



Tier 1 – Establishing a Tribal Response Program

Module 7: Public Record & Institutional Controls

What is required to be in the Public Record and in the annual update and what is optional? What are Tribal institutional controls and when are they needed?

TribalTAB.org

The “Law”

Section 128(b)(1)(C) Public Record

“States and Tribes must:

1. maintain and update, at least annually, or more often as appropriate, a Public Record that includes the name and location of sites at which response actions have been completed during the previous year;
2. maintain and update, at least annually, or more often as appropriate, a Public Record that includes the name and location of sites at which response actions are planned in the next year;”



The “Law”

Section 128(b)(1)(C) Public Record (cont.)

“States and Tribes must:

3. identify in the Public Record whether or not the site, upon completion of the response action, **will be suitable for unrestricted use**. **If not**, the Public Record must identify the institutional controls relied on in the remedy and include relevant information concerning the entity responsible for oversight, monitoring, and/or maintenance of the institutional and engineering controls; and how the responsible entity is implementing those activities.”

Section 128(a) funds may be used to maintain and make available a Public Record system that meets the requirements discussed above.



Two Parts of this Requirement

- 1) A publicly available **Public Record of sites** that have been remediated and those that are planned to be remediated.
- 2) Publication of **institutional controls** implemented.



A stylized, light blue graphic of a bridge with a triangular truss pattern, arching over the top of the slide.

Part 1

Public Record

The Public Record

Each Tribe receiving financial assistance under 128(a) shall maintain and update, not less than annually, and make available to the public a record of sites, by name and location, at which:

- ❖ response actions have been **completed** in the previous year;
- ❖ response actions are **planned** to be addressed the next year.



Inventory vs Public Record

The Brownfield Inventory is a Tribal list of all actual or potential brownfield sites.

The Public Record is only* a list of sites that have been cleaned up last year or will be cleaned up next year and institutional controls in place.

**Note: The Tribe can include additional information in the Public Record if they choose to do so such as sites assessed or to be assessed.*



U.S. EPA Guidance

- ❖ Tribes that receive funding under section 128(a) must establish a Public Record system **during the first grant funding period** unless a Public Record system that meets the requirements is already established.
- ❖ Prior to funding a Tribe's annual work plan for subsequent years, EPA regional offices will **verify and document** that a Public Record, as required, exists and is being maintained.



U.S. EPA Guidance

The Public Record must include any response action (completed or planned) under the [oversight or jurisdiction of the Tribal Response Program](#) in the previous or coming year.

Note: This would include any third-party response action (completed or planned) under the oversight or jurisdiction of the Tribal Response Program. A third-party could include a private company or an individual



U.S. EPA Guidance

The Public Record is not required to include a response action conducted under Federal jurisdiction (i.e., LUST, Superfund, or DOD), however, EPA would strongly encourage listing of these actions as well as a means of informing the community of such actions.



Bottom Line

- ❖ Minimum EPA Requirement: include all response actions taken/planned under the Tribal Response Program
- ❖ Encouraged by EPA: include all response actions taken/planned, regardless of jurisdiction, on Tribal lands.



Public Record vs Element 3

The Public Record is a separate requirement from Element 3 for Public Participation. However, it can be a component of that Element.



U.S. EPA Goal & Funding

- ❖ EPA's goal is to enable Tribes to make the Public Record easily accessible.
- ❖ Section 128(a) funds may be used to establish and maintain and make available a Public Record system that meets these requirements.
- ❖ This includes making information available to the public on the internet or other means that ensures that the information is readily accessible to the public. (e.g., Website)



Public Record on the Internet

If a Tribe places the Public Record on the internet, maintains the substantive requirements of the Public Record, and provides EPA with the link to that site, EPA will, for purposes of cooperative agreement funding only, deem the Public Record reporting requirement met.



More than 1 Year?

- ❖ EPA encourages Tribes to maintain Public Record information, including data on institutional controls, on a long-term basis (more than one year) for sites at which a response action has been completed.
- ❖ Subject to EPA regional office approval, Tribes may include development and operation of systems that ensure long term maintenance of the Public Record in their work plans.



Contents of Public Record

The Public Record should only include the required information and facts, not full response/cleanup plans or reports. However, those documents can be referenced and made available for review separately.

Some related documents (work plans and reports) have been made available via web sites.

Note: Such documents & reports can be stored in the [Brownfields Inventory Tool \(BiT\)](#) with Tribal controls on access to the database.



Tribal Options

A Tribe may elect to use the Public Record to:

- ❖ Inform the public of all response actions within a Reservation, in the vicinity of the Tribal village or community; and/or
- ❖ Nearby response actions that could potentially impact the Tribal community health, environment and/or welfare (including the economy).



Other Information in the Public Record

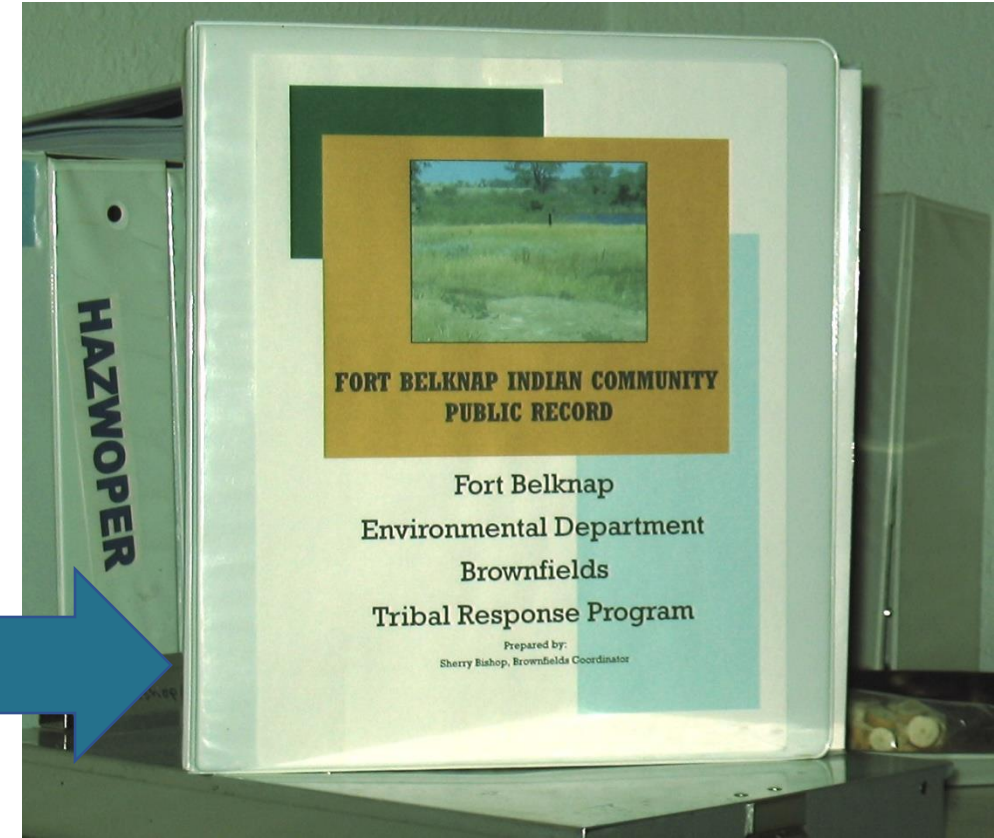
The process or media used for the Public Record may also be a mechanism to inform the community of related information or actions such as:

- ❖ Phase I or II Assessments planned or conducted
- ❖ Brownfield Inventory sites
- ❖ Related Inventories (open dumps, LUST, etc.)
- ❖ Informal “cleanups” such as community cleanups, school lab cleanups, open dump removals, etc.



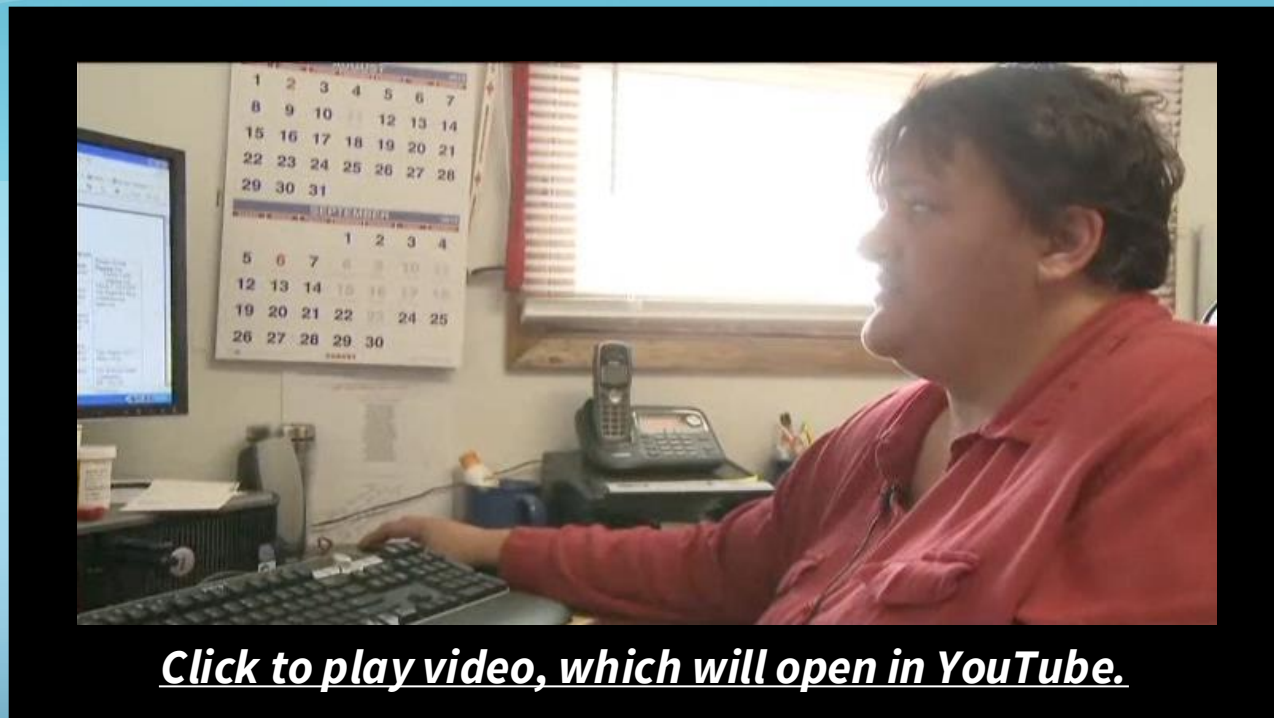


A pile of reports
is NOT a
Public Record.



Most Tribes have created a notebook or file designated as the “Public Record” with the required information that is available to the public at the Tribal environmental office, the Tribal government office, or other readily accessible public locations, such as a school or library.





Click to play video, which will open in YouTube.

Video 7.1: Public Record
Sherry Bishop
TRP Coordinator, Ft. Belknap Indian Community, MT

Tribal Implementation Issues

Some Tribes have not planned or completed a response action or cleanup yet under the 128(a) Program. This has made it difficult to “establish” the Public Record when the required information does not exist.

It can be difficult to manage community expectations when projecting cleanups for the coming year when a number of things can cause delays or even stop the project, such as:

- ❖ Funding delays
- ❖ Contracting delays
- ❖ Weather related delays
- ❖ Legal and/or federal enforcement issues
- ❖ Jurisdictional problems



Lessons Learned

- ❖ Do NOT put original copies of files or documents in the Public Record or out for public review. (They will disappear!)
- ❖ Make sure you know where all copies of the Public Record are located, if there is more than one, and update them all at the same time.
- ❖ If you put the Public Record on a website, be sure you know how to access and update the website information and, if necessary, funding is in place to do that.



Lessons Learned

- ❖ Ensure that all appropriate Tribal environmental program staff, including the director, are aware of the Public Record, its purpose, and where it's located.
- ❖ A proactive approach to providing clear, understandable information via the Public Record can prevent rumors and misconceptions by community members. (aka “alternative facts”)



Further Implementation

- ❖ Use a multi-media approach that will reach all of the community.
- ❖ Improve coordination with other cleanup authorities and other Tribal programs and the use of the Public Record as a means to inform the community of all response actions that have or will take place in, or in the vicinity of, their community.





Part 2

Institutional Controls (and Engineering Controls)

Institutional Controls

- ❖ Administrative and/or legal controls
- ❖ Help minimize the potential for human exposure to contamination on a site, or
- ❖ Protect the integrity of a response action (before, during, or after remediation)



Institutional Controls

- ❖ Tribes that receive 128(a) funding must establish a Public Record and identify in the Public Record whether or not the site, upon completion of the response action, will be suitable for unrestricted use.
- ❖ If not, the Public Records must identify the Institutional Controls relied upon in the remedy.



Why?

Governmental, Administrative, and/or Legal Controls and/or Conditions need to be placed upon the use of a property when remaining or residual contaminants may pose a hazard if they are disturbed or if the land use changes and that would cause unacceptable exposures or new releases.



Why are Contaminants Left on a Site?

Contaminants are left on a site when total cleanup is:

- ❖ too expensive or not feasible
- ❖ not necessary based upon planned land use
- ❖ complete cleanup would cause more environmental damage
- ❖ would damage historical or cultural sites
- ❖ not done (yet)



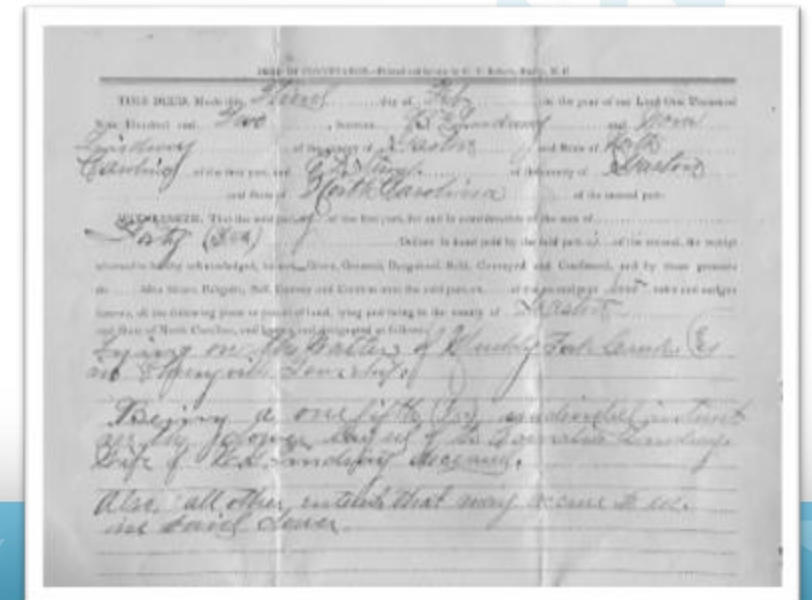
Who Implements Institutional Controls?

- ❖ Federal Agencies (BIA, BLM, NPS, etc.)
- ❖ Tribal Council
- ❖ Tribal Court
- ❖ Tribal Land/Real Estate Office
- ❖ Incorporated towns
- ❖ Other local non-Tribal government
- ❖ Property owner
- ❖ State



Examples of Institutional Controls

- ❖ Signs
- ❖ Notices in Deed
- ❖ BIA Title Status Reports (TSRs)
- ❖ General area land use restrictions
- ❖ Site specific land use restrictions
- ❖ Land use review and approval
- ❖ Lease Terms and Conditions
- ❖ Tribal Council Resolution



Fundable Activities

- ❖ EPA considers activities related to maintaining and monitoring institutional controls to be eligible costs under section 128(a).
- ❖ This may include installing, maintaining, and monitoring engineering controls necessary to implement and enforce the institutional controls such as: fencing, gates, earthen berms or other barriers, signage, boarding of buildings and monitoring equipment.





Click to play video, which will open in YouTube.

Video 7.2: Institutional Controls

Sherry Bishop

TRP Coordinator, Ft. Belknap Indian Community, MT

What Can Happen without Institutional Controls?

Tribal housing built new homes above a prior landfill (without any prior assessment) resulting in the abandonment & demolition of the homes.





Click to play video, which will open in YouTube.

Video 7.3: Institutional Controls

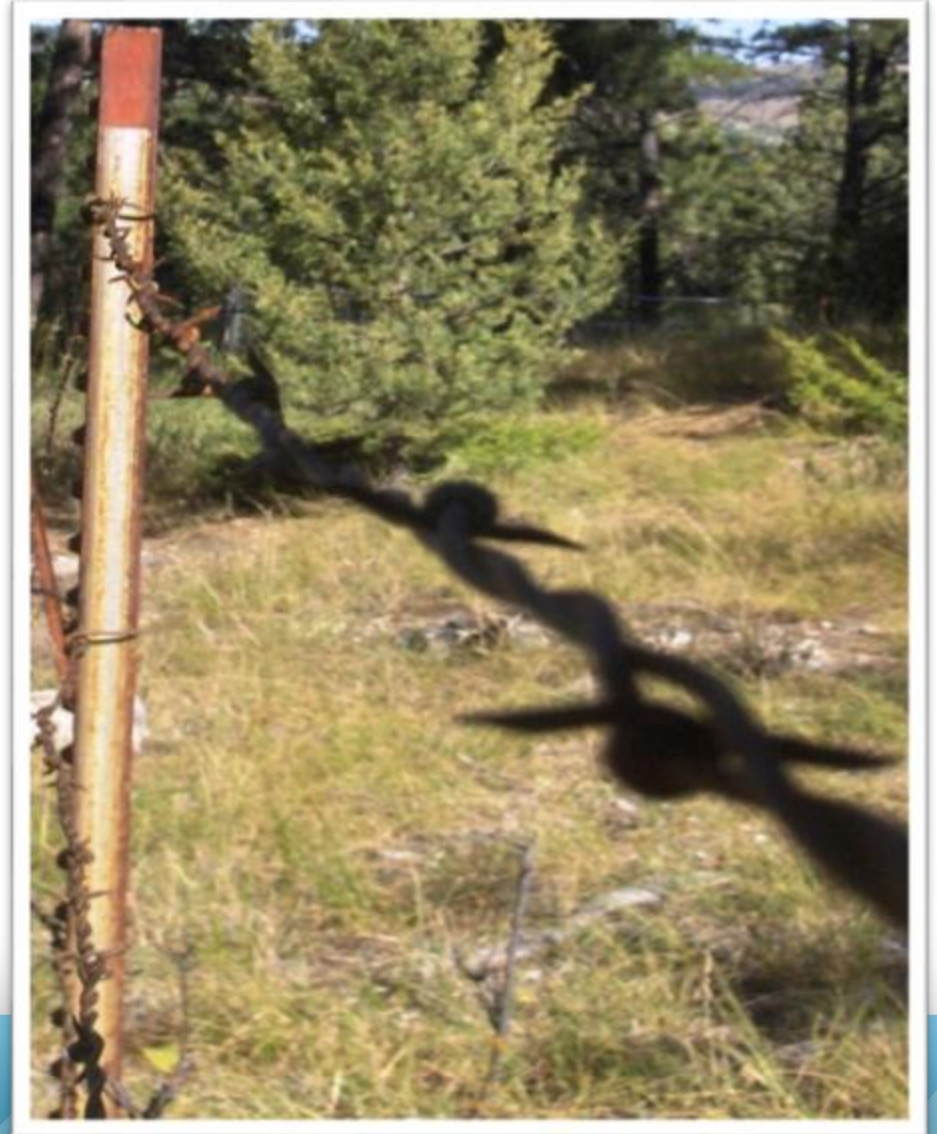
Ray Reed

Turtle Mountain Band of Chippewas, ND

Physical or Engineering Controls

Examples:

- ❖ Fence
- ❖ Ground water controls
- ❖ Surface water controls
- ❖ Area caps and covers (paving)
- ❖ Solidification
- ❖ Chemical treatment
- ❖ Vicious Dog!



Classic Failure of Institutional Controls

Love Canal, New York

Institutional controls at Love Canal were ignored by the developers and local government who built schools and housing on top of a Superfund site.

Institutional Controls must be monitored and enforced to be effective.



Tribal Examples of Institutional Controls

- ❖ Ft. Belknap, MT: Closed Landfills – signs and use restrictions
- ❖ Wind River Tribes, WY: DOE Radioactive Uranium Mine Tailings
- ❖ Remedial Action (UMTRA) Site: land use restrictions
- ❖ Keweenaw Bay Indian Community, MI: restricted access to a site by recreational vehicles to minimize damage to a cap over a contaminated area.
- ❖ Oglala Sioux Tribe, SD: Environmental Review Process before site use or construction.



Monitoring and Enforcement



Someone must monitor and enforce the controls



Signs are a form of institutional controls



Monitoring of Institutional Controls

- ❖ Inspections
- ❖ Pre-approvals of changes in land use
- ❖ Pre-approval for construction (*OST Env. Review includes TRP sign-off*)
- ❖ Notification of change in ownership
- ❖ Notification of change of lease
- ❖ Notification in change of BIA “land status”



Tribal Implementation Issues

- ❖ Very little precedent for institutional controls on Tribal lands by a Tribe therefore not many legal procedures developed
- ❖ Institutional controls must often be coordinated with multiple Tribal government departments and functions, as well as the BIA and other federal agencies such as BLM or the U.S. Forest Service.
- ❖ Authority, responsibility, and jurisdiction for enforcement and monitoring of institutional controls can be a problem.
- ❖ Few Reservations have zoning laws.
- ❖ Checker-boarding of land, and relevant jurisdictions, on Reservations can make effective controls difficult, especially when use of adjacent lands or waters can affect the contaminated area or water or vice versa.



Lessons Learned

- ❖ Land use and land use controls and zoning are an important developing issue in “Indian country”.
- ❖ The lack of land use or institutional controls had led to serious problems and impacts on the health of Tribal members and communities.
- ❖ Tribal Councils and attorneys generally need to be educated on the purpose of institutional controls and procedures to establish such Tribal controls adopted.



Further Implementation

- ❖ The sharing of Tribal legal research and implementation issues between Tribes is important.
- ❖ Coordination with BIA and other federal agencies will be important to include review of the BIA leases and processes and coordination with BIA Title Status Reports (TSRs).
- ❖ Efficient storage and accessibility of land records and leases is important.



Storing & Managing Documents & Data

The KSU TAB [Brownfield Inventory Tool \(BiT\)](#) is a comprehensive brownfield program management tool that can be used to compile and record data for the Public Record. You may enter detailed site data, upload documents and data, and generate and export a variety of reports, including a “Property Profile Form”.

[BiT](#) has restricted access controlled by the Tribe. [Contact the Tribal TAB team](#) for more information.



EPA Guidance

“A Citizen’s Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups”
OSWER 9255.0-98, EPA-540-R-04-004, February 2005

EPA's institutional controls web site at: [Superfund: Institutional Controls | US EPA](#)



We Would Like to Hear From You

Questions about this Module or need other
brownfields assistance?

Contact the Tribal TAB team at
Tribal-TAB@ksu.edu



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