

Implementing Institutional Controls in Indian Country¹

Introduction

This handbook answers questions that EPA regions may have on the process of implementing institutional controls (ICs) in Indian country as part of a cleanup project. This handbook functions as a companion to “Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls” (PIME).² EPA IC guidance is founded on state laws that follow traditional English and American property and government legal theory.³ There are unique circumstances to IC implementation in Indian country such as tribal sovereignty, cultural traditions, and property jurisdiction. Further, unique policy considerations are raised by the potential role of ICs in Indian country due to the land and resource use by many tribes. This document guides the practitioner through common questions about how Indian law⁴ impacts the implementation of ICs through the categories of overall jurisdiction, land records, and working with tribes.

The handbook is designed to help promote consistent national policy on IC issues in Indian country in the context of cleanups across several cleanup programs: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund); brownfields; Resource Conservation and Recovery Act (RCRA); and underground storage tanks (UST). The handbook addresses crosscutting IC issues while recognizing that there are some differences among the cleanup programs. EPA, tribal, and local decision-makers retain the discretion to adopt approaches on a case-by-case basis that differ from this handbook, where appropriate. Topics covered include:

- Jurisdiction and structure;
- Land records and title concerns; and
- Working with tribes.

¹ This document is intended solely as a handbook for employees of the U.S. Environmental Protection Agency (EPA). It does not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. EPA may take action at variance with this handbook or its internal implementing procedures.

² *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls* (PIME) may be found at <http://www.epa.gov/superfund/policy/ic/guide/index.htm>.

³ EPA IC guidance is available at www.epa.gov/superfund/policy/ic/index.htm.

⁴ This document assumes a basic understanding of Indian law, e.g. tribal sovereignty, the role of the Bureau of Indian Affairs (BIA), and land ownership categories (Trust land, restricted land, allotted land, etc.). For a basic understanding of Indian law, see the EPA handbook and companion training Working Effectively with Tribal Governments and Cohen’s Handbook of Federal Indian Law, among other resources.

Jurisdiction and Structure

1. What is Indian country?

The term “Indian country” is defined in 18 U.S.C. § 1151:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,”... means:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.⁵

Simplified, the term Indian country generally refers to: (a) land within the boundaries of Indian reservations regardless of who owns the land; and (b) off reservation land owned by tribes and/or tribe members.⁶

2. How is BIA involved in Indian country?

The United States Bureau of Indian Affairs (BIA) in the United States Department of the Interior generally provides services to federally recognized Indian tribes for certain matters that affect Indian country, such as education, health, law enforcement, and land management. Federal Indian law and tribal laws generally apply within the area known as Indian country.

3. What is tribal sovereignty and how does it affect ICs?

Sovereignty is the right of power that comes from itself and no other sources that a government draws upon to govern. Tribes are “self-governing societies” that, like other governments, are “organized [for] collective action, facilitate[] social control, and resolve[] disputes.”⁷ Tribes are domestic dependent nations within the United States.⁸ Courts have reasoned that, because tribes existed before U.S. governance, tribes must derive their authority to govern from their own

⁵ Where “Indian country” is not otherwise defined in federal statutes and regulations, § 1151 provides the default definition. Most land owned by Alaska Native Villages (ANV) is not considered “Indian country,” with the exception of the Metlakatla Indian Community. *See Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520 (1998); 42 U.S.C. § 6991(1).

⁶ For a discussion of United States policies concerning Indian tribes over time, *see* § 1-3 Cohen’s Handbook of Federal Indian Law (2009). The general rule has notable exceptions where, due to historical circumstances, the Indian country status of property may have been altered.

⁷ *See* § 4.01 Cohen’s Handbook of Federal Indian Law (2009).

⁸ *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).

sovereignty.⁹ Tribes retain sovereign powers until Congress acts to divest that sovereignty, and interact with the United States on a government-to-government basis.¹⁰

The federal government also has a trust responsibility to federally recognized Indian tribes that the Supreme Court has described as a “moral obligation[] of the highest responsibility and trust.”¹¹ Unless there is a specific duty on the government with respect to Indians, that responsibility is normally “discharged by [EPA’s] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”¹² Principles of Indian law specify that EPA normally directly implements federal environmental statutes in Indian country. EPA policies specify how it interacts with tribal governments and considers tribal interests in carrying out its programs to protect human health and the environment.¹³ Due to this unique government-to-government relationship that the United States has with tribes, there are often different considerations and sensitivities involved than are at play in the federal-state relationship. When implementing ICs, EPA seeks to work within the government-to-government relationship.

4. When should tribal consultation occur when considering ICs in Indian country?

EPA consultation with Indian tribes is governed by, among other documents, EPA’s Policy on Consultation and Coordination with Indian Tribes¹⁴ and specifies that “EPA’s policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests.”¹⁵ Tribal consultation is usually initiated once a cleanup site is identified.¹⁶ Consultation concerning ICs¹⁷ should be initiated early in the cleanup process when ICs are being evaluated, selected, and/or whenever the tribe has interests that may be affected. Consultation should occur regardless of the tribe’s liability status.

5. What are the different types of land ownership?

The term “Indian country” covers multiple types of property with different types of owners. For example, the definition of Indian country includes property owned by a member of a tribe but located within the reservation boundaries of another tribe.

⁹ Working Effectively with Tribal Governments, 39 (EPA Jul. 1998).

¹⁰ See § 4.01[1][a] Cohen’s Handbook of Federal Indian Law and EPA Policy on the Administration of Environmental Programs on Indian Reservations (“1984 Indian Policy”) (Nov. 8, 1984), *available at* <http://www.epa.gov/tribal/pdf/indian-policy-84.pdf>.

¹¹ See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

¹² *Gros Ventre Tribe v. BLM*, 469 F.3d 801 (9th Cir. 2007).

¹³ EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), *available at* <http://epa.gov/indian/pdf/cons-and-coord-with-indian-tribes-policy.pdf>; Consulting with Indian Tribal Governments at Superfund Sites (a beginner’s booklet), OSWER 9200.3-42 (Nov. 2006), *available at* http://www.epa.gov/superfund/partners/osrti/pdfs/booklet_print.pdf; Working Effectively with Tribal Governments (EPA Jul. 1998), *available at* <http://www.epa.gov/Indian/wetg/>.

¹⁴ EPA Policy on Consultation and Coordination with Indian Tribes, <http://epa.gov/indian/pdf/cons-and-coord-with-indian-tribes-policy.pdf> (May 4, 2011).

¹⁵ *Id.*

¹⁶ *Id.*; Consulting with Indian Tribal Governments at Superfund Sites (a beginner’s booklet), OSWER 9200.3-42 (Nov. 2006).

¹⁷ Where possible, the arrangements among these parties should be documented in writing to describe commonly understood roles and responsibilities.

Although tribes retain sovereignty, land ownership is governed by federal property law and extensive court doctrine regarding Indian lands. As a result of the United States' varied Indian policies regarding land ownership over time, parcels of land in Indian country may be owned by:

- (1) the United States in trust for tribes (Trust land);
- (2) individual Indians;
- (3) the United States in trust for individual Indians;
- (4) tribes or individual Indians but subject to statutory restrictions against alienation (*e.g.*, against sale or transfer); and
- (5) tribes; individual Indians and others in fee simple.

The United States holds about 55 million acres in trust for tribes and tribe members.¹⁸ Allotted land is land once possessed collectively by a tribe that has been divided and deeded to individual members or a tribe through the General Allotment Act of 1887 and similar laws, and is normally now considered either Trust or restricted land. For the purposes of this handbook, allotted land will be referred to as Trust or restricted land.

The table below generally summarizes different types of property ownership :¹⁹

| Property Category | Description | Holder of Title |
|---|--|--|
| Trust land | Legal title held in trust by United States for the benefit of a tribe or tribe member. | United States |
| Restricted Land (a.k.a. restricted fee land) | Legal title held by tribe or tribe member subject to restriction. | Tribe or tribe member |
| Fee simple (within boundaries of reservation), a.k.a. non-restricted land, or non-restricted fee land | Legal title held without restriction. | Tribe, tribe member, or non-tribe member |

Within a single Indian reservation, there can be land under each property category. This is particularly prevalent in certain parts of the country. There are also usufruct rights (rights of use in ceded territory which means land for which the tribe or tribe member no longer holds title, but still retains rights, such as for hunting, harvesting, or fishing). Sometimes mineral ownership rights are bifurcated from the surface land, such as when one party owns the surface land and another owns the underlying minerals.

The precise nature of Indian land ownership impacts the implementation and long-term effectiveness of ICs, especially proprietary controls. For example, implementing ICs on non-restricted land would be similar to implementing ICs in states. Implementation on trust and restricted land may be complicated by restrictions on the tribe or tribe member's ability to impose limits on land use. Finally, due to inheritance law in Indian country, much Indian trust and restricted land is held for the benefit of more than one owner, further complicating land

¹⁸ Statistics and Facts about the Office of the Special Trustee, http://www.doi.gov/ost/about_ost/facts.html.

¹⁹ Note this is a general summary – consult your regional tribal coordinator for more information.

management.²⁰ Therefore, before ICs are selected, it is critical to understand the ownership pattern of the site.

6. Does checkerboarding affect a tribe's zoning and permit authority?

“Checkerboarding” (*i.e.*, the intermingling of tribe/tribe member owned and non-tribe member owned property) in Indian country may pose jurisdictional issues to the enforcement of governmental controls by a tribe. Identifying which government entity holds zoning authority over a specific parcel of land can be a challenge. Under federal law administered by EPA, states lack regulatory authority over pollution sources on Indian reservations unless there has been an express grant of such authority from Congress or agreement between the state and tribe. Tribe zoning authority has been limited by the courts.²¹ To avoid a question about jurisdiction, a tribe could take steps to ensure effective implementation of a governmental control such as: (1) enter into jurisdictional agreements with the local municipality or state zoning authority to establish a system of coordinated land use planning;²² and/or (2) work with non-tribal communities located within the boundaries of the reservation.²³ EPA may further tribes' implementation of governmental controls by sharing ideas and providing examples of successful strategies used by other tribes and municipalities.²⁴ The tribe, not EPA, has the authority to develop and enforce a tribe's land use or zoning code in Indian country.

²⁰ For more information, see BIA's Indian Land Consolidation Program, at <http://www.bia.gov/WhoWeAre/BIA/ILCA/index.htm>.

²¹ *Brendale v. Confederate Bands and Tribes of Yakima Indian Nation*, 492 U.S. 408 (1989); Judith Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, Kan. J.L. Pub. & Pol'y 89, 91 (1991).

²² Tribal Legal Code Project, Part Five, Tribal Law and Policy Institute. http://www.tribal-institute.org/codes/part_five.htm; For example, the Swinomish Tribe entered into a Cooperative Land Use Program with Skagit County, Washington. The Official Land Use Comprehensive Plan for the Swinomish Indian Reservation 5 (Aug. 6, 1996), <http://www.swinomish-nsn.gov/uploads/Docs/resources/Planning%20and%20Land%20Use/SWINCOMPPLAN96.pdf>.

²³ For example, the Colville Tribe allows the appointment of two non-Indian residents of the reservation community to the Land Use Board, and has thus been able to assert zoning jurisdiction over its entire reservation. Colville Confederated Tribes, Tribal Code § 4-3-80(a)(1), *available at* <http://codeamend.colvilletribes.com/2005%20titles/Title%204%20PDF%202005/04-03%20Land%20Use%20&%20Develop.pdf>.

²⁴ See the Tribal Law and Policy Institute Tribal Legal Code Project that addresses land use *available at* <http://www.tribal-institute.org/lists/codes.htm>; see also Navajo Nation Zoning Law (a decentralized method of zoning) *available at* <http://www.navajocountyaz.gov/pubworks/pz/>; Colville Land Use Ordinance (complex zoning using a broad definition of *Brendale*) *available at* http://www.tribal-institute.org/codes/part_five.htm; Muckleshoot Zoning Ordinance (flexible zoning on a small reservation) *available at* <http://www.tribal-institute.org/envirotext/24.htm>.

*Case Study - Navajo Nation
Underground Storage Tank Homesite Application Permitting Process*

The Navajo Nation requires homesite lease applicants to obtain clearances from the proper tribal authorities/offices prior to siting a home. Clearances include grazing, field, archeological, and biological resource land use. The clearance process ensures that the proposed land is suitable for residential use and does not impair other important uses. For example, the Local Grazing Official is responsible for identifying all grazing permittees who are affected by a proposed homesite application prior to approval. Homesite leases are finalized by the BIA Agency Superintendent. In addition to the necessary clearances, there are several general restrictions on homesite leases. These include the provision that applicants may not disturb the site prior to a final evaluation by the Navajo Nation Historical Preservation Department, and written permission from the District Grazing Committee is required if the proposed homesite is within one half mile of a government or Navajo tribal developed permanent livestock watering site. The restrictions are enforced in Tribal Court.²⁵

Water well prohibitions are often used as an IC where groundwater will remain contaminated over a period of time. For example, these prohibitions may be effective for residential properties located over a contaminated groundwater plume where the properties are not the source of contamination.²⁶ Water well prohibitions may be complex in Indian country if the groundwater is on an Indian reservation located in the western United States where tribal water rights²⁷ may be governed by the Winters Doctrine.²⁸

Case Study – Agua Caliente Band Land Use Planning

The Agua Caliente Band of Cahuilla Indians (Agua Caliente or Band) in California has land in fee and in Trust. The tribe adopted a unique strategy in its land use planning.²⁹ Through agreements, the Agua Caliente specifically adopted the land use development and use regulations of the neighboring local governments and the State of California. According to the agreements, the local governments have the ability to enforce and administer the regulations/laws as an agent of the Band. Appeals of decisions regarding land use are handled through the Tribal Council. Agua Caliente also has its own permitting process for activities in its designated conservation management area. This arrangement with the local governments uses existing enforcement capacity, thereby circumventing the issue of capacity building and funding.

²⁵ Section of Homesites, Division of Natural Resources, Land Department, Navajo Nation. *See* <http://www.dinehbikeyah.org/Homesite.htm>.

²⁶ U.S. Government Accountability Office, Report to Congressional Requesters, Hazardous Waste Sites: Improved Effectiveness of Controls at Sites Could Better Protect the Public," 8 (Jan., 2005) *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-06-781>.

²⁷ Generally, water rights are reserved and apply to surface waters. However, in some cases groundwater rights may also be implicated in the western states. Stephen L. Pevar, at 243.

²⁸ The Winters Doctrine established that when a reservation was created, the reserved water rights were in sufficient quantity to meet the needs of the reservation's purpose. *See* 1-19 Cohen's Handbook of Federal Indian Law, § 19.03 (2009).

²⁹ Agua Caliente Band of Cahuilla Indians Tribal Ordinance 4 - 5 *et seq.*; Agua Caliente Code, Land-Use Regulations, Chapter 9.04.

7. Is BIA involved in the implementation of ICs?

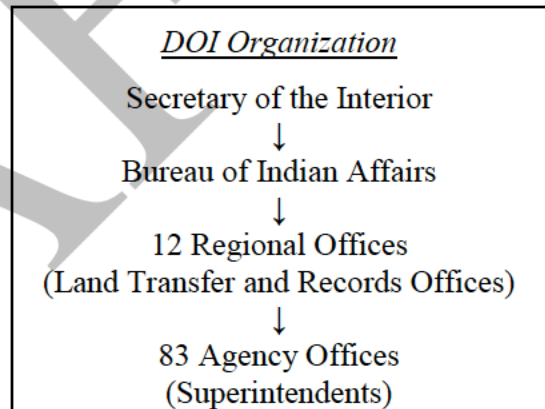
BIA becomes involved in IC approval whenever a proprietary control will be implemented on Trust land and restricted land (see below). BIA also will be involved for the title search for parcels within reservations or off-reservation Trust lands.

Land Records and Title Concerns

1. How do I conduct a title search in Indian country?

In Indian country, the location of the appropriate title office depends on site land ownership status. Title for trust and restricted land is managed by BIA. BIA provides administration services and manages Trust land through 12 regional offices.³⁰ Each regional office maintains a Land Transfer and Records Office (LTRO).³¹ BIA regions are further split into 83 agency offices, each headed by a Superintendent. The Superintendent has the authority to approve land transfers concerning Trust and restricted land.³²

Although LTROs usually keep land records, six tribes “contracted out” the records office function from the regional LTRO.³³ Tribes have the option to operate the regional LTRO records function under Public Law 638 contracts or compacts.³⁴ Additionally, over time land may have transferred out of Indian control and therefore the records for some periods in the ownership history may be managed by the municipality.³⁵ Therefore, title records for a parcel held in fee simple within the boundaries of a reservation may be kept by BIA’s LTRO, a tribe-operated records office, or a local municipal recording office.³⁶ To conduct a title search of BIA records, contact the local LTRO to place a request.



³⁰ Regional and Agency Office locations are *available at* <http://www.bia.gov/WhoWeAre/RegionalOffices/index.htm>.

³¹ Land Records and title Documents, 25 C.F.R. § 150.2(h).

³² Commissioner of Indian Affairs, 25 U.S.C. § 1; Delegation of Powers and Duties by Secretary of the Interior and Commissioner of Indian Affairs, 25 U.S.C. § 1a.

³³ The six tribes that manage their own land records are: Confederated Tribes of the Colville Reservation, Morongo Band of Mission Indians, Saginaw Chippewa Indian Tribe of Michigan, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Cherokee Nation; *see* The Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH): Hr’g on H.R. 2523 before the H. Comm. on Natural Resources, 111th Cong. 3 (Oct. 21, 2009) (statement of Hon. Harvey Moses Jr., Second Vice President, Affiliated Tribes of Northwest Indians).

³⁴ This is the commonly used term for contracts or compacts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450.

³⁵ For example, older land records pre-1864, and records owned by a non-tribal owner would not be kept by LTRO.

³⁶ Record of deeds by Indians requiring approval, 25 U.S.C. § 5; Letter from the Sec’y DOI re: Legalizing the Records of the Indian Office, H. Exec. Doc. No. 73, 23 Cong. Rec. 2254 (52nd Cong., 1st Sess. (1892)).

2. What are the differences in property law terminology between EPA and DOI?

There are discrepancies of terminology between EPA and the Department of Interior (DOI) regarding partial property interests. In EPA, proprietary controls refer to controls on land use. EPA uses a state's terminology for a particular proprietary control, such as easement, conservation easement, or real covenant. DOI refers to partial property interests as "encumbrances", which is defined in 40 C.F.R. Part 84: "[e]ncumber means to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances). Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land."³⁷

The property law terms "easement" and "real covenant" are not specifically included in DOI's definition of encumbrance, but Part 84 specifically contemplates that a real covenant or conservation easement may potentially encumber Trust or restricted land.³⁸ Thus when communicating with DOI to implement proprietary controls, EPA should be aware of the difference in DOI terminology to minimize confusion.

3. How do I obtain approval for a proprietary control?

Implementing a proprietary control on Trust or restricted land requires three steps: (1) owner approval; (2) BIA approval; and (3) recordation. Implementing an IC on a parcel of non-restricted land does not require BIA approval, but does require recording and might be subject to tribal governance rules, such as zoning.

a. Does a tribe or tribe member approve a proprietary control?

EPA needs the owner's agreement to implement a proprietary control. A tribal government may also need to approve land transfers and acceptance of proprietary controls for parcels within its jurisdiction. An example of the latter is when a tribal zoning ordinance affects a tribe member's parcel. The tribal governing body that approves land transfers varies widely by tribe – it could be a general body such as a tribal council, or a specific business development, real estate, or environmental office. For example, the Shoshone-Bannock Tribe Business Council has the power "to approve or veto any disposition, lease, or proprietary control of tribal lands, interests in lands, or other tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs or any other official or agency of Government, provided that no tribal lands shall ever be sold, encumbered, or leased for a period exceeding 5 years, except for governmental purposes."³⁹ When contemplating a proprietary control, ask the tribe about its approval process.

³⁷ "What terms should I know?," 25 C.F.R. § 84.002.

³⁸ 66 Fed. Reg. 38918, 38920 (July 26, 2001) ("For example, a restrictive covenant or conservation easement may encumber tribal land within the meaning of Section 81, while an agreement that does not restrict all economic use of tribal land may not."); BLM Acquisition Handbook, H-2100-1, Chapter II(B) (2002).

³⁹ Shoshone-Bannock Tribal Constitution and Bylaws, Art. 5 Section 1.(c). Powers and Duties of the Business Council, *available at* <http://www.shoshonebannocktribes.com/documents/pressreleases/ConstitutionalAmendments.pdf>.

b. How do I obtain BIA approval of a proprietary control?

After EPA secures approval from the landowner and/or the tribe, the Agency then must ask the local Agency Superintendent to approve the acceptance of the proprietary control, and then file the deed with the LTRO. BIA procedures to place proprietary controls on Trust land appear in 25 C.F.R. Part 84,⁴⁰ while procedures for individual Trust land that are not subject to specific regulations for BIA approval are provided in 25 C.F.R. Part 169 (rights-of-way over Indian lands). The Superintendent must approve any proprietary control on tribal Trust land that lasts for more than seven years.⁴¹ Superintendent approval requires that: (1) the language of agreement with the tribe does not violate federal law; and (2) the proprietary control includes one of three approved methods of dispute resolution.⁴² The Superintendent must approve any proprietary control for individual Trust land regardless of the length of time that the control will remain in place. The process to obtain Superintendent approval varies by Agency Office. After EPA obtains Superintendent approval, the next step is to record the proprietary control in the LTRO.

Ultimately, deed language must be approved by the regional LTRO. Although Part 84 describes procedures for implementing a proprietary control, it does not provide examples of deed language. DOI's Bureau of Land Management guidance may be used as an example.⁴³ For title review and title standard issues, refer to U.S. Department of Justice guidance.⁴⁴ Coordinate with the LTRO for conforming language.

4. What are the disadvantages of using proprietary controls in Indian country?

Proprietary controls might not be an effective tool in all circumstances. Although land records in Indian country are searched in connection with transactions such as mining leases or mortgages, property held in trust is not often transferred in Indian country. For example, tribe members and/or non-Indians may receive a lease or permit to utilize a particular parcel on the reservation instead of actual ownership. Additionally, record searches are performed less often because DOI title records are kept in only 12 regional LTROs. While the public may generally search state and local land records, record searches in Indian country are typically only conducted by LTRO staff. The record may also be incomplete⁴⁵ or not stored electronically. Moreover, the federal

⁴⁰Contracts and Agreements with Indian Tribes, 25 U.S.C. §§ 81 *et seq.*; Tribal Government, Encumbrance of Tribal Lands - Contract Approvals, 25 C.F.R. Part 84 *et seq.*

⁴¹ Encumbrances of Tribal Land-Contract Approvals, "What types of contracts and agreements require Secretarial approval under this part?," 25 C.F.R. § 84.003.

⁴² Encumbrances of Tribal Land-Contract Approvals, "Under what circumstances will the Secretary disapprove a contract or agreement that requires Secretarial approval under this part?," 25 C.F.R. § 84.006(a)(2)

⁴³ 25 C.F.R. §§ 150 *et seq.*; *BLM Acquisition Handbook*, Chapter IV, H-2100-1, Release No. 2-290 (Jan. 31, 2002), available at http://www.blm.gov/nils/AQ_handbook/h-2100-1/handbook-toc.htm.

⁴⁴ The Department of Justice provides resources for appraisal and title review such as *Title Standards 2001: A Guide for the Preparations of Title Evidence in Land Acquisitions by the U.S.A.* (March 2001) and *Uniform Appraisal Standards for Federal Land Acquisitions* (December 2000), available at www.justice.gov/enrd/Current_topics.html.

⁴⁵ BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications 1, Gov't Accountability Office (July 2006) ("GAO found the data in BIA's land in trust database, which was implemented in August 2004, were frequently incomplete and inaccurate."), available at www.gao.gov/cgi-bin/getrpt?GAO-06-781.

government's former policies of termination, relocation, and assimilation have generated a certain amount of distrust of the federal government on the part of some tribes that could make implementation of a proprietary control a contentious issue.⁴⁶

The practicality of enforcement may also be an obstacle. For example, BIA owns Trust land and may grant a restriction (*e.g.*, BIA could promise that no one will disturb the soil cap). But unless BIA continuously monitors the parcel of land, it could not ensure compliance with the restriction. EPA enforcement against BIA would not achieve compliance, because BIA did not violate the condition. The tribe could monitor the property, which would encumber tribal resources, often in a situation not of the tribe's creation.

Despite enforcement problems, a proprietary control may still serve as notice that contamination exists and can be an important layer in a long-term stewardship plan. Therefore, proprietary controls should be layered with other institutional controls, such as governmental controls or informational devices.⁴⁷

Working with Tribes

1. Can I require a tribe to implement an IC?

Regardless of the party implementing the IC, IC implementation that requires action by the tribe (such as governance approval) cannot be mandated. EPA, a liable party, and the tribe may enter into agreements to take the required action to implement the IC. If the tribe or tribe government refuses to approve an IC, EPA may need to consider other options such as informational controls.

2. How do I address or incorporate cultural traditions when implementing ICs?

It is important not to undervalue the role of culture in the dissemination of knowledge among the tribe community. Cultural traditions are an important component of informational devices that are often overlooked. Traditions are more ingrained in the daily tasks of a society than are land records and permits. Cultural memory may rely more on knowledge and experience than information.

Physical devices and official documents may be a short-term solution, whereas integrating land management into the traditional fabric may promote long-term stewardship.⁴⁸ Thus it is important to use cultural informational devices, such as oral traditions and bilingual materials. Some informational devices cannot be implemented by EPA, because cultural traditions may vary. For instance, many tribes conduct activities such as subsistence farming, grazing, fishing, and religious ceremonies that may restrict ICs. Tribal lands are generally fixed in size, so tribes

⁴⁶ Working Effectively with Tribal Governments, 28- 38 (EPA July 1998).

⁴⁷ For more information, see the PIME at <http://www.epa.gov/superfund/policy/ic/guide/index.htm>.

⁴⁸ For a greater discussion of cultural traditions in environmental cleanups, see Kimberly TallBear, Tribal Social & Cultural Institutions for Long-Term Stewardship of Hazardous Sites (April 3, 2001), available at <http://www.iiirm.org/publications/Articles%20Reports%20Papers/Environmental%20Protection/socialcul.pdf> and Dan Miller, Institutional Controls: Here Today, Gone Tomorrow? (2001), available at <http://www.iiirm.org/publications/Articles%20Reports%20Papers/Environmental%20Protection/socialcul.pdf>.

and tribe members must work with the land in their possession instead of shifting the location of a cultural use. In some cases, tribes may object to any restrictions on land use based on cultural traditions that put a high value on maintaining and preserving the land in its pristine condition.

It is important to evaluate all forms of knowledge sharing, including sacred practices that may affect the use of an IC. However, tribes may be reluctant to divulge information that could later be released to the public from the federal government through a Freedom of Information Act (FOIA) request. FOIA exceptions do not necessarily apply to information tribes provide, so special care must be taken to determine the level of detail to include when documenting this information.

3. What resources are available to effectively work with tribes?

EPA has numerous resources that may support the implementation of ICs. EPA's American Indian Environmental Office (AIEO) leads EPA's efforts to protect human health and the environment of federally recognized tribes. AIEO also hosts the EPA Tribal Portal, which provides environmental information specifically related to tribal governments, such as environmental policies, practices, and laws.⁴⁹ Regional offices often have tribal experts that may act as regional experts or liaisons.

For Indian law questions, the National Indian Law Workgroup (NILWG) may be a good source of information. The group discusses legal issues that arise in the course of developing and implementing EPA Indian programs. NILWG is composed of lawyers from EPA's regional counsel and program offices, AIEO, the Office of General Counsel, the Office of Enforcement and Compliance Assurance, the Department of Justice, and DOI.

For questions about implementing ICs, each EPA region has an IC Coordinator. These IC Coordinators also participate in a monthly call to discuss pressing or nationally significant IC issues.

Lastly, third party neutrals may be used to help explain why land or other media needs to be restricted and why ICs are necessary. EPA, through its Conflict Prevention and Resolution Center⁵⁰ (CPRC), has a contract to access third party neutrals. The CPRC also provides services such as consensus building, collaborative problem solving, alternative dispute resolution, and environmental conflict resolution.

Conclusion

ICs are often a vital component of cleanup programs, including those that may be implemented in Indian country. This handbook provides an overview of some key issues Regions may encounter when implementing ICs in Indian country.

⁴⁹ Available at <http://www.epa.gov/tp/>.

⁵⁰ For more information, please visit CRPC's website at <http://www.epa.gov/adtr/>.

- The use of ICs in Indian country is not a rote task because each tribe is unique. Little differences may entirely change the approach, such as the type of land ownership or cultural traditions.
- Implementation of proprietary controls relies on effective use of the land records office, agreements, and a tribe's environmental stewardship capacity. Additionally, the methods must be tailored to the site, especially the integration of cultural considerations.
- Implementing ICs in Indian country requires planning and research into the land and governance of the tribe.

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