

INDIAN AFFAIRS MANUAL

1.1 Purpose.

This chapter establishes the Indian Affairs (IA) policy, responsibilities, and requirements for programs and offices under the authority of the Assistant Secretary – Indian Affairs (AS-IA) to evaluate environmental risk prior to acquiring interests in real property or other administrative land transfers to Indian Affairs jurisdiction. This includes the potential to expose the Department of the Interior (Department) and IA to fiscal or legal liabilities and the associated potential costs of property cleanup and remediation related to the release or threatened release of hazardous substances (e.g., oil, or related petroleum products) and includes other environmental conditions potentially impacting property acquired by IA. In addition, this chapter:

- A. Sets IA policy when acquiring real property for the United States regarding the use of a Phase I Environmental Site Assessment (Phase I ESA) to satisfy the requirements for conducting all appropriate inquiries (AAI) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. §§ 9601, et seq.
- B. Sets IA policy regarding the use of the Limited Environmental Due Diligence: Transaction Screen Process (LEDD/TSP), (ASTM E1528 Standard Practice) in limited situations when acquiring real property by the Department for the United States.
- C. Describes steps to ensure informed decision-making and compliance with applicable laws, regulations, and standards for assessments prior to the acquisition of real property by IA.

1.2 Scope.

- A. This policy applies to programs and offices (IA Offices) under the authority of AS-IA, including the BIA Office of Trust Services, Division of Real Estate Services, Division of Environmental Services & Cultural Resources Management, and Office of Field Operations at the central, regional, agency, or field level involved in carrying out these programs, and to the Bureau of Indian Education.
- B. This policy applies to entities carrying out activities on behalf of IA under contracts or other agreements if expressly agreed to in the contracts or agreements, or if the requirement to abide by such policy is otherwise required by law. These entities may include contractors or Tribes operating through contracts issued pursuant to Public Law 93-638.
- C. This policy applies to all proposed discretionary acquisitions. This includes the following:

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1. Interests in real property to be acquired by IA from states, Tribes, individual owners, federal agencies, or other non-federal entities through acts or operations of law, condemnation, escheat, right-of-entry, land exchange, lapses, reversions, purchase, donation, leases, or transfers that will be under the jurisdiction or control of IA for any period of time, except as specified in paragraph 1.2 (E).
 2. Withdrawn public domain land being returned or reverted to the Department/IA's jurisdiction. The transaction should be treated as a land acquisition because the land might not be in the same condition as it was at the time of withdrawal.
 3. Transfers of administrative jurisdiction from other government agencies (e.g., real property acquired from the General Services Administration (GSA) or Department of Defense/U.S. Army Corps of Engineers, including Base Realignment and Closure properties; National Guard; U.S. Coast Guard; U.S. Department of Energy).
- D. It is the policy of IA to ensure compliance with all applicable real estate services' regulations, requirements, and standards, and to promote sustainable practices to carry out the mission of the Division of Real Estate Services.
- E. The policy in this chapter does not apply to the following:
1. Mandatory fee-to-trust and real property acquisitions. Under certain mandatory acquisition statutes, judicial decrees, and legislative transfers, the Secretary of the Interior (Secretary) has no discretion to refuse to acquire land regardless of the findings of any environmental analysis. Therefore, IA shall not require compliance with this policy as a precondition to processing and completing mandatory acquisitions. Nevertheless, it still is important for IA to understand any potential legal liabilities and any environmental hazards that might be present on the lands it must acquire. Accordingly, the IA Office must conduct a site investigation of conditions likely to affect Recognized Environmental Conditions (in connection with the subject property. However, acquisition is not conditioned upon the site investigation or the findings. In addition, the IA Office shall, to the maximum extent practicable, ensure that reports to Congress, comments on proposed legislation, congressional testimony, and responses pertaining to the acquisition of real property contain environmental site assessment information from a Phase I ESA or LEDD/TSP and estimates of remediation costs in order to inform total costs for any congressionally mandated acquisition of contaminated property.

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2. Leases for commercial real estate, GSA Occupancy Agreements, and agreements between IA and non-governmental entities for the use of buildings or structures. This exception does not apply to leases where there is reason to believe a building or structure has been used to store or handle hazardous substances, oil, or petroleum products, or where there is visible evidence of hazardous substances, oil, petroleum products.
3. Federal lands transferred through public benefit transfer programs where IA acquires an interest in real property solely as a pass-through entity.
4. Easements that do not convey authority or rights to participate in the management of the property (e.g., conservation or other negative easements) or do not otherwise create the potential for federal environmental liability.
5. Other less-than-fee property interests, such as access easements, water rights, or mineral rights, whose acquisition and reasonably expected future use will not expose IA to associated liabilities or potential remediation costs that would trigger the requirements of this chapter. The applicability of this exemption must be determined on a case-by-case basis in consultation with the Office of the Solicitor.
6. Non-scope environmental issues of concern for a broad array of environmental conditions that may be present on a property but are outside of the scope of releases of hazardous substances, oil, or petroleum products addressed by CERCLA or OPA.

1.3 Policy.

It is IA policy to minimize the exposure of IA to liabilities and potential remediation costs by avoiding the acquisition of real property that is determined to be contaminated, unless otherwise specifically directed by Congress, court mandate, or as determined by the Secretary or the Secretary's authorized representative as described in paragraph 1.13. In order to avoid unreasonable environmental liability for the Department and IA when acquiring real property, it is IA policy to:

- A. Preserve potential defenses to CERCLA and/or OPA liability when prudent and practicable by conducting AAI (see the definition in the paragraph 1.6 (A)), including by performing a Phase I ESA, with the exceptions identified within this chapter, which is one step in the requirements for AAI. Although 40 C.F.R. Part 312 does not, however, require the use of ASTM standards to meet AAI, it is IA policy that when conducting AAI, the IA Office must use the most current ASTM standards accepted by the EPA.

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- B. Ensure that costs for cleanup of hazardous substances, oil, petroleum products, or any other Recognized Environmental Conditions are properly estimated by qualified parties prior to acquisition or the applicant remediates the property prior to acquisition and completes an updated Phase I ESA after remediation is complete. The estimated costs of cleanup are disclosed in writing and provided to the responsible decisionmaker along with any appraisal report as part of the IA Office's overall evaluation of a proposed real property acquisition if remediation was not completed.
- C. To the extent practicable, the IA should attempt to limit its fiscal exposure to known or suspected releases of hazardous substances, oil, petroleum products, and other Recognized Environmental Conditions by consulting with Office of the Solicitor concerning site-specific legal protections in deeds and other real property transaction documents prior to acquisition of an interest in real property.
- D. Except as precluded by law or congressional action, prior to acquiring real property from another Federal agency, including the Department of Defense or its components, enter into written agreements, to the extent practicable, to document how compliance requirements will be met, and which party will be responsible for compliance requirements and potential future remediation efforts. In developing agreements for real property to be acquired from other Federal agencies, the agreement should provide that future property use is determined by IA and that the Federal agency transferring real property to agrees to clean up the property to accommodate such future property use prior to acquisition.
- E. Prohibit the use of the Central Hazardous Materials Funds (CHF) to conduct a Phase I ESA or LEDD/TSP, or to fund environmental compliance or cleanup work associated with property acquired after September 30, 1995, where the environmental contamination was, or reasonably could have been, identified prior to acquisition.

1.4 Authority.

A. Statutes and Regulations.

1. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. §§ 9601, et seq.
2. Oil Pollution Act (OPA), as amended, 33 U.S.C. §§ 2701, et seq.
3. Innocent Landowners, Standards for Conducting All Appropriate Inquiries (AAI), 40 C.F.R. Part 312.

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4. Oil Spill Liability: Standards for Conducting All Appropriate Inquiries Under the Innocent Landowner Defense, 33 C.F.R. Part 137. To the extent IA Offices are seeking to establish liability protections under OPA, they should follow the requirements of 33 C.F.R. Part 137, but they should not use the standard described in 33 C.F.R. § 137.20 to comply with those requirements. Instead, IA Offices should use one of the standards described in the current version of 40 C.F.R. § 312.11.
5. ASTM E1527 and E2247. IA Offices shall use the most current ASTM E1527 (for commercial real estate), or ASTM E2247 (for forestland or rural property) standards accepted by the EPA to meet the substantive requirements of 40 C.F.R. Part 312.
6. ASTM E1528. This standard offers guidance accepted by the Department and IA for conducting Limited Environmental Due Diligence: Transaction Screen Process (LEDD/TSP). To the extent IA Offices use the ASTM standard to perform an LEDD/TSP, it should use the most current version of ASTM E1528.

1.5 Responsibilities.

A. Assistant Secretary – Indian Affairs (AS-IA).

Provides policy oversight for acquisition of real property by IA Offices. Makes decisions on all recommendations to acquire real property that could result in IA incurring associated liabilities or potential remediation costs exceeding \$500,000.

B. Director, Bureau of Indian Affairs (Director).

1. Oversees real property acquisition and development of guidance and instructions to implement the policy requirements of this chapter. The Director must ensure that a Phase I ESA or LEDD/TSP is performed in accordance with the requirements of this chapter and must exercise due diligence in limiting any associated liabilities and potential costs of remediation to IA. The Director is responsible for approval of remediation expenditures under his or her jurisdiction and, within their scope of authority, must ensure adequate program support (i.e., resources and budget) to fulfill the requirements of this chapter.
2. If anticipated remediation expenditures total \$500,000 or less, the Director is responsible for review and approval of expenditures for acquisition, and subsequent approval by AS-IA is not necessary. If anticipated remediation expenditures total \$250,000 or less, the Director may redelegate this approval authority in writing to a Regional Director.

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3. Is responsible for ensuring that appropriate organizational arrangements, resources, and personnel are available to implement and maintain the Office of Trust Service programs. The Director serves as the Senior Accountable Official for the trust program and has primary responsibility for implementing and executing BIA programs in accordance with statute, regulation, and Departmental policy. The Director oversees the Division of Real Estate Services program to maintain working relationships and approving agreements with other federal agencies and negotiating with Tribes and Tribal organizations to determine areas of concern and to address conflicts.

C. Regional Director.

1. Serves as the Senior Accountable Official responsible for providing regional guidance and ensuring implementation of policy for the Division of Real Estate Services program, acting on any approval or disapproval as delegated under 3 IAM 4. The Regional Director also addresses appeals from decisions made by Agency Superintendents.
2. The Regional Director may determine, upon recommendation of the Environmental Professional, not to conduct a Phase I ESA that meets AAI requirements and instead to proceed with LEDD/TSP. An LEDD/TSP will not preserve certain liability protection defenses to CERCLA and/or OPA liability and may not establish a comprehensive assessment of the property's baseline environmental conditions. This decision may not be delegated below the Regional Director level.
3. The Regional Director may determine, upon recommendation of the Environmental Professional, that in situations where landowner liability protections are not sought under the AAI regulations, the IA Office may use the conclusions of a Phase I ESA that has not been updated within 180-days for decision-making purposes as identified in paragraphs 1.8 (C)(2) and (3)

D. Agency Superintendent.

Responsible for managing and ensuring their respective organizations' Division of Real Estate Services program activities comply with all applicable statutory, regulatory, and policy requirements. Assigns and organizes BIA agency staff and resources to fulfill agency responsibilities, and serves as Approving Official as delegated by the Regional Director.

E. Deputy Bureau Director, Office of Trust Service.

1. Receives notification of decisions made by the Regional Director to not seek

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landowner liability protection. Provides oversight of BIA land acquisitions.

2. Is responsible for ensuring that statutory and regulatory timetables are met and that guidance is available to BIA regional and agency staff tasked with real estate services activities associated with management and protection of trust and restricted lands. The Deputy Bureau Director is also responsible for providing oversight of the DRES program activities with other Office of Trust Service programs, the BIA field offices, and supporting program budget and staffing.

F. Division Chief, Division of Real Estate Services, Office of Trust Service.

Responsible for implementing overall guidance, developing and monitoring policies, standards, and procedures for the Division of Real Estate Services program, including establishing Realty program policies and standards to comply with statutory and regulatory requirements; day-to-day oversight of the Realty program; ensuring that technical assistance and training is provide to BIA regions as needed; conducting program reviews; and managing BIA's federal reporting requirements as they relate to the Realty program.

G. Director, Office of Environmental Policy and Compliance (OEPC).

The OEPC assists IA in interpreting and implementing the requirements of this chapter. In addition, OEPC may provide and revise additional guidance on land acquisition (e.g., environmental compliance memoranda). The OEPC is also responsible for informing IA of updates to ASTM standards consistent with the EPA's AAI regulations.

H. Office of the Solicitor (SOL).

Provides legal review and guidance for proposed real property acquisition including, but not limited to, providing advice with respect to potential legal enforcement by third parties and evaluating whether the Department's defenses for liability under CERCLA or OPA should be or have been adequately preserved. SOL provides legal review and guidance to structure the instrument for land acquisition, whether it is a deed, statute, or interagency agreement, to minimize, whenever possible and appropriate, the Department's and IA's exposure to associated liabilities and potential costs of remediation. IA Offices must consult with SOL concerning the applicability of the policy and requirements in this chapter to site-specific acquisitions and language in specific agreements (e.g., easements, environmental covenants, deed restrictions, indemnity agreements, and other interests), as well as language of specific withdrawal agreements identified in paragraph 1.2 (C)(2) in

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which liability could arise. Acquisitions that require AS-IA approval, must be coordinated with SOL.

1.6 Definitions

- A. All Appropriate Inquiries (AAI). That inquiry constituting all appropriate inquiries into the previous ownership and uses of the subject property consistent with good commercial and customary standards and practices, as defined in sections 101(35) (B)(i) and 101(40) (B) of CERCLA, 40 C.F.R. Part 312, and 33 C.F.R. Part 137 that will qualify the IA Office for one of the threshold criteria for satisfying landowner liability protections pursuant to CERCLA and/or OPA liability, assuming compliance with other elements of the defense.
- B. Bona Fide Prospective Purchaser. A person (or tenant of a person) who acquires ownership of a facility after January 11, 2002, and establishes by a preponderance of the evidence each of the requirements set forth in CERCLA 101(40) and applicable regulations by conducting AAI on or before the date of purchase. All bona fide prospective purchasers must conduct AAI into previous ownerships and uses of the facility in accordance with generally accepted good commercial and customary standards and practices.
- C. Environmental Professional. A person with specific education, training, and experience as set forth in 40 C.F.R. § 312.10(b) and 33 C.F.R. § 137.25.
- D. Hazardous Substance. A substance as defined in CERCLA § 101(14).
- E. Landowner Liability Protections. A defense to CERCLA and/or OPA liability available for the landowner who qualifies for and meets certain statutory criteria to preserve defenses under CERCLA for “bona fide prospective purchaser” liability protection, contiguous property owner liability protection, or innocent landowner defense under 42 U.S.C. §§ 9601(35)(A), 9601(40), 9607(q), and 9607(r) including, but not limited to, conducting All Appropriate Inquiries (AAI). For OPA, the liability protections pertain to the operator of a facility who qualifies for and meets certain statutory criteria to preserve defenses for innocent landowner defense to liability under 33 U.S.C. § 2703 (d)(4) of OPA.
- F. Limited Environmental Due Diligence: Transaction Screen Process (LEDD/TSP). An evaluation conducted prior to land acquisition, to identify “Potential Environmental Concerns.” Such analysis determines the potential of, and extent of liability for oil and hazardous substances or other environmental remediation. This includes, but is not limited to, a determination of the absence or presence of oil and hazardous substances or conditions that indicate an existing or past release, or a material threat of a release on the real property, into the air, soil, sediment,

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groundwater, surface water or any structures located on the real property. The standards can be found in ASTM standard E1528; however, completion of this evaluation will not meet the standards for a Phase I ESA for landowner liability protection from CERCLA or OPA.

- G. Occupancy Agreement. The formal written agreement between GSA and the IA Office defining the financial terms and conditions for the occupancy of GSA-provided space.
- H. Oil. As defined in 33 U.S.C. § 2701 (23) of OPA, oil means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredge spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) section 101(14) of CERCLA and which is subject to the provisions of that Act.
- I. Petroleum products. Those substances included within the meaning of the petroleum exclusion to CERCLA, 42 U.S.C. § 9601(14), as interpreted by the courts and EPA, that is: petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under 42 U.S.C. § 9601(14)(A-F), natural gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). The word fraction refers to certain distillates of crude oil, including gasoline, kerosene, diesel oil, jet fuels, and fuel oil, pursuant to Standard Definitions of Petroleum Statistics.
- J. Phase I Environmental Site Assessment (Phase I ESA). A pre-acquisition evaluation of real property that identifies Recognized Environmental Conditions and other environmental issues of concern. A Phase I ESA is used by IA Offices to assist in identifying and evaluating associated liabilities; evaluating potential costs of remediation; and evaluating the total cost of acquisition inclusive of environmental issues of concern, associated liabilities, and potential costs of remediation. The Phase I ESA must comply with all AAI requirements set forth in 40 C.F.R. Part 312 and 33 C.F.R. Part 137 and ASTM standards E1527 (for commercial real property) or E2247 (for forestland or rural property).
- K. Potential Environmental Concerns. As defined in ASTM standard E1528 (LEDD/TSP): The possible presence of any hazardous substances or petroleum products on a property under conditions that indicate the possibility of an existing release, a past release, or a threat of a future release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water, or surface water of the property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws. Note that “threat of release” is generally understood to be present when hazardous substances or petroleum products are poorly managed (for example in corroded tanks or

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damaged containers), but the release of the contaminants has not yet occurred, and there is an opportunity to take response action to prevent a release of the contaminants.

- L. Real Property. Land or interests in land, including easements, and any improvements thereon (e.g., roads, buildings, and other structures, including installed permanent features).
- M. Recognized Environmental Conditions (RECs). (1) the presence of hazardous substances or petroleum products in, on, or at the subject property due to a release to the environment; (2) the likely presence of hazardous substances or petroleum products in, on, or at the subject property due to a release or likely release to the environment; or (3) the presence of hazardous substances or petroleum products in, on, or at the subject property under conditions that pose a material threat of a future release to the environment. A de minimis condition is not a Recognized Environmental Condition.
- N. Release. As defined in CERCLA 101(22), any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance, oil, petroleum product, or pollutant or contaminant into the environment, including the abandonment or discarding of any barrels, containers, or other closed receptacles containing a hazardous substance, oil, petroleum product, or pollutant or contaminant.
- O. User. The party seeking to complete a Phase I ESA of the subject property or conducting AAI to seek to qualify for landowner liability protections to CERCLA or OPA liability.

1.7 Standards, Requirements, and Procedures.

- A. The responsibilities and functions prescribed in this chapter are intended to ensure that the IA Office, prior to the acquisition of real property, determine the associated liabilities and potential remediation costs that could result from the presence, extent and/or release of hazardous substances, oil, or petroleum products. Such determinations must be considered in any decision to acquire real property and must be considered when establishing the total cost of acquisition. The IA Office must use either a Phase I ESA or LEDD/TSP, to identify the presence or potential presence of Recognized Environmental Conditions or Potential Environmental Concerns, as applicable, as well as the associated liabilities and potential costs to remedy contamination. This provides the IA Office with valuable information on the property's baseline environmental conditions at the time of acquisition, including the liabilities and potential remediation costs and allows for an evaluation of the true costs of a proposed acquisition.

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- B. Before taking title to real property, except as specified in paragraph 1.2 (E), and in accordance with applicable regulations and/or guidance, the IA Office must either:
1. Complete a Phase I ESA in compliance with 40 C.F.R. Part 312 and/or 33 C.F.R. Part 137, as applicable, to preserve certain defenses to CERCLA and/or OPA, as well as to understand baseline environmental conditions that a Phase I ESA would identify; or
 2. Under limited circumstances, complete an LEDD/TSP in place of a Phase I ESA in accordance with the most recent version of ASTM standard E1528. The Regional Director may determine, upon recommendation of the Environmental Professional, whether to use an LEDD/TSP where the land is comprised of native prairie or lands not previously disturbed and that have had no historic or current infrastructure development. The Environmental Professional must conduct a site investigation of conditions likely to affect Recognized Environmental Conditions in connection with the subject property. The use of aerial imagery/USGS topographic maps can be used for verification of past property usage. The LEDD/TSP cannot be used when IA Office is seeking to preserve defenses to liability under CERCLA and/or OPA.
- C. IA may establish, in consultation with SOL, additional real property pre-acquisition assessment procedures to meet its needs, including developing criteria for when not to seek landowner liability protection from CERCLA and/or OPA. These procedures could assist in defining the objectives of the IA Office's comprehensive environmental assessment (e.g., evaluate total cost of acquisition inclusive of potential costs of remediation, determine associated liabilities, identify Recognized Environmental Conditions or Potential Environmental Concerns, and ascertain potentially responsible parties). This may include liability indemnification agreements.
- D. The IA Office is responsible for ensuring that the Phase I ESA or LEDD/TSP is complete in terms of technical accuracy and comprehensiveness. This applies to reports performed by an IA employee or a contractor.

1.8 Phase I Requirements.

- A. Unless it is otherwise determined by the Regional Director upon recommendation from the Environmental Professional, to conduct an LEDD/TSP, as set forth in paragraph 1.5 (C)(2), the applicant or IA Office shall complete a Phase I ESA in compliance with the applicable requirements of CERCLA, OPA, and the AAI regulations (40 C.F.R. Part 312 and 33 C.F.R. Part 137). The ASTM standards specified in paragraph 1.4 (A)(5) may be used to satisfy the AAI requirements.

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- B. Review of Contractor Work Product. Any Phase I ESA completed by a contractor on behalf of the applicant or IA Office, must be completed under the review and oversight of the IA Office. The IA Office may approve the Phase I ESA only after a qualified individual, as designated by IA, determines that it complies with applicable statutory and regulatory standards. Note that the Phase I ESA itself must be conducted by an Environmental Professional as specified in paragraph 1.8 (F) below.
- C. Time Requirements. A Phase I ESA must be completed prior to taking title to the subject property, and in accordance with the following standards:
1. To ensure landowner liability protections for IA, as required by the AAI regulations (40 C.F.R. § 312.20 and 33 C.F.R. § 137.33), a Phase I ESA must be completed no more than one year prior to the date of acquisition. The date of the report generally does not represent the date the individual components of AAI were completed and should not be used when evaluating compliance with the 180-day or one-year AAI requirements. For more details on timing requirements, see 40 C.F.R. § 312.20 and 33 C.F.R. § 137.33. The following specific components of the Phase I ESA must be completed or updated no more than 180 days prior to the date of acquisition:
 - a. Interviews with past and present owners, operators, and occupants.
 - b. Searches for recorded environmental cleanup liens.
 - c. Government records reviews.
 - d. Visual inspections of the site and adjoining properties.
 - e. The declaration by an Environmental Professional that all appropriate inquiries into the previous ownership and uses of the property have been conducted.
 2. In situations where landowner liability protections are not sought under the AAI regulations, the IA Office may use the conclusions of a Phase I ESA that has not been updated within 180-days for decision-making purposes for 30 months when:
 - a. The property is composed of native prairie, agricultural land, or undisturbed ground with no structures or commercial business operations that produce, store, or include uses related to petroleum products, hazardous substances, or any product that could produce environmental

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- harm if released on the land, in groundwater, or in surrounding bodies of water;
- b. When the Phase I ESA does not identify Recognized Environmental Conditions; and
 - c. The applicant proposes no change in land use, construction activities, or ground disturbance.
 - d. If after 30 months no final decision has been made to acquire the property, the IA Office or applicant must update the Phase I ESA pursuant to 40 C.F.R. Part 312.
3. In situations where landowner liability protections are not sought under the AAI regulations, the IA Office may use the conclusions of a Phase I ESA that has not been updated within 180-days for decision-making purposes for 18 months when:
- e. The property is rural in nature and contains no structures or non-commercial operations such as home sites, residential subdivisions, residential storage buildings, and other uses that are not structures or commercial business operations that produce, store, or include uses related to petroleum products, hazardous substances, or any product that could produce environmental harm if released on the land, in groundwater, or in surrounding bodies of water;
 - f. When the Phase I ESA does not identify Recognized Environmental Conditions; and
 - g. The applicant proposes no change in land use or construction.
 - h. If after 18 months, no final decision has been made to acquire the property, the IA Office or applicant must update the Phase I pursuant to 40 C.F.R. Part 312 before acquiring an interest in the property.
- D. Visual Inspections. Provided that other requirements in 40 C.F.R. § 312.27 and 33 C.F.R. § 137.65 are met, an exception to the on-site visual inspection of a property may be granted in unusual circumstances where it cannot be performed because of physical limitations, remote and inaccessible location, or other inability to obtain access to the property after good faith efforts. If an on-site visual inspection cannot be conducted, the requirement to conduct such an inspection of the subject property can be satisfied using other methods, including the use of aerial photography, aerial imagery, and/or aerial flyover or by viewing the subject property from the nearest

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accessible vantage point (as detailed in standard ASTM E2247; Phase I ESA for forestland or rural properties).

E. Prior Assessments.

1. A prior Phase I ESA may be used if (a) it is reviewed and found to comply with the AAI regulations, (40 C.F.R. Part 312 and 33 C.F.R. Part 137), (b) the information accurately reflects the current conditions of the property, and (c) the prior Phase I ESA must be completed no more than one year prior to the date of acquisition, and the components of the assessment identified in paragraph 1.8 (C)(1) must be completed or updated no more than 180 days prior to acquisition. A prior Phase I may not be used without current investigation of conditions likely to affect Recognized Environmental Conditions in connection with the subject property. Note that The Regional Director may determine, upon recommendation of the Environmental Professional, that in situations where landowner liability protections are not sought under the AAI regulations, the IA Office may use the conclusions of a Phase I ESA that has not been updated within 180-days for decision-making purposes as identified in paragraphs 1.8 (C)(2) and (3).
2. Additional tasks may be necessary to document conditions that may have changed materially since the prior ESA was conducted. If all of the Phase I ESA requirements are not met by the prior ESA report, whether it was conducted by the IA Office, an outside party, or an IA-contracted party, the IA Office must complete a new Phase I ESA addressing any missing information or data gaps and ensure that all applicable ESA requirements are met prior to the acquisition. If the IA Office intends to rely on a prior Phase I ESA to satisfy AAI, it must be listed as a “user” or must confer with SOL prior to acquisition to ensure that any contractual and legal obligations as the “user” of a prior Phase I ESA are met. Any prior assessment conducted by outside parties (including a Phase I ESA or LEDD/TSP) should be considered as a part of the “User Provided Information” and “Records Review” section of the final Phase I ESA report.

- F. Environmental Professional. The AAI regulations (40 C.F.R. Part 312 and 33 C.F.R. Part 137) require that AAI investigations, of which Phase I ESA is a critical component, must be conducted or supervised by an Environmental Professional that meets specific education, training, and experience as set forth in 40 C.F.R. § 312.10(b) and 33 C.F.R. § 137.25. Pursuant to 40 C.F.R. § 312.10(b)(5) and 33 C.F.R. § 137.25(a)(4), a person who does not qualify as an Environmental Professional may assist in conducting a Phase I ESA if such person is under the

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supervision or responsible charge of an Environmental Professional when conducting such activities.

- G. Certification program. IA may develop its own certification program for Environmental Professionals. At a minimum, the IA Office must determine what constitutes “relevant experience” in accordance with 40 C.F.R. § 312.10(b) and 33 C.F.R. § 137.25 and determine whether their personnel are Environmental Professionals. This may include using an IA training program to facilitate meeting these requirements or relevant courses provided by other agencies or bureaus/offices.
- H. IA Office as “User.” The IA Office must be identified as a “user” of the Phase I ESA report.

1.9 LEDD/TSP Requirements.

- A. The Regional Director may determine, upon recommendation of the Environmental Professional, to use an LEDD/TSP in accordance with the most recent version of ASTM standard E1528. Whether the LEDD/TSP is performed by an IA employee or by a contractor, the IA Office is responsible for ensuring that the LEDD/TSP is complete in terms of technical accuracy and comprehensiveness in order to ascertain whether Potential Environmental Concerns exist that could expose the Department or IA to associated liabilities or potential costs of remediation.
- B. The LEDD/TSP must be conducted or supervised by a qualified individual, as determined by IA. This person does not need to be classified as an Environmental Professional, as that term is defined in the AAI regulations and the definition in paragraph 1.6 (C).
- C. Prior to taking title to the subject property, the LEDD/TSP must be completed, and approval given in accordance with paragraphs 1.10 and 1.13.
- D. Prior assessments may be used if the prior assessment is reviewed and found comply with this policy and there have been no material changes at the subject property since the prior assessment was conducted that could affect Potential Environmental Concerns. If all the requirements of the standards in the most recent version of ASTM E1528 are not met, the applicant or IA Office should complete a new assessment.

1.10 Finalizing a Phase I ESA or LEDD/TSP.

- A. The IA Office must incorporate the Phase I ESA or LEDD/TSP results and the associated liabilities and potential costs of remediation in its evaluation of the

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estimated total cost of the acquisition, unless the applicant remediates the property, and the IA Office or applicant performs an additional Phase I ESA. This information must be provided as part of the acquisition approval process addressed in paragraph 1.13 below.

- B. If evidence is found during the initial Phase I or LEDD/TSP that indicates environmental contamination could be present on the land, the IA Office may require that the applicant complete additional analysis to determine the potential cost of remediation (e.g., ASTM standard E1903 for Environmental Site Assessments: Phase II), unless a reasonable cost estimate can be ascertained by other means. Such additional analysis is not intended to fully characterize the nature and extent of contamination or assess the associated risks, (e.g., site characterization as part of an Engineering Evaluation/Cost Analysis or a Remedial Investigation/Feasibility Study), but only to gather sufficient information to enable the IA Office to reasonably estimate the cost of addressing the conditions identified in the Phase I ESA or LEDD/TSP. The results of the additional analysis must be incorporated into the Phase I or LEDD/TSP prior to acquisition. It is recommended, that the applicant consult with the IA Environmental Professional regarding the scope and extent of the Phase II ESA before proceeding to ensure the data collected will satisfy all needed requirements.
- C. Evaluation of Potentially Responsible Parties: The IA Office should coordinate with SOL to identify any information on known potentially responsible parties for the purpose of confirming there is no affiliation between the IA Office and the potentially responsible party for purposes of developing landholder liability protections.

1.11 Funding.

The IA Office reviewing an acquisition of property may provide funds or resources if the applicant is unable to conduct a Phase I ESA or LEDD/TSP and/or complete any further investigation of contaminated real property proposed to be acquired, including the identification and evaluation of cleanup alternatives. The IA Office may not obtain funding for a Phase I ESA or LEDD/TSP from the Department's Central Hazardous Materials Fund (CHF). The CHF also will not be used to fund remediation work associated with property acquired after September 30, 1995, where the environmental contamination was, or reasonably could have been, identified prior to acquisition.

1.12 Acquisition.

Following the preparation of the Phase I ESA or LEDD/TSP report, including the determination of any associated liabilities and potential costs of remediation, IA may acquire the real property, provided one of the following conditions exists:

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- A. There is no evidence of releases or threatened releases of hazardous substances, oil, or petroleum products, nor is there evidence of Potential Environmental Concerns.
- B. The pre-acquisition proposal, which would include the findings of a Phase I ESA or LEDD/TSP and any calculated liabilities and potential costs of remediation associated with the acquisition, is approved in accordance with paragraph 1.13 below.

1.13 Acquisition Approvals.

Approval, as described in this paragraph, is required for all real property acquisitions whenever the Phase I ESA identifies a REC(s) or an LEDD/TSP identifies a Potential Environmental Concern or the acquisition could otherwise result in associated liabilities or potential costs of remediation to the Department or IA. Where applicable, a formal estimate of the costs of remediation alternatives, taking into consideration reasonable future-use assumptions, should be included as part of the request for approval.

- A. IA may acquire an interest in real property with Recognized Environmental Conditions or Potential Environmental Concerns upon receipt of the following levels of approval:
 - 1. If there is evidence of a release or threatened release of hazardous substances, oil, or petroleum products, or any identified Recognized Environmental Conditions, and associated liabilities and potential costs of remediation are estimated to exceed \$500,000, the acquisition must be approved by AS-IA, after the IA Office consults with the SOL.
 - 2. If there is evidence of a release or threatened release of hazardous substances, oil, or petroleum products, and associated liabilities and potential costs of remediation are estimated to be \$500,000 or less, the Director may approve the acquisition after consulting with SOL. The Director may re-delegate this approval authority in writing to the Regional Director for acquisitions for which associated liabilities and potential costs of remediation total \$250,000 or less. The Regional Director must also consult with SOL prior to approving the acquisition and may not re-delegate this authority.
- B. Requests for approval pursuant to this section must provide detailed information on the benefits of the acquisition relative to the total cost, including the fair market value of the property; the estimated costs of acquisition, including associated liabilities and potential costs of remediation to address hazardous substances, oil, or petroleum products.; and any other known or reasonably estimated monetary costs or damages that are expected to be associated with the acquisition.

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- C. The AS-IA, in consultation with SOL as appropriate, may impose additional limitations on, or requirements for, acquisitions that are necessary to protect the interests of the Department or IA.
- D. If the IA Office determines it is appropriate, the existence of any Recognized Environmental Conditions or Potential Environmental Concerns found prior to the transfer, as well as the associated liabilities and potential costs of remediation should be documented during the transfer of property. This documentation should identify whether the party transferring the property, or some other potentially responsible party, will be responsible for addressing the associated liabilities and potential costs of remediation, in whole or in part. The IA Office should work closely with SOL early in the acquisition process to determine if liability protections such as environmental covenants, indemnity agreements, or other environmental cleanup agreements should be negotiated with the seller prior to the United States taking title to the property, or if the seller can address Recognized Environmental Conditions or Potential Environmental Concerns prior to the transfer. In the case of a transfer from another Federal agency, AS-IA should negotiate an agreement with the transferring agency, prior to the transfer of administrative jurisdiction, assigning responsibility for the funding and performance of any activities necessary to address Recognized Environmental Conditions or Potential Environmental Concerns.

1.14 Environmental and Disposal Liabilities.

Environmental liabilities are subject to the Federal Accounting Standards Advisory Board's Statement of Federal Financial Accounting Standard (SFFAS) Number 5, Accounting for Liabilities of the Federal Government. If IA acquires real property with associated liabilities and potential costs of remediation, the IA Office must coordinate with its environmental office to determine whether the subject property should be listed on the EDL database.

1.15 Records Retention.

The IA Office must maintain documentation of the process and the findings of the Phase I ESA or LEDD/TSP. The IA Office must retain these records as part of the acquisition case file and real property record as long as the Department and IA manage and retain ownership of the real property. After the Department and IA no longer manage or retain the real property, the IA Office must transfer eligible permanent records to the National Archives of the United States for appropriate retention, in accordance with 36 C.F.R. § 1235 and OCIO RMP 2021-05: "Transferring Records Between Organizations."

1.16 Reprogramming.

Any reprogramming proposal should be submitted according to established Departmental

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reprogramming procedures.

Approval

Bryan Mercier
Director, Bureau of Indian Affairs

Date