

**The 2011 Amendments to the Suquamish Tribal Marriage and Divorce Ordinance:
Creating Equal Access to Fundamental Rights in 2011 – A Case Study**

A Young Woman's Desire Creates the Impetus for Change

The red-haired young woman with freckles sat quietly in the second row of the Suquamish Tribal Council's new chamber as the Council began its afternoon session. Heather Purser kept her nerves in check as she listened to several elders question the Council about whether Tribal housing rents were going up. Other Tribal members wanted to know when the housing crew would come to their homes to make repairs. Chairman Leonard Forsman assured everyone that Tribal housing rents would remain frozen until the Housing Board made recommendations to the Council. He added that the Executive Director and Housing Director had agreed to develop a repair schedule. Housing staff would let each family know when to expect the repair crew.

It was June 8, 2009. The Council's afternoon agenda was long and the conversation about housing issues had gone past its allotted time. Heather looked over to the Tribal Attorney and watched her taking notes. They had met the week before and planned to present Heather's request for a new ordinance. When Heather returned her attention to the meeting, the Education Director was reporting that twenty-three Suquamish students were graduating from high school this weekend. Six of the graduates were Tribal descendants, not enrolled Tribal members. She asked permission to use \$1,800 from the Education budget's special activities fund to give these graduates a \$300 stipend like the others. The Council approved the request. A question arose about the timing of elder stipends. After a short discussion, the Council confirmed the monthly payment date.

Heather looked at the agenda and worried about how her request would be received. She listened to the Executive Director report on retrofitting the old Tribal Center into a Tribal school. He requested approval of a \$44,500 design contract, which the Council approved. The Higher Education Coordinator next presented proposed bylaws for the Higher Education Board and proposed policies and procedures for the Higher Education program. More students want to

go to college, she said. Council passed both resolutions. The Tribal Journey Coordinator presented modifications of the Tribal Canoe Journey budget. That was followed by an announcement about a public hearing on the prioritization of proposed capital projects.

New Business was next on the Council agenda. Heather was first on the list. She and the Tribal Attorney stepped up to the table together. Heather identified herself to the seven Councilmembers and stated her Tribal lineage. She spoke of returning from college and being glad to be home. She said she had come out recently as being gay. Not that she wanted to get married just yet, she said, but she asked the Tribe to consider passing a same-sex marriage ordinance. Heather said changing the marriage ordinance was important to her and to other Tribal members. The Tribal Attorney said she had done some initial research and found that a tribe in Oregon had passed such an ordinance, so Suquamish would not be the first. Heather asked for permission to work with the Tribal Attorney to draft an ordinance. After a brief pause, the Council said to go ahead as long as the work did not interfere with the Tribal Attorney's regular workload. Heather's proposed ordinance was just one in an array of modern issues that the Tribal Council faced that day.

Potential Fiscal Impacts of Same-Sex Marriages

Although many Indian communities have a tradition of acknowledging and accepting those with "two spirits", not all modern Indian communities embrace the concept of same-sex marriages. To date two tribes, the Coquille Tribe in Oregon and the Suquamish Tribe in Washington, have recognized same-sex marriages. Coquille was the first tribe in the nation to do so. Six Tribal governments expressly do not recognize same-sex marriages. They are the Cherokee, Chippewa and Iowa Tribes, and the Chickasaw, Creek and Navajo Nations.

When a Coquille Tribal member advocated in 2008 for a same-sex marriage ordinance the community became embroiled in controversy. The community discussion was not so much focused on same-sex marriages as a moral issue but, instead, on the very practical issue of what, if any, Tribal benefits the spouse should receive. In other words, same-sex marriages in Indian Country have practical financial impacts, especially for tribes with limited budgets. If both

people getting married are enrolled Tribal members no issue exists since both are already entitled to all government benefits. In most instances of tribal same-sex marriages, however, only one person in the marriage is an enrolled member. The other is a non-member Indian or a non-Indian. Consequently, the question of what benefits a non-Tribal spouse should receive and the financial impact of providing such benefits is a real concern for the community.

In the case of the Coquille Community, the Tribal Council made the decision to grant same-sex spouses the same tribal benefits that are provided to non-Indian hetero-sexual spouses. These include access to the Tribe's health care plan, Tribal housing, fitness programs and Tribal events. The entire Council did not embrace this point. It adopted the ordinance by a 5-2 vote. Soon after the ordinance became effective in May 2009, four same-sex couples got married. No marriages have occurred since. As the long term financial impact of the ordinance turned out to be negligible, opposition to the ordinance faded. The Tribal Attorney made note of this to the Suquamish Council as it considered what action to take.

External Politics Can Influence a Community's Willingness to Take Action

Even though *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) explicitly identifies domestic relations as one of the areas that is the sole province of Tribal governments, same-sex marriages in Indian Country are not immune from federal government influence. Just as internal politics played a role in the adoption of a same-sex marriage ordinance at Coquille, external politics also affected the discussion. When the Coquille Council considered enacting a same-sex marriage ordinance there was a fear and concern that the Federal government would take action against the Tribe or against individuals under the 1996 Defense of Marriage Act (DOMA). In the end, this concern was not strong enough to prevent the Council from enacting the ordinance. The federal government did not and has not taken any action under DOMA against the Coquille Tribe or against any individual. In February 2011, after the Second Circuit Court of Appeals ruled Section 3 of that Act unconstitutional, President Obama instructed the United States Justice Department to stop defending DOMA. Thus, by the time Suquamish considered amending its ordinance, concerns about this issue were limited.

The possibility of Federal government interference with internal Tribal affairs, however, remains a real concern in modern Tribal politics, especially when a Tribe takes any controversial action. In August 2011 the Cherokee Nation Supreme Court excluded Cherokee Freedmen descendants from voting in a Cherokee special run-off election for Principal Chief. Shortly thereafter, then House Finance Services Committee Chairman Congressman Barney Frank sent letters to the Bureau of Indian Affairs (BIA) and the Department of Housing and Urban Development (HUD) requesting that they withhold all housing funds to the Cherokee Nation and restore Tribal citizenship to black Cherokees. HUD responded to his request by freezing \$33 million in housing funds earmarked for the Cherokee Nation until the freedman citizenship issue was resolved. HUD released the funds only after the Tribal Government, the Freedmen descendants and the United States Government filed an agreement in federal court which allowed the descendants to vote in the special election. Although this situation arose after Suquamish passed its ordinance, nevertheless it must be mentioned that political correctness may enter the discussion when a Tribal government is thinking of taking action that could be perceived as controversial.

Social Values May be Tested When a Community Considers Same-Sex Marriages

Federal government grants often come with requirements and restrictions that limit program benefits to enrolled Tribal members. Typically, non-Indians have no right to Tribal government benefits funded by the federal government even when they are married to a Tribal member. This disparity can cause friction in Tribal households where some members are Tribal members and others are not. For instance, in a mixed Tribal member and non-Tribal member household, only some members of the household may have Tribal health care while others in the family go without because the family cannot afford it. In same-sex marriages, Indian and non-Indian partners face these same issues.

Not all Tribal governments programs are federally funded programs. Tribes create revenue generated by Tribal enterprises and taxes, known as “hard dollars” which come with no strings attached. Tribal members have strong and varied opinions about how Tribal hard dollars

should be spent. Providing benefits to non-Tribal member spouses and family members is often a sensitive issue. This issue is not specific to same-sex couples. It is a continuing topic of discussion regarding non-Indian spouses in general, especially when the community's needs are many, federal programs are underfunded and Tribal hard dollar revenues are limited. What makes the issue socially difficult is that non-Tribal member spouses live in the Tribal community, have children who may be enrolled as Tribal members and are usually active and productive members of the Tribal reservation community. This issue pits the Tribe's fiscal priorities against the heart of a community's values and traditions.

Even when financial resources are not limited, Tribal Councils must be mindful of how to structure government programs funded by hard dollars. For example, Suquamish offers off reservation trips for elders' honorings or cultural activities such as weaving conferences. These events may involve multi-day, out of state travel with lodging, food and other expenses. If non-Tribal member spouses are included in the program, this could double the cost of the program. Should the community allow non-Tribal member spouses to attend the event at all? If so, should the spouse pay his or her own way? What happens when the non-Tribal member spouse becomes a widow or widower? Should they still be allowed to participate in community activities and events? Should the Tribal government pay for that cost? Being generous may mean that other Tribal programs go wanting for lack of funding. If same-sex marriage spouses are included, costs increase. There are no easy answers to these questions.

Suquamish's Proposed Ordinance Amendments

The Tribal attorney decided that the strongest basis for legally supporting Tribal same-sex marriage was to treat it as a civil rights issue. Instead of starting fresh with a new ordinance, the attorney revised the existing ordinance so as to make it gender-neutral. In doing this, the ordinance maintained equivalency and created no distinction between existing spousal benefits provided to hetero-sexual non-Tribal spouses and benefits to be made available to same-sex non-Tribal spouses.

There were other considerations in amending the ordinance. There was the question of

who would be entitled to marry under this law. At the time the City of Seattle and the State of Washington authorized civil unions between same-sex couples. Someone asked if the Tribe could or should authorize same-sex marriages of all people regardless of heritage if they consented to the civil personal jurisdiction of the Suquamish Tribe. The legal answer was that given the right circumstances and drafting the ordinance correctly, the Tribe can exercise civil personal jurisdiction over all persons who enter into contracts within the exterior boundaries of the Port Madison Indian Reservation. The practical answer, however, was that at the time there was still a risk in taking a legislative stand on same-sex marriages. Tribal civil jurisdiction over non-Indians on the reservation was strengthened on March 1, 2013, when Congress passed amendments to the Violence Against Women Act, giving Tribal Courts criminal jurisdiction over non-Indians who abuse their Native American partners. Requiring at least one person in the same-sex marriage to be a Tribal member assured a direct jurisdictional nexus in the event of a legal challenge to the ordinance. Requiring the solemnization of the marriage to occur on the Port Madison Indian Reservation ensured a further jurisdictional nexus to the Tribe.

The attorney needed to revise other provisions in the existing ordinance as well. To ensure that each spouse had a forum if they wished to dissolve a marriage, the ordinance required the marriage to be dissolved by the Suquamish Tribal Court in accordance with Suquamish Tribal laws. As part of the amendments, the Council repealed existing law permitting girls between 16 and 18 years old to marry with their parents' consent and instead required both persons to be at least 18 years old, therefore legally recognized adults, in order to marry.

Just as the need exists to protect children conceived or born during a marriage with a hetero-sexual couple, the amendments ensured such children would be deemed the legitimate child of both parents in a same-sex marriage. The question of whether the child could become enrolled as a Tribal member was not an issue for Suquamish as the Tribe requires DNA testing to establish Tribal lineage. With these changes the draft amendments were ready for Heather Purser's review.

Sometimes Life Gets in the Way of Progress

The Tribal Attorney forwarded the draft amendments to Heather Purser, and then waited to hear her comments. Heather, as it turned out, was in the midst of making some major transitions in her personal life. She moved from living near the Tribal reservation to living in Seattle. She entered into a relationship and she took a new job. Almost a year and a half passed with a few phone conversations between the two, but there was no finalization of the draft ordinance. Given the lack of an active advocate for the cause, the ordinance revision became less of a priority for the Tribal government.

Heather saw this passage of time differently. She may have felt that the Council was responsible for moving the ordinance forward without further action from her. She felt the Tribe was dragging its feet on getting the amendments enacted and she grew frustrated.

A General Council Meeting Spurs Moving Forward With the Amendments

The Suquamish Tribal Constitution provides for an annual General Council meeting for all adult Tribal members in good standing to occur on the third Sunday of March. This is the day when the Tribal Council, Enterprise Boards and Department Directors give annual reports to the membership and when Tribal elections take place. Council also sets time aside for comments from the floor. Tribal member comments usually occur in the afternoon after all of the political candidates have given their speeches and the voting booths have opened.

The March 20, 2011 General Council meeting proceeded as usual. The Council and others gave their reports and answered questions. After lunch, Tribal members nominated candidates for seats on the Council. Those nominated gave political speeches about their past accomplishments and what they would accomplish for the community if elected. Then voting began with elders voting first and then the lines opening up for general voting.

While the voting was going on, the Council opened the microphone for comments from the floor. Heather sat with her cousin. She wanted to know if Council really supported her request for a same-sex marriage ordinance and why it was taking so long to pass. Her cousin encouraged her to get up and ask these questions. The only way to get Council to move, said

her cousin, is to get the general membership to agree that the ordinance must be acted upon.

Heather sat in the audience while others lined up to have their say on one issue or another. She finally got up the nerve to get in line for the microphone. When it was her turn to speak she told Council she was disappointed that they had not passed the same-sex ordinance yet. She asked everyone in the room if they supported her in having a same-sex ordinance. Though there were less than 50 people in the room, those who were there raised their hand in support. Chairman Forsman promised Heather that Council would work on the issue at its next regular Council meeting.

Tribal Members Support the Proposed Amendments at a Public Hearing

At the next Council meeting, the Tribal attorney provided a status report, saying she had talked to Heather Purser after the General Council meeting and they agreed to go over the proposed amendments. A few meetings later, the Tribal attorney presented the proposed amendments. After reading and discussing the proposed amendments, the Council authorized the Tribal attorney to proceed with a public hearing.

Eight people came to the public hearing. All of them supported the proposed amendments. There was no opposition to the proposed changes. Several Tribal members expressed gratitude to Heather for pursuing this cause. Everyone generally agreed that spouses in a same-sex marriage should have the same benefits as everyone else. Heather said she felt supported by the community. A Tribal elder said these amendments affect all of our families and it was important that the community support its loved ones. One Tribal member came with her partner and showed the group her certificate of civil union. She asked what would happen to her civil union under the amended ordinance. The Tribal Attorney agreed to add a provision to the ordinance that would allow those with civil unions to transfer the union into a marriage recognized by the Tribe. With that, the public hearing closed.

The Amendment Passes Without Controversy or Hoopla

On August 1, 2011, the Suquamish Council passed the same-sex marriage amendment to its Marriage and Divorce ordinance. It was at the end of the day and the Tribal Attorney had

just reported on the public hearing. Heather Purser was only one of a handful of Tribal members still in the audience.

The Council did not expect the amended ordinance to attract much media attention, but calls started coming in after Heather alerted a local news reporter. The news made the New York Times a week later, but otherwise media interest peaked and faded within a few days. Washington's governor Christine Gregoire congratulated Suquamish on its ordinance. Not long after, she publicly announced her support for passage of a same-sex marriage law in Washington State. The State Legislature passed a same-sex marriage law in 2012 and a referendum of the people approved the law in November 2013.

Not much has changed in the Suquamish community, however. No same-sex couples have married under the new provisions. Soon after the Tribal newsletter published an article about the passage of the same-sex marriage ordinance, Tribal elders talked about the amendments during their daily lunch gathering. I don't know if I agree with that lifestyle, an elder said, I think a marriage should be between a man and a woman. Another elder complained that he didn't remember anyone asking him about it before it passed. The Tribal attorney ate lunch with the elders regularly and said Heather Purser brought up the issue at the last General Council meeting. That must have been discussed late in the day after we voted and had gone home for a nap, laughed the elders. Well, there was a public hearing on it too, the attorney added, with several elders attending in support of the amendments. It's a new generation and a new world, they all agreed. Live and let live. Perhaps, in reality, life on the reservation had changed.

Attachments: Suquamish Tribal Code Title 9.1 Marriage and Divorce Ordinance, as Amended on August 1, 2011

Forms Used by Suquamish Tribal Court re Applications for a Marriage License

Forms Used by Suquamish Tribal Court re Applications for Recognition of Civil Unions/Marriages Formed in Other Jurisdictions