



May 2019

INDIAN ISSUES

Agricultural Credit Needs and Barriers to Lending on Tribal Lands

Why GAO Did This Study

About 46 million of the 56 million acres of the land that the federal government holds in trust for the benefit of Indian tribes and their members has an agricultural purpose. However, tribal agriculture and economic development experts have noted that Indian tribes and their members may need improved access to agricultural credit.

Congress included a provision in statute for GAO to review the ability of FCS to meet the agricultural credit needs of Indian tribes and their members on tribal lands. This report describes (1) what is known about the agricultural credit needs of Indian tribes and their members, (2) barriers stakeholders identified to agricultural credit on tribal lands, (3) FCS authority and actions to meet those agricultural credit needs, and (4) stakeholder suggestions for improving Indians' access to agricultural credit on tribal lands.

GAO explored potential data sources on Indians' agricultural credit needs, conducted a literature review, and reviewed statutes and regulations governing tribal lands and FCS. GAO also reviewed the marketing plans and written responses of a nongeneralizable sample of 11 FCS associations whose territories included tribal lands with high levels of agricultural activity. GAO interviewed stakeholders from a sample of seven tribes (generally selected based on tribal region and agricultural activity), experts in tribal agriculture and economic development (selected based on relevant publications, Congressional testimonies, and others' recommendations), and representatives from FCS and its regulator, the Farm Credit Administration, and other relevant government agencies.

View GAO-19-464. For more information, contact Alicia Puente Cackley at (202) 512-8678 or cackleya@gao.gov.

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What GAO Found

Limited data are available on the needs of Indian tribes and their members for agricultural credit, such as operating or equipment loans, to develop and expand agricultural businesses on tribal lands. Federal regulations have generally prohibited lenders from inquiring about the personal characteristics, such as race, of applicants on nonresidential loans. Some tribal stakeholders and experts said that tribal members may not have applied for agricultural credit because they heard of other tribal members being denied loans. They said that tribal members likely obtain agricultural credit from Department of Agriculture programs or tribal lenders. Another potential source of agricultural credit is the Farm Credit System (FCS), a government-sponsored enterprise that includes 69 associations that lend to farmers and ranchers.

Tribal stakeholders and experts reported a general lack of commercial credit on tribal lands due to the following factors:

- **Land use restrictions.** Most tribal lands only can be used as loan collateral in certain circumstances or with federal permission.
- **Administrative process delays.** Tribal members reported often encountering delays obtaining necessary federal loan documents.
- **Legal challenges.** Lenders reported concerns about their ability to recover loan collateral due to the unique legal status of tribes.
- **Loan readiness.** Tribal members may have no or poor credit histories and be unfamiliar with the paperwork required for an agricultural loan, such as a business plan.

FCS is authorized to provide a range of credit services to eligible agricultural producers, which may include Indian tribes, tribal businesses, and tribal members. FCS associations must obtain land as collateral for long-term real estate loans, but are not required to do so for shorter-term loans, such as for operating costs or equipment purchases. Some FCS associations GAO contacted reported making loans to Indian tribes or their members. In a sample of 11 FCS associations with tribal lands in their territory, eight said they have loaned to tribes or their members in the past 2 years. GAO's review of these 11 associations' marketing plans and written responses to GAO follow-up questions found that seven noted outreach—such as support for agricultural education activities—targeted to tribes and their members. The other four reported broad and general outreach efforts that also included minority groups.

To improve access to agricultural credit on tribal lands, stakeholders discussed several options. For example, some stakeholders discussed the potential for partnerships between commercial or government lenders and tribal lenders (such as Native Community Development Financial Institutions) and increased use of loan guarantees. Some stakeholders also discussed actions tribes could take to ease barriers to lending, such as adopting their own leasing procedures to reduce administrative processing time with federal agencies for certain loans.

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Abbreviations

BIA	Bureau of Indian Affairs
FCA	Farm Credit Administration
FCS	Farm Credit System
HEARTH Act	Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012
Interior	Department of the Interior
Native CDFI	Native Community Development Financial Institution
USDA	Department of Agriculture

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U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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May 9, 2019

The Honorable Pat Roberts
Chairman
The Honorable Debbie Stabenow
Ranking Member
Committee on Agriculture, Nutrition, and Forestry
United States Senate

The Honorable Collin C. Peterson
Chairman
The Honorable Mike Conaway
Ranking Member
Committee on Agriculture
House of Representatives

The Honorable Raul M. Grijalva
Chairman
The Honorable Rob Bishop
Ranking Member
Committee on Natural Resources
House of Representatives

Approximately 46 million acres of the 56 million acres the federal government holds in trust for the benefit of Indian tribes and their members has an agricultural purpose, according to the Department of the Interior's (Interior) Bureau of Indian Affairs (BIA).¹ Agricultural activity on tribal lands can include farming, ranching, aquaculture, and other agribusinesses.² Tribal agriculture and economic development experts have noted that Indian tribes and their members may need improved access to agricultural credit, such as operating or equipment loans, to develop and expand agricultural businesses on tribal lands. One source

¹See Bureau of Indian Affairs, "Branch of Agriculture and Rangeland Development," accessed on April 18, 2019. <https://www.bia.gov/bia/ots/division-natural-resources/branch-agriculture-and-rangeland-development>. BIA officials told us that tracts with agricultural utilization also may have coinciding land uses that do not prohibit or interfere with agriculture purposes. Individuals and tribes decide how to use their respective lands and report those decisions to BIA.

²For purposes of this report, "tribal lands" refers to reservations (including all land within the reservations' boundaries), trust land, allotments, and restricted fee land. We discuss the types of tribal lands in more detail later in the Background. Also see appendix I.

of agricultural credit is the Farm Credit System (FCS), a national network of customer-owned lending institutions.

The Agricultural Improvement Act of 2018 included a provision for us to study the agricultural credit needs of Indian tribes and their members on tribal lands, and FCS institutions' authority and resources to meet those needs. This report describes (1) what is known about the agricultural credit needs of Indian tribes and their members on tribal lands, (2) the barriers stakeholders and experts identified that Indian tribes and their members on tribal lands face in obtaining agricultural credit to meet their needs, (3) FCS's lending authority and lending and outreach activities on tribal land, and (4) suggestions stakeholders have discussed to improve access to agricultural credit on tribal lands.

To address all the objectives, we reviewed relevant federal statutes, regulations, and other legal documentation. We interviewed officials from the Farm Credit Administration (FCA), BIA, the Department of Agriculture (USDA), and FCS's trade association, the Farm Credit Council. We interviewed experts on tribal agriculture and economic development from advocacy groups and academia, selected based on relevant publications, testimonies before Congress, or recommendations from other experts in these fields. Throughout this report, we refer to them as experts.

We also interviewed stakeholders associated with seven selected tribes.³ We first selected six tribes from locations in different regions (Great Plains, Rocky Mountain, Northwest, Southwest) and one state (Oklahoma). Within these regions, the selected tribes were those with generally large tribal land areas with high levels of agricultural activity, as indicated by the USDA 2012 Census of Agriculture data.⁴ Four of the six tribes we contacted to request interviews provided us with various contacts. As a result, for four tribes, we interviewed tribal agriculture department employees, tribal farm employees, or representatives of the Native Community Development Financial Institution (Native CDFI)

³Our report generally addresses the agricultural credit needs of tribes and their members in the lower 48 states. See appendix I.

⁴Department of Agriculture, *2012 Census of Agriculture: American Indian Reservations*, Subject Series, Part 5, AC-12-S-5 (Washington, D.C.: August 2014). This was the most recent available version of the reservation data as of April 2019.

serving the tribe.⁵ We then selected three additional tribes based on USDA data or recommendations from experts we interviewed.⁶ For these three tribes, we interviewed employees of tribal farms or representatives of Native CDFIs or community development corporations. Throughout this report, we refer to tribal government employees, tribal farm employees, or representatives of Native CDFIs or community development corporations serving a tribe as tribal stakeholders. Although the information we obtained from the tribal agriculture department employees allowed us to provide anecdotal tribal perspectives, it is not generalizable to the 573 federally recognized Indian tribes. The views of tribal farm employees and Native CDFI and community development corporation representatives also cannot be generalized to tribes but illustrate views on needs, barriers, and other issues from the perspectives of the organizations.

To address the first objective on agricultural credit needs, we also reviewed federal data sources and federal regulations related to collecting data on loan applicants' personal characteristics for nonresidential loans.

To supplement the limited data and provide additional information for the second objective on barriers to obtaining agricultural credit, we conducted a review of literature from government and academic reports and identified additional materials through citations in literature we reviewed.

To collect information for the third objective, we reviewed the marketing plans of a nongeneralizable sample of 11 FCS associations whose territories included large tribal land areas with high levels of agricultural activity. We also obtained written responses from the 11 associations to a series of questions we posed about their lending and outreach to tribes and their members and any challenges in making loans involving tribal lands. For more information on our scope and methodology, see appendix I.

⁵CDFIs expand economic opportunity in low-income communities by providing access to financial products and services for local residents and businesses. The Department of the Treasury's CDFI Fund has a Native American CDFI Assistance Program that makes financial and technical assistance awards to Native CDFIs (certified or certifiable CDFIs where at least 50 percent of the activities serve Native Americans, Alaska Natives, and/or Native Hawaiians). There were 68 certified Native CDFIs as of February 2019, according to the CDFI Fund.

⁶We contacted the additional three tribes to supplement our original sample. For more information, see appendix I.

We conducted this performance audit from December 2018 to May 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

Indian Tribes and Tribal Land Types	<p>As of May 2019, the federal government recognized 573 Indian tribes as distinct, independent political communities with certain powers of sovereignty and self-government, including power over their territory and members. The tribes can vary greatly in terms of their culture, language, population size, land base, location, and economic status. As of the 2010 U.S. Census, about 21 percent, or 1.1 million, of all American Indians lived on tribal lands.</p> <p>Tribal lands include many land types (see table 1). According to BIA, the federal government holds about 46 million acres in trust for tribes (tribal trust land) and more than 10 million acres in trust for individual Indians (individual trust land).⁷</p>
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⁷The terms Native American and Indian generally refer to American Indians. In this report, we use the term “Indian” unless citing the work of others that uses “Native American.”

Table 1: Tribal Land Types and Definitions

Land type	Description
Trust	The federal government holds legal title but the beneficial interest remains with the Indian tribe or individual Indian.
Restricted fee	An Indian tribe or individual Indian holds title to the land, but with legal restrictions against alienation or encumbrance (for example, the land cannot be sold or conveyed without the approval of the Secretary of the Interior).
Allotment	Land owned by one or more individual Indians as a result of federal laws that divided reservation lands and allotted them to individual tribal members. Allotments can be individual trust land or individual restricted fee land.
Reservation	Land set aside by treaty, federal law, or executive order for the residence or use of an Indian tribe. The land within the reservation may include a mixture of tribal trust land, individual trust land, restricted fee land, allotments, and fee-simple land. (Fee-simple land is owned without restriction and can be alienated or encumbered on the owner's initiative unless it is owned by an Indian tribe. It is the most common type of private land ownership in the United States.)

Source: GAO analysis of federal laws and regulations. | GAO-19-464

Some tribes also have reservations. According to BIA, there are approximately 326 Indian land areas in the United States administered as federal Indian reservations (including reservations, pueblos, rancherias, missions, villages, and communities). The land within the reservation may include a mixture of tribal trust land, individual trust land, restricted fee land, allotments, and land without trust or restricted status (that is, fee-simple land), which may be owned by tribes, individual Indians, or non-Indians.⁸

Agricultural Activity on Tribal Lands

Agricultural producers (farmers, ranchers, or producers or harvesters of aquatic products) on tribal lands can be individual tribal members, the tribe itself, or non-Indians who lease the land from the tribe or Indian owner. According to USDA's 2012 Census of Agriculture, about 75 percent of farms and ranches on 76 selected Indian reservations were operated by agricultural producers that identified as American Indian or

⁸Beginning in the late 1880s, federal laws were enacted that divided some reservation lands among individual tribal members. These allotments were often only held in trust or subject to restrictions on alienation for a limited period of time. Once the trust period and restrictions ended, it was easier for land to be sold or pass out of Indian ownership. In addition, surplus lands within the reservation were sold to non-Indians. As a result, Indian land holdings in the lower 48 states decreased from 138 million acres to 48 million acres and non-Indians may own fee-simple land within a reservation's boundaries. In 1934, the Indian Reorganization Act ended the practice of allotting Indian reservations.

Alaska Native (see table 2).⁹ On these reservations, Indian producers held 61 percent of total farm and ranch acreage. However, the total market value of agricultural products sold from Indian-operated farms and ranches was just over a tenth of that of non-Indian operated farms and ranches on the 76 selected reservations.¹⁰

Table 2: Agricultural Activity on 76 Selected Indian Reservations, by Primary Farm or Ranch Operator (2012)

	Total number of farms and ranches	Total share of farms and ranches (%)	Total acreage of farms and ranches (in acres)	Total share of acreage of farms and ranches (%)	Total market value of agricultural products sold (in \$1000s) ^a	Total share of market value of agricultural products sold (%)
Indian-operated	17,948	75	28,560,057	61	361,145	10
Non-Indian operated	5,980	25	18,449,341	39	3,079,386	90
Total	23,800	100	47,009,398	100	3,440,531	100

Source: GAO analysis of 2012 Department of Agriculture Census of Agriculture data. | GAO-19-464

Notes: For the Census of Agriculture, the Department of Agriculture (USDA) primarily collected data through the mail. However, to maximize coverage of American Indian and Alaska Native agricultural producers, USDA staff obtained supplemental information from knowledgeable reservation officials. USDA adjustments for nonresponse, misclassification, or other factors may result in a level of error related to its estimates.

^aAccording to USDA officials, sales reported are for the entire farm, both on and off of the reservation. Therefore, if a farm had a small piece of land on the reservation, the entire sales would be reported in these values, even if little of the value was produced on reservation land.

In 2011, USDA, which operates several agricultural programs targeted to traditionally underserved populations, settled a class action lawsuit brought by Native American farmers and ranchers for \$760 million (*Keepseagle v. Vilsack*).¹¹ The lawsuit alleged that USDA discriminated against Native Americans in its farm loan and farm loan servicing

⁹The Navajo Nation, which has the largest reservation in the United States at 16 million acres, operates a large share of the total Indian-operated farms and ranches. According to the 2012 Census of Agriculture, there were 14,362 Indian-operated farms on the Navajo reservation—approximately 80 percent of all Indian-operated farms and ranches on the 76 reservations detailed in the census.

¹⁰All U.S. Census and USDA Census of Agriculture estimates in this report are likely underestimates, as Indian populations historically have been undercounted in census activities. In addition, the reservation data from the Census of Agriculture only reflect 76 of 326 total reservations. According to USDA, it based its decisions about which reservation data to publish on factors including approval of tribal officials, amount of agricultural activity, success of list building, and respondent confidentiality.

¹¹Civil Action No. 1:99CV03119 (D.D.C.).

programs. In 2018, \$266 million of the remaining settlement proceeds were used to establish the Native American Agriculture Fund. The Fund will begin awarding grants in 2019 to fund the provision of business assistance, agricultural education, technical support, and advocacy services to Native American farmers and ranchers.

Agricultural Credit and the Farm Credit System

Like other businesses, agricultural producers generally require financing to acquire, maintain, or expand their farms, ranches, or agribusinesses. Types of agricultural loans as categorized by their purpose or maturity may vary by lender but generally include the following:¹²

- **Short-term loans.** These loans are used for operating expenses and match the length and anticipated production value of the operating or production cycle. They are typically secured by the product (crops or livestock).
- **Intermediate-term loans.** These loans are typically used to finance depreciable assets such as equipment, which serves as the loan collateral. The loan terms usually range from 18 months to 10 years.
- **Long-term loans.** These loans are used to acquire, construct, and develop land and buildings with terms longer than 10 years. They are secured by real estate and may be called real estate loans.

Several types of lenders provide credit to U.S. agricultural producers. According to USDA's Economic Research Service, in 2017, FCS and commercial banks provided most agricultural credit in the United States, with respective market shares of 40 and 41 percent. USDA's Farm Service Agency—a lender that focuses on assistance to beginning and underserved farmers and ranchers and also guarantees the repayment of loans made by other lenders—provided 3 percent, and the remainder was provided by individuals, life insurance companies, and other lenders.¹³

FCS is a government-sponsored enterprise, established in 1916 to provide sound, adequate, and constructive credit to American farmers and ranchers. FCS is regulated by FCA, an independent federal agency.

¹²Paul N. Ellinger and Peter J. Barry, *A Farmer's Guide to Agricultural Credit* (Urbana-Champaign, Ill.: The Center for Farm and Rural Business Finance, University of Illinois), accessed April 5, 2019, <http://www.farmdoc.illinois.edu/finance/FarmersGuidetoCreditBody.htm>.

¹³Department of Agriculture, Economic Research Service, *U.S. and State-Level Farm Income and Wealth Statistics*, accessed April 18, 2019, <https://www.ers.usda.gov/data-products/farm-income-and-wealth-statistics/>.

FCS's statutory mission includes being responsive to the needs of all types of creditworthy agricultural producers, and in particular, young, beginning, and small farmers and ranchers.¹⁴ According to FCA, FCS is not statutorily mandated to focus on providing financial opportunities to any other group.

FCS lends money to eligible agricultural producers primarily through its 69 lending associations (FCS associations), which are funded by its four banks (FCS banks).¹⁵ All are cooperatives, meaning that FCS borrowers have ownership and control over the organizations. As of 2017, FCS had approximately \$259 billion in loans outstanding, of which 46 percent were long-term real estate-based loans; 20 percent were short- and intermediate-term loans (such as for farm equipment or advance purchases of production inputs); and 16 percent were for agribusiness activities, such as agricultural processing and marketing.¹⁶

FCS associations are not evaluated under the Community Reinvestment Act, which requires certain federal banking regulators to assess whether financial institutions they supervise are meeting the credit needs of the local communities. FCS receives certain tax exemptions at the federal, state, and local level.¹⁷

¹⁴FCS associations are required to establish programs for furnishing sound and constructive credit and related services to young, beginning, and small farmers and ranchers. These programs must assure that such credit and services are available in coordination with other units of FCS serving the territory and with other governmental and private sources of credit. 12 U.S.C. § 2207(a).

¹⁵The scope of this report is limited to the FCS banks and FCS associations (collectively, FCS institutions). In addition to the FCS institutions, FCS includes the Federal Farm Credit Banks Funding Corporation, a special-purpose entity that issues and markets debt securities on behalf of FCS banks to raise loan funds. FCS also includes the Federal Agricultural Mortgage Corporation (Farmer Mac), which provides a secondary market for agricultural real estate loans, government-guaranteed portions of certain loans, rural housing mortgage loans, and eligible rural utility cooperative loans. Farmer Mac has no liability for the debt of any other FCS institution, and the other FCS institutions have no liability for Farmer Mac debt.

¹⁶The rest of the loans were generally for other agriculture-related purposes, such as rural housing or utilities, which are not included in our scope. See Farm Credit Administration, *2017 Annual Report on the Farm Credit System* (McLean, Va.: October 2018).

¹⁷See, for example, 12 U.S.C. §§ 2023, 2077, 2098, 2134.

Limited Data Are Available on Agricultural Credit Needs of Indian Tribes and Their Members

Data on Agricultural Credit Needs for Tribes and Their Members Are Limited

Little data exists on the credit needs of tribes and their members. One measure of unmet credit needs is the difference between the amount applied for and the amount received. However, we could not determine the amount of agricultural credit that Indian tribes and their members applied for or received. These data were limited in part because federal regulations historically have prohibited lenders from asking about the race of applicants for nonresidential loans, including agricultural loans.¹⁸

Additionally, even if data were available, the unmet need could be greater than that indicated by information on those who may have applied for and did not receive credit. Four tribal stakeholders and experts told us that tribal members may choose not to apply for agricultural credit because they were directly discouraged by loan officers, had problems completing paperwork, or had heard of other tribal members being denied loans.

Two tribal agricultural experts told us that on some level, the agricultural credit needs of Indian tribes and their members are the same as other agricultural producers' credit needs. In particular, tribal stakeholders and

¹⁸With limited exceptions, creditors may not inquire about the race, color, religion, national origin, or sex of an applicant for a credit transaction that is subject to the Equal Credit Opportunity Act. 12 C.F.R. § 1002.5(b). In 2010, the law was amended to require financial institutions to collect information concerning credit applications made by women-owned, minority-owned, and small businesses. The purpose of the data collection is to facilitate enforcement of fair lending laws and identify the business and community development needs of women-owned, minority-owned, and small businesses. 15 U.S.C. § 1691c–2. However, in 2011, the Consumer Financial Protection Bureau advised financial institutions that their obligations under the new provision would not go into effect until implementing regulations were issued. As of April 2019, the bureau has not issued implementing regulations. On a separate note, in cases that did not involve lending, the U.S. Supreme Court has ruled that membership in a federally recognized Indian tribe is a political, not a racial, classification.

experts told us that the tribal members need short-term loans for operating expenses and intermediate-term loans for equipment. One difference between the agricultural credit needs of tribal members and other producers is that tribal members may have a greater unmet need for long-term loans, which are typically secured by real estate, because of difficulties in using tribal lands as collateral, as discussed later in this report.

Credit needs vary based on the type of operation or borrower.

- **Type of operation.** Some tribal stakeholders we interviewed told us that members of their tribes were more likely to participate in ranching than farming, partly because farming has higher start-up costs. For example, one tribal agricultural expert told us a rancher can start with a few head of cattle and grow the herd over time, but a beginning farmer may need to purchase equipment. Additionally, several tribal stakeholders told us that land on their reservations was more suitable for ranching than farming.
- **Type of borrower.** Some tribes have agricultural businesses, which have credit needs different from those of individual tribal members, according to experts and BIA officials we interviewed. For example, they may be greater or more complex. According to an expert and a tribal stakeholder, established agricultural businesses likely would be able to receive credit from commercial lenders because they have more resources to pledge as collateral or stronger credit histories. Additionally, if a tribe has other profitable businesses, it likely will have less difficulty obtaining credit or financing agriculture with those other resources than those without such resources.

According to tribal stakeholders, experts, and BIA officials we interviewed, tribal members who obtain agricultural credit likely receive it from USDA's Farm Service Agency, other USDA programs, or Native CDFIs. Some tribal members receive agricultural credit from local private lenders, but they are typically larger, more established borrowers. One expert told us that tribal members who are smaller or beginning agricultural producers and cannot access commercial banks instead may borrow money from family members. A 2017 report found that Native business owners were less likely than other business owners to obtain start-up capital from banks.¹⁹

¹⁹Miriam Jorgensen and Randall K.Q. Akee, *Access to Capital and Credit in Native Communities: A Data Review* (Tucson, Ariz.: Native Nations Institute, 2017).

Some experts we interviewed cited Native CDFIs as growing providers of agricultural credit to tribal members. A 2014 survey of 41 Native CDFIs—credit unions, community banks, and loan funds—found more than 40 percent provided credit and training to farmers and ranchers.²⁰ In total, these CDFIs made almost \$6 million in agricultural loans annually. However, Native CDFIs are limited in how much agricultural credit they can provide. In the 2014 survey, 56 percent of the Native CDFIs that made agricultural loans reported not having enough capital for such loans, with a total unmet need of at least \$3 million in the previous year. One Native CDFI we interviewed said its agricultural loans averaged about \$100,000 per borrower, and another said its operating loans were about \$50,000–\$75,000 and its intermediate-term loans about \$100,000.

Stakeholders See Potential for Growth of Agricultural Activity on Tribal Lands That Could Require Access to Credit

Selected literature we reviewed and interviews with some tribal stakeholders found that tribes have a growing interest in agriculture, motivated by concerns over tribal members' access to food, health, and employment opportunities.

- **Food access.** A 2014 USDA study found that about 26 percent of individuals in tribal areas lived within 1 mile of a supermarket, compared to about 59 percent of all Americans.²¹
- **Health.** According to the Centers for Disease Control and Prevention, American Indians and Alaska Natives have higher rates of obesity and diabetes than white Americans.²²

²⁰First Nations Oweesta Corporation, *Food Financing Efforts 2014: Native CDFI Support of Native Farmers & Ranchers* (Longmont, Colo.: 2014). The survey queried all 67 Native CDFIs that were established at the time of the survey and 41 responded for a response rate of 61 percent.

²¹Phillip Kaufman, et al., *Measuring Access to Healthful, Affordable Food in American Indian and Alaska Native Tribal Areas*, EIB-131 (Washington, D.C.: December 2014).

²²Centers for Disease Control and Prevention, *Summary Health Statistics: National Health Interview Survey: 2017*. Tables A4a and A-15 (Atlanta, Ga.: 2017). Data were only available for American Indians and Alaska Natives as a combined group.

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- **Employment.** A 2014 Interior report found that, on average, only about 50 percent of Native American adults in tribal statistical areas were employed either full or part-time.²³

Two commissioned reports on tribal agriculture say that Indian tribes' vast land base represents an untapped opportunity for tribes to increase agricultural production, including growing their own healthful foods and economic development.²⁴ But, as previously discussed, for reservations featured in USDA's 2012 Census of Agriculture, non-Indian producers received a large share of the agricultural revenue. Additionally, the agricultural products grown on tribal lands typically do not feed tribal members and instead are sold into the general agriculture commodity system.

Furthermore, these reports and experts we interviewed noted that the growth of agriculture on tribal lands could require access to credit. For example, one tribal agriculture expert told us some tribes are interested in transitioning to "value-added" agriculture, which aims to help the community that produces raw agricultural materials capture the value of the products as they progress through the food supply chain (for example, by processing crops they grow or transitioning to more profitable products, such as organic). Value-added agriculture initiatives might require building facilities or acquiring more expensive inputs, and tribes likely would need financing to support these initiatives. According to some experts and a study we reviewed, if tribes and their members cannot access affordable credit, it could limit the growth of these initiatives.²⁵

²³Department of the Interior, Office of the Assistant Secretary – Indian Affairs, *2013 American Indian Population and Labor Force Report* (Washington, D.C.: Jan. 16, 2014). The report defined "tribal statistical areas" as geographic areas identified by the Census that define the boundaries of reservations or comparable tribal areas for the purposes of statistical data collection.

²⁴Echo Hawk Consulting, *Feeding Ourselves: Food Access, Health Disparities, and the Pathways to Healthy Native American Communities* (Longmont, Colo.: 2015) and First Nations Development Institute, *Time for the Harvest: Native Food Systems in Perspective* (Longmont, Colo.: February 2004).

²⁵Echo Hawk Consulting.

Stakeholders Reported That Tribes and Their Members Face Multiple Barriers to Obtaining Agricultural Credit on Tribal Lands

Land Tenure Issues May Present Hurdles to Obtaining Agricultural Credit

Tribes and their members face several barriers to obtaining agricultural credit, including land tenure issues, administrative challenges, lenders' legal concerns, and loan readiness issues. As a result, there is limited commercial lending on tribal lands.

Ten tribal stakeholders and experts we interviewed cited difficulties in using tribal lands as collateral as a barrier to obtaining credit because of federal laws or other constraints.

- **Tribal trust and restricted fee lands.** Federal law generally prohibits lenders from obtaining an ownership interest in tribal trust and restricted fee lands. As a result, tribes are not able to use their 46 million acres of tribal trust or restricted fee lands as collateral for a loan. However, tribes can lease such lands to other parties, including a tribal business or tribal member who wishes to use the land for agricultural purposes (lessees). These lessees can then pledge their "leasehold interest" in the lands as collateral for a loan, but may face challenges in doing so.²⁶ For example, in general, leases of tribal trust and restricted fee lands must be approved by BIA and comply with its leasing regulations, which stipulate that agricultural leases generally

²⁶The lessee must obtain approval of the Secretary of the Interior to pledge a leasehold interest as collateral. When a borrower uses a leasehold interest as collateral, upon default, the lender has the right to exercise control over the land for the remaining term of the underlying lease.

have a maximum term of 10 years.²⁷ While BIA generally allows leased tribal trust and restricted fee lands to be subject to a leasehold mortgage, three tribal stakeholders and experts we interviewed said that BIA's maximum term for agricultural leases often was insufficient for obtaining an agricultural loan.²⁸

- **Individual trust and restricted fee lands.** Unlike tribal trust and restricted fee lands, the owners of individual trust and restricted fee lands can use these lands as collateral for a loan with permission of the Secretary of the Interior.²⁹ However, many tracts of individual trust and restricted fee lands are allotments with fractionated ownership. According to nine tribal stakeholders and experts we interviewed, fractionated land is a barrier to agricultural activity and obtaining credit. Fractionated land occurs when an allottee dies without a will and ownership is divided among all the heirs, but the land is not physically divided. Thus, multiple owners (in some cases thousands) can have an ownership interest in the land and may have different ideas about how the land should be used. Interior estimated that out of the 92,000 fractionated tracts (representing more than 10 million acres), more than half generated no income in 2006–2011.³⁰ For agricultural leases and leasehold mortgages on fractionated lands, BIA regulations require consent from owners of a majority interest in

²⁷An agricultural lease may have a term of up to 25 years if substantial investment in the improvement of the land is required. However, some tribes may have statutory authority to enter into agricultural leases for longer than 10 or 25 years. In addition, the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act) authorizes tribes to develop their own agricultural leasing regulations and, once those regulations are approved by the Secretary of the Interior, to issue agricultural leases of their trust and restricted fee lands without BIA approval. Under the HEARTH Act, tribes may issue agricultural leases of tribal trust and restricted fee lands for a term of 25 years with up to two renewal terms of 25 years each. The HEARTH Act does not authorize tribes to assume responsibility for leasing individual trust and restricted fee lands. Pub. L. No. 112-151, § 2,126 Stat. 1150, 1151 (2012) (codified at 25 U.S.C. § 415(h)). Tribes also may be able to lease their trust and restricted fee land without Interior approval pursuant to other statutory authority.

²⁸In general, lenders require that the term of the lease be longer than the term of the loan. Therefore, a 10-year lease would not be sufficient collateral for most long-term real estate loans, which have terms longer than 10 years.

²⁹Individual trust and restricted fee land also can be subject to a leasehold mortgage with the approval of the Secretary of the Interior, like tribal trust and restricted fee land. In such cases, lessees may encounter the same difficulties as described previously for leasehold mortgages.

³⁰Department of the Interior, *Land Buy-Back Program for Tribal Nations: Initial Implementation Plan* (Washington, D.C.: Dec. 18, 2012).

such lands.³¹ However, according to Interior, some allotments have thousands of co-owners, some of whose whereabouts are unknown, which could make it difficult to obtain their permission for an agricultural lease or a leasehold mortgage.³²

Additionally, as a result of allotment, many Indian reservations contain different land ownership types, creating a “checkerboard” pattern of lands that can make the establishment and financing of large-scale agricultural projects difficult. For example, in addition to tribal and individual trust and restricted fee lands, reservations also may include lands that passed out of trust during the allotment period and were bought by non-Indians. Thus, multiple tracts within a large-scale agricultural project may need to be leased and financed separately because they have different owners and may be subject to different laws. This can also make legal jurisdiction unclear, which is a concern for private lenders financing projects on such lands, as discussed below.

Experts and tribal stakeholders we interviewed reported that the barriers to collateralizing various types of tribal lands make it difficult for tribes and tribal members to access different types of agricultural loans. Most long-term loans—typically used for larger projects—generally need to be secured by real estate, which make these inaccessible to tribes and tribal members who do not have land that can be encumbered. For example, an Indian agricultural producer who operates on trust land and wants to build an agricultural facility for a value-added operation may not be able to obtain a long-term loan unless he or she has other unrestricted land to pledge as collateral. In addition, according to the former Executive Director of the Intertribal Agriculture Council, when most agricultural producers face economic distress, they can pledge land as security and receive an extended period of time (20–40 years) to pay off the debt.³³ Tribal members may not have that option, making it difficult to obtain credit in an emergency (such as adverse weather). In addition, according to a tribal agriculture expert and three tribal stakeholders, tribal trust land

³¹25 C.F.R §§ 162.207(c), 162.230(a). BIA also may grant an agricultural lease on behalf of all of the individual Indian owners of a fractionated tract if (1) they cannot agree on a lease within a specified time period after BIA’s written notification to them of its intention to grant an agricultural lease on their behalf and (2) the land is not being used by an Indian landowner. 25 C.F.R § 162.209(b).

³²Department of the Interior, *Land Buy-Back Program for Tribal Nations*.

³³*Breaking New Ground in Agribusiness Opportunities in Indian Country*, Senate Committee on Indian Affairs, 115th Cong. (Jan. 17, 2018); statement of Ross Racine, Executive Director, Intertribal Agriculture Council.

is not counted as an asset on balance sheets, which may affect an agricultural lender's assessment of a borrower's creditworthiness for various types of loans.

Administrative Process Delays May Deter Lenders and Borrowers

Processes at Interior—particularly at BIA—can increase the amount of time it takes to obtain a loan, which can discourage both lenders and borrowers, according to tribal stakeholders and experts. Most of the tribal stakeholders and experts we interviewed told us that tribal members often encounter delays when seeking necessary documentation from BIA. For example, for loans involving trust or restricted fee lands, BIA needs to provide a title status report to the lender that identifies the type of land ownership and current owners. Two tribal stakeholders told us that BIA takes months to produce a certified title status report. By that time, the growing season could be over. A representative from a Native CDFI serving a tribe in the Great Plains said it can take years to receive these reports. BIA reported that in fiscal year 2017, it certified 95 percent of land titles within 48 hours.³⁴ However, BIA's performance on this measure has varied considerably over the last several years, and BIA officials told us that it can take significantly longer to process title status reports for complicated cases.

Tribal members also can encounter administrative challenges at other points in the process. One Native CDFI representative told us she found out that BIA did not record a leasehold mortgage when the CDFI attempted to foreclose on the loan, which almost prevented the CDFI from recovering the loan collateral. In other cases, Interior's Appraisal and Valuation Services Office might need to conduct an appraisal, such as for an agricultural lease. According to Interior policy, these appraisals should be completed within 60 days, but one tribal economic development expert said they routinely take much longer.

Lenders Reported Having Legal Concerns about Recovering Collateral Involving Tribal Lands

As a result of the unique legal status of tribes, some lenders, including FCS associations, reported concerns about their ability to recover loan collateral if the borrower defaulted on a loan involving tribal lands. Seven of the 11 FCS associations we contacted told us that they had legal concerns of this nature, and six of the associations said they had

³⁴BIA met its 48-hour processing goal in 71 percent and 46 percent of cases in fiscal years 2016 and 2015, respectively. See Department of the Interior, *U.S. Department of the Interior 2018/2019 Annual Performance Plan and 2017 Report* (Washington, D.C.: Mar. 8, 2018).

experienced the issues themselves. These concerns primarily arise from the following issues:

- **Tribal sovereign immunity.** Tribes are distinct, independent political communities with certain inherent powers of self-government and, as a result of this sovereignty, have immunity from lawsuits. A lender cannot sue to enforce the terms of a loan agreement with a tribe unless the tribe waives its sovereign immunity in connection with the agreement. Private lenders therefore might be hesitant to make a loan because they would not be able to sue the tribe if any disputes arose. We previously reported that tribes may waive sovereign immunity in agreements or contracts on a case-by-case basis and some tribes have formed separate companies to conduct business that are not immune from lawsuits.³⁵ However, tribal government officials may decide that waiving the tribe's sovereign immunity for purposes of enforcing the loan agreement is not in the tribe's best interest. Additionally, tribal sovereign immunity would not bar lenders from seeking to foreclose on loans made to individual tribal members.
- **Legal jurisdiction.** Loans made to Indian tribes or their members and secured by tribal lands or collateral located on tribal lands may be subject to tribal laws, rather than state laws. In addition, it is sometimes unclear whether federal, state, or tribal courts would have jurisdiction in the event of a default or foreclosure. If tribal laws govern but do not adequately provide for the lender's foreclosure, or if there is not a legal forum to hear the foreclosure lawsuit, lenders may be unable to recover the loan collateral. To address these types of concerns, some tribes have adopted secured transaction codes modeled after the Uniform Commercial Code, which can help to assure lenders of their ability to recover collateral in the event of default.³⁶
- **Unfamiliarity with tribal laws.** Laws and court systems vary among the nation's 573 tribes, making it more difficult and costly for lenders to learn tribal laws. For example, one FCS association noted that it has many federally recognized tribes in its region, each of which may have different laws.

³⁵GAO, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands*, GAO-11-543T (Washington, D.C.: April 7, 2011).

³⁶Office of the Comptroller of the Currency, *Commercial Lending in Indian Country: Potential Opportunities in a Growing Market*, Community Developments Insights (Washington, D.C.: February 2016).

If lenders have concerns regarding their ability to recover loan collateral in the event of a default, lenders may not make loans involving tribal lands due to concerns that the loan would not meet safety and soundness requirements.

Potential Borrowers May Need Assistance with Loan Readiness

Five tribal stakeholders we interviewed said some tribal members may need assistance—such as credit repair and technical assistance for loan applications—to become ready for agricultural loans. Some tribal members have no credit history, which can be a barrier to obtaining a loan. One study found that compared to off-reservation counterparts, reservation residents were more likely to have no credit history and when credit scores were available, they were lower on average.³⁷ Many Native CDFIs provide credit builder or credit repair products to help tribal members qualify for larger loans, such as small business loans.³⁸

Four tribal stakeholders we interviewed said members of their tribes sometimes need technical assistance to complete the paperwork required for agricultural loans, such as a business plan. One tribal member who owns a ranch told us that the first time he tried to apply for a loan, he had trouble completing the required paperwork and ultimately chose not to apply. He felt tribal members seeking credit would benefit from assistance in completing loan applications. One Native CDFI representative told us that her organization provides technical assistance to its borrowers to help them complete loan paperwork but noted that commercial lenders often did not provide these services.

Barriers Have Limited Commercial Lending on Tribal Lands

We and others have noted that the barriers described above have depressed commercial lending on tribal lands. In 2010, we found that banks were reluctant to do business on tribal lands because of the cumbersome procedures and their lack of experience.³⁹ More recently, a report for the Department of Housing and Urban Development surveying

³⁷Valentina Dimitrova-Grajzl, et al., "Consumer Credit on American Indian Reservations," *Economic Systems*, vol. 39 (2015): p. 518.

³⁸First Nations Oweesta Corporation, *Snapshot 2018: The Growing Native CDFI Movement*, accessed April 19, 2019. https://www.oweesta.org/wp-content/uploads/2018/11/Snapshot-2018-Growing-NCDFI-Movement_web.pdf.

³⁹GAO, *Native American Housing: Tribes Generally View Block Grant Program Effective, but Tracking of Infrastructure Plans and Investments Needs Improvements*, GAO-10-326 (Washington, D.C.: Feb. 25, 2010).

lenders found that BIA processing times were a major challenge in making mortgage loans involving tribal lands.⁴⁰ A Native CDFI representative told us that lenders have little incentive to engage in a lengthy underwriting process, particularly if the loan is for a small amount and if other potential borrowers have less complicated circumstances. Some experts have described tribal lands as “credit deserts.”⁴¹ For example, one study of three different areas of tribal lands found that few financial institutions or automated teller machines were located on these reservations.⁴² One Native CDFI representative told us that in her experience, many people on her reservation never had a bank account. She noted that when people do not have a bank account, it can be challenging for them to see themselves as potential borrowers.

Similarly, our analysis found that the land tenure issues, administrative process delays, lenders’ legal concerns, and loan readiness issues can make agricultural loans involving tribal lands more time-consuming and costly to underwrite. For example, one FCS association told us that loans involving tribal lands require specialized legal analysis, which may be an additional expense that it would not incur for otherwise comparable loans. These same issues can increase a lender’s exposure to the risks inherent in agricultural lending because they can affect the borrower’s ability to repay the loan, the adequacy of the collateral to secure the loan, and the lender’s ability to recover the collateral in the event of a default.⁴³ According to FCA, consistent with the purposes of the Farm Credit Act of 1971, the ability of a lender to collect loans is an important element of the institution’s safety and soundness, and the continued availability of credit.

Finally, some stakeholders said they believe that discrimination also contributes to the lack of commercial lending on tribal lands. Four experts, a tribal stakeholder, and a BIA representative told us that they believe that some commercial lenders do not want to make loans involving tribal

⁴⁰David Listokin, et al., *Mortgage Lending on Tribal Land: A Report from the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs* (Washington, D.C.: January 2017).

⁴¹For example, see Echo Hawk Consulting and Racine.

⁴²Jorgensen and Akee.

⁴³According to the Office of the Comptroller of the Currency, the risks associated with agricultural lending are credit, interest rate, liquidity, operational, price, compliance, strategic, and reputation. See Office of the Comptroller of the Currency, *Comptroller’s Handbook, Safety and Soundness: Agricultural Lending*, version 1.3 (Washington, D.C.: Oct. 15, 2018).

lands because of bias. As previously discussed, the plaintiffs in the *Keepseagle* case that USDA settled for \$760 million alleged that USDA discriminated against Native American farmers and ranchers in certain programs. According to a tribal economic development expert, tribal members who face discrimination or other negative experiences with commercial lenders may share these experiences with other tribal members and deter them from applying for credit.

FCS Laws Allow for Lending on Tribal Lands, and Some FCS Associations Reported Lending to Tribes or Tribal Members

FCS Laws Allow for Lending on Tribal Lands

We found that FCS generally has authority to make loans involving tribal lands. Of the 11 FCS associations we contacted with tribal lands in their territories, some reported that they had recently made loans to Indian tribes or their members, and their outreach to these populations included support for agricultural education.

Generally, FCS has authority to provide a broad range of credit services to eligible agricultural producers, which may include tribes, tribal businesses, and individual tribal members operating on various types of tribal lands.⁴⁴ However, borrowers must meet various eligibility and underwriting criteria that are required by law. For example, applicants for agricultural loans must be determined to be eligible borrowers, which means they must own agricultural land or be engaged in the production of agricultural products, including aquatic products.⁴⁵

Also, long-term real estate loans (which have terms of up to 40 years) made by FCS institutions must be secured by a first-position lien on interests in real estate, thus enabling FCS to obtain ownership or control

⁴⁴For example, eligible borrowers can be individual U.S. citizens, as well as legal entities established pursuant to the laws of any tribal authority and legally authorized to conduct business. 12 C.F.R. § 613.3000. Groups of individual tribal members operating as a cooperative also may qualify, provided they meet the criteria set forth in 12 C.F.R. § 613.3100.

⁴⁵Persons furnishing farm-related services also may be eligible. See 12 U.S.C. § 2017 and 12 C.F.R. § 613.3000.

of the land in the event of default.⁴⁶ FCA has determined that this statutory requirement can be satisfied, for example, with leasehold interests in real estate—such as that held by a tribal member leasing reservation land from a tribe—provided that the lease grants the borrower significant rights to the land, and the loan is made on a safe and sound basis.⁴⁷ As noted earlier, BIA regulations often limit agricultural leases of tribal lands to a term of up to 10 years. In such cases, FCS associations similarly may limit the term of the related loan (to less than 10 years). According to FCA, when loans are for shorter terms than the leases, the FCS association's first lien is preserved, as required by law, and the loan is prudent from a safety and soundness perspective.

FCA has not issued written guidance indicating whether interests in other types of tribal lands—such as individual trust or restricted fee lands—also satisfy the requirement for a first-position lien on interests in real estate. However, FCA has the authority to determine what types of interests in real estate will satisfy this requirement. Also, according to FCA, there is no statutory requirement that short- and intermediate-term loans be secured with interests in real estate; such loans instead can be secured by other collateral, such as equipment, crops, livestock, and business revenues.

In addition to making direct loans to agricultural producers, FCS has authority to lend to non-FCS institutions, such as commercial banks and credit unions, which in turn make agricultural loans to FCS-eligible borrowers. These other financing institutions are known as OFIs.⁴⁸

⁴⁶12 U.S.C. §2018(a)(2).

⁴⁷Farm Credit Administration, “Mortgage Lending: Does a mortgage loan secured by a first lien on rural real estate that an eligible borrower leases meet the requirements of section 1.10(a)(2) of the Farm Credit Act of 1971?” Legal Opinion Summary 07-01 (McLean, Va.: June 12, 2007).

⁴⁸In particular, FCS generally must assure funding to any creditworthy OFI that (1) maintains at least 15 percent of its loan volume at a seasonal peak in loans and leases to agricultural producers, and (2) establishes a financing relationship with FCS for at least 2 years. 12 C.F.R. §614.4540. All such obligations funded through FCS must be endorsed with the full recourse or unconditional guarantee of the OFI. 12 C.F.R. § 614.4570. According to the 2017 FCS Annual Report, FCS had outstanding loan volume to OFIs of \$857 million as of December 31, 2017. This amount represented less than one-half of 1 percent of FCS’s loan portfolio. FCS also may partner with non-FCS lenders through loan syndications and participations, typically to reduce credit risk and comply with lending limits. Also, under its similar-entity authority, FCS may participate with non-FCS lenders that originate loans to those who are not eligible to borrow directly from FCS, but whose activities are functionally like those of eligible borrowers.

According to FCA, the OFI lending authority allows FCS banks to fulfill their mission as a government-sponsored enterprise by enhancing the liquidity of OFIs, thereby lowering the cost of agricultural credit. As noted earlier, FCS is required to establish programs to serve young, beginning, and small farmers and ranchers, but it is not statutorily mandated to focus on providing financial opportunities to any other group of eligible agricultural producers.

Notwithstanding the authorities described above, FCS must comply with other applicable laws and requirements. For example, FCS institutions are subject to safety and soundness oversight by FCA, including with respect to loan underwriting. FCS institutions also must comply with applicable federal, state, and tribal laws governing any tribal lands or property thereon used as loan collateral. FCS associations may obtain Farm Service Agency guarantees on loans to borrowers who otherwise may not meet FCS underwriting requirements. However, by law, loans made by FCS associations are not eligible for a similar BIA loan guarantee program.⁴⁹

Some FCS Associations Reported Lending to Indian Tribes or Their Members, and Selected Associations' Outreach to These Populations Included Education

Lending

Based on information from selected FCS associations located near tribal lands, some FCS associations have lent to Indian tribes or their members in the last 2 years.⁵⁰ Of the 11 FCS associations we contacted with tribal lands in their territories, representatives of eight told us they had loaned to tribes or their members in the last 2 years—primarily to individual tribal

⁴⁹FCS associations are instrumentalities of the federal government and thus their loans are ineligible for BIA guaranties. 12 U.S.C. §§ 2071, 2091; 25 U.S.C. § 1486, 25 C.F.R. §103.10.

⁵⁰We sent questionnaires to the associations on March 14, 2019. Therefore, the “last 2 years” generally would refer to loans made since March 2017.

members. We made the following observations based on the associations' responses:

- **Limited data on lending amounts.** Representatives of 10 of the 11 FCS associations we queried stated that they either do not collect or do not maintain data on lending to specific racial populations, thus making it difficult to provide more detailed information on lending to Indian tribes and their members.⁵¹ However, four representatives provided estimates of their recent lending to this population on tribal lands. One association cited more than \$25 million in total loans outstanding to a small number of tribes and tribal entities. Another association reported making about \$5.5 million in new loans to tribes or their members on tribal lands in the last 2 years. A third reported a \$3 million revolving line of credit to a family farm, and the fourth said it had made approximately \$150,000 in five separate loans to two tribal members.
- **Loan purposes.** Seven associations reported on the type of credit they extended to Indian tribes and their members on tribal lands. In general, they made short-term operating loans and short- and intermediate-term loans for the purchase or refinance of items such as machinery and equipment, livestock, vehicles, or buildings and improvements. Two associations also reported making long-term real estate loans. The other association that reported lending to tribes or their members did not report on the types of loans it made.
- **Type of collateral.** Representatives of the eight associations that reported lending to tribes or their members all indicated that the associations secured loans with personal property, such as crops, livestock, or equipment. In addition, the associations that reported making real estate loans said they secured the loans with fee-simple land.

Representatives of three FCS associations said they had not loaned to Indian tribes in the past 2 years. One association had not received any credit applications from tribal members, and another could not say if it

⁵¹A representative of the remaining association stated that the association collects data related to all of its lending, including loans to Indian borrowers. As noted earlier, creditors are generally prohibited from inquiring about the race and other personal characteristics of an applicant for a credit transaction that is subject to the Equal Credit Opportunity Act. 12 C.F.R. § 1002.5(b). One exception is that creditors may collect such data from credit applicants in order to assess the creditor's compliance with the Equal Credit Opportunity Act. However, lenders may not use this information in decisions about whether to provide credit or when setting the terms of the credit.

had served tribal members because of a lack of racial data on borrowers.⁵² The third association had not provided loans to tribal members in the past 2 years, but the representative stated that it provided several letters of credit to guarantee the payments of BIA leases on tribal land.

Although the FCS associations we contacted stated they have the resources to lend to tribes and their members on tribal lands, a few key factors affect their lending decisions. Representatives of all 11 FCS associations stated their associations had adequate financial capacity and resources to make potentially more complicated or time-consuming loans, such as those involving tribal lands. In general, they stated that the factors they consider in deciding whether to loan to Indian tribes or their members on tribal lands are the same as for any comparable loan—for example, creditworthiness, loan purpose, and the ability to secure a lien on collateral. However, as described earlier, some FCS association representatives described challenges related to tribal law, jurisdiction, tribal sovereign immunity, and recovery of collateral as complicating the lending process to Indian tribes and their members on tribal lands. Although three of the 11 FCS associations we queried reported making loans to tribes that had waived their sovereign immunity for those contracts, most loans the associations reported were to individual tribal members and secured by personal property or fee-simple land.

According to two tribal stakeholders we interviewed, Indian tribes or tribal members who received loans from FCS or other commercial lenders may have larger agricultural operations, a longer credit history, and property that can be more easily used as collateral. For example, an established rancher may be able to secure operating loans with his or her cattle herd or interests in fee-simple land, thus preventing the need to rely on trust land as collateral.

Outreach

At the national level, FCS—through its trade association, the Farm Credit Council—conducts and facilitates outreach to tribes and tribal stakeholder groups. According to a representative of the Farm Credit Council, the Council and representatives of associations with tribal lands in their territories participate in an informal FCS working group focused on outreach and lending on tribal lands. One association representative

⁵²As noted earlier, in cases that did not involve lending, the U.S. Supreme Court has ruled that membership in a federally recognized Indian tribe is a political, not a racial, classification.

described the group as sharing examples of lending success or reasons for missed opportunities; local, regional or national sponsorship opportunities; local or regional agricultural education events; and relevant legal proceedings, such as the *Keepseagle* settlement.

At the institution level, FCS associations must prepare annual marketing plans describing, among other things, how they will be responsive to the credit needs of all eligible and creditworthy agricultural producers in their respective territories, with a focus on diversity and inclusion.⁵³ The marketing plan must detail strategies and actions to market their products and services to potential borrowers who may not have been considered previously for reasons other than eligibility or creditworthiness. However, FCS associations are not required to achieve specific outcomes or quantifiable results.

Our nongeneralizable review of the marketing plans of the 11 selected FCS associations with tribal lands in their territories and our analysis of their written responses to our queries for additional information found that outreach to tribes and their members focused on educational and charitable initiatives and direct marketing about agricultural lending, or did not directly target tribal populations.

- Seven of the 11 associations discussed actual or planned outreach to Indian tribes or their members in their marketing plans or written responses.
 - Four of those seven associations cited financial support of specific agricultural education activities for tribes and their members. Two associations reported making charitable donations that benefited tribal members.
 - Four of the seven associations reported direct marketing to potential tribal borrowers. However, in one case, the marketing was a one-time conversation with a tribe regarding financing for a new facility. The other three associations reported that they called potential Indian borrowers, sought referrals from existing tribal member customers, or conducted meetings with tribal government officials.

⁵³FCS marketing plans are also required to include strategies and actions to promote diversity and inclusion within the association's workforce and management, on the basis that diverse perspectives within institutions can help increase diversity among customers. See, generally, 12 C.F.R. § 618.8440 and 77 Fed. Reg. 25577 (May 1, 2012).

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- In general, the four remaining associations, in their marketing plans and written responses, addressed outreach to minority producers through broader methods, such as participation in ethnic group organizations or through inclusion in the association's overall outreach and marketing efforts. In addition, five of the 11 associations discussed outreach to minority producers in conjunction with their statutorily-mandated outreach to young, beginning, and small farmers. According to FCA officials, FCA's guidance on providing credit to young, beginning, and small farmers, as well as to local food producers, would be broadly applicable to socially disadvantaged or minority populations that fall within the program definitions.

Most of the tribal stakeholders with whom we spoke either were not familiar with FCS or did not know of the tribe or any of its members receiving FCS loans. One Native CDFI representative noted that although he was not familiar with any members of his tribe receiving FCS loans, he thought other nearby tribes or their members had worked with FCS.

FCA also encouraged FCS associations to develop underwriting procedures to facilitate lending on Indian reservations.⁵⁴ FCA identified one FCS association that developed such procedures, and another one of the associations we queried noted that they had such procedures. The first association provided an overview of its procedures, which identified links to information on borrower and collateral eligibility and actions that require BIA approval, among other topics. According to representatives of the second association, its procedure manual directs loan officers to treat tribal members' applications for loans secured by personal property the same as any other applications. In addition, they said the manual

⁵⁴In general, lenders must comply with applicable fair lending laws, including the Equal Credit Opportunity Act. For example, with regard to mortgage lending in Indian Country, the Office of the Comptroller of the Currency has stated that while lenders may consider risks and costs in setting the terms and conditions for loans, the procedures should be based on documented differences in risks and costs, rather than speculative or generalized assumptions. See Office of the Comptroller of the Currency, *Guide to Mortgage Lending in Indian Country* (Washington, D.C.: 1997). FCA took a similar position in the past, when it evaluated an institution's procedures for lending on Indian reservations. In that case, the institution's procedures required additional security in the form of government guarantees on any loan for which reservation land was pledged as collateral. The association based the additional security requirement in part on generalized concerns that tribal courts were inadequate forums in which to recover collateral, rather than evidence regarding the courts of the specific tribe in question. FCA ultimately determined that the institution's procedures were not consistent with the Equal Credit Opportunity Act, and required that the procedures be withdrawn.

Stakeholders Discussed Lender Partnerships, Loan Guarantees, and Other Options to Improve Agricultural Credit Access on Tribal Lands

contains instructions for working with BIA for real estate loans to tribal members on trust land and for making direct loans to tribes.

Our review of literature and interviews with experts, tribal stakeholders, FCS associations, Farm Credit Council representatives, and FCA officials identified the following options for improving access to agricultural credit on tribal lands.

- **Partnerships with local lenders.** Tribal economic development experts and tribal stakeholders cited the importance of commercial or government lenders partnering with Native CDFIs and other Indian-owned lenders, which are the most capable of navigating the challenges related to Indian agricultural credit. According to these experts and stakeholders, if larger commercial or government lenders worked with Native CDFIs or other tribal lenders (such as tribal banks or economic development corporations) to provide funds or conduct outreach, the tribal organizations could more efficiently reach Indian tribes and their members. They noted these organizations are familiar with tribal members and the administrative processes for obtaining loans on tribal land. Partnership with tribal lenders and other tribal businesses also could support tribes' efforts to improve members' loan readiness, according to literature we reviewed and a tribal economic development expert and a Native CDFI representative we interviewed.⁵⁵

Commercial and government lenders may need to clarify whether tribal lenders with which they might partner meet their lending requirements. For example, although FCS banks have authority to lend to OFIs, which in turn can lend to FCS-eligible borrowers, only

⁵⁵The executive director of a Native CDFI has noted that because Native CDFIs are mission-driven, they offer development services—such as financial education and business training—that banks do not. See Tanya Fiddler, “Working Together: Effective Partnerships between Native CDFIs and Banks Bridge the Financing Gap in Indian Country” August 2013, accessed on March 21, 2019.

<https://www.occ.gov/publications/publications-by-type/other-publications-reports/cdi-newsletter/extending-credit-indian-country-aug-2013/indian-country-ezine-article-7-working-together.html>. In addition, a 2017 study on mortgage lending on tribal lands similarly noted the importance of commercial lenders partnering with tribes and local nonprofits serving tribal members to provide homebuyer education. See David Listokin, et al., *Mortgage Lending on Tribal Land*.

certain types of CDFIs may qualify as OFIs.⁵⁶ In addition, this authority does not extend to long-term funding, and thus cannot be used to fund agricultural real estate loans made by OFIs.⁵⁷ One FCS bank that commented on a 2004 FCA rule noted the latter statutory limitation as a major impediment to OFI program expansion.

- **Flexibility with collateral requirements.** As noted earlier, multiple stakeholders we interviewed discussed the challenges related to collateralizing trust land. In addition, FCA officials cited the need for a statutory change or clarification of the requirement that long-term loans made by FCS be secured by a first lien on interests in real estate.⁵⁸ They said that by removing or clarifying this requirement, lenders would have authority to provide larger, longer-term loans to creditworthy tribes or tribal members who cannot mortgage their tribal lands.
- **Guarantees.** Some stakeholders we interviewed mentioned loan guarantees as an option to improve access to agricultural credit on tribal lands. For instance, FCA officials and Farm Credit Council representatives told us they had spoken with leadership of the Native American Agriculture Fund (created as part of the *Keepseagle* settlement) regarding the potential establishment of a loan guarantee fund, such as a first-loss fund, which would step in to purchase a loan in default (thus substantially reducing credit risk to the lender). In addition, three of the 11 FCS associations we queried identified guarantees as a possible way to increase FCS lending to Indian tribes and their members on tribal lands.

FCS associations still face challenges in using guarantees. With regard to the first-loss loan guarantee fund, FCS associations still must adhere to the FCS statutory requirement for a first-position lien on interests in real estate for long-term loans. According to an FCA official, although the first-loss loan guarantee fund could mitigate

⁵⁶OFIs can include banks, credit unions, agricultural credit corporations, and certain other entities engaged in the making of loans to agricultural producers. 12 U.S.C. § 2015(b)(1)(B) and 12 C.F.R. § 614.4540. The preamble to an FCA rule confirms that CDFIs that are community development banks or community development credit unions could qualify as an OFI. 69 Fed. Reg. 29852, 29860 (May 26, 2004). However, most Native CDFIs operate as loan funds chartered as state corporations, the eligibility of which the preamble to the FCA rule did not address.

⁵⁷69 Fed. Reg. 29852, 29859 (May 26, 2004).

⁵⁸Two FCS stakeholders called for statutory or regulatory clarification on whether leasehold interests in real estate can satisfy this statutory requirement. But as noted earlier, FCA already published a legal opinion to that effect (07-01).

repayment risk, a statutory change or clarification would be necessary for FCS associations to accept guarantees in lieu of real estate for long-term loans. And as noted earlier, FCS loans are statutorily ineligible for BIA's loan guarantee program. Two FCS associations noted that removal of this restriction could increase FCS lending on tribal lands. Finally, FCA officials stated that challenges FCS associations face in making loans involving tribal lands also can extend to Farm Service Agency guarantees on those loans. In other words, to obtain such guarantees, FCS associations must navigate issues around land tenure, legal jurisdiction, and tribal laws.

- **Tribal options.** In addition, stakeholders discussed the following tribal actions that could increase credit access for tribes and their members:
 - Representatives of two FCS associations noted that waivers of sovereign immunity (limited to specific contracts) by tribes may increase lending involving tribal lands, as it helps to enable lenders to enforce the terms of loans made to tribes. According to the Office of the Comptroller of the Currency, some banks have negotiated limited waivers of sovereign immunity (restricted to a specific transaction). As noted earlier, tribes may decide that waiving sovereign immunity is not in their best interest. In addition to the limited waivers of sovereign immunity, representatives of three FCS institutions stated that increased adoption of uniform commercial laws (such as the Uniform Commercial Code) by tribes could increase lending involving tribal lands.
 - One tribal economic development expert told us that tribes that adopted their own leasing regulations under the HEARTH Act have seen substantially increased economic development. As noted earlier, the HEARTH Act provides tribes with greater flexibility to enter into leases for agriculture or other purposes. Once a tribe's leasing regulations have been approved by the Secretary of the Interior, tribes may negotiate and enter into agricultural leases with 25-year terms without further approval by the Secretary.⁵⁹ The combination of longer lease terms and the ability to conduct business outside of the BIA approval process can expedite the process of obtaining a leasehold mortgage on tribal trust and restricted fee land. As of May 1, 2019, the

⁵⁹25 U.S.C. § 415(h).

Secretary had approved agricultural leasing regulations for seven tribes under the HEARTH Act.⁶⁰

Agency Comments

We provided a draft of this report to FCA, Interior, and USDA for review and comment. FCA and USDA provided technical comments, which we incorporated as appropriate. In comments provided in an email, Interior officials noted that efforts to simplify the Secretary of the Interior's approval process could provide faster mortgage determinations and thus may result in expanded lending and production opportunities for Indian agricultural producers.

We are sending copies of this report to the appropriate congressional committees, the Chairman and Chief Executive Officer of the Farm Credit Administration, the Secretary of the Interior, and the Secretary of Agriculture. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-8678 or cackleya@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix II.



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Director, Financial Markets and Community Investment

⁶⁰In addition, the Secretary of the Interior approved the Navajo Nation's agricultural leasing regulations pursuant to other statutory authority, thus allowing the tribe to lease its trust and restricted fee land for agricultural purposes without Secretarial approval. 25 U.S.C. § 415(e). We recently reported BIA's review and approval process for 42 proposed leasing regulations that tribes submitted in 2012–2017 often took at least a year. We recommended that Interior and BIA develop a clearly documented process with established time frames for each step in the process for reviewing proposed tribal leasing regulations submitted under the HEARTH Act. Interior concurred with the recommendation but had not implemented it as of May 2019. See GAO, *Indian Programs: Interior Should Address Factors Hindering Tribal Administration of Federal Programs*, GAO-19-87 (Washington, D.C.: Jan. 3, 2019).

Appendix I: Objectives, Scope, and Methodology

Our objectives in the report were to describe (1) what is known about the agricultural credit needs of Indian tribes and their members on tribal lands, (2) the barriers stakeholders and experts identified that Indian tribes and their members on tribal lands face in obtaining agricultural credit to meet their needs, (3) the Farm Credit System's (FCS) lending authority and lending and outreach activities on tribal land, and (4) suggestions stakeholders have discussed to improve access to agricultural credit on tribal lands.

For the purpose of this report, we use the term “tribal lands” to refer to reservations (including all land within the reservations’ boundaries), trust land, allotments, and restricted fee land. In general, our report focuses on the agricultural credit needs of tribes and their members in the lower 48 states.

To describe what is known about the agricultural credit needs of Indian tribes and their members on tribal lands, we explored various potential data sources on agricultural loans that Indian tribes and their members applied for or received. We reviewed available data from the Consumer Financial Protection Bureau and Department of Agriculture (USDA). For example, we obtained borrower-reported loan data from USDA’s Agricultural Resource Management Survey, but for several data fields related to Indian producers on tribal lands, sample sizes were too small or the coefficients of variation were too high to produce reliable estimates. We also reviewed provisions of the Equal Credit Opportunity Act, federal regulations, and other legal documentation pertaining to collection of data regarding the personal characteristics of applicants for nonresidential loans.

To describe what is known about Indian tribes and their members’ agricultural credit needs and the barriers they face in obtaining agricultural credit, we conducted a literature review. We conducted searches of various databases, such as EBSCO, ProQuest, Google Scholar, and Westlaw to identify sources such as peer-reviewed academic studies; law review articles; trade and industry articles; reports from government agencies, nonprofits, and think tanks; and Congressional transcripts related to tribal agriculture, barriers to accessing credit on tribal lands, and FCS. We identified additional materials through citations in literature we reviewed. In addition, we reviewed statutes and the Department of the Interior’s Bureau of Indian Affairs’ (BIA) regulations related to use and ownership of tribal lands, including leasing.

To describe FCS's authority and lending and outreach activities on tribal lands, we reviewed statutes and regulations governing FCS, as well as written guidance issued by the Farm Credit Administration (FCA). We also reviewed the marketing plans of a nongeneralizable sample of 11 FCS associations (16 percent of the 69 FCS associations that lend directly to agricultural producers) whose territories included large tribal land areas with high levels of agricultural activity, including the tribes we interviewed (described below). We selected an additional FCS association but on closer review realized it did not have a significant amount of tribal land in its territory; we therefore excluded this association from our analysis. For comparison purposes, we also reviewed three marketing plans from FCS associations that did not have significant tribal populations in their territories. In addition to reviewing the marketing plans, we sent the 11 FCS associations a questionnaire about their lending and outreach to tribes and their members and any challenges in making loans involving tribal lands. We also asked these associations about any suggestions to improve access to agricultural credit on tribal lands. We received responses from all 11 FCS associations, and followed up with some associations to clarify information they provided. While the sample allowed us to learn about many important aspects of FCS associations' lending and outreach to tribes and their members on tribal lands, it was designed to provide anecdotal information, not findings that would be representative of all of 69 FCS lending associations.

To address all four objectives, we attempted to interview representatives of six tribes. First, we selected these tribes to represent five regions (Great Plains, Rocky Mountain, Northwest, Southwest) and a state (Oklahoma) that—according to experts we interviewed—have tribes engaged in agricultural activity. Within these regions, we generally selected large tribal land areas that have high levels of agricultural activity, as indicated by the USDA 2012 Census of Agriculture data.¹ Specifically, we selected tribes based on number of farms, land in farms, and market value of agricultural products. In addition, we selected one of the six tribes because two experts recommended that we speak with them. For the six tribes, we contacted tribal government leaders and employees of the relevant government offices, such as the agriculture or tribal lands departments.

¹Department of Agriculture, *2012 Census of Agriculture: American Indian Reservations*, Subject Series, Part 5, AC-12-S-5 (Washington, D.C.: August 2014).

- For two of the six tribes, we interviewed employees of the tribal agriculture department. One of these interviews also included representatives of the Native Community Development Financial Institution (Native CDFI) that serves the reservation.
- For the third tribe, we received written responses from a tribal farm.
- For the fourth tribe, we interviewed a representative of the Native CDFI that serves the reservation.
- For this series of interviews, we only received information relating to four tribes. We did not obtain meetings with relevant tribal government officials for the last two tribes.

We also contacted farms or Native CDFIs associated with an additional three tribes based on USDA data or recommendations from experts we interviewed. For one of these tribes, we interviewed a tribal farm employee and a representative of the tribe's community development corporation. For the second tribe, we interviewed a tribal farm employee. For the third tribe, we interviewed a representative of the Native CDFI that serves the reservation.

In summary, we interviewed employees of two tribal agriculture departments, employees of three tribal farms, and representatives of three Native CDFIs and one tribal community development corporation. Throughout this report, we refer to tribal government employees, tribal farm employees, or representatives of Native CDFIs or community development corporations serving a tribe as "tribal stakeholders."

Although the information we obtained from the tribal agriculture employees allowed us to provide anecdotal tribal perspectives, it is not generalizable to the 573 federally recognized Indian tribes. In addition, the views of tribal farm employees and Native CDFI and community development corporation representatives cannot be generalized to tribes but illustrate views on needs, barriers, and other issues from the perspectives of the organizations.

In addition, for all four objectives, we interviewed the following:

- **Experts on agricultural and economic development on tribal lands.** We interviewed subject matter experts on tribal agriculture and economic development from various organizations, including advocacy and academia. Specifically, we interviewed representatives of the following organizations: the Center for Indian Country Development at the Federal Reserve Bank of Minneapolis, First Nations Oweesta Corporation, the Indian Land Tenure Foundation,

the Indigenous Food and Agriculture Initiative at the University of Arkansas, the Intertribal Agriculture Council, and the Native American Agriculture Fund. We selected these organizations based on relevant publications, testimonies before Congress, or recommendations from other experts. These organizations work with a number of tribes and thus could speak to general trends or commonalities in tribal agriculture and economic development. Throughout the report, we refer to the representatives of these organizations as “experts.”

- **Agency and trade group representatives.** We interviewed officials from FCA, USDA (including the Farm Service Agency, Economic Research Service, and National Agricultural Statistics Service), and BIA. We also interviewed representatives of the Farm Credit Council, the national trade association for the Farm Credit System.

We conducted this performance audit from December 2018 to May 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.

Appendix II: GAO Contact and Staff Acknowledgments

GAO Contact

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Staff Acknowledgements

In addition to the contact named above, Karen Tremba (Assistant Director), Lisa Reynolds (Analyst in Charge), Miranda Berry, Tom Cook, Anne-Marie Fennell, John Karikari, Marc Molino, Kirsten Noethen, Barbara Roesmann, Jeanette Soares, and Farrah Stone made significant contributions to this report.

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