

## **Title 23 – Tidelands**

### **Chapter 1 – Tribal Tidelands**

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## Legislative History

Enacted:

Ordinance 416 Amending STC Title 19 Environmental Protection, Chapter 4 Shorelines and Sensitive Areas and STC Title 23 Tidelands, Chapter 1 Tribal Tidelands 4/20/21).

Ordinance 310 Adopting STC Chapter 23-01, Tribal Tidelands (5/1/12), BIA (5/10/12)

### **23-01.010 Title.**

This Chapter shall be known and may be cited as the “Swinomish Tribal Tidelands Code.”

[History] Ord. 310 (5/1/12), BIA (5/10/12).

### **23-01.020 Purpose.**

The purposes of this Chapter are:

- (A) To confirm that the United States owns all tidelands within the Swinomish Indian Reservation in trust for the Swinomish Indian Tribal Community, with the exception of those tidelands conveyed by the United States on behalf of the Tribe to the Elmer F. Edwards Company in 1970 and those tidelands quitclaimed by the United States on behalf of the Tribe to the Knudson family in 1994;
- (B) To define in accordance with existing Federal law and establish a process to determine the shoreward boundary of Tribal tidelands;
- (C) To preserve, restore, enhance, and protect the ecological, cultural, aesthetic, economic and other values of Tribal tidelands in concert with the provisions of Title 19, Chapter 4 of the Swinomish Tribal Code –Shorelines and Sensitive Areas;
- (D) To prohibit the placement of any structure or fill material on Tribal tidelands after the effective date of this Chapter by any person other than the Tribe without a lease from the Tribe, and to establish an orderly process whereby the Tribe will require the removal of or grant a lease to maintain (with or without modification) any structure or fill material located on Tribal tidelands as of the effective date of this Chapter if the Tribe has not previously granted a lease to maintain such structure or fill material;
- (E) To prohibit all uses of Tribal tidelands after the effective date of this Chapter except in accordance with this Chapter; and

(F) To safeguard and promote the peace, safety, health, general welfare, economic security, and political and cultural integrity of the Tribe and its members.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.030 Authority.**

This Chapter is authorized by the following provisions of the Constitution of the Swinomish Indian Tribal Community: Article VI, Sections 1(c), (h), (k), (l), (q), and (s); and Article VIII, Section 3.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.040 Jurisdiction.**

The Tribe asserts jurisdiction both as a sovereign and as a proprietor over all persons, things and activities on Tribal tidelands to the maximum extent permitted by law.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.050 Construction.**

(A) Except as expressly provided otherwise, the provisions of this Chapter are in addition to and do not modify, replace or repeal the provisions of: (1) Title 19, Chapter 4 of the Swinomish Tribal Code – Shorelines and Sensitive Areas; (2) any other Tribal law or regulation; or (3) any Federal law or regulation. No lease or license issued under this Chapter shall supersede or negate the necessity for obtaining permits or other authorizations that may be required under: (1) Title 19, Chapter 4 of the Swinomish Tribal Code – Shorelines and Sensitive Areas; (2) any other Tribal law or regulation; or (3) any Federal law or regulation.

(B) In the event a provision of this Chapter is determined to conflict with any other provision of Tribal law, the provision that better protects the environment shall control.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.060 Findings.**

The Senate makes the following findings:

(A) Regulation of the conduct of persons and the use of property within the Swinomish Indian Reservation for the purpose of safeguarding and promoting the peace, safety, health, general welfare, economic security, and political and cultural integrity of the Tribe and its members is an essential incident of sovereignty.

- (B) The Treaty with the Duwamish, Suquamish, Etc., 12 Stat. 927 (1855) (“Treaty of Point Elliott” or “Treaty”), reserved the Swinomish Indian Reservation as the permanent homeland for the Indian tribes and bands to which the Swinomish Indian Tribal Community is a political and legal successor in interest, and reserved to such tribes and bands the exclusive right to use and occupy the territory within the exterior boundaries of the Reservation.
- (C) As intended by the parties to the Treaty, confirmed by Executive Order, and adjudicated in Federal and State courts, the exterior boundaries of the Swinomish Indian Reservation include all tidelands adjacent to Reservation uplands and extend seaward to the line of extreme low water. September 9, 1873 Executive Order; *Corrigan v. Brown*, 169 F. 477, 480 (W.D. Wash. 1907); *State v. Edwards*, 188 Wash. 467, 62 P.2d 1094 (1936).
- (D) As more specifically described in STC 19-04.060, Reservation tidelands were and remain of vital importance to the Tribe and its members because they:
- (1) Provide critical fish and wildlife habitat and migratory pathways and serve other essential ecological functions;
  - (2) Provide a location for the exercise of the Tribe’s Treaty hunting, fishing, and gathering rights, including the right to harvest shellfish; and
  - (3) Have unique ecological, cultural, aesthetic, economic and other values.
- (E) Upland portions of the Reservation were surveyed and allotted to provide permanent homes to Tribal members in the late 1800s and early 1900s.
- (F) The allotted parcels did not include tidelands, which continued to be held by the United States in trust for the Tribe.
- (G) Some allotted parcels passed out of Tribal member ownership and, through subsequent conveyances, are now held variously by the Tribe, Tribal members and/or nonmembers of the Tribe.
- (H) In 1970, the United States on behalf of the Tribe sold a single Tribal tidelands parcel to the Elmer F. Edwards Company and in 1994, the United States on behalf of the Tribe quitclaimed another single Tribal tidelands parcel to the Knudson family, but the United States continues to hold all other Reservation tidelands in trust for the Tribe.
- (I) As a matter of Federal law:
- (1) Except as provided below in paragraph (I)(3), the shoreward boundary of Tribal tidelands is the line of mean high tide;

- (2) The line of mean high tide is determined by taking the average elevation of all high tides, including spring tides and neap tides, calculated over a complete tidal cycle of 18.6 years, and is ambulatory, changing location in response to erosion and accretion as well as changes in tidal elevations; and
  - (3) If the line of mean high tide is seaward of where it would be in the absence of a human-made assemblage of materials or other human-made alteration, then the shoreward boundary of Tribal tidelands is where the line of mean high tide would be in the absence of such assemblage or alteration.
- (J) Some owners of Reservation uplands have without permission from the Tribe placed and/or maintained structures or fill material on Tribal tidelands, some of which have significant adverse impacts on fish and wildlife habitat and/or migratory pathways, other ecological functions provided by the tidelands, the exercise of the Tribe's Treaty hunting, fishing, and gathering rights, and/or the tidelands' cultural, aesthetic, economic and other values.
- (K) Some owners of Reservation uplands have asserted claims to ownership of Reservation tidelands and/or have interfered with or prevented entirely the Tribe and/or Tribal members from:
- (1) Using Tribal tidelands during the course of the Tribe's performance of its governmental responsibilities and programs;
  - (2) Exercising the Tribe's Treaty hunting, fishing, and gathering rights on Tribal tidelands; or
  - (3) Using Tribal tidelands in other ways.
- (L) This ordinance is necessary in order to preserve, restore, enhance, and protect the ecological, cultural, spiritual, aesthetic, economic and other values of Tribal tidelands and to prevent serious and substantial threats to the political integrity, economic security and health and welfare of the Tribe.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.070 Definitions.**

- (A) As used in this Chapter, the following words and phrases shall have the following meanings, unless specifically stated otherwise:
- (1) **“Agency”** and **“BIA”** mean the United States Department of the Interior Bureau of Indian Affairs, Puget Sound Agency, or its successor.
  - (2) **“Aquaculture”** means the culture and/or farming of fish, shellfish, and other aquatic plants and animals in fresh water, brackish water, or salt water.

“Aquaculture” includes, but is not limited to hatching, seeding, planting, cultivating, feeding, raising, or processing aquatic plants or animals.

- (3) **“Boat facility”** means a marina, open water moorage or anchorage area, pier, dock, mooring buoy, boat launch, or any other similar fixed site associated with the use or mooring of boats.
- (4) **“Commercial Use”** and **“Commercial Purposes”** mean the use of land or water for activities that produce or provide goods, merchandise, or services for compensation.
- (5) **“Construct”** and its derivatives mean to assemble, build, form, create, place, erect, attach or anchor a structure on or to land.
- (6) **“Controlled substance”** is defined in STC 4-10.020.
- (7) **“Dangerous weapon”** means a firearm or other weapon apparently capable of producing bodily harm.
- (8) **“Department”** and **“Planning Department”** mean the Office of Planning and Community Development of the Swinomish Indian Tribal Community.
- (9) **“Director”** means the Director of the Office of Planning and Community Development of the Swinomish Indian Tribal Community or his or her authorized designee.
- (10) **“Emergency”** means a situation in which immediate action is necessary to protect the life, health, or safety of any natural person, preserve public health, maintain essential public services, or protect property from fire damage.
- (11) **“Emergency services personnel”** means a person who is employed as a law enforcement officer, paramedic, emergency medical service technician, firefighter, emergency communications operator or in some related occupation or profession, or who serves as a volunteer member of a fire department, duly incorporated fire or first aid company, volunteer emergency, ambulance or rescue squad association or organization and provides emergency services for the Tribe or for a Federal, State or local governmental unit.
- (12) **“Fill material”** means material placed on land or in water where the material has the effect of raising the elevation of the land or the bottom elevation of the water. Examples of fill material include, but are not limited to, rock, gravel, sand, soil, clay, construction debris, wood chips, and material removed from the earth or water during mining, excavation, or dredging activities.
- (13) **“Fish,”** when used as a noun, means anadromous and nonanadromous fish, shellfish, and all other fishery resources.

- (14) **“Fish”** and its derivatives, when used as a verb, mean the attempt to, or the act of, capturing, taking or otherwise harvesting any fish by any method.
- (15) **“Gather”** and its derivatives mean any effort to take, dig up, remove, fell, or harvest a member of a plant species or any part thereof by any method.
- (16) **“Industrial Use”** and **“Industrial Purposes”** mean the use of land for activities that create economic value by storing or processing raw or bulk materials, systematic or large-scale fabrication, construction, manufacturing, or transportation.
- (17) **“Inflation rate”** means the rate of change in the all commodity producer price index published by the Bureau of Labor Statistics of the United States Department of Commerce from the year preceding the previous calendar year to the previous calendar year.
- (18) **“Hunt”** and its derivatives mean any effort to kill, injure, capture, or intentionally disturb wildlife.
- (19) **“Lease”** and **“tidelands lease”** mean a written agreement whereby the Tribe grants a person a right to use Tribal tidelands for a specified purpose and duration, and includes but is not limited to leases issued pursuant to 25 C.F.R. Part 162 and rights of way and/or access agreements issued pursuant to 25 C.F.R. Part 169. “Lease” does not include permits issued by the Tribe pursuant to Title 19, Chapter 4 of the Swinomish Tribal Code – Shorelines and Sensitive Areas.
- (20) **“License”** and **“tidelands license”** mean a written agreement whereby the Tribe grants a person a revocable privilege to use Tribal tidelands for a specified purpose. “License” does not include permits issued by the Tribe pursuant to Title 19, Chapter 4 of the Swinomish Tribal Code – Shorelines and Sensitive Areas.
- (21) **“Line of extreme low water”** means the line of intersection of the land with the lowest elevation reached by the sea.
- (22) **“Line of mean high tide”** means the line of intersection of the land with the average elevation of all high tides, including spring tides and neap tides, calculated over a complete tidal cycle of 18.6 years. The line of mean high tide is ambulatory, changing location in response to erosion and accretion as well as changes in tidal elevations.
- (23) **“Maintain”** and its derivatives mean to allow a structure or fill material to remain in existence or to take any action to keep a structure or fill material in its existing or an improved condition.

- (24) **“Nonmember”** means a person who is not an enrolled member of the Swinomish Indian Tribal Community.
- (25) **“Person”** means any natural person; any corporation, trust, unincorporated association, general or limited partnership, or limited liability company; the United States or any State or local government or any of their programs, agencies, or departments; any Indian tribe or any of its programs, agencies, or departments; or any other legal entity, and includes the Swinomish Indian Tribal Community.
- (26) **“Recreational facility”** means a park, campground, boat facility, golf course, playground, athletic field, gymnasium, swimming pool, trail system, or other similar facility used for recreational purposes.
- (27) **“Recreational use”** and **“Recreational purpose”** mean the use of land for activities of a voluntary and leisurely nature that aid in promoting entertainment, pleasure, play, relaxation, or instruction. The terms include walking, running, sunbathing, picnicking, wading, and boating, but do not include hunting, fishing, or gathering any natural resource.
- (28) **“Real capitalization rate”** means the rate determined by the Washington Department of Natural Resources pursuant to RCW 79.105.240(2), as in force on the effective date of this Chapter or as hereafter amended.
- (29) **“Reservation”** means the Swinomish Indian Reservation and includes all lands and waters within the exterior boundaries of the Swinomish Indian Reservation.
- (30) **“Senate”** means the Swinomish Indian Senate, the governing body of the Swinomish Indian Tribal Community.
- (31) **“Shoreward boundary of Tribal tidelands”** and **“seaward boundary of uplands”** mean the legal boundary between Tribal tidelands and adjacent upland parcels.
- (32) **“Structure”** means any human-made assemblage of materials of any nature whatsoever extending above and/or below the surface of the earth, but does not include fill material.
- (33) **“Tidelands”** means all lands within the exterior boundaries of the Swinomish Indian Reservation that lie between the line of extreme low water and the line of mean high tide, provided that, if the line of mean high tide is seaward of where it would be in the absence of a human-made assemblage of materials or other human-made alteration, then the shoreward boundary of tidelands is where the line of mean high tide would be in the absence of such assemblage or alteration.

- (34) **“Tribal employee”** means an employee of the Swinomish Indian Tribal Community or Skagit River System Cooperative.
- (35) **“Tribal law enforcement officer”** means a police officer or enforcement officer commissioned or appointed by the Tribe, and includes but is not limited to Swinomish Police Department officers and Swinomish Fisheries Enforcement officers.
- (36) **“Tribal member”** and **“member”** mean an enrolled member of the Swinomish Indian Tribal Community.
- (37) **“Tribal tidelands”** means those tidelands that are as of the date of enactment of this Chapter or hereafter owned by the Tribe or the United States in trust for the Tribe.
- (38) **“Tribe,” “Tribal,”** and **“Swinomish”** mean or refer to the Swinomish Indian Tribal Community, a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, which is composed of members tracing their ancestry to, and is a political and legal successor in interest to, certain tribes and bands and groups of Indians which were parties to the Treaty of Point Elliott.
- (39) **“Uplands”** and **“Reservation uplands”** mean all lands within the Swinomish Indian Reservation that lie above the line of mean high tide, provided that, if the line of mean high tide is seaward of where it would be in the absence of a human-made assemblage of materials or other human-made alteration, then the seaward boundary of uplands is where the line of mean high tide would be in the absence of such assemblage or alteration.
- (40) **“Wildlife”** means all species of the animal kingdom except fish and domesticated animals.
- (B) All other words and phrases used in this Chapter shall have their ordinary and customary meanings, unless the context clearly indicates otherwise.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

### *Subchapter I – Swinomish Indian Reservation Tidelands*

#### **23-01.080 Ownership of Tidelands.**

As of the date of enactment of this Chapter, all tidelands as defined herein within the exterior boundaries of the Swinomish Indian Reservation are owned by the United States in trust for the Tribe, with the exception of a single tidelands parcel conveyed by the United States on behalf of the Tribe to the Elmer F. Edwards Company in 1970 and a

single tidelands parcel quitclaimed by the United States on behalf of the Tribe to the Knudson family in 1994.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

### **23-01.090 Tribal Tideland Zones.**

21 Tribal Tideland Zones are hereby established. The location of each Tribal Tideland Zone is shown on a Tribal Tideland Zone Map that is attached to this ordinance and incorporated herein. The Department shall make the Tribal Tideland Zone Map available to the public in accordance with common Department practices, and shall make a copy of the Tribal Tideland Zone Map available for inspection during regular business hours.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

## *Subchapter II – Uses of Tribal Tidelands*

### **23-01.100 Uses Allowed Without a Tidelands Lease or License.**

(A) *Recreational Uses.* Subject to Sections 23-01.110(A)(3), 23-01.120, and 23-01.130 of this Chapter, the following recreational uses of the following Tribal Tidelands are allowed by any person without first obtaining a tidelands lease or license from the Tribe:

- (1) A person who has lawful access to and from Tribal Tideland Zones A, B, D, F, G, H, N, and T may use the tidelands or boat facilities within these Tribal Tideland Zones for recreational purposes provided that such use complies with all other provisions of this Chapter and all other applicable provisions of Tribal and Federal law;
- (2) Guests of Kukutali Preserve may use the tidelands or boat facilities within Tribal Tideland Zone C for recreational purposes provided that such use complies with the rules and regulations governing Kukutali Preserve, the terms of the applicable lease, all other provisions of this Chapter, and all other applicable provisions of Tribal and Federal law;
- (3) Guests of Thousand Trails may use the tidelands or boat facilities within Tribal Tideland Zone E for recreational purposes provided that such use complies with the rules and regulations governing Thousand Trails, the terms of the applicable lease, all other provisions of this Chapter, and all other applicable provisions of Tribal and Federal law;
- (4) Residents of Shelter Bay and their guests may use the tidelands or boat facilities within Tribal Tideland Zone J for recreational purposes provided that such use complies with the rules and regulations governing Shelter Bay, the terms of the

applicable lease, all other provisions of this Chapter, and all other applicable provisions of Tribal and Federal law;

- (5) Residents of Kwonesum and their guests may use the tidelands or boat facilities within Tribal Tideland Zone P for recreational purposes provided that such use complies with the rules and regulations governing Kwonesum, the terms of the applicable lease, all other provisions of this Chapter, and all other applicable provisions of Tribal and Federal law; and
  - (6) Guests of a recreational facility that has a tidelands lease from the Tribe may use the Tribal tidelands covered by the lease provided that such use complies with the rules and regulations of the recreational facility, the terms of the applicable lease, all other provisions of this Chapter, and all other applicable provisions of Tribal and Federal law.
- (B) *Other uses.* The following persons may use Tribal tidelands or boat facilities thereon for the following purposes and in the following manners without first obtaining a tidelands lease or license from the Tribe provided that such use complies with all other provisions of this Chapter and all other applicable provisions of Tribal and Federal law:
- (1) Tribal members exercising the Tribe's Treaty hunting, fishing, and gathering rights;
  - (2) Tribal members participating in Tribally-recognized spiritual or cultural activities;
  - (3) Tribal employees and contractors acting within the course and scope of their employment or contracts;
  - (4) Federal, State or local government employees and contractors acting within the course and scope of their employment or contracts, provided that they request and receive permission from the Department in advance unless such permission is impracticable due to an emergency;
  - (5) Emergency services personnel responding to an emergency; and
  - (6) Nonmember owners of Reservation uplands that adjoin Tribal tidelands and their guests using Tribal tidelands adjoining their property for ingress from and egress to the water.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.110 Uses Requiring a Tidelands Lease.**

- (A) Subject to subsection (B) of this Section, it shall be unlawful for any person other than the Tribe to engage in the following activities without first obtaining a tidelands lease from the Tribe:
- (1) Construct or maintain a structure on Tribal tidelands;
  - (2) Deposit or maintain fill material on Tribal tidelands;
  - (3) Operate a recreational facility that involves the use of Tribal tidelands; or
  - (4) Use Tribal tidelands for commercial purposes, industrial purposes, or aquaculture.
- (B) Tribal members may fish on or from Tribal tidelands for commercial purposes without first obtaining a tidelands lease from the Tribe if such use complies with all other provisions of this Chapter, Title 18 of the Swinomish Tribal Code – Natural Resources, and other applicable provisions of Tribal law.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.120 Uses Requiring a Tidelands License.**

- (A) It shall be unlawful for any person other than the Tribe to engage in the following activities without first obtaining a tidelands license from the Tribe:
- (1) Use tidelands or boat facilities in Tribal Tideland Zones I, K, L, M, O, Q, R, S, or U for recreational purposes;
  - (2) Start or maintain a fire on Tribal tidelands, except that Tribal members may start or maintain a fire on Tribal tidelands associated with Tribally-recognized spiritual or cultural activities;
  - (3) Operate or park a vehicle on Tribal tidelands, unless such use is by:
    - (a) Tribal members exercising the Tribe’s Treaty hunting, fishing, and gathering rights in accordance with Title 18 of the Swinomish Tribal Code—Natural Resources and other applicable Tribal law;
    - (b) Tribal members participating in Tribally-recognized spiritual or cultural activities;
    - (c) Tribal employees and contractors acting within the course and scope of their employment or contracts;

- (d) Federal, State or local government employees and contractors acting within the course and scope of their employment or contracts, provided that they request and receive permission from the Department in advance unless such permission is impracticable due to an emergency; or
  - (e) Emergency services personnel responding to an emergency;
- (4) Possess, discharge, set off, or cause to be discharged any fireworks on Tribal tidelands;
- (5) Deface, destroy, disturb, or remove any natural beach material upon or within Tribal tidelands, including but not limited to vegetation and woody debris, unless such activity is by:
- (a) Tribal members exercising the Tribe's Treaty hunting, fishing, and gathering rights in accordance with Title 18 of the Swinomish Tribal Code—Natural Resources and other applicable Tribal law;
  - (b) Tribal members participating in Tribally-recognized spiritual or cultural activities;
  - (c) Tribal employees and contractors acting within the course and scope of their employment or contracts;
  - (d) Federal, State or local government employees and contractors acting within the course and scope of their employment or contracts, provided that they request and receive permission from the Department in advance unless such permission is impracticable due to an emergency; or
  - (e) Emergency services personnel responding to an emergency;
- (6) Bring, ride, or lead a domesticated animal on Tribal tidelands, provided, however, that dogs may be lead on Tribal tidelands if they are on a leash and under the control of a person physically able to control them;
- (7) Bring, ride or use a bicycle or similar device on Tribal tidelands; and
- (8) Camp on Tribal tidelands, or erect, maintain, use or occupy a tent or other shelter on Tribal tidelands, unless such use is by:
- (a) Tribal members exercising the Tribe's Treaty hunting, fishing, and gathering rights in accordance with Title 18 of the Swinomish Tribal Code—Natural Resources and other applicable Tribal law;
  - (b) Tribal members participating in Tribally-recognized spiritual or cultural activities; or

- (c) Any person in an emergency.

[History] Ord. 416 (4/20/21); Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.130 Prohibited Uses of Tribal Tidelands.**

(A) *Hunting, fishing, and gathering by non-members:* It shall be unlawful for any person to hunt, fish, or gather on or from Tribal tidelands, except that:

- (1) The Tribe and Tribal members may hunt, fish, and gather on or from Tribal tidelands in accordance with Title 18 of the Swinomish Tribal Code—Natural Resources and other applicable Tribal law; and
- (2) A person with a tidelands lease to use Tribal tidelands for aquaculture may harvest the animal or plant products of such aquaculture in accordance with the terms of his or her tidelands lease and other applicable Tribal and Federal law.

(B) *Other prohibited uses:* It shall be unlawful for any person to:

- (1) Possess, use, or be under the influence of an intoxicating beverage or a controlled substance without a valid prescription for such controlled substance on Tribal tidelands, except that law enforcement officers may possess intoxicating beverages or controlled substances on Tribal tidelands in the lawful performance of their duties;
- (2) Possess, display, discharge or propel a dangerous weapon on or from Tribal tidelands, unless such use is by:
  - (a) Tribal members exercising the Tribe’s Treaty hunting, fishing, and gathering rights in accordance with Title 18 of the Swinomish Tribal Code—Natural Resources and other applicable Tribal law; or
  - (b) Law enforcement officers in the lawful performance of their duties;
- (3) Deposit any garbage, debris, rubbish, or refuse upon Tribal tidelands;
- (4) Interfere with the lawful use of Tribal tidelands by the Tribe, Tribal members, or Tribal employees and contractors; and
- (5) Enter, be present on, or use Tribal tidelands in any manner that would tend to create a nuisance thereon.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

### *Subchapter III – Tidelands Lease*

#### **23-01.140 Lease Application.**

- (A) An application for a tidelands lease shall be submitted to the Department on a form supplied by the Department. At a minimum, the application shall include the following information:
- (1) Name, address, and phone number of the applicant;
  - (2) A description of the nature and purpose of the proposed or existing structure, proposed or existing fill material, or proposed recreational facility, commercial use, industrial use, or aquaculture;
  - (3) A legal description and map showing the approximate location of the Tribal tidelands proposed to be leased and, if applicable, the location of the proposed or existing structure, proposed or existing fill material, or proposed recreational facility, commercial use, industrial use, or aquaculture;
  - (4) A description of the anticipated effects of the proposed or existing structure, proposed or existing fill material, or proposed recreational facility, commercial use, industrial use, or aquaculture on Tribal tidelands, the Reservation environment, the Tribe's Treaty hunting, fishing, and gathering rights, and public health and welfare if approved;
  - (5) A statement whether the applicant owns the uplands adjacent to the Tribal tidelands proposed to be leased, and if not, the name and address of the owner(s) of the adjacent uplands;
  - (6) Signature of the applicant; and
  - (7) For an application to construct a new structure or deposit fill material:
    - (a) A site plan and basic design of the structure or fill material; and
    - (b) Estimates of the cost and timing of construction; or
  - (8) For an application to maintain an existing structure or fill material:
    - (a) The date on which the owner(s) of the adjacent uplands acquired ownership of the adjacent uplands;
    - (b) To the extent known by the applicant, the date on which the structure was constructed or the fill material was deposited and the dates on which any

affirmative action to maintain the structure or fill material was performed, with a description of the affirmative action performed on such dates;

- (c) To the extent known by the applicant, whether, on the date on which the structure was constructed or the fill material was deposited and the dates on which any affirmative action to maintain the structure or fill material was performed, the structure or fill material was located on Tribal tidelands or uplands; and
  - (d) The estimated costs and any anticipated adverse effects of removing or modifying the structure or fill material.
- (B) In its discretion, the Department may require the applicant to submit additional information reasonably necessary or helpful to evaluate the application, including but not limited to any documentation required by the Agency to comply with the National Environmental Policy Act or other applicable Federal statutes or regulations.
- (C) The lease application shall be submitted together with any permit issued, or, if a permit has not been issued, permit application required, under STC 19-04.080 or other applicable provisions of Tribal law. If mitigation for the proposed or existing structure, proposed or existing fill material, or proposed recreational facility, commercial use, industrial use, or aquaculture is required by the Department under STC 19-04.200, the lease application shall also be submitted together with a description of the mitigation, a list of potential contractors, if any, who may implement the mitigation plan, and a preliminary time frame for completion of the mitigation.
- (D) The Department shall determine and may from time-to-time amend the fee for a lease application under this section, subject to Senate approval. The Department shall publish the fee in the Office of Planning and Community Development's Schedule of Fees, and shall make copies available for public inspection during regular business hours.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

### **23-01.150 Application Review and Decision.**

- (A) Within a reasonable time after receipt of a complete lease application under Section 23-01.140, but not to exceed one-hundred and eighty (180) days, the Department shall prepare and transmit a recommendation to the Senate as to whether the lease application should be granted, granted subject to conditions, or denied. The Department shall base its decision on the provisions of this Chapter, including the anticipated effects of the proposed use on Tribal tidelands, the Reservation environment, the Tribe's Treaty hunting, fishing and gathering rights, and public

health and safety. If the application reflects that the applicant does not own the uplands adjacent to the Tribal tidelands proposed to be leased, the Department shall notify and consider any comments from the owner(s) of the adjacent uplands prior to making its recommendation. The Department may, but is not required to, (1) negotiate with the applicant regarding conditions of the proposed lease or (2) conduct a public hearing on the application prior to preparing its recommendation. The Department's recommendation is not subject to appeal.

- (B) Within a reasonable time after receipt of the Department's recommendation, the Senate shall consider the lease application and inform the Department as to its decision to grant, grant subject to conditions, or deny the lease application. The Senate shall consider the Department's recommendation and, in its discretion, may consider any other information it deems reasonably necessary or helpful to evaluate the application. The Senate may, but is not required to, (1) negotiate with the applicant regarding conditions of the proposed lease or (2) conduct a public hearing on the application prior to issuing its decision. The Senate has no obligation to grant or grant subject to conditions a lease application or to explain the reasons for its decision to grant, grant subject to conditions, or deny a lease application. The Senate's decision is final and not subject to appeal.
- (C) If the lease application is granted or granted subject to conditions and requires Agency approval, the Department shall:
  - (1) Notify the applicant in writing of the Senate's decision and the date on which the Department will forward the lease application to the Agency for review;
  - (2) By the date stated in the notice, forward the lease application to the Agency for review; and
  - (3) If the lease application is approved by the Agency, issue a tidelands lease to the applicant that conforms to any applicable Tribal or Federal law.
- (D) If the lease application is granted or granted subject to conditions and does not require Agency approval, the Department shall notify the applicant in writing of the Senate's decision and issue a tidelands lease to the applicant that conforms to any applicable Tribal law.
- (E) If a lease application to maintain a structure or fill material on Tribal tidelands is denied or is granted subject to a condition that the applicant modify the structure or fill material, the Department shall notify the applicant that he or she must remove or modify the structure or fill material in accordance with all applicable Tribal and Federal law, including but not limited to prohibited fish work windows, within thirty (30) days of the notice or within a longer period of time not to exceed one (1) year if the Department determines a longer period of time is reasonable based upon the location, nature, and size of the structure or fill material. If the applicant fails to

remove or modify the structure or fill material within the deadline stated in the notice, the Department shall take enforcement action pursuant to Section 23-01.220.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.160 Lease Fees; Failure to Pay Lease Fees.**

- (A) Unless the Senate decision granting or granting subject to conditions a lease application waives the Tribe's right to monetary payment, every tidelands lease shall specify an annual lease fee, a payment schedule, and a payment method.
- (B) Unless the Senate decision granting or granting subject to conditions a lease application specifies a different annual lease fee, the initial annual lease fee for a tidelands lease shall be equal to:
  - (1) The assessed land value, exclusive of improvements, per square foot of the upland tax parcel adjacent to or used in conjunction with the leased area, or, if there is no such upland tax parcel or such upland tax parcel is not assessed or has an assessed value that is inconsistent with the purposes of the lease, of the nearest waterfront upland tax parcel that has an assessed value that is consistent with the purpose of the lease; multiplied by
  - (2) The square footage of tideland area leased; multiplied by
  - (3) Thirty percent (30%); multiplied by
  - (4) The real capitalization rate for the fiscal year within which the lease becomes effective or is modified.
- (C) The initial annual lease fee shall be:
  - (1) Redetermined in accordance with subsection (B) of this Section at least every four years or as otherwise provided in the lease; and
  - (2) Adjusted by the inflation rate each year in which the annual lease fee is not redetermined in accordance with subsection (C)(1) of this Section.
- (D) A lessee shall pay his or her lease fee in accordance with the terms of his or her lease. If the Tribe is responsible for collecting the lease fee and a lessee fails to pay his or her lease fee when due, the Department shall notify the lessee in writing, return receipt requested, that unless the lease fee and any applicable interest and late payment penalty is paid in full within thirty (30) days of the notice the lease will be terminated, and, if the lease authorizes the construction or maintenance of a structure or the deposit or maintenance of fill material on Tribal tidelands, the lessee will be required to remove the structure or fill material in accordance with the terms of the lease. If the lessee fails to pay the lease fee and any applicable interest and late

payment penalty in full within the thirty (30) day deadline, the Department shall take enforcement action pursuant to STC 23-01.220.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

#### *Subchapter IV – Tidelands License*

##### **23-01.170 License Application.**

- (A) An application for a license to use Tribal tidelands shall be submitted to the Department on a form supplied by the Department. At a minimum, the application shall include the following information:
- (1) Name, address, and phone number of the applicant;
  - (2) A description of the nature and purpose of the proposed use(s);
  - (3) A map showing the approximate location of the Tribal tidelands proposed to be used;
  - (4) A description of the anticipated effects of the proposed use on Tribal tidelands, the Reservation environment, the Tribe's Treaty hunting, fishing, and gathering rights, and public health and safety if approved; and
  - (5) Signature of the applicant.
- (B) In its discretion, the Department may require the applicant to submit additional information reasonably necessary or helpful to evaluate the application.
- (C) The license application shall be submitted together with any permit issued, or, if a permit has not been issued, permit application required, under STC 19-04.080 or other applicable provisions of Tribal law. If mitigation for the proposed use is required by the Department under STC 19-04.200, the license application shall also be submitted together with a description of the mitigation, a list of potential contractors, if any, who may implement the mitigation plan, and a preliminary time frame for completion of the mitigation.
- (D) The fee for a tidelands license is \$15.00. The Department may periodically amend the fee for a license under this section, subject to Senate approval. The Department shall include the fee for a tidelands license in the Department fee schedule, and shall make a copy of the fee schedule available to the public in accordance with common Department practices, and shall make a copy of the fee schedule available for inspection during regular business hours.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.180 Application Review and Decision.**

- (A) Within a reasonable time not to exceed forty-five (45) days of receipt of a complete license application under Section 23-01.170, the Department shall review the application and grant, grant subject to conditions, or deny the application. The Department shall base its decision on the provisions of this Chapter, including the anticipated effects of the proposed use on Tribal tidelands, the Reservation environment, the Tribe's Treaty hunting, fishing and gathering rights, and public health and safety. The Department may, but is not required to, (1) negotiate with the applicant regarding conditions of the proposed license or (2) conduct a public hearing on the application or (3) to confer with the Senate regarding the application prior to issuing its decision.
- (B) The Department shall notify the applicant in writing of its decision within ten (10) days of the decision.
  - (1) If the license application is granted or granted subject to conditions, the Department shall issue a tidelands license to the applicant pursuant to Section 23-01.190.
  - (2) If the license application is granted subject to conditions or denied, the Department shall notify the applicant that he or she may appeal the decision to the Senate by filing a written notice of appeal with the Department within ten (10) days from the date on which the Department gave notice of the decision setting forth the reasons the application should be granted.
- (C) Within a reasonable time after receipt of a notice of appeal pursuant to subsection (B)(2) of this Section, the Senate shall consider the appeal and inform the Department as to its decision affirm, reverse, or modify the Department's decision. The Senate shall consider the Department's decision and the applicant's notice of appeal, and, in its discretion, may consider any other information it deems reasonably necessary or helpful to evaluate the application. The Senate may, but is not required to, (1) negotiate with the applicant regarding conditions of the proposed license or (2) conduct a public hearing on the application prior to issuing its decision. The Senate has no obligation to grant or grant subject to conditions a license application or to explain the reasons for its decision to affirm, reverse, or modify the Department's decision. The Senate's decision is final and not subject to appeal. The Department shall notify the applicant in writing of the Senate's decision.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.190 Issuance of Tidelands License.**

- (A) A tidelands license shall:
  - (1) List the name, address, and phone number of the licensee;

- (2) Specify the date that the license was issued;
  - (3) Identify the Tribal tidelands that the licensee is authorized to use;
  - (4) Describe the use authorized by the license;
  - (5) Set forth any conditions of the license;
  - (6) State that the licensee shall comply with the provisions of this Chapter, including but not limited to Section 23-01.130;
  - (7) State that the license shall be produced to Tribal law enforcement officers or the Department upon request; and
  - (8) State that the license is revocable at any time in accordance with Section 23-01.220.
- (B) A tidelands license shall be valid for one year from the date of issuance unless revoked pursuant to Section 23-01.220.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

### *Subchapter V – Implementation and Enforcement*

#### **23-01.200 Determination of Shoreward Boundary.**

- (A) The Department is authorized and directed to determine the location of the shoreward boundary of particular Tribal tidelands for purposes of implementing this Chapter. The Department shall determine the locations of the shoreward boundaries of those Tribal tidelands for which it considers, in its discretion, such determinations to be necessary or desirable for purposes of implementing this Chapter. The Department may also, in its discretion, determine the location of the shoreward boundary of particular Tribal tidelands upon the request and at the expense of the owner of the adjoining uplands.
- (B) The Department shall make shoreward boundary determinations in accordance with the following principles:
- (1) Except as provided below in paragraph (B)(3), the shoreward boundary of Tribal tidelands, is the line of mean high tide;
  - (2) The line of mean high tide is determined by taking the average elevation of all high tides, including spring tides and neap tides, calculated over a complete tidal cycle of 18.6 years and is ambulatory, changing location in response to erosion and accretion as well as changes in tidal elevations; and

- (3) If the line of mean high tide is seaward of where it would be in the absence of a human-made assemblage of materials or other human-made alteration, then the shoreward boundary of Tribal tidelands is where the line of mean high tide would be in the absence of such assemblage or alteration.
- (C) The Department shall adhere to the following procedures in determining the shoreward boundary of Tribal tidelands:
- (1) The Department shall make an initial determination of the location of the shoreward boundary of Tribal tidelands on the basis of the best information available to the Department. The Department may, but is not required to, obtain a survey in order to make its initial determination. However, if the United States Bureau of Land Management (BLM) has surveyed the shoreward boundary of Tribal tidelands in accordance with the principles set forth in subsection (B) of this Section, the BLM survey shall be considered the best information available to the Department as of the date of such survey.
  - (2) The Department shall notify the adjacent uplands owner in writing, return receipt requested, of its initial determination. The notice shall inform the adjacent uplands owner that:
    - (a) He or she may dispute the Department's initial determination by (i) notifying the Department in writing within thirty (30) days of receipt of the Department's notice of his or her intent to dispute the Department's initial determination; and (ii) submitting to the Department in writing information supporting the uplands owner's position regarding the location of the shoreward boundary of Tribal tidelands within ninety (90) days of receipt of the Department's notice; and
    - (b) If he or she does not dispute the Department's initial determination in accordance with subsection (C)(2)(a) of this Section, the Department's determination shall be final and binding under this Chapter thirty-one (31) days after his or her receipt of the Department's notice of the initial determination unless and until revised under subsection (C)(4) of this Section.
  - (3) If the adjacent uplands owner disputes the Department's initial determination in accordance with subsection (C)(2)(a) of this Section, the Department may, but is not required to, obtain additional information regarding the location of the shoreward boundary of Tribal tidelands. The Department shall make a final determination of the location of the shoreward boundary of Tribal tidelands on the basis of the best information available to the Department, including the information provided by the adjacent uplands owner and any additional information obtained by the Department under this paragraph. The Department shall notify the adjacent uplands owner in writing, return receipt requested, of its

final determination of the location of the shoreward boundary of Tribal tidelands under this paragraph. Such notice shall inform the adjacent uplands owner that the Department's final determination is subject to appeal in conjunction with an appeal of any enforcement order issued pursuant to 23-01.220 on the basis of the Department's final determination.

- (4) The Department may revise its final determination of the location of the shoreward boundary of Tribal tidelands if new information indicates such revision is appropriate. The new information may be provided in writing by the adjacent uplands owner or obtained otherwise by the Department. The Department shall follow the procedures set forth in this subsection (C) in making a revised determination.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.210 Existing Uses Requiring a Tidelands Lease to Come into Compliance.**

- (A) The Department shall determine whether each use requiring a tidelands lease along the Reservation shoreline as of the effective date of this Chapter complies with the provisions of this Chapter. The Department shall exercise discretion to prioritize its determinations with respect to uses requiring a tidelands lease that have or may have an adverse effect on Tribal tidelands, the Reservation environment, the Tribe's Treaty hunting, fishing, and gathering rights, and/or public health and welfare.
- (B) If the Department determines that an existing use requiring a tidelands lease is being maintained in violation of the provisions of this Chapter, the Department shall notify the adjacent uplands owner in writing, return receipt requested, that he or she must either:
  - (1) Submit an application for a tidelands lease to maintain the existing use requiring a tidelands lease pursuant to Section 23-01.140 within thirty (30) days of his or her receipt of the Department's notice; or
  - (2) Cease the existing use requiring a tidelands lease in accordance with all applicable Tribal and Federal law, including but not limited to prohibited fish work windows, within thirty (30) days of the notice or within a longer period of time not to exceed one (1) year if the Department determines a longer period of time is reasonable based upon the location, nature, and size of the structure or fill material.
- (C) If the adjacent uplands owner fails to submit a lease application within thirty (30) days or to cease the existing use requiring a tidelands lease within the applicable deadline, the Department shall take enforcement action pursuant to Section 23-01.220.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.220 Enforcement.**

*(A) Enforcement Authority.*

- (1) The provisions of Sections 23-01.120 and 23-01.130 of this Chapter shall be enforced by Tribal law enforcement officers in accordance with applicable Tribal and Federal law, with assistance from the Department upon request.
- (2) All other provisions of this Chapter shall be enforced by the Department, with assistance from Tribal law enforcement officers upon request.

*(B) Inspections.* The Department and Tribal law enforcement officers may inspect all structures, fill material, and activities subject to this Chapter to ensure compliance with this Chapter. Department officials and Tribal law enforcement officers may enter the premises or location of structures, fill material, or activities subject to this Chapter at reasonable times to inspect such structures, fill material, or activities and otherwise perform the duties established pursuant to this Chapter. Prior to entering privately owned uplands to conduct an inspection, Department officials and Tribal law enforcement officers shall make a reasonable effort to locate the owner of or a person with authority over the uplands to request entry. If entry is refused, the official or officer shall have recourse to the remedies provided by law to secure entry.

*(C) Orders.*

- (1) In the event of any violation of this Chapter or applicable lease or license conditions, the Department may issue an enforcement order:
  - (a) Terminating a lease issued pursuant to this Chapter, provided, however, that the Department shall comply with any applicable terms of the lease;
  - (b) Revoking a license issued pursuant to this Chapter, provided, however, that the Department shall provide the licensee at least twenty-four (24) hours written notice prior to revoking a license; and/or
  - (c) Requiring the landowner, lessee, licensee, or other responsible party to perform any or all of the following:
    - (i) Cease or abate the activity causing the violation;
    - (ii) Remove any structure constructed or maintained or fill material deposited or maintained on Tribal tidelands in violation of this Chapter or any applicable lease;
    - (iii) Pay a civil penalty pursuant to Section 23-01.230;

- (iv) Remediate, restore or mitigate any adverse effects of such violation pursuant to Section 23-01.240; and/or
  - (v) Pay damages pursuant to Section 23-01.250.
- (2) Any enforcement order issued by the Department pursuant to this Section shall cite the nature, time, date, and location of the violation; the Section(s) of this Chapter and/or lease or license condition applicable to the observed violation; the name and address of the responsible party; contact information for the Department; and any required action(s) that must be taken by the responsible party.
- (3) A person to whom an enforcement order is issued by the Department pursuant to subsection (D)(1)(c) of this Section may appeal the order in accordance with STC 19-04.560 through 19-04.600.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.230 Penalties.**

- (A) The penalty for a violation of Section 23-01.110 of this Chapter, an applicable lease condition, or Section 23-01.130(A) of this Chapter shall be a civil fine of not less than \$250.00 per violation and not more than \$5,000.00 per violation. The penalty for a violation of Section 23-01.120 of this Chapter, an applicable license condition, Section 23-01.130(B) of this Chapter, or any other provision of this Chapter shall be a civil fine of not less than \$50.00 per violation and not more than \$500.00 per violation. The Department shall assess the fine based upon its consideration of the following factors:
- (1) The severity of the violation, in terms of the effect of the violation on Tribal tidelands, the Reservation environment, the Tribe's Treaty hunting, fishing, and gathering rights, and/or public health and welfare;
  - (2) Whether the responsible party has been determined to have committed past violations of this Chapter, applicable lease or license conditions, or other provisions of the Swinomish Tribal Code;
  - (3) The staff time required to correct the violation;
  - (4) Whether the responsible party has cooperated with the Tribe in addressing the violation, which may allow reduction of the fine by up to 50% based on all of the following:
    - (a) Whether the responsible party immediately complied with an enforcement order to cease or abate the activity causing the violation;

- (b) Whether the responsible party took actions to correct the violation as quickly as feasible;
- (c) Whether the responsible party fully cooperated with investigations related to the violation; and
- (d) Whether the responsible party fully rectified the violation within thirty (30) days of notice of violation.

(B) For the purpose of assessing a penalty, each day a structure, fill material, or activity is in violation of this Chapter or an applicable lease or license condition is a separate violation of this Chapter or lease or license condition.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.240 Remediation.**

Adverse effects on Tribal tidelands, the Reservation environment, the Tribe’s Treaty hunting, fishing, and gathering rights, and/or public health and welfare associated with a violation of this Chapter or applicable lease or license conditions shall be remediated, restored, and/or mitigated by the responsible party in accordance with the terms and provisions of this Chapter and a plan approved by the Department.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.250 Damages.**

In addition to any other remedies provided by this Chapter for violations of this Chapter or applicable lease or license conditions, including but not limited to penalties assessed pursuant to Section 23-01.230 and remediation pursuant to Section 23-01.240, the Department is authorized to assess and to recover, by means of a civil suit filed in Swinomish Tribal Court or Federal court on behalf of the Tribe if necessary, damages in the following amounts:

- (A) Triple the economic benefit the violator gained by non-compliance with this Chapter or applicable lease or license conditions, as determined by the Department;
- (B) Triple the harm the Tribe sustained due to the person’s violation of this Chapter or applicable lease or license conditions, as determined by the Department; and/or
- (C) Triple the amount of money the Tribe expended in remediating and/or mitigating the adverse effects on Tribal tidelands, the Reservation environment, the Tribe’s Treaty hunting, fishing, and gathering rights, and/or public health and welfare of the

violation of this Chapter or applicable lease or license conditions, as determined by the Department.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

***Subchapter VI – Effective Date, Severability, and Sovereign Immunity***

**23-01.260 Effective Date.**

This Chapter shall become effective immediately upon approval of the Swinomish Tribal Senate.

[History] Ord. 416 (4/20/21); Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.270 Severability.**

The terms and provisions of this Chapter are severable. If a court of competent jurisdiction should find that the application of any Section, subsection, clause, or phrase of this Chapter to any person is invalid, such finding shall not affect the application of that provision to any other person or the validity of any of the remaining Sections, subsections, clauses, or phrases of this Chapter.

[History] Ord. 310 (5/1/12), BIA (5/10/12).

**23-01.280 Sovereign Immunity.**

The sovereign immunity of the Tribe is not in any way waived or limited by this Chapter, or by any appeal commenced pursuant to this Chapter, and nothing in this Chapter shall constitute or be construed as a waiver of the sovereign immunity of the Tribe. Such sovereign immunity shall extend to the Tribe, the Senate, the Planning Commission, the Department, the Director, the Tribal Realty Office, and all Tribal officials, employees, staff and agents as to all actions taken in, or concerning, the administration or enforcement of this Chapter, and as to all actions taken pursuant to any authority of any action, decision or order authorized by this Chapter.

[History] Ord. 310 (5/1/12), BIA (5/10/12).