

**The Swinomish/Skagit Joint Comprehensive Plan:****A Model Land-Use Agreement**

In the mid-1980's, the Swinomish Tribe of Fidalgo Island in Washington State began to exert control over land-use planning on their reservation, in defiance of Skagit County's long-standing presumed authority. The Tribe was emboldened by the 1974 Boldt decision upholding its treaty rights to 50% of the salmon harvest; this long-awaited assertion of the Tribe's sovereign-nation status under its treaty with the U.S. government encouraged the Tribe to assert its right to self-governance in local jurisdictional matters. The court decision also showed the local and state governments of Washington that litigation, once an unjust method of discrediting tribes' sovereign rights, would not result in a certain outcome in the county's favor. In this unsure climate, the Swinomish tribal government and Skagit County officials took the unprecedented step of using cooperation to resolve their land-use differences.

**Land-Use Planning on Checkerboard Reservations**

The total area of the Swinomish reservation on Fidalgo Island is 7,000 acres, and it is home to about 4,000 residents, including Indians and non-Indians. The reservation is completely within the borders of Skagit county (Honoring Nations, 2000). However, some lands on the reservation are in fact county lands. The Swinomish Reservation is a checkerboard reservation; in the late 1800's, under the General Allotment Act of 1887, communal lands were taken from the Tribe and meted out to individual tribal members (The Swinomish Experience n.d., Honoring Nations 2000). Some tribal members later sold their land to non-Indians, creating a checkerboard of Indian-owned and non-Indian-owned lots on the reservation. At the time of the agreement, 48% of the land was owned by Indians, and 51% was owned by non-Indians. There was also a population

imbalance, with a three-to-one ratio of non-Indians to Indians on the Reservation (Reynolds 1997, 22, Honoring Nations 2000).

The 3,800 acres of land owned by the non-Indian residents (Fisher 1998) is considered to be county land, despite its location on the reservation. At the time that the consultation process began, the county and Tribe were both issuing zoning and land use permits and enforcing their own conflicting regulations (Honoring Nations, 2000). This resulted in a jurisdictional conflict over land use planning: Who had the power to regulate the non-Indian-owned land, the Tribe or the county?

### **Why Consultation?**

The Swinomish Tribe, beginning to move from an isolationist perspective to one of growing self-determination in intergovernmental relationships, wanted to assert its jurisdictional authority. The Tribe felt that it had control over all of the lands on the reservation, even those lands owned by non-Indians and therefore county-based (Reynolds 1997, 22, 29).

The county, meanwhile, for the first time had to take into account the wishes of the Tribe when planning for land use on the Reservation. After “several decades... [of] making unilateral decisions about the use of the reservation lands and resources,” according to Swinomish Planning Director Nick Zaferatos (Reynolds 1997, 24), the county had been given notice by the Boldt decision that it would not be guaranteed automatic priority by the courts.

The two governments also had common reasons to resolve their differences. As the National Congress of American Indians and the National Conference of State Legislatures note, “Any two... neighboring governments... share many aspects of their respective economic and social systems and are connected through political and legal relationships.” (Government to Government 2002, 2) The confusion generated by the

duplicative permitting was creating tension between the two communities, as well as impacting both communities' ability to attract investments (Honoring Nations 2000). Rather than take their intractable problem to a costly and uncertain court battle, the two sides decided to use a consultation process to resolve the differences of jurisdiction over the reservation land (Reynolds 1997, 22-23).

There were also disincentives for the county and tribal officials to cooperate. First, there was no guaranteed positive outcome for the consultation; this made both sides initially hesitant to invest financial resources in the process. Also, both sides faced potential political consequences. The Tribe has no wish to be seen as "weak" by cooperating with a local government, sacrificing their sovereignty and "developing further dependence" on the county (Reynolds 1997, 29, Honoring Nations 2000). The elected County officials faced a potential backlash from constituents living on the reservation, many of whom were unhappy about cooperating with an entity (the Swinomish Tribe) whose rights as a government they did not personally recognize (Reynolds 1997, 29). Also, as American landowners, they came from a highly individualistic perspective that they had "full property rights" to their lands, rights to which the needs of the community were subordinate (Reynolds 1997, 28).

A further incentive came while the consultation process was well underway. In 1989, during the creation of the Memorandum Of Understanding (MOU) that would become the Swinomish/Skagit Joint Comprehensive Plan, the U.S. Supreme Court handed down a decision on checkerboard land use planning in *Brendale v. the Confederated Tribes and Bands of the Yakima Indian Nation*. This decision found that the county had jurisdiction over Reservation lands owned by non-Indians and that the Tribe had jurisdiction over trust lands (Reynolds 1997, 16, 33). Though the case had the potential to decide the issue of which government had rights over the disputed

reservation lands, it ultimately “did nothing to resolve the jurisdictional conflict” and further reinforced the need for the Tribe and county to cooperate (Reynolds 1997, 33).

### **The Agreement**

The Northwest Renewable Resources Center helped create the forum that brought the Tribe and county together, facilitating the relationship-building of the two groups.

Though the Tribe did not control the forum, as Deloria recommends (1995, 11, 19-20), the county did not control the forum either. Having the agreement brokered by a neutral third-party helped bring the two sides to the table in a good-faith effort (Reynolds 1997, 22).

The Swinomish Tribe and Skagit County developed two MOUs in the course of this process. The first MOU was implemented in 1987, after a year of work by both sides. This MOU established the existence of a joint planning process for developing the land-use agreement, outlined the formal government-to-government working relationship, and, most crucially, declared that neither side was waiving its sovereign rights by working together to develop a solution (Reynolds 1997, 25, 28, Honoring Nations 2000). It was the vital framework that established the trust necessary to move forward to the task of jointly planning for land use.

The development of this second MOU took three years, from October 1987 to September 1990. This work was primarily done by two groups, a technical support group composed of tribal and county planners that proposed solutions to the different land-use issues, and an Advisory Group that reviewed each proposal. The Advisory Group was composed of four county appointees, four tribal appointees, and 1 NRRC facilitator (Reynolds, 1997 26-30, Honoring Nations 2000).

Though held up by the state’s 1990 Growth Management Act, the Swinomish/Skagit Joint Comprehensive Plan was ultimately adopted in 1996. The plan stated that

each government was responsible for permitting on its own lands. It also institutionalized consultation in disputes: it created a five-person advisory board (two tribal members, two county members, and one jointly-agreed-upon member) to review land-use issues that could not be resolved by a comment process and a more informal consultation process. After the first year, the plan would be reviewed every two years by the Tribe and the county. Described as “a well-defined, consensus-oriented process for addressing the complex and ongoing jurisdictional problems surrounding land use,” the plan still stands today between the Tribe and county (Honoring Nations, 2000).

### **A Model Land-Use Agreement**

The Swinomish/Skagit Joint Comprehensive Plan ultimately became a model in consultation and especially in land-use planning agreements between tribes and local governments. The Kennedy School of Government at Harvard hails it as “the first comprehensive planning effort attempted by a Tribe and county” (Honoring Nations, 2000).

The success of the initial agreement seems to have built the Swinomish Tribe’s trust in intergovernmental agreements. Since the first MOU of 1986, the Tribe has entered into over a dozen agreements with state, regional, and local governments on issues such as law enforcement, water supply coordination, and fishery resources protection (Fisher 1998, Honoring Nations 2000). In its own materials, the Tribe explains: “Swinomish continues to explore cooperative working relationships with adjacent jurisdictions.” (The Swinomish Experience, n.d.) “While disagreements in public policy matters will inevitable arise, the expectation is that... through [a] cooperative approach, disputes will be resolved directly through discussion by the affected parties rather than through judicial proceedings.” (Fisher, 1998).

By reaching outside of its boundaries and negotiating an agreement with the county, the Tribe was able to build a solid working relationship that actually increased its powers in the community and supported its tribal sovereignty (Deloria 1995, 22, Government to Government, 3). In addition to asserting and defining the rights of the Tribe on reservation land, the agreement has also freed up tribal resources to be directed at economic development, fisheries, and cultural development. The local community surrounding the reservation, once hostile in the wake of fishing rights arguments and land-use tensions, held a Native American Day celebration in the Fall of 2000 (Honoring Nations, 2000).

The agreement was not only a beginning for the Swinomish Tribe, but also a model for many other tribes and local governments seeking to iron out land-use planning issues, and even to simply begin the consultation process. The educational work done by the NRRC became the basis for a statewide Tribes and Counties Intergovernmental Cooperation Project, and the two MOUs became templates for other land-use agreements between tribes and counties (Reynolds, 21, 35). Two hallmarks of the agreement that have made it so successful are its reliance on consensus, and the institutionalization of an ongoing cooperative effort to resolve the differences. These two elements have helped to sustain the positive working relationship between the county and the Tribe (Honoring Nations 2000, Deloria 1995, 20, Reynolds 1997, 35).

By seeking a cooperative relationship rather than a litigious win-lose outcome, the Swinomish Tribe and Skagit County have resolved their differences over land-use planning and simultaneously diffused the tensions that existed between their two communities. The 1986 MOU, and the process that followed from it, slowly developed the trust necessary to create the joint land use plan. The two governments and their constituents have reaped the rewards of their efforts in improved relationships, smooth land-use planning, and economic growth in their area. Their agreement, and the

process that lead them to it, stand as models of intergovernmental relations, recognized on the state and national level for their success.

### Resources

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#### MEMORANDUM OF UNDERSTANDING FOR ESTABLISHING PROCEDURES

#### FOR THE ADMINISTRATION OF A COOPERATIVE LAND USE PLANNING PROGRAM BETWEEN THE SWINOMISH INDIAN TRIBAL COMMUNITY AND SKAGIT COUNTY

Reynolds, B. "Indian Land Tenure Project, 1987-1989: An Award-Winning Model for Cooperation." From *Building Bridges: A Resource Guide for Tribal/County Intergovernmental Cooperation*. Northwest Renewable Resources Center, Seattle, WA, June 1997.

The Swinomish Experience; Past, Present and Future. The Swinomish Indian Tribal Community. Retrieved March 19, 2005 from [http://www.swinomish.org/history/swin\\_experience/](http://www.swinomish.org/history/swin_experience/) and [http://www.swinomish.org/history/swin\\_experience/page2.html](http://www.swinomish.org/history/swin_experience/page2.html)