



Oregon

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Department of Land Conservation and Development

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December 28, 2005



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

FROM: Doug White, Community Development Specialist
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 January 14, 2005.

Major Highlights for 2005:

- ✓ Legislature enacted SB 82 and funded the 30-year review of Oregon's Land Use Planning System.
- ✓ The Land Conservation and Development Commission (LCDC) held roundtable discussions in Bandon and Medford, to hear from local governments and Tribal representatives.
- ✓ The LCDC amended Goal 11 and related rule to allow hook-ups to existing sewer lines in rural areas under certain conditions. This action greatly assisted the Confederated Tribes of Grand Ronde to proceed with their housing plans.
- ✓ Marion County Circuit Court issued its opinion in *MacPherson v. Department of Administrative Services* that Ballot Measure 37 was unconstitutional. The case is currently on appeal to the Oregon Supreme Court.
- ✓ DLCD's key contact on Tribal matters relocates to Bend where better coverage statewide (with the key contact back-up located in Salem) is available to assist the Tribes directly.

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. DLCD's strategic plan includes the very elements that SB 770 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: (to be determined)
FAX: (to be determined)
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 and Growth Management Coordinator, extension 241
Christine Valentine, Natural Resources and Natural Hazards, extension 250
Dale Blanton, Coastal Program and Federal Consistency, extension 260
Doug White, Liaison for Office of Rural Policy, extension 240
Steven Santos, Industrial/Commercial Lands Specialist, extension 284
Gloria Gardner, Urban Growth Management, extension 282
Doug White, Intergovernmental Agreements and Rural Development, extension 240
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 SB 770 for DLCDC 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 DLCDC 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. DLCDC 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. DLCDC 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 SB 770, each time 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 Commission 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 2005:

On September 30, 2005, the Land Conservation and Development Commission (LCDC) held a roundtable discussion in Bandon with local governments from the region, Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, and Coquille Indian Tribe to discuss coastal communities in transition for resource extraction to a retirement and recreation economy.

On December 2, 2005, the LCDC held a roundtable discussion in Medford with local governments from the region. The Klamath Tribes, Cow Creek Band of Umpqua Tribe of Indians, and Confederated Tribes of Grand Ronde were invited to the roundtable.

(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 contact arranges 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, 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 the Executive Order.

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 the executive order, the department's interests have been refined and clarified. In our 1999 report, the department's statement expressed our support for and commitment to work with Tribal governments in the maintenance and development of cultural and natural resources management programs, land use policies and Tribal zoning. In our 2000 report, the department's statement was modified to encourage the Tribes to establish policies aimed at preserving Oregon's best agricultural lands when considering land acquisitions and development. Our interest in government-to-government relations at the regional level encourages the participation by Tribal governments in regional partnerships. In our 2001 report, the department's statement included recognition of Regional Partnerships and Regional Community Solution Teams as a way to continue and foster improved government-to-government relations. In our 2002 report, and based on anticipated budget cuts, it was necessary to review the department's interest statement to find ways to achieve these objectives with fewer resources. As a result, DLCD revised its interest statement in 2003 to include a statement to work with Tribal governments and stakeholders to find ways to continue government-to-government relations with fewer resources.

With the passage of Ballot Measure 37 in November 2004 (land use compensation/waiver measure), DLCD needs to find ways to work with the Tribes to assess what effects Measure 37 will have on Tribal interests. It may be appropriate to conduct this assessment as part of the SB 82 land use review, and in conjunction with the work of the Economic Development, Natural Resources, and Cultural Resources Cluster Groups. As a result, last year DLCD revised its

interest statement to indicate that issues which result from Measure 37 need to be addressed as part of the land use review under SB 82 (2005).

On October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, holding that Measure 37 was unconstitutional. On October 24, 2005, the court entered a judgment and an order in the MacPherson case directing all defendants, including the Department of Administrative Services and DLCD, not to accept, grant, deny or otherwise rule on any claims under Measure 37. The order also determined that all time lines under Measure 37 are suspended indefinitely. The October 24, 2005 order took effect on October 25, 2005. The State of Oregon is appealing the circuit court's judgment. The appeal will be heard by the Oregon Supreme Court on an expedited basis. In the meantime, as a result of the circuit court actions, the state is handling Measure 37 claims in the manner described above. As a result, DLCD has revised its interest statement to read as follows (new language in *italics*):

- 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 Community Solutions 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 cluster groups, work with Tribal governments to assess what implications

Ballot Measure 37, *if it is determined by the Oregon Supreme Court to be constitutional*, will have on Tribal interests.

Solutions and Programs:

Goal 5: A 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 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 the last cluster meeting, 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, emails and written correspondence.

The key contact and the back-up to the key contact are participating on the Cascade Locks Casino Regulatory Advisory Group for the preparation of the Draft Environmental Impact Statement for the fee-to-trust transfer for the Confederated Tribes of the Warm Springs in Cascade Locks.

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 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: Last year, four new committees were formed and included good Tribal representation. No new committees were formed in 2005

Training:

Natural Resources Cluster Group: On June 7, October 5, and October 20, 2005, the agency's key contact attended the cluster meetings in Salem and Portland. The agency's key contact backup also attended the June 7 and October 5, 2005, meetings.

Cultural Resources Cluster Group: On January 26, May 18 and October 20, 2005, the agency's key contact attended the cluster meetings in Salem, North Bend, and Portland. The agency's key contact back-up also attended the January 26, 2005 meeting.

Economic Development Cluster Group: On February 28, 2005, in Salem, the agency's key contact, back-up to key contact, and economic development specialist attended the cluster meeting. On May 4, 2005, the agency's regional representative from central and eastern Oregon attended the cluster meeting at Kah-Nee-Ta. On October 20, 2005, the agency's key contact attended the cluster meeting in Portland.

Other Government-to-Government Meetings: On October 21, 2005, the agency's key contact and director, Lane Shetterly, attended the 8th Annual Conference at Portland State University.

On May 16-18, 2005, the agency's key contact attended the Coquille Tribe's 9th Annual Cultural Preservation Conference "*Honoring Tradition*" in North Bend.

On January 5, 2005, Gary Fish, the agency's back-up to the key contact, attended the Legislative Commission on Indian Services meeting in Salem, and introduced himself as the agency's new key contact back-up person on Tribal matters.

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 updates 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 SB 770 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 as the department's new back-up to the key contact, additional participation in meetings and coverage of Tribal concerns and issues has been possible. The additional resource of a key contact back-up has helped to improve the agency's service to the Tribes over the past year.

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 for improved coverage, and other improvements and changes made during 2005 should help the department provide improved coordination in government-to-government relations and service to the Tribes in 2006.