

United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response



DIRECTIVE NUMBER:	9610.9
TITLE:	Interim Guidance On Conducting Federal- Lead, Underground Storage Tank Corrective Actions For Petroleum Releases On Indian Lands
DATE:	July 31, 1989
ORIGINATING OFFICE:	OSWER

OSWER	OSWER	OSWER
DIRECTIVE	DIRECTIVE	DIRECTIVE

Table of Contents

TRANSMITTAL MEMO	1
1.0 INTRODUCTION	3
1.1 Purpose.....	3
1.2 Background.....	3
1.3 Policy	3
2.0 CRITERIA FOR FEDERAL-LEAD RESPONSE.....	5
3.0 DELEGATIONS.....	5
4.0 APPROVAL PROCESS	6
4.1 Oral Request.....	6
4.2 Written Request	6
5.0 ENFORCEMENT ACTIONS.....	7
6.0 INITIATING AND MANAGING FEDERAL-LEAD LUST CORRECTIVE ACTION	7
APPENDIX A: ORAL REQUEST INFORMATION	A-1
APPENDIX B: ACTION MEMORANDUM.....	B-1

JUN 31, 1989

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: OSWER Directive 9610.9: Final Interim Guidance for
Conducting Federal-Lead UST Corrective Actions on Indian
Lands

FROM: Ron Brand, Director
Office of Underground Storage Tanks

TO: Hazardous Waste Division Directors, Regions 1-3, 5-9
Water Division Directors, Regions 4 and 10
Superfund Branch Chiefs, Regions 1-10
OHM Coordinators, Regions 1-10
Timothy Fields Jr., Emergency Response Division,
OERR (WH-548B)
Lisa Friedman, Office of General Counsel (LE-132S)

Attached is a copy of the final "Interim Guidance Conducting Federal-Lead Underground Storage Tank Corrective Actions For Petroleum Releases on Indian Lands." The guidance discusses the procedures and documentation that are necessary for approving and carrying out Federal responses to UST releases on Indian Lands. This document supplements guidance on Federal-lead corrective actions for States (OSWER Directive 9360.0-16A), which does not address Indian Land releases.

In developing this guidance, the legal situation of Indian Lands and the limited capabilities of Indian Tribal authorities for undertaking or overseeing corrective actions was taken into consideration. Based on these considerations, this guidance gives EPA the flexibility to respond to types of releases not covered under the guidance for Federal-lead corrective actions in States.

The guidance incorporates comments made to the draft document. Changes to the draft include:

- The reference in the draft to a "limited" number of releases has been deleted and the final guidance specifies that the extent of the LUST problem on Indian Lands will be determined through the on-going pilot project and other information gathering efforts.
- The final guidance specifies that Regional attorneys and circuit riders, if applicable, should assist in gathering information necessary to make a written request for a Federal-lead corrective action.
- The final guidance also specifies that EPA's goal is to

encourage Indian Tribes to undertake RP searches and negotiations to secure owner or operator action, and that EPA will work cooperatively to achieve compliance.

A major concern of several of the commenters was that the guidance was limited to short-term corrective actions. Because of our lack of knowledge on the extent of the problem on Indian Lands and of the ability of Indian Tribal authorities to undertake or oversee long-term corrective actions, the final guidance is still limited to "time-critical" responses to Indian Lands (i.e., releases that may require response within six months). Long-term corrective actions will be addressed on a site-by-site basis. Guidance for long-term corrective actions will be issued when the extent of the problem on Indian Lands is more fully understood, and when more information on the Capability of Indian Tribal authorities to undertake or oversee corrective actions is available.

Implementing an effective, efficient clean-up program on Indian Lands is a necessary component of the national LUST program. This guidance is a first step in an on-going efforts to implement such a program. If you have any questions concerning this guidance, please contact Mark Waiwada on FTS-475-9727.

cc: UST Regional Program Managers
UST Regional Attorneys
John Riley, ERD (WH-548B)
Bruce Englebert, ERD (WH-548B)
Betty Zeller, ERD (WH-548B)
Kirsten Engel, OGC (LE-132S)
OUST Management Team and Desk Officers

1.0 INTRODUCTION

1.1 Purpose

This guidance document is designed to provide direction to On–Scene Coordinators, Underground Storage Tank (UST) Regional Program Managers, and other Regional personnel for the initiation and coordination of Federal–lead corrective actions on Indian Lands in response to petroleum from UST systems. The guidance discusses the procedures to be followed, including how to determine whether Federal–lead corrective action is justified, and what documentation is necessary for undertaking Federal–lead UST corrective actions on Indian Lands.

This interim document supplements the guidance for conducting Federal–lead UST corrective actions for States (OSWER Directive 9360.0–16A) which does not address releases on Indian Lands. Although this interim does address releases on Indian Lands, it is limited to time–critical releases and does not cover long–term corrective actions. The final guidance document will address long–term corrective–actions when the need for such actions is established, the purpose of our ongoing Indian Lands pilot projects is to gather information about USTs on Indian Lands in order to assess the extent of the UST problem and the capability of Indian Tribes to address the problem. To develop the final guidance document, we will assess the information gathered through the pilot projects and other information gathered on actions initiated under this interim guidance.

1.2 Background

Section 205 of the Superfund Amendments and Reauthorization Act (SARA) amends Subtitle I of the Resource Conservation and Recovery Act (RCRA) to give EPA and States, under cooperative the authority to conduct corrective actions in petroleum releases from USTs. Such corrective funded by monies from the Leaking Underground Storage Trust–Fund. However, SARA does not explicitly with the authority to enter into LUST Trust Fund agreements with Indian Tribes.

Preliminary assessments indicate that the total number of USTs on Indian Lands is small (0.3 percent of the Federally regulated UST universe). Further assessments, including those agreements, response to actions are tank (LUST) provide EPA cooperative based on the information gathered during the Indian Lands pilot projects, will generate a more accurate estimate of the total ,number of USTs on Indian Lands and the likelihood of releases occurring from these tanks. While this document is limited to "time–critical" responses on Indian Lands (i.e., releases that may require response within 6 months), guidance for longer–term corrective actions will be issued when the extent of the problem on Indian Lands is more fully understood.

1.3 Policy

The national UST program is implemented at the State level. States that have cooperative agreements with EPA may carry out Fund–financed responses to releases from leaking USTs. Our role is to provide guidance and support to the States in their development of State UST programs. We will lead a Fund–financed response in a State only in limited circumstances, i.e., when there is a major public health or environmental emergency, if the owner or operator is unwilling or unable to respond, and if the State is unable to respond.

Because of the State-centered design of the UST program, Indian Lands present a unique situation for EPA. We do not have the statutory authority to enter directly into LUST Trust Fund Cooperative agreements with Indian Tribes, and most States do not have the authority to run environmental programs on Indian Lands. Our goal is for Indian Tribes to develop and implement programs similar to those carried out by States. Mechanisms for allowing Indian Tribes to directly access the LUST Trust Fund are being investigated. In addition, we are examining the willingness and capability of Indian Tribes to develop and implement such programs.

During this period we are prepared to respond to emergency LUST releases on Indian Lands. To trigger Federal-lead action, an Indian Lands site must pose a time-critical, either immediate or near-term, substantial threat to human health or the environment; the Indian Tribe must be unable to respond; and the owner or operator must be unable or unwilling to provide adequate and timely response. Because many Indian Tribes lack the capability for overseeing or conducting corrective actions, the criteria for initiating a Federal response to releases on Indian Lands are broader than those set forth in the guidance for Federal-lead corrective actions in States. Federal response in States is limited to "classic" emergencies (i.e., the release immediately threatens human health or the environment and requires response within hours or days). On Indian Lands, however, Federal response may occur in situations where immediate action is not necessary but the release is considered time critical and may require a response within 6 months.

Federal-lead corrective actions for UST releases will be by the same EPA emergency response and contractor that conduct oil and hazardous substance removal under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Section 311 of the Clean Water Act. Similar removal-type actions that are appropriate for a Federal response to an UST release on Indian include, but are not limited to, the following:

- Site investigations or exposure assessments to determine potential health effects of a leak and to establish corrective action priorities;
- Ventilation of fumes from a residence or other building;
- Construction of fences, warning signs, or other security or site control precautions;
- Removal of a tank or free product;
- Emptying of a leaking UST or removal of contaminated soils;
- Construction of an intercepting ditch;
- Provision of alternative water supplies; and
- Temporary relocation of affected residents.

Under this guidance, Federal-lead corrective action on an Indian Lands site will be terminated when the threat to human health and the environment has been mitigated. Release situations for which longer-term corrective actions are necessary, such as ground-water cleanup, may require a response that is beyond the capabilities of EPA's removal personnel. We will address long-term corrective action under separate guidance when the need for such action is established.

For time-critical actions, efforts will be made to involve Indian Tribe authorities in cleanup decisions. Prior to initiating a Federal response action, On-Scene Coordinators (OSCs) and UST Regional personnel

should rely on Indian Tribal authorities to gather as much information as possible about the site and owners and operators.

2.0 CRITERIA FOR FEDERAL-LEAD RESPONSE

To qualify for Federal-lead response, an Indian Lands site must meet the legislative criteria specified in Section 9003(h) of Subtitle I of RCRA and the site must pose a time-critical (i.e., an immediate or near-term), substantial threat to human health and the environment. More specifically, the site must meet at least one of the following criteria:

- The release poses a time-critical, either immediate or near-term, substantial threat of direct human, animal, or food chain exposure to petroleum;
- The release poses a time-critical, either immediate or near-term, threat of fire or explosion;
- The release poses a time-critical, either immediate or near-term, substantial threat to public drinking water supplies; or
- The release poses a time-critical, either immediate or near-term, threat to a significant population or substantial amounts of property, or poses a substantial threat to natural resources.

These criteria have been expanded from those requiring a "major" emergency Federal-lead response in states. These broader criteria allow EPA to respond to a wider range of releases on Indian Lands. Specifically, "near-term threat" has been added to these criteria to allow for Federal-lead response at sites that pose a less immediate, but still substantial threat. Immediate and near-term threats are defined as follows:

- **Immediate threat:** A release requires response within hours or days of discovery. Examples include potential or actual UST explosions or fires, or a release that is contaminating a water supply for which there is no readily available alternative.
- **Near-term threat:** The release is time-critical, and may require response within 6 months. An example includes a slow release of petroleum spreading at a rate that will contaminate residences within 6 months.

Since the OSC must give priority to responding to classic emergencies, both in the removal program under CERCLA as well as the LUST program, response to less urgent LUST removals will depend on the availability of staff and resources.

3.0 DELEGATIONS

Delegating the authority for initiating Federal-lead corrective actions on Indian Lands follows the same procedures as those specified in the guidance for Federal-lead corrective actions in States. Federal-lead UST corrective actions that initially cost over \$250,000 require approval of the Assistant Administrator (AA), Office of Solid Waste and Emergency Response (OSWER). The Office Director (OD) of the Office of Emergency and Remedial Response (OERR) will approve actions that initially cost up to \$250,000 and will approve ceiling increases that bring the cost of an action up to \$250,000, with concurrence from the OD, Office of Underground Storage Tanks (OUST).

In addition, Regional Administrators (RAs) may approve actions costing up to \$50,000 in acute, life-threatening situations where response must be initiated before Headquarters can be contacted. This authority may be redelegated to Division Directors and OSCs.

4.0 APPROVAL PROCESS

The approval process for Federal-lead corrective actions on Indian Lands is essentially the same as that for Federal-lead UST corrective actions taken in States. However, on Indian Lands, EPA Regional personnel are also responsible for assisting in the initial evaluation of the site and the gathering of information necessary to support a request for Federal action.

To request Federal-lead corrective action, the Regional Oil and Hazardous Materials (OHM) Coordinator, or other designated Regional management official must be notified that a release has occurred. The UST Regional Program Manager will gather information about the site through the Indian Tribe and other Federal agencies, such as the Bureau of Indian Affairs and the Indian Health Service, and will evaluate all attempts made by the Indian Tribe to locate the responsible party (RP). The assigned OSC and the UST Regional Program Manager will determine whether the site qualifies for a Federal response. If insufficient information about the site is available from outside sources, the OSC, in coordination with the UST Regional Program Manager, may conduct a site assessment if available information provides sufficient reason to warrant such a visit. To use the Technical Assistance Team (TAT) on a site assessment, the OSC must obtain Headquarters approval as prescribed in OSWER Directive 9360.0-16A (Section 6.2.1).

Requests for Federal-lead corrective action can either be oral, for sites requiring action within hours or days, or written, for those sites that do not require immediate action.

4.1 Oral Request

An oral request should be used in a case where an emergency situation occurs that presents an immediate threat of death, injury, or catastrophic environmental damage due to a petroleum release from an UST (see Exhibit 1). The OSC may take immediate action to address the situation, using the RA's authority to approve emergency obligations of up to \$50,000.

When possible, the OSC, in conjunction with the UST Regional Program Manager, will get approval from the RA or the RA's representative to request approval from Headquarters, as prescribed in OSWER Directive 9360.0-16A. The OSC provides oral request information to Headquarters (see Appendix A of this guidance). This information is similar to that required for an oral request for Federal-lead corrective action in States, except that additional information is required of the Tribal authority reporting the release and having jurisdiction over the site. If the request is approved, the UST Regional Program Manager, in conjunction with the OSC, prepares an action memorandum within 10 days of initiating a response. This memorandum contains more detailed information about the site (see Appendix B).

4.2 Written Request

The UST Regional Program Manager, in conjunction with the OSC, will gather all information necessary to support a request for Federal-lead corrective action and will prepare an action memorandum (see Appendix B). This action memorandum is similar to that required for a written request for Federal-lead corrective action in States. However, it also requires information on the Indian Tribes capacity to oversee

or conduct corrective actions and information on why the site meets the criteria for Federal response on Indian Lands. Regional attorneys and circuit riders, if applicable, should assist in gathering this information. The action memorandum is reviewed by the Emergency Response Division (ERD) Regional Coordinator and other appropriate Headquarters officials prior to approval as prescribed in the guidance for Federal–lead corrective actions in States. The ERD Regional Coordinator will communicate to the Region as quickly as possible the decision to approve or deny the action (see Exhibit 1).

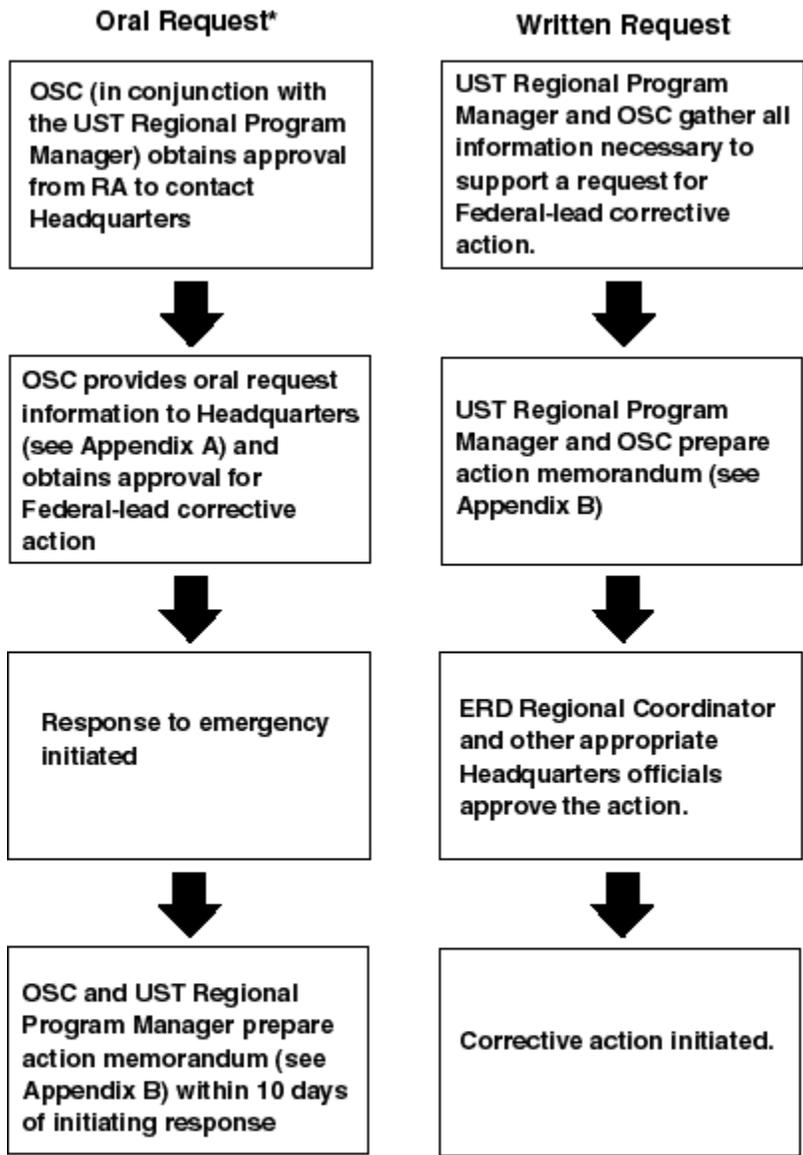
5.0 ENFORCEMENT ACTIONS

Enforcement actions should be taken to ensure that every attempt is made to compel the owner or to respond to the release. Our goal is to encourage Indian Tribes to undertake Responsible Party (RP) searches and negotiations to secure owner or operator action. We will work cooperatively with Tribal authorities to achieve compliance. Depending on the availability and resources, the OSC may undertake initial RP searches and preliminary discussions with RPs, if necessary, to secure owner or operator action. Subsequent enforcement actions against RPs, including cost recovery, should be coordinated by Regional UST personnel in conjunction with other responsible EPA offices.

6.0 INITIATING AND MANAGING FEDERAL–LEAD LUST CORRECTIVE ACTION

The procedure to be followed for initiating and managing Federal–lead corrective action on Indian Lands (including information required) are the same as those specified in OSWER Directive 9360.0–16A. This covers procedures for managing accounting information, procuring EPA contractor and other services, and obtaining assistance from other agencies. It also includes information and procedures for allowable costs stabilization standards, ceiling increases, reporting requirements, and operation maintenance.

Exhibit 1. Procedure for Requesting Federal-Lead Corrective Action on Indian Lands



***Oral requests should be made in case of an emergency in which there exists an immediate threat of death, injury, or catastrophic environmental damage due to a petroleum release from an UST**

APPENDIX A: ORAL REQUEST INFORMATION

1. What is the location of the release?
2. What is the type—and estimated amount of petroleum released to the environment?
3. What is the number and proximity of persons potentially affected?
4. Describe the increased threat to human health or the environment if response is delayed or denied.
5. Specify the time and date the release was discovered.
6. Provide the name, description, and general condition of facility.
7. Is the release a long-term or chronic problem?
8. Is the release from a leaking underground storage tank (see definition in section 9001(1) of SWDA)?
9. Is the released material a petroleum substance (see definition in Section 9001(8) of SWDA)?
10. Describe the ongoing efforts to respond to the release.
11. What Indian Tribal authority has jurisdiction over the site?
12. Are there other authorities that have jurisdiction over the site (e.g., Federal, State or local)?
13. Is the person requesting a Federal-response an official representative of the Indian Tribe? If so, in what capacity does he or she serve?
14. Has the Tribal authority given permission for a Federal response?
15. Does the Indian Tribe have its own legislative authority that covers this release?
16. Does the Indian Tribe have any formal agreement/relationship with the State regarding UST cleanups or UST related programs that would allow the State to respond?
17. Which of the criteria for Federal-lead response on Indian Lands in section 2.0 does the release meet?
18. What is the Tribal authority's ability and willingness to provide a response? Provide specific reasons for its inability to respond (e.g., lack of authority, technical expertise, qualified staff, or funding).
19. Describe the efforts undertaken to locate the Responsible Party (RP) and pursue an RP-financed cleanup.
20. What type of action is needed to mitigate or stabilize emergency (if known)?

APPENDIX B: ACTION MEMORANDUM

The Regional UST Program Manager must submit an action memorandum to initiate approval of a written request for Federal action on Indian Lands. This should be done jointly with the OSC. The memorandum must also be submitted within 10 days of an oral request. In addition to the topics specified below, the action memorandum should address all of the topics outlined in Appendix C of OSWER Directive 9360.0–16A, "State Request Letter Format." References to a State or local implementing agency in Appendix C of OSWER Directive 9360.0–16A should be changed to Indian Tribal authority.

The Regional UST Program Manager and the OSC should attempt to gather the necessary information through Indian Tribal authorities and other sources. If the information necessary to substantially complete the action memorandum is unavailable from these sources, an on–site evaluation/investigation may be undertaken.

I. HEADING

DATE: (Month/Day/Year)
SUBJECT: Request for Emergency Federal–Lead UST Corrective Action on Indian Lands
[Site]
ACTION MEMORANDUM
FROM: [Regional Administrator]
TO: [Director, OERR]

II. BACKGROUND

The background section should contain information on the location of the site, the nature of the incident (including the history of the site, general character of the site, and issues relevant to petroleum management), quantity and types of petroleum substances released, Indian Tribal authority's role, the cleanup time frame, and any actions to date, including previous and current actions to abate the threat. For specific instructions on these sections see OSWER Directive 9360.0–16A, Appendix C.

A. Location Description

B. Site and Incident Characteristics

C. Quantity and Types of Petroleum Substances Present

D. Indian Tribal Authority Capacity

1. Describe the capacity of the appropriate Indian Tribal authority to oversee/conduct corrective actions.

- Has the Tribal authority ever overseen/conducted an UST cleanup or petroleum spill cleanup?
- Has the Indian Tribal authority had experience with other EPA, State, or local environmental programs?
- Has the Indian Tribal authority had applicable experience in overseeing contractors?

E. Actions to Date

III. CRITERIA MET FOR TIME–CRITICAL FEDERAL–LEAD CORRECTIVE ACTION ON INDIAN LANDS

The criteria specified in section 2.0 must be met to justify Federal response to a petroleum UST release on Indian Lands. Specific reasons why the site meets those criteria should be discussed in this section. Also include the name and position of the person in the Tribe requesting a Federal response.

IV. ATTEMPTS MADE AT SECURING OWNER/OPERATOR CLEANUP

See OSWER Directive 9360.0–16A, Appendix C, section IV.

V. EXPECTED CHANGE IN THE SITUATION SHOULD NO ACTION BE TAKEN OR SHOULD ACTIONS BE DELAYED.

See OSWER Directive 9360.0–16A, Appendix C, section V.

VI. TYPE OF ACTION REQUESTED

See section 1.3.