



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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December 1, 2006



TO: David Reese, Legal Counsel to Governor Kulongoski
Karen Quigley, Director to Legislative Commission on Indian Services

FROM: Doug White, Community Development Specialist *DW*
Gary Fish, Willamette Valley Regional Representative *GF*

RE: **Government-to-Government Report**

We are pleased to transmit the response of the Department of Land Conservation and Development (DLCD) to the legislative directive under ORS 182.162-.168 (SB 770) to issue a report on agency activities under government-to-government relations, and on other contacts and issues encountered since the department issued last year's report on December 28, 2005.

Major Highlights for 2006:

- ✓ Formation of the Oregon Task Force on Land Use Planning under Senate Bill 82 (2005), the funded 30-year review of Oregon's Land Use Planning System under SB 82.
- ✓ The Land Conservation and Development Commission (LCDC) held roundtable discussions in Roseburg, Pendleton, Florence and Bend, to hear from local governments and Tribal representatives.
- ✓ The LCDC amended Goal 14 and adopted new rule to streamline the process for expanding urban growth boundaries. This action may greatly assist certain Tribes interested in bringing their lands into an urban growth boundary in order to receive urban services.
- ✓ The Oregon Supreme Court overturned a previous Marion County Circuit Court opinion in *MacPherson v. Department of Administrative Services* who has now ruled that Ballot Measure 37 (ORS 197.352, Compensation for loss of value loss due to land use regulation) is constitutional.

Relationship of DLCD with Indian Tribes (ORS 182.162-182.168, SB 770):

These statutes require state agencies that work with Tribal governments to submit reports that address the factors under (a) through (f) below. Each of the factors are listed below, along with DLCD's response:

(a) ***The policy the state agency adopted under ORS 182.164.***

DLCD Response to Subsection (a)

ORS 182.164 directs DLCD to develop and implement a policy that:

- Identifies agency staff responsible for developing and implementing agency programs that affect the Tribes;
- Establishes a process to identify agency programs that affect Tribes;
- Promotes communication between DLCD and Tribes;
- Promotes positive government-to-government relations; and
- Establishes a method of notifying agency staff of the statutory provisions and agency policy.

The department's report issued for 2002 lays out the agency's policy to carry out these directives (see also *Departmental Statement*, below). DLCD's strategic plan includes the very elements that ORS 182.162-.168 envisioned for an agency policy. Please refer to our 2002 Annual Report, located on our website, under *Relations with Tribes*.

(b) *The name of individuals in the state agency who are responsible for development and implementing programs of the state agency that affect Tribes.*

DLCD Response to Subsection (b)

DLCD has had a specific contact for Tribal matters since the mid-1980s.

Key Contact: Doug White, Community Development Specialist
888 NW Hill Street, Suite 3
Bend, Oregon 97701-2942
Phone: (541-318-8193)
FAX: (541-318-8361)
E-mail: doug.white@state.or.us
Web Address: <http://www.lcd.state.or.us>

DLCD's back-up to the agency's key contact on Tribal matters is:

Key Contact Back-up: Gary Fish, Willamette Valley Regional Representative
635 Capitol St., N.E., Suite 150
Salem, Oregon 97301-2540
Phone: (503) 373-0050, ext. 254
FAX: (503) 378-5518
E-mail: gary.fish@state.or.us
Web Address: <http://www.lcd.state.or.us>

Several other DLCD staff members are responsible for developing and implementing programs that may affect or be of interest to the Tribes. Principal contacts, listed by agency program responsibility, follow below. They are available by dialing (503) 373-0050, then the extension.

Lane Shetterly, Director, extension 280

Bob Rindy, Policy and Coordination, extension 229

Tom Hogue, Economic Development, extension 323

Bob Cortright, Transportation & Growth Management Coordinator, extension 241

Christine Valentine, Natural Hazards & Floodplains, extension 250

Mark Darienzo, Floodplain Map Modernization, extension 269

Amanda Punton, Natural Resources, 971-673-0961

Dale Blanton, Coastal Program and Federal Consistency, extension 260

Gloria Gardner, Urban Growth Management, extension 282

Doug White, Intergovernmental Agreements and Rural Development, 541-318-8193

Sarah Watson, Assistant to Director and Commission, extension 271

Regional Representatives: See agency website for regional representative assigned to cities and counties.

The agency's Tribal contacts are responsible for assuring that the agency is kept apprised of activities that may be of interest to the Tribes, to provide appropriate Tribal contacts, and ensure that the Tribes are informed of agency activities. Good two-way communications have resulted from these efforts.

Through comprehensive plans and zoning (approved by the state) local governments (cities and counties) are responsible for carrying out the land use planning program. Tribal lands are not subject to state and local land use laws. However, these laws sometimes affect the use of Tribal lands. The challenge under ORS 182.162-.168 for DLCD will be to continue to promote a minimal level of service to foster government-to-government relations between the Tribes and local governments.

(c) The process the state agency established to identify the programs of the state agency that affect Tribes.

DLCD Response to Subsection (c)

The process DLCD has used to inform the Tribes of agency programs that affect the Tribes is to participate in three of the cluster groups established in 1996 under Executive Order 96-30. The agency participates in the Natural Resources, Cultural Resources, and Economic Development cluster groups. DLCD has also been available to meet with the Tribes one-on-one, although resources are limited, making this continued outreach a challenge. In spite of this challenge, this has proven to be quite successful given the diverse interests of the Tribes and the complexity of land use and how it may affect each of the Tribes' unique interests. DLCD also maintains an agency web site, which includes a specific section on government-to-government relations that is

available to keep the Tribal governments informed of agency activities.

- (d) The efforts of the state agency to promote communication between the state agency and the Tribes and government-to-government relations between the state and Tribes.*

DLCD Response to Subsection (d)

Including the Tribes in stakeholder meetings and activities and working to develop intergovernmental agreements with each of the Tribes is a significant step for promoting two-way communication and government-to-government relations. As explained in greater detail below, the agency contacts and others have participated in three of the cluster groups as well as with the Tribes directly. Previous discussions on land use with the Legislative Commission on Indian Services have also promoted good communications and government-to-government relations between DLCD and the Tribes in the past. DLCD hopes to continue that effort.

Roundtables: As part of implementing ORS 182.162-.168, each time the Land Conservation and Development Commission (LCDC) has an out-of-town meeting DLCD has made it a practice to schedule a roundtable discussion with local and Tribal governments from the area. The purpose of the roundtables is for the LCDC to hear from local and Tribal officials in the area on issues of importance to that region. The roundtable also provides a great opportunity for local governments to hear and participate in these discussions and for the Tribes to discuss with the Commission their interest and issues of importance to the Tribes. Economic development was one of the main topics of discussion at the following roundtables held during 2006:

On May 5, 2006, the LCDC held a roundtable discussion in Roseburg with local governments from the region and the Cow Creek Band of Umpqua Tribe of Indians to discuss growth, transportation, housing and economic development issue in the region.

On June 30, 2006, the LCDC held a roundtable discussion in Pendleton with local governments from the region and the Confederated Tribes of the Umatilla Indian Reservation to discuss development challenges, opportunities and needs by communities, local planning issues, economic development concerns, and streamlining.

On August 11, 2006, the LCDC held a roundtable discussion in Florence with local governments from the region and the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians to discuss development challenges, opportunities and needs by communities, local planning and coastal issues, economic development concerns, and streamlining. The Tribe was able to exchange and share concerns they have with LCDC about state standards governing sewer service to rural areas, and how they are affecting tribal economic development opportunities. The LCDC meeting also included a tour (put on by the Tribe) of the Tribes' recent economic developments adjacent to Florence, including the Three Rivers Casino. Future discussion before the LCDC has resulted from this meeting and tour with tribal representatives to develop strategy to address many of these concerns. (See **Goal 11**, below).

On October 6, 2006, the LCDC held a roundtable discussion in Bend with local governments from the region and the Confederated Tribes of the Warm Springs Indian Reservation to discuss issues associated with the rapid growth occurring in Central Oregon. Tribal representative attended a lively discussion and presentations from local planners and decision makers, and made presentation on treaty rights in Central Oregon and responsible of Oregonians to protect these important natural and cultural resources.

(e) A description of the training required by [ORS 182.166(1)].

DLCD Response to Subsection (e)

See *Training* below.

(f) The method the state agency established for notifying employees of the state agency of the provisions of ORS 182.162 to 182.168 and the policy the state agency adopts under ORS 182.164.

DLCD Response to Subsection (f)

As described in previous reports, the agency policy under these statutes is the strategic plan and the existing program established under Executive Order 96-30. When new staff that may be working with the Tribes is hired, the agency's key contacts' arrange for their attendance at annual training, briefs them on cluster activities, and provides an overview of the statutory requirements for working with Tribal governments on agency activities.

NOTE: For purposes of comparison and continuity the rest of this report follows the format of previous reports under Executive Order 96-30.

Major Areas:

The department is continuing to offer growth management and natural resource conservation services to all the Tribes and is working with some of the Tribes in several areas. These include the Oregon Coastal Management Program (OCMP), Oregon Ocean Policy Advisory Council, flood plain management services, policy development, local government plan amendments, and periodic review. All of these activities are in addition to the work the department's key contacts do with three of the cluster groups under ORS 182.162-.168.

Departmental Statement:

The Executive Order directed the department to develop an "interest statement," and present it to Tribal governments and state agencies at the September 23, 1997 conference on Government-to-

Government relations. The department presented its interest statement at the conference, which included an overall objective to:

"Establish, improve and maintain partnerships with Oregon's Indian Tribal governments, while seeking to better understand each other, and work cooperatively to identify and address mutual goals and concerns arising from state land use policy that affects Tribal interests. To the extent possible, work to have the growth management and resource conservation objectives of both the State and the Tribes compatible with one another. Improve upon or design solutions and programs to help reach these objectives."

The interest statement also includes several points that are of specific interest to the department. As a result of working with Tribal governments under ORS 82.162-.168, the department's interests have been refined and clarified over the years. Each of these refinements and clarifications to DLCD's interest statement are described in each of the previous Annual Reports.

With the passage of Ballot Measure 37 (ORS 197.352) in November 2004 (land use compensation/waiver measure), DLCD needed to find ways to work with the Tribes to assess what effects Measure 37 will have on Tribal interests. As a result, DLCD revised its interest statement in 2004 to indicate that issues which result from Measure 37 need to be addressed as part of the 30-year land use review under SB 82 (2005). In our 2005 report, DLCD revised its interest statement to state that in conjunction with the 30-year review of Oregon's land use planning system and/or the work plans of the cluster groups, DLCD will work with Tribal governments to assess what implications Ballot Measure 37 will have on tribal interests, "if it is determined by the Oregon Supreme Court to be constitutional." Now that the measure has been ruled constitutional by the Oregon Supreme Court, DLCD is revising its interest statement to read as stated below. DLCD is also revising its interest statement to include provision related to the Goal 11 issue discussed below (see *italic* for new language and ~~strikethrough~~ for deleted language):

- Facilitate better relations between the Tribes and state and local government.
- Establish a notification process to better coordinate and inform Tribes, and state and local governments about development projects under consideration, and about long-term economic and community land use objectives. Determine what projects and land use policy issues are of interest to the Tribes and keep them informed.
- Continue "Government-to-Government" relations on land use matters at the regional level between state agency contacts in the field (or region), local government planning department staff and Tribal administrators within the region, including Regional Partnerships and Regional Economic Revitalization Teams.

- Work with Tribal governments to share information that supports development and maintenance of resource management plans, development policies and Tribal zoning ordinances applicable to lands held in trust. In the interests of state, local and Tribal governments, encourage Tribal land use policies and zoning to be similar and compatible with Oregon's land use planning system, including policies for preserving Oregon's best agricultural lands.
- Continue to assist local governments and the Tribes in natural and cultural resource site protection programs under the statewide planning goals.
- Be accountable for a land use program that is coordinated and consistent with the efforts under the Governor's Coastal Salmon Restoration Initiative, and keep the Tribes informed of such actions that may affect Tribal interests.
- Work with Tribal governments and stakeholders to find ways to continue government-to-government relations with fewer resources.
- In conjunction with the ~~30-year review of Oregon's land use planning system and/or the work plans of the Natural Resources Work Group and Cultural Resources Cluster Group~~, *continue to work with Tribal governments to assess what implications ~~Ballot Measure 37, if it is determined by the Oregon Supreme Court to be constitutional~~, state and local waivers issued under ORS 197.352 will have on Tribal interests, particularly with respect to natural and cultural resources and sites.*
- *Involve Tribal Governments, through a Working Group and Economic Development Cluster, in the development of a work plan to address the process by which sewer service may be extended to tribal lands located adjacent to urban growth boundaries or unincorporated communities.*

Solutions and Programs:

Goal 11: A key issue identified by a number of Tribes is the challenge they face in providing or obtaining infrastructure for tribal development. Goal 11 directly affects some of the Tribes ability to receive municipal sewer service from a local service provider. A recent land use action by the City of Florence, to extend sewer service to serve tribal trust land belonging to the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, was challenged by a private citizen and appealed to the Land Use Board of Appeals (LUBA). The challenge was upheld by LUBA and has resulted in the Tribe having to add additional capacity to its existing sewer system, instead of receiving sewer service from the city. The Tribe was able to share its concerns with LCDC at their August 11, 2006, meeting in Florence. The LCDC was also given a briefing of the LUBA decision at its October 4, 2006, meeting in Bend, where the Commission indicated an interest in resolving this issue soon after the end of this Legislative session. In late 2007, DLCD and LCDC plans to work with local governments, Legislatures, service providers

and the Tribes to initiate a work plan to address this matter, including changes to state law to better address the process by which sewer service may be extended to tribal lands.

Goal 5: Another key issue identified by the Tribes is the need for the Land Conservation and Development Commission (LCDC) to better protect cultural resources during the land development process. See DLCD's 2003 Report for further discussion of Goal 5.

The agency's Tribal contacts continue to participate in and discuss Goal 5 and funding concerns with the Cultural Resources Cluster Group. Additional strategies for protecting cultural resources continue to be explored with the cluster, such as education, early consultation with Tribes and coordination with state and local government regarding actions involving development and ground disturbing activities. DLCD has provided assistance to Tribal governments on obtaining information on the tracking of state and local Measure 37 claims, as well as through the periodic review and plan amendment processes, to help assure that Tribal interests will be addressed in the update of local comprehensive plans and land use regulations.

At previous meetings of the cultural and natural resources clusters, the discussion focused on expectations that the review of Oregon's land use planning system, under SB 82, would help to foster and renew efforts in the field of cultural and natural resource protection under Goal 5. Future cluster meetings to discuss Goal 5 should focus on this review, as well as working together to better educate and implement current regulations.

Fee-to-Trust: DLCD's Ocean and Coastal Services and Community Services Divisions remain involved in the Bureau of Indian Affairs (BIA) fee-to-trust process. BIA routinely sends the Governor notification of pending fee-to-trust transfers. BIA's notice of the consistency of these transfers with the Oregon Coastal Zone Management Program is sent directly to the department. DLCD strives to work cooperatively with the Tribes, BIA and affected local governments in addressing the state's interests in these transfers. DLCD also works with "coastal" Tribes (Confederated Tribes of Siletz Indians, Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians and the Coquille Indian Tribe) to assure coastal program consistency, including the proper coordination of land use issues. The department's coordination with the Tribes usually occurs through a combination of meetings, phone calls, e-mails and written correspondence.

Coastal: Our Ocean and Coastal Services Division invites tribal government representatives from the three coastal Tribes to participate in periodic meetings held at the coast with local jurisdictions and other coastal program partners. Several of these meetings have occurred since the submittal of DLCD's last Government-to-Government annual report.

The Department also serves as staff to the Oregon Ocean Policy Advisory Council (OPAC). The membership of OPAC is defined by Legislation and includes one seat for the "coastal" Indian Tribes. DLCD works to ensure that a Tribal representative is designated for that seat and that any Tribal issues raised, in the OPAC setting, are addressed.

Tribal Appointments to Agency Committees: In 2004, four new committees were formed and included good Tribal representation. No new agency committees were formed in 2005 and 2006.

Training:

Natural Resources Work (formally Cluster) Group: On February 28, May 31-June 1, and September 22, 2006, the agency's key contact attended the cluster meetings in Grand Ronde, Canyonville and Warm Springs. The back-up to key contact attended the February 28 and May 31 – June 1 cluster meetings in Grand Ronde and Canyonville.

Cultural Resources Cluster Group: On May 31-June 1 and September 20-21, 2006, the agency's key contact attended the cluster meetings in Canyonville and Bend. The cluster meeting in Bend was hosted by DLCD. The back-up to key contact attended the May 31 – June 1 cluster meeting in Canyonville.

Economic Development Cluster Group: On October 11, 2006, the agency's key contact and back-up to key contact attended the cluster meeting in Canyonville.

Other Government-to-Government Meetings: On May 19, 2006, four agency staff, including the back-up to key contact, attended the training sessions available at the Tribal Information Day at the Capitol.

On November 11, 2006, the agency regional representative for Central and Eastern Oregon, along with the South Central Economic Revitalization Team (ERT) met with the Klamath Tribe, in Chiloquin, to discuss state funding opportunities for the Tribes. The ERT directed the Tribe to the appropriate funding resources. DLCD is interested in exploring ways that the Tribe could explore economic development opportunities and benefits being spread across the entire community, including the City of Chiloquin, in addition to state highway travelers.

The agency's flood map modernization specialist held a meeting with local jurisdictions in McMinnville on November 21, 2006, to discuss flood map modernization efforts in Yamhill County. The agenda included FEMA's Flood Map Modernization Initiative, benefits of the Digital Flood Insurance Rate Map (DFIRM), and a discussion of the communities' flood mapping needs. The McMinnville meeting was attended by a tribal representative from the Confederated Tribes of the Grand Ronde. Map modernization training sessions are being scheduled around the state with an effort to involve each of the Tribes in local areas. Please contact Mark Darienzo at 503-373-0050, Ext. 269, or by e-mail at Mark.Darienzo@state.or.us for scheduling and meeting information.

As of November 27, 2006, the agency's natural hazards and floodplain specialist is reviewing a Natural Hazards Mitigation Plan currently being prepared by the Coquille Tribe. As required by federal law, the Coquille Tribe is seeking comment and coordination from state, federal, and local stakeholders to ensure that all have the opportunity to participate in the planning process.

Agency comments will be reviewed by the tribe for possible incorporation into the plan which will then be forwarded to FEMA for approval and Tribal adoption.

Cooperation among Departments:

Agency/Tribal Coordination: DLCD's web site (www.lcd@state.or.us), under the link "Relations with Tribes" continues to provide information on the agency government-to-government program, contacts, DLCD's interest statement, annual reports, and links with other Tribal web sites. When notified, DLCD up dates its mailing list with changes in Tribal administration and Tribal councils. Mailing lists are being improved through the use of the state/Tribal cluster groups.

Issues and Concerns:

With all the issues raised, the lack of a full-time position to work solely on tribal matters challenges DLCD's ability to meet with the Tribes and/or to follow up in a timely manner. While increased understanding and coordination between the department and Tribes (per ORS 182.162-.168 and EO 96-30) has helped to resolve some issues, the growing number of new tasks, with little or no additional resources, has made it difficult to achieve ideal coordination in government-to-government relations. In particular, the agency's key contact previously had difficulty attending all the meetings that involved three different cluster groups that the agency is assigned to. With the addition of Gary Fish in 2005 as the department's back-up to the key contact, additional participation in meetings and coverage of Tribal concerns and issues has been possible and will continue. The additional resource of a key contact back-up has helped to improve the agency's service to the Tribes over the past two years.

DLCD's involvement to date in Tribal affairs has resulted in many questions, and discussions about ways to address various issues and concerns. However, the department continues to be challenged by having limited resources to work on these matters. Key issues/concerns include:

- Limited understanding of the legal complexities associated with fee-to-trust transfers and Tribal sovereignty;
- Difficulties with trying to fit Tribal projects and planning into the state-local planning framework which does not include a clearly defined role for Tribal governments;
- Limited ability to address local-Tribal coordination problems in general and certain issues important to local interests such as loss of property taxes, payments for local services, fear of loss of control over trust properties, and impacts on local land use planning;
- Limited finances or other resources to encourage or support Tribal planning efforts; and

- A need to establish a standing department role in fee-to-trust proposals occurring outside the coastal zone.

Conclusion:

As noted, many issues and concerns regarding the department's government-to-government coordination and relations remain to be solved. The department will strive to address these issues and concerns, and improve service once again in the coming year. Continued integration of the back-up to the department's key contact, relocation of the department's key contact to Bend in early 2006 for improved coverage, and other improvements and changes made during 2006 should help the department provide improved coordination in government-to-government relations and service to the Tribes in 2007.