



March 2019

TRIBAL CONSULTATION

Additional Federal Actions Needed for Infrastructure Projects

Accessible Version

GAO Highlights

Highlights of [GAO-19-22](#), a report to congressional requesters

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, which may affect tribal natural and cultural resources. GAO was asked to review federal agencies' processes for consulting with tribes on infrastructure.

This report examines, among other things, key factors tribes and selected federal agencies identified that hinder effective consultation on infrastructure projects and steps agencies have taken to facilitate tribal consultation. GAO examined laws, regulations, and policies and interviewed officials from 21 federal agencies that are generally members of the FPISC. GAO also summarized comments that 100 tribes submitted to federal agencies in 2016 to provide input on tribal consultation for infrastructure projects and interviewed available officials from 57 tribes and eight tribal organizations. Tribal and agency views are not generalizable.

What GAO Recommends

GAO is making one matter for congressional consideration and 22 specific recommendations to 17 of 21 agencies and the FPISC on actions they can take to improve tribal consultation, including that the FPISC develop a plan for establishing a central federal information system and that agencies establish or update their policies to better communicate their consideration of tribal input. The agencies to which GAO made recommendations generally agreed with them.

View [GAO-19-22](#). For more information, contact Anne-Marie Fennell at (202) 512-3841 or fennella@gao.gov.

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Additional Federal Actions Needed for Infrastructure Projects

What GAO Found

Based on interviews with officials from 57 tribes and 21 federal agencies, as well as comments submitted by 100 tribes in 2016 on tribal consultation for infrastructure projects, GAO identified key factors that tribes and agencies believe hinder effective consultation on infrastructure projects.

Some of the key factors identified by tribes included

- agencies initiating consultation late in project development stages,
- agencies not adequately considering tribal input when making decisions about proposed infrastructure projects, and
- agencies not respecting tribal sovereignty or the government-to-government relationship between federally recognized tribes and the federal government.

Some of the key factors identified by the agencies included

- challenges in obtaining and maintaining accurate contact information for tribes, which is needed to notify tribes of consultation opportunities;
- agency resource constraints to effectively support consultation; and
- difficulties coordinating with other federal agencies when there are multiple agencies involved in particular infrastructure projects.

The 21 agencies in GAO's review have taken some steps to facilitate tribal consultation, but the extent to which these steps have been taken varied by agency. For example, GAO found the following:

- Three agencies have developed systems to help identify tribes that should be consulted on infrastructure projects, and 18 agencies have developed systems to help notify tribes of consultation opportunities. For instance, 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 (FPISC)—which was created to make the process for federal approval for certain (large) infrastructure projects more efficient—recommended in its fiscal year 2018 best practices report the development of a central federal information system of tribal areas of interest and points of contact for consultation. In July 2018, the Department of Housing and Urban Development submitted a proposal to the FPISC to expand the department's system in response to the FPISC recommendation. Although the FPISC has discussed the proposal, as of October 2018 it had not yet decided whether and how to respond to it. If the FPISC decides to move forward and develop a centralized system, a plan with well-defined goals and clear roles and responsibilities, among other things, will provide greater assurance that a centralized system will be implemented in accordance with successful practices for developing government websites.
- Five agencies' tribal consultation policies specify that agencies are to communicate with tribes on how tribal input was considered, but 16 agencies do not call for such communication in their policies.

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Abbreviations

ACHP	Advisory Council on Historic Preservation
ANC	Alaska Native corporation
Corps	Army Corps of Engineers
FPISC	Federal Permitting Improvement Steering Council
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act

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March 20, 2019

Congressional Requesters

Federal agencies are to consult with tribes on many infrastructure projects and other federal activities—commonly referred to as tribal consultation. For example, infrastructure projects,¹ such as constructing pipelines, may involve various federal activities that trigger statutory and regulatory tribal consultation requirements, such as those under the National Historic Preservation Act as amended (NHPA).² In addition, executive directives call for federal agencies to consult with federally recognized Indian tribes on activities that may have tribal implications. For example, Executive Order 13175 calls for agencies to establish “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”³ Federal law also requires federal agencies to consult with corporations established under the Alaska Native Claims Settlement Act

¹For the purposes of this report, 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.

²Under section 106 of the NHPA and its implementing regulations, federal agencies are to take into account the effects of their undertakings on historic properties through consultation between agency officials, Indian tribes, and others. Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (1966) (*codified as amended at* 54 U.S.C. § 306108); 36 C.F.R. pt. 800. Section 106 applies to undertakings, which are projects, activities, or programs that are 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. The NHPA specifically requires federal agencies, in carrying out their section 106 responsibilities, to consult with Indian tribes that attach religious and cultural significance to a historic property. 54 U.S.C. § 302706(b).

³Exec. Order No. 13175, Consultation and Coordination with Indian Tribal Governments, § 5(a), 65 Fed. Reg. 67249 (Nov. 9, 2000).

“on the same basis as Indian tribes under Executive Order 13175.”⁴ Throughout this report we refer to these entities as Alaska Native corporations (ANC).

According to the National Congress of American Indians, it is important for federal agencies to consult with tribes on infrastructure projects so that tribal knowledge and expertise can be used to avoid potential harm to tribes’ natural and cultural resources.⁵ Tribal resources include natural resources such as fish or medicinal plants, as well as cultural resources, such as sacred sites, burial sites, and landscapes that are part of tribes’ identity and culture. According to the National Congress of American Indians, federal approval of certain infrastructure projects historically had negative effects on tribal communities, and tribes’ knowledge and expertise can help ensure that infrastructure projects are completed in a timely manner to avoid negative impacts on tribal resources and reduce the risk of subsequent disagreement or litigation.

You asked us to review federal agencies’ processes for consulting with tribes on infrastructure. This report examines (1) the extent to which selected federal agencies have policies for consulting with Indian tribes and ANCs on infrastructure projects and related activities; (2) key factors tribes and selected federal agencies identified that hinder effective consultation on infrastructure projects; and (3) the extent to which selected federal agencies have taken steps to facilitate tribal consultation on infrastructure projects.⁶ In addition, we are reporting on certain long-

⁴The Alaska Native Claims Settlement Act was enacted in December 1971 to resolve long-standing aboriginal land claims and to foster economic development for Alaska Natives. The corporations established under the act would become the vehicle for distributing land and monetary benefits to Alaska Natives in lieu of a reservation system. These corporations are not federally recognized Indian tribes. Federal agencies’ consultation requirements for Alaska Native Claims Settlement Act corporations are found in Pub. L. No. 108-199, div. H, § 161, 118 Stat. 3, 452 (2004) as amended by Pub. L. No. 108-447, div. H, tit. V, § 518, 118 Stat. 2809, 3267 (2004). Specifically, the requirement is for the Director of the Office of Management and Budget and all federal agencies to consult with Alaska Native Claims Settlement Act corporations on the same basis as Indian tribes under Executive Order 13175.

⁵See 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.

⁶For the purposes of this report, policies collectively refer to regulations, policies, and guidance. We define infrastructure projects as physical construction of infrastructure; related activities refer to actions such as updates to agency regulations or policies regarding infrastructure.

standing issues that we identified during the course of our review regarding the Army Corps of Engineers (Corps) Regulatory Program's procedures for implementing section 106 of the NHPA.⁷

To examine the extent to which selected federal agencies have policies for consulting with Indian tribes and ANCs on infrastructure projects and related activities, we reviewed applicable laws, regulations, executive directives, and documents obtained from 21 federal agencies. These agencies include 3 independent regulatory agencies, 3 departments, and 15 component agencies that are offices or bureaus within other departments.⁸ We selected these agencies because they or their departments are, in general, members of the Federal Permitting Improvement Steering Council (FPISC) and they consult with tribes on infrastructure projects.⁹ Specifically, of the 21 agencies in our review, 2 independent regulatory agencies and 3 departments are members of the

⁷The Corps Regulatory Program's procedures for implementing section 106 of the NHPA consist of a regulation finalized in 1990, guidance issued in 2005, and a memorandum issued in 2007. 33 C.F.R. pt. 325, App. C. Army Corps of Engineers Directorate of Civil Works/Regulatory, *Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800* (Apr. 25, 2005). See also Army Corps of Engineers CECW-CO, *Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005* (Jan. 31, 2007).

⁸The 21 selected federal 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.

⁹The FPISC was created by statute to make the process for federal approval for certain infrastructure projects more efficient. Pub. L. No. 114-94, div. D, tit. XLI, 129 Stat. 1312, 1741-1762 (2015). As of November 2018, the FPISC members were: 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. The Executive Director is the Chair of the FPISC, who works within the FPISC Office of the Executive Director.

FPISC; the 15 selected component agencies are from departments that are FPISC members. We also included the Federal Communications Commission, which is not a member of the FPISC, because its approach to tribal consultation for telecommunications towers was identified as a best practice among reports we reviewed and tribal and agency officials we interviewed.

From each of these 21 agencies, we obtained regulations, policies, and guidance that the agencies identified as applicable to consulting with Indian tribes or ANCs on infrastructure projects or related activities. We collectively refer to these documents as tribal consultation policies. We reviewed these policies and interviewed respective federal agency officials to determine whether the policies address consultation with ANCs and whether agencies consulted Indian tribes on the most recent policy updates, among other things.¹⁰

To examine key factors tribes and selected federal agencies identified that hinder effective consultation on infrastructure projects, we analyzed comments from tribes, agencies, and others. Specifically:

- 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

¹⁰Of the 21 agencies, 18 agencies provided their tribal consultation policies. Three component agencies do not have their own tribal consultation policies, but follow department-level policies that we reviewed: the Coast Guard, within the Department of Homeland Security, and the Federal Railroad Administration and the Federal Transit Administration, within the Department of Transportation. We also included in our review certain aspects of policies from the Departments of Agriculture and the Interior. Rural Development follows the Department of Agriculture's policy for tribal consultation under Executive Order 13175. The Bureau of Land Management and National Park Service follow the Department of the Interior's policy for consultation with ANCs.

infrastructure projects, released in January 2017.¹¹ Throughout the report, we refer to the comments we analyzed as tribal comments provided to federal agencies in 2016. After analyzing all of the factors that tribes identified as hindering effective consultation, we considered those factors that more than 40 percent of tribes identified as key factors that hinder effective tribal consultation for tribes.¹² We did not verify the factual or legal accuracy of these tribal comments.

- We corroborated key factors that hinder effective consultation for infrastructure projects through interviews with federally recognized Indian tribes and tribal organizations. First, during site visits to three states from July to September 2017, we interviewed tribal officials from seven federally recognized Indian tribes who were available to meet with us.¹³ Second, with the assistance of the National Association of Tribal Historic Preservation Officers, we invited tribal officials to meet with us during or after the association's 2017 conference. In total, we interviewed officials from 50 federally recognized Indian tribes.¹⁴ Individual tribal officials we interviewed shared their experiences as participants in the consultation process.

¹¹Department of the Interior, the Department of Army, and Department of Justice, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* (January 2017). To develop this report, the participating agencies held eight meetings across the country, where tribes' oral comments on consultation on infrastructure projects were documented in transcripts. The agencies also collected written comments from tribes. Overall, representatives from 96 federally recognized Indian tribes and 4 of the 6 bands of the federally recognized Minnesota Chippewa Tribe spoke at the meetings or submitted additional comments. Because the 4 bands submitted comments separate from the Minnesota Chippewa Tribe, we treated them as additional tribes for the purpose of this analysis, for a total of 100 tribes. As of March 2019, there were 573 federally recognized Indian tribes, but there were 567 federally recognized Indian tribes when oral and written comments were collected.

¹²The factors identified are methodologically dependent on the tribes that provided comments in 2016. We recognize that had other tribes participated, other factors that hinder effective consultation on infrastructure projects may have been identified, and therefore we may not have captured some factors that tribes may face. Additionally, because each tribe provides its own unique perspective, which is not generalizable to other tribes, we recognize that the key factors we identified may not necessarily be the most important factors for effective consultation to individual tribes.

¹³We visited Nebraska, Oregon, and South Dakota. These states were selected based on (1) geographic distribution including different tribes and types of infrastructure projects and (2) the concentration of tribes and federal agency field offices.

¹⁴The National Association of Tribal Historic Preservation Officers is a national non-profit membership organization of tribal officials who implement federal and tribal preservation laws for their member tribes. The Association's 19th tribal preservation conference took place at the Pala Casino Spa Resort in Pala, California, the week of August 7, 2017.

The views of tribal officials we interviewed are not generalizable to all tribes but provide examples of their views of factors that hinder effective consultation on infrastructure projects and corroborate the factors that we had identified in our analysis of the tribal comments provided in 2016. Third, we interviewed representatives of eight national and regional tribal organizations to obtain their views on the types of factors that hinder effective consultation on infrastructure projects.¹⁵ The views of tribal organizations cannot be generalized to tribes but illustrate the types of factors encountered from the perspectives of the organizations.

- To identify key factors that hinder effective consultation as cited by agencies, we analyzed factors identified during our interviews with headquarters officials from the 21 selected federal agencies, and our interviews with field officials from 4 of the 21 agencies as a part of site visits to three states.¹⁶ After analyzing all of the factors that the agencies identified, we considered those factors cited by more than 40 percent of the selected agencies as key factors.

To examine the extent to which selected federal agencies have taken steps to facilitate tribal consultation on infrastructure projects, we collected agency documents as well as information using a standard set of questions from the 21 selected federal agencies and interviewed agency officials. Information collected included agencies' methods to support tribal consultation, such as mechanisms used to initiate consultation, training courses offered to staff,¹⁷ and methods used to help ensure effective communication. We also reviewed the content of the 21 agencies' policies, including any referenced department-level policies that component agencies' officials said they followed instead of having their

¹⁵We interviewed representatives from the following eight national and regional tribal organizations: the Alaska Federation of Natives, Great Lakes Indian Fish and Wildlife Commission, Inter Tribal Council of Arizona, National Association of Tribal Historic Preservation Officers, National Congress of American Indians, National Tribal Emergency Management Council, Native Nations Institute, and United South and Eastern Tribes, Inc. We obtained lists of tribal organizations from the National Congress of American Indians' tribal directory. We invited representatives from these organizations to speak with us based on the number of affiliated tribes they advocate for and geographic locations of affiliated tribes.

¹⁶We interviewed officials from the Corps' Portland District Office, the Federal Highway Administration Oregon Division, the Forest Service Pacific Northwest Regional Office, and the National Park Service Midwest Regional Office. We selected these field offices based on their proximity to tribes we visited and the availability of their officials to meet.

¹⁷Reviewing the content of agencies' training courses was outside the scope of our review.

own policies. Further, we gathered documentation and interviewed officials from four additional FPISC entities about actions taken related to information systems for initiating tribal consultation, particularly in implementing a FPISC best practice to develop a central federal system for initiating tribal consultation. These entities are the FPISC Office of the Executive Director (the Executive Director serves as the chair of the FPISC), Advisory Council on Historic Preservation (ACHP), General Services Administration, and Office of Management and Budget.¹⁸

To report on issues regarding the Corps Regulatory Program's procedures for implementing section 106 of the NHPA, we reviewed the NHPA and its legislative history; regulations implementing section 106; and court decisions and documents we obtained from the Corps and ACHP regarding the Corps Regulatory Program's procedures. We also interviewed Corps and ACHP officials. Appendix I presents a more detailed description of our objectives, scope, and methodology.

We conducted this performance audit from January 2017 to March 2019 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

Tribal consultation is an important topic internationally and in the United States. In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, which included consultation in several articles.¹⁹ In particular, the declaration calls for governments to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order

¹⁸We interviewed officials from these four entities because they are either members of the FPISC or involved in the FPISC and because several federal agency officials said that they are involved in supporting tribal consultation for infrastructure projects and related activities.

¹⁹G.A. Res. 295, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/295 (2007). In 2007, the United States voted against this resolution on the day of its adoption but subsequently endorsed the declaration in 2010.

to obtain their free, prior, and informed consent” before adopting and implementing legislative or administrative measures that may affect them or approving any project affecting their lands, territories, or other resources. In endorsing the declaration in 2010, the White House issued a statement of support, stating that it understood the declaration’s provisions on “free, prior and informed consent” to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken. The statement said the United States intended to continue to consult and cooperate in good faith with federally recognized Indian tribes in accordance with federal law and executive directives. The statement also said the United States would continue to implement the many laws that require the agreement of federally recognized tribes before certain actions can be taken.

Laws, Regulations, and Directives on Tribal Consultation for Infrastructure

Requirements for federal agencies to consult with tribes before taking some actions related to proposed infrastructure projects can be found in certain federal laws and implementing regulations. In particular, the NHPA as well as regulations implementing section 106 of the NHPA and the National Environmental Policy Act (NEPA) contain such consultation requirements. These consultation requirements can be triggered, for example, when a federal agency is developing or funding an infrastructure project or approving construction on federal land or issuing a permit for an infrastructure project. Specifically:

- **Section 106 of the NHPA and its implementing regulations.** Under section 106 of the NHPA and its implementing regulations, federal agencies must 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.²⁰ The law authorizes the ACHP—an independent federal agency that promotes preservation, enhancement, and productive use of the nation’s historic resources—to issue regulations implementing section 106. The

²⁰An 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.

implementing regulations of section 106 require agencies to consult with Indian tribes for undertakings that (1) occur on or affect historic properties on tribal lands or (2) may affect historic properties to which Indian tribes attach religious or cultural significance, regardless of where the historic properties are located.²¹ In addition, the implementing regulations establish the following four-step review process for federal agencies, with tribal consultation required for each step: (1) initiating the section 106 process, (2) identifying historic properties, (3) assessing adverse effects, and (4) resolving adverse effects.²²

- **NEPA implementing regulations.** Under NEPA, federal agencies generally are to prepare either an environmental assessment or a more detailed environmental impact statement to evaluate potential environmental effects of proposed projects or actions. The Council on Environmental Quality, within the Executive Office of the President, issued regulations in 1978 for implementing NEPA, which require federal agencies to consult with Indian tribes “early” when evaluating potential environmental effects of proposed projects or actions.²³ The regulations do not define consultation or specify procedures for these consultations.

A series of executive directives issued in the 1990s and 2000s also broadly call for federal agencies to consult with Indian tribes on activities that may affect tribes, which could include infrastructure projects and related activities. In particular, Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (November 6, 2000), states that federal agencies shall, in formulating or implementing policies that have tribal implications, be guided by fundamental principles underlying the unique legal relationship between the United States and Indian tribal

²¹Regulations 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.” In addition to consultation with Indian tribes, the regulations require agencies to consult with, among others, interested parties and Native Hawaiian organizations; Native Hawaiians are outside of the scope of this report. The regulations do not specifically require consultation with ANCs but ANCs may be interested parties.

²²For 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).

²³40 C.F.R. § 1501.2(d)(2). In June 2018, the Council on Environmental Quality published an advanced notice of proposed rulemaking seeking comments on potential revisions to update the regulations, including whether and how the role of tribal governments in the NEPA process should be clarified. 83 Fed. Reg. 28591, 28592 (June 20, 2018).

governments.²⁴ As such, Executive Order 13175 directs federal agencies to establish “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”²⁵ Executive Order 13175 “encourages” independent regulatory agencies to comply with the order, although they are not subject to it.²⁶ A subsequent 2009 presidential *Memorandum on Tribal Consultation* directed agency heads to submit to the Office of Management and Budget, after consultation with tribes, detailed plans of actions that agencies would take to implement policies and directives of Executive Order 13175.²⁷ According to two White House reports, many agencies developed or updated tribal consultation policies as a result of the 2009 memorandum.²⁸

In addition, a 2004 consolidated appropriations law, as amended, requires federal agencies to consult with ANCs “on the same basis as Indian tribes under Executive Order 13175.”²⁹ ANCs are not federally recognized Indian tribes, so the federal government does not have a government-to-government relationship with them or a trust responsibility to them as it does with federally recognized tribes. ANCs were established to manage land and assets on the behalf of Alaska Natives. Specifically, under the Alaska Native Claims Settlement Act,

²⁴In addition, the executive order says the United States has recognized Indian tribes as domestic dependent nations that exercise inherent sovereign powers over their members and territory and the right of Indian tribes to self-government. The executive order also says the United States works with Indian tribes on a government-to-government basis.

²⁵Executive Order 13175 defines policies with tribal implications as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

²⁶Exec. Order No. 13175, § 8, 65 Fed. Reg. 67249 (Nov. 9, 2000). The Federal Communications Commission, Federal Energy Regulatory Commission, and Nuclear Regulatory Commission are independent regulatory agencies within the scope of our review.

²⁷A review of plans developed in accordance with the 2009 memorandum was outside the scope of our review.

²⁸Executive Office of the President, *A Renewed Era of Federal-Tribal Relations* (Washington, D.C.: January 2017), and *Building Prosperous & Resilient Tribal Nations* (Washington, D.C.: August 2016).

²⁹Pub. L. No. 108-199, div. H, § 161, 118 Stat. 3, 452 (2004), as amended by Pub. L. No. 108-447, div. H, tit. V, § 518, 118 Stat. 2809, 3267 (2004).

approximately 44 million acres of land and a nearly \$1 billion cash payment were conveyed to ANCs in exchange for extinguishing aboriginal land claims in Alaska. Overall, 13 regional corporations and more than 200 urban, village, and group corporations formed to participate in the settlement under the act.³⁰

Role of Federal Agencies in Infrastructure Projects and Tribal Consultation

Federal agencies have varying roles in planning, approving, and implementing infrastructure projects, depending on their missions and authorities.³¹ Some federal agencies help fund or construct infrastructure projects, and others grant permits or licenses for activities on private or federal lands. 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. Agencies that manage federal lands, such as the Bureau of Land Management, may construct infrastructure on those lands and must also approve projects on lands they manage. The Corps issues permits for the discharge of dredged or fill materials into waters of the United States, which may be needed for project construction. Some infrastructure projects may require approval by multiple federal agencies. For example, a natural gas pipeline project spanning multiple states may need (1) approval from the Federal Energy Regulatory Commission for constructing a natural gas pipeline across state borders,³² (2) a Corps permit for fill materials placed into waters of the United States,³³ and (3) approval from a federal land management agency to cross federal lands. See appendix II for additional information on missions and examples of

³⁰Alaska Natives may be shareholders in both a regional corporation and their respective urban, village, or group corporations; they may also receive various monetary and nonmonetary benefits from ANCs. For more information on ANCs see GAO, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations*, GAO-13-121 (Washington, D.C.: Dec. 13, 2012).

³¹Not 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.

³²The Federal Energy Regulatory Commission is an independent agency that regulates, among other things, the construction of interstate transmission of natural gas pipelines.

³³Under section 404 of the Clean Water Act, the Corps is responsible for issuing permits for the discharge of dredged or fill material into the waters of the United States.

responsibilities for infrastructure projects for the 21 federal agencies in our review.

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. 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.³⁴ In other instances, non-federal project applicants, such as private developers or local governments seeking permit approval or federal financial assistance, may be involved in tribal consultation. In these instances, project applicants may reach out to tribes during initial planning phases about interests in consulting on a proposed project, with the relevant federal agency responsible for identifying relevant tribes and conducting any required consultation.

For some projects, a survey of the proposed project site may be needed to help identify and evaluate potential historic or cultural items of importance to tribes. Tribes may conduct these surveys, in which case agencies may compensate tribes for such work as it would compensate a contractor, according to a 2001 memorandum and 2012 guidance issued by ACHP.³⁵ The ACHP memorandum and guidance also say non-federal applicants should expect to pay tribes for information or documentation that they would normally obtain from a contractor or consultant. In addition, the memorandum and guidance state that agencies may provide financial assistance for tribes to travel to proposed project sites or

³⁴Treaties 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.

³⁵Advisory Council on Historic Preservation, Memorandum: Fees in the Section 106 Review Process (Washington, D.C.: July 6, 2001) and *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (Washington, D.C.: December 2012).

participate in consultation meetings. In cases where non-federal project applicants are involved in proposed infrastructure projects, the ACHP memorandum and guidance encourage applicants to use available resources to facilitate and support tribal participation in the section 106 process, such as covering tribes' travel costs to consultation meetings. However, the ACHP memorandum and guidance state that agencies and applicants are not required to pay tribes for providing their views during the section 106 process.³⁶

FPISC members are generally charged with participating in the federal permitting and environmental review decisions for large, "covered" infrastructure projects, which we refer to as certain infrastructure projects.³⁷ The FPISC was established in 2015 and is scheduled to terminate in December 2022.³⁸ By statute, the FPISC is required to issue recommendations at least annually on best practices for, among other things, enhancing early stakeholder involvement.³⁹ As of November 2018, the FPISC had issued best practices reports for fiscal years 2017 and 2018, which have included best practices on consulting with tribes.⁴⁰ According to these reports, best practices apply broadly to federal

³⁶The memorandum and guidance encourage federal agencies to use their resources, consistent with their authorities, to help tribes overcome any financial challenges in their participation in the section 106 process, such as by reimbursing tribes for their travel expenses.

³⁷Title 41 of the Fixing America's Surface Transportation Act defines a covered project as any activity in the United States that requires authorization or environmental review by a federal agency involving construction of specified infrastructure that meets certain requirements. These requirements are: (1) the activity is subject to NEPA, is likely to require a total investment of more than \$200,000,000, and does not qualify for abbreviated authorization or environmental review processes under any applicable law; or (2) is subject to NEPA and the size and complexity of which, in the opinion of the FPISC, make the project likely to benefit from enhanced oversight and coordination. Pub. L. No. 114-94, div. D, tit. XLI, § 41001(6), 129 Stat. 1312, 1741-1742 (2015) (*codified at* 42 U.S.C. § 4370m(6)).

³⁸42 U.S.C. § 4370m-12. FPISC Office of Executive Director officials stated that although FPISC was established in 2015 by statute, permanent staff were not hired until January 2017. The Executive Director of FPISC was appointed in September 2018 and, according to officials, began work in December 2018.

³⁹42 U.S.C. § 4370m-1(c)(2)(B).

⁴⁰Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects* (Washington, D.C.: Jan. 18, 2017); 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).

authorizations for environmental review of infrastructure projects, and federal agencies already widely use many of the best practices. Among other things, FPISC best practices for tribal consultation state that agencies should:

- train staff on trust and treaty rights as well as have mechanisms to access expertise on the legal aspects of Indian law and federal trust and treaty responsibilities;
- seek tribal expertise to determine whether proposed projects could affect tribal interests;
- initiate consultation by providing clear information on proposed infrastructure to the correct tribal representatives, in a consistent and timely manner;
- establish, utilize, and support one central federal database of tribal areas of interest with tribal points of contact to facilitate timely coordination and consultation;
- hold consultation meetings on tribes' lands or locations convenient to tribes, if possible;
- explore avenues for compensating tribes for costs incurred when they are asked to provide consultant-like services or special expertise; and
- work to build strong, ongoing relations with tribes and promote regular dialogue between tribal authorities and agency decision makers, to the extent practicable.

In 2017, Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, directed agencies to implement the techniques and strategies the FPISC identifies annually as best practices, as appropriate.⁴¹

⁴¹Executive Order 13807, § 4(b)(iii), 82 Fed. Reg. 40463, 40465 (Aug. 24, 2017).

Selected Federal Agencies Have Tribal Consultation Policies Covering Infrastructure Projects and Related Activities, but Some Agencies Have Not Addressed Consultation with ANCs

All 21 federal agencies in our review have tribal consultation policies that cover infrastructure projects and related activities, but only 9 of these agencies addressed consulting with ANCs in policy.⁴² See appendix III for a list of the tribal consultation policies of the 21 federal agencies that we reviewed.

Most agencies in our review have more than one policy laying out agency processes for consulting with Indian tribes under various requirements or directives. For example, the Department of Housing and Urban Development has three tribal consultation policies: one policy is for addressing tribal consultation under Executive Order 13175,⁴³ and two policies are for implementing section 106 of the NHPA. Other agencies, such as the Forest Service and Bureau of Land Management, each have a tribal consultation policy along with supporting guidance that lays out procedures for meeting tribal consultation responsibilities related to various types of agency activities.

The content of these policies varies across agencies. For example, agencies may define “consultation” differently in their policies, as shown by the following:

⁴²We broadly refer to regulations, policies, and guidance identified by agencies as applicable to consulting with tribes or ANCs on infrastructure projects or related activities as tribal consultation policies. Three component agencies follow department-level policies: the Coast Guard, within the Department of Homeland Security, and the Federal Railroad Administration and Federal Transit Administration, within the Department of Transportation. The agencies’ policies may cover other types of activities in addition to infrastructure projects and related activities.

⁴³The April 2016 *Department of Housing and Urban Development Tribal Government-to-Government Consultation Policy* outlines general principles applicable to the department’s planning and management activities such as developing legislative initiatives, regulations, or policies.

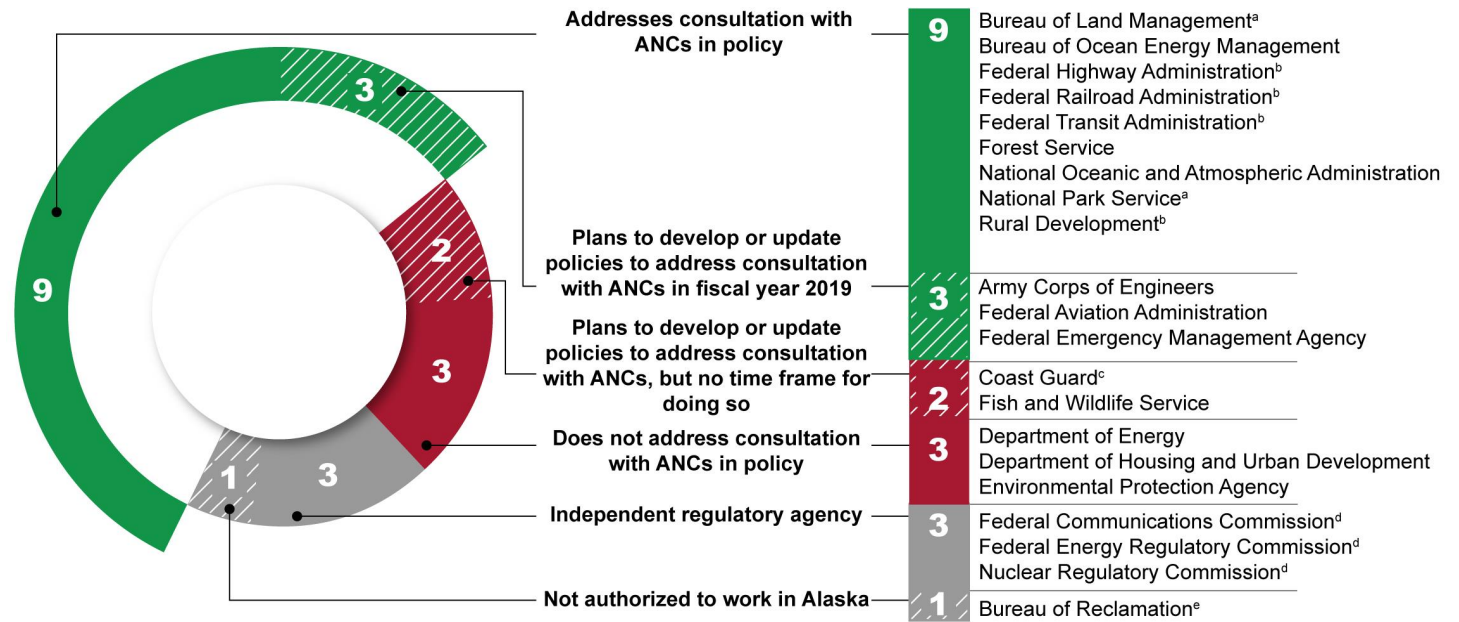
- The Bureau of Land Management defines consultation as a mutual, open, and direct two-way communication, conducted in good faith, to secure meaningful participation in the decision-making process, as allowed by law.
- The Bureau of Ocean Energy Management defines consultation as a deliberative process that aims to create effective collaboration and informed federal decision-making.

See appendix IV for the list of definitions of consultation used by the 21 agencies.

The selected agencies' policies also address a range of topics relevant to tribal consultation. For instance, each of the agencies' policies address Indian law, including tribal sovereignty and the government-to-government relationship between the United States and federally recognized Indian tribes. Some agencies' policies address additional topics, such as discussing conflict or dispute resolution systems or involving agency decision makers in consultation meetings (see app. V).

However, we found that agencies varied in the extent to which they addressed required consultation with ANCs in agency policy, as shown in figure 1.

Figure 1: Extent to Which Selected Federal Agencies Address Consultation with Alaska Native Corporations (ANC) in Agency Policy



Source: GAO analysis of selected federal agencies' tribal consultation policies. | GAO-19-22

Notes: We reviewed regulations, policies, and guidance regarding consulting with Indian tribes and ANCs, which we refer to collectively as tribal consultation policies. The figure identifies whether agencies have addressed consultation with ANCs in policy and does not necessarily reflect agency practices. Federal agencies are required by law to consult with ANCs established under the Alaska Native Claims Settlement Act "on the same basis as Indian tribes under Executive Order 13175," Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000). Pub. L. No. 108-199, div. H, § 161, 118 Stat. 3, 452 (2004) as amended by Pub. L. No. 108-447, div. H, tit. V, § 518, 118 Stat. 2809, 3267 (2004). Executive Order 13175 directs federal agencies to "establish an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Exec. Order No. 13175, § 5(a), 65 Fed. Reg. 67249, 67250 (Nov. 9, 2000). ANCs are not federally recognized Indian tribes.

^aThe Bureau of Land Management and National Park Service follow the Department of the Interior's policy for consulting with ANCs, according to agency documentation we reviewed.

^bThe agency follows department-level policies that address consultation with ANCs; the agency does not have a policy for consultation under Executive Order 13175. Specifically the Federal Highway Administration, the Federal Railroad Administration and the Federal Transit Administration follow the Department of Transportation's policies. Rural Development follows the Department of Agriculture's policies.

^cThe Coast Guard does not have its own tribal consultation policies but follows department-level policies of the Department of Homeland Security, which do not address consultation with ANCs.

^dIndependent regulatory agencies are not subject to Executive Order 13175 and have not addressed consultation with ANCs in their policies. The order encourages such agencies to comply with it.

^eThe Bureau of Reclamation is authorized to work in 17 western states but not Alaska, so the agency does not have a policy addressing consultation with ANCs.

Under the Consolidated Appropriations Act, 2004, as amended, federal agencies are required to consult ANCs “on the same basis as Indian tribes under Executive Order 13175.”⁴⁴ Of the 21 selected agencies:

- Nine agencies addressed consultation with ANCs through agency-specific or department-level policies they follow.
- Three agencies—the Corps, Federal Aviation Administration, and Federal Emergency Management Agency—plan to develop new or updated policies to address consultation with ANCs in fiscal year 2019, according to agency officials.
- Two agencies—Coast Guard and Fish and Wildlife Service—recognized the need to address consultation with ANCs in agency policy and indicated plans to do so, according to their respective agency officials, but did not provide time frames for their efforts. Specifically, Fish and Wildlife Service officials said that they had developed a draft policy but that the effort was on hold to determine next steps. Coast Guard officials said the agency does not have its own tribal consultation policy but follows the Department of Homeland Security’s policy, but the department does not address consultation with ANCs in policy. Department of Homeland Security officials said they were not aware of the requirement to consult with ANCs but now that they are, they agreed that the department needs to address consultation with ANCs in policy.
- The three independent regulatory agencies—the Federal Communications Commission, Federal Energy Regulatory Commission, and Nuclear Regulatory Commission—are not subject to Executive Order 13175 and have not addressed consultation with ANCs in their policies. The order encourages independent regulatory agencies to comply with it.
- The Bureau of Reclamation is not authorized to work in Alaska, so the agency does not have a policy for consultation with ANCs.
- Officials from the remaining three agencies—the Department of Energy, Department of Housing and Urban Development, and Environmental Protection Agency—said that ANC consultation is not included in their agencies’ tribal consultation policies because ANCs are not federally recognized Indian tribes. Specifically, Department of Energy officials said it is their understanding that the U.S.

⁴⁴Pub. L. No. 108-199, div. H, § 161, 118 Stat. 3, 452 (2004) as amended by Pub. L. No. 108-447, div. H, tit. V, § 518, 118 Stat. 2809, 3267 (2004).

government's federal relationship with ANCs has a different basis than its government-to-government relationship with federally recognized Indian tribes. Environmental Protection Agency and Department of Housing and Urban Development officials said their respective tribal consultation policies apply to consultation with federally recognized Indian tribes and were developed to address Executive Order 13175. Department of Housing and Urban Development officials added that ANCs are not recipients or grantees of programs they administer and are not included on consultations they conduct related to those programs. Even though ANCs are not federally recognized Indian tribes, under the Consolidated Appropriations Act, 2004, as amended, ANCs are to be treated on the same basis as Indian tribes under the executive order, and agencies can develop a separate policy for consulting with ANCs, distinct from policies for consulting with federally recognized Indian tribes.⁴⁵

Federal internal control standards state that management should design control activities to achieve objectives and respond to risks, for example, by clearly documenting internal controls in management directives, administrative policies, or operating manuals.⁴⁶ For example, by developing documented policies that address consultation with ANCs, agencies can help ensure that their staff have the information they need to consistently consult with ANCs. In addition, documented policies provide a means to retain organizational knowledge and mitigate the risk of having that knowledge limited to a few personnel. By developing documented policies, or clarifying existing policies, to implement the statutory requirement to consult with ANCs on the same basis as Indian tribes under Executive Order 13175, the three federal agencies that currently do not have these policies can help ensure that they consistently meet the requirement to consult with ANCs.⁴⁷

⁴⁵For example, the Department of the Interior developed a separate policy that addresses consultation with ANCs. See Department of the Interior, *Policy on Consultation with Alaska Native Claims Settlement Act (ANSCA) Corporations* (Washington, D.C.: August 2012). This policy was subsequently incorporated into the department's broader policies for consulting with tribes.

⁴⁶GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

⁴⁷The three agencies are the Departments of Energy and Housing and Urban Development and the Environmental Protection Agency.

In addition, federal internal control standards state that management should define objectives clearly to enable the identification of risks and define risk tolerances.⁴⁸ For example, agencies should define objectives in specific terms including clearly defining the time frames for achieving an objective. By establishing a time frame for developing or updating policy to implement the statutory requirement to consult with ANCs on the same basis as Indian tribes under Executive Order 13175, the two agencies that plan to develop or update existing policies but currently do not have time frames for doing so can help ensure that they take the necessary steps to complete their efforts in a timely manner and help meet the requirement.⁴⁹

Tribes and Selected Federal Agencies Identified a Number of Key Factors That Hinder Effective Consultation on Infrastructure Projects

Indian tribes and the 21 selected federal agencies have identified a number of key factors that hinder effective consultation on infrastructure projects, based on our review of the tribal comments provided to federal agencies in 2016 and interviews with tribal and agency officials.⁵⁰ Tribes identified factors related to agency consultation practices and tribal resources. Agencies identified factors ranging from initiating consultation to building agency capacity.

⁴⁸ [GAO-14-704G](#).

⁴⁹ The two agencies are the Coast Guard (which follows the Department of Homeland Security's policies) and Fish and Wildlife Service.

⁵⁰ We defined key factors as those identified by more than 40 percent of 100 tribes in the tribal comments from 2016 or more than 40 percent of the 21 selected federal agencies in interviews. The 100 tribes include 96 federally recognized Indian tribes, plus 4 bands of one of these tribes.

Tribes Identified Agency Consultation Practices and Tribal Resources as Key Factors That Hinder Effective Consultation

In our review of tribal comments provided to federal agencies in 2016, we found a variety of key factors tribes identified that hinder effective tribal consultation for infrastructure projects, which we organized into five categories: (1) agencies' processes for initiating consultation, (2) agencies' practices for engaging with tribes to obtain and use their input, (3) agencies' respect for Indian law and accountability, (4) tribal resources for participating in consultation, and (5) agency officials' knowledge or training on tribal consultation. These key factors were corroborated during our interviews with officials from 57 federally recognized tribes and eight tribal organizations. Information on the key factors across these five categories is described below.

Agencies' Processes for Initiating Consultation

Tribes providing comments to federal agencies in 2016 identified federal agencies' processes for initiating consultation for proposed infrastructure projects, when there may be tribal implications, as a factor that hinders effective consultation. Specifically, tribes identified concerns in the following areas:

- **Timing of consultation.** Overall, 67 of 100 tribes that provided comments to federal agencies in 2016 identified concerns with agencies initiating consultation late in project development stages. The comments included concerns about agencies investing resources into or making decisions about projects before consulting tribes. Comments also included concerns about project applicants investing resources into projects before applying for federal approvals that would trigger the need for agency consultation. An official from one tribe we interviewed stated that late initiation of consultation limits opportunities for tribes to identify tribal resources near proposed project sites and influence project design. According to the tribal official, consequently, the tribe is often limited to monitoring construction.
- **Agency identification of tribes.** Fifty-six of 100 tribes that provided comments to federal agencies in 2016 identified concerns related to how agencies identify relevant tribes with whom to consult. Some of these comments expressed concern that agencies do not consistently identify tribes that should be consulted for proposed projects on tribes'

ancestral land, where tribes may have (1) treaty rights to hunt, fish, and gather, or (2) sites of cultural or religious significance.⁵¹ Officials from one tribe we interviewed explained that their federal recognition as an Indian tribe had been terminated by the U.S. government but then restored and that the tribe has ancestral ties to areas that agency officials are often not aware of.⁵² Consequently, tribal officials said agencies have not included the tribe in consultation about some proposed projects affecting their ancestral lands.

- **Agency identification of tribal resources.** Overall, 52 of 100 tribes that provided tribal comments to federal agencies in 2016 cited concerns related to how agencies identify tribal resources that may be affected by proposed projects. Examples of such tribal resources include traditional plants used for medicines, subsistence foods, waterways, burials, and geological formations that are considered spiritual places. According to several tribal officials we interviewed, agencies sometimes rely on archaeologists who may not have the specialized expertise or traditional knowledge, such as oral histories passed across generations, needed to identify tribal resources. For example, officials from one tribe said that archaeologists have characterized holes that form an alignment or ring on hilltops as “teepee rings.” However, tribal officials noted that the tribe does not construct teepees on hilltops, where the wind would blow them over.
- **Agency notification of consultation opportunities.** Forty-two of 100 tribes that provided comments to federal agencies in 2016 identified concerns related to how agencies notify tribes of consultation opportunities, once agencies have identified relevant tribes. Some comments included concerns that agencies do not send tribes sufficient notifications for a given consultation opportunity, and other comments expressed concerns that agencies may send notifications to incorrect addresses or tribal officials or to a generic “tribal leader.” For example, some tribes commented that letters addressed to a generic “tribal leader” are disrespectful or difficult to route internally to the correct tribal official, which can shorten the amount of time tribes have to respond to letters.

⁵¹Tribes may have been removed from their ancestral homelands, pursuant to treaties or other means, but they may maintain treaty rights or an interest in those areas. Tribes may retain certain rights on lands ceded to the U.S. government in treaties, such as rights to hunt, fish, or gather.

⁵²In the 1950s and 1960s, laws were enacted to terminate the federal government’s relationship with certain Indian tribes. Subsequently, many of these tribes’ federal recognition has been restored by federal courts or statute.

Agencies' Practices for Engaging with Tribes to Obtain and Use Their Input

Tribes that provided comments to federal agencies in 2016 identified federal agencies' practices for engaging with tribes to obtain and use tribal input when making decisions as another key factor that hinders effective consultation. Specifically, tribes identified concerns in the following areas:

- **Agency consideration of tribal input.** Sixty-two of 100 tribes that provided comments to federal agencies in 2016 identified concerns with agencies' consideration of tribal input, commenting that agencies often do not adequately consider the tribal input they collect during tribal consultation when making decisions about proposed infrastructure projects. These comments included perceptions that agencies consult to "check a box" for procedural requirements rather than to inform agency decisions. In addition, one tribal official we interviewed said that consultation is superficial when agencies do not consider tribal input. According to the official, the tribe sees consultation as a means to influence agency decisions, but agencies often see consultation as the end in itself. The official said that this difference in views can stifle dialogue and information sharing during consultation.
- **Communication between tribes and agencies.** Fifty-five of 100 tribes that provided comments to federal agencies in 2016 identified concerns with communication between tribes and agencies, including general communication concerns and an absence of two-way, back-and-forth dialogue—among other things. In particular, 22 tribes commented that some agencies do not communicate with tribes after consulting them about proposed projects regarding, for example, (1) the agency's final decision on the proposed project, (2) the rationale for that decision, or (3) how the agency considered—or planned to consider—tribal input.
- **Scope of issues for consultation.** Forty-six of 100 tribes that provided comments to federal agencies in 2016 identified concerns with agencies limiting the scope of issues to be discussed or considered in consultation. The comments focused on three areas. First, tribes commented that the geographic scope may be too narrow; for example, agencies may consider project effects on tribal resources within a limited area around the proposed project site. Second, tribes commented that the time frame may be too narrow; for example, agencies may not consider potential long-term future effects on tribal resources (e.g., potential pipeline leaks). Third, tribes commented that

agencies may limit the scope to be considered in other ways, such as by not allowing a discussion of environmental justice considerations or project effects on climate change.⁵³

- **Opportunities for consent.** Forty-five of 100 tribes that provided comments to federal agencies in 2016 identified concerns related to the extent to which agencies obtain tribes' consent on proposed projects that may affect them. Tribes commented that agencies either are not required to or have not obtained tribal consent for proposed projects on tribes' land or on ancestral land where tribes may have treaty rights or interests.

Agencies' Respect for Indian Law and Accountability

Tribes that provided comments to federal agencies in 2016 also identified factors that hinder effective consultation related to the extent which federal agency officials showed respect for Indian law, as well as agencies' general accountability for tribal consultation on infrastructure projects. Specifically, tribes identified concerns in the following areas:

- **Agency respect for tribal sovereignty or the government-to-government relationship.** Seventy-three of 100 tribes that provided comments to federal agencies in 2016 identified concerns related to agencies' level of respect for (1) tribal sovereignty or (2) the government-to-government relationship between the United States and federally recognized Indian tribes. 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, sending low-level agency staff without decision-making authority to represent the U.S.

⁵³Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to developing, implementing, and enforcing environmental laws, regulations, and policies. See GAO, *Environmental Justice: EPA Needs to Take Additional Actions to Help Ensure Effective Implementation*, [GAO-12-77](#) (Washington, D.C.: Oct. 6, 2011).

government in consultation meetings, or delegating consultation to project applicants.⁵⁴

- **Agency fulfillment of tribes' expectations for the trust responsibility.** Fifty-three of 100 tribes that provided comments to federal agencies in 2016 identified concerns with the extent that agency officials fulfilled tribes' expectations for the U.S. government's trust responsibility to federally recognized Indian tribes and their members.
- **Agency efforts to honor treaty rights.** Fifty-two of 100 tribes that provided comments to federal agencies in 2016 identified concerns with agency efforts to honor tribal treaty rights. Comments included concerns about agencies not consulting with tribes that have treaty rights in the geographic area of a proposed project site or not examining the potential effects of proposed projects on treaty-reserved resources.
- **Agency accountability.** Sixty-one of 100 tribes that provided comments to federal agencies in 2016 identified 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 agency officials did not adhere to consultation requirements.

Tribal Resources for Participating in Consultation

Forty-nine of 100 tribes that provided comments to federal agencies in 2016 identified insufficient resources for participating in consultation on infrastructure projects, such as having limited funding or staff to travel to consultation meetings—which was also a common concern for tribes we interviewed. For example, officials from one tribe we interviewed stated that the tribe's remote location made traveling to consult with certain

⁵⁴A 2011 ACHP report discussed the need to remind federal agencies that applicants may initiate consultation with tribes if the tribes agree, but federal agencies are responsible for maintaining the government-to-government relationship with tribes and upholding their consultation responsibilities, according to ACHP guidance. Advisory Council on Historic Preservation, *Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act*, (Washington, D.C.: July 1, 2011) and *Section 106 Consultation Between Federal Agencies and Indian Tribes Regarding Federal Permits, Licenses, and Assistance: Questions and Answers* (Washington, D.C. Mar. 27, 2008).

federal agencies costly and time consuming, explaining that the closest meeting locations were often a 6-hour drive by car. According to officials we interviewed from another tribe, the tribe often does not have sufficient staff to adequately respond to notifications for consultation when they are received (see fig. 2). To respond to a consultation notice for a proposed project, another tribal official we interviewed said that the tribe may need to take numerous steps such as reviewing archaeological surveys or reports, searching the tribe's geographic database, and visiting the area of the proposed project to investigate whether tribal natural resources are present. However, with limited resources, the official said the tribe has a difficult time completing steps needed to provide information on potential impact to tribal resources for a proposed project.

Figure 2: Tribal Official with Federal Agency Notifications of Tribal Consultation Opportunities for Proposed Infrastructure Projects



A tribal official shows notifications of tribal consultation opportunities for proposed infrastructure projects, received in the mail from federal agencies within about 4 months. According to the official, the tribe receives more notifications than its staff can manage in a timely manner.

Source: GAO. | GAO-19-22

Officials from several tribes we interviewed also cited insufficient funding for tribal historic preservation officers as a factor hindering effective consultation on infrastructure projects. The National Park Service provides annual *Tribal Historic Preservation Officer Historic Preservation Fund* grants to tribes to support tribal cultural resources preservation and protection activities on tribal lands, according to agency documents.

Among other things, the funding may be used to help pay expenses for consultation on projects on or affecting resources on tribal lands.⁵⁵ Tribes and representatives of tribal organizations we interviewed said even with these grants, some tribes do not have sufficient resources to respond to consultation requests in a timely manner particularly when there is a high volume of requests or short deadlines, among other factors.

Agency Officials' Knowledge or Training on Tribal Consultation

Forty-seven of 100 tribes that provided comments to federal agencies in 2016 identified agency officials' knowledge or training on tribal consultation for infrastructure projects as a factor that hinders effective consultation. Among other things, these tribes cited concerns with agency officials' knowledge or training on:

- tribal culture, such as understanding tribal customs, religion, or values (25 of 47);
- individual tribes' characteristics, such as a tribe's history or government structure (24 of 47);
- agencies' consultation responsibilities (20 of 47);
- Indian law, including tribal treaty rights, tribal sovereignty, the government-to-government relationship, and the federal trust responsibility (19 of 47); and
- Native American history (13 of 47).

Several tribal officials we interviewed shared similar concerns. For instance, tribal council officials from one tribe said that some agency officials they have interacted with did not know that tribes exist in the United States. In the comments provided by tribes to federal agencies in 2016 and in interviews with tribal officials, some tribes noted that cultural

⁵⁵According to National Park Service officials, there is no current prohibition or authorization in law or regulation for the use of Historic Preservation Fund grants outside of tribal lands. The NHPA and its implementing regulations define tribal land as all land within the exterior boundaries of any Indian reservation and all dependent Indian communities. 54 U.S.C. § 300319; 36 C.F.R. § 800.16(x). Grants can fund activities such as archaeological and architectural surveys, the nomination of sites to be added to the National Register of Historic Places; review and compliance activities, such as section 106 consultations; and education programs. According to National Park Service officials, in fiscal year 2018, 175 federally recognized Indian tribes were awarded average grants of approximately \$65,600.

training similar to training required of Foreign Service officials before serving abroad would help ensure agency officials had sufficient knowledge regarding tribal culture, history, and legal principles to facilitate positive government-to-government interactions.

Agencies Identified Various Key Factors That Hinder Effective Consultation

Officials from the 21 federal agencies in our review identified a variety of key factors they have experienced that hinder effective consultation for infrastructure projects, which we organized into four categories: (1) initiating consultation when there may be tribal implications, (2) tribal participation in consultation and response to consultation notifications, (3) agency capacity to conduct tribal consultation, and (4) interagency coordination on tribal consultation. Information on the key factors across these four categories is described below.

Initiating Consultation When There May be Implications for the Tribes

Consistent with issues raised by tribes, agency officials cited factors that hinder effective consultation related to initiating consultation for proposed infrastructure projects:

- **Identifying tribes.** Officials from 10 of 21 agencies (48 percent) cited difficulties identifying relevant tribes with whom to consult, including tribes with treaty rights or interests in the geographic area of proposed infrastructure project sites. Officials from 7 of the 10 agencies cited issues with identifying relevant tribes that have ancestral homelands and potential interests in proposed projects including those in the eastern United States.⁵⁶
- **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. Most of these agencies (11 of the 14) identified issues they have faced with sending notifications to the correct officials and addresses when they may not be aware of changes in tribal staff or elected leaders. For example, ongoing

⁵⁶Many tribes historically from the eastern United States were removed and relocated to the western United States but still maintain interests in the east.

changes or turnover in tribal leadership make it difficult to maintain updated tribal information, according to some agency officials we interviewed.

Tribal Participation in Consultation and Response to Consultation Notifications

Officials from 11 of 21 agencies (52 percent) identified factors that hinder effective consultation related to limited tribal participation in consultation or insufficient response to notifications of consultation opportunities. Officials from 10 of these agencies generally indicated that tribes' response rates regarding consultation opportunities for infrastructure projects are often low, and agencies may not hear back from tribes even when they make multiple attempts to contact them. Officials from one agency said that they believe tribes may prioritize other issues facing their communities over consultation, even if they have an interest in participating in consultations. In addition, officials from 2 agencies said that tribes are often reluctant to engage with project applicants, who may gather information for federal permits or other approvals in earlier project stages when tribal input may be important. Officials from one of the agencies we interviewed said this type of coordination between tribes and project applicants is allowed but that from a tribe's perspective, the project applicant has a financial stake in the project that may create incentives to minimize tribes' concerns, and therefore the tribe may be reluctant to share information with applicants or participate in consultations.

Agency Capacity to Conduct Tribal Consultation

Agency officials cited factors that hinder effective consultation related to agency capacity to conduct tribal consultation. Specifically, they cited the following:

- **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. For example, Department of Housing and Urban Development officials said that many consultations for department funded projects take place over the telephone, because of resource constraints, though face-to-face consultation is viewed as a more effective method of consultation by

some tribes. Officials from 5 agencies said they have limited staff available to support consultation activities such as regular outreach to tribes or to develop ongoing relationships with tribes to facilitate consultation.

In addition, officials from 8 of the 13 agencies citing resources as a factor discussed difficulties in responding to tribes' requests for reimbursement for consultation activities. For example, Federal Aviation Administration officials stated that the agency's appropriations for its airport improvement program have many stipulations on how the program's funding may be used. According to these officials, the agency's position is that this does not include funding for tribal consultation.

Officials we interviewed from 2 agencies also said that they have experienced challenges when tribes ask project applicants to pay fees, or reimburse their costs, for participating in the section 106 process. Although ACHP guidance says agencies or applicants should compensate tribes when they ask tribes to do more than respond to findings and determinations, the guidance also says agencies and applicants are not required to pay tribes for providing their views during section 106 consultations.⁵⁷ Officials from these 2 agencies said tribes have asked project applicants to pay fees for their participation in the section 106 process. For example, applicants seeking Federal Communications Commission permits for telecommunications tower construction raised concerns about increasing costs incurred from tribal fees for the section 106 review

⁵⁷ ACHP's guidance also encourages project applicants or applicants for federal assistance that assume responsibilities for carrying out section 106 functions to pay for expenses that facilitate consultation with Indian tribes. Advisory Council on Historic Preservation, Memorandum *Fees in the Section 106 Review Process* (Washington, D.C.: July 6, 2001) and *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook*, (Washington, D.C., December 2012). The FPISC fiscal year 2017 best practice report also encourages agencies to explore avenues, in coordination with project applicants, for compensating tribes for costs incurred when they are asked to provide consultant-like services or special expertise. Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects*, (Washington, D.C.: Jan. 18, 2017).

process, according to an agency notice.⁵⁸ Specifically, the applicants were concerned about the fees tribes require applicants to pay before they will review any or most of these projects in light of an increasing number of tribes charging fees, rising fee amounts, and an increasing number of tribes with interests in the same area.

- **Agency workload.** Officials from 13 of 21 agencies (62 percent) identified a demanding workload for consultation, 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 6 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. For example, Nuclear Regulatory Commission officials said that it is not unusual to reach out to 20 tribes for each proposed uranium recovery licensing action and have found it challenging to coordinate efforts and align schedules for the tribes, the applicants, the commission, and other interested government agencies to discuss licensing actions and gather input from tribes within project milestones.
- **Agency staff knowledge or training on tribal consultation.** Officials from 9 of 21 agencies (43 percent) identified staff knowledge or training as a factor that hinders effective consultation. For example, according to officials at 4 agencies, untrained staff may be unaware of cultural sensitivities such as the need to (1) collaborate on agendas for consultation meetings, (2) allow tribes to discuss historical or other issues during consultation meetings, or (3) hold additional meetings, as needed. Officials from 2 agencies said that some staff—such as cultural resource managers or environmental specialists—may not receive in-depth training on tribal consultation because it is an

⁵⁸After reviewing public comments on this notice, the Federal Communications Commission adopted an order that says the project proponent may negotiate and contract with a tribe for services similar to those of a contractor or consultant but that the applicant is not obligated to hire the tribe or accede to tribal requests for fees in the absence of an agreement. 83 Fed. Reg. 19440 (May 3, 2018). In addition, the order clarifies that project applicants are not required to pay up-front fees to tribes to initiate the section 106 process or to compensate tribes for providing their comments or views during the section 106 process. Accordingly, the order says, tribes will no longer be allowed to request fees in the agency's Tower Construction Notification System for providing their initial assessment of the project in the section 106 review process. Tribal officials we interviewed said they opposed many of the changes in the order and questioned whether they were adequately consulted with on these changes. According to commission officials, the commission continued to conduct outreach to tribes on this order after it voted to adopt it. Several tribes filed lawsuits, which were subsequently consolidated, challenging the order.

ancillary duty or because they consult with tribes infrequently. In addition, officials from 4 agencies said turnover creates challenges when new staff do not have training or previous experience working with tribes. For example, according to some of these officials new staff without training or experience may react defensively to tribes, particularly in initial encounters where tribes may want to share past experiences including historical wrongdoing by the United States. According to these officials, training could provide historical context and help new staff understand the importance of this interaction when establishing relationships with tribes.

Interagency Coordination on Tribal Consultation for Infrastructure Projects

Officials from 12 of 21 agencies (57 percent) identified difficulties coordinating with other federal agencies—when there may be multiple agencies involved in particular infrastructure projects— as a factor that hinders effective consultation. With such projects, a lead agency is generally identified to coordinate environmental reviews, which may include tribal consultation steps. Agency officials from 6 agencies said that often federal agencies enter into interagency agreements on how to coordinate on tribal consultation, among other aspects of an environmental review, but still may encounter challenges. For instance, according to Rural Development officials, if other agencies have preexisting agreements with tribes, the lead agency is to fulfill the collective responsibilities for consultation outlined in these agreements, but these agreements may differ or conflict, complicating agency coordination. In addition, according to some agency officials, coordination may not be feasible in some cases based on the timing of when certain agency reviews are conducted or when funding is made available across the agencies involved in the project.

In addition, some agency officials noted there may be differences in consultation practices across coordinating federal agencies that can create challenges. For example, an agency may prefer conducting in-person consultation meetings when possible, while another agency may more typically conduct consultations by telephone. Some officials also said that collaborating can complicate tribal consultation when the other agencies are not as committed to tribal consultation processes or have a “check-the-box” attitude. Officials from a few agencies noted that they may take additional consultation steps if the lead agency does not meet their agencies’ standards for consultation.

Selected Federal Agencies Have Taken Some Steps to Facilitate Tribal Consultation for Infrastructure Projects, but the Extent to Which Agencies Have Done So Has Varied

The 21 selected federal agencies have taken some steps to facilitate tribal consultation for infrastructure projects, but the extent to which they have taken steps varied across the agencies. Based on our review, 3 agencies developed systems to help identify tribes with whom to consult, and 18 of the 21 agencies developed systems to help notify tribes of consultation opportunities, the first steps in initiating consultation. Recently, the FPISC has recommended that agencies develop a centralized information system with tribal areas of interest and points of contact for consultation to further facilitate agencies with initiating consultation. However, no decisions have yet been made on how to implement this recommendation. Furthermore, some agencies have employed methods for communicating with tribes during and after consultations, provided training opportunities for staff involved in consultation, and used varying approaches to address resource constraints that tribes and agencies may face for consultation.

Most Selected Agencies Developed Individual Information Systems and Approaches to Help Identify Tribes or Notify Them of Consultation Opportunities

Of the 21 agencies, 3 developed information systems for identifying relevant tribes with tribes' geographic areas of interest, and 18 agencies relied on multiple sources of information.⁵⁹ In addition, 18 of the 21 agencies developed systems for notifying tribes about consultation opportunities that includes contact information for tribes, and the remaining 3 use a web-based directory to obtain tribal contact information.




The 3 agencies with information systems for identifying relevant tribes include information on geographic areas where tribes have treaty rights or

⁵⁹We collectively refer to agencies' databases, spreadsheets, or lists for providing information to agency officials as systems.

other interests in these systems (see fig. 3). For example, the Forest Service's Tribal Connections is an interactive mapping system that integrates 67 maps of lands ceded in treaties to assist agency officials in identifying tribes with treaty rights in particular geographic areas. The Federal Communications Commission's Tower Construction Notification System⁶⁰ and the Department of Housing and Urban Development's Tribal Directory Assessment Tool aim to provide the geographic areas of interest and contact information for the more than 500 federally recognized Indian tribes.

⁶⁰The Federal Communications Commission spent approximately \$1.1 million to develop the Tower Construction Notification System, not including ongoing maintenance costs, according to agency documents.

Figure 3: Three Federal Agencies' Information Systems for Identifying Relevant Tribes for Consultation on Proposed Infrastructure Projects

Tribal Connections	
	<p>Agency: Forest Service Launch year: 2015 Description: Tribal Connections is an online, interactive mapping tool that shows how lands managed by the Forest Service connect or overlap with current tribal trust lands and lands ceded in treaties. Clicking on the map provides additional current and historical detail for each location. Purpose:</p> <ul style="list-style-type: none"> - Help Forest Service employees and the public better understand treaties - Improve the efficiency of tribal coordination, collaboration, and consultation - Improve Forest Service decision making and honor and strengthen treaty rights and the federal trust responsibility
Tower Construction Notification System	
	<p>Agency: Federal Communications Commission Launch year: 2004 Description: The Tower Construction Notification System is a website on which tribes can designate geographic areas of interest and notification preferences. Areas of interest are by state or county. When telecommunications companies submit information on proposed tower construction, the system automatically notifies tribes with interest in the geographic area of the proposed tower. Tribes can directly contact companies to express any concerns and coordinate to address them. Purpose:</p> <ul style="list-style-type: none"> - Facilitate early coordination between telecommunications companies and tribes to help the commission meet its tribal consultation responsibilities - Advance the goal of the National Historic Preservation Act to protect historic properties, including tribal religious and cultural sites, in an efficient and convenient manner that promotes the interests of both tribes and the communications industry
Tribal Directory Assessment Tool	
	<p>Agency: Department of Housing and Urban Development Launch year: 2011 Description: The Tribal Directory Assessment Tool is an online, geographic database that shows tribes' designated geographic areas of interest and contact information, which the department collects from tribes. Areas of interest are by state or county. Purpose:</p> <ul style="list-style-type: none"> - Help agency employees and grant and loan recipients identify tribes that may have an interest in the location of an agency-assisted project - Provide tribal contact information to assist users with initiating tribal consultation

Source: GAO analysis of agency information. | GAO-19-22

Officials from the other 18 agencies said they use multiple information sources to identify relevant tribes who may be affected by proposed infrastructure projects. For instance, officials we interviewed from more than half the agencies indicated that they use information from the Department of Housing and Urban Development's Tribal Directory Assessment Tool or the Forest Service's Tribal Connections to identify

relevant tribes.⁶¹ Officials from 12 agencies said that they research tribes' history, culture, or lands, for example by conducting research with ceded land maps housed in the Library of Congress.⁶² Several agency officials said they used information from project applicants in some instances, sometimes requiring applicants to research tribes or hire consultants to do so. For example, Federal Transit Administration officials said they primarily expect the project applicant or its consultant to identify tribes that may be affected by a proposed project, because they are more familiar with the project area or tribes with potential interests from prior work.

Eighteen of the 21 agencies developed systems for notifying tribes about consultation opportunities, which generally include contact information for tribal leaders or other tribal officials. Some systems contain tribal contact information for tribes nationwide, and others contain tribal contact information for tribes in a particular region or designated geographic area. For example, the Environmental Protection Agency maintains a system that contains contact information for tribal environmental specialists nationwide. In contrast, some Corps district offices, such as the Albuquerque District Office, have systems that contain contact information for tribes in their respective regions. Similarly, Federal Aviation Administration officials said that their regional and district offices maintain individual systems that list tribal contacts. The 3 agencies that did not develop specific systems for notifying tribes indicated using the

⁶¹Tribal Connections and the Tribal Directory Assessment Tool are available to other agencies, but the Tower Construction Notification System is generally for internal use. The Federal Communications Commission has two active agreements allowing certain federal agencies to use its system. However, commission officials said they generally do not make the system widely available because of concerns about costs, sharing confidential tribal information, and other agencies potentially inappropriately applying tribes' areas of interest for tower construction to other types of infrastructure.

⁶²Nine agencies referenced using *Indian Land Cessions in the United States, 1784-1894* (United States Serial Set Number 4015), which includes 67 maps and two tables compiled by Charles C. Royce. One table, the *Schedule of Indian Land Sessions*, has information such as the locations and descriptions of lands ceded or reserved and the name of the tribe or tribes affected.

Bureau of Indian Affairs' Tribal Leaders Directory to obtain tribal contact information.⁶³

FPISC Recommended Agencies Develop a Centralized Information System but Has Not Yet Developed a Plan to Establish One

In December 2017, in its fiscal year 2018 best practices report, the FPISC recommended the development of a central federal information system of tribal areas of interest and points of contact for consultation.⁶⁴ The report stated that agencies involved in the FPISC requested a single system to enable timely tribal consultation. The report also referenced a 2017 ACHP report recommending a government-wide central system for identifying and notifying tribes, similar to the Federal Communications Commission's Tower Construction Notification System.⁶⁵

Officials from several agencies we interviewed suggested that one central information system to identify and notify relevant tribes would be preferable to having individual systems. For example, Federal Energy Regulatory Commission officials stated that in the absence of a central system, they had planned to develop their own system, which would require them to seek information from various tribes across the nation where the commission may approve infrastructure and other related projects. The officials said that other agencies may be undergoing similar efforts or already have acquired similar information from tribes.

⁶³The Bureau of Indian Affairs' Tribal Leaders Directory is an electronic, map-based, interactive directory containing information about each Bureau of Indian Affairs region and agency that provides services to specific tribes as well as contact information for leaders of federally recognized Indian tribes. The bureau states on the directory's website that it cannot guarantee the accuracy of contact information, as changes in tribal leadership occur throughout the year. Bureau of Indian Affairs officials said they update the directory monthly.

⁶⁴Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* (December 2017). The 2017 FPISC best practices also broadly called for using geographic information systems and integrated web tools to create efficiencies in tribal consultation. FPISC, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects* (Jan. 18, 2017).

⁶⁵Advisory Council on Historic Preservation, *Improving Tribal Consultation in Infrastructure Projects: A Report by the Advisory Council on Historic Preservation* (Washington, D.C.: May 24, 2017).

In July 2018, the Department of Housing and Urban Development, a FPISC member, submitted a proposal to the FPISC to scale up the department's Tribal Directory Assessment Tool for broader government use to implement the FPISC recommendation.⁶⁶ The proposal indicates that the information in the scaled-up system would help federal agencies identify tribes for consultation by including tribal leaders' and historic preservation officers' names and contact information, as well as geographic areas of tribal interest, broken out by county. The proposal states that the system could make the work of federal agencies more efficient by providing reasonably reliable contact information, improving consistency between federal agencies in terms of their tribal outreach, and potentially increasing the likelihood that notifications reach tribes with interests in a proposed project.

The proposal identified a tribally developed information system as a possible model for a central government-wide information system. Specifically, it referenced the Arizona Government-to-Government Consultation Toolkit developed by the Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona, and the Arizona State Historic Preservation Office. The system is a public website that integrates several tools.⁶⁷ For example, it includes definitions for "meaningful consultation" and certain federal and state consultation requirements. The system's consultation map shows tribes' self-defined areas of interest on which they wish to be consulted for various types of proposed infrastructure projects. Clicking a geographic point on the map brings up a list of tribes to consult. Users may click on a tribe for more information that the tribe self-defined, such as the tribe's full geographic area of interest, contact information and notification preferences, and consultation protocols. The system also includes contact information for federal agency officials and links to federal agency websites. According to tribal and state officials, the system is a resource to facilitate contact between tribes and agencies that gives tribes the ability to define affiliation areas and disseminate specific protocols for meaningful consultation.

⁶⁶According to the proposal, a scaled-up system could be used for federal agencies' reviews of projects covered under title 41 of the Fixing America's Surface Transportation Act, as well as a wide range of other proposed infrastructure projects.

⁶⁷See the *Government-to-Government Consultation Toolkit*, <https://sites.google.com/view/az-consultation-toolkit/home>, accessed on January 4, 2019.

The Department of Housing and Urban Development's proposal states that the department is willing to own and host a scaled-up system,⁶⁸ with a long-term commitment of resources and support from other FPISC members but that the department alone does not have the resources to support such an effort. The department recommended in its proposal that the FPISC decide whether the department should scale up its Tribal Directory Assessment Tool to implement the FPISC recommendation, and if so, create a plan for doing so, including determining the long-term resources needed. According to the FPISC Office of the Executive Director, a meeting was held in August 2018 to discuss the Department of Housing and Urban Development's proposal. But the officials said that as of October 2018, a decision for accepting the department's proposal or developing a plan to implement that proposal had not been made, and they did not have a time frame for doing so.

We have previously reported that leading practices for developing government websites and modernizing information technology include establishing a plan with well-defined goals for information technology systems, clearly defined functional and technical requirements that consider user needs, and clear roles and responsibilities of those involved in developing and managing of the systems.⁶⁹ Roles and responsibilities can include agencies' responsibilities for providing human capital and other resources as well as identifying the agency or entity with statutory authority to develop and manage such systems. By developing a plan to establish a central information system for identifying and notifying tribes that includes well-defined goals, roles and responsibilities, and resources for developing and maintaining the system—if the FPISC decides to move

⁶⁸According to the proposal, the department would need to make technical upgrades to make the system useful for a broader set of agencies.

⁶⁹GAO, *Information Technology Modernization: Corporation for National and Community Service Needs to Develop a System That Supports Grant Monitoring*, [GAO-17-267](#) (Washington, D.C.: Aug. 17, 2017) and *Managing for Results: Leading Practices Should Guide the Continued Development of Performance.gov*, [GAO-13-517](#) (Washington, D.C.: June 6, 2013).

forward with a centralized system—it would have better assurance that the project will be implemented in accordance with successful practices.⁷⁰

Another area that the FPISC would have to consider is how to ensure the accuracy of information in the centralized system. The department's proposal for a scaled-up system states that tribes would be able to request updates to their geographic areas of interest or contact information at any time but otherwise does not discuss how agencies would communicate with tribes in establishing the system or ensuring the accuracy of tribal data. According to Department of Housing and Urban Development officials, outreach to tribes to verify the accuracy of existing tribal data in the Tribal Directory Assessment Tool would not be necessary to scale up the system.

However, a representative from the National Association of Tribal Historic Preservation Officers emphasized the importance of federal agencies communicating with tribes in establishing a central information system to ensure that the tribal data maintained in the system are accurate once it is set up. The representative explained that existing tribal data within the Department of Housing and Urban Development's Tribal Directory Assessment Tool may not be valid for a scaled-up system. For example, she said that her tribe may provide different data on areas of interest for consultation on department-assisted housing and urban development projects where there may be site-specific tribal interests on or near tribal lands, versus other types of infrastructure projects like pipelines or offshore wind turbines where tribes may have larger areas of interest. Further, at the 2018 National Association of Tribal Historic Preservation Officers annual conference, many tribal officials indicated that the existing publicly available tribal data in the Tribal Directory Assessment Tool are not accurate. Specifically, several tribal officials stated that geographic areas of interest, contact information, or both were inaccurate in some cases for their respective tribes.

⁷⁰As of March 2019, the FPISC members were: 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. The Executive Director is the Chair of the FPISC, who works within the FPISC Office of the Executive Director.

Federal internal control standards state that management should use quality information to achieve the entity's objectives.⁷¹ This may include obtaining relevant data from reliable internal and external sources in a timely manner based on the identified information requirements. By considering how it will communicate with and involve tribes to help maintain accurate tribal data as it establishes a central information system, the FPISC could have better assurance that the system has accurate data to identify tribes and notify them of consultation opportunities.

Agencies Use Various Methods to Communicate with Tribes, but Few Have Policies That Call for Communicating on How Tribal Input Was Considered in Agency Decision-Making

Officials from the 21 selected federal agencies identified various communication methods they use to facilitate tribal consultation for infrastructure projects. To promote communication with tribes, agency officials described taking the following steps:

- **Using tribal liaisons.** Officials from 18 agencies cited using agency staff in tribal liaison roles to facilitate communication between agencies and tribes. For example, according to agency officials, the Bureau of Ocean Energy Management's Alaska Outer Continental Shelf Region employs a full-time tribal liaison to attend tribal consultation meetings and generally engage with tribes. These officials said that the tribal liaison contacts tribes about monthly to support relationships—for instance, checking in by telephone or sharing research reports that may be of interest.
- **Meeting regularly outside of consultation.** Officials from 14 agencies discussed holding regular meetings with tribes outside of consultations on particular infrastructure projects, and officials from 18 agencies discussed attending conferences or other tribal events. For example, Nuclear Regulatory Commission officials said that they hosted workshops with tribes to facilitate and enhance the commission's reviews of licensing projects under NEPA and section 106 of the NHPA. Bureau of Land Management Alaska regional officials said they typically meet face-to-face at least once a year, or

⁷¹[GAO-14-704G](#).

more often as needed, with each tribal council or equivalent leadership in Alaska to maintain regular communication.

- **Entering into memorandums of agreement with tribes.** Officials at 13 agencies described establishing memorandums of agreement or understanding with tribes on tribal consultation processes. For example, a National Marine Sanctuary located off the coast of Washington has entered into a memorandum of agreement with several tribes, according to National Oceanic and Atmospheric Administration officials. The memorandum outlines communication strategies regarding the management of marine resources and activities within the boundaries of the sanctuary.

In reviewing the selected agencies' tribal consultation policies, we found that 17 of 21 agencies' policies address engaging in two-way communication—or back and forth dialogue—with tribes when consulting on infrastructure projects. In particular, 16 of the agencies' policies highlight the importance of two-way communication within their definitions for “consultation.” For example, a Forest Service policy states that “consultation is based on dialogue, and dialogue can occur in many forms.” Similarly, the Federal Highway Administration’s policy states, “consultation means the process of seeking, discussing, and considering the views of others, and where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information.”

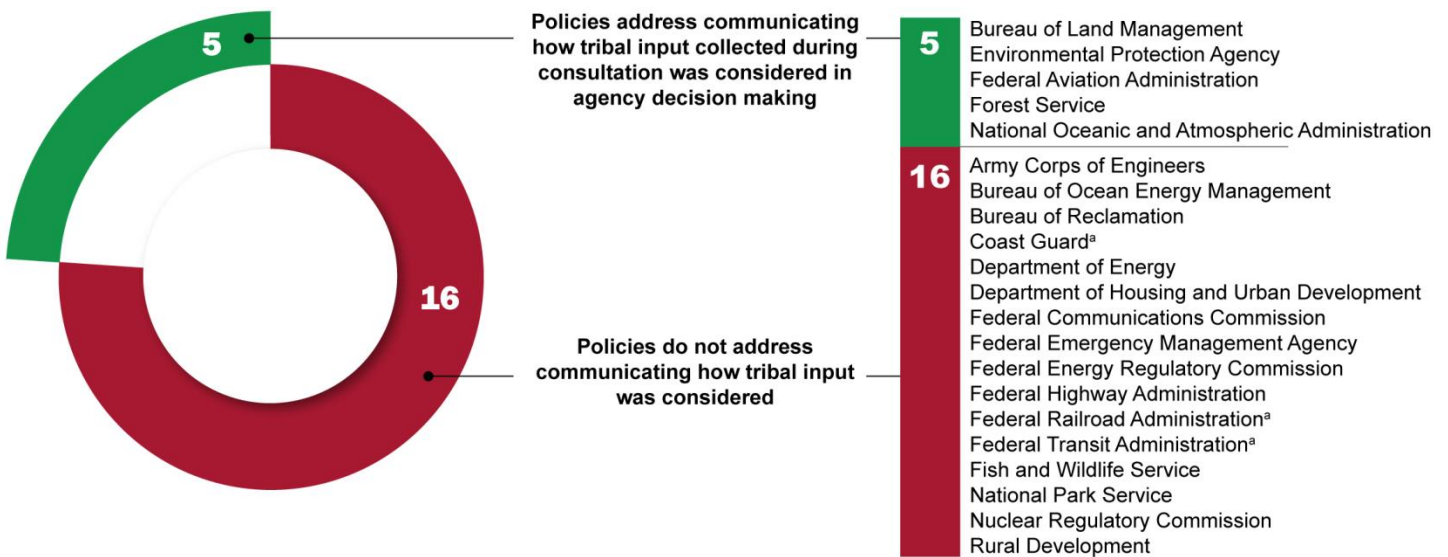
In addition, representatives we interviewed from one tribal organization that advocates for 11 tribes discussed the importance of agencies communicating with tribes about how their input was considered. They said, for example, that in their experience Environmental Protection Agency officials diligently try to address tribal concerns and reach consensus during consultation on infrastructure projects as well as thoroughly explain their decisions. The representatives said that the agency once approved a permit for an injection well that the tribes opposed during consultation, but agency officials explained their rationale for the decision to the affected tribes. According to these representatives, the tribal officials involved considered the consultation a success because they knew the agency had considered their input, even though the tribal officials disagreed with the final decision.

In contrast, these representatives said that other agencies may not tell tribes how their input was considered during agency decision-making,

and tribes may learn about these decisions in public forums. The representatives said this gives the impression that agency officials are not interested in consultation, reflecting underlying issues with trust between tribes and agencies. However, the representatives said that increased agency communication about how tribal input was used in agency decision-making could alleviate these concerns.

We found that 5 agencies' tribal consultation policies specify that the agency is to communicate with tribes about how the agency considered tribal input when making decisions on proposed infrastructure projects (see fig. 4).

Figure 4: The Extent to Which Selected Federal Agencies' Tribal Consultation Policies Address Communicating with Tribes about How Tribal Input Was Considered When Making Decisions on Proposed Infrastructure Projects



Source: GAO analysis of selected federal agencies' tribal consultation policies. | GAO-19-22

Note: We reviewed agency regulations, policies, and guidance on consulting with Indian tribes, which we refer to collectively as tribal consultation policies. This figure presents information about topics included in agency tribal consultation policies and may differ from agency practices.

^aThe agency does not have its own tribal consultation policies but follows department-level policies. Specifically, the Coast Guard follows the Department of Homeland Security's policies, and the Federal Railroad Administration and the Federal Transit Administration follow the Department of Transportation's policies.

The content of the 5 agencies' policies varied. For example, the policies of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration direct 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. The Environmental Protection Agency policy states that informing tribes about

how their input was considered is an important part of demonstrating that the agency values tribal input. The Bureau of Land Management, Forest Service, and Federal Aviation Administration policies more broadly direct agency officials to inform tribes of how their input was considered and provide the basis for any agency decisions that did not adopt tribal recommendations.

Officials from the 16 remaining agencies provided various reasons for why their tribal consultation policies did not address communicating how tribal input was considered, including the following:⁷²

- **Officials may communicate in practice how tribal input was used.** Officials from 7 agencies (the Bureau of Ocean Energy Management, Corps, Department of Energy, Department of Housing and Urban Development, and Federal Emergency Management Agency, as well as the Federal Railroad Administration and Federal Transit Administration—which follow Department of Transportation policies) noted that agency officials may, in practice, communicate how tribal input was used, regardless of the content of agency policies.⁷³ However, without having procedures documented in policy, agency officials may not be aware of expectations to communicate how tribal input was used and may not do so consistently.
- **Broader policies on communication guide agency actions.** Officials from 4 agencies (Bureau of Reclamation, Federal Communications Commission, Fish and Wildlife Service, and Rural Development) said that communicating with tribes about how tribal input was considered is consistent with the agencies' broader direction on communication in other agency policies, such as guidance that directs agency officials to engage in two-way communication with tribes. Federal Communications Commission officials also noted that they have a policy that outlines procedures for collecting and considering tribal input on telecommunication facilities

⁷²Of the 16 agencies, the Coast Guard uses the policies of the Department of Homeland Security, and the Federal Railroad Administration and Federal Transit Administration use the policy of the Department of Transportation. The remaining 13 agencies have their own tribal consultation policies.

⁷³Corps officials also stated that Corps districts in collaboration with tribes may establish consultation procedures for individual projects or programs, and may include procedures for communicating how tribal input was used in this type of document.

licensed by the Commission.⁷⁴ Among other things, the policy describes tribes' roles in the section 106 process and authorizes applicants to initiate, coordinate, and assist the commission with many aspects of the section 106 process, including communicating with tribes, provided the tribes agree. For example, the policy specifies that tribes are to be provided an opportunity to have their views taken into account by the applicant and the commission. However, the language in the guidance referenced does not specify that two-way communication is to include information on how tribal input was considered. By not having this expectation documented in guidance, agency officials may not know that they are to do so consistently.

- **Agencies communicate decisions in published orders or through other publicly available documents.** Officials from 2 independent regulatory agencies (Federal Energy Regulatory Commission and Nuclear Regulatory Commission) said they do not need to directly communicate with tribes about how their input was considered because the agencies explain their decisions in published orders and other documents that are available to the public.⁷⁵ For example, Federal Energy Regulatory Commission officials said that tribes can subscribe to dockets in the commission's eLibrary to be notified of these orders.⁷⁶ In addition to published orders, Nuclear Regulatory Commission officials noted that information on how the commission considered tribal input is also included in other publicly available documents, such as environmental impact statements. Relying on

⁷⁴Federal Communications Commission, *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission*, September 2004. 47 C.F.R. pt. 1, Appx. C.

⁷⁵Further, Federal Energy Regulatory Commission officials said that in certain circumstances the agency's ex parte rules that govern communication during commission proceedings for making permitting decisions prohibit them from communicating off-the-record with tribes for a period of time after a consultation. The commission's ex parte rule generally prohibits off-the record communications with commissioners and commission staff who are involved in the decisional process of the proceeding in all contested on-the-record proceedings. 18 C.F.R. § 385.2201.

⁷⁶In May 2018, the Department of Energy Office of Inspector General reported that deficiencies with eLibrary may limit stakeholders' access to Federal Energy Regulatory Commission documents for specific project applications. Among other things, the Office of Inspector General report recommended that the Federal Energy Regulatory Commission address eLibrary deficiencies and document processes for tracking stakeholder input to ensure that comments are considered. The commission concurred with the recommendations., Department of Energy, Office of Inspector General, *The Federal Energy Regulatory Commission's Natural Gas Certification Process*, DOE-OIG-18-33, (Washington, D.C.: May 2018).

published orders or other documents for the general public to explain how tribes' input was considered during decision-making could give the impression that agency officials may not be interested in consultation, furthering issues of lack of trust between tribes and agencies. Without including in policy the importance of communicating with tribes about how their input from project consultation was considered, agency officials may not be aware of expectations to communicate how tribal input was used and may not do so consistently.

- **State agencies' policies may have communication procedures.** Federal Highway Administration officials said they do not need communication procedures because funding recipients, such as state departments of transportation, are responsible for communicating with tribes for projects their agency funds, and state departments of transportations' policies typically include information on communication. However, under regulations implementing section 106 of the NHPA and the ACHP's guidance, the authorization of applicants to initiate section 106 consultations does not apply to initiating consultation with Indian tribes unless expressly authorized by the Indian tribe to do so. Moreover, the federal agency remains responsible for all section 106 findings and determinations and for ensuring that the consultation process is carried out properly. By not having these expectations documented in procedures, agency officials may not know to do so consistently.
- **Policy is designed to grant agency flexibility.** Officials from 2 agencies (Coast Guard, which uses Department of Homeland Security policies, and National Park Service) said that their agencies' policies for communicating with tribes grant agency officials' flexibility to tailor their approaches to individual tribes and that more specific procedures would limit this flexibility. National Park Service officials added that communication post-consultation is part of the ongoing consultation relationship that the agency encourages. Consequently, the officials from both agencies said they did not believe it would be appropriate to include procedures for communicating how tribal input was used in their tribal consultation policies. However, the 5 agencies' policies that address such communication also recognize the need for agency flexibility in consultations. For example, the National Oceanic and Atmospheric Administration's policy directs agency officials to close consultation with formal, written communication that explains the extent of agency efforts to address tribal concerns. It also states that agency representatives need to be flexible for consultation to be effective. Without documenting in policy the expectation that agencies communicate with tribes about how their input was considered,

agency officials may not know to take this step when tailoring approaches.

Federal internal control standards state that management should design control activities to achieve objectives and respond to risks, such as by clearly documenting internal control in management directives, administrative policies, or operating manuals.⁷⁷ By documenting in tribal consultation policies how agencies are to communicate with tribes about how their input from project consultation was considered in agency decision-making, the 16 agencies without such policies could have better assurance that they are adequately communicating with tribes about how their input was considered.⁷⁸

Agencies Provide a Range of Training Opportunities for Staff Involved in Consultation

Most of the 21 selected federal agencies have taken steps to facilitate tribal 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.

We found that 13 of the 21 selected federal agencies have developed relevant elective training opportunities for staff involved in tribal consultation.⁷⁹ For example, the Corps coordinates an immersive, 4-day training, hosted by a tribe on the tribe's land or reservation for Corps staff and other participating agency officials, which focuses on cultural

⁷⁷[GAO-14-704G](#).

⁷⁸The 16 agencies are: the Corps, Bureau of Ocean Energy Management, Bureau of Reclamation, Coast Guard (which follows Department of Homeland Security policies), Department of Energy, Department of Housing and Urban Development, Federal Communications Commission, Federal Emergency Management Agency, Federal Energy Regulatory Commission, Federal Highway Administration, Federal Railroad Administration (which follows Department of Transportation policy), Federal Transit Administration (which follows Department of Transportation policy), Fish and Wildlife Service, National Park Service, Nuclear Regulatory Commission, and Rural Development.

⁷⁹The 13 agencies that have developed elective tribal consultation-related training courses are: the Corps, Bureau of Land Management, Bureau of Ocean Energy Management, Department of Energy, Department of Housing and Urban Development, Environmental Protection Agency, Federal Emergency Management Agency, Federal Energy Regulatory Commission, Federal Highway Administration, Forest Service, National Oceanic and Atmospheric Administration, Nuclear Regulatory Commission, and Rural Development.

competency important for tribal consultation. The Corps has conducted the training every 1 to 3 years since 2005, according to Corps officials. Corps officials said they also developed training entitled Diplomacy for Tribal Liaisons to address tribes' suggestions that agencies implement cultural training similar to that required of Foreign Service members before serving abroad. Officials said they pre-tested the training in May 2018 and plan to consult with a tribal leaders working group on the training content as a next step before finalizing it.

Officials from 2 additional agencies said that they are in the process of developing tribal consultation-related training that will be available for staff in calendar year 2019. Specifically, Fish and Wildlife Service officials said they are developing "train-the-trainer" materials to support regional tribal liaisons in teaching other regional staff, which they expected to complete by the end of 2018. Officials from the National Park Service piloted a 40-hour course in August 2018 that blends online and in-person training entitled *Pathway to Confidence: Engaging in Effective National Park Service Tribal Consultation*. Agency officials said the course will provide intermediate-level training to staff involved in tribal consultation, including National Park Service superintendents and resource managers.

In addition, officials from several agencies said they support staff participation in external training as needed, such as tribal consultation-related training provided by other federal agencies, organizations, or tribes. For example, officials from 3 agencies said some of their staff have taken the Department of the Interior's 3-day course on tribal consultation offered several times a year, which is fee-based and open to all federal employees. According to the training materials, the course covers legal and technical aspects of the tribal consultation process as well as cultural awareness activities, such as conducting a mock consultation where participants play various roles. Officials from a few agencies said they have also encouraged their staff to take training provided by tribal organizations and tribes, such as immersion training hosted by tribes whereby agency officials take part in traditional tribal activities and other interactions and dialogue to help build relationships (see fig. 5).

Figure 5: Tribally Hosted Immersion Training for Federal Agency Officials

As part of immersion training hosted by tribes, federal agency officials are invited to sleep in traditional dwellings and take part in traditional activities including cooking, storytelling, and attending ceremonies on the host tribe's land. Cultural competence and tribal consultation are among the training topics. According to tribal officials from the Confederated Tribes of Grand Ronde, which hosts immersion trainings for agency officials, instructors aim to create an environment where agency officials can speak freely and ask questions to facilitate dialogue and interaction that will help build trust between the tribe and agency officials. In this photo, training participants are flintknapping, using traditional tribal techniques to turn obsidian into points, blades, or other tools.

Source: Confederated Tribes of Grand Ronde, Ceded Lands Program. | GAO-19-22

Officials from a few agencies said they encourage staff to take relevant web-based training, often available at no cost. For example, some of these officials said they encourage staff to complete a free 1-1/2-hour training entitled *Working Effectively with Tribal Governments* that covers federal Indian law, tribal consultation, and tribal culture, among other things.⁸⁰ Some officials also said they encourage staff, such as environmental staff, to watch a free 1-hour video entitled *Native American*

⁸⁰This course was last updated in April 2017 and is available on the Office of Personnel Management website, <https://tribal.golearnportal.org/>, accessed October 6, 2018. The course was developed by a federal interagency working group on tribal issues.

Sacred Sites and the Federal Government that covers applicable laws and tips on effective consultation.⁸¹

Further, 6 of the 21 selected federal agencies require some level of training for all agency staff involved in consultation, including either participation in training developed by the agency or offered externally.⁸² For example, since 2011 the Environmental Protection Agency has required its staff to take an agency-developed training on working with tribes every 2 years, which officials said the agency updates every 2 years to emphasize different topics, such as treaty rights. In addition, as of November 2018 the Federal Emergency Management Agency mandated training for staff on *Building Partnerships with Tribal Governments* available on the agency's training website as a step to help improve the agency's nation-to-nation relationship with tribes.

Agencies Use Various Approaches to Help 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. Specifically, we found that 10 of 21 agencies' tribal consultation policies specify the extent to which the agencies may compensate tribes for participating in consultation. 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

⁸¹This training video was released in 2017 on the Department of Justice's website, <https://www.justice.gov/tribal/video/sacred-sites-training-video>, accessed October 29, 2018. The training video was developed in coordination with subject matter experts from across the federal government, tribes, academia, and tribal advocacy groups.

⁸²The six agencies that require some level of training for staff involved in consultation are: the Bureau of Ocean Energy Management, Department of Energy, Environmental Protection Agency, Federal Emergency Management Agency, Forest Service, and Rural Development. In addition, the Nuclear Regulatory Commission planned to implement training requirements for staff and management who may interact with tribes by September 2018 according to its written response to a recommendation from its Office of Inspector General. Office of the Inspector General, Nuclear Regulatory Commission Defense Nuclear Facilities Safety Board, *Audit of NRC's Consultation Practices With Federally Recognized Native American Tribal Governments*, OIG-18-A-10, (Washington, D.C.: Apr. 4, 2018).

expenses to attend meetings in connection with some consultations.⁸³ Further, the policies state that the agency can contract with tribes for consultant-like services (i.e., providing expert knowledge for a fee) that may be helpful in consultation, such as for providing data and documentation for tribal resources on bureau-managed land that may be affected by agency decisions. In contrast, a Bureau of Reclamation policy states that the agency has not traditionally paid tribes for consulting with the agency or reimbursed travel or related expenses to participate in consultation, but specifies that it is appropriate to provide financial compensation when the agency requests tribes to perform consultant-like services.

In addition, some agency officials described using other approaches beyond policies to help address resource constraints, as shown in the following examples:

- **Collecting fees from applicants to cover agency costs.**⁸⁴ The Nuclear Regulatory Commission collects fees from project applicants to cover agency costs related to consultation.⁸⁵ Nuclear Regulatory Commission officials said that they are authorized to recoup costs related to project licensing from project applicants, including agency costs for consultation with tribes. For example, this authority includes recouping agency costs for travel for consultation meetings, or for contracts, such as contracting with a tribe to conduct tribal surveys to identify historic properties of cultural or religious significance to them.

⁸³Bureau 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).

⁸⁴Agencies are encouraged to consider initiating user fees that can promote economic efficiency and equity, as highlighted in Office of Management and Budget guidance and our past work on user fees. Office of Management and Budget, *Office of Management and Budget Circular-025 Transmittal Memorandum #1, User Charges* (Washington, D.C.: July 8, 1993); GAO, *Federal User Fees: Key Considerations for Designing and Implementing Regulatory Fees*, [GAO-15-718](#) (Washington, D.C.: Sept. 16, 2015) and GAO, *Federal User Fees: Fee Design Options and Implications for Managing Revenue Instability*, [GAO-13-820](#) (Washington, D.C.: Sept. 30, 2013).

⁸⁵The 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.

- **Distributing debit cards to tribal officials to cover travel expenses related to consultation.** The Forest Service created a program in 2017 that provides debit cards to tribal officials to help address tribal resource constraints and potentially long reimbursement time frames, which tribes can use for eligible expenses related to consultation. Forest Service officials said they can load these cards with funds to cover travel expenses for tribal officials participating in consultations. This allows tribal officials to pay for expenses as they go, avoiding the normal reimbursement process, which agency officials said can be lengthy. According to Forest Service officials, as of January 2018 the agency had distributed cards to 27 tribal officials.
- **Contracting with third-parties that reimburse tribes for their expertise.** According to agency officials, the Bureau of Ocean Energy Management provides indirect funding to tribes through its contracts with third parties, such as universities, that may hire or reimburse tribes for their expertise on potential impacts of proposed infrastructure projects on tribal resources, which helps inform consultation.

Differences in the Corps Procedures for Implementing Section 106 of the National Historic Preservation Act Have Gone Unresolved for over Two Decades

During the course of our review, we found that the Corps Civil Works program uses the ACHP's regulations implementing section 106 of the NHPA, but the Corps Regulatory Program⁸⁶ uses a regulation finalized in 1990,⁸⁷ guidance issued in 2005,⁸⁸ and a memorandum issued in 2007.⁸⁹

⁸⁶The Corps Civil Works program, among other things, grants permission for pipeline projects to cross federal land that the Corps manages under 30 U.S.C. § 185 or for infrastructure to affect Corps projects under 33 U.S.C. § 408. The Regulatory Program issues permits for certain activities in waters of the United States and ocean waters.

⁸⁷55 Fed. Reg. 27000 (June 29, 1990) (*codified at* 33 C.F.R. pt. 325, App. C).

⁸⁸Army Corps of Engineers Directorate of Civil Works/Regulatory, *Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800*, Apr. 25, 2005. This guidance supersedes interim guidance that the Corps issued in 2002 after the NHPA was amended and the ACHP amended its regulations.

Together these three documents are the Regulatory Program's procedures for implementing section 106, which we refer to as procedures.

The NHPA expressly authorizes the ACHP to issue regulations implementing section 106 "in its entirety."⁹⁰ The ACHP regulations have changed over time, but since 1979 they have required ACHP approval for agencies to use alternatives to the ACHP regulations.⁹¹ The ACHP did not concur with the regulation the Corps finalized in 1990 according to ACHP documentation we reviewed, and ACHP officials told us they did not approve the 2005 guidance or the 2007 memorandum. In addition, a federal district judge noted in a decision in 2001 that the Corps had agreed there was no record of the ACHP concurring in the regulation finalized in 1990.⁹² In response to our questions, Corps attorneys told us that the Corps had authority to issue its own regulation implementing section 106 but did not cite a specific statute.⁹³

⁸⁹Army Corps of Engineers, CECW-CO, *Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800*, Jan. 31, 2007.

⁹⁰54 U.S.C. § 304108(a).

⁹¹In 1979, the ACHP issued a regulation authorizing agencies to issue their own regulations to implement section 106—known as counterpart regulations—that were jointly drafted with the ACHP Executive Director and approved by the ACHP's Chairman. 44 Fed. Reg. 6068, 6079 (Jan. 30, 1979) (*codified at* 36 C.F.R. § 800.11 (1980)). In 1986, the ACHP amended this regulation to authorize agencies to develop counterpart regulations in consultation with the ACHP that were concurred in by the ACHP. 51 Fed. Reg. 31115, 31124-31125 (Sept. 2, 1986) (*codified at* 36 C.F.R. § 800.15 (1987)). In 1999, the ACHP repealed its 1986 regulation authorizing counterpart regulations and issued a regulation authorizing various program alternatives as a way for federal agencies to tailor the section 106 process to their needs. 64 Fed. Reg. 27044, 27081-27083 (May 18, 1999) (*codified at* 36 C.F.R. § 800.14 (2000)). Program alternatives include alternate procedures such as regulations or other procedures that do not go through the rulemaking process. Under the 1999 regulation, the ACHP must determine that an agency's alternate procedures are consistent with the ACHP regulations. If the ACHP does so, the alternate procedures substitute for the ACHP regulations.

⁹²*Comm. to Save Cleveland's Hulett's v. United States Army Corps of Eng'rs*, 163 F. Supp. 2d 776, 792 (N.D. Ohio 2001) (noting that "[a]ll parties agree that there is no record of the ACHP ever approving or concurring in the Corps' regulations").

⁹³Corps attorneys stated that the Corps had implied authority to issue regulations interpreting and implementing statutes under its authority. They also stated that the Supreme Court has long recognized that agencies have implied authority to issue legislative regulations to formulate policy and make rules to fill any gap in a law left implicitly or explicitly by Congress.

In addition, the NHPA requires agency procedures for compliance with section 106 to be consistent with the ACHP regulations.⁹⁴ ACHP documents we reviewed identified several inconsistencies between the Corps procedures and ACHP regulations, including that the Corps procedures (1) defined the geographic area to be analyzed narrowly, (2) improperly assigned the Corps' analytical responsibilities to third parties, and (3) limited opportunities for consultation with tribes and others.

Our review of documents shows that Corps Regulatory Program and ACHP officials engaged at different points in time regarding the content of the Corps' procedures. According to Corps documents we reviewed, the Corps first issued interim guidance implementing section 106 in December 1978. At the time, according to the ACHP documents, the ACHP raised concerns about this interim guidance and began working with the Corps on a draft regulation. In August 1979, the ACHP Executive Director stated that the draft Corps regulation "provides for adequate consideration of historic and cultural resources in the issuance of Corps permits." However, neither the Corps nor the ACHP could provide us with documentation of the ACHP Chair's approval of the draft August 1979 regulation.

The August 1979 draft regulation was published in the Federal Register as a proposed regulation in April 1980.⁹⁵ The Federal Register notice stated the 1980 proposed regulation was drafted jointly with the ACHP Executive Director but did not say that the ACHP Chair approved it. Moreover, a court decision we reviewed indicates that the 1980 proposed regulation had not been approved by the ACHP Chair.⁹⁶ ACHP documents we reviewed included a letter from the ACHP Chairman approving a version of the Corps draft regulation in December 1981, but this version was not published in the Federal Register. Neither the ACHP nor the Corps could provide us with a copy of the approved 1981 draft regulation.

⁹⁴54 U.S.C. § 306102(b)(5)(A). This provision was added to the NHPA by the National Historic Preservation Act Amendments of 1992.

⁹⁵45 Fed. Reg. 22112 (Apr. 3, 1980). The *Federal Register* notice is a proposal for a counterpart regulation pursuant to the ACHP regulations.

⁹⁶*Colorado River Indian Tribe v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985) (noting that "[w]hile a federal agency can choose to adopt counterpart regulations related to its own specific programs and authorities, to do so, the counterpart must be approved by the chairperson of the Advisory Council, a fact which is lacking with respect to the proposed [1980] regulation upon which the Corps relied") (internal citations omitted).

According to a January 1982 letter from the ACHP Executive Director to the Assistant Secretary of the Army for Civil Works, the Corps contacted the ACHP in early 1982 to ask for assistance in its review of the Corps' regulatory programs and their historic preservation ramifications. The Corps submitted a draft proposed regulation to the ACHP in December 1983, according to a letter the ACHP sent to the Corps that month. In that letter the ACHP Executive Director advised the Corps that the ACHP could not approve the draft proposed regulation and suggested the Corps defer publishing it for comment. Nevertheless, the Corps published a notice of proposed rulemaking for section 106 regulations in the Federal Register in May 1984.⁹⁷ ACHP documents we reviewed indicated that the proposed regulation published in the Federal Register in May 1984 differed from the December 1981 version the ACHP Chair had approved.

After the proposed regulation's publication in the Federal Register in 1984, the Corps engaged with the ACHP about the proposed regulation, but the ACHP did not concur in the regulation the Corps finalized in 1990. According to the ACHP documents we reviewed, the Regulatory Program provided the ACHP with revised drafts of the proposed Corps regulation in 1986 and 1987. ACHP officials informed the Corps that these drafts were inconsistent with the NHPA and the ACHP regulations, according to the documents we reviewed.

In 1988, after the Regulatory Program submitted a version of the regulation to the Office of Management and Budget for clearance as a final rule, the ACHP consulted with the Office of Management and Budget and the Corps Regulatory Program about the regulation and provided edits in 1988 and 1989.⁹⁸ However, the Office of Management and Budget acknowledged in a letter that it might not be possible to resolve some of the issues with the regulation to the satisfaction of all parties. According to ACHP documents, the ACHP did not concur in the final rule, indicating it was inconsistent with ACHP regulations. In addition, ACHP officials told us they did not approve the 2005 guidance or 2007 memorandum the Corps issued.

⁹⁷49 Fed. Reg. 19036 (May 4, 1984). The *Federal Register* notice was for a proposed rule to establish the procedures to be followed by the Corps Regulatory Program in order to comply with the NHPA.

⁹⁸The Office of Information and Regulatory Affairs within the Office of Management and Budget generally reviews the text of draft and final rules written by executive branch agencies.

At various times, Corps officials acknowledged issues with the procedures and made several attempts to resolve inconsistencies with the ACHP regulations but were unable to do so. Such efforts included:

- In 2002, the Corps published a Federal Register notice soliciting comments regarding issues and concerns related to the Corps' and ACHP's regulations because it had identified differences between them.⁹⁹
- After considering the comments received in response to the 2002 notice, the Corps published an advanced notice of proposed rulemaking in the Federal Register soliciting comments regarding the appropriateness and feasibility of four options to update its permit application processing procedures in 2004.¹⁰⁰
- From 2001 to 2008, Regulatory Program officials worked with ACHP officials, and at times Office of Management and Budget officials, to revise or replace the Corps procedures but did not reach agreement on how to resolve several inconsistencies.¹⁰¹
- In 2009, the Regulatory Program issued a memorandum stating it had suspended its efforts to revise its procedures and that its procedures fully comply with section 106 of the NHPA.¹⁰²
- In 2017, the Corps committed to updating its procedures in response to tribal comments calling for its rescission or revision, but this update was not undertaken.¹⁰³

Subsequently, the Regulatory Program indicated it did not intend to revise or replace its procedures because they were fully consistent with ACHP

⁹⁹67 Fed. Reg. 10822 (Mar. 8, 2002). According to the Corps and our review of the comments submitted in response to this notice, most comments expressed support for revising Appendix C.

¹⁰⁰69 Fed. Reg. 57662 (Sept. 27, 2004).

¹⁰¹Officials involved in these efforts said the scope of review and definition of undertaking were key inconsistencies that could not be resolved.

¹⁰²Army Corps of Engineers, CECW-CO, *Headquarters Regulatory Community of Practice Guidance on the Continued Use and Applicability of 33 CFR 325, Appendix C*, Jan. 6, 2009.

¹⁰³Departments of the Interior, the Army, and Justice, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*.

regulations, according to documents we reviewed and interviews with Corps Regulatory Program officials.¹⁰⁴

The long-standing nature of the differences between the Corps procedures and the ACHP regulations, as well as the agencies' inability to resolve these differences over almost two decades despite numerous attempts to do so, suggests that legislative action may be needed to resolve this issue. Without action by Congress, we believe the Corps may continue to use procedures that have not been approved by the ACHP and may not be consistent with regulations developed by the ACHP for implementing section 106 of the NHPA.

Conclusions

The 21 federal agencies have developed policies for consulting with federally recognized Indian tribes about infrastructure projects and related activities. However, 3 agencies do not address the requirement to engage in consultation with ANCs in agency policy. By developing a documented policy, or clarifying existing policy, to require consultation with ANCs on the same basis as tribes under Executive Order 13175, these agencies can help ensure they consistently meet this consultation requirement. In addition, 2 agencies have recognized the need to document required consultation with ANCs in policy but do not have time frames for doing so. By establishing time frames for developing or updating policy to implement the statutory requirement to consult with ANCs, these agencies can help ensure they take the necessary steps to complete the efforts in a timely manner to meet the requirement.

Most of the 21 agencies have policies that call for engaging in two-way communication with tribes when consulting on infrastructure projects. However, 16 agency policies do not specifically address communication with tribes after consultation to communicate how tribal input was considered. By documenting in their tribal consultation policies how agencies are to communicate with tribes about how their input from project consultation was considered in agency decision-making, the 16

¹⁰⁴For example, see *Army Corps of Engineers Office of the Assistant Secretary of the Army, Civil Works and Office of General Counsel Review of 12 Nationwide Permits Pursuant to Executive Order 13783* (Sept. 25, 2017). In addition, this document says Appendix C to 33 C.F.R. Part 325 is an acceptable federal agency program alternative under the ACHP's regulations.

agencies could have better assurance that they are adequately communicating with tribes about how their input was considered.

Most of the 21 federal agencies have developed various information systems to identify or notify tribes but have done so to varying degrees and with some potential inefficiencies. Developing a central federal system, as recommended by the FPISC in its fiscal year 2018 best practices report, could address these potential inefficiencies and benefit federal agencies. However, the FPISC has not yet decided whether and how to implement its recommendation and does not have a time frame for doing so. By developing a plan to establish a central information system for identifying and notifying tribes that includes well-defined goals, roles and responsibilities, and resources for developing and maintaining the system—if the FPISC decides to move forward with a centralized system—it would have better assurance that the project will be implemented in accordance with successful practices. Furthermore, by considering how it will communicate with and involve tribes to help maintain accurate tribal data as it establishes a central information system, the FPISC will have better assurance that the system it develops has accurate data with which to identify tribes and notify them of consultation opportunities.

Finally, for over two decades, the Corps and the ACHP have been unable to resolve differences in the Corps' procedures for implementing section 106 of the NHPA despite various efforts to do so. Without legislative action to help resolve this issue, the Corps may continue to use procedures that have not been approved by the ACHP and may not be consistent with regulations developed by the ACHP for implementing section 106 of the NHPA.

Matter for Congressional Consideration

Congress should consider taking legislative action to resolve the long-standing issues between the Corps and the ACHP over the Corps Regulatory Program's procedures for implementing section 106 of the NHPA. (Matter for Consideration 1)

Recommendations for Executive Action

We are making a total of 22 recommendations—20 recommendations to federal agencies and 2 recommendations to the FPISC Office of the Executive Director.

- The Secretary of Energy should develop a documented policy or clarify existing policy to implement the statutory requirement to consult with ANCs on the same basis as Indian tribes under Executive Order 13175. (Recommendation 1)
- The Administrator of the Environmental Protection Agency should develop a documented policy or clarify existing policy to implement the statutory requirement to consult with ANCs on the same basis as Indian tribes under Executive Order 13175. (Recommendation 2)
- The Secretary of Housing and Urban Development should develop a documented policy or clarify existing policy to implement the statutory requirement to consult with ANCs on the same basis as Indian tribes under Executive Order 13175. (Recommendation 3)
- The Director of the Fish and Wildlife Service should establish a time frame for developing or updating policy to implement the statutory requirement to consult with ANCs on the same basis as Indian tribes under Executive Order 13175. (Recommendation 4)
- The Secretary of Homeland Security should establish a time frame for developing or updating policy to implement the statutory requirement to consult with ANCs on the same basis as Indian tribes under Executive Order 13175. (Recommendation 5)
- The Assistant to the Secretary of Agriculture for Rural Development should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on proposed infrastructure projects. (Recommendation 6)
- The Director of Civil Works of the Corps should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 7)
- The Director for the Bureau of Ocean Energy Management should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from

consultation was considered in agency decisions on infrastructure projects. (Recommendation 8)

- The Commissioner of the Bureau of Reclamation should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 9)
- The Secretary of Energy should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 10)
- The Chairman of the Federal Communications Commission should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 11)
- The Administrator of the Federal Emergency Management Agency should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 12)
- The Chairman of the Federal Energy Regulatory Commission should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 13)
- The Administrator of the Federal Highway Administration should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 14)
- The Director of the Fish and Wildlife Service should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 15)
- The Secretary of Homeland Security should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 16)

- The Secretary of Housing and Urban Development should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 17)
- The Director for the National Park Service should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 18)
- The Chairman of the Nuclear Regulatory Commission should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 19)
- The Secretary of Transportation should document in the agency's tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 20)
- The Executive Director of the FPISC Office of the Executive Director should work collaboratively with FPISC members to develop a plan to establish a central information system for identifying and notifying tribes that includes (1) well-defined goals for the system, (2) specifies FPISC members' roles and responsibilities for establishing and maintaining the system given existing statutory authority, and (3) identifies resources required for developing and maintaining the system. (Recommendation 21)
- As a central information system is established, the Executive Director of the FPISC Office of the Executive Director should work collaboratively with FPISC members to consider how they will communicate with and involve tribes to help maintain accurate tribal data in the system. (Recommendation 22)

Agency Comments and Our Evaluation

We provided a draft of this report to the 3 independent regulatory agencies, 3 departments, 6 departments that oversee the 15 component agencies included in our review, ACHP, and FPISC's Office of the Executive Director. We received written comments from ACHP; the Departments of Defense, Energy, Homeland Security, Housing and

Urban Development, the Interior, and Transportation; the Environmental Protection Agency; the Federal Communications Commission; the Federal Energy Regulatory Commission; and the Nuclear Regulatory Commission. These comments are reprinted in appendixes VI through XVI and summarized below. We also received technical comments from ACHP; the Departments of Agriculture, Commerce, Homeland Security, and the Interior; FPISC's Office of the Executive Director; and the Nuclear Regulatory Commission, which we incorporated into the report as appropriate.

Of the agencies to which we made recommendations, nine stated that they agreed with the recommendations directed to them or their component agencies, as follows:

- In its written comments (reprinted in app. VII), the Department of Defense agreed with our recommendation and said that the Corps will update its tribal consultation policy to document how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects. In addition, in an email correspondence accompanying the written comments, the Army stated that it maintains its position that the Corps Regulatory Program's procedures are consistent with section 106 of the NHPA and its implementing regulations. However, as we describe in our report, these procedures have not been approved by the ACHP, and we believe that legislative action is needed to help resolve long-standing issues with the Corps and ACHP related to the Corps' procedures.
- In written comments from the Department of Energy (reprinted in app. VIII), the department stated that tribal consultation is important to the process of infrastructure development and concurred with the two recommendations. The department stated that its relevant program offices will clarify and consolidate their consultation policies and practices with ANCs on the same basis as Indian tribes under Executive Order 13175, as well as update their policies to document how input from tribal consultation was considered in agency decisions on infrastructure projects.
- In its written comments (reprinted in app. IX), the Department of Homeland Security agreed with the two recommendations we made to it and the one recommendation to the Federal Emergency Management Agency. In response to our recommendation, the department stated that it developed a timeline—to conclude by March 2020—for updating its departmental tribal consultation policy, which will implement the statutory requirement to consult with ANCs on the

same basis as Indian tribes under Executive Order 13175. The department also described steps it plans to take to improve consultation communication practices related to how tribal input was considered from consultation on infrastructure projects. It indicated that the results from these efforts will then be used to update its tribal consultation policy. Similarly, the department stated that the Federal Emergency Management Agency is updating its tribal consultation policy with language that provides tribes with information on how their input was considered in the decision-making process as a result of tribal consultation and plans to complete its update by June 2019.

- In its written comments (reprinted in app. X), the Department of Housing and Urban Development stated its appreciation for our review of federal agencies' processes for consulting with tribes on infrastructure and for offering recommendations to enhance those processes to facilitate tribal consultation. In response to our two recommendations, the department stated that it will prioritize working with tribes to revise its tribal consultation policy to (1) specifically address consultation with ANCs and (2) address how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.
- In its written comments (reprinted in app. XI), the Department of the Interior concurred with the six recommendations directed at five component agencies. Specifically:
 - Regarding our recommendation to the Bureau of Land Management, in our draft report we recommended that the bureau establish a time frame for developing or updating its policy for consulting with ANCs based on interviews with agency officials during our review that indicated the bureau planned to develop a policy. However, in its written comments, the department stated that the bureau follows departmental-level policies for consulting with ANCs. In a subsequent interview, Bureau of Land Management officials clarified that the agency does not plan to develop a separate policy, but that the agency follows departmental policy for consulting with ANCs. Upon receiving documentation confirming this information, we revised the relevant section of our report accordingly and removed the recommendation from our final report.
 - The department agreed with the two recommendations to the Fish and Wildlife Service. Regarding the first recommendation, the department stated that the agency utilizes departmental policy for consulting with ANCs. In a subsequent interview, Fish and Wildlife Service officials clarified that the agency had developed a draft

policy for consultation with ANCs that was awaiting final approval, although a time frame for final approval had not been established. As stated in our report, by establishing a time frame for finalizing its policy, the agency can help ensure that it takes the necessary steps to complete the effort in a timely manner to meet the requirement. Regarding the second recommendation, the department stated that in October 2018 the Fish and Wildlife Service updated its tribal consultation handbook to describe how agency officials are to communicate with tribes regarding how tribal input from consultation was considered in agency decisions on infrastructure projects.¹⁰⁵

- The department agreed with the recommendation that the Bureau of Ocean Energy Management should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects. Among other efforts, the department stated that the bureau's tribal working group will develop a plan for the stages of consultation and will address procedures for feedback.
- The department agreed with the recommendation to the Bureau of Reclamation and stated that the bureau will review and modify, as appropriate, its policy about how officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.
- The department agreed with the recommendation to the National Park Service, stating that the service will update its tribal consultation policy to require that its annual consultation summary report to the Secretary include information on how the agency has communicated with tribes about how tribal input was considered in its decisions.
- In written comments from the Department of Transportation (reprinted in app. XII), the department concurred with the two recommendations—one to the department and one to the Federal Highway Administration—to document in tribal consultation policy how agency officials are to communicate with tribes about how their input was considered in agency decisions on infrastructure projects. The department stated that it remains committed to implementing an effective tribal consultation process.

¹⁰⁵Our review of agencies' tribal consultation policies includes those policies updated as of July 2018.

- In its written comments (reprinted in app. XIII), the Environmental Protection Agency agreed with our recommendation and stated that it recognizes its obligation under the referenced public laws to consult with ANCs on the same basis as Indian tribes under Executive Order 13175. It stated that the agency plans to develop a best practices guide for consulting with ANCs, which it anticipates finalizing by the end of calendar year 2019.
- The FPISC's Office of the Executive Director did not provide formal written comments. However, through technical comments from the FPISC's Office of the Executive Director and an interview with the Senior Advisor and Executive Operations Manager, the office generally agreed with our two recommendations regarding working with FPISC members to take certain actions to help establish a central information system for identifying and notifying tribes of consultation opportunities. The FPISC Office of the Executive Director stated that it may not be the entity that creates a central information system but rather would facilitate discussions, and that it may be more efficient for one agency to upgrade an existing agency database for use by all members.
- In its written comments (reprinted in app. XVI), the Nuclear Regulatory Commission stated its agreement with our report's findings, conclusions, and the recommendation that applies to the commission. It stated that its understanding is that the recommendation refers to one or more of the agency's regulations, policies, and guidance, which make up the collective set of documents described as tribal consultation policies in the report. We agree with this understanding and believe there may be various ways in which the agency may document how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects.

We also made recommendations to three agencies that did not directly state whether they agreed or disagreed with our recommendations, but each of the agencies described actions they plan to take in response to the recommendations, as follows:

- The Department of Agriculture did not provide formal written comments. In technical comments, the department did not state its agreement or disagreement with our recommendation to Rural Development to document how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects. However, it stated that it is in the process of revising, clarifying, and consolidating its tribal

consultation policies, and stated that it will evaluate all of our recommendations in the final report to determine if any other action is necessary regarding departmental guidelines, programs, and regulations.

- In its written comments (reprinted in app. XIV), the Federal Communications Commission said it will continue to explore ways of documenting how its staff could communicate with tribes about how tribal input was used in commission decisions on telecommunications infrastructure projects. It stated that it believes its current practices strike an appropriate and reasonable balance between keeping tribes informed while respecting tribal communication preferences, consistent with tribal preferences and its nationwide programmatic agreement.¹⁰⁶ This agreement, among other things, sets forth the section 106 process the applicant and Indian tribes will use and the circumstances under which the Commission will get involved. In its comments, the commission detailed the steps it is to take in communicating with tribes and stated that the agreement provides a flexible approach. More specifically, it stated that the agreement contemplates a collaborative, back-and-forth process between applicants and tribes that allows tribes to express their views and requires applicants to take those views into account.
- In written comments from the Federal Energy Regulatory Commission (reprinted in app. XV), the commission stated that it directed its staff to develop possible revisions to its tribal consultation policy, for consideration by the commission, to document how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

In addition, ACHP provided written comments (reprinted in app. VI) stating that our findings are consistent with what ACHP regularly hears from tribes and its extensive experience on tribal consultation matters. It noted that section 106 of the NHPA and its implementing regulations require consultation with ANCs and said that some portions and footnotes of the draft report may convey the idea that they do not. In our report, we explain that under section 106 of the NHPA and its implementing regulations, federal agencies are required to consult with Indian tribes. The definition of Indian tribe in the NHPA and implementing regulations include ANCs “which are recognized as eligible for the special programs

¹⁰⁶We reviewed this policy listed in app. III and entitled *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission*.

and services provided by the United States to Indians because of their status as Indians.” However, no ANCs are recognized as eligible for these special programs and services, so section 106 and its implementing regulations do not specifically require consultation with ANCs. ACHP also stated that our discussion of the history of the differences between the Corps Regulatory Program and ACHP is accurate and consistent with their records. ACHP further maintained that an administrative solution would best address the long-standing issues between the Corps Regulatory Program and ACHP, but also stated that such administrative solutions have been sought unsuccessfully for decades. The agency added that some of these issues are technical and require careful phrasing by those who have extensive experience with the section 106 process to help ensure that a well-crafted solution is developed, consistent with the NHPA.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to appropriate congressional committees; the Secretaries of Agriculture, Commerce, Defense, Energy, Homeland Security, Housing and Urban Development, the Interior, and Transportation; the Administrator of the Environmental Protection Agency; the Chairmen of the Federal Communications Commission, Federal Energy Regulatory Commission, and Nuclear Regulatory Commission; the Executive Directors of the Federal Permitting Improvement Steering Council and the Advisory Council on Historic Preservation; and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff members have any questions about this report, please contact me at (202) 512-3841 or fennella@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report are listed in appendix XVII.

A handwritten signature in black ink that reads "Anne-Marie Fennell". The signature is written in a cursive style with a large initial "A" and a long horizontal line extending from the end of the name.

Anne-Marie Fennell
Director, Natural Resources and Environment

List of Requesters

The Honorable Bernie Sanders
Ranking Member
Committee on the Budget
United States Senate

The Honorable Thomas Udall
Vice Chairman
Committee on Indian Affairs
United States Senate

The Honorable Raúl M. Grijalva
Chairman
Committee on Natural Resources
House of Representatives

The Honorable Ruben Gallego
Chairman
Subcommittee for Indigenous Peoples of the United States
Committee on Natural Resources
House of Representatives

The Honorable Peter Aguilar
House of Representatives

The Honorable Donald S. Beyer, Jr.
House of Representatives

The Honorable Tony Cárdenas
House of Representatives

The Honorable Yvette D. Clarke
House of Representatives

The Honorable William Lacy Clay
House of Representatives

The Honorable Keith Ellison
House of Representatives

The Honorable Jared Huffman
House of Representatives

The Honorable Daniel T. Kildee
House of Representatives

The Honorable Derek Kilmer
House of Representatives

The Honorable Ann Kirkpatrick
House of Representatives

The Honorable Alan S. Lowenthal
House of Representatives

The Honorable Ben Ray Lujan
House of Representatives

The Honorable Betty McCollum
House of Representatives

The Honorable Gwen Moore
House of Representatives

The Honorable Grace F. Napolitano
House of Representatives

The Honorable Frank Pallone, Jr.
House of Representatives

The Honorable Jared Polis
House of Representatives

The Honorable Lucille Roybal-Allard
House of Representatives

The Honorable Raul Ruiz, M.D.
House of Representatives

The Honorable Linda T. Sanchez
House of Representatives

The Honorable Mark Takano
House of Representatives

The Honorable Norma J. Torres
House of Representatives

Appendix I: Objectives, Scope, and Methodology

This report examines (1) the extent to which selected federal agencies have policies for consulting with Indian tribes and Alaska Native corporations (ANC)¹ on infrastructure projects and related activities, (2) key factors tribes and selected federal agencies identified that hinder effective consultation on infrastructure projects, and (3) the extent to which selected federal agencies have taken steps to facilitate tribal consultation on infrastructure projects.² In addition, we are reporting on certain long-standing issues that we identified during the course of our review regarding the Army Corps of Engineers (Corps) Regulatory Program's procedures for implementing section 106 of the National Historic Preservation Act (NHPA).³

To examine the extent to which selected federal agencies have policies for consulting with Indian tribes and ANCs on infrastructure projects and related activities, we reviewed applicable laws, regulations, and executive directives and documents. Specifically, we reviewed the NHPA and the regulations implementing section 106 of the NHPA; the National Environmental Policy Act and its implementing regulations; section 161 of division H of the Consolidated Appropriations Act, 2004 as amended;

¹Throughout this report we refer to corporations established under the Alaska Native Claims Settlement Act as Alaska Native corporations or ANCs.

²For the purposes of this report, we define infrastructure projects as physical construction of infrastructure that broadly includes ground-disturbing activities. For example, infrastructure projects may include surface transportation projects such as highway or rail projects, energy development such as wind turbine projects, and facilities construction such as visitor centers in national parks. Related activities refer to actions such as updates to agency regulations or policies regarding infrastructure.

³The Corps Regulatory Program's procedures for implementing section 106 of the NHPA consist of a regulation finalized in 1990, guidance issued in 2005, and a memorandum issued in 2007. 33 CFR pt. 325, App. C. Army Corps of Engineers Directorate of Civil Works/Regulatory, *Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR, Part 800* (Apr. 25, 2005), and Army Corps of Engineers, CECW-CO, *Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005* (Jan. 31, 2007).

Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (November 6, 2000); and a presidential memorandum regarding the executive order.

We obtained regulations, policies, and guidance from 21 selected federal agencies that agency officials identified as applicable to consulting with tribes or ANCs on infrastructure projects and related activities (which we collectively refer to as tribal consultation policies). The 21 federal agencies include 3 independent regulatory agencies, 3 departments, and 15 component agencies that are offices or bureaus within other departments (see table 1). We selected these agencies because either they or their departments, in general, are members of the Federal Permitting Improvement Steering Council (FPISC) and they consult with tribes on infrastructure projects.⁴ Specifically, of the 21 agencies in our review, 2 independent regulatory agencies and 3 departments are members of the FPISC, which was established by statute; the 15 selected component agencies are a part of departments that are FPISC members.⁵ We also included the Federal Communications Commission, which is not a member of the FPISC, because of its approach to tribal consultation for telecommunications tower construction, which involves using an information system to help with identifying tribes and notifying them of consultation opportunities. The commission's approach was considered a

⁴We did not include the National Telecommunications and Information Administration within the Department of Commerce, an agency involved in FPISC, because the agency had no ongoing responsibilities for infrastructure projects and limited responsibilities in the past, according to administration officials. We also did not include the First Responder Network Authority, an independent authority within the National Telecommunications and Information Administration because of a relevant GAO audit of that agency completed in 2017. Specifically, in June 2017, we found tribes had concerns about First Responder Network Authority's efforts to engage and communicate with tribes when developing its nationwide public safety broadband network and made related recommendations. See GAO, *Public-Safety Broadband Network: FirstNet Has Made Progress Establishing the Network, but Should Address Stakeholder Concerns and Workforce Planning*, [GAO-17-569](#) (Washington, D.C.: June 20, 2017).

⁵The FPISC was created by statute to make the process for federal approval for certain infrastructure projects more efficient. Pub. L. No. 114-94, div. D, tit. XLI, 129 Stat. 1312, 1741-1762 (2015). As of March 2019, the FPISC members were: 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. The Executive Director is the Chair of the FPISC, who works within the FPISC Office of the Executive Director.

best practice at the time that we selected the 21 agencies, according to tribal and agency officials we interviewed and reports we reviewed. To confirm that selected federal agencies have roles in infrastructure projects that may involve tribal consultation, we summarized the agencies' missions and responsibilities for infrastructure projects (see app. II).

Table 1: Selected Federal Agencies Included in Review

Agency	Agency type ^a	Department
Army Corps of Engineers	Component	Department of Defense
Bureau of Land Management	Component	Department of the Interior
Bureau of Ocean Energy Management	Component	Department of the Interior
Bureau of Reclamation	Component	Department of the Interior
Coast Guard	Component	Department of Homeland Security
Department of Energy	Department	Not applicable
Department of Housing and Urban Development	Department	Not applicable
Environmental Protection Agency	Department	Not applicable
Federal Aviation Administration	Component	Department of Transportation
Federal Communications Commission	Independent regulatory	Not applicable
Federal Emergency Management Agency	Component	Department of Homeland Security
Federal Energy Regulatory Commission	Independent regulatory	Not applicable
Federal Highway Administration	Component	Department of Transportation
Federal Railroad Administration	Component	Department of Transportation
Federal Transit Administration	Component	Department of Transportation
Fish and Wildlife Service	Component	Department of the Interior
Forest Service	Component	Department of Agriculture
National Oceanic and Atmospheric Administration	Component	Department of Commerce
National Park Service	Component	Department of the Interior
Nuclear Regulatory Commission	Independent regulatory	Not applicable
Rural Development	Component	Department of Agriculture

Legend: — = Not applicable

Source: GAO analysis of agency information. | GAO-19-22

Note: We selected Federal Permitting Improvement Steering Council (FPISC) members and component agencies that agency officials identified as having a role in tribal consultation for infrastructure projects. The FPISC was created by statute to make the process for federal approval for certain infrastructure projects more efficient. Pub. L. No. 114-94, div. D, tit. XLI, 129 Stat. 1312, 1741-1762 (2015). We also included the Federal Communications Commission because its approach to tribal consultation for telecommunications towers was considered a best practice, according to tribal and agency officials we interviewed and reports we reviewed.

^aFor the purposes of this analysis, we refer to agencies as independent regulatory agencies, departments, or components. Components include offices or bureaus within departments.

We reviewed the tribal consultation policies provided by the 21 selected federal agencies and interviewed respective agency officials to determine the extent to which the policies contained various characteristics.⁶ Specifically, we reviewed the agencies' policies to determine whether the policies address the statutory requirement to consult with ANCs on the same basis as Indian tribes under Executive Order 13175; the date the policies were last updated, as of June 2018; and whether the agencies solicited input from tribes on the most recent policy updates. We summarized definitions for "consultation" and "meaningful consultation" when those terms were included in specific policies. We also reviewed the agencies' policies to determine whether they discussed aspects of Indian law, including tribal treaty rights, federal trust responsibility, tribal sovereignty, and government-to-government relationship between tribes and the federal government. In addition, we reviewed 14 reports, studies, and other documents from federal agencies, tribal organizations, academia, non-profit organizations, and the United Nations to identify other topics related to leading practices in tribal consultation, such as processes for addressing confidentiality or seeking consensus among all parties. To identify these documents, we searched academic databases and solicited recommended documents from tribal organizations we interviewed and from agencies in our review. We summarized the extent to which these topics were included in the agencies' policies.

To learn about ANCs' experiences with consulting on infrastructure projects and related activities, we interviewed representatives from eight ANCs—seven regional and one village—in a group interview. This interview was facilitated with assistance from the Alaska Native Claims Settlement Act Regional Association, which sent invitations to its regional and village ANC contacts. ANC representatives we interviewed were those who received the invitation and chose to participate. We also received written comments from the Alaska Native Claims Settlement Act Resource Managers group, representing 12 regional ANCs, and from one

⁶Of the 21 agencies, 18 agencies provided their tribal consultation policies. Three component agencies do not have their own tribal consultation policies but follow department-level policies that we reviewed. These agencies are the Coast Guard, within the Department of Homeland Security, and the Federal Railroad Administration and the Federal Transit Administration, within the Department of Transportation. We also included certain aspects of policies from the Departments of Agriculture and of the Interior. Specifically, Rural Development follows the Department of Agriculture's policy for tribal consultation under Executive Order 13175 and the Bureau of Reclamation and the National Park Service follow the Department of the Interior's policy for consultation with ANCs.

ANC that also participated in the group interview. The views we obtained from ANC representatives cannot be generalized to all ANCs, but provide examples of ANCs' perspectives and experiences in consulting with federal agencies on infrastructure projects and related activities.

To identify key factors that tribes identified that hinder effective consultation on infrastructure projects, we obtained 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. The agencies collected these comments as part of developing an interagency report on barriers to and improvements needed for tribal consultation on infrastructure projects, released in January 2017.⁷ Throughout our report, we refer to the comments we analyzed as tribal comments provided to federal agencies in 2016. To develop the interagency report, the participating agencies held eight meetings at various locations across the country, as well as by teleconference, where tribes' oral comments on tribal consultation for infrastructure projects were solicited and documented in transcripts. The agencies also collected written comments from tribes. Tribes were asked to respond to the following questions:

1. How can federal agencies better ensure meaningful tribal input into infrastructure-related reviews and decisions, to protect tribal lands, resources, and treaty rights within the existing framework?
2. Where and when does the current framework present barriers to meaningful consultation?
3. What changes to the current framework would promote meaningful consultation?

Overall, 96 federally recognized Indian tribes and 4 of the 6 bands of the federally recognized Minnesota Chippewa Tribe spoke at the meetings or

⁷Department of the Interior, Department of the Army, and Department of Justice, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* (January 2017).

submitted additional comments.⁸ Because the four bands submitted comments separate from the Minnesota Chippewa Tribe, we treated them as additional tribes for the purpose of this analysis, for a total of 100 tribes. As of March 2019, there were 573 federally recognized Indian tribes, according to the list of Indian tribes recognized and eligible to receive services from the Bureau of Indian Affairs by virtue of their status as Indian tribes, published on February 1, 2019 in the Federal Register.⁹ There were 567 federally recognized Indian tribes at the time oral and written comments were collected for the interagency report.¹⁰ There are over 200 federally recognized Indian tribes in Alaska, but no meetings were held in that state and 2 of the 100 participating tribes were located in Alaska.

We then analyzed the meeting transcripts and written comments submitted by the 100 tribes to identify and categorize factors that tribes described as hindering effective consultation on infrastructure projects. We defined factors as areas where tribes described a problem they face or advocated for an improvement to tribal consultation. To conduct our analysis, we first reviewed the written comments and one meeting transcript, and we recorded each unique factor to tribal consultation that tribes identified that hinder effective consultation. Four GAO analysts then independently reviewed a sample of written comments and transcripts to systematically analyze each sentence and mark any unique factors in the text, using the full list of unique factors as a guide—known as coding. The analysts compared their coding to assess consistency across analysts and revised the list of unique factors as needed. This process culminated

⁸The interagency report states that 59 tribes provided input on the questions posed by the Departments of the Interior, the Army, and Justice. Departments of the Interior, the Army, and Justice, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*. However, in reviewing all meeting transcripts, attendance sheets, and written comments from tribes, we determined that officials from 96 federally recognized Indian tribes either spoke at the meetings or submitted written comments. We included in our review oral comments that were documented in meeting transcripts, as well as written comments, from the Navajo Nation (Arizona, New Mexico, and Utah) and Sault Ste. Marie Tribe of Chippewa Indians (Michigan) submitted after the deadline for written comments. Tribal organizations and individuals also submitted comments, which we did not include in our analysis of tribal comments.

⁹84 Fed. Reg. 1200 (Feb. 1, 2019).

¹⁰The agencies collected comments for the interagency report from September, 2016 through the report's publication in January, 2017. The list of tribes recognized and eligible to receive services from the Bureau of Indian Affairs by virtue of their status as Indian tribes published in the *Federal Register* in May, 2016 included 567 tribes.

into a list of 46 unique factors. The analysts then divided all transcripts and written comments, including those in the samples, between them and independently coded their assigned documents using the revised list of unique factors. When any unique factors were added to the list, the analysts returned to all previously coded documents to ensure that the new factors did not apply to text already coded. Once all documents were coded by one analyst, a second analyst reviewed every document to ensure consistent coding of the comments; the two analysts discussed and reconciled any differences across the coding.

We considered factors identified by more than 40 percent of tribes as key factors that hinder effective tribal consultation for infrastructure projects. We then organized key factors into five categories. We acknowledge that we may not have identified all of the factors that tribes face during consultation for infrastructure projects in our analysis of tribal comments provided to federal agencies in 2016. The factors identified are methodologically dependent on the tribes providing the comments in 2016. We recognize other factors may have been identified had other tribes participated. Each tribe provided its own unique perspectives which are not generalizable to other tribes. We recognize that the key factors we identified are not necessarily the most important factors to effective consultation to individual tribes. We did not verify the factual or legal accuracy of these tribal comments.

We also conducted site visits to three states—Nebraska, Oregon, and South Dakota—selected based on (1) geographic distribution to include varying tribes and types of infrastructure projects and (2) the concentration of tribes and federal agency field offices. During our site visits from July through September 2017, we interviewed tribal officials, such as tribal council members, from seven federally recognized Indian tribes. We invited federally recognized Indian tribes for interviews based on our site visit locations and travel routes and interviewed 7 whose officials were available to meet with us. We also visited local infrastructure project sites that 3 of the 7 tribes showed us, including a tribal burial site disturbed by an infrastructure project in South Dakota and a drinking water infrastructure project in Oregon, among others. The views of tribal officials we interviewed are not generalizable to all tribes but provide examples of factors that hinder effective consultation when tribes consult on infrastructure projects and corroborate key factors identified in tribal comments provided in 2016.

Further, with the assistance of the National Association of Tribal Historic Preservation Officers, we invited tribal officials to meet with us during the

association's 2017 conference or afterwards.¹¹ We interviewed officials or received written comments from 50 federally recognized Indian tribes. Individual tribal officials we interviewed, such as tribal historic preservation staff or technical specialists shared their individual experiences including information on any factors they may have encountered as participants in the consultation process. We also attended sessions at the National Association of Tribal Historic Preservation Officers 2018 conference on tribal preservation.¹²

Finally, to obtain national and regional tribal perspectives, we interviewed representatives from national and regional tribal organizations. To select organizations to interview, we obtained lists of tribal organizations from the National Congress of American Indians' tribal directory¹³ and identified organizations that advocate for the highest number of affiliated tribes and geographic variation across affiliated tribes. In total, we interviewed officials from eight organizations, including the Alaska Federation of Natives, Great Lakes Indian Fish and Wildlife Commission, Inter Tribal Council of Arizona, National Association of Tribal Historic Preservation Officers, National Congress of American Indians, National Tribal Emergency Management Council, Native Nations Institute, and United South and Eastern Tribes, Inc. The views we obtained from tribal organizations complement but do not substitute for views obtained from tribes. Rather, the organizations' views we obtained corroborate the types of factors that tribes may have encountered when consulting on infrastructure projects, from the perspective of the organizations.

To identify key factors hindering effective consultation on infrastructure projects for selected federal agencies, we interviewed headquarters officials from the 21 agencies in our review. We also interviewed officials from the following 4 agency field offices during our site visits: the Army Corps of Engineers Portland District Office, the Federal Highway

¹¹The National Association of Tribal Historic Preservation Officers is a national non-profit membership organization of tribal officials who implement federal and tribal preservation laws for their member tribes. The association's 19th tribal preservation conference took place at the Pala Casino Spa Resort in Pala, California, the week of August 7, 2017.

¹²The association's 20th tribal preservation conference took place at the Suquamish Clearwater Casino in Suquamish, Washington the week of September 10, 2018.

¹³The National Congress of American Indians is a nonprofit organization that advocates for tribal governments and communities. It is organized as a representative congress of American Indians and Alaska Natives that serves to develop consensus on national priority issues that affect tribal sovereignty.

Administration Oregon Division, the Forest Service Pacific Northwest Regional Office, and the National Park Service Midwest Regional Office. We selected these field offices based on their proximity to tribes we visited and the availability of their officials to meet. Agency officials were asked to describe any factors that hinder effective consultation with tribes on infrastructure projects and, specifically, whether they face any challenges initiating tribal consultation (including identifying tribes and notifying them of consultation opportunities).¹⁴ We then systematically analyzed agency officials' comments to identify factors. This process culminated into a list of 42 unique factors. The views of agency officials we interviewed are not generalizable to all agencies but provide examples of factors they have experienced that hinder effective consultation with tribes on infrastructure projects. We considered factors identified by more than 40 percent of agencies as key factors that hinder effective tribal consultation for infrastructure projects. We then organized the key factors into four categories. We acknowledge that we may not have identified all of the factors that agencies face during consultation for infrastructure projects and that those cited are not necessarily the most important to individual agencies. We did not verify the factual or legal accuracy of the factors the agency officials identified.

To examine the extent to which selected federal agencies have taken steps to facilitate tribal consultation on infrastructure projects, we interviewed officials and collected information through a standard set of questions from the 21 selected federal agencies. Information collected included agencies' methods to facilitate tribal consultation, such as information systems and other mechanisms used to initiate consultation, training courses developed and offered to or required of staff involved in consultation for infrastructure projects,¹⁵ methods used to help ensure effective communication, and approaches for addressing resource constraints. We also analyzed the content of the 21 agencies' policies—including the extent to which they communicated with tribes about how tribal input was considered in agency decision-making on infrastructure projects. We included in our review any referenced department-level policies that component agencies' officials said they follow in lieu of component-level policies. Further, we reviewed actions taken by four additional entities related to information systems for initiating tribal

¹⁴We specifically asked about challenges initiating consultation as part of our work examining agency mechanisms for initiating consultation.

¹⁵Analyzing the content of training courses was outside the scope of our review.

consultation, particularly in implementing a FPISC best practice to establish one central federal system for initiating consultation.¹⁶ These entities are the FPISC Office of the Executive Director (the Executive Director serves as the Chair of the FPISC) and the Advisory Council on Historic Preservation (ACHP), General Services Administration, and Office of Management and Budget, which are FPISC members.

Finally, during the course of our work examining factors that hinder effective consultation on infrastructure projects, we identified specific issues regarding the Corps Regulatory Program's procedures for implementing section 106 of the NHPA.¹⁷ To examine these issues, we reviewed the NHPA and its legislative history. We also reviewed available documents from the ACHP and the Corps about the Corps' procedures, including correspondence and documents regarding the procedures from its early development in 1979 through 2016, *Federal Register* notices on the procedures, comments received in response to these notices, and relevant court cases. We also interviewed Corps and ACHP officials about any areas of disagreement on the Corps Regulatory Program's procedures and their efforts to address these issues.

We conducted this performance audit from January 2017 to March 2019 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.

¹⁶We selected these entities because they are FPISC members or involved with FPISC and officials at the respective agencies said they are involved in activities supporting tribal consultation for infrastructure projects and related activities.

¹⁷The Corps Regulatory Program's procedures for implementing section 106 of the NHPA consist of a regulation finalized in 1990, guidance issued in 2005, and a memorandum issued in 2007. 33 C.F.R. pt. 325, App. C. Army Corps of Engineers Directorate of Civil Works/Regulatory, *Revised Interim Guidance for Implementing Appendix C of 33 C.F.R. Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 C.F.R. Part 800* (Apr. 25, 2005), and Army Corps of Engineers, GECW-CO, *Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005* (Jan. 31, 2007).

Appendix II: Missions and Examples of Infrastructure-Related Responsibilities for Selected Federal Agencies

Federal agencies have varying missions and responsibilities for planning, approving, or implementing infrastructure projects, which may trigger the need for tribal consultation. Table 2 lists the 21 selected federal agencies in our review with their stated missions and examples of their responsibilities for infrastructure projects.

Table 2: Missions and Examples of Infrastructure-Related Responsibilities of 21 Selected Federal Agencies

Agency	Mission	Examples of agency responsibilities for infrastructure projects
Army Corps of Engineers (Corps)	To provide vital public engineering services in peace and war to strengthen U.S. security, energize the economy, and reduce risks from disasters.	Permits a wide range of infrastructure projects in waters of the United States, including wetlands, that require Clean Water Act section 404 permits or Rivers and Harbors Act section 10 permits Constructs or approves infrastructure projects on Corps-managed lands Plans and implements authorized water resource development projects such as flood risk management, navigation and ecosystem restoration projects
Bureau of Land Management	To sustain the health, diversity, and productivity of U.S. public lands for the multiple use and enjoyment of present and future generations.	Manages federal subsurface mineral development such as oil and gas drilling and coal mining in coordination with the federal agency managing the federal surface estate Constructs or approves roads, transmission lines, renewable energy infrastructure, or other infrastructure on or crossing Bureau of Land Management lands
Bureau of Ocean Energy Management	To manage development of U.S. Outer Continental Shelf energy and mineral resources in an environmentally and economically responsible way.	Permits conventional and renewable energy projects on submerged lands including offshore oil and gas production and offshore wind or wave energy projects
Bureau of Reclamation	To manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public.	Manages hydropower dams, irrigation facilities, municipal and industrial water infrastructure

**Appendix II: Missions and Examples of
Infrastructure-Related Responsibilities for
Selected Federal Agencies**

Agency	Mission	Examples of agency responsibilities for infrastructure projects
Coast Guard	To ensure U.S. maritime safety, security, and stewardship.	Permits bridges crossing navigable waters Permits off-shore wave energy facilities and windmills with regard to safety of navigation
Department of Energy	To ensure U.S. security and prosperity by addressing its energy, environmental, and nuclear challenges through transformative science and technology solutions.	Permits electricity transmission infrastructure crossing U.S. borders Funds renewable energy projects such as wind and solar energy facilities
Department of Housing and Urban Development	To create strong, sustainable, inclusive communities and quality affordable homes for all.	Provides financial assistance for housing and community-level infrastructure (e.g., public buildings, drinking water, and wastewater), including recovery projects to rebuild community-level infrastructure damaged by disasters
Environmental Protection Agency	To protect human health and the environment and ensure that Americans have clean air, land, and water.	Provides financial assistance to states for drinking water and wastewater facilities Issues Clean Air Act permits and Clean Water Act permits where states or tribes do not have delegated authority
Federal Aviation Administration	To provide the safest, most efficient aerospace system in the world.	Licenses and provides financial assistance for airport facilities Manages or leads certain airport traffic control projects Licenses operation of aerospace launch sites and vehicles
Federal Communications Commission	To implement and enforce interstate and international communications law and regulations for radio, television, wire, satellite, and cable across the United States and its territories.	Licenses spectrum
Federal Emergency Management Agency	To help people before, during, and after disasters.	Provides financial assistance for roads, energy facilities, water and wastewater infrastructure, and other recovery projects for infrastructure damaged by disasters
Federal Energy Regulatory Commission	To assist consumers in obtaining reliable, efficient, and sustainable energy services at a reasonable cost through its regulation of energy industries and promote safe, reliable, secure, and efficient infrastructure.	Approves the siting and abandonment of interstate natural gas pipelines and storage facilities Reviews and approves proposals to build liquefied natural gas terminals Licenses nonfederal hydropower projects
Federal Highway Administration	To improve mobility on U.S. highways through national leadership, innovation, and program delivery.	Provides financial assistance for highways and bridge projects
Federal Railroad Administration	To enable the safe, reliable, and efficient movement of people and goods for a strong United States, now and in the future.	Provides financial assistance and safety-related approvals for railroad projects, including improvements to existing rail infrastructure (e.g., track, bridges, tunnels, stations, and signal and communications systems) and construction of new rail lines Promulgates and enforces railroad safety regulations
Federal Transit Administration	To improve public transportation for U.S. communities.	Provides financial assistance for mass-transit projects, including subways, light rail, commuter rail, trolleys, bus and bus facilities, and ferries

**Appendix II: Missions and Examples of
Infrastructure-Related Responsibilities for
Selected Federal Agencies**

Agency	Mission	Examples of agency responsibilities for infrastructure projects
Fish and Wildlife Service	To work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people.	Consults with other federal agencies on federal agency actions that may affect certain species including all terrestrial (land-dwelling) and freshwater species and birds, as required by the Endangered Species Act ^a Constructs or approves facilities or other infrastructure on or crossing Fish and Wildlife Service lands
Forest Service	To sustain the health, diversity, and productivity of U.S. forests and grasslands to meet the needs of present and future generations.	Permits roads, telecommunications infrastructure, mineral extraction, or other infrastructure on or crossing Forest Service lands
National Oceanic and Atmospheric Administration	Among other things, to conserve and manage coastal and marine ecosystems and resources.	Consults with other federal agencies on federal agency actions that may affect certain species including anadromous (saltwater-freshwater migrant) fish, such as salmon, and most marine species as required by the Endangered Species Act ^a Permits infrastructure projects, such as submarine cables in or crossing national marine sanctuaries
National Park Service	To preserve unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations.	Constructs or approves roads, transmission lines, building and general facilities improvements, or other infrastructure on or crossing National Park Service lands
Nuclear Regulatory Commission	To license and regulate the U.S. civilian use of radioactive materials to protect public health and safety, promote the common defense and security, and protect the environment.	Licenses nuclear power plants and uranium recovery projects
Rural Development	To help improve the economy and quality of life in rural America through assistance programs, including housing, water, electric, and communications infrastructure grant and loan programs.	Provides financial assistance for telecommunications, electricity, water and wastewater infrastructure, and other infrastructure that supports economic development in rural areas

Source: GAO analysis of agency information. | GAO-19-22

^aUnder section 7 of the Endangered Species Act, federal agencies must consult with the Fish and Wildlife Service or the National Marine Fisheries Service within the National Oceanic and Atmospheric Administration when any action they intend to carry out, fund, or authorize—such as through a permit—may affect a listed endangered or threatened species or its habitat. Any consultation with tribes related to the action is conducted by the responsible federal agency.

Appendix III: List of Selected Federal Agencies' Tribal Consultation Policies

Table 3 lists the tribal consultation policies provided by the 21 selected federal agencies in our review, as of July 2018.¹ We define tribal consultation policies as regulations, policies, or guidance regarding consulting with Indian tribes or Alaska Native corporations. These policies provide guidance for tribal consultation conducted under various laws, regulations, and executive directives and are not necessarily specific to consultation on infrastructure projects but may encompass a broader set of activities. The table also provides the dates these policies were last updated, as well as whether the agencies solicited input from tribes on those updates, according to information provided by the agencies.

Table 3: List of Selected Federal Agencies' Tribal Consultation Policies That GAO Reviewed, as of July 2018

Agency	Tribal consultation policy	Date last updated	Agency solicited input from tribes when last updated ^a
Department of Agriculture			
Department of Agriculture	Tribal Consultation, Coordination, and Collaboration (Regulation 1350-002) ^b	Jan. 2013	No
Forest Service	External Relations, ch. 1560, State, Tribal, County, and Local Agencies; Public and Private Organizations (Forest Service Manual 1500)	Mar. 2016	Yes
Forest Service	American Indian and Alaska Native Relations Handbook, ch. 10, Consultation, Cooperation and Collaboration with Indian Tribes and Alaska Native Corporations (Forest Service Handbook 1509.13)	Mar. 2016	Yes

¹We included in our review certain department-level policies from the Departments of Agriculture, Homeland Security, the Interior, and Transportation in cases such as when officials from component agencies without tribal consultation policies indicated they follow the corresponding department-level policy.

**Appendix III: List of Selected Federal
Agencies' Tribal Consultation Policies**

Agency	Tribal consultation policy	Date last updated	Agency solicited input from tribes when last updated^a
Rural Development	Rural Development Instruction Part 1970 – Environmental: Subpart H - Historic and Cultural Resources	Apr. 2016	Yes
Department of Commerce			
National Oceanic and Atmospheric Administration	National Oceanic and Atmospheric Administration Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations	June 2014	Yes
National Oceanic and Atmospheric Administration	Policy on Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations (Administrative Order 218-8)	June 2014	Yes
Department of Defense			
Army Corps of Engineers	Processing of Department of the Army Permits; Procedures for the Protection of Historic Properties (Appendix C to 33 C.F.R. Part 325)	June 1990	Unknown ^c
Army Corps of Engineers	Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800	Apr. 2005	No
Army Corps of Engineers	Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005	Jan. 2007	No
Army Corps of Engineers	Tribal Policy Principles	May 2010	Yes
Army Corps of Engineers	Tribal Consultation Policy	Nov. 2012	Yes
Army Corps of Engineers	Tribal Consultation Responsibilities in the Regulatory Program	Aug. 2016	No
Department of Energy			
Department of Energy	A Guide for Department of Energy Employees: Working with Indian Tribal Nations	Dec. 2000	Yes
Department of Energy	Department of Energy American Indian Tribal Government Interactions and Policy (Order 144.1)	Jan. 2009	Yes
Department of Homeland Security			
Department of Homeland Security	Historic Preservation in Asset Management and Operations (Directive No. 017-01)	Mar. 2008	No
Department of Homeland Security	Department of Homeland Security Tribal Consultation Policy	May 2011	Yes
Federal Emergency Management Agency	Federal Emergency Management Agency Tribal Consultation Policy (Policy No. 101-002.01) ^d	Aug. 2014	Yes

**Appendix III: List of Selected Federal
Agencies' Tribal Consultation Policies**

Agency	Tribal consultation policy	Date last updated	Agency solicited input from tribes when last updated^a
Federal Emergency Management Agency	Federal Emergency Management Agency Tribal Policy (Policy No. 305-111-1)	Dec. 2016	Yes
Department of Housing and Urban Development			
Department of Housing and Urban Development	Process for Tribal Consultation in Projects That Are Reviewed under 24 C.F.R. Part 58 (Notice: Community Planning and Development 12-006)	June 2012	No
Department of Housing and Urban Development	Section 106 Tribal Consultation in Projects Reviewed Under 24 C.F.R. Part 50	May 2015	No
Department of Housing and Urban Development	Department of Housing and Urban Development Tribal Government-to-Government Consultation Policy	Apr. 2016	Yes
Department of the Interior			
Department of the Interior	Department of the Interior Policy on Consultation with Alaska Native Claims Settlement Act Corporations	Aug. 2012	Yes
Department of the Interior	Department of the Interior Policy on Consultation with Indian Tribes and Alaska Native Corporations (Departmental Manual, Part 512, Chapter 4)	Nov. 2015	Yes
Department of the Interior	Procedures for Consultation with Indian Tribes (Departmental Manual, Part 512, Chapter 5)	Nov. 2015	Yes
Bureau of Land Management	Tribal Relations (Bureau of Land Management Manual 1780)	Dec. 2016	Yes
Bureau of Land Management	Improving and Sustaining Bureau of Land Management Tribal Relations (Bureau of Land Management Handbook 1780-1)	Dec. 2016	Yes
Bureau of Ocean Energy Management	Bureau of Ocean Energy Management Tribal Consultation Guidance	June 2018	No
Bureau of Reclamation	Bureau of Reclamation Guidance for Implementing Indian Sacred Sites Executive Order (No. 13007)	Sept. 1998	No
Bureau of Reclamation	Protocol Guidelines: Consulting with Indian Tribal Governments	Sept. 2012	No
Bureau of Reclamation	Indian Policy of the Bureau of Reclamation	June 2016	No ^e
Fish and Wildlife Service	Fish and Wildlife Service Tribal Consultation Handbook	Dec. 2011	Yes
Fish and Wildlife Service	Fish and Wildlife Service Native American Policy (Fish and Wildlife Service Manual Part 510)	Jan. 2016	Yes
Fish and Wildlife Service	Tribal Consultation under Cultural Resource Authorities (Fish and Wildlife Service Manual, Part 614, Chapter 6)	Aug. 2016	No
National Park Service	National Park Service Management Policies 2006	2006	Unknown ^c

**Appendix III: List of Selected Federal
Agencies' Tribal Consultation Policies**

Agency	Tribal consultation policy	Date last updated	Agency solicited input from tribes when last updated^a
Department of Transportation			
Department of Transportation	Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives and Tribes(Order 5301.1)	Nov.1999	Yes
Federal Aviation Administration	American Indian and Alaska Native Tribal Consultation Policy and Procedures (Order 1210.20)	Jan. 2004	No
Federal Aviation Administration	Guidance - Federal Aviation Administration Order 1210.20 American Indian and Alaska Native Tribal Consultation Policy and Procedures	Feb. 2004	Unknown ^c
Federal Aviation Administration	Section 106 Handbook: How to Assess the Effects of Federal Aviation Administration Actions on Historic Properties under Section 106 of the National Historic Preservation Act	June 2015	No
Federal Aviation Administration	1050.1F Desk Reference	July 2015	No
Federal Highway Administration	Interagency Guidance: Transportation Funding for Federal Agency Coordination Associated with Environmental Streamlining Activities	Mar. 2006	No
Federal Highway Administration	Tribal Consultation Guidelines	Mar. 2015	Yes
Environmental Protection Agency			
Environmental Protection Agency	Environmental Protection Agency Policy for the Administration of Environmental Programs on Indian Reservations	Nov. 1984	No
Environmental Protection Agency	Environmental Protection Agency Policy on Consultation and Coordination with Indian Tribes	May. 2011	Yes
Environmental Protection Agency	Environmental Protection Agency Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights	Feb. 2016	Yes
Environmental Protection Agency	Environmental Protection Agency Tribal Consultation Implementation Frequently Asked Questions	Aug. 2016	No
Federal Communications Commission			
Federal Communications Commission	Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes	June 2000	Unknown ^c
Federal Communications Commission	Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission	Sept. 2004	Yes
Federal Energy Regulatory Commission			
Federal Energy Regulatory Commission	Policy Statement on Consultation with Indian Tribes in Commission Proceedings	July 2003	Yes

Appendix III: List of Selected Federal Agencies' Tribal Consultation Policies

Agency	Tribal consultation policy	Date last updated	Agency solicited input from tribes when last updated^a
Federal Energy Regulatory Commission	Hydroelectric Licensing under the Federal Power Act	July 2003	Yes
Federal Energy Regulatory Commission	Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects	July 2017	Yes
Nuclear Regulatory Commission			
Nuclear Regulatory Commission	Intergovernmental Consultation (Directive 5.1)	Apr. 1993	No
Nuclear Regulatory Commission	Staff Guidance for Withholding Sensitive Information about Historic Resources in Accordance with the National Historic Preservation Act	June 2011	No
Nuclear Regulatory Commission	Tribal Policy Statement	Jan. 2017	Yes
Nuclear Regulatory Commission	Tribal Protocol Manual	July 2018 ^f	Yes

Source: GAO analysis of agency information. | GAO-19-22

Notes: We reviewed agency regulations, policies, and guidance regarding consulting with Indian tribes and Alaska Native corporations (referred to collectively here as tribal consultation policies) that 21 selected agencies identified. The 21 agencies included are: the (1) Army Corps of Engineers, (2) Bureau of Land Management, (3) Bureau of Ocean Energy Management, (4) Bureau of Reclamation, (5) Coast Guard, (6) Department of Energy, (7) Department of Housing and Urban Development, (8) Environmental Protection Agency, (9) Federal Aviation Administration, (10) Federal Communications Commission, (11) Federal Emergency Management Agency, (12) Federal Energy Regulatory Commission, (13) Federal Highway Administration, (14) Federal Railroad Administration, (15) Federal Transit Administration, (16) Fish and Wildlife Service, (17) Forest Service, (18) National Oceanic and Atmospheric Administration, (19) National Park Service, (20) Nuclear Regulatory Commission, and (21) Rural Development.

We also reviewed the policies of the Departments of Agriculture, Homeland Security, the Interior, and Transportation in cases such as when officials from component agencies without tribal consultation policies indicated that they used the corresponding department-level policy. We did not review tribal consultation policies of the Department of Commerce or Department of Defense.

^aAgencies may have consulted tribes for previous versions of policies.

^bThe Department of Agriculture has other complementary regulations in effect related to tribal consultation not listed here. We reviewed *Tribal Consultation, Coordination, and Collaboration* (Regulation 1350-002) because it is the most recent and comprehensive regulation focused on tribal consultation identified and discussed by agency officials during our review.

^cAgency officials were not able to confirm whether the agency consulted tribes for the last policy update.

^dThe Federal Emergency Management Agency's tribal consultation policy addresses tribal consultation for new program actions, such as regulations, legislative proposals, and guidance, that substantially affect tribes. The agency distinguishes tribal consultation to comply with National Environmental Policy Act and section 106 of the National Historic Preservation Act from tribal consultation per its tribal consultation policy, according to agency officials.

^eThe Bureau of Reclamation consulted with tribes when making major revisions to its *Indian Policy of the Bureau of Reclamation* in 2014, according to agency officials.

^fWe reviewed a version of the Nuclear Regulatory Commission's *Tribal Protocol Manual* dated August 2017. The Nuclear Regulatory Commission republished the Tribal Protocol Manual with minor technical corrections in July 2018.

Appendix IV: Definitions for Consultation in Agency Tribal Consultation Policies

Table 4 lists the definitions for consultation that the 21 selected federal agencies in our review included in their tribal consultation policies (see app. III for a list of agencies' tribal consultation policies we reviewed).¹

Table 4: Definitions of “Consultation” in Selected Federal Agencies’ Tribal Consultation Policies

Agency	Definition (source)
Army Corps of Engineers	Consultation: Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the Army Corps of Engineers that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands. (<i>Tribal Consultation Policy</i> , 2012)
Bureau of Land Management	Consultation: The conduct of mutual, open, and direct two-way communication in good faith to secure meaningful and timely participation in the decision-making process, as allowed by law. (<i>Tribal Relations, Bureau of Land Management Manual 1780, 2016; Improving and Sustaining Bureau of Land Management Tribal Relations, Bureau of Land Management Handbook 1780-1, 2016</i>)
Bureau of Ocean Energy Management	Consultation is a deliberative process that aims to create effective collaboration and informed federal decision-making. (<i>Bureau of Ocean Energy Management Tribal Consultation Guidance</i> , 2018)
Bureau of Reclamation	Consultation means the process of seeking and considering the views of others. It involves establishing, conducting, and maintaining formal communication with Indian tribal governments and their members. (<i>Protocol Guidelines: Consulting With Indian Tribal Governments</i> , 2012)

¹Executive Order 13175 on *Consultation and Coordination with Indian Tribal Governments*, describes consultation as an “accountable process to ensure meaningful and timely input by tribal officials.” However, the order does not further define consultation or meaningful consultation. The regulation implementing section 106 of the National Historic Preservation Act defines consultation as the “process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement,” but does not define meaningful consultation. 36 C.F.R. § 800.16(f). The implementing regulations for the National Environmental Policy Act do not define consultation or meaningful consultation.

**Appendix IV: Definitions for Consultation in
Agency Tribal Consultation Policies**

Agency	Definition (source)
Department of Agriculture ^a	Tribal consultation is the timely, meaningful, and substantive dialogue between Department of Agriculture officials who have delegated authority to consult, and the official leadership of federally recognized Indian tribes, or their designated representative(s), pertaining to agency policies that may have tribal implications. It is also important to distinguish between consultation and other actions. Notification – the distribution of information from a Department of Agriculture office or agency to one or more tribes - is not consultation. Neither are technical communications or outreach activities, however important or influential, between staffs without leadership involvement. While notification, technical communications and outreach are all essential, and are often used as part of consultation, they alone do not constitute government-to-government consultation. (<i>Tribal Consultation, Coordination and Collaboration, Regulation 1350-002, 2013</i>)
Department of Energy	Consultation: Prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural ways of life, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process, including final decision-making and action implementation as allowed by law, consistent with a government to government relationship. (<i>Department of Energy American Indian Tribal Government Interactions and Policy, Order 144.1, 2009</i>)
Department of Homeland Security ^a	"Consultation" involves the direct, timely, and interactive involvement of Indian tribes regarding proposed federal actions on matters that have tribal implications. (<i>Department of Homeland Security Tribal Consultation Policy, 2011</i>)
Department of Housing and Urban Development	<p>"Consultation" means the direct and interactive (i.e., collaborative) involvement of tribes in the development of regulatory policies on matters that have tribal implications. Consultation is the proactive, affirmative process of: (1) identifying and seeking input from appropriate Native American governing bodies, community groups, and individuals; and (2) considering their interest as a necessary and integral part of HUD's decision-making process. This definition adds to statutorily mandated notification procedures. The goal of notification is to provide an opportunity for comment; however, with consultation procedures, the burden is on the federal agency to show that it has made a good faith effort to elicit feedback. (<i>Department of Housing and Urban Development Government-to-Government Tribal Consultation Policy, 2016</i>)</p> <p>Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. (<i>Process for Tribal Consultation in Projects That Are Reviewed Under 24 C.F.R. Part 58, Notice: Community Planning and Development 12-006, 2012</i>)</p>
Department of the Interior ^a	The basis of consultation is rooted in meaningful dialogue where the viewpoints of tribes and the Department of the Interior, including its bureaus and offices, are shared, discussed, and analyzed. A consultation session is, but is not limited to, in-person meetings, video-conferences, teleconferences, and correspondence to discuss a specific issue. In the case of in-person meetings, video-conferences, and teleconferences, the consultation may be expanded upon through subsequent correspondence after consultation is initiated. On a case-by-case basis, consultation may be held through a series of written correspondence with the tribal leadership, but this process of utilizing written correspondence should only be used when other methods of dialogue are not feasible. (<i>Procedures for Consultation with Indian Tribes, Departmental Manual, Part 512, Chapter 5, 2015</i>)
Department of Transportation ^a	Consultation: Refers to meaningful and timely discussion in an understandable language with tribal governments during the development of regulations, policies, programs, plans, or matters that significantly or uniquely affect federally recognized American Indian and Alaska Native tribes and their governments. (<i>Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives and Tribes, Order 5301.1, 1999</i>)

**Appendix IV: Definitions for Consultation in
Agency Tribal Consultation Policies**

Agency	Definition (source)
Environmental Protection Agency	<p>Consultation is a process of meaningful communication and coordination between Environmental Protection Agency and tribal officials prior to the Environmental Protection Agency taking actions or implementing decisions that may affect tribes. As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current practices, adjustments made through this policy, the continuing dialogue between the Environmental Protection Agency and tribal governments, and program and regional office consultation procedures and plans. (<i>Environmental Protection Agency Policy on Consultation and Coordination with Indian Tribes</i>, 2011)</p> <p>The consultation process is flexible and tailored to the specific needs of Environmental Protection Agency, tribes, and the issues involved. Some consultations may involve multiple communications between the Environmental Protection Agency and tribes, potentially including workshops, webinars, teleconferences, or face-to-face meetings. Multiple communications may be particularly appropriate for highly technical and complex agency actions. The policy recognizes that there is no “one-size-fits-all” approach to consultation. Environmental Protection Agency’s tribal consultation differs from the public notice and comment period, and conducting public outreach, by the nature and timing of the interaction. Tribal consultation is between the Environmental Protection Agency and tribal governments. Tribes can, and do, participate in public comment processes, which are distinct from consultation under the policy. (<i>Environmental Protection Agency Tribal Consultation Implementation Frequently Asked Questions</i>, 2016)</p>
Federal Aviation Administration	<p>Consultation does not mean merely the right of American Indians and Alaska Natives, as members of the public, to be consulted or to provide comments under the Administrative Procedures Act or other federal law of general applicability. Consultation means a process of government-to-government dialogue between Federal Aviation Administration and tribes on proposed federal actions in a manner intended to secure meaningful and timely Tribal input. (<i>American Indian and Alaska Native Tribal Consultation Policy and Procedures</i>, Order 1210.20, 2004)</p> <p>“Consultation” means not only soliciting and considering the views of consulting parties but also, where feasible, seeking agreement. (<i>Section 106 Handbook: How to Assess the Effects of Federal Aviation Administration Actions on Historic Properties under Section 106 of the National Historic Preservation Act</i>, 2015)</p>
Federal Emergency Management Agency	<p>“Consultation” involves the direct, timely, and interactive involvement of Indian tribes regarding proposed federal actions on matters that have direct tribal implications. At the Federal Emergency Management Agency, this means the process to communicate and collaborate with tribal officials and Indian tribes to exchange information and receive input on an action that has tribal implications. (<i>Federal Emergency Management Agency Tribal Consultation Policy</i>, Policy No. 101-002.01, 2014)</p>
Federal Highway Administration	<p>Consultation means the process of seeking, discussing, and considering the views of others, and where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information. (<i>Tribal Consultation Guidelines</i>, 2015)</p>
Fish and Wildlife Service	<p>Consultation is a mutual, open, and direct two-way communication, conducted in good faith, to secure meaningful participation in the decision-making process, as allowed by law. (<i>Fish and Wildlife Service Native American Policy</i>, <i>Fish and Wildlife Service Manual</i>, Part 510, 2016; <i>Fish and Wildlife Service Tribal Consultation Handbook</i>, 2011)</p>

**Appendix IV: Definitions for Consultation in
Agency Tribal Consultation Policies**

Agency	Definition (source)
Forest Service	<p>Government-to-government consultation: The timely, meaningful, and substantive dialogue between Forest Service officials who have delegated authority to consult, and the official leadership of federally recognized Indian tribes, or their designated representative(s), pertaining to decisions or actions that may have tribal implications.</p> <p>Meaningful consultation: In the context of government-to-government consultation as expressed in Executive Order 13175, the information and dialogue exchanged actually has the potential to affect a decision for which the Agency has discretion. If a tribe is part of a consultation and their views have no real potential to be used in the related decision, the consultation is not meaningful. (<i>External Relations, ch. 1560, State, Tribal, County, and Local Agencies; Public and Private Organizations, Forest Service Manual 1500, 2016</i>)</p>
National Oceanic and Atmospheric Administration	<p>Consultation: As defined in Section 5 of Executive Order 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on National Oceanic and Atmospheric Administration policies that have tribal implications. (<i>Policy on Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations, Administrative Order 218-8, 2014; National Oceanic and Atmospheric Administration Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations, 2014</i>)</p>
National Park Service	<p>Consultation—a discussion, conference, or forum in which advice or information is sought or given, or information or ideas are exchanged. Consultation generally takes place on an informal basis; formal consultation requirements for compliance with section 106 of National Historic Preservation Act are published in 36 C.F.R. Part 800. Consultation with recognized tribes is done on a government-to-government basis. (<i>National Park Service Management Policies, 2006</i>)</p>
Nuclear Regulatory Commission	<p>Consultation means efforts to conduct meaningful and timely discussions between the Nuclear Regulatory Commission and Tribal governments on the Commission’s regulatory actions that have substantial direct effects on one or more Indian Tribes and those regulatory actions for which tribal consultation is required under federal statute. The Nuclear Regulatory Commission’s tribal consultation allows Indian Tribes the opportunity to provide input on regulatory actions with Tribal implications and those where tribal consultation is required, and is different from the outreach and public comment periods. The consultation process may include, but is not limited to, providing for mutually-agreed protocols, timely communication, coordination, cooperation, and collaboration. The consultation process provides opportunities for appropriate tribal officials or representatives to meet with Commission management or staff to achieve a mutual understanding between the Commission and the tribes of their respective interests and perspectives. (<i>Tribal Policy Statement, 2017; Tribal Protocol Manual, 2017</i>)</p>
Rural Development	<p>The term consultation is a term of art in section 106 review that is defined in 36 C.F.R. § 800.16(f). (<i>Rural Development Instruction Part 1970—Environmental: Subpart H: Historic and Cultural Resources, 2016</i>)</p>

Source: GAO analysis of agency documents. | GAO-19-22

Notes: We reviewed agency regulations, policies, and guidance regarding consulting with Indian tribes and Alaska Native corporations (referred to collectively here as tribal consultation policies) that 21 selected agencies identified. The 21 agencies included in our analysis are: (1) the Army Corps of Engineers, (2) Bureau of Land Management, (3) Bureau of Ocean Energy Management, (4) Bureau of Reclamation, (5) Coast Guard, (6) Department of Energy, (7) Department of Housing and Urban Development, (8) Environmental Protection Agency, (9) Federal Aviation Administration, (10) Federal Communications Commission, (11) Federal Emergency Management Agency, (12) Federal Energy Regulatory Commission, (13) Federal Highway Administration, (14) Federal Railroad Administration, (15) Federal Transit Administration, (16) Fish and Wildlife Service, (17) Forest Service, (18) National Oceanic and Atmospheric Administration, (19) National Park Service, (20) Nuclear Regulatory Commission, and (21) Rural Development.

^aWe included in our review policies from the Departments of Agriculture, Homeland Security, the Interior, and Transportation in cases such as when officials from component agencies without tribal consultation policies indicated that they used the corresponding department-level policy. We did not review the tribal consultation policies of the Department of Commerce and Department of Defense.

Appendix V: Topics Included in Selected Federal Agencies' Tribal Consultation Policies

Table 5 provides information on the discussion of Indian law that the 21 selected federal agencies in our review included in their tribal consultation policies. Table 6 provides information on other topics that the agencies included in their tribal consultation policies (see app. III for the list of agencies' tribal consultation policies we reviewed).

Table 5: Discussion of Indian Law in 21 Selected Federal Agencies' Tribal Consultation Policies

Discussion of Indian law (description)	Agencies with policies that include discussion
<p>Government-to-government relationship (The United States has a government-to-government relationship with federally recognized Indian tribes, which recognizes tribal sovereignty and acknowledges tribes as government entities.)</p>	<p>21 agencies: Army Corps of Engineers, Bureau of Land Management, Bureau of Ocean Energy Management, Bureau of Reclamation, Coast Guard, Department of Energy, Department of Housing and Urban Development, Environmental Protection Agency, Federal Aviation Administration, Federal Communications Commission, Federal Emergency Management Agency, Federal Energy Regulatory Commission, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, Fish and Wildlife Service, Forest Service, National Oceanic and Atmospheric Administration, National Park Service, Nuclear Regulatory Commission, and Rural Development</p>
<p>Tribal sovereignty (Federally recognized Indian tribes are distinct, independent political communities that predate the formation of the United States. As such, they retain their inherent powers of self-government over their territory and people and sovereignty to the extent they have not been abrogated by treaty or statute.)</p>	<p>21 agencies: Army Corps of Engineers, Bureau of Land Management, Bureau of Ocean Energy Management, Bureau of Reclamation, Coast Guard, Department of Energy, Department of Housing and Urban Development, Environmental Protection Agency, Federal Aviation Administration, Federal Communications Commission, Federal Emergency Management Agency, Federal Energy Regulatory Commission, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, Fish and Wildlife Service, Forest Service, National Oceanic and Atmospheric Administration, National Park Service, Nuclear Regulatory Commission, and Rural Development</p>
<p>Federal trust responsibility (The federal government has charged itself with moral obligations of the highest responsibility and trust for Indian tribes, which in some instances impose enforceable fiduciary obligations on the United States.)</p>	<p>18 agencies: Army Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, Coast Guard, Department of Energy, Environmental Protection Agency, Federal Aviation Administration, Federal Communications Commission, Federal Emergency Management Agency, Federal Energy Regulatory Commission, Federal Railroad Administration, Federal Transit Administration, Fish and Wildlife Service, Forest Service, National Oceanic and Atmospheric Administration, National Park Service, Nuclear Regulatory Commission, and Rural Development</p>

**Appendix V: Topics Included in Selected
Federal Agencies' Tribal Consultation Policies**

Discussion of Indian law (description)	Agencies with policies that include discussion
<p>Tribal treaty rights (Treaties between the United States and tribes document the agreements reached between the parties in exchange for tribes ceding most of their ancestral lands to the federal government. Tribes that ceded ancestral lands to the U.S. government through treaties may retain certain rights on those lands, such as hunting, fishing, or gathering rights, as well as such rights on land the treaty set aside for the tribe.)</p>	<p>15 agencies: Army Corps of Engineers, Bureau of Land Management, Bureau of Ocean Energy Management, Bureau of Reclamation, Department of Energy, Department of Housing and Urban Development, Environmental Protection Agency, Federal Aviation Administration, Federal Highway Administration, Fish and Wildlife Service, Forest Service, National Oceanic and Atmospheric Administration, National Park Service, Nuclear Regulatory Commission, and Rural Development</p>

Source: GAO analysis of selected federal agencies' tribal consultation policies. | GAO-19-22

Notes: We reviewed agency regulations, policies, and guidance regarding consulting with Indian tribes and Alaska Native corporations (referred to collectively here as tribal consultation policies) that 21 selected agencies identified. Of the 21 agencies, 3 component agencies we reviewed do not have their own tribal consultation policies but use department-level policies: the Coast Guard, within the Department of Homeland Security, and the Federal Railroad Administration and the Federal Transit Administration, within the Department of Transportation.

Table 6: Topics Included in 21 Selected Federal Agencies' Tribal Consultation Policies

Topic (explanation of topic)	Agencies with policies that discuss each topic
<p>Flexibility to adapt processes (The permission or ability on the agency's part for agency officials to adapt processes that consider tribes' customs, protocols, or other needs, as appropriate.)</p>	<p>19 agencies: Army Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, Coast Guard, Department of Energy, Department of Housing and Urban Development, Environmental Protection Agency, Federal Aviation Administration, Federal Communications Commission, Federal Emergency Management Agency, Federal Energy Regulatory Commission, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, Fish and Wildlife Service, Forest Service, National Oceanic and Atmospheric Administration, Nuclear Regulatory Commission, and Rural Development</p>
<p>Confidentiality of information on sacred sites (Addresses confidentiality on the part of agencies when receiving or handling information on tribal sacred sites out of concern for the safety of tribal religious or cultural items which could be looted if discovered.)</p>	<p>15 agencies: Army Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, Coast Guard, Department of Energy, Department of Housing and Urban Development, Federal Aviation Administration, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Highway Administration, Fish and Wildlife Service, Forest Service, National Park Service, Nuclear Regulatory Commission, and Rural Development</p>
<p>Conflict or dispute resolution (A method or system to handle disagreements during consultation that assists in solving issues and creating consensus or consent.)</p>	<p>11 agencies: Army Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, Department of Energy, Federal Aviation Administration, Federal Communications Commission, Fish and Wildlife Service, Forest Service, National Park Service, Nuclear Regulatory Commission, and Rural Development</p>
<p>Seeking consensus among all parties (The agency objective of seeking mutual understanding and agreement during consultation.)</p>	<p>11 agencies: Army Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, Department of Energy, Environmental Protection Agency, Federal Aviation Administration, Fish and Wildlife Service, Forest Service, National Park Service, Nuclear Regulatory Commission, and Rural Development</p>

**Appendix V: Topics Included in Selected
Federal Agencies' Tribal Consultation Policies**

Topic (explanation of topic)	Agencies with policies that discuss each topic
<p>Agency decision makers attending consultation meetings (The understanding that an official with the ability to influence the agency decision in a significant way attends consultation meetings with tribes.)</p>	<p>10 agencies: Army Corps of Engineers, Bureau of Land Management, Bureau of Ocean Energy Management, Bureau of Reclamation, Department of Energy, Fish and Wildlife Service, Forest Service, National Oceanic and Atmospheric Administration, National Park Service, and Nuclear Regulatory Commission</p>
<p>Appeals process for tribes (A process by which a tribe may seek an administrative review of an agency decision regarding consultation with which it disagrees.)</p>	<p>3 agencies: Bureau of Land Management, Forest Service, and Nuclear Regulatory Commission</p>

Source: GAO analysis of selected federal agencies' tribal consultation policies. | GAO-19-22

Notes: We reviewed agency regulations, policies, and guidance regarding consulting with Indian tribes and Alaska Native corporations (referred to collectively here as tribal consultation policies) that 21 selected agencies identified. Of the 21 agencies, 3 component agencies we reviewed do not have their own tribal consultation policies but use department-level policies: the Coast Guard, within the Department of Homeland Security, and the Federal Railroad Administration and Federal Transit Administration, within the Department of Transportation.

This table presents information about topics included in agency tribal consultation policies and may differ from agency practices.

Appendix VI: Comments from the Advisory Council on Historic Preservation



Preserving America's Heritage

February 14, 2019

Alyssa Hundrup
Assistant Director
Natural Resources and Environment
United States Government Accountability Office
441 G St., NW.
Washington, DC 20226

SENT VIA ELECTRONIC MAIL TO HundrupA@gao.gov

Dear Ms. Hundrup:

Thank you for the opportunity to comment on the January 2019 draft of GAO's Report on Tribal Consultation. We also want to convey our appreciation for your herculean effort in compiling this report on such an important topic and for referencing many of our guidance documents on tribal consultation.

Except for the small handful of clarifications discussed further below and the technical comments addendum, the ACHP agrees with the draft report's findings, conclusions and recommendations. And since it directly relates to our agency, we specifically acknowledge that the draft report's discussion of the history of the differences between the Corps Regulatory Program and our agency is accurate and consistent with our records.

Your findings regarding what the tribes identify as key factors hindering effective consultation are particularly consistent with what we regularly hear from tribes and our extensive experience on these matters. Among other things, as we mentioned during our interviews, the issue raised by tribes about narrow geographic scopes of review is directly tied to the longstanding conflict between our agency and the Corps Regulatory Program that is addressed in the report.

As more specifically addressed in our technical comments addendum, we want to highlight the fact that Section 106 of the National Historic Preservation Act and its implementing regulations specifically require consultation with Alaska Native Corporations. Some portions and footnotes of the draft report may convey the idea that they do not.

We also want to note that a part of the discussion titled "State agencies' policies may have communication procedures" on page 39, is at odds with the ACHP's position regarding the delegation of tribal consultation. As explained in our official guidance on this issue, "the authorization to applicants to initiate Section 106 consultation does not apply to the initiation of consultation with Indian tribes unless

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

expressly authorized by the Indian tribe to do so." *See Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act* (July 1, 2011).¹ However, the draft report states that the Section 106 regulations allow applicants, such as state agencies, to carry out consultation with tribes. As further stated in our guidance:

Appendix VII: Comments from the Department of Defense



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON, DC 20310-0108

Ms. Anne-Marie Fennell
Director, Natural Resources & Environment
U.S. Government Accountability Office
441 G Street, NW
Washington DC 20548

Dear Ms. Fennell,

This is the Department of Defense (DoD) response to the GAO Draft Report, GAO-19-22, "TRIBAL CONSULTATION: Additional Federal Action Needed for Infrastructure Projects," dated November 4, 2018 (GAO Code 101433).

Attached is DoD's proposed response to the subject report. My point of contact is Stacey Jensen who can be reached at stacey.m.jensen.civ@mail.mil and by phone at 703-695-6791.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. James", is positioned above the typed name.

R.D. James
Assistant Secretary of the Army
(Civil Works)

Enclosure

GAO DRAFT REPORT DATED NOVEMBER 30, 2018
GAO-19-22 (GAO CODE 101433)

“TRIBAL CONSULTATION: ADDITIONAL FEDERAL ACTIONS NEEDED FOR
INFRASTRUCTURE PROJECTS”

DEPARTMENT OF DEFENSE COMMENTS
TO THE GAO RECOMMENDATION

Now Recommendation 7.

RECOMMENDATION 1: The Director of Civil Works of the Army Corps of Engineers should document in its tribal consultation policy how agency officials are to communicate with those tribes about how input from consultation was considered in agency decisions on infrastructure projects.

DoD RESPONSE: Concur. The U.S. Army Corps of Engineers will update its tribal consultation policy to ensure that tribal input during consultation is documented and tribes are informed on how their input was used in the agency decision making process.

Appendix VIII: Comments from the Department of Energy



Department of Energy
Washington, DC 20585

1/30/2019

Mr. Franklin Rusco
Director
Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Dear Mr. Rusco:

Thank you for providing a draft copy of the Government Accountability Office (GAO) report, "*Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects (GAO-19-22)*." We have reviewed the draft report and provide the following responses to the recommendations for the Department of Energy (DOE) in the attached enclosure and paragraphs below.

The Department agrees tribal consultation is important to the process of infrastructure development, as studies show that tribal lands have significant potential for energy infrastructure development. In addition, successful infrastructure projects can significantly lower energy costs and provide electricity, particularly in remote tribal communities.

If you have any questions, please contact me, at 202-287-6566 or Mr. Douglas Little, Deputy Assistant Secretary in the Office of Congressional and Intergovernmental Affairs, at 202-586-3655.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin R. Frost".

Kevin R. Frost
Director
Office of Indian Energy Policy and Programs

Enclosure

cc: Douglas Little

Response to Report Recommendations

Recommendation 1: *The Secretary of Energy should develop a documented policy or clarify existing policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.*

Management Response: Concur

The relevant Department of Energy program offices will clarify and consolidate their consultation policies and practices with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

Recommendation 2: *The Secretary of Energy should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.*

Management Response: Concur

The relevant Department of Energy program offices will document their policies regarding how input from tribal consultation was considered in agency decisions on infrastructure projects.

Now Recommendation
10.

Appendix IX: Comments from the Department of Homeland Security

U.S. Department of Homeland Security
Washington, DC 20528



Homeland
Security

February 19, 2019

Anne-Marie Fennell
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Management Response to Draft Report GAO-19-22, "TRIBAL
CONSULTATION: Additional Federal Actions Needed for Infrastructure
Projects" (Job Code 101433)

Dear Ms. Fennell:

Thank you for the opportunity to review and comment on the subject draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO) work in planning and conducting its review and issuing this report.

We are pleased to note GAO's recognition that the 21 agencies reviewed, including DHS, have developed policies for consulting with federally recognized Indian tribes about infrastructure projects and related activities. DHS is committed to strengthening the government-to-government relationship between the United States and these tribes.

The draft report contained three recommendations for DHS with which the Department concurs. Attached find our detailed responses to each recommendation. Technical comments were previously provided under separate cover.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim H. Crumpacker".

JIM H. CRUMPACKER, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

Attachment

**Attachment: Management Response to Recommendations
Contained in GAO-19-22**

GAO recommended that:

Now Recommendation 5.

Recommendation 6: The Secretary of Homeland Security should establish a timeframe for developing or updating policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

Response: Concur. DHS Office of Partnership and Engagement (OPE) Intergovernmental Affairs Tribal Governmental Affairs Program staff have created a timeline for developing and updating Departmental tribal consultation policy and implementing related statutory requirements. A copy of this timeline was provided to GAO under a separate cover.

It is important to note that GAO was informed prior to its initiation of this audit in March of 2017 that DHS was in the initial stages of drafting an update to its tribal consultation policy. At that time, prudence dictated that DHS await the findings and recommendations of GAO's report to ensure consideration of all recommendations for improvement, as appropriate. We request that GAO consider this recommendation resolved and closed, as implemented.

Now Recommendation 12.

Recommendation 13: FEMA's Administrator should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Response: Concur. FEMA's Office of External Affairs is updating the FEMA Tribal Consultation Policy with language that provides tribes with information on how their input was considered in the decision-making process as a result of tribal consultation. That updated Policy is currently in the final leadership review and approval process. The updated Policy will serve as a support document for previously-published DHS guidance, including the DHS Tribal Consultation Policy, and is consistent with the previous FEMA Consultation Policy (FP 101-002.01) and Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Estimated Completion Date (ECD): June 30, 2019.

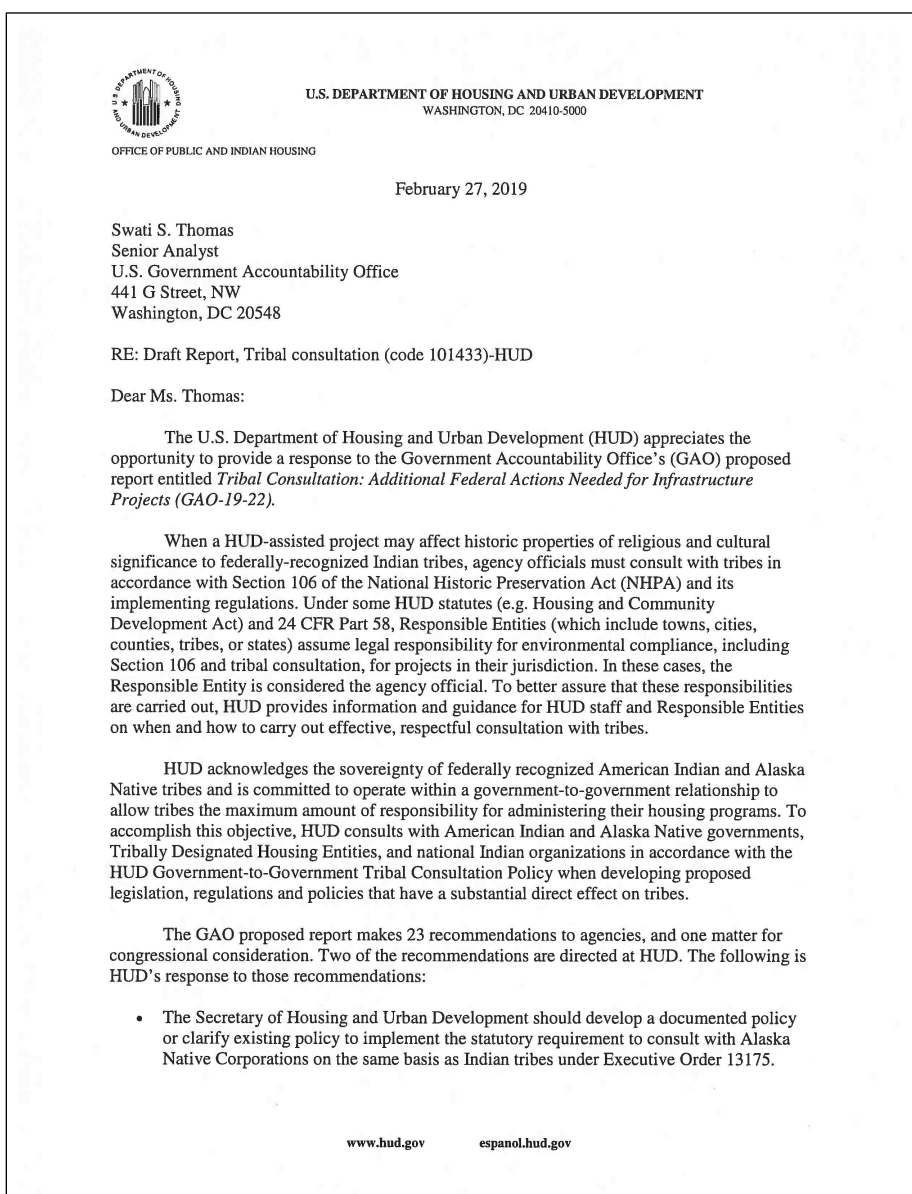
Now Recommendation 16.

Recommendation 17: The Secretary of Homeland Security should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Response: Concur. While the DHS Tribal Consultation Policy for the implementation of Executive Order 13175 may supplement consultation requirements for infrastructure projects, its primary purpose to ensure that DHS does not create any policies, develop regulations, create unfunded mandates, or take actions that have tribal implications without consulting Indian tribes. OPE Intergovernmental Affairs Tribal Governmental Affairs Staff will develop potential scenarios, process maps, and crosswalks of the disposition of input received from tribal officials during formal consultation and how considerations of the same might be published or communicated. In addition, OPE staff and others, as appropriate, will consult with tribal officials to determine where DHS can continue to improve consultation communications practices related to how input was considered from consultation on infrastructure projects.

The results of these efforts will be used to update the DHS Tribal Consultation Policy in a manner ensuring the Department is not creating prescriptive or non-flexible policy requirements realizing the uniqueness in every consultation and collaboration effort. This approach of scenario building should address the challenges identified by GAO in its consideration of the concept of free, prior, and informed consent. A copy of the detailed timeline for implementing this recommendation was provided to GAO under a separate cover. ECD: March 30, 2020.

Appendix X: Comments from the Department of Housing and Urban Development



The HUD Government-to-Government Tribal Consultation Policy was developed in consultation with tribes, and any revisions to that policy will require further tribal consultation. HUD will prioritize working with tribes to revise the HUD Government-to-Government Tribal Consultation Policy to specifically address consultation with Alaska Native Corporations. HUD will also prioritize ensuring that its procedures for tribal consultation on HUD-assisted projects under the National Historic Preservation Act specifically address consultation with Alaska Native Corporations.

- The Secretary of Housing and Urban Development should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

The HUD Government-to-Government Tribal Consultation Policy was developed in consultation with tribes, and any revisions to that policy will require further tribal consultation. HUD will prioritize working with tribes to revise the HUD Government-to-Government Tribal Consultation Policy to address this recommendation. HUD will also prioritize revising its procedures for tribal consultation on HUD-assisted projects under the National Historic Preservation Act to address this recommendation.

HUD appreciates GAO's review of federal agencies' processes for consulting with tribes on infrastructure and for offering recommendations to enhance those processes to facilitate tribal consultation. If you need additional information, please contact Hilary Atkin, Acting Director of Grants Management, Office of Native American Programs, at (202) 402-3427 or Gary A. Nemeck, Director, Office of Grants Evaluation, Office of Native American Programs, at (202) 402-2988.

Sincerely,



Heidi Frechette
Deputy Assistant Secretary
for Native American Programs

Appendix XI: Comments from the Department of the Interior



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

FEB 14 2019

Anne-Marie Fennell
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Fennell:

Thank you for providing the Department of the Interior (Department) the opportunity to review and comment on the draft Government Accountability Office (GAO) report entitled, *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects* (GAO-19-22). We appreciate GAO's review of the key factors Tribes and selected Federal agencies identified that hinder effective consultation on infrastructure projects and the steps agencies have taken to facilitate Tribal consultation.

GAO issued the Department six recommendations to address its findings. Below is a summary of actions planned or taken to address the implementation of the recommendations.

Recommendation 4: The Director of the Bureau of Land Management should establish a time frame for developing or updating policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

Response: Concur. The Bureau of Land Management (BLM) follows the Department's *Policy on Consultation with Alaska Native Claims Settlement Act Corporations* and follows the Departmental Manual provisions, 512 DM 4 & 5, that incorporate that policy. BLM considers this recommendation implemented and suggests updating Table 1 on Page 14 to correctly reflect this information.

Recommendation 5: The Director of the Fish and Wildlife Service should establish a time frame for developing or updating policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

Response: Concur. The U.S. Fish and Wildlife Service (FWS) utilizes the Department's *Policy on Consultation with Alaska Native Claims Settlement Act Corporations*. FWS considers this recommendation implemented and suggests updating Table 1 on Page 14 to correctly reflect this information.

Recommendation was
removed.

Now Recommendation 4.

Now Recommendation 8.

Recommendation 9: The Director for the Bureau of Ocean Energy Management should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Response: Concur. The Bureau of Ocean Energy Management (BOEM) issued Tribal consultation guidance on June 29, 2018, which will be included in the BOEM Manual. The guidance incorporates Departmental Policy 512 DM 5 for accountability and reporting and complies with the annual reporting requirements. BOEM also maintains a contract with the Department's Office of Collaborative Action and Dispute Resolution for facilitation, note taking, and coordination of consultations. The consultation notes are shared with the Tribes for accuracy before finalizing and returning to the Tribe. BOEM has also developed project-specific Memoranda of Understanding with Tribes pertaining to the review of environmental documents.

Additionally, an internal BOEM working group and a full-time Tribal Coordinator have been established to lead the Guidance Consultation in Fiscal Year 2019. The BOEM Tribal working group will consider additional recommendations for reporting on Bureau decisions and will develop a plan for the stages of consultation and which will address procedures for feedback.

Now Recommendation 9.

Recommendation 10: The Commissioner of the Bureau of Reclamation should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Response: Concur. Reclamation's Native American and International Affairs Office will review and modify, as appropriate, Reclamation's "Protocol Guidelines: Consulting with Indian Tribal Governments" about how Reclamation officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Now Recommendation 15.

Recommendation 16: The Director of the Fish and Wildlife Service should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Response: Concur. The FWS' Tribal Consultation Handbook, which was updated in October 2018, describes how FWS officials are to communicate with Tribes regarding how Tribal input from consultation was considered in agency decisions on infrastructure projects. FWS considers this recommendation implemented and suggest updating Table 14 on Page 37 to correctly reflect this information.

Now Recommendation 18.

Recommendation 19: The Director for the National Park Service should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

**Appendix XI: Comments from the Department
of the Interior**

Response: Concur. The National Park Service (NPS) will update its Tribal consultation policy to require that its annual consultation summary report to the Secretary include information on how NPS has communicated with Tribes about how Tribal input from consultation was considered in NPS' decisions.

The enclosure contains technical comments for your consideration when finalizing the report.

If you have any questions about this response, please contact Nancy Thomas, the Department's Audit Liaison at (202) 208-7954.

Sincerely,



Scott Cameron
Principal Deputy Assistant Secretary
for Policy, Management and Budget

Enclosure

Appendix XII: Comments from the Department of Transportation



U.S. Department
of Transportation

Office of the Secretary
of Transportation

1200 New Jersey Avenue, SE
Washington, DC 20590

Anne-Marie Fennell
Director, Natural Resources and Environment
U.S. Government Accountability Office (GAO)
441 G Street NW
Washington, DC 20548

JAN 29 2019

Dear Ms. Fennell:

The U.S. Department of Transportation (Department) remains committed to implementing an effective tribal consultation process. The Department consults regularly and meaningfully with American Indians, Alaska Natives, and Indian tribal governments (Tribes) on a government-to-government basis and collaborates with Tribal officials in developing infrastructure projects that have Tribal implications. This process is governed by the DOT Order on Tribal Consultations. The Order affirms the Department's and its Operating Administrations' (OAs) unique legal relationship with Tribes, establishes the Department's consultation and coordination process with Tribes for any action that has a substantial direct effect on one or more Tribes, lists goals for the OAs to meet when carrying out policies, programs, and activities affecting Tribes, and provides direction to the Department and OAs to improve upon communication with Tribes.

Upon review of the GAO draft report, we concur with Recommendations 15 and 21 directing the Department and the Federal Highway Administration to document in our Tribal consultation policy how agency officials are to communicate with Tribes on how their input from consultation was considered in agency decisions on infrastructure projects. We will provide a detailed response to each recommendation within 60 days of the final report's issuance.

We appreciate the opportunity to respond to the GAO draft report. Please contact Madeline M. Chulumovich, Director, Audit Relations and Program Improvement, at (202) 366-6512 with any questions or if you would like to obtain additional details.

Sincerely,

Keith Washington
Deputy Assistant Secretary for Administration

Now Recommendations
14 and 20.

Appendix XIII: Comments from the Environmental Protection Agency



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Mr. Alfredo Gomez
Director
Natural Resources and Environment
U.S. Government Accountability Office
Washington, DC 20548

FEB 14 2019

Office of
International and
Tribal Affairs

Dear Mr. Gomez:

Thank you for the opportunity to review and comment on U.S. Government Accountability Office's (GAO) draft report, Tribal Consultation Additional Federal Action Needed for Infrastructure Projects (GAO-19-22).

This letter provides the U.S. Environmental Protection Agency's (EPA) response to the GAO's draft report recommendation specific to EPA. The draft report examines: (1) extent to which selected federal agencies have policies for consulting with Indian tribes and Alaska Native Corporations on infrastructure projects and related activities; (2) key factors tribes and selected federal agencies identified that hinder effective consultation on infrastructure projects; and (3) the extent to which selected federal agencies have taken steps to facilitate tribal consultation on infrastructure projects.

The EPA appreciates the GAO's work in this area and your collegial working relationship and dialogue with our staff. Below is EPA's response to the GAO Recommendation number two.

GAO Recommendation 2

The Administrator of the Environmental Protection Agency should develop a documented policy or clarify existing policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.


EPA agrees with GAO Recommendation #2. Pursuant to Public Law 108-199, 118 Stat. 452, as amended by Public Law 108-447, 118 Stat. 3265, EPA recognizes its obligation under the referenced public laws to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

To support this recommendation, EPA will clarify its engagement practices with Alaska Native Corporations through the development of a best practices guide for consulting with Alaska Native Corporations. We anticipate finalizing the best practices guide by the end of calendar year 2019.

**Appendix XIII: Comments from the
Environmental Protection Agency**

Thank you for the opportunity to review the draft report. We believe there is useful information in this report that will strengthen EPA's consultation efforts with tribes and Alaska Native Corporations. If you have any questions or need additional information; please contact Dona Harris, American Indian Environmental Office at 202-564-6633, harris.dona@epa.gov.

Sincerely,



Jane Nishida
Principal Deputy Assistant Administrator

cc: Chris Hladick, EPA Region 10, Regional Administrator
Felicia Wright, Acting American Indian Environmental Office
EPA GAO Liaison Team

Appendix XIV: Comments from the Federal Communications Commission



Federal Communications Commission
Washington, D.C. 20554

February 25, 2019

Swati Sheladia Thomas
Government Accountability Office
441 G St., NW
Washington, DC 20548

Dear Ms. Thomas,

Thank you for the opportunity to review GAO's draft report, "Tribal Consultation, Additional Federal Actions Needed for Infrastructure Projects." The Commission has long recognized the importance of consulting with Tribal governments on projects that have the potential to affect Tribes, and we appreciate your agreement that the Commission's "approach to tribal consultation for telecommunications towers was identified as a best practice among reports [GAO] reviewed and tribal and agency officials [GAO] interviewed."

The Commission's procedures for communicating with Tribal governments regarding individual telecommunication infrastructure projects are set forth in the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process. At the center of our process is the Commission's Tower Construction Notification System, a centralized electronic notification system that alerts Tribes when a project is proposed inside its area of interest. As the draft report recognizes, having such a central notification system facilitates Tribal communications, and we concur with recommendations like the one from the Federal Permitting Improvement Steering Council for agencies to develop "a government-wide central system for identifying and notifying tribes, similar to the Federal Communication Commission's Tower Construction Notification System." We appreciate GAO's recognition that a 2017 report by the Advisory Council on Historic Preservation (ACHP) held out the FCC's Tower Construction Notification System as a model.

The Nationwide Programmatic Agreement provides a flexible approach for how to communicate with each of the 573 federally recognized Indian tribes, all of which may have different preferences as to the extent and manner of communications with the Commission. The Nationwide Programmatic Agreement was developed by a working group that included the National Association of Tribal Historic Preservation Officers and other Tribal and historic preservation constituencies. The Nationwide Programmatic Agreement's Preamble explains that the FCC "actively sought and received participation and comment from Indian tribes" and "consulted with federally recognized Indian tribes" on the Nationwide Programmatic Agreement's framework, including the development of the Tower Construction Notification System through which Tribes voluntarily identify geographic areas likely to have historic sites. The Nationwide Programmatic Agreement was signed by the ACHP, the National Conference of State Historic Preservation Officers and the Commission.

As the Nationwide Programmatic Agreement explains, FCC project applicants are authorized to initiate, coordinate, and assist the FCC with many aspects of the Section 106 review process, including communicating with Tribes, provided the Tribe agrees. For many FCC undertakings, communications

about a project occur exclusively between a Tribe and an FCC applicant. The Nationwide Programmatic Agreement also directs applicants to refer any requests for government-to-government consultation to the FCC immediately, and the FCC often engages directly with Tribes.

At the start of a proposed project, FCC applicants use the Tower Construction Notification System to notify Tribes that a project has been proposed in their geographic area of interest. If a Tribe indicates that a historic property of religious and cultural significance to it may be affected by the project, the applicant is required to invite that Tribe to be a consulting party in the Section 106 process. Once the Tribe becomes a consulting party, it is entitled to: (1) receive notices, submission packets, and other information, and (2) have an opportunity to have its views expressed and taken into account by the applicant, the State Historic Preservation Officer/Tribal Historic Preservation Officer and, where appropriate, the FCC.

Section IV of the Nationwide Programmatic Agreement contemplates a collaborative, back-and-forth process between applicants and Tribes that allows Tribes to express their views and requires applicants to take those views into account. Communications between applicants and Indian Tribes are intended to: (1) ascertain whether historic properties of religious and cultural significance to the Indian Tribe may be affected by the undertaking and whether consultation is therefore necessary, and (2) where possible, with the concurrence of the Indian Tribe or Native Hawaiian Organization, to reach an agreement on the presence or absence of effects that may obviate the need for consultation. The Nationwide Programmatic Agreement also requires applicants to communicate in a manner consistent with the reasonable wishes of the Tribe. Accordingly, the means of communications follow Tribal preference, which might be more or less formal, and could include emails, documents uploaded to a Tribal database, formal letters to Tribal leadership, and conference calls.

Under the process set forth in the Nationwide Programmatic Agreement, applicants and Tribes frequently come to agreement on how to address Tribal concerns in a project. Applicants must retain documentation of Tribal concurrence. When a Tribe does not concur, an applicant may notify the Commission but can continue to work to address the Tribe's concern. Tribal input on a project, whether through communications with the FCC directly or with an FCC applicant, can take a number of forms. Four examples include:

- Applicant has revised a project in response to Tribal input, such as (a) lowering the height of a tower, often to avoid impact on an important viewshed identified by a Tribe or (b) changing the location of a tower to avoid disturbing an important site identified by a Tribe. If the applicant agrees to modify its proposal to address Tribal concerns, it must retain a record that Tribal participation was successfully concluded such that Section 106 is complete and the project will not affect Indian religious and cultural sites. The concluding communication evidences how Tribal input was considered to avoid an effect on the Tribe.
- In cases where an applicant and Tribe do not agree on a project's impact on an historic site, the FCC will become involved in the assessment of effects. In such cases, the FCC will communicate directly with a Tribe to explain how its input was taken into consideration.
- In cases where there is an adverse effect that cannot be avoided, the Nationwide Programmatic Agreement requires that the applicant submit a "plan designed to avoid, minimize or mitigate the adverse effect," and ultimately it must negotiate a Memorandum of Agreement with affected parties. The Memorandum of Agreement sets out the nature of the adverse effect on a property and how the impact is to be mitigated. Where a Tribe is a party to a Memorandum of Agreement, the agreement represents another type of written communication explaining how Tribal input was taken into consideration for an FCC undertaking.

- Under section 1.1307 of the FCC's rules, a Memorandum of Agreement currently triggers an Environmental Assessment that subsequently goes on public notice. Tribes have access to a public Environmental Assessment, which would document how a Tribe's input was obtained and considered and how the Tribe's views were addressed in the proposed project.

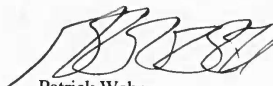
We believe our current practices strike an appropriate and reasonable balance between keeping Tribes informed while respecting Tribal communication preferences, consistent with Tribal preferences and the Nationwide Programmatic Agreement. Nevertheless, consistent with GAO's recommendation to better document our communications practices with Tribes, we will continue to explore ways of documenting how Commission staff could communicate with Tribes about how Tribal input was used in Commission decisions on telecommunications infrastructure projects.

Thank you for the opportunity to review GAO's recommendations. We look forward to working with GAO in the future.

Sincerely,



Donald K. Stockdale, Jr.
Chief, Wireless Telecommunications Bureau



Patrick Webre
Chief, Consumer and Governmental Affairs Bureau

Appendix XV: Comments from the Federal Energy Regulatory Commission

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

January 4, 2019

OFFICE OF THE CHAIRMAN

Ms. Anne-Marie Fennell
Director
Natural Resources and Environment
U. S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Director Fennell:

Thank you for the opportunity to provide comments on behalf of the Federal Energy Regulatory Commission with respect to the Government Accountability Office's draft report entitled, "Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects (GAO-19-22)." GAO has made the following recommendation with regard to the Commission:

The Federal Energy Regulatory Commission should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 14).

I have directed Commission staff to develop possible revisions to the Commission's Tribal Consultation Policy Statement responsive to Recommendation 14, for consideration by the Commission.

Sincerely,



Neil Chatterjee
Chairman

Attachment

Now Recommendation
13.

Appendix XVI: Comments from Nuclear Regulatory Commission



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 31, 2018

Ms. Alyssa Hundrup
Assistant Director, Natural Resources
and the Environment
U.S. Government Accountability Office
Washington, DC 20548

Dear Ms. Hundrup:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to Ms. Ann-Marie Fennell's letter dated November 30, 2018, which provided the NRC with an opportunity to review and comment on the U.S. Government Accountability Office (GAO) draft report GAO-19-22, "Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects."

We appreciate the opportunity to review the draft report. Overall, we agree with the draft GAO report and its findings, conclusions, and recommendations as they apply to our agency. In Recommendation 20, the GAO refers to documenting in the NRC's "tribal consultation policy" the manner in which agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects. Our understanding is that GAO's recommendation refers to one or more of the agency's regulations, policies, and guidance which make up the collective set of documents described as "tribal consultation policies" in GAO's report. In the enclosure to this letter, we have provided technical comments and clarifications for your consideration.

Thank you again for the opportunity to provide comments on the GAO report. Please feel free to contact Mr. John Jolicoeur of my staff at (301) 415-1642 or John.Jolicoeur@nrc.gov if you have questions or need additional information.

Sincerely,

M. Doane for M. Doane

Margaret M. Doane
Executive Director
for Operations

Enclosure:
NRC Comments on Draft Report
GAO-19-22

cc: Chairman Svinicki
Commissioner Baran
Commissioner Burns
Commissioner Caputo
Commissioner Wright

Now Recommendation
19.

Appendix XVII: GAO Contact and Staff Acknowledgments

GAO Contact

Anne-Marie Fennell, (202) 512-3841 or fennella@gao.gov

Staff Acknowledgments

In addition to the contact named above, Jeff Malcolm (Assistant Director), in memoriam; Alyssa M. Hundrup (Assistant Director); Carolyn Blocker; Joseph Capuano; John Delicath; Cindy Gilbert; Joe Hackett; Kelsey Kennedy; Serena Lo; Dave Messman; Cindy Saunders; Jeanette Soares; Sara Sullivan; Kiki Theodoropoulos; Swati Sheladia Thomas; Sarah Veale; and Vincent Whalen made key contributions to this report.

In Memoriam:

Jeffery D. Malcolm **Assistant Director, Natural Resources and Environment (1962-2018)**

Jeff Malcolm was a key contributor on this report at the time of his death in April 2018, and we dedicate this report to his memory. GAO's work on Native American issues, in part, reflects Jeff's encyclopedic knowledge, perseverance, and dedication. As an Assistant Director in GAO's Natural Resources and Environment team, Jeff led a pivotal body of work on federal lands and American Indian and Alaska Native issues. His work helped improve oversight of the federal government's responsibilities to Indian tribes. Over his almost 30-year career, beginning in 1988, Jeff's leadership resulted in hundreds of reports and testimonies generating over 170 recommendations to federal agencies and more than 15 matters for congressional consideration. In addition, the work of Jeff and his teams identified an estimated \$1 billion in financial savings or new revenue sources for the U.S. government.

Appendix XVIII: Accessible Data

Agency Comment Letter

Text of Appendix VI: Comments from the Advisory Council on Historic Preservation

Page 1

February 14, 2019

Alyssa Hundrup
Assistant Director
Natural Resources and Environment
United States Government Accountability Office
441 G St., NW.
Washington, DC 20226

SENT VIA ELECTRONIC MAIL TO HundrupA@gao.gov

Dear Ms. Hundrup:

Thank you for the opportunity to comment on the January 2019 draft of GAO's Report on Tribal

Consultation. We also want to convey our appreciation for your herculean effort in compiling this report on such an important topic and for referencing many of our guidance documents on tribal consultation.

Except for the small handful of clarifications discussed further below and the technical comments addendum, the ACHP agrees with the draft report's findings, conclusions and recommendations. And since it directly relates to our agency, we specifically acknowledge that the draft report's discussion of the history of the differences between the Corps Regulatory Program and our agency is accurate and consistent with our records.

Your findings regarding what the tribes identify as key factors hindering effective consultation are particularly consistent with what we regularly hear from tribes and our extensive experience on these matters. Among other things, as we mentioned during our interviews, the issue raised by tribes about narrow geographic scopes of review is directly tied to the longstanding conflict between our agency and the Corps Regulatory Program that is addressed in the report.

As more specifically addressed in our technical-1 comments addendum, we want to highlight the fact that Section 106 of the National Historic Preservation Act and its implementing regulations specifically require consultation with Alaska Native Corporations. Some portions and footnotes of the draft report may convey the idea that they do not.

We also want to note that a part of the discussion titled "State agencies' policies may have communication procedures" on page 39, is at odds with the ACHP's position regarding the delegation of tribal consultation. As explained in our official guidance on this issue, "the authorization to applicants to initiate Section 106 consultation does not apply to the initiation of consultation with Indian tribes unless expressly authorized by the Indian tribe to do so." See *Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act* (July 1, 2011).¹ However, the draft report states that the Section 106 regulations allow applicants, such as state agencies, to carry out consultation with tribes. As further stated in our guidance:

Text of Appendix VII: Comments from the Department of Defense

Page 1

Ms. Anne-Marie Fennell
Director, Natural Resources & Environment
U.S. Government Accountability Office 441 G Street, NW
Washington DC 20548 Dear Ms. Fennell,

This is the Department of Defense (DoD) response to the GAO Draft Report, GAO-19-22, "TRIBAL CONSULTATION: Additional Federal Action Needed for Infrastructure Projects," dated November 4, 2018 (GAO Code 101433).

Attached is DoD's proposed response to the subject report. My point of contact is Stacey Jensen who can be reached at stacey.m.jensen.civ@mail.mil and by phone at 703-695-6791 .

Sincerely,

R.D. James
Assistant Secretary of the Army (Civil Works)

Enclosure

Text of Appendix VIII: Comments from the Department of Energy

Page 1

1/30/2019

Mr. Franklin Rusco Director
Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, N.W.

Washington , DC 20548 Dear Mr. Rusco:

Thank you for providing a draft copy of the Government Accountability Office (GAO) report, "Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects (GA0-19-22)." We have reviewed the draft report and provide the following responses to the recommendations for the Department of Energy (DOE) in the attached enclosure and paragraphs below.

The Department agrees tribal consultation is important to the process of infrastructure development , as studies show that tribal lands have significant potential for energy infrastructure development. In addition, successful infrastructure projects can significantly lower energy costs and provide electricity, particularly in remote tribal communities.

If you have any questions, please contact me, at 202-287-6566 or Mr. Douglas Little, Deputy Assistant Secretary in the Office of Congressional and Intergovernmental Affairs, at 202-586-3655.

Sincerely,

Kevin R. Frost
Director
Office of Indian Energy Policy and Programs

Enclosure

cc: Douglas Little

Page 2

Response to Report Recommendations

Recommendation 1:

The Secretary of Energy should develop a documented policy or clarify existing policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

Management Response: Concur

The relevant Department of Energy program offices will clarify and consolidate their consultation policies and practices with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

Recommendation 2:

The Secretary of Energy should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Management Response: Concur

The relevant Department of Energy program offices will document their policies regarding how input from tribal consultation was considered in agency decisions on infrastructure projects.

Text of Appendix IX: Comments from the Department of Homeland Security

Page 1

February 19, 2019

Anne-Marie Fennell
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Management Response to Draft Report GAO-19-22, "TRIBAL CONSULTATION: Additional Federal Actions Needed for Infrastructure Projects" (Job Code 101433)

Dear Ms. Fennell:

Thank you for the opportunity to review and comment on the subject draft report. The

U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO) work in planning and conducting its review and issuing this report.

We are pleased to note GAO's recognition that the 21 agencies reviewed, including DHS, have developed policies for consulting with federally recognized Indian tribes about infrastructure projects and related activities. DHS is committed to strengthening the government-to-government relationship between the United States and these tribes.

The draft report contained three recommendations for DHS with which the Department concurs. Attached find our detailed responses to each recommendation. Technical comments were previously provided under separate cover.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Sincerely,

Jim H. Crumpacker, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

Attachment

Page 2

**Attachment: Management Response to Recommendations
Contained in GA0-19-22**

GAO recommended that:

Recommendation 6:

The Secretary of Homeland Security should establish a timeframe for developing or updating policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

Response: Concur. DHS Office of Partnership and Engagement (OPE) Intergovernmental Affairs Tribal Governmental Affairs Program staff have created a timeline for developing and updating Departmental tribal consultation policy and implementing related statutory requirements. A copy of this timeline was provided to GAO under a separate cover.

It is important to note that GAO was informed prior to its initiation of this audit in March of 2017 that DHS was in the initial stages of drafting an update to its tribal consultation policy. At that time, prudence dictated that DHS await the findings and recommendations of GAO's report to ensure consideration of all recommendations for improvement, as appropriate. We request that GAO consider this recommendation resolved and closed, as implemented.

Recommendation 13:

FEMA's Administrator should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Response: Concur. FEMA's Office of External Affairs is updating the FEMA Tribal Consultation Policy with language that provides tribes with

information on how their input was considered in the decision-making process as a result of tribal consultation. That updated Policy is currently in the final leadership review and approval process. The updated Policy will serve as a support document for previously-p ublished DHS guidance, including the DHS Tribal Consultation Policy, and is consistent with the previous FEMA Consultation Policy (FP 101-002.01) and Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Estimated Completion Date (ECD): June 30, 2019.

Recommendation 17:

The Secretary of Homeland Security should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Page 3

Response: Concur. While the DHS Tribal Consultation Policy for the implementation of Executive Order 13175 may supplement consultation requirements for infrastructure projects, its primary purpose to ensure that DHS does not create any policies, develop regulations, create unfunded mandates, or take actions that have tribal implications without consulting Indian tribes. OPE Intergovernmental Affairs Tribal Governmental Affairs Staff will develop potential scenarios, process maps, and crosswalks of the disposition of input received from tribal officials during formal consultation and how considerations of the same might be published or communicated. In addition, OPE staff and others, as appropriate, will consult with tribal officials to determine where DHS can continue to improve consultation communications practices related to how input was considered from consultation on infrastructure projects.

The results of these efforts will be used to update the DHS Tribal Consultation Policy in a manner ensuring the Department is not creating prescriptive or non-flexible policy requirements realizing the uniqueness in every consultation and collaboration effort. This approach of scenario building should address the challenges identified by GAO in its consideration of the concept of free, prior, and informed consent. A copy of the detailed timeline for implementing this recommendation was provided to GAO under a separate cover. ECD: March 30, 2020.

Text of Appendix X: Comments from the Department of
Housing and Urban Development

Page 1

February 27, 2019

Swati S. Thomas
Senior Analyst
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

RE: Draft Report, Tribal consultation (code 101433)-HUD

Dear Ms. Thomas:

The U.S. Department of Housing and Urban Development (HUD) appreciates the opportunity to provide a response to the Government Accountability Office's (GAO) proposed report entitled Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects (GAO-19-22).

When a HUD-assisted project may affect historic properties of religious and cultural significance to federally-recognized Indian tribes, agency officials must consult with tribes in accordance with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations. Under some HUD statutes (e.g. Housing and Community Development Act) and 24 CFR Part 58, Responsible Entities (which include towns, cities, counties, tribes, or states) assume legal responsibility for environmental compliance, including Section 106 and tribal consultation, for projects in their jurisdiction. In these cases, the Responsible Entity is considered the agency official. To better assure that these responsibilities are carried out, HUD provides information and guidance for HUD staff and Responsible Entities on when and how to carry out effective, respectful consultation with tribes.

HUD acknowledges the sovereignty of federally recognized American Indian and Alaska Native tribes and is committed to operate within a government-to-government relationship to allow tribes the maximum amount of responsibility for administering their housing programs. To accomplish this objective, HUD consults with American Indian and Alaska

Native governments, Tribally Designated Housing Entities, and national Indian organizations in accordance with the HUD Government-to-Government Tribal Consultation Policy when developing proposed legislation, regulations and policies that have a substantial direct effect on tribes.

The GAO proposed report makes 23 recommendations to agencies, and one matter for congressional consideration. Two of the recommendations are directed at HUD. The following is HUD's response to those recommendations:

- The Secretary of Housing and Urban Development should develop a documented policy or clarify existing policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175. The HUD Government-to-Government Tribal Consultation Policy was developed in consultation with tribes, and any revisions to that policy will require further tribal consultation. HUD will prioritize working with tribes to revise the HUD Government-to-Government Tribal Consultation Policy to specifically address consultation with Alaska Native Corporations. HUD will also prioritize ensuring that its procedures for tribal consultation on HUD-assisted projects under the National Historic Preservation Act specifically address consultation with Alaska Native Corporations.

Page 2

- The Secretary of Housing and Urban Development should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects. The HUD Government-to-Government Tribal Consultation Policy was developed in consultation with tribes, and any revisions to that policy will require further tribal consultation. HUD will prioritize working with tribes to revise the HUD Government-to-Government Tribal Consultation Policy to address this recommendation. HUD will also prioritize revising its procedures for tribal consultation on HUD-assisted projects under the National Historic Preservation Act to address this recommendation.

HUD appreciates GAO's review of federal agencies' processes for consulting with tribes on infrastructure and for offering recommendations to enhance those processes to facilitate tribal consultation. If you need

additional information, please contact Hilary Atkin, Acting Director of Grants Management, Office of Native American Programs, at (202) 402-3427 or Gary A. Nemece, Director, Office of Grants Evaluation, Office of Native American Programs, at (202) 402-2988.

Sincerely,

Heidi J. Frechette
Deputy Assistant Secretary
for Native American Programs

Text of Appendix XI: Comments from the Department of the Interior

Page 1

February 2019

Anne-Marie Fennell
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Fennell:

Thank you for providing the Department of the Interior (Department) the opportunity to review and comment on the draft Government Accountability Office (GAO) report entitled, Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects (GAO-19-22). We appreciate GAO's review of the key factors Tribes and selected Federal agencies identified that hinder effective consultation on infrastructure projects and the steps agencies have taken to facilitate Tribal consultation.

GAO issued the Department six recommendations to address its findings. Below is a summary of actions planned or taken to address the implementation of the recommendations.

Recommendation 4:

The Director of the Bureau of Land Management should establish a time frame for developing or updating policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

Response: Concur. The Bureau of Land Management (BLM) follows the Department's Policy on Consultation with Alaska Native Claims Settlement Act Corporations and follows the Departmental Manual provisions, 512 DM 4 & 5, that incorporate that policy. BLM considers this recommendation implemented and suggests updating Table 1 on Page 14 to correctly reflect this information.

Recommendation 5:

The Director of the Fish and Wildlife Service should establish a time frame for developing or updating policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

Response: Concur. The U.S. Fish and Wildlife Service (FWS) utilizes the Department's Policy on Consultation with Alaska Native Claims Settlement Act Corporations. FWS considers this recommendation implemented and suggests updating Table 1 on Page 14 to correctly reflect this information.

Page 2

Recommendation 9:

The Director for the Bureau of Ocean Energy Management should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Response: Concur. The Bureau of Ocean Energy Management (BOEM) issued Tribal consultation guidance on June 29, 2018, which will be included in the BOEM Manual. The guidance incorporates Departmental Policy 512 DM 5 for accountability and reporting and complies with the annual reporting requirements. BOEM also maintains a contract with the Department's Office of Collaborative Action and Dispute Resolution for facilitation, note taking, and coordination of consultations. The

consultation notes are shared with the Tribes for accuracy before finalizing and returning to the Tribe. BOEM has also developed project-specific Memoranda of Understanding with Tribes pertaining to the review of environmental documents.

Additionally, an internal BOEM working group and a full-time Tribal Coordinator have been established to lead the Guidance Consultation in Fiscal Year 2019. The BOEM Tribal working group will consider additional recommendations for reporting on Bureau decisions and will develop a plan for the stages of consultation and which will address procedures for feedback.

Recommendation 10:

The Commissioner of the Bureau of Reclamation should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Response: Concur. Reclamation's Native American and International Affairs Office will review and modify, as appropriate, Reclamation's "Protocol Guidelines: Consulting with Indian Tribal Governments" about how Reclamation officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Recommendation 16:

The Director of the Fish and Wildlife Service should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Response: Concur. The FWS' Tribal Consultation Handbook, which was updated in October 2018, describes how FWS officials are to communicate with Tribes regarding how Tribal input from consultation was considered in agency decisions on infrastructure projects. FWS considers this recommendation implemented and suggest updating Table 14 on Page 37 to correctly reflect this information.

Recommendation 19:

The Director for the National Park Service should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.

Page 3

Response: Concur. The National Park Service (NPS) will update its Tribal consultation policy to require that its annual consultation summary report to the Secretary include information on how NPS has communicated with Tribes about how Tribal input from consultation was considered in NPS' decisions.

The enclosure contains technical comments for your consideration when finalizing the report.

If you have any questions about this response, please contact Nancy Thomas, the Department's Audit Liaison at (202) 208-7954.

Sincerely,

Scott Cameron
Principal Deputy Assistant Secretary for Policy, Management and Budget

Enclosure

Text of Appendix XII: Comments from the Department of Transportation

Page 1

January 29, 2019

Anne-Marie Fennell
Director, Natural Resources and Environment
U.S. Government Accountability Office (GAO)
441 G Street NW

Washington, DC 20548

Dear Ms. Fennell:

The U.S. Department of Transportation (Department) remains committed to implementing an effective tribal consultation process. The Department consults regularly and meaningfully with American Indians, Alaska Natives, and Indian tribal governments (Tribes) on a government-to-government basis and collaborates with Tribal officials in developing infrastructure projects that have Tribal implications. This process is governed by the DOT Order on Tribal Consultations. The Order affirms the Department's and its Operating Administrations' (OAs) unique legal relationship with Tribes, establishes the Department's consultation and coordination process with Tribes for any action that has a substantial direct effect on one or more Tribes, lists goals for the OAs to meet when carrying out policies, programs, and activities affecting Tribes, and provides direction to the Department and OAs to improve upon communication with Tribes.

Upon review of the GAO draft report, we concur with Recommendations 15 and 21 directing the Department and the Federal Highway Administration to document in our Tribal consultation policy how agency officials are to communicate with Tribes on how their input from consultation was considered in agency decisions on infrastructure projects. We will provide a detailed response to each recommendation within 60 days of the final report's issuance.

We appreciate the opportunity to respond to the GAO draft report. Please contact Madeline M. Chulumovich, Director, Audit Relations and Program Improvement, at (202) 366-6512 with any questions or if you would like to obtain additional details.

Sincerely,

Keith Washington
Deputy Assistant Secretary for Administration

Text of Appendix XIII: Comments from the Environmental Protection Agency

Page 1

February 14, 2019

Mr. Alfredo Gomez
Director
Natural Resources and Environment
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Gomez:

Thank you for the opportunity to review and comment on U.S. Government Accountability Office's (GAO) draft report, Tribal Consultation Additional Federal Action Needed for Infrastructure Projects (GAO-19-22).

This letter provides the U.S. Environmental Protection Agency's (EPA) response to the GAO's draft report recommendation specific to EPA. The draft report examines: (1) extent to which selected federal agencies have policies for consulting with Indian tribes and Alaska Native Corporations on infrastructure projects and related activities; (2) key factors tribes and selected federal agencies identified that hinder effective consultation on infrastructure projects; and (3) the extent to which selected federal agencies have taken steps to facilitate tribal consultation on infrastructure projects.

The EPA appreciates the GAO's work in this area and your collegial working relationship and dialogue with our staff. Below is EPA's response to the GAO Recommendation number two.

GAO Recommendation 2

The Administrator of the Environmental Protection Agency should develop a documented policy or clarify existing policy to implement the statutory requirement to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

EPA agrees with GAO Recommendation #2. Pursuant to Public Law 108-199, 118 Stat. 452, as amended by Public Law 108-447, 118 Stat. 3265, EPA recognizes its obligation under the referenced public laws to consult with Alaska Native Corporations on the same basis as Indian tribes under Executive Order 13175.

To support this recommendation, EPA will clarify its engagement practices with Alaska Native Corporations through the development of a best practices guide for consulting with Alaska Native Corporations. We

anticipate finalizing the best practices guide by the end of calendar year 2019.

Page 2

Thank you for the opportunity to review the draft report. We believe there is useful information in this report that will strengthen EPA's consultation efforts with tribes and Alaska Native Corporations. If you have any questions or need additional information; please contact Dona Harris, American Indian Environmental Office at 202-564-6633, harris.dona@epa.gov.

Sincerely,

Jane Nishida
Principal Deputy Assistant Administrator

cc: Chris Hladick, EPA Region 10, Regional Administrator

Felicia Wright, Acting American Indian Environmental Office EPA GAO
Liaison Team

Text of Appendix XIV: Comments from the Federal
Communications Commission

Page 1

February 25, 2019

Swati Sheladia Thomas
Government Accountability Office
441 G St., NW
Washington, DC 20548

Dear Ms. Thomas,

Thank you for the opportunity to review GAO's draft report, "Tribal Consultation, Additional Federal Actions Needed for Infrastructure Projects." The Commission has long recognized the importance of consulting with Tribal governments on projects that have the potential to affect Tribes, and we appreciate your agreement that the Commission's "approach to tribal consultation for telecommunications towers was

identified as a best practice among reports [GAO] reviewed and tribal and agency officials [GAO] interviewed."

The Commission's procedures for communicating with Tribal governments regarding individual telecommunication infrastructure projects are set forth in the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process. At the center of our process is the Commission's Tower Construction Notification System, a centralized electronic notification system that alerts Tribes when a project is proposed inside its area of interest. As the draft report recognizes, having such a central notification system facilitates Tribal communications, and we concur with recommendations like the one from the Federal Permitting Improvement Steering Council for agencies to develop "a government-wide central system for identifying and notifying tribes, similar to the Federal Communication Commission's Tower Construction Notification System." We appreciate GAO's recognition that a 2017 report by the Advisory Council on Historic Preservation (ACHP) held out the FCC's Tower Construction Notification System as a model.

The Nationwide Programmatic Agreement provides a flexible approach for how to communicate with each of the 573 federally recognized Indian tribes, all of which may have different preferences as to the extent and manner of communications with the Commission. The Nationwide Programmatic Agreement was developed by a working group that included the National Association of Tribal Historic Preservation Officers and other Tribal and historic preservation constituencies. The Nationwide Programmatic Agreement's Preamble explains that the FCC "actively sought and received participation and comment from Indian tribes" and "consulted with federally recognized Indian tribes" on the Nationwide Programmatic Agreement's framework, including the development of the Tower Construction Notification System through which Tribes voluntarily identify geographic areas likely to have historic sites. The Nationwide Programmatic Agreement was signed by the ACHP, the National Conference of State Historic Preservation Officers and the Commission.

As the Nationwide Programmatic Agreement explains, FCC project applicants are authorized to initiate, coordinate, and assist the FCC with many aspects of the Section 106 review process, including communicating with Tribes, provided the Tribe agrees. For many FCC undertakings, communications about a project occur exclusively between a Tribe and an FCC applicant. The Nationwide Programmatic Agreement also directs applicants to refer any requests for government-to-

government consultation to the FCC immediately, and the FCC often engages directly with Tribes.

Page 2

At the start of a proposed project, FCC applicants use the Tower Construction Notification System to notify Tribes that a project has been proposed in their geographic area of interest. If a Tribe indicates that a historic property of religious and cultural significance to it may be affected by the project, the applicant is required to invite that Tribe to be a consulting party in the Section 106 process. Once the Tribe becomes a consulting party, it is entitled to: (1) receive notices, submission packets, and other information, and (2) have an opportunity to have its views expressed and taken into account by the applicant, the State Historic Preservation Officer/Tribal Historic Preservation Officer and, where appropriate, the FCC.

Section IV of the Nationwide Programmatic Agreement contemplates a collaborative, back-and-forth process between applicants and Tribes that allows Tribes to express their views and requires applicants to take those views into account. Communications between applicants and Indian Tribes are intended to: (1) ascertain whether historic properties of religious and cultural significance to the Indian Tribe may be affected by the undertaking and whether consultation is therefore necessary, and (2) where possible, with the concurrence of the Indian Tribe or Native Hawaiian Organization, to reach an agreement on the presence or absence of effects that may obviate the need for consultation. The Nationwide Programmatic Agreement also requires applicants to communicate in a manner consistent with the reasonable wishes of the Tribe. Accordingly, the means of communications follow Tribal preference, which might be more or less formal, and could include emails, documents uploaded to a Tribal database, formal letters to Tribal leadership, and conference calls.

Under the process set forth in the Nationwide Programmatic Agreement, applicants and Tribes frequently come to agreement on how to address Tribal concerns in a project. Applicants must retain documentation of Tribal concurrence. When a Tribe does not concur, an applicant may notify the Commission but can continue to work to address the Tribe's concern. Tribal input on a project, whether through communications with the FCC directly or with an FCC applicant, can take a number of forms. Four examples include:

- Applicant has revised a project in response to Tribal input, such as (a) lowering the height of a tower, often to avoid impact on an important viewshed identified by a Tribe or (b) changing the location of a tower to avoid disturbing an important site identified by a Tribe. If the applicant agrees to modify its proposal to address Tribal concerns, it must retain a record that Tribal participation was successfully concluded such that Section 1.06 is complete and the project will not affect Indian religious and cultural sites. The concluding communication evidences how Tribal input was considered to avoid an effect on the Tribe.
- In cases where an applicant and Tribe do not agree on a project's impact on an historic site, the FCC will become involved in the assessment of effects. In such cases, the FCC will communicate directly with a Tribe to explain how its input was taken into consideration.
- In cases where there is an adverse effect that cannot be avoided, the Nationwide Programmatic Agreement requires that the applicant submit a "plan designed to avoid, minimize or mitigate the adverse effect," and ultimately it must negotiate a Memorandum of Agreement with affected parties. The Memorandum of Agreement sets out the nature of the adverse effect on a property and how the impact is to be mitigated. Where a Tribe is a party to a Memorandum of Agreement, the agreement represents another type of written communication explaining how Tribal input was taken into consideration for an FCC undertaking.

Page 3

- Under section 1.1307 of the FCC's rules, a Memorandum of Agreement currently triggers an Environmental Assessment that subsequently goes on public notice. Tribes have access to a public Environmental Assessment, which would document how a Tribe's input was obtained and considered and how the Tribe's views were addressed in the proposed project.

We believe our current practices strike an appropriate and reasonable balance between keeping Tribes informed while respecting Tribal communication preferences, consistent with Tribal preferences and the Nationwide Programmatic Agreement. Nevertheless, consistent with GAO's recommendation to better document per communications practices with Tribes, we will continue to explore ways of documenting

how Commission staff could communicate with Tribes about how Tribal input was used in Commission decisions on telecommunications infrastructure projects.

Thank you for the opportunity to review GAO's recommendations. We look forward to working with GAO in the future.

Sincerely,

Donald K. Stockdale, Jr.
Chief, Wireless Telecommunications Bureau

Patrick Webre
Chief, Consumer and Governmental Affairs Bureau

Text of Appendix XV: Comments from the Federal Energy Regulatory Commission

Page 1

January 4, 2019

OFFICE OF THE CHAIRMAN

Ms. Anne-Marie Fennell
Director
Natural Resources and Environment
U. S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Director Fennell:

Thank you for the opportunity to provide comments on behalf of the Federal Energy Regulatory Commission with respect to the Government Accountability Office's draft report entitled, "Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects (GAO-19-22)." GAO has made the following recommendation with regard to the Commission:

The Federal Energy Regulatory Commission should document in its tribal consultation policy how agency officials are to communicate with tribes

about how their input from consultation was considered in agency decisions on infrastructure projects. (Recommendation 14).

I have directed Commission staff to develop possible revisions to the Commission's Tribal Consultation Policy Statement responsive to Recommendation 14, for consideration by the Commission.

Sincerely,

Neil Chatterjee
Chairman

Attachment

Text of Appendix XVI: Comments from Nuclear Regulatory Commission

Page 1

December 31, 2018

Ms. Alyssa Hundrup
Assistant Director, Natural Resources and the Environment
U.S. Government Accountability Office
Washington, DC 20548

Dear Ms. Hundrup:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to Ms. Ann-Marie Fennell's letter dated November 30, 2018, which provided the NRC with an opportunity to review and comment on the U.S. Government Accountability Office (GAO) draft report GA0-19-22, "Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects."

We appreciate the opportunity to review the draft report. Overall, we agree with the draft GAO report and its findings, conclusions, and recommendations as they apply to our agency. In Recommendation 20, the GAO refers to documenting in the NRC's "tribal consultation policy" the manner in which agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects. Our understanding is that GAO's recommendation

refers to one or more of the agency's regulations, policies, and guidance which make up the collective set of documents described as "tribal consultation policies" in GAO's report. In the enclosure to this letter, we have provided technical comments and clarifications for your consideration.

Thank you again for the opportunity to provide comments on the GAO report. Please feel free to contact Mr. John Jolicoeur of my staff at (301) 415-1642 or John.Jolicoeur@nrc.gov if you have questions or need additional information.

Sincerely,

Margaret M. Doane
Executive Director for Operations

Enclosure:
NRC Comments on Draft Report GAO-19-22

cc: Chairman Svinicki Commissioner Baran Commissioner Burns
Commissioner Caputo Commissioner Wright

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