



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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December 8, 2008

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

FROM: Doug White, Community Services 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 182.162-182.168 (SB 770) to issue a report on agency activities under government-to-government relations. This report also summarizes the agency's tribal contacts and activities following the department's December 14, 2007, report.

### **Major Highlights for 2008:**

- ✓ The Land Conservation and Development Commission (LCDC) established an agenda to consider policy and rulemaking activities for 2009 and 2010.
- ✓ The LCDC held roundtable discussions in Baker City, Prineville and Tillamook, to hear from local governments and Tribal representatives.
- ✓ The LCDC changed the Goal 11 Rule for extending sewer service to Tribal lands located outside urban growth boundaries and unincorporated communities.

### **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 is 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 182.162-182.168 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 designated a specific key contact for Tribal matters since the mid-1980s.

*Key Contact:* Doug White, Community Services Specialist  
888 NW Hill Street, Suite 2  
Bend, Oregon 97701-2942  
Phone: (541-318-8193)  
FAX: (541-318-8361)  
E-mail: [doug.white@state.or.us](mailto:doug.white@state.or.us)  
Web Address: <http://www.lcd.state.or.us>

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

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

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

*Richard Whitman, Director, extension 280*  
*Bob Rindy, Policy and Coordination, extension 229*

*Michael Morrissey, Policy Analyst, extension 320*

*Tom Hogue, Economic Development, extension 323*

*Bob Cortright, Transportation & Growth Management, extension 241*

*Chris Shirley, Natural Hazards & Floodplains, extension 250*

*Steve Lucker, Floodplain Map Modernization, extension 295*

*Amanda Punton, Natural Resources, 971-673-0961*

*Dale Blanton, Coastal Program and Federal Consistency, extension 260*

*Gloria Gardiner, Urban Growth Management, extension 282*

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

*Lisa Howard, Executive Assistant to Director and LCDC, extension 271*

*Regional Representatives: See agency website for regional assignments.*

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. The agency recognizes that maintaining good communication is a benefit to the Tribes and to the State of Oregon.

Oregon local governments (cities and counties) are responsible for carrying out the statewide land use planning program through locally-adopted comprehensive plans and zoning codes that are approved by the state. Tribal lands are not subject to state and local land use laws but these laws occasionally affect the use of Tribal lands. Under ORS 182.162-182.168 the challenge for DLCD is to continue to promote government-to-government relations between the Tribes and Oregon's 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)**

DLCD informs the Tribes of agency programs that affect the Tribes primarily through agency participation in three of the cluster groups established in 1996 under Executive Order 96-30. The agency actively participates in the Natural Resources, Cultural Resources, and Economic and Community Development cluster groups. The clusters provide a forum for two-way communication and government-to-government relations. Key agency contacts provide periodic updates to the Tribes on program activities, while the Tribes inform agency key contacts on relevant Tribal programs, and agency programs affecting Tribes.

DLCD also meets with the Tribes one-on-one to address specific issues as they arise in regions around the state. These department efforts has proven very successful given the diverse interests of the Tribes and the complexity of land use issues that affect the Tribes' unique interests. DLCD also maintains an agency web site, which includes a section on government-to-government relations. That site is available to keep Tribal governments and other Oregonians 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's key contacts and others have participated in three of the cluster groups as well as with the Tribes directly. Previous land use discussions with the Legislative Commission on Indian Services also promoted good communications and government-to-government relations between DLCD and the Tribes. DLCD is committed to continue those efforts.

Roundtables: As part of implementing ORS 182.162-182.168, DLCD schedules a roundtable discussion with local and Tribal governments in a region each time the Land Conservation and Development Commission (LCDC) conducts a meeting outside of Salem. Tribal participation is also welcomed at the Commission's regular meetings in Salem, although those meetings typically do not include a roundtable discussion. The purpose of the roundtable is for the LCDC to hear from local and Tribal officials on issues of importance to that region. The roundtable also provides an opportunity for local governments and Tribes to hear and participate in discussions on issues of mutual importance. In 2008, three out-of-town LCDC meetings included roundtables with local governments and Tribes. Although the Commission welcomes participations from all the Tribes, advance notice of the roundtables are mailed to the Tribes located in or near the region where each LCDC meeting is held.

Development challenges and opportunities, local planning issues, and economic development were frequent topics of discussion at the following 2008 LCDC roundtables:

- August 6, 2008 in Baker City, mailed invitations included the Confederated Tribes of the Umatilla Indian Reservation and the Burns-Paiute Tribe.
- October 17, 2008 in Prineville, mailed invitations included the Confederated Tribes of Warm Springs and the Burns-Paiute Tribe.
- December 3, 2008 in Tillamook, mailed invitations included the Confederated Tribes of the Grande Ronde Community and the Confederated Tribes of Siletz.

The agency is committed to conducting its regular meetings around the state as often as possible and will continue to invite the Tribes to participate in the meetings, as well as the roundtables.

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

#### **DLCD Response to Subsection (e)**

When new staff that may work with a Tribe is hired, the agency's key contacts arrange for staff's attendance at annual training at the State Capitol, brief them on cluster activities, and provide an overview of the statutory requirements for working with Tribal governments on agency activities. The agency's Operation Services Division has begun to include the key contact in their staff meetings to inform the division of the responsibilities under the agencies government-to-government relations policy and the statutes. See page 10 for more on *Training*, through participation in cluster meetings and other government-to-government meetings.

(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 policy and program established under Executive Order 96-30. See below.

***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 continues 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 (OPAC), flood plain management services, rulemaking, 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 listed under ORS 182.162-182.168.

#### *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 of specific interest to the department. As a result of working with Tribal governments under ORS 182.162-182.168, the department's interests have been refined and clarified. Each refinement and clarification to DLCD's interest statement is also described in previous Annual Reports.

Following the passage of Ballot Measure 37 (ORS 197.352) in November 2004 (land use compensation/waiver measure), DLCD worked with the Tribes to assess the effects Measure 37 on Tribal interests. As a result, DLCD revised its interest statement on January 4, 2005 to indicate that in conjunction with the 30-year review of Oregon's land use system (SB 82, 2005) and/or the work plans of the cluster groups, DLCD would work with the Tribes to assess the implications of Measure 37 on tribal interests.

In our December 28, 2005, report, DLCD revised its interest statement to state that in conjunction with the 30-year review 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." In our 2006 report, DLCD revised its interest statement based on the measure being ruled constitutional by the Oregon Supreme Court.

On August 29, 2006, the Oregon Land Use Board of Appeals (LUBA) remanded a decision by the City of Florence to extend city sewer services outside the urban growth boundary onto tribal trust land (Or. LUBA #2006-068). The issue involved the legal requirements required for taking an exception to Goal 11. LUBA admitted it is "awkward, at least, to apply the criteria in OAR 660-004-0020(2)(b)-(d) to evaluate a 'proposed use' that does not require a goal exception" and "to apply rule criteria when the 'proposed use' is a proposed sewer extension."

Previously, at the August 11, 2006, meeting before the Land Conservation and Development Commission (LCDC), the Confederated Tribes of the Coos, Lower Umpqua & Siuslaw Indians discussed their concerns with the difficulty under land use law to partnership with a community to provide wastewater management service to both private and tribal lands. This concern was also made aware to the department in subsequent meetings, including the November 11, 2007, meeting of the Economic and Community Development Cluster held at Kah Nee Ta. Based on these concerns, DLCD revised its interest statement to include a provision related to the Goal 11 issue discussed in our 2006 report (See **Goal 11**, under Solutions and Programs, pp. 7-8, 2006 Annual Report).

On March 21, 2008, the LCDC amended the administrative rules for Goal 11 to include the following new provision under subsection (b) (OAR 660-011-0060(9), effective 4-18-08):

"(9) A local government may allow the establishment of new sewer systems or the extension of sewer lines not otherwise provided for in section (4) of this rule, or allow a use to connect to an existing sewer line not otherwise provided for in section (8) of this rule, provided the standards for an exception to Goal 11 have been met, and provided the local government adopts land use regulations that prohibit the sewer system from serving any uses or areas other than those justified in the exception. Appropriate reasons and facts for an exception to Goal 11 include but are not limited to the following:

(a) The new system, or extension of an existing system, is necessary to avoid an imminent and significant public health hazard that would otherwise result if the sewer service is not provided; and there is no practicable alternative to the sewer system in order to avoid the imminent public health hazard, or

(b) The extension of an existing sewer system will serve land that, by operation of federal law, is not subject to statewide planning Goal 11 and, if necessary, Goal 14.”

The above rule change was reported to the Economic and Community Development Cluster on November 12, 2008, including the Confederated Tribes of the Coos, Lower Umpqua & Siuslaw Indians. Although, this resolved much of the issues raised previously by Tribes, continued work with the Tribes is needed to better implement the provisions of sewer service to tribal lands.

Following passage of Ballot Measure 49 (amending Measure 37), approved by Oregon voters on November 6, 2007 (effective December 6, 2007), DLCD revised its interest statement to help the cluster groups become familiar with Measure 49 and with state and local governments application of the new law. Then, based upon an assessment and direction from the cluster groups, DLCD is to further refine and/or expand this interest statement as appropriate. It is anticipated that further refinement of this interest statement will be needed when more is learned about what effects Measure 49 may have on tribal interests.

The agency has had a single key contact on tribal matters dating back to the 1980's, as well as into the 1990's with the enactment of Executive Order EO-96-30, and through today under ORS 182.162-182.168 (SB 770). In 2005, an additional staff person was trained and assigned as back-up to the key contact. With the approaching retirement of the agency's key contact near the end of the next reporting period, DLCD will need to transfer the responsibilities of the key-contact to other person(s) in the agency. Therefore, DLCD is including a new interest statement to work with the three clusters and the Legislative Commission on Indian Services (LCIS) to make this transition to a new key-contact (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, *including new legislation resulting from the 30-Year land Use Review Task Force*.
- 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 work plans of the Natural Resources Working Group and Cultural Resources Cluster Group, *continue to work with Tribal governments to assess what implications state and local waivers issued under Ballot Measure 49 will have on Tribal interests, particularly with respect to natural and cultural resources and sites. The initial assessment by the cluster groups should include becoming familiar with Measure 49, and how state and local governments intend to apply the new law. Upon that assessment and based on direction from the cluster groups, DLCD will further refine and/or expand this interest statement as appropriate.*
- ~~Involve~~ *Continue to work with Tribal Governments, through the a Working Group and Economic and Community Development Cluster, in the development of a work plan to address the revised administrative rule included in OAR 660-011-0060(9)(b) and the process by which sewer service may be extended to tribal lands located adjacent to urban growth boundaries or unincorporated communities.*
- *Work with the Cultural Resources Cluster, the Natural Resources Working Group, the Economic and Community Development Cluster and LCIS on the agency's transfer of responsibilities from the current key-contact to a new key-contact for agency activities involving state/tribal government-to-government relations, briefing the clusters on agency programs and policies, and coordinating land use policies affecting the Tribes.*

#### *Solutions and Programs:*

**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 49 waivers, 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 ("Big Look"), would help to foster and renew efforts in the field of cultural and natural resource protection under Goal 5. On November 2, 2008, the 30-Year Land Use Review Task Force issued its Legislative Concept for proposed changes to Oregon's land use system. Future cluster meetings that discuss Goal 5 should focus on this proposed legislation, as well as working together to better educate the public, tribal members, and government staff, and implement current regulations. At the last cluster meeting(s), the Tribes re-affirmed their continued interest in having more resources at DLCD devoted to working on Goal 5 issues and to work with cities and counties to better implement natural and cultural resource protection measures.

**Fee-to-Trust:** Although the actual number of fee-to-trust transfers has been considerably smaller than previous years, DLCD's Ocean and Coastal Service Division and agency key-contact 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, who has a team of agency staff who review them. BIA's notice of the consistency of these transfers with the Oregon Coastal Zone Management Program is sent directly to the department. In coordination with the Governor's office, 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 Division also reviews federal energy projects on the coast to ensure consistency with Oregon's Coastal Zone Management Program. These projects often involve the Tribes, including the Columbia River Inter-Tribal Fisheries Commission (CRITFC).

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 or 2006. In late 2007, DLCD asked for tribal participation on the Metro Urban/Rural Reserve Working Group under SB 1011 (2007), but no one responded to the request. In 2008, LCDC initiated rulemaking to address wind farm development on agricultural lands. Representation from the Confederated Tribes of the Umatilla Indian Reservation was included in the Wind Farm Working Group.

*Training:*

**Natural Resources Working Group:** On February 20-21, May 21-22, and November 12, 2008, the agency's back-up key contact attended the working group meetings in Grand Ronde (Spirit Mountain Casino), Salem, and Florence (Three Rivers Casino).

**Cultural Resources Cluster Group:** On March 4-5, June 24-25, September 17-18, and November 12, 2008, the agency's key contact attended the cluster meetings at the University of Oregon Museum of Natural and Cultural History in Eugene, the State Medical Examiner's Office in Clackamas, the Tamástslikt Cultural Institute in Mission and the Three Rivers Casino in Florence. The agency's back-up key contact and Community Services Division manager also attended the November 12th cluster meeting.

**Economic Development Cluster Group:** On November 12, 2008, the agency's key contact attended the cluster meeting in Florence.

**Other Government-to-Government Meetings:** On May 16, 2008, several agency staff, including the back-up to key contact and agency director, attended the training sessions available at the Tribal Information Day at the Capitol. On November 13, 2008, the agency's deputy director, Community Services Division Manager, South and North Coast Regional Representatives, key contact and back-up key contact attended the 11<sup>th</sup> Annual Summit of state/tribal government-to-government relations in Florence at the Three Rivers Casino.

*Cooperation among Departments:*

**Agency/Tribal Coordination:** DLCD's web site ([www.lcd@state.or.us](http://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 contact list to reflect changes in Tribal administration and Tribal councils. Contact lists are also improved through the state/Tribal cluster groups.

*Issues and Concerns:*

With all the issues raised, the lack of a position dedicated to work 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 182.162-182.168 and EO 96-30) has helped to resolve some issues, the growing number of new tasks, with few or no additional resources, makes 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. The addition of Gary Fish as the department's back-up to the key contact in 2005, offers additional participation in meetings and coverage of Tribal concerns and issues. The addition of a key contact back-up significantly improves the agency's service to the Tribes over the past four years; that resource remains a department commitment.

DLCD's involvement to date in Tribal affairs has resulted in many questions, and discussions about ways to address various issues and concerns.

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 financial and/or other resources to 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, several 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.

