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NATIVE AMERICAN ISSUES

Examples of Certain Federal Requirements That Apply to Cultural Resources and Factors That Impact Tribal Consultation

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GAO Highlights

Highlights of GAO-20-466T, a testimony before the Subcommittee for Indigenous Peoples of the United States, Committee on Natural Resources, House of Representatives

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Why GAO Did This Study

Federal agencies are required in certain circumstances to consult with tribes on infrastructure projects and other activities—such as permitting natural gas pipelines—that may affect tribal natural and cultural resources. According to the National Congress of American Indians, federal consultation with tribes can help to minimize potential negative impacts of federal activities on tribes' cultural resources.

The Secretary of Homeland Security has waived federal cultural resource laws that generally require federal agencies to consult with federally recognized tribes to ensure expeditious construction of barriers along the southern U.S. border.

This testimony discusses examples of (1) federal laws and regulations that apply to Native American cultural resources and (2) factors that impact the effectiveness of federal agencies' tribal consultation efforts. It is based on reports GAO issued from July 2018 through November 2019 related to federal laws that apply to Native American cultural resources, tribal consultation for infrastructure projects, and border security. It also includes additional information about the consultation requirements in these cultural resource laws and regulations.

What GAO Recommends

GAO recommended in March 2019 that 17 federal agencies take steps to improve their tribal consultation practices. The agencies generally agreed and one agency has implemented the recommendation.

View GAO-20-466T. For more information, contact Anna Maria Ortiz at (202) 512-3841 or ortiza@gao.gov.

What GAO Found

Examples of federal laws and regulations that apply to Native American cultural resources include:

- **The Native American Graves Protection and Repatriation Act (NAGPRA).** In August 2018, GAO reported that NAGPRA prohibits the intentional removal from, or excavation of, Native American cultural items from federal or tribal lands unless a permit has been issued and other requirements are met. NAGPRA and its implementing regulations contain provisions to address both the intentional excavation and removal of Native American cultural items as well as their inadvertent discovery on federal and tribal lands.
- **Section 106 of the National Historic Preservation Act (NHPA).** In March 2019, GAO reported that section 106 of the NHPA and its implementing regulations require federal agencies to consult with Indian tribes when agency "undertakings" may affect historic properties—including those to which tribes attach religious or cultural significance—prior to the approval of the expenditure of federal funds or issuance of any licenses.

In March 2019, GAO reported that tribes and selected federal agencies identified a number of factors that impact the effectiveness of consultation on infrastructure projects, based on GAO's review of the comments on consultation submitted by 100 tribes to federal agencies in 2016 and GAO's interviews with officials from 57 tribes and 21 federal agencies. Examples of these factors include:

- **Agency consideration of tribal input**. Sixty-two percent of the 100 tribes that provided comments to federal agencies in 2016 identified concerns that agencies often do not adequately consider the tribal input they collect during consultation when making decisions about proposed infrastructure projects.
- **Maintaining tribal contact information**. Officials from 67 percent of the 21 federal agencies in GAO's review cited difficulties obtaining and maintaining accurate contact information for tribes, which is needed to notify tribes of consultation opportunities.

GAO also found that the 21 agencies in GAO's review had taken some steps to facilitate tribal consultation. For example:

- Eighteen agencies had developed systems to help notify tribes of consultation opportunities, including contact information for tribal leaders or other tribal officials.
- Five agencies' tribal consultation policies specify that agencies are to communicate with tribes on how tribal input was considered.

Chairman Gallego, Ranking Member Cook, and Members of the Subcommittee:

Thank you for the opportunity to discuss examples from our prior work regarding federal laws and regulations that apply to Native American cultural resources and factors that impact the effectiveness of federal agencies' tribal consultation efforts for infrastructure projects. Federal cultural resource laws include the Native American Graves Protection and Repatriation Act (NAGPRA), the Archeological Resources Protection Act of 1979 (ARPA), and section 106 of the National Historic Preservation Act (NHPA). These acts and their implementing regulations cover different cultural resources, including Native American cultural resources, but all require federal agencies to consult with federally recognized Indian tribes in certain circumstances. According to the National Congress of American Indians, federal consultation with tribes can help to minimize potential negative impacts of federal infrastructure projects on tribes' natural resources and cultural resources, which may include cultural items protected by NAGPRA and archaeological resources subject to ARPA.[1] Federal agencies are to consult with tribes on many infrastructure projects and other federal activities.[2] For example, infrastructure projects, such as constructing pipelines, may involve various federal activities that trigger statutory and regulatory tribal consultation requirements.

As Congress found in the Indian Trust Asset Reform Act, "through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians."[3] The act also notes that the historic federal-tribal relations and understandings have benefited the people of the United States for centuries and established "enduring and enforceable

[1]See National Congress of American Indians, *NCAI Comments on Tribal Trust Compliance and Federal Infrastructure Decision-Making* (Nov. 30, 2016). The National Congress of American Indians is a non-profit organization that advocates for tribal governments and communities.

[2]For the purposes of this testimony, we define infrastructure to include any ground-disturbing activities. For example, infrastructure may include surface transportation such as highway or rail infrastructure, energy development such as wind turbine projects, and facilities construction such as visitor centers in national parks.

[3]Pub. L. No. 114-178, § 101(3) (2016) (*codified at* 25 U.S.C. § 5601(3)). See also U.S. Commission on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* (Washington, D.C.: December 2018).

[f]ederal obligations to which the national honor has been committed."[4] We have previously reported that agencies can improve the efficiency of federal programs that serve tribes and can take additional actions to improve tribal consultation for infrastructure projects.[5] Such improvements would be consistent with the expressed view of Congress in the act as to the federal government's trust responsibilities and would strengthen the performance and accountability of the federal government.

In January 2017, the President issued Executive Order 13767, which directs the Secretary of Homeland Security to immediately plan, design, and construct a wall or other physical barriers along the southwest border.[6] In response, U.S. Customs and Border Protection (CBP) initiated the Border Wall System Program to plan and deploy new barriers and other assets.[7] Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, authorizes the Secretary of Homeland Security to waive all legal requirements as determined to be necessary, in the Secretary's sole discretion, to ensure expeditious construction of barriers and roads under section 102.[8] The Secretary of Homeland Security has used this statutory authority to waive the three cultural resource laws identified above and their implementing regulations as well as certain other legal requirements. We have previously reported on the progress the Department of Homeland

[4]Pub. L. No. 114-178, § 101(5) (2016)(*codified at* 25 U.S.C. § 5601(5)).

[5]GAO, *High-Risk Series: Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others*, GAO-17-317 (Washington, D.C.: Feb. 15, 2017*)* and *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects,* GAO-19-22 (Washington, D.C.: Mar. 20, 2019).

[6]Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, § 4, 82 Fed. Reg. 8793, 8794 (Jan. 30, 2017) (issued Jan. 25). Executive Order 13767 defines "wall" as a "contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier." See id. § 3(e), 82 Fed. Reg. at 8794.

[7]Within the Department of Homeland Security, CBP's U.S. Border Patrol is the federal agency responsible for securing U.S. borders between ports of entry. See 6 U.S.C. § 211(a) (establishing CBP within the department), (c) (enumerating CBP's duties), (e) (establishing and listing duties of U.S. Border Patrol within CBP). Ports of entry are officially designated sea, air, or land border facilities that provide for the controlled entry into or departure from the United States.

[8]Pub. L. No. 104-208, div. C, § 102(c), 110 Stat. at 3009-555, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, § 102, 119 Stat. 231, 306 (2005).

Security has made and challenges it has faced implementing its border security efforts.[9]

My statement today will focus on examples of (1) federal laws and regulations that apply to Native American cultural resources and (2) factors that impact the effectiveness of federal agencies' tribal consultation efforts. My statement is based on work we issued from July 2018 through November 2019 related to federal laws that apply to Native American cultural resources, tribal consultation for infrastructure projects, and border security.[10] It also includes additional information about the consultation requirements in these laws and regulations. To conduct our previously issued work, we reviewed relevant federal laws, regulations, and policies; reviewed agency documentation; reviewed oral and written comments submitted by tribes to several federal agencies; and interviewed tribal, federal, and industry officials. To identify examples of factors that impact the effectiveness of federal agencies' consultation efforts for this testimony, we considered those factors that more than 60 percent of 100 tribes identified as hindering effective tribal consultation for tribes in our March 2019 report;[11] we also considered those factors that more than 60 percent of 21 federal agencies identified as concerns in our

[9]GAO, *Border Security: Assessment of the Department of Homeland Security's Border Security Improvement Plan,* GAO-19-538R (Washington, D.C.: July 16, 2019); *Southwest Border Security: CBP is Evaluating Designs and Locations for Border Barriers but Is Proceeding Without Key Information,* GAO-18-614 (Washington, D.C.: July 30, 2018); and *Southwest Border Security: Additional Actions Needed to Better Assess Fencing's Contributions to Operations and Provide Guidance for Identifying Capability Gaps,* GAO-17-331 (Washington, D.C.: Feb. 16, 2017).

[10]GAO, *Tribal Programs: Resource Constraints and Management Weaknesses Can Limit Federal Program Delivery to Tribes,* GAO-20-270T (Washington, D.C.: Nov. 19, 2019); GAO-19-22; *Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions,* GAO-18-537 (Washington, D.C.: Aug. 6, 2018); and GAO-18-614.

[11]GAO-19-22. We analyzed the transcripts of oral comments as well as written comments that 100 tribes provided to the Departments of the Interior, the Army, and Justice from October through December 2016 during meetings, in letters submitted to the agencies, or both. The agencies collected these comments as part of developing an interagency report on barriers to and improvements needed for consultation on infrastructure projects, released in January 2017.

March 2019 report.[12] More detailed information on our objectives, scope, and methodology for that work can be found in the corresponding issued reports.

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Federal agencies have varying roles in planning, approving, and implementing infrastructure projects, depending on their missions and authorities.[13] Some federal agencies help fund or construct infrastructure projects, and others grant permits or licenses for activities on private or federal lands.[14] Agencies that manage federal lands, such as the Bureau of Land Management, may construct infrastructure on lands they manage and must also approve projects on those lands.

The circumstances under which federal agencies may need to consult with tribes will vary based on the agencies' responsibilities for infrastructure projects as well as an infrastructure project's potential effects on tribes' land, treaty rights, or other resources or interests.

[12]GAO-19-22. We interviewed officials with 21 federal agencies, which we selected because they are, in general, members of the Federal Permitting Improvement Steering Council and they consult with tribes on infrastructure projects. The 21 selected agencies are: the Department of Agriculture's Forest Service and Rural Development; Department of Commerce's National Oceanic and Atmospheric Administration; Department of Defense's Army Corps of Engineers; Department of Energy; Environmental Protection Agency; Federal Communications Commission; Federal Energy Regulatory Commission; Department of Homeland Security's Coast Guard and Federal Emergency Management Agency; Department of Housing and Urban Development; Department of the Interior's Bureau of Land Management, Bureau of Ocean Energy Management, Bureau of Reclamation, Fish and Wildlife Service, and National Park Service; Nuclear Regulatory Commission; and Department of Transportation's Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, and Federal Transit Administration.

[13]Not all infrastructure projects have federal involvement, and the extent of federal involvement depends on the nature and type of project, as well as ownership of the land.

[14]For example, the Federal Highway Administration funds highway and bridge projects, and the Federal Emergency Management Agency helps fund recovery projects for infrastructure damaged by disasters.

Federal agencies are generally responsible for identifying relevant tribes that may be affected by proposed projects, notifying the tribes about the opportunity to consult, and then initiating consultation, as needed. One or more tribes located near or far from the proposed project site may have treaty rights within lands ceded in treaties or interests in lands with cultural or religious significance outside of lands ceded in treaties.[15]

Additionally, the Federal Permitting Improvement Steering Council—which was created to make the process for federal approval for certain (large) infrastructure projects more efficient—has issued two annual reports that identified best practices for, among other things, consulting with tribes.[16] These best practices include: training staff on trust and treaty rights; providing clear information on proposals in a consistent and timely manner; holding consultations on lands convenient to tribes when possible; compensating tribes for consultant-like advice; and working to build strong, ongoing dialogue between tribal authorities and agency decision makers, among others. In 2017, Executive Order 13807 directed agencies to implement the techniques and strategies identified by the steering council as best practices, as appropriate.[17]

[15]Treaties between the U.S. government and Indian tribes are the supreme law of the land. Treaties often described the boundaries of the tribe's land ceded to the federal government and the boundaries of the lands reserved for habitation by the tribe. Treaties also often discussed the tribe's rights reserved by the treaty, such as the right to hunt, fish, and gather on specified lands they ceded to the federal government. As a result of these treaties and other federal actions, many tribes have ancestral lands they ceded to the federal government distant from where they are located today. These ancestral lands may include sites that have religious and cultural significance for the tribe.

[16]Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects* (Washington, D.C.: Jan. 18, 2017); and *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* (Washington, D.C.: December 2017). In our March 2019 report, we identified the members of the steering council as: the Advisory Council on Historic Preservation, Council on Environmental Quality, Department of Agriculture, Department of the Army, Department of Commerce, Department of Defense, Department of Energy, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior, Department of Transportation, Environmental Protection Agency, Federal Energy Regulatory Commission, General Services Administration, Nuclear Regulatory Commission, and Office of Management and Budget.

[17]Exec. Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, § 4(b)(iii), 82 Fed. Reg. 40463, 40465 (Aug. 24, 2017).

For purposes of this testimony, Native American cultural resources means Native American cultural items as defined by NAGPRA,[18] archaeological resources that are remains of past activities by Native Americans,[19] and historic properties to which Indian tribes attach cultural or religious significance.[20]

Examples of Federal Laws and Regulations That Apply to Native American Cultural Resources

ARPA, NAGPRA, and section 106 of the NHPA are examples of federal laws that apply to Native American cultural resources. These laws and their implementing regulations contain many different provisions applicable to Native American cultural resources, including requirements for federal agencies to consult with Indian tribes in certain circumstances.

ARPA and NAGPRA

ARPA and NAGPRA, among other things, prohibit trafficking of certain archaeological resources and Native American cultural items, respectively. In August 2018, we reported on federal laws that address the export, theft, and trafficking of Native American cultural items and any challenges in proving violations of these laws.[21] That report included a discussion of ARPA and NAGPRA.

In addition, we reported in August 2018 that ARPA and NAGPRA contain provisions prohibiting the removal of archaeological resources and Native American cultural items from certain lands unless certain conditions are met, including consultation with Indian tribes.[22] Specifically, ARPA

[18]NAGPRA defines Native American cultural items to mean human remains, funerary objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. § 3001(3).

[19]Archaeological resources as defined by ARPA and its implementing regulations are any material remains of past human life or activities which are at least 100 years old and capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation. 16 U.S.C. § 470bb(1); 43 C.F.R. § 7.3(a).

[20]Historic properties are prehistoric or historic districts, sites, buildings, structures, or objects included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. 36 C.F.R. § 800.16(*l*)(1).

[21]GAO-18-537.

[22]GAO-18-537.

prohibits, among other things, the excavation or removal of archaeological resources from public[23] or Indian[24] lands without a permit from the federal agency with management authority over the land.[25] If the federal agency determines that issuance of such a permit may result in harm to, or destruction of, any religious or cultural site, the agency must notify any Indian tribe which may consider the site as having religious or cultural importance and meet, upon request, with tribal officials to discuss their interests.[26]

NAGPRA prohibits the intentional removal from, or excavation of, Native American cultural items from federal[27] or tribal[28] lands unless an ARPA permit has been issued and other requirements are met. Specifically, regulations implementing NAGPRA require federal agency officials to take reasonable steps to determine whether a planned activity on federal lands may result in the excavation of human remains or other cultural items. Officials are also required to consult with certain tribes, including any tribe on whose aboriginal lands the planned activity will occur, about the planned activity. After consultation, the federal agency official must

[23]Public lands are lands owned and administered by the United States as part of the national park system, national wildlife refuge system or national forest system and all other lands the fee title to which is held by the United States except lands on the Outer Continental Shelf and lands under the jurisdiction of the Smithsonian Institution. 16 U.S.C. § 470bb(3).

[24]Indian lands are lands of Indian tribes or Indians, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or Indian. 16 U.S.C. § 470bb(4).

[25]The regulations implementing ARPA specify that the Department of the Interior is the agency with management authority for Indian lands. 43 C.F.R. § 7.3(c)(2). ARPA does not require Indian tribes and their members to have a federal permit for excavation or removal of any archaeological resource on Indian lands of such tribe unless the tribe does not have a law regulating the excavation or removal of archaeological resources. 16 U.S.C. § 470cc(g)(2).

[26]If the federal agency determines that a permit must be issued immediately because of an immediate threat of loss or destruction of an archaeological resource, the federal agency must notify the appropriate tribe. 43 C.F.R. § 7.7(a)(4).

[27]Under NAGPRA, federal land is any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971. 25 U.S.C. § 3001(5).

[28]Tribal land is all lands within the exterior boundaries of any Indian reservation, all dependent Indian communities, and any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act. 25 U.S.C. § 3001(15).

complete and follow a written plan of action that includes, among other things, the planned treatment, care, and disposition of human remains and other cultural items recovered.[29]

NAGPRA and its implementing regulations also include provisions regarding inadvertent discovery of Native American cultural items on federal and tribal lands. Specifically, the person making the discovery must notify the responsible federal agency or tribal official, stop any activity occurring in the area of the discovery, and make a reasonable effort to protect the human remains or other cultural item discovered. The NAGPRA regulations specify procedures for the agency and tribal officials to take after receiving a notification and when the activity that resulted in the inadvertent discovery can resume.

Section 106 of the NHPA

In March 2019, we reported that under section 106 of the NHPA and its implementing regulations, federal agencies are required to consult with Indian tribes when agency "undertakings" may affect historic properties—including those to which tribes attach religious or cultural significance—prior to the approval of the expenditure of federal funds or issuance of any licenses.[30] The implementing regulations require agencies to consult with Indian tribes for undertakings that occur on or affect historic properties on tribal lands or may affect historic properties to which Indian tribes attach religious or cultural significance, regardless of where the historic properties are located.[31] In addition, these regulations establish the following four-step review process for federal agencies, with tribal consultation required for each step: (1) initiating the section 106 process,

[29]NAGPRA specifies who has ownership or control of Native American cultural items excavated from federal or tribal lands after NAGPRA's enactment on November 16, 1990. 25 U.S.C. § 3002(a).

[30]An undertaking is a project, activity, or program that is funded in whole or in part by a federal agency and under the agency's direct or indirect jurisdiction, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license, or approval.

[31]Regulations implementing section 106 of the NHPA define consultation as the "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement."

(2) identifying historic properties, (3) assessing adverse effects, and (4) resolving adverse effects.[32]

Examples of Factors Tribes and Selected Agencies Identified That Impact the Effectiveness of Federal Agencies' Consultation Efforts

As we found in March 2019, tribes and selected federal agencies identified a number of factors that hinder effective consultation on infrastructure projects, based on our review of the comments submitted by 100 tribes to federal agencies in 2016 on tribal consultation and our interviews with officials from 57 tribes and 21 federal agencies.[33]

Tribes identified a variety of factors that hinder effective consultation. For the purposes of this testimony, we are highlighting those factors that more than 60 percent of the 100 tribes identified as concerns. For example:

- **Agencies' timing of consultation**. Sixty-seven percent of tribes that provided comments to federal agencies in 2016 identified concerns with agencies initiating consultation late in project development stages; according to one tribal official we interviewed, late initiation of consultation limits opportunities for tribes to identify tribal resources near proposed project sites and influence project design.
- **Agency consideration of tribal input**. Agencies often do not adequately consider the tribal input they collect during tribal consultation when making decisions about proposed infrastructure projects, according to 62 percent of tribes that provided comments to federal agencies in 2016. Tribes' comments included perceptions that agencies consult to "check a box" for procedural requirements rather than to inform agency decisions.
- **Agency respect for tribal sovereignty or the government-to-government relationship**. Other concerns were related to agencies' level of respect for (1) tribal sovereignty or (2) the government-to-government relationship between the United States and federally recognized tribes, according to 73 percent of tribes that provided comments to federal agencies in 2016. Comments included concerns that some agency practices are inconsistent with this relationship. For example, tribes cited agencies limiting consultation to tribal participation in general public meetings and sending staff without decision-making authority to represent the U.S. government in consultation meetings.

[32]For more information, see Advisory Council on Historic Preservation, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (Washington, D.C.: December 2012).

[33]See GAO-19-22 for additional information.

- **Agency accountability**. Sixty-one percent of tribes that provided comments to federal agencies in 2016 raised concerns related to the extent of agencies' accountability for tribal consultation, stating that some agencies or officials are not held accountable for consulting ineffectively or for not consulting with relevant tribes. For example, comments included concerns that tribes may not have appeal options short of litigation when they believe that federal officials did not adhere to consultation requirements.

In addition, officials from 21 federal agencies included in our March 2019 report identified factors that they had experienced that limit effective consultation for infrastructure projects.[34] For the purposes of this testimony, we are highlighting those factors that more than 60 percent of the 21 agencies identified as concerns. For example:

- **Maintaining tribal contact information**. Officials from 14 of 21 agencies (67 percent) cited difficulties obtaining and maintaining accurate contact information for tribes, which is needed to notify tribes of consultation opportunities. For example, ongoing changes or turnover in tribal leadership make it difficult to maintain updated tribal information, according to some agency officials we interviewed.
- **Agency resources to support consultation**. Officials from 13 of 21 agencies (62 percent) cited constraints on agency staff, financial resources, or both to support consultation. Officials from these agencies said that they have limited funding to support consultation activities, such as funding for their staff to travel to in-person consultation meetings for infrastructure projects.
- **Agency workload**. Officials from 13 of 21 agencies (62 percent) identified a demanding workload for consultation as a constraint, because of large numbers of tribes involved in consultation for a single project, high volumes of consultations, or lengthy consultations, among other reasons. Officials from some of these agencies said that it may be difficult to stay on project schedules when there are multiple tribes to consult with or multiple agencies involved.

[34]The 21 agencies include three independent regulatory agencies, three departments, and 15 component agencies that are offices or bureaus within other departments. We selected these agencies because they or their departments (1) are, in general, members of the Federal Permitting Improvement Steering Council and (2) consult with tribes on infrastructure projects. See GAO-19-22 for more information.

In March 2019, we also found that the 21 agencies in our review had taken some steps to facilitate tribal consultation, but the extent to which these steps had been taken varied by agency.[35] For example:

- **Developing information systems to help contact affected tribes**. Eighteen agencies developed systems to help notify tribes of consultation opportunities, which generally include contact information for tribal leaders or other tribal officials. Three of these agencies also included information on tribes' geographic areas of interest. For example, the Department of Housing and Urban Development developed a system that aims to identify over 500 tribes' geographic areas of interest and includes their contact information. The Federal Permitting Improvement Steering Council identified developing a central federal database for tribal points of contact as a best practice.[36] We recommended that the council should develop a plan to implement such a database and consider how it will involve tribes to help maintain the information, among other actions.
- **Developing policies to communicate how they considered tribal input.** Five agencies' tribal consultation policies specify that agencies are to communicate with tribes on how tribal input was considered. For example, the Environmental Protection Agency's policy directs the most senior agency official involved in a consultation to send a formal, written communication to the tribe to explain how the agency considered tribal input in its final decision.[37] However, 16 agencies did not call for such communications in their policies. We recommended that these agencies update their tribal consultation policies to better communicate how tribal input was considered in agency decision-making.[38]
- **Addressing capacity gaps through training**. Most of the 21 selected federal agencies have taken steps to facilitate tribal

[35]GAO-19-22.

[36]See Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* (Washington, D.C.: December 2017).

[37]Representatives from one tribal organization we interviewed said that in one example, the agency had approved a permit for an injection well that the tribes had opposed during consultation, but agency officials explained their rationale for the decision to the affected tribes. As a result, tribal officials considered the consultation a success, even though they disagreed with the final decision.

[38]GAO-19-22. The 16 agencies generally agreed with this recommendation and one agency—the Federal Emergency Management Agency—has implemented it.

consultation for infrastructure projects by providing a range of training opportunities for staff involved in tribal consultation to help build agency officials' knowledge of tribal consultation topics. For example, the U.S. Army Corps of Engineers coordinates an immersive, 4-day training, hosted by a tribe on the tribe's land or reservation for agency staff and other participating agency officials, which focuses on cultural competency important for tribal consultation.

- **Utilizing various approaches to address resource constraints.** Some of the selected federal agencies used various approaches to help address resource constraints agencies and tribes may face when consulting on infrastructure projects, according to agency officials. For example, the Bureau of Land Management's policies state that the agency may use its appropriated funds and designated accounts to reimburse tribal members' travel expenses to attend meetings in connection with some consultations.[39] The Nuclear Regulatory Commission collects fees from project applicants to cover agency costs related to consultation.[40]

In conclusion, effective consultation is a key tenet of the government-to-government relationship the United States has with Indian tribes, which is based on tribal sovereignty. Failure to consult, or to consult effectively, sows mistrust; risks exposing the United States to costly litigation; and may result in irrevocable damage to Native American cultural resources. In our March 2019 report, we made recommendations to 17 agencies to take steps to improve their tribal consultation practices, which agencies generally agreed with and in one case, have implemented.[41] However, sustained congressional attention to these issues and the relevant factors impacting the effectiveness of agencies' consultation efforts may help to

[39]Bureau of Land Management, *Bureau of Land Management Manual 1780 Tribal Relations*, (Washington, D.C: Dec. 15, 2016) and *BLM Handbook 1780-1: Improving and Sustaining Bureau of Land Management -Tribal Relations* (Washington, D.C.: Dec. 15, 2016).

[40]The Nuclear Regulatory Commission is required by statute to charge fees to anyone who receives a service or thing of value from the commission to cover the commission's costs in providing that service or thing. In addition, the commission is required to recover approximately 90 percent of its annual budget authority through fees on licensees and certificate holders. 42 U.S.C. § 2214.

[41]In March 2019, we made one matter for congressional consideration and 22 specific recommendations to 17 of 21 agencies and a federal steering committee for permitting decisions on actions they can take to improve tribal consultation. The 17 agencies to which we made recommendations generally agreed with them, and one agency, the Federal Emergency Management Agency, has implemented our recommendation. GAO-19-22.

minimize the negative impacts on tribes' cultural resources, when relevant federal laws and regulations apply.

Chairman Gallego, Ranking Member Cook, and Members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

GAO Contacts and Staff Acknowledgments

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