

# **Implementing Institutional Controls in Indian Country**

Office of Site Remediation Enforcement  
Office of Enforcement and Compliance Assurance

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## Introduction

The *Implementing Institutional Controls in Indian Country* handbook answers questions that U.S. Environmental Protection Agency (EPA) regional staff 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 the EPA's *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls* (PIME).<sup>1</sup>

The implementation of ICs in Indian country presents unique circumstances that can be distinguished from the EPA's current ICs practice and guidance that is derived from traditional English and American real property law and government legal theory.<sup>2</sup> These uniquely tribal circumstances may include tribal sovereignty, fixed reservation sizes, cultural traditions, and jurisdiction.

This handbook assumes the reader has 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.*). It is designed to:

- (1) provide regional staff with common questions and answers on the impact of Indian law<sup>3</sup> on the implementation of ICs; and
- (2) promote consistent national policy on ICs in Indian country at properties addressed by the EPA cleanup programs and authorities.<sup>4</sup>

The handbook addresses cross-program IC issues while recognizing that there are some differences among federal cleanup programs. The handbook is arranged into three sections:

- I. Jurisdiction;
- II. Land records and title concerns; and
- III. Working with tribes.

**Disclaimer:** This document is intended solely as a handbook for EPA employees. 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, tribal, and local decision-makers retain the discretion to adopt approaches on a case-by-case basis that differ from this handbook, where appropriate.

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<sup>1</sup> EPA-540-R-09-001 (Dec. 2012), available at <http://www.epa.gov/superfund/policy/ic/guide/index.htm>.

<sup>2</sup> The EPA's ICs guidance is available on the Agency's website at <http://www.epa.gov/superfund/policy/ic/index.htm>.

<sup>3</sup> For a basic understanding of Indian law, see the EPA resource guide *Working Effectively with Tribal Governments*, EPA (Jul. 1998) (WETG), available at <http://www.epa.gov/Indian/wetg/training/EPA/common/data/docs/WETGResourceGuide.pdf>, and COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2009).

<sup>4</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (Superfund Removal, Superfund Remedial, and Brownfields programs) and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (Hazardous Waste and Leaking Underground Storage Tank programs).

## I. Jurisdiction

### 1. What is Indian country?

Generally, the term Indian country 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.<sup>5</sup> Indian country also includes land on which tribe members have treaty rights, such as fishing or hunting. Federal law and tribal law generally apply within the area known as 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.<sup>6</sup>

### 2. How is the Bureau of Indian Affairs (BIA) involved in Indian country?

The U.S. Bureau of Indian Affairs (BIA) in the U.S. Department of the Interior (DOI) generally provides services to federally recognized Indian tribes for certain matters that affect Indian country.

Programs administered through the BIA include: (1) social services; (2) natural resources management on trust lands representing 55 million surface acres and 57 million acres of subsurface minerals estates; (3) economic development programs in some of the most isolated and economically depressed areas of the United States; (4) law enforcement and detention services; (5) administration of tribal courts, implementation of land and water claim settlements; (6) housing improvement; (7) disaster relief; and (8) replacement and repair of schools, roads, bridges, and structural deficiencies on high hazard dams. The BIA also operates a series of irrigation systems and provides electricity to rural parts of Arizona.<sup>7</sup>

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<sup>5</sup> For a discussion of United States’ policies concerning Indian tribes over time, *see COHEN’S, supra* note 3 at § 1-3. The general rule has notable exceptions where, due to historical circumstances, the Indian country status of property may have been altered.

<sup>6</sup> 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).

<sup>7</sup> *See* BIA: About Us at <http://bia.gov/WhatWeDo/index.htm>.

### 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.<sup>8</sup> Tribes are “self-governing societies” that, like other governments, are “organized [for] collective action, [to] facilitate social control, and resolve disputes.”<sup>9</sup>

Courts have reasoned that, because tribes existed before U.S. governance, tribes must derive their authority to govern from their own sovereignty.<sup>10</sup> Tribes retain sovereign powers until Congress acts to divest that sovereignty, and interact with the United States on a government-to-government basis.<sup>11</sup> Regarding governmental controls, tribes have the authority to develop and enforce a tribe’s land use or zoning code in Indian country.

The federal government also has a trust responsibility to federally recognized Indian tribes.<sup>12</sup> The U.S. Supreme Court has described this as a “moral obligation of the highest responsibility and trust.”<sup>13</sup> The EPA resource guide titled *Working Effectively with Tribal Governments* explains the trust responsibility as it applies to the EPA:<sup>14</sup>

“The federal courts often discuss the specific trust responsibility in terms of a fiduciary relationship that arises when the government assumes such elaborate control over Indian trust assets that the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (a tribe or an individual Indian), and a trust corpus (timber, lands, funds, etc.).<sup>15</sup> It is easy to envision the trust corpus in situations where Congress has directed a federal agency to manage particular resources, such as timber or lands, for the benefit of tribes. Applying the trust corpus principle to a regulatory agency like EPA raises unique issues. Nonetheless, it is clear that EPA must ensure that its actions are consistent with the protection of tribal rights arising from treaties, statutes, and executive orders.”

Principles of law specify that the EPA directly implements federal environmental statutes in Indian country. The EPA’s policies clarify how it interacts with tribal governments and considers tribal interests in carrying out its programs to protect human health and the environment.<sup>16</sup> 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, the EPA seeks to work within the government-to-government relationship.

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<sup>8</sup> *WETG*, *supra* note 3 at 39.

<sup>9</sup> See *COHEN’S*, *supra* note 3 at § 1-3.

<sup>10</sup> *WETG*, *supra* note 3, at 39 .

<sup>11</sup> See *COHEN’S*, *supra* note 3 at § 1-3; *EPA Policy on the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984), available at <http://www.epa.gov/tribal/pdf/indian-policy-84.pdf>.

<sup>12</sup> *WETG*, *supra* note 3, at 47.

<sup>13</sup> See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

<sup>14</sup> *WETG*, *supra* note 3, at 48.

<sup>15</sup> *United States v. Mitchell*, 463, U.S. 206, 224 (1983).

<sup>16</sup> *EPA Policy on Consultation and Coordination with Indian Tribes* (May 4, 2011) (*Consultation Policy*), available at <http://epa.gov/indian/pdf/cons-and-coord-with-indian-tribes-policy.pdf>; *Consulting with Indian Tribal Governments at Superfund Sites*, Dir. 9200.3-42, OSWER (Nov. 2006) (*Consulting at Superfund Sites*), available at [http://www.epa.gov/superfund/partners/osrti/pdfs/booklet\\_print.pdf](http://www.epa.gov/superfund/partners/osrti/pdfs/booklet_print.pdf); *WETG*, *supra* note 3.

#### 4. What are the different types of land ownership in Indian country?

As described in Section I.1., 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.

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.

Currently the United States holds about 55 million acres in trust for tribes and tribe members.<sup>17</sup> Allotted land is land once possessed collectively by a tribe that has been divided and deeded to a tribe or individual tribe members 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:<sup>18</sup>

Property Category	Description	Holder of Title
<b>Trust land</b>	Legal title held in trust by United States for the benefit of a tribe or tribe member.	United States
<b>Restricted Land</b> (a.k.a. restricted fee land)	Legal title held by tribe or tribe member subject to restriction.	Tribe or tribe member
<b>Fee simple</b> (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. 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. In addition to land ownership, tribes also have non-proprietary rights of use in ceded territory (*i.e.*, land for which the tribe or tribe member no longer holds title, but still retains rights, such as for hunting, harvesting, or fishing). While those are not ownership rights, the use is important for the final use of the site post cleanup.

<sup>17</sup> As of Aug 6, 2013, the BIA website stated 55 million acres. Statistics and Facts about the Office of the Special Trustee, [http://www.doi.gov/ost/about\\_us/statistics-and-facts.cfm](http://www.doi.gov/ost/about_us/statistics-and-facts.cfm).

<sup>18</sup> Note this is a general summary – consult your Regional tribal office for more information.

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 trust and restricted land is held for the benefit of more than one owner, further complicating land management.<sup>19</sup> Therefore, before ICs are selected, it is critical to understand the ownership pattern of the site.

## 5. Does “checkerboarding” affect a tribe’s zoning and permit authority?

The intermingling of tribe/tribe member owned and non-tribe member owned property in Indian country (also referred to as non-contiguous landholding, checkerboarding, or private landholding) may pose jurisdictional issues for a tribe, particularly to the enforcement of governmental controls. In this situation, identifying which government entity holds zoning authority over a particular parcel of land can be a challenge.

Under federal law administered by the 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 on reservations with private landholdings.<sup>20</sup> To avoid a conflict about jurisdiction, a tribe might 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;<sup>21</sup> and/or (2) work with non-tribal communities located within the boundaries of the reservation.<sup>22</sup>

The EPA may further tribes’ implementation of governmental controls by sharing ideas and providing examples of successful strategies used by other tribes and municipalities.<sup>23</sup> Local knowledge and understanding of a tribe’s needs may play a critical role. For example, water

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<sup>19</sup> For more information, see BIA’s Indian Land Consolidation Program, at <http://www.bia.gov/WhoWeAre/BIA/ILCA/index.htm>.

<sup>20</sup> *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).

<sup>21</sup> 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), available at <http://www.swinomish-nsn.gov/resources/planning/planning-land-use.aspx>. See also Tribal Legal Code Project, Part Five, Tribal Law and Policy Institute, [http://www.tribal-institute.org/codes/part\\_five.htm](http://www.tribal-institute.org/codes/part_five.htm).

<sup>22</sup> For example, the Colville Tribe allows the appointment of two non-Indian residents of the reservation community to the Land Use Board, which decreases the likelihood of a challenge to its zoning jurisdiction. Colville Confederated Tribes, Tribal Code § 4-3-80(a)(1), available at <http://www.colvilletribes.com/updatedcode.php>.

<sup>23</sup> See the Tribal Law and Policy Institute Tribal Legal Code Project addressing 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](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>.

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 rights may be governed by the Winters Doctrine.<sup>24</sup>

## **6. When should EPA tribal consultation occur when considering ICs in Indian country?**

The EPA consultation with Indian tribes is governed by the EPA's *Policy on Consultation and Coordination with Indian Tribes*<sup>25</sup> which specifies that the "EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when [the] EPA actions and decisions may affect tribal interests."<sup>26</sup> Tribal consultation is usually initiated soon after a cleanup site is identified in Indian country.<sup>27</sup>

Consistent with the EPA's policy, regional staff are encouraged to consult tribes about ICs<sup>28</sup> 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.

### **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.<sup>29</sup>

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<sup>24</sup> 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 *COHEN'S*, *supra* note 3 at § 1-19.03. 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, *The Rights of Indians and Tribes*, 243(Southern Ill. Univ. Press 2002).

<sup>25</sup> *Consultation Policy*, *supra* note 19.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; *Consulting at Superfund Sites*, *supra* note 19, at 10.

<sup>28</sup> Where possible, the arrangements among these parties should be documented in writing to describe commonly understood roles and responsibilities.

<sup>29</sup> Section of Homesites, Division of Natural Resources, Land Department, Navajo Nation, available at <http://www.dinehbikeyah.org/Homesite.htm>.

## **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.<sup>30</sup> 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. This arrangement with the local governments uses existing enforcement capacity, thereby circumventing the issue of capacity building and funding.

## **II. Land Records and Title Concerns**

### **1. What is the BIA's role in the implementation of ICs?**

BIA becomes involved in institutional control (IC) approval whenever a proprietary control<sup>31</sup> will be implemented on trust land and/or restricted land. BIA records land records of restricted and trust land. BIA also must approve most proprietary controls on restricted and trust land. This Section discusses BIA's role in further detail.

### **2. How are title searches conducted in Indian country?**

For Indian country, the location of the appropriate title office depends on site land ownership status. BIA provides administration services and manages trust and restricted land through 12 regional offices. Regional and Agency Office locations are available at <http://www.bia.gov/WhoWeAre/RegionalOffices/index.htm>. BIA regions are further subdivided into 83 agency offices across the country, each headed by a Superintendent. The Superintendent has the authority to approve land transfers concerning trust and restricted land.<sup>32</sup> Documents affecting title to trust and restricted land are managed by the BIA Division of Land Titles and Records in eight field offices, called Land Transfer and Records Offices (LTROs).<sup>33</sup>

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<sup>30</sup> Agua Caliente Band of Cahuilla Indians Tribal Ordinance 4 - 5 *et seq.* and Land-Use Regulations, Chapter 9.04, available at <http://www.aguacaliente.org/content/Planning%20%26%20Development/> and <http://www.aguacaliente.org/downloads/TribalLandUseCode.pdf>.

<sup>31</sup> Proprietary controls refer to controls on land use that are considered private in nature because they tend to affect a single parcel of property and are established by private agreement between the property owner and a second party who, in turn, can enforce the controls.

<sup>32</sup> 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.

<sup>33</sup> Record of deeds by Indians requiring approval, 25 U.S.C. § 5; Land Records and Title Documents, 25 C.F.R. §§ 150.2(h), 150.4, 150.5.



Although LTROs maintain most land records, six tribes assumed responsibility of the records office function from the regional LTROs.<sup>34</sup> 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. The public may search the land records,<sup>35</sup> but only the LTRO may conduct a title examination and produce a Title Status Report (TSR) that shows the proper legal description of the parcel, current ownership, encumbrances, and land status (*e.g.*, restricted or trust land).<sup>36</sup> To request a TSR, contact the local BIA agency office.<sup>37</sup> Additional information about a parcel might be found in a tribes' geographic information system (GIS) office, state archives, or local historical society, if applicable.<sup>38</sup>

### **3. What are the differences in property law terminology between the EPA and DOI?**

The EPA and DOI use different terms to refer to partial property interests. The EPA uses the term “proprietary controls” to refer to controls on land use such as easements that restrict use, and real covenants. In contrast, DOI uses the term “encumbrance” which means “to attach a claim, lien, charge, right of entry or liability to real property” (referred to generally as encumbrances).<sup>39</sup> Common examples of encumbrances 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.”<sup>40</sup>

Although the property law terms “easement” and “real covenant” are not specifically included, DOI's definition of encumbrance contemplates that a real covenant or conservation easement may potentially encumber trust or restricted land.<sup>41</sup> Thus, when communicating with DOI and BIA to implement proprietary controls, it is important to be aware of the difference in terminology to minimize confusion.

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<sup>34</sup> 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).

<sup>35</sup> 25 C.F.R. § 150.11.

<sup>36</sup> 25 C.F.R. §§ 150.2(o), 150.3, 150.8.

<sup>37</sup> 25 C.F.R. § 150.8.

<sup>38</sup> See, *e.g.*, the Oklahoma Historical Society records of Indian township plats and allotments, available at <http://www.okhistory.org/research/land>; DONNA SPINDEL, DIV. ARCHIVES AND HISTORY, N.C. DEP'T OF CULTURAL RES., INTRODUCTORY GUIDE TO INDIAN-RELATED RECORDS (TO 1876) IN THE NORTH CAROLINA STATE ARCHIVES (Debra A. Blake ed., 2004) (1979), available at <http://www.archives.ncdcr.gov/findingaids/circulars/indian.pdf>.

<sup>39</sup> 40 C.F.R. § 84.

<sup>40</sup> What terms should I know?, 25 C.F.R. § 84.002.

<sup>41</sup> 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).

#### **4. 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/non-trust 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?**

The EPA needs the landowner's agreement to implement a proprietary control. For parcels within a tribe's jurisdiction, the tribe may also require tribal government approval of land transfers and proprietary controls.

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 five years, except for governmental purposes.”<sup>42</sup> Close coordination with the tribe about how to incorporate its approval process into the IC plan may facilitate implementing a proprietary control.

##### **b. What are the requirements to obtain BIA approval of a proprietary control?**

Generally after the EPA secures approval from the landowner and/or the tribe, the BIA Agency Superintendent must approve the proprietary control, and file it with the LTRO. Superintendent approval is necessary for a proprietary control for tribal trust and restricted land that lasts for seven years or more,<sup>43</sup> and for individually owned land (both restricted and trust) regardless of the length of time that the control will remain in place.<sup>44</sup>

Superintendent approval for tribal trust and restricted land 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.<sup>45</sup> The exact process to obtain Superintendent

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<sup>42</sup> 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>.

<sup>43</sup> Contracts and Agreements with Indian Tribes, 25 U.S.C. §§ 81 *et seq.*; 25 C.F.R. §§ 84.002, 84.003; 25 C.F.R. § 169.1(b)-(d), 169.2.

<sup>44</sup> Purpose and scope of regulations, 25 C.F.R. § 169.2.

<sup>45</sup> 25 C.F.R. § 84.006(a)(2).

approval varies by BIA Agency Office. The Superintendent approval process for individually owned restricted and trust land is lengthy and outlined in BIA regulations.<sup>46</sup> After obtaining Superintendent approval, the next step is to record the proprietary control in the LTRO.

Ultimately, deed language must be approved by the LTRO. The LTRO reviews a title document “to determine that it meets the minimum requirements for recording if the title document has been approved and dated by the properly authorized Federal official, if there is sufficient legal land description and tract identification to locate the land, and if the title document has been properly executed by the parties (*e.g.*, grantor and grantee).”<sup>47</sup> To date, there are no examples of deed language of a proprietary control. Therefore you should coordinate with the LTRO through the BIA Agency to draft deed language.<sup>48</sup>

## **5. 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 and therefore would not typically require a records search. Additionally, record searches may be performed less often because there are only eight LTROs and thus not geographically close to many reservations.

While the public may generally search state and local land records, record searches in Indian country are typically only conducted by LTRO staff.<sup>49</sup> Moreover, the federal government’s former policies of termination, relocation, and assimilation may 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.<sup>50</sup> Finally, if a tribe seeks to place land into trust, BIA may seek clear title before taking that parcel into trust, which could be hindered by the presence of a proprietary control.

Enforcement of proprietary controls may also present obstacles. For example, if BIA as title owner granted a restriction on trust land (*e.g.*, BIA could promise that no one will disturb the soil cap), BIA, not the tribe, would be responsible for ensuring compliance with the restriction. The EPA enforcement against BIA would not achieve compliance because BIA did not violate the condition. While the tribe could theoretically monitor the property, it may impose an undue burden on tribal resources.

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<sup>46</sup> 25 C.F.R. § 169.

<sup>47</sup> Indian Affairs Manual, Part 51, Chapter 2, at 2.3 (Apr. 30, 2012), available at <http://www.bia.gov/WhatWeDo/Knowledge/Directives/IAM/>.

<sup>48</sup> For title review and title standard issues, refer to U.S. Department of Justice guidance 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](http://www.justice.gov/enrd/Current_topics.html).

<sup>49</sup> See *supra* note 43.

<sup>50</sup> *WETG*, *supra* note 3 at 38 (“[The United States] acknowledged, after nearly two centuries of assaults and insults to tribal self-government, that there was little use in attempting to eliminate tribes”).

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 state, local, or federal governmental controls or informational devices.<sup>51</sup>

### **III. Working with Tribes**

#### **1. May a tribe be required to implement an IC?**

Regardless of the party implementing the IC, principles of sovereignty may prevent mandating a tribe to take certain actions such as government approval. The 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's government refuses to approve an IC, the EPA may need to consider other options such as informational devices.

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

It is important not to undervalue the role of culture in selecting and implementing land use controls. 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 documents.

Physical devices and official documents may be a short-term solution, whereas integrating land management into the traditional fabric may promote long-term stewardship.<sup>52</sup> Thus it is important to use cultural informational devices, such as oral traditions and bilingual materials. Some informational devices would not be successfully implemented by the EPA because cultural traditions are organic. 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 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 lifeways and 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

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<sup>51</sup> For more information on informational devices, see Section 7 of the PIME at <http://www.epa.gov/superfund/policy/ic/guide/index.htm>.

<sup>52</sup> 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>.

Freedom of Information Act (FOIA) request. FOIA exemptions 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?**

The EPA has numerous resources that may support the implementation of ICs on tribal land. The American Indian Environmental Office (AIEO) leads the EPA's efforts to protect human health and the environment of federally recognized tribes. AIEO hosts the EPA Tribal Portal, which provides environmental information specifically related to tribal governments, such as environmental policies, practices, and laws.<sup>53</sup> The EPA regional offices have internal tribal offices and Regional Tribal Operations Committees (RTOCs) to help answer questions. Hazardous waste groups with experience in Superfund-specific Indian country issues such as ICs include the EPA National Tribal Waste and Response Steering Committee, the EPA Tribal Superfund Workgroup, and state and regional tribal technical assistance groups.

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 tribal programs. NILWG is composed of lawyers from the 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. NILWG may be contacted through the appropriate Indian law staff in the EPA Offices of Regional Counsel.

For questions about implementing ICs on all types of property, each EPA region has an IC Coordinator. These IC Coordinators 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. The EPA, through its Conflict Prevention and Resolution Center<sup>54</sup> (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.

## **IV. Conclusion**

ICs are often a vital component of cleanup programs, including those that may be implemented in Indian country. However, over time, Regions should continue to review their effectiveness in light of any changes to land use, communities, laws, the condition and location of subsurface materials, and responsible entities.

For more information about any of these topics, please contact Kimberly Fedinatz at (202) 564-6300 or Ceci De Robertis at (202) 564-5132 of EPA's Office of Site Remediation Enforcement.

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<sup>53</sup> Available on the Agency's website at <http://www.epa.gov/tp/>.

<sup>54</sup> For more information, please visit CRPC's website at <http://www.epa.gov/adr/>.