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Title

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Permalink

<https://escholarship.org/uc/item/5t7728gd>

Journal

American Indian Culture and Research Journal , 27(3)

ISSN

0161-6463

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Publication Date

2003-06-01

DOI

10.17953

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Planning for Sustainable Reservation Economic Development: A Case Study of the Swinomish Marina and Mixed-Use Commercial Development

NICHOLAS CHRISTOS ZAFERATOS

INTRODUCTION

The attainment of tribal economic self-sufficiency depends in part upon a tribe's ability to develop reservation lands and natural resources in a manner that meets long-term tribal objectives and maximizes tribal benefit. For successful tribal development, the tribe should carefully assess the strengths of its organizational capacities, as well as its inherent weaknesses. Successful tribal development requires a tribe to decide how much risk it is willing to assume in undertaking economic development. This decision takes into consideration the assets it has available to invest in its own development, the equity position it desires to retain in the development, and its expectations for a fair return on its investment. The Swinomish Indian tribal community of Washington state employed a strategic approach to assess its inherent strengths and weaknesses as a starting point for determining the most advantageous approach for undertaking a large-scale pleasure boat marina and mixed-use commercial real estate development on its reservation. This article examines the approach followed by the tribe as it sought to advance its economic development by leveraging its assets along with private investments.

ECONOMIC DEVELOPMENT AND TRIBAL POLITICAL CONSIDERATIONS

Tribal economic development is a principal strategy that many tribes use to improve their financial independence, reduce their dependency on external

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forms of assistance, and alleviate chronically depressed economic and social conditions that persist in many Indian reservations. Tribal governments rely largely on their inherent governing political powers and their proprietary reservation land and natural resources to achieve community betterment. They can facilitate the process of economic development by conceiving appropriate forms of reservation development, establishing the entitlements needed to induce economic activity, facilitating project development financing, and managing and/or regulating the operation of the activity. Past Supreme Court rulings have clarified the tribal power to raise tax exempt funds for certain types of reservation development, as well as to tax and regulate persons and activities within the tribal territory.¹ The principles of sovereignty and self-determination are important doctrines that provide the legal foundation for tribes to improve their reservation conditions by developing the reservation economy.

A prevailing approach for reversing the conditions of reservation underdevelopment² brought about by the historic exploitation and exportation of reservation resources by non-tribal interests is through well-planned and tribally controlled economic development.³ This approach is coupled with the recognition that the most successful forms of reservation development also involve the concurrent development of the cultural and social community. Development of a successful, self-sustaining economy involves access to affordable project financing and private capital, a skilled management and labor force, and a demonstrated market demand. "The creation of private investment opportunities is a critical component in the development of Indian reservations."⁴

The use of tax incentives can help overcome some of the obstacles to attracting capital to the reservation economy. Popular forms of tax incentives for Indian reservations include incentives that encourage employment, business development, and passive investment capital. Investment capital can be obtained by issuing tax-exempt tribal bonds authorized under the Indian Finance Act of 1974.⁵ This form of preferential financing provides lower interest funding for the provision of eligible "essential governmental services," such as basic reservation infrastructure that must be in place before economic development can occur. Tax incentives for reservation economic development are limited, however, under the federal 1987 Omnibus Reconciliation Act,⁶ which authorizes the use of private activity bonds only under very restrictive terms. Tribal governments can also provide additional incentives for private investment in tribal economic development by removing the imposition of competing state and local taxation on reservation economic activities.

The combination of tribal taxation power and tax immunity can be important components in structuring a revenue system that supports long-term reservation economic development. In addition to a tribe's inherent authority to impose taxation and regulations on economic activities, tribes also possess significant tax immunities. By carefully structuring the formation of a tribal development project, several exemptions from federal income tax and state tax laws can create important advantages to attract private investment to the reservation.⁷ The application of these tribal taxing structures advantages the development of the reservation economy.

The ability to apply exclusive tribal taxation on reservation economic activities also helps to ensure that the activity will result in measurable benefit to the reservation community. Tribes, like other forms of government, rely on raising tax revenues to operate essential governmental services that in turn help to provide a safe reservation business climate. These services include tribal courts and agencies that enforce tribal laws, the delivery of fire and police protection, social and educational programs to establish a skilled labor force, and the development of reservation infrastructure that is prerequisite for the growth of the reservation economy.

CASE STUDY OF THE SWINOMISH MARINA DEVELOPMENT PROJECT

Members of the Swinomish tribe are descendants of the Swinomish, Kikiallus, Samish, and Lower Skagit tribes. The ancestors of these groups lived in the Skagit River Valley and on the coastline and islands around the river's delta. The culture and economy of the inhabitants of the Skagit region centered upon natural resources, especially on marine fisheries resources. The Treaty of Point Elliott removed the tribes from the Skagit region and relocated them to the Swinomish Reservation, one of the sites that has continuously been inhabited by the Swinomish for more than 4,000 years.⁸

In 1936, the tribe voted to reorganize its structure of government under the provisions of the Indian Reorganization Act of 1934.⁹ A tribal charter, constitution and by-laws were adopted by the tribal general council and approved by the secretary of the Interior. The tribe has sought to diversify its economy over the past two decades through economic development planning. Reservation economic assets include tribal-owned waterfront properties fronting the navigable Swinomish Channel, access to a major state highway and major utilities, and proximity to the metropolitan urban centers of Seattle and Vancouver. The development of a tribal economy is intended to provide long-term opportunities for the economic enrichment of the current and future tribal membership.

POLITICAL JURISDICTION OVER RESERVATION LAND RESOURCES

Jurisdictional interests within the boundaries of the reservation are complicated by the intrusion of state and local governments in civil and criminal matters, including natural resource management, taxation, gaming regulation, and the zoning of the reservation land base. The General Allotment Act of 1887¹⁰ divided the reservation into parcels ranging from 40 to 160 acres for individual member ownership. The only lands remaining in collective tribal ownership were the tidelands surrounding the reservation and an 80-acre parcel containing the traditional tribal village of Twiwok, several smaller individual parcels, and several recently acquired larger parcels intended to support economic development. The allotment system also resulted in the transfer of land ownership from Indians to non-Indians. Consequently, just less than half of the reservation uplands have become alienated from Indian ownership. Presently, land ownership on the reservation includes tribal community

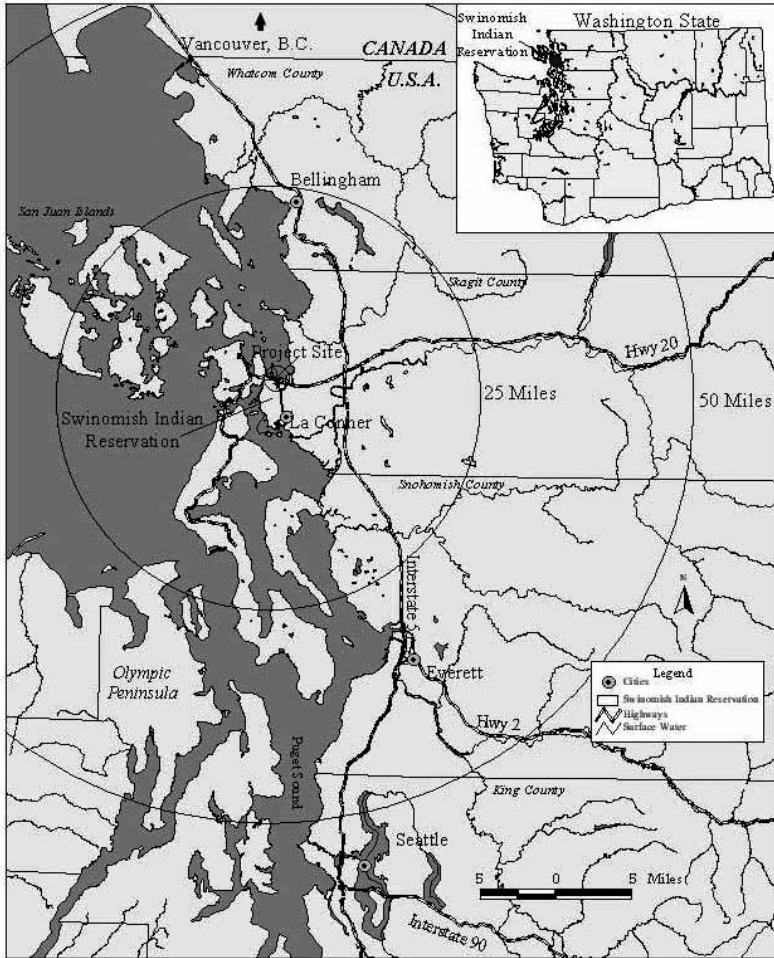


FIGURE 1. Location map of the Swinomish Indian Reservation.

holdings of about 600 acres, or 10 percent of the 6,000-acre reservation uplands, and 2,900 tideland acres. Individual tribal members own 50 percent of the land base. Fee simple, non-Indian owned land on the reservation accounts for about 40 percent of the total land base. Today's reservation population is about 4,000, of which about 1,000 are tribal members or Native Americans from other tribes, and about 3,000 non-Indian residents occupying both fee lands and leased Indian lands.

Before the tribe embarked on its economic development program, it sought to remove many of the obstacles it faced from the competing application of state and local jurisdiction within its reservation. Competition over the management of reservation resources became complex due to the concurrent application of non-tribal jurisdiction over reservation lands and resources, which

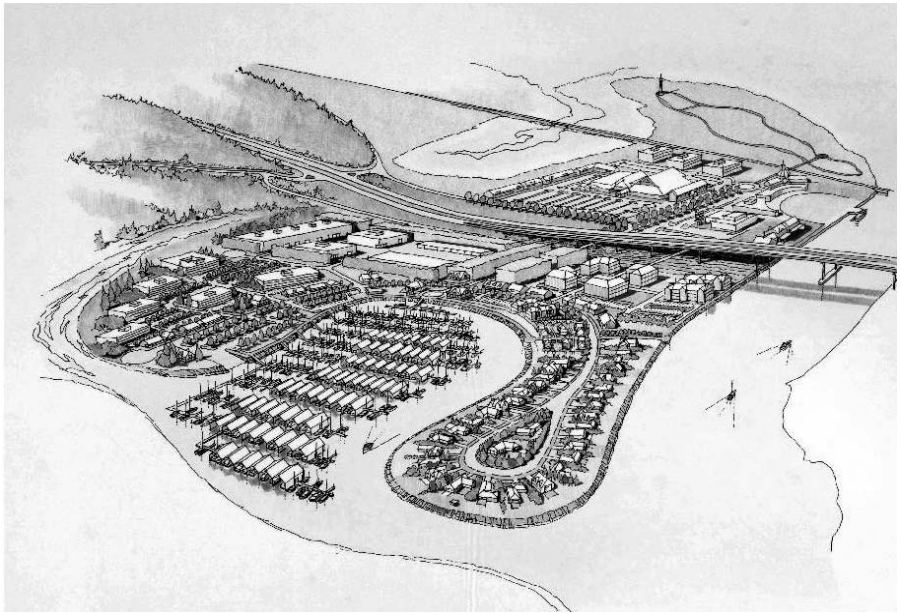


FIGURE 2. *Conceptual rendering of the Swinomish Channel marina development.*

frustrated the exercise of tribal governance. Since 1980, the tribe has employed a strategic approach to counter the interference to tribal regulation over the reservation environment. The tribe overcame many of its jurisdictional conflicts with non-tribal governments through the expansion of its powers of self-governance, by enacting its own land development regulations, and exercising its tribal powers to preempt state-asserted jurisdiction. It also successfully avoided jurisdictional conflict by entering into several interlocal cooperative agreements with local, regional, and state governments.¹¹ The first approach affirmed the tribe's authority to control the reservation environment, facilitating, among other objectives, the expansion of the reservation economy. The use of interlocal agreements helped the tribe expand its reservation utility infrastructure through mutual cooperation with regional utility planning agencies. Those agreements, which recognized the primacy of the tribal government to provide reservation-wide utility services, helped to strengthen the tribe's control over land use activities on the reservation and provided the necessary infrastructure to support long-term reservation economic development.

ECONOMIC DEVELOPMENT AS STRATEGIC PLANNING

Successful tribal economic development requires direct and continuous tribal participation in order to ensure that business development activities are consistent with the community's long-term social and economic goals. However, many tribes lack the financial, managerial, or technical capability for long-term economic development. A development approach that

combines a tribe's capabilities and assets with the participation from the private investment community offers a promising approach for assembling the necessary ingredients for successful economic development.

The Swinomish tribe employed a strategic approach in its economic development planning when it designated a reservation site for exclusive tribal economic use. The site consists of a contiguous waterfront parcel of about 240 acres fronting the Swinomish Channel, a protected navigable waterway that connects southern Puget Sound and the San Juan Islands, a major recreational boating destination. The tribe determined the project site to be ideal for the development of water-dependent commercial uses, including a 1,200-boat slip recreational marina and upland commercial businesses to complement and support the marina. The project site is in close proximity to Seattle and Vancouver, cities which have some of the world's highest per capita pleasure boat owners. Further, the marina site is within a one-hour drive from these urban centers, allowing boat owners residing in metropolitan areas to drive to their vessels and easily reach the popular boating grounds of Washington state's San Juan Islands and Canada's Gulf Islands.

The planning approach began with an evaluation of the tribe's strengths and weaknesses for undertaking economic development activities. The tribe identified several primary strengths. First, it was able to define socially desirable and market-feasible forms of reservation economic development and build a community-wide consensus supporting the tribe's economic development goals. Second, it was able to assemble a land base by acquiring the fee simple title land parcels that were once alienated as a result of the General Allotment Act, and consolidate these parcels with adjoining tribal trust lands to form a contiguous economic development site. Third, the tribe was able to conduct detailed project site planning, market research studies, environmental assessments, and the preparation of applications to obtain federal and tribal project development permits and approvals. Once the tribe developed a clear vision for economic development and secured the land base, the tribe would apply its land-use regulatory powers to entitle economic development activities consistent with the tribally adopted development vision.

Because the tribe had already established a reservation-wide utility authority, it controlled the extension of services needed to support the economic development project. The tribe was also able to allocate funds to undertake pre-development project planning and economic studies sufficient to demonstrate the economic feasibility for developing the project.

ECONOMIC DEVELOPMENT FINANCING ALTERNATIVES

The tribe's strategic approach also identified several weaknesses that needed to be overcome before the project could proceed, including the lack of development expertise for undertaking and operating a large-scale commercial development and insufficient equity to match the requirements for securing construction debt financing. After evaluating several approaches that included developing the project entirely on its own, the tribe acknowledged that it was unable to raise the projected construction and operating

capital needed to fund the project without the participation of private investors. Another important consideration was the tribe's decision not to assume all of the financial risks associated with a project of this scale. Other development approaches considered included leasing the unimproved property to a third-party developer. This approach was rejected because the tribe's development goals called for an active, rather than a passive involvement in the development, and sought an economic return far greater than could be expected from a fixed annual lease payment based on the unimproved value of the land. As a compromise alternative, the tribe selected a "joint-association" development approach intended to reduce tribal financial risk while providing for tribal financial participation in the project's revenue stream. The approach allowed the tribe to decide how much investment it was willing to contribute to the project, supplementing its contribution with additional equity from a private investment partner with expertise in large-scale real estate and marina development. The approach was appealing because it offered the tribe a way to reduce its financial risk while participating in projected revenue returns, and would provide project management expertise it lacked.

THE DEVELOPMENT APPROACH: A SIX-STEP PROGRAM

The tribe's economic development approach began with an initial set of questions intended to clarify its own long-term needs for economic development on the reservation. Decisions based on these questions helped form the conceptual framework for structuring the development project. These considerations were necessary before formulating an acceptable development project. The larger questions regarding the nature and extent of tribal involvement in reservation development were carefully considered early in the planning process to ensure that detailed project planning would result in a project that met the tribe's goals for reservation community development. Planning the development approach began with six key questions:

1. How will economic development achieve long-term benefit for the tribe?
2. What is the ideal form of development that the tribe wishes to achieve and how should the tribe carry out the project?
3. What are the tribe's strengths and available assets that can advance its economic development?
4. What are its weaknesses in undertaking economic development?
5. What is the long-term profit potential from the development project?
6. What form of a business relationship with private investors would best provide a continuous and meaningful tribal involvement as well as a fair return on the tribe's investment?

Establishing Goals and Objectives for Swinomish Economic Development

The tribe's first step was to define its long-term economic development goals for improving tribal social and economic conditions in several important

respects. Once defined, the activity of economic development planning would become subservient to those goals and serve as evaluation criteria to measure the acceptability of alternative economic development proposals. The tribe's six major development goals are:

- *Long-term economic self-sufficiency.* Tribal economic development is sufficiently intensive in scale, resulting in long-term and substantial economic self-sufficiency for the tribe;

- *Obtain fair return on tribal investment and assets.* The project should be structured in a way that will give the tribe a fair return on the assets it invests in the project. These assets include the value of land, pre-development project planning, economic feasibility, environmental studies, and the value of project development permits and other entitlements;

- *Participatory opportunities in business activities.* In each element of the development project, the tribe seeks to create economic opportunities for tribal members that include direct employment in businesses and individual business ownership opportunities;

- *Quality development with ecological responsibility.* The project should be designed to minimize adverse social and environmental impacts and restore important fisheries' habitat and environmental quality;

- *Positive perception of the tribe.* Reservation economic development is intended to be perceived positively by the surrounding community as high quality development that would enhance the tribe's image within the region;

- *Contribution to the regional economy.* Reservation economic development is expected to stimulate additional investment that will result in an economic spillover that benefits the greater regional economy.

- *A legacy for future generations to be proud.* The project is intended to establish a permanent economic base on the reservation that will contribute to tribal members' sense of pride of ownership.

After the adoption of the tribe's development goals, project objectives were then drafted and adopted. The objectives were intended to guide the tribe's economic development team in carrying out detailed project planning and for establishing a business model that provides for the participation by prospective private-sector investors:

- *Protect tribal land and capital.* The structure of the business model should protect the tribe from risking the loss of tribal lands or financial assets;

- *Purchase fee lands and convert to trust.* The tribe should acquire reservation fee simple lands and consolidate them with adjoining tribal trust lands to form a contiguous development site;

- *Encourage strong community involvement.* The planning team should seek the early and continuous involvement of the community in developing alternative project design concepts;

- *Seek a quality development partner.* This objective calls for locating a qualified land developer and investor capable of financing and implementing the development project, while attaining tribal economic and social objectives;

- *Restore wetlands on the project site.* The development site was once a productive marine estuarine habitat. However, historic nontribal developments on Swinomish Channel resulted in diking activities that destroyed hundreds of acres

of valuable intertidal wetlands and reduced the once productive fisheries habitat. The project seeks to restore marine habitat to benefit fisheries resources;

- *Maximize project proforma with pass-through tax benefits.* The business model should incorporate available tax incentives and leverage the tribe's governance authority to obtain tax-exempt financing in order to reduce the cost of project debt;

- *Market based return through revenue sharing.* The business model should establish the fair market value of the tribe's contributions to the project and ensure a fair rate of return from future project revenues;

- *Increase tribal tax base and government services.* The project should create a significant taxable economic base on the reservation. Business and property improvements should create new tax revenues that support tribal governmental programs and services;

- *Expand tribal employment, skills, and business ownership.* To maximize economic benefits to tribal members, training and skills development are needed to ensure that tribal employment is realized. Business development training and financial aid and incentives should be provided to enable tribal members to own their small businesses within the larger development project.

- *Provide tribal buy-out of investor's interests.* The business model should give the tribe an option to purchase the investor's interests at a fair price, if the tribe believes it advantageous to increase its ownership interest in the development.

Master Development Planning

To coordinate development planning, the tribe delegated authority for all aspects of project planning to a tribal development team that consists of an appointed tribal business committee which oversees activities carried out by project staff. The Swinomish Development Authority (SDA) was formally established as the tribe's economic development agency, a four-member body separate from the tribal senate, the tribe's governing body. The SDA was delegated the authority to expend funds provided by the tribal senate to prepare a project development plan, to conduct studies on market and business feasibility, to propose alternative development scenarios, and to initiate negotiations with prospective private investors.

Staff resources available to the SDA include tribal technical staff. A consulting development management firm was also hired with expertise in commercial real estate development. The tribe's general manager, economic development director, and financial comptroller serve on the SDA's staff. The tribe's legal, planning, finance, and employment and training departments also provide support services to the SDA. The SDA's planning team includes additional consultants who prepare business development studies, market research, site planning, civil engineering, environmental analysis, construction cost estimates, and tribal bond counsel attorneys.

The project design was accomplished by assembling a design team comprised of the SDA, its staff, and consultants who sought a design that would meet the financial and social objectives of the tribe. The team combined knowledge about reservation lands, tribal policies and regulations, and

community priorities with the contracted expertise in the specialized fields of real estate market analysis, project master planning, design and architecture, engineering, and business analysis.

The project design team convened a series of design charrettes to produce alternative development concepts for a project site that would encompass about 240 acres. The central activity proposed was the sixty-acre pleasure boat marina. Market feasibility analysis by project consultants indicated a strong long-term demand for boat moorage slips. As a historically based fishing and boating community, the tribal membership had expressed a strong desire for a marina as the centerpiece to the project and supported new job opportunities associated with boat-related industries. The design team's market research was expanded beyond marina feasibility to consider retail commercial, light industrial, residential, office, and recreational and other land uses. The final assembly of potential land uses was evaluated against market assumptions, construction costs were estimated for the marina, roads, and utilities infrastructure necessary to support the upland commercial uses, and a business proforma was prepared to project long-term economic performance and viability.

The task of master development planning is a creative process that involves several interdisciplinary considerations. The master development plan sought not only to depict how reservation economic development could be physically laid out, but also considered how the project would "fit" as an important element of the tribe's overall reservation community development, and, especially, how the tribal membership could actively participate in the newly created economic activity. Throughout the design process, the project team evaluated how each of the project elements would correspond to the adopted tribal development objectives. The consideration of alternative business uses was continuously evaluated against the criteria of marketability to test the feasibility of alternative uses, as well as to evaluate the potential economic and employment benefits that each business activity could bring to the community. Concurrently, the team carefully evaluated social and environmental impacts in order to minimize adverse affects to the reservation environment. The final development design would then be presented to the community and the tribal senate for formal adoption.

Identifying Tribal Strengths and Assets

An internal review of tribal assets identified several resources that the tribe could contribute to the development. These include governance assets, the project development site, and equity assets.

Governance assets. The tribe possesses powers of self-government, which enables it to entitle the development site for the commercial uses proposed by enacting zoning laws that would establish the necessary development rights. As a utility purveyor for the reservation, the tribe also has the ability to extend water and sewer utility services to the project. The tribe's administrative capacity to carry out economic development planning and environmental review, prepare and submit permit applications, and conduct legal and financial analysis enabled

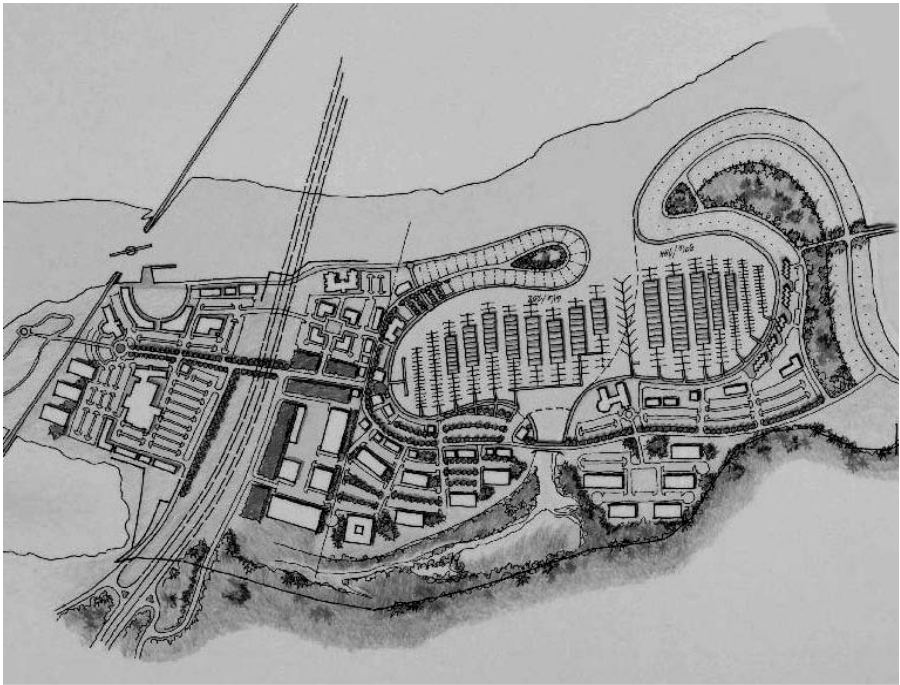


FIGURE 3. *Project site plan.*

the tribe to complete many of the pre-development activities needed to obtain development permits and prepare the project for implementation. Finally, its eligibility to obtain tax-exempt financing and potential grants funding assisted in reducing project construction financing costs.

Site assets. The project site is ideally situated, being in close proximity to two large metropolitan markets, and lies adjacent to Washington's premier marine boating destination in the San Juan Islands. Located on the Swinomish Channel, the marina would provide services to both resident and transient boaters who use the Channel for safe passage to the San Juan Islands. A state highway provides direct access connecting these regional markets to the project site.

Equity assets. The tribe already owned a portion of the development site, and had obtained an exclusive option to purchase the remaining fee simple lands. The tribe acquired the fee parcels and consolidated these parcels into a single master development site. In addition, the tribe pledged a certain amount of cash equity to partially secure long-term debt financing.

Identifying Weaknesses to Tribal Development

Equally important in the evaluation of the tribe's strengths was an earnest evaluation of its limitations to carry out economic development. The tribe

readily acknowledged that it had limited managerial expertise in commercial real estate development and marina operations. In evaluating the ability of the tribe to raise the capital necessary to construct and operate the project, it acknowledged it was unable to pledge the necessary equity to leverage construction debt financing. Therefore, additional equity would be needed. The tribe also recognized that lending institutions would require experienced project management expertise in place as a condition to project financing.

To bring management expertise to the project, the tribe evaluated two approaches: hiring specialists in commercial real estate development and marina operations, which would necessitate assuming further financial cost, or entering into a business relationship with an investor with substantial business development expertise. The tribe determined that it was advantageous to enter into a business agreement with a proven project developer who could participate as the project operator and as an equity partner to help secure project financing. In return, the operator would receive a fair share of future project revenues. The tribe considered several business development models and selected a joint association partnership model that would combine the tribe's assets with a private investor's contribution of managerial expertise and equity capital. The joint association model appeared to be an optimal approach for increasing the likelihood for attaining tribal development objectives, for obtaining long-term project financing, and for guaranteeing the project's success.

Identifying the Long-Term Upside

A project proforma was developed to project revenues and to establish that a reasonable rate of return on equity contributed by both the tribe and its private development partner could be realized. The long-term revenue forecast was based on a project proforma that considered several financing variables, including the benefits of a lower construction loan interest rate realized through the tribe's issuance of a tax-exempt bond. The financial proforma showed that projected revenues could meet both the private investor's requirements for a fair market rate of return on its investment as well as a comparable return on the value of the tribe's contribution.

Designing the Ideal Business Relationship

The scope of development envisioned exceeded the capacity of the tribe to undertake financing on its own. Without a financial equity contribution from an outside investor, which would include a combination of capital and credit enhancements, in addition to managerial expertise, the tribe concluded that the project could not be financed and constructed. The tribe determined that by joining its assets with those of a private development partner, it could realize its long-term objectives. An important consideration was to locate a business partner that could work compatibly with the community in order to attain both the tribe's economic goals, as well as the community's social objectives.

Based upon the project's business proforma, a preferred business structure was developed that would guide future negotiations with private investors towards the negotiation of a fair and equitable business agreement. The business structure contained several provisions:

- *Pre-qualification of investor / developer.* To ensure the ability of the prospective private partner to perform, potential investors would be evaluated based on their prior experience in managing similar real estate and marina developments, knowledge of tribal community development objectives, and evidence of its ability to pledge equity and credit enhancements to obtain project financing;

- *Earnest money deposit.* Before entering into negotiations, an earnest money deposit should be obtained in exchange for a right of exclusive negotiations for a limited time period;

- *Prepaid payment.* As a demonstration of the prospective investor's commitment to the project, an advanced cash payment would be sought to partially fund pre-development planning expenses;

- *Annual guaranteed income.* A business agreement would be sought that would provide guaranteed annual revenues to the tribe to support ongoing tribal governmental activities as well as to repay the tribal portion of construction debt for project infrastructure improvements;

- *Tribal profit participation.* Based on the value of the tribe's overall contribution to the project, including pre-development planning activities, contributive value of the land base, and other considerations, a distribution of project revenues should provide compensation to the tribe;

- *Minimum cash investment.* Project financial planning should determine the minimum amount of equity and other credit enhancements required by financial institutions to secure construction debt financing. This amount would represent the private partners' equity in the project with the intention of ensuring their motivation by having equity capital at risk;

- *Tribal property tax.* The business agreement should provide for the reasonable application of tribal property and business activity taxes to support essential governmental services and reservation economic development;

- *Social development objectives.* Incentives should be negotiated in the business agreement to ensure that potential adverse social and cultural impacts to the tribal community are minimized or avoided, and that benefits to tribal members are ensured;

- *Training programs and tribal entrepreneurialism.* The agreement should provide for early identification of new jobs and training programs that prepare the tribal workforce for employment. Opportunities for individually owned businesses should be identified and tribal member business ownership should be encouraged through incentive programs, preferential leasing policies, and assistance in business financing and development.

- *Tribal "buy-out" provision.* The agreement should provide the tribe the option of increasing its equity ownership in the project by buying out the equity shares of its investment partners at a fair market price.

**READYING THE PROJECT FOR IMPLEMENTATION:
PRE-DEVELOPMENT TASKS**

With the conceptual business structure in place, the tribe was ready to proceed by authorizing its development team to undertake a series of pre-development activities in order to “package” the development for presentation to private investors. This tactic would emphasize the readiness of the project to proceed to construction without delay by demonstrating the project’s feasibility and the availability of required construction permits and zoning entitlements that the tribe would obtain. Hence, the tribe’s pre-development planning activities served to remove perceived risk from the standpoint of both the investor and the lender, which added value to the tribe’s equity position in the project. To accomplish the pre-development activities, the tribe’s development team constructed a four-phase work plan to guide project planning and implementation. The tribal activities that would be accomplished under the work plan are illustrated in Table 1.

Table 1. Pre-Development Work Plan

Phase I: Project Planning	<ul style="list-style-type: none"> • Finalize the Statement of Tribal Development Objectives; • Delegate responsibilities to the Swinomish Development Authority; • Compile land survey, title reports, and document existing conditions; • Negotiate and execute utilities services agreements; • Implement the land purchase agreement for fee lands, acquire title, and transfer title to federal trust; • Develop the Conceptual Master Plan; • Compile development entitlements; • Obtain federal and tribal construction permits.
Phase II: Detailed Project Planning	<ul style="list-style-type: none"> • Finalize Master Development Site Plan; • Complete market feasibility studies; • Develop construction cost estimates; • Investigate taxation advantages and tax-exempt eligibility; • Develop “ideal” business terms with private investor; • Distribute “Project Portfolio” to solicit investor interest; • Prepare a due diligence report.
Phase III: Business Structure Agreement	<ul style="list-style-type: none"> • Select Partner; • Negotiate development partnership agreement; • Execute “joint association” business agreements; • Finalize business plan and construction debt financing.
Phase IV Work Plan: Project Implementation	<ul style="list-style-type: none"> • Obtain construction loan; • Commence training, member business development; • Construction bidding, phased construction • Market and lease marina slips; • Lease upland commercial parcels.

PACKAGING THE PROJECT

Once the tribe had completed preliminary feasibility studies and its pre-development package, the project was presented to the private investment community. The tribe assembled pertinent project information in a “Project Prospectus” (Table 3) that it published and distributed to solicit inquiry from the commercial real estate industry. The qualifications of responding investors were reviewed by the tribe’s business development consultants and the SDA, and interviews were scheduled with prospective parties. Qualifying investors were then provided project due diligence material to familiarize them with the technical and business aspects of the project. The due diligence report was compiled in a five-volume set of three-ring notebooks containing all pertinent background information regarding the project. The

Table 2. Due Diligence Checklist

Chapter 1: Tribal Policy	Project goals and objectives.
Chapter 2: Tribal Governance	Tribal constitution; bylaws; taxation policy.
Chapter 3: Project Status	Attorney opinion, project entitlements; federal NEPA Record of Decision.
Chapter 4: Title Review	Preliminary Title Report for the property.
Chapter 5: Infrastructure Services	Availability of site utilities; transportation improvement plan; police and fire protection services.
Chapter 6: Conditions and Federal Permits	Cultural resources protection; wetland mitigation plan; federal development permits; NEPA, TEPA compliance.
Chapter 7: Local Jurisdiction	Comprehensive plan and zoning approvals; construction permit approval.
Chapter 8: Market Analysis	Supply and demand analysis; highest and best use analysis; absorption rates for marina slips and commercial parcels.
Chapter 9: Cost Analysis and Business Proforma	Cost of land, closing costs, property taxes <i>Hard Cost:</i> Boat basin development; marina slips; grading, streets and utilities. <i>Soft Cost:</i> Permit fees, consulting services; construction cost contingency; bonds and insurance costs, underwriting rating; operating capital; legal and accounting fees; financing and loan fees; interest during construction.
Chapter 10: Construction Schedule	Construction documents and bidding; final plat processing and approval; land lease approval; cash flow analysis.

documentation was intended to facilitate the review of the project's feasibility by investors and future financial lenders. The due diligence report was assembled in ten major chapters. Table 2 summarizes the information contained in the due diligence report. Finally, the SDA was authorized to proceed with negotiations with the selected investor toward an executable joint association development agreement.

CONCLUSION

The Swinomish economic development approach sought to ensure that the economic development on the reservation would result in substantial and long-term benefits to the Swinomish community. By participating directly in pre-development planning, the tribe was able to determine the form of economic activities that would best meet tribal community goals and would ensure that tribal lands would be used to their highest economic potential. By investing in project planning and preparing a financial proforma, the tribe was able to determine the feasibility of the project and anticipate likely revenues that the economic development project could produce. This information enabled the tribe to determine the precise capital contributions required to finance the project and helped to prepare the tribe to engage in well-informed business discussions with private investors regarding the fair distribution of project revenues to both the tribe and the private investment partner. Sophistication in business negotiations was demonstrated by having first prepared the financial forecasts, which demonstrated that the tribe could achieve its economic development objectives and receive a fair return on the value of its contributed assets. Since the tribe elected to combine its assets with the assets of a private partner, it was able to minimize its own risk in securing the construction financing.

Because the tribe initiated pre-development project planning on its own, it was in a far stronger position to determine the exact form of economic development it believed would be most beneficial and consistent with its community development goals. The tribe's planning efforts successfully obtained the required development permits for the marina and upland commercial development,¹² and it secured a strong consensus of community support that helped to minimize project delays and controversy usually associated with large-scale development projects. These results reduced the financial risk as perceived by the private investment community.

The tribe's economic development strategy enabled it to strengthen its position in negotiating a fair and equitable business agreement with its development partner and to attract the financial equity and credit enhancements necessary to fund the project. The tribe is currently working with its selected development partner, lending institutions, project underwriters, and bond counsel to structure the project financing package.

Table 3. The Swinomish Channel Marina Project Prospectus

<p>Project Overview</p>	<p>The Swinomish Indian Tribal Community (the “Tribe”) is seeking an investment partner to master develop approximately 240 acres of land situated within the Swinomish Indian Reservation and develop the property into a mixed-use project centered around a 1,200-slip marina. The project is located near LaConner, WA and stands at the gateway to the San Juan Islands, one of the premier boating locations in the United States. The ideal investor/developer will have a highly successful track record in real estate and marina development, possess experience with development in Indian Country, and have the financial capability and the team of professionals necessary to bring a project of this scale to fruition.</p> <p>The Tribe has secured all the necessary federal permits to construct approximately 1,200 boat slips in two dredged basins totaling 60 acres within the site. The remaining uplands areas consists of 120 acres surrounding the marina, and 35 acres north of the marina and surrounding the existing tribal casino, which are suitable for commercial development. Initial estimates of construction costs for backbone infrastructure and for completely constructing the marina total just over \$35 million.</p>
<p>Project Location</p>	<p>The Swinomish Channel Marina is strategically located approximately 70 miles equidistant between the Seattle, Washington and Vancouver, British Columbia metropolitan markets. The site is situated at the gateway to the San Juan Islands, one of the premier marine recreational areas in the United States. Located on the Swinomish Channel, this site possesses the potential infrastructure capacity to support the planned commercial development. The project contains more than 100 acres of contiguous commercial designated properties with direct access to State Highway 20, a major limited access highway connecting to Interstate 5, eight miles to the east.</p> <p>The subject property is comprised of relatively flat, irregularly shaped land situated within the northernmost section of the Swinomish Indian Reservation near Anacortes, Washington. The property contains several thousand linear feet of low bank frontage along the Swinomish Channel, a dredged, navigable waterway bordering the subject on the east and connecting Skagit Bay and LaConner to the south with Padilla Bay to the north. This site provides a protected vessel passage alternative to the open waters of the Strait of Juan de Fuca.</p> <p>The property is located five miles southeast of Anacortes, eight miles west of Mt. Vernon, four miles northwest of LaConner, 70 miles north of Seattle, and 80 miles south of Vancouver, British Columbia. It is situated adjacent to some of the best boating areas in the nation and offers a mild climate, averaging much less rainfall than the average for the Puget Sound area. The Swinomish Casino is situated within the northern borders of the subject property, although its 10 acres is excluded from the subject property.</p>

Table 3 (continued)

Project Description	<p>The centerpiece of the planned development is a permitted 60-acre, 1,200 boat-slip marina located on a 240-acre parcel adjacent to the Swinomish Channel. The parcel provides more than 120 acres to support planned commercial, offices, light industrial, and other waterfront uses. In addition, there are approximately 30 developable acres north of State Route 20 adjacent to the existing Swinomish Casino which are ready to develop for commercial purposes.</p> <p>The Puget Sound area has the highest per capita boat ownership rate of any region in the nation and is a popular boating destination for out-of-state tourists. Marina occupancy in the subject market area is approximately 98 percent. From the metropolitan Seattle area, the project site offers relatively short combined travel times (driving and sailing) to the San Juan Islands. The approximately two-hour travel time from the subject property, compared to eight hours from Seattle, provides a distinct advantage for mooring boats on the subject property.</p>
Vehicular Access	<p>Primary access to this area would be from the existing SR-20 northern access road and from a southern access road. The backdrop to Area 2 is a forested natural hillside with elevations up to 200 feet.</p>
Project Development Permits	<p>All major permits for the marina have been obtained. In addition, the Tribe has issued local coastal zone management development permits and zoning approvals.</p>
Proposed Business Venture	<p>The Swinomish Tribe desires a development relationship on a pure market-oriented basis with a partner that possesses the necessary expertise and capital to assist in the master planning, project financing and development of all or part of the mixed-use project. The investor/developer will be responsible for the construction, management, and operation of the various developments on the site. While the total investment will depend on the master planning process and final designs, a preliminary estimate of construction costs for the area, including backbone infrastructure and marina construction, is approximately \$35,000,000.</p> <p>The Tribe has invested a great deal of time and effort in assembling land parcels, project planning, and identifying appropriate forms of participation by the Tribe to ensure project success. Accordingly, the Tribe has defined several overall objectives relative to the formation of this public/private venture.</p> <p>It is proposed that a Tribal-Private form of joint association development be entered into for the use and development of the Tribe's properties. The Tribe will act in the capacity of landowner, master lessor, and local government. The agreement provisions would include a lease for the marina basin, as well as annual ground rent payments and profit participation. The final structure for financing and development of the properties is subject to the evaluation of the feasibility of the project,</p>

Table 3 (continued)

	<p>the potential return on investment, and the projected return based on internal investment criteria. The final structure will depend upon the particular needs of the selected private partner(s).</p> <p>As a federally recognized tribe, the Swinomish Tribe has access to competitive taxable and tax-exempt financing. Several features of recent legislation provide important tax incentives to a private/tribal partnership. Tribal ventures are exempt from a variety of federal and state taxes and, under certain circumstances, partnerships may qualify for those tax exemptions, deductions, and credits. Private partners may enjoy accelerated depreciation for capital investments as well as wage tax credits.</p> <p>In addition, the Swinomish Tribe has exclusive jurisdiction over all land use activity affecting the Tribe on the Swinomish Indian Reservation and is motivated to see the project succeed.</p>
<p>The Swinomish Tribal Community</p>	<p>The Swinomish Indian Reservation, occupying the southeastern portion of Fidalgo Island, is home to the Swinomish Indian tribal community. The population of more than 4,000 people includes approximately 1,000 tribal members and other Native Americans.</p>
<p>Governing Structure</p>	<p>The Swinomish Indian Tribal Community voted to accept the Indian Reorganization Act of 1934 and is organized under the provisions of that act. A tribal constitution and bylaws were adopted by the tribal General Council and approved by the Secretary of the U.S. Department of the Interior in 1936. The governing body of the Swinomish Indian Tribal Community is the Swinomish Indian Senate, consisting of 11 members who are elected to five-year terms. The principal tribal officers (chairman, vice chairman, secretary and treasurer) are elected from this 11-member group.</p>
<p>Economic Planning</p>	<p>Income-producing activities have been a major focus of Swinomish economic development planning since the establishment of the Reservation. The increase in income-producing activities reflects the growing diversification of the economic base on the Reservation. Continued expansion of the economic base, as reflected in the Channel Marina Development, ensures that future generations of the community will enjoy opportunities for economic enrichment and individual betterment.</p>
<p>The Reservation Land Base</p>	<p>The Reservation contains about 10,000 acres and is comprised of 75 percent forest, 16 percent agriculture, 8 percent residential, and 1 percent industrial land usage. Land ownership on the Reservation includes Tribal community holdings in uplands and tidelands. More than two thirds (67.1 percent) of the Reservation is owned in federal trust, and of this approximately 20 percent is leased to non-Indians on a long-term basis. Fee simple, non-Indian owned land on the Reservation accounts for 32.9 percent of the Reservation land base.</p>

Table 3 (continued)

	<p>The Swinomish Comprehensive Land Use Plan (1996) affirms the Tribe's jurisdiction over all lands within its reservation boundaries. The Channel Marina development site will be entirely held in tribal trust ownership, which places jurisdiction over all development and activities exclusively under the authority of the Swinomish Indian Tribal Community. Extensive regional cooperative agreements with other local governments provide support to the Tribe in the delivery of reservation public safety and infrastructure services.</p>
The Swinomish Development Authority	<p>The Swinomish Development Authority (SDA) is a governmental subdivision of the Swinomish Indian Tribal Community. Membership on the SDA consists of three appointed Senate members, The Director of the Office of Planning and Community Development, the Finance Director, and the General Manager. The SDA has several purposes which include to function as a holding entity for certain "for-profit" businesses and enterprises and to manage and supervise all such businesses and enterprises in a "for-profit" businesslike manner. The SDA is granted authority to issue bonds for the attainment of tribal economic objectives.</p>
Economic Development Objectives	<p>The Tribe's economic development goals seek to establish a means to secure long-term sustainable employment and economic security for the community by participating in a quality development that can earn the distinction as a national model for private/tribal partnerships. There is flexibility as to the specific structure of the development relationship to achieve these ends. These eight objectives highlight the overall outcomes sought by the Tribe:</p> <ol style="list-style-type: none"> 1. To establish economic opportunities and self-sufficiency for the Swinomish Tribe and its members by developing a marina and related upland uses on the Reservation. 2. To facilitate the reversal of economically depressed conditions within the Reservation by providing long-term, diversified employment opportunities for Swinomish Indians and by supporting the continued and improved operation of tribal governmental services. 3. To foster a positive perception of the Swinomish Tribe within the surrounding community, as well as to provide an economic development opportunity from which greater Skagit County can also benefit. 4. To increase and protect the amount of land held in trust by the U.S. Government for the Tribe and its people. 5. To establish and obtain values and appropriate returns on current and future tribal investments and assets. 6. To maintain and encourage high-quality development on the Reservation consistent with tribal objectives and ecological responsibility. 7. To provide a national model for tribal-private economic development partnerships. 8. To establish a legacy from which future generations of Swinomish

Table 3 (continued)

Indians can both benefit and be proud.	
Inquiry Information	<p>The Swinomish Channel Properties are to be developed through a cooperative Joint Association agreement between the Tribe and private investors. The Tribe currently owns and controls the development site and views the development of these properties as its primary economic development priority in order to advance and sustain the tribal community's long-term economic welfare.</p> <p>The Tribe is experienced in public/private partnerships and complex development projects, and because of that experience, the Tribe will consider several approaches to facilitate the development process and protect the interest of potential private investors.</p> <p>Respondents to this Project Prospectus are cordially invited to provide the following Statement of Interest:</p> <ol style="list-style-type: none"> 1. Name of your organization, address, name, and telephone number of principal or contact person 2. Type of participation interest (active or passive) 3. Type of preferred project organizational structure 4. Experience in mixed-use commercial and marina development 5. Experience working with Indian Tribes 6. Criteria for investment and amount of investment proposed 7. Representation of net worth <p>Upon receiving your letter of inquiry, a meeting may be scheduled to discuss the structure of the development opportunity and specific business terms. Your submittals will be reviewed in strict confidence.</p>

NOTES

1. The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. The power to tax enables a tribal government to raise revenues for its essential services and is derived from a tribe's general sovereign authority to control economic activity within its jurisdiction. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) for decisions regarding the extent to which states may impose taxation on non-Indians engaged in commerce with Indians.

2. Underdevelopment refers to the present economic conditions of disadvantaged communities whose underdevelopment is caused by external factors rather than attributed to their own pattern of development. See Andre Gunder Frank, "The Development of Underdevelopment," in *The Political Economy of Development and*

Underdevelopment, ed. Charles K. Wilber (New York: Random House Press, 1988); Thomas D. Hall, "Native Americans and Incorporation: Patterns and Problems," *American Indian Culture and Research Journal* 11, 2 (1987).

3. See Timothy J. Smith, *Strategies for Financing Economic and Business Development on Indian Reservations* (St. Paul, MN: Northwest Area Foundation, 1989).

4. See Stephen Cornell and Joseph P. Kalt, *Report of the Task Force on Indian Economic Development* (Washington, DC: U.S. Department of the Interior, 1986), vi.

5. Indian Finance Act of 1974 (Act of April 12, 1974), 25 U.S.C., sec. 1451.

6. Omnibus Budget Reconciliation Act of 1987, Public Law 100-203.

7. Douglas B. L. Endreson, *Resolving Tribal-State Conflicts* (Washington, DC: National Indian Policy Center, 1991).

8. Natalie Andrea Roberts, *A History of the Swinomish Tribal Community*, Ph.D. dissertation (Seattle: University of Washington, 1975).

9. The Indian Reorganization Act of 1934 (Wheeler-Howard Act), 25 U.S.C. sec 461-479 afforded tribes an opportunity to accept or reject the restructured form of tribal government mandated by the Act. The form of government drawn up by this Act was based on a written constitution mandating open elections. Additional provisions in the Act prohibited further allotment of land; prevented the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and authorized tribes to negotiate with the federal, state, and local governments.

10. The General Allotment (or Dawes) Act of 1887 (25 U.S.C. sec. 331-334; 339; 341; 348; 349; 354; 381) authorized the allotting of the tribal lands to individual tribal members, the land to remain in trust for twenty-five years. The stated reason for allotment was to provide for tribal members to become self-supporting members of their communities. The result was that after the twenty-five-year trust period, the land became eligible for state taxation, resulting in more than 17.5 million acres of land being lost to non-Indian ownership nationwide.

11. See Nicholas C. Zaferatos, "Planning the Native American Tribal Community: Understanding the Basis of Power Controlling the Reservation Territory," *The Journal of the American Planning Association* 64, 4 (Autumn 1988): 395-410.

12. Permit applications and environmental review under the National Environmental Policy Act were completed over a ten-year period between 1986 and 1996 when a federal section 10/404 dredge and fill permit was issued to the tribe for the construction of the marina basin. Permitting activities included compliance with the National and Tribal Environmental Policy Acts, preparation of a draft, supplemental, and final supplemental environmental impact statement, issuance of federal water quality certification under the Clean Air Act, compliance with federal endangered species biological and cultural resources assessments, and issuance of tribal development approvals.