocation evaluation; thus, any possible NEPA environmental assessment or impact statement cannot be conducted.<sup>161</sup> Village relocation is dependent on a NEPA review, but without a lead federal agency, it is difficult to plan the relocation to Mertarvik in piecemeal fashion.<sup>162</sup> The lack of a lead federal agency dedicated to assisting villages facing relocation has forced Newtok to attempt to obtain assistance from individual state and federal agencies, each of which has different funding requirements.<sup>163</sup> Seeking assistance from multiple agencies with different goals creates inefficiency, increased costs, and potential delays in the relocation process, which is why NEPA requires a lead agency for such projects.<sup>164</sup> The Alaska statutes governing disaster response are nearly identical to the federal disaster response structure.

### *C. Alaskan Legal Framework*

Alaska disaster response statutes are strikingly similar to federal disaster response statutes. Just as the President can declare a natural disaster, the Governor can declare a “disaster emergency” if a natural catastrophe causes or will likely cause severe damage or death.<sup>165</sup> Only after the Governor’s disaster declaration can funds be dispersed to the needy community.<sup>166</sup> However, the Alaskan legal framework is ill-suited to coordinate community relocation because no state agency is prepared handle such a monumental task. Currently, Newtok is receiving state funding in the form of state project grants and grants from the Denali Commission (Commission).<sup>167</sup> The Commission is the federal-state body

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159. *Id.*

160. *Id.*

161. GAO 2009 Report, *supra* note 14, at 31.

162. *Id.* at 39.

163. *Id.*

164. *See* 40 C.F.R. § 1508.28 (2014).

165. *See* ALASKA STAT. §§ 26.23.900(2)-(3) (2008).

166. *Id.* § 26.23.020 (2008).

167. *See Assistance Program*, *supra* note 6 (detailing how the Alaskan government has granted \$1,477,000 to Newtok for erosion control measures).

that coordinates project and financial assistance throughout Alaska.<sup>168</sup> Commission officials have stated that if it were to assume the lead role for village relocations, it needs more staff and funding.<sup>169</sup> This means that because the Commission is not prepared to spearhead relocation efforts, Newtok is at the mercy of federal agency programs that do not account for the type of need that Newtok has. In an attempt to address the cost-sharing issue, Alaska appropriated funds to be applied on behalf of the tribes for the FEMA cost-sharing requirement.<sup>170</sup>

The Alaska Division of Homeland Security and Emergency Management (ADHS) is the state agency that administers the FEMA post-disaster grant programs and manages Alaska's disaster recovery projects.<sup>171</sup> ADHS is essentially a state version of FEMA, and does not address relocation funding. Alaska designated the Department of Commerce, Community, and Economic Development (DCCED) as the lead state agency for the relocation process while the lead federal agency role remains vacant.<sup>172</sup> A temporary workgroup headed by state and federal representatives coordinates state activities and recommends appropriations.<sup>173</sup> In 2007, Alaska's Governor established a climate change sub-cabinet to develop a strategic plan to address climate change impacts with prioritization based on village need.<sup>174</sup> It established the Immediate Action Workgroup to identify obstacles facing Natives, which include the "inability to meet federal aid qualifications, project cost, and lack of scientific erosion data."<sup>175</sup> A DCCED employee acknowledged that "relocating a village [is] beyond the [skill and] capacity of any single agency."<sup>176</sup>

The barriers in the way of Newtok qualifying for state assistance are just as numerous as the federal barriers. Similar to the function of FEMA, the Alaskan State Division of Emergency Services responds to State disaster declarations when communities require assistance.<sup>177</sup> However, erosion does not qualify as an emergency under the law, further impeding

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168. See Pub. L. No. 105-277, Div. C, Title III, 112 Stat. 2681-637 (1998), codified as amended at 42 U.S.C. § 3121.

169. GAO 2009 Report, *supra* note 14, at 33.

170. *Id.*

171. ALASKA STAT. §§ 26.20.025, 26.23.040 (2008).

172. GAO 2009 Report, *supra* note 14, at 9.

173. *Id.*

174. IMMEDIATE ACTION WORKGROUP, RECOMMENDATIONS TO THE GOVERNOR'S SUB CABINET ON CLIMATE CHANGE 1 (2009), available at [http://www.climatechange.alaska.gov/docs/iaw\\_finalrpt\\_12mar09.pdf](http://www.climatechange.alaska.gov/docs/iaw_finalrpt_12mar09.pdf).

175. *Id.*

176. UNC, *supra* note 1.

177. ALASKA STAT. §§ 26.20.025, 26.23.040 (2008).

the funding efforts.<sup>178</sup> Even so, it is difficult for Newtok to qualify for assistance because the erosion has not been attributed to any particular polluter.<sup>179</sup> Alaska has a hazardous substance response fund, but it applies only to materials, such as oil, that have been discharged and are a present threat to Alaskans.<sup>180</sup>

#### IV. PROPOSAL TO CREATE RELOCATION REMEDIES UNDER FEMA AND NEPA

Newtok Village will be forced to migrate once again due to the way agency disaster relief is structured. The process of people being displaced by climate change has been coined “climigration.”<sup>181</sup> A climigration scenario should require a human rights analysis to frame the appropriate response.<sup>182</sup> This paper’s analysis of federal and state agencies programs has shown that a shift away from mitigation is needed. With this line of reasoning, policies would be created to determine when a community needs relocation services instead of disaster relief services.<sup>183</sup> When mitigation is inappropriate or impossible, relocation is the only option.<sup>184</sup> Due to the current inadequate remedies of federal and state agencies, three relocation remedies under FEMA and NEPA should be adopted. First, a FEMA cost-sharing exception should be created. Second, a FEMA community relocation grant program should be created. Third, NEPA should be amended to mandate a lead state agency to work with the lead federal agency.

##### A. Create a FEMA Cost-Sharing Exception

The Stafford Act should be amended to allow a federal agency such as FEMA to adjust or exempt cost-sharing requirements. Although the GAO made recommendations in 2003 and 2009 regarding potential relocation solutions for Newtok, little progress has been made to accomplish the relocation due in part to a lack of accessible funding. The

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178. *See id.* §§ 26.23.900(2)–(3) (2008).

179. UNC, *supra* note 1.

180. ALASKA STAT. § 46.08.005 (1993).

181. Robin Bronen, *Forced Migration of Alaskan Indigenous Communities Due to Climate Change: Creating a Human Rights Response*, in ENVIRONMENT, FORCED MIGRATION, AND SOCIAL VULNERABILITY 87, 89 (Tamer Afifi & Jill Jäger eds., 2010).

182. *Id.* at 68.

183. Robin Bronen, *Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine*, 35 N.Y.U. REV. L. & SOC. CHANGE 357, 360 (2011).

184. *See id.* at 360 (stating that the traditional government reposes of disaster relief and mitigation efforts are unable to protect Alaskan indigenous communities).

current FEMA funding structure is of no benefit to Newtok, which suffers not only from a present and obvious threat, but also a gradual threat that becomes worse as time passes, rather than a traditional one-day or week-long disaster. The creation of a cost-sharing exception for tribes is necessary so that tribes are able to become eligible for grants that have a cost-sharing requirement.

The Stafford Act currently allows Indian tribal governments to submit a request for a declaration by the President; however, the same tribal governments do not have recourse if they cannot meet the other requirements of a FEMA grant, such as cost-sharing.<sup>185</sup> The Stafford Act defines a small impoverished community as “a community of 3,000 or fewer individuals that is economically disadvantaged as determined by the State in which the community is located and based on criteria established by the President.”<sup>186</sup> However, this definition of impoverishment applies only to pre-disaster hazard mitigation programs.

To expedite the relocation process for Native communities who may require relocation services, FEMA should create a tribal cost-sharing exemption application so Natives can more easily qualify for funding.<sup>187</sup> Federal agencies could incorporate social factors when looking to see if an exception to a cost-sharing requirement is warranted. This could be done by the community applicant completing a brief yet thorough community application form that would include yearly tax data for the given community, the population size, and the like. The agency could then create a standard method of application evaluation based on the data to determine if cost-sharing would be feasible for the community. A standardized calculation would be necessary to ensure the agency reviews each application in a uniform way.

Native communities are typically self-sustaining and exchange only the monies accessible to members within a community.<sup>188</sup> Newtok lacks tourist and tax revenue due to its remote location, and does not have enough revenue to meet FEMA’s cost-sharing requirements of ten to twenty-five percent. Additionally, providing an application where tribal communities facing relocation can apply based on unique data will make their application more competitive. It will provide a needed alternative because they do not have the means to cost-share any of the relocation expenses. However, this proposal is just one part of the bigger solution for communities like Newtok and others who need funds for relocation instead

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185. Stafford Act, *supra* note 17, § 5133.

186. *Id.* § 5191.

187. W. Barry, *Aboriginal Cultural Identity*, 19 CANADIAN J. NATIVE STUD. 1, 24 (1999).

188. *See generally* GAO 2009 Report, *supra* note 14, at 33.

of mitigation projects. Attempting to raise cost-sharing funds is useless because the primary purpose of FEMA grant programs is to fund mitigation projects and relocation is outside that scope.

*B. Create a FEMA Community Relocation Grant Program*

The Stafford Act should be amended to allow a Community Relocation Grant Program to be established under existing FEMA framework. This would allow a community to have a second option when agencies have deemed mitigation to be a wasteful and ineffective band-aid.<sup>189</sup> The current structure allows the people of a suffering village to obtain aid to stay in the current location as opposed to relocating to safer ground.<sup>190</sup> A cost-sharing exemption, paired with a relocation option, would mean that Natives, and any other eligible community, would have access to federal relocation funding. The community relocation application would include an addendum option that would allow the relocation applicant to apply for a cost-sharing exemption. Only one application would be needed, thus ensuring efficiency throughout the application process.

In addition to the five disaster mitigation programs, a relocation program would be added that would incorporate environmental factors into the community relocation application. This would allow communities that have been victims of weather attributed to climate change to seek an exception based on a recurring harm. Several of the disaster mitigation programs require the project to be cost-effective. Part of the relocation application would include professional assessments. The community would hire a professional organization to attest to the cost of mitigating the problem versus the cost of relocating to avoid the problem altogether.<sup>191</sup> This would allow victims of climate change access to a program that has only looked at recurring environmental problems and recurring disasters when making funding decisions. The application analysis would include an evaluation of the effects of erosion, flooding, and greenhouse gas as part of the review process.

This proposal would allow FEMA to respond to the gradual process of climate change, specifically erosion, when presented with evidence of

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189. *See generally Assistance Program, supra* note 6 (outlining the costs of future erosion projects in Newtok at \$90 million, which could be considered wasteful in comparison to the \$80-\$200 million estimate to relocate Newtok).

190. GAO 2009 Report, *supra* note 14, at 20-21.

191. Native villages also have difficulty qualifying under a cost-effective standard because the value of their infrastructure is often much lower than the cost of proposed mitigation projects. *See* GAO 2009 Report, *supra* note 14, at 38.

its effects. This grant program would open the funding gates for many tribes. Also, it would save federal and state governments money by preventing the likelihood of yearly grant applications that could arise from remaining in the same flood-prone or erosion-prone location.

The very nature of being a coastal tribe places Newtok at a disadvantage in the funding process. Newtok is at high risk of future disasters and agencies do not want to spend money on mitigation when there is a high likelihood of recurrence. If Newtok were to apply to the Community Relocation Grant Program, Newtok could supplement its application with the federal and state agency reports documenting the flooding and erosion. Ultimately, FEMA would still have to approve the relocation application, but this would provide communities access to funding otherwise unavailable based on location, environmental problems, and funding resources.

### *C. Amend NEPA to Mandate a Lead State Agency*

NEPA should be amended so that the appointment of a lead state agency is mandated. The state agency would assume responsibility for monitoring the progress of the appointment of a lead federal agency.

First, state agencies should define their roles regarding climate change. It is unclear whether the DCCED will remain the lead state agency for climate change related problems. After role definition, state agencies should meet with federal agencies to discuss gaps in protection and determine which state or federal agency will assume the role. All parties must be aware of the agency responsible for disasters caused by climate change and how funding can be obtained for harmed villages. Alaska was successful in establishing a lead state agency, DCCED, to assist in relocation efforts, and the federal government must do the same. The relationship between state and federal agencies is key to the success of Newtok's relocation because FEMA requires state involvement before Newtok can be eligible for certain FEMA grants.<sup>192</sup> If consistent communication is not established, Newtok's funding options are even more limited.

Second, under an amended NEPA, the lead state agency must adhere to deadlines and a compliance structure regarding proper follow-up procedures to secure federal involvement. If a lead federal agency is not secured by the deadline, Congress must intervene and appoint a coordinator for all federal agencies who will work with state agencies to

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192. Stafford Act, *supra* note 17, § 5165.

assist villages. The lead state agency should have a steady stream of local financing to remain the lead agency and prevent the creation of new taxes.

By creating a coalition of agencies, applicants will not wait indefinitely for the lead role to be filled, which widens the time table to redress the environmental issue before it gets worse. This also makes it easier to recommend to FEMA that it create an exemption for Native villages who are suffering from recurring harm and do not have cost-sharing funds. FEMA would be able to prioritize claims based on need rather than analyzing whether the claim meets the current standards.

Finally, Congress can also re-endow the Army Corps of Engineers with the authority to fully fund and conduct projects and relocations.<sup>193</sup> That authority was repealed in 2009 and replaced with a cost-sharing provision.<sup>194</sup> In 2006, the Army was vested with the power to “carry out, at full Federal expense . . . relocation of affected communities and construction of replacement facilities.”<sup>195</sup> The Corps were engaged in constructing infrastructure at Mertarvik until halted,<sup>196</sup> which made it apparent that the relocation project did not have a lead agency.

The Corps are proficient in providing technical assistance to agencies, governments, and private companies. If deemed the lead agency, it would bring the necessary expertise in project management. The Corps is a large agency with expertise in navigating projects with both federal and private actors. This expertise creates a higher likelihood of the Corps being able to successfully coordinate efforts between Newtok and other agencies.<sup>197</sup> With a mandated lead state agency complying with proactive deadlines, the entire NEPA process will be expedited. This streamlined process will allow applicants to receive approval decisions faster and to continue or modify the project.

## V. CONCLUSION

The relocation challenges due to climate change facing Newtok Village are growing more common among Native Alaskan communities. Newtok is one of four communities requiring relocation because it is

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193. Omnibus Appropriations Act Pub. L. No. 108-447, Div. C, Title I, § 117, 123 Stat. 524 (2009). See also Notice of Intent, *supra* note 78.

194. *Id.*

195. Omnibus Appropriations Act, *supra* note 193. See also S. REP NO. 109-84 at 41 (2006). Ultimately, the Energy and Water Appropriations Bill funded \$2,400,000 for Alaska coastal erosion and the funding went to protection the shoreline of Shishmaref; *Assistance Program*, *supra* note 6.

196. *Assistance Program*, *supra* note 6.

197. Charles R. Glagola & William Malcolm Sheedy, *Partnering on Defense Contracts*, J. CONSTRUCTION ENGINEERING & MGMT. (Mar./Apr. 2002), available at <http://www.civ.utoronto.ca/sect/coneng/tamer/Courses/CIV1278/REF/partnering.pdf> (last visited Nov 12, 2014).

estimated to be underwater by 2017. Despite the imminent flooding and erosion threats facing many Native Alaskan communities, federal and state agencies continue with no apparent intention to modify grant eligibility or create any new programs.<sup>198</sup>

Although the federal and Alaskan governments have disaster relief protocol and funding parameters, neither has an agency that will assume the permanent role of a lead agency needed to assist and fund relocations. There are many communities that are in need of relocation resulting from climate change, particularly repeat flooding and erosion. Additionally, as Alaskan Natives, Newtok has a federal trust relationship with the United States government; however, the trust relationship does not mandate funding for climate change induced relocation. Thus, while the current disaster relief programs are necessary to helping communities in need, enhancing the grant programs offered by FEMA and modifying the NEPA lead agency process will allow at-risk Native communities the opportunity to have a funding resource and a timely remedy. This is an appropriate framework for protecting tribal rights and preserving indigenous traditions.

Specifically, defining the new grant exemption process and community relocation application processes gives indigenous people and communities like Newtok an equal opportunity to access funding for relocation due to environmental causes. Until these changes are made, Newtok's history, resources, and environmental forecasts do not take precedence over the next grant applicant.<sup>199</sup>

The solutions advocated for in this article benefit indigenous peoples and communities facing displacement due to environmental causes. Providing a general cost-sharing exemption allows an applicant to turn to one agency for potential assistance while remaining on equal footing with other applicants. This approach would remove the competitive factor of cost-sharing from the equation. A needs based approach to environmental problems inherently shifts the response away from mitigation and towards relocation, an approach Newtok has been waiting for.

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198. Written Testimony, *supra* note 146.

199. *Id.*



