

4.5 Tribal Treaty Rights and Trust Responsibilities

This section identifies the original Indian tribes occupying the study area, the vehicle for establishing reservations and treaty reserved rights, highlights of traditional tribal cultures and territories, and the potential impacts on tribal resources. Not all of the original tribes, however, became treaty tribes with lands protected by specific rights and privileges or received federal recognition through other legal means.

For the purposes of this Draft Environmental Impact Statement (Draft EIS), *tribal resources* refers to tribal fishing, hunting and gathering practices, including access to traditional areas associated with a tribe's sovereignty or treaty rights. These resources may include plants, animals, or fish used for commercial, subsistence, and ceremonial purposes.

4.5.1 Regulatory Setting

This section presents the tribal authorities within the study area, as well as relevant laws and regulations pertaining to the tribes and tribal resources.

4.5.1.1 Tribal Authorities

Tribal authorities pertinent to the study area include, but are not limited to, the following.

- **Ratified federal treaties.** Ratified federal treaties refers to formal agreements between the federal government and Native American tribes under Article II, Section 2 of the United States Constitution approved by the president and subsequently ratified by the United States Senate. A treaty is a constitutionally recognized agreement between sovereign nations. These legally binding agreements are protected under the United States Constitution, which states, like the United States Constitution, they are the “supreme law of the land.” Under these treaties, tribes ceded millions of acres of land while reserving certain rights such as fishing, hunting, and gathering, as well as rights to determine use of reserved land and its resources. Treaties have been ratified with the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation), Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of Warm Springs, and Nez Perce Tribe.
- **Treaty tribes.** A Native American tribe that formally negotiated a treaty with the United States government between 1778 and 1871, which was subsequently ratified by the United States Senate, is known as a treaty tribe. As federally recognized tribes, treaty tribes retain a sovereign status and maintain a government-to-government relationship with the United States. The treaties obligate the federal government to protect tribal treaty rights, lands, assets, and resources—commonly referred to as a trust obligation.
- **Reserved tribal treaty rights.** Reserved tribal treaty rights refer to preexisting rights of indigenous peoples that were reserved by a treaty to continue their traditional access and harvest of natural resources on Indian reservations, and off-reservation “open and unclaimed” lands in common with other citizens. Today “open and unclaimed” lands refer to most state and federal public lands, but not private lands, or lands unsuited for hunting, gathering, or fishing activities. In some treaties, notable here, the Yakama Nation, Confederated Tribes of the Umatilla

Indian Reservation, Confederated Tribes of Warm Springs, and Nez Perce Tribe, the treaty tribes, also reserved their right to take fish at usual and accustomed stations.

- Unratified federal treaties.** Unratified federal treaties are treaties negotiated but not ratified by the United States Senate. Unratified treaties were negotiated with Chinook, Clatsop, Clackamas, Tillamook, Umpqua, Siletz, and Rogue River Tribes of the Oregon-Washington coast and other groups who established claims against the government for wrongful taking of their lands. Reservations established on the Oregon coast were all terminated by United States Congress, House Resolution No.108 in 1954, and took effect in 1956. Executive Order reservations since then have been restored at Grand Ronde and Siletz in Oregon. Chinookan tribes formerly occupied the study area before the major malaria epidemic of 1829 to 1833 (Boyd 1998; Nisbet 2009:200), and retain historical and traditional connections to the lower Columbia River.
- Treaty tribal ceded lands.** Treaty tribal ceded lands are former tribal territories taken by treaty, whether or not ratified by United States Congress. Some claims made by tribes remain unawarded, requiring their recognition as a federally recognized Indian tribe to fulfill these claims.
- U.S. Department of the Interior Office of Federal Recognition.** The U.S. Department of the Interior Office of Federal Recognition sets up a process and review for unrecognized Indian tribes and communities to gain federal recognition. This is important in order for a tribe to be recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. This status is automatically conferred on members of treaty tribes, but does not automatically designate Indian communities that were not treaty signers, or who lost their lands and social-cultural identity because they were struggling for their own survival and tribal social-cultural integrity over the past 150 years. Those communities each must apply for, and be granted, this status to be listed as a federally recognized tribe. Both the Cowlitz Indian Tribe and the Confederated Tribes of Grand Ronde are federally recognized tribes. The Chinook Indian Nation is based in Bay Center, Washington, and is petitioning for federal recognition.

4.5.1.2 Laws and Regulations

Laws and regulations relevant to treaty rights for federally recognized tribes are summarized in Table 4.5-1.

Table 4.5-1. Laws, Regulations, and Treaty Rights for Federally Recognized Tribes

Laws, Regulations, Court Cases, and Treaties	Description
United States Constitution (1787)	Article II and Article VI. Authorizes the federal government to make treaties and regulate commerce with Indian tribes.
Treaty With The Yakama (1855)	Set aside reservation land and reserve fishing, gathering and hunting rights for the Confederated Tribes and Bands of the Yakama Nation.
Treaty with the Walla Walla, Cayuse, etc. (1855)	Set aside reservation land and reserve fishing, gathering and hunting, and pasturing rights for the Confederated Tribes of the Umatilla Indian Reservation.
Treaty with the Nez Perce (1855)	Set aside reservation land and reserve fishing, gathering and hunting rights for the Nez Perce Tribe.

Laws, Regulations, Court Cases, and Treaties	Description
Treaty with the Tribes of Middle Oregon (1855)	Set aside reservation land and reserve fishing, gathering and hunting for the Confederated Tribes of Warm Springs.
Rivers and Harbors Act of 1945 (Pub. L. 79-14)	Appropriates funding for the acquisition of “In-Lieu-“ sites to replace the Usual and Accustomed fishing sites inundated by the construction of Bonneville Dam. Five sites were acquired.
Endangered Species Act of 1973 (16 USC 1531 <i>et seq.</i>)	NMFS is responsible for managing, conserving, and protecting ESA-listed marine and anadromous species. Actions affecting ESA-listed fishery species are subject to review by NOAA Fisheries for compliance with the Endangered Species Act.
Columbia River Treaty Fishing Access Pub. L. No. 100-581, 102 Stat. 2944 (1988)	Federal lands acquired by the Secretary of the Army and transferred to the Secretary of the Interior to be administered to provide access to usual and accustomed fishing areas and ancillary fishing facilities on the Columbia River.
DoD American Indian and Alaska Native Policy (1998)	Instructs DoD interactions with federally recognized tribes based on tribal input, federal policy, treaties, and federal statues, and supports tribal self-governance and government-to-government relations between the federal government and tribes.
Army Regulation 200-1 (2007)	Regulates environmental protection and enhancement, including stewardship of natural and cultural resources.
Presidential Memorandum, Tribal Consultation (2009)	Reaffirms Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (65 FR 67249) and charges executive departments and agencies with engaging in consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.
USACE Tribal Policy Principals (1998 and 2010)	Affirms the Corps’ legal responsibility to engage in pre-decisional consultation with federally recognized Tribes.
Notes:	
NMFS = National Marine Fisheries Service; ESA = Endangered Species Act; NOAA = National Oceanic and Atmospheric Administration; v = versus; BPA = Bonneville Power Administration; Corps = U.S. Army Corps of Engineers, Reclamation = U.S. Bureau of Reclamation; BiOp = Biological Opinion; FR = <i>Federal Register</i>	

4.5.2 Study Area

The study area for this EIS focuses on treaty tribes, and federally recognized tribes. The primary focus is reserved tribal treaty rights, including fishing, hunting, and food gathering rights not limited to accessing usual and accustomed stations and/or places.

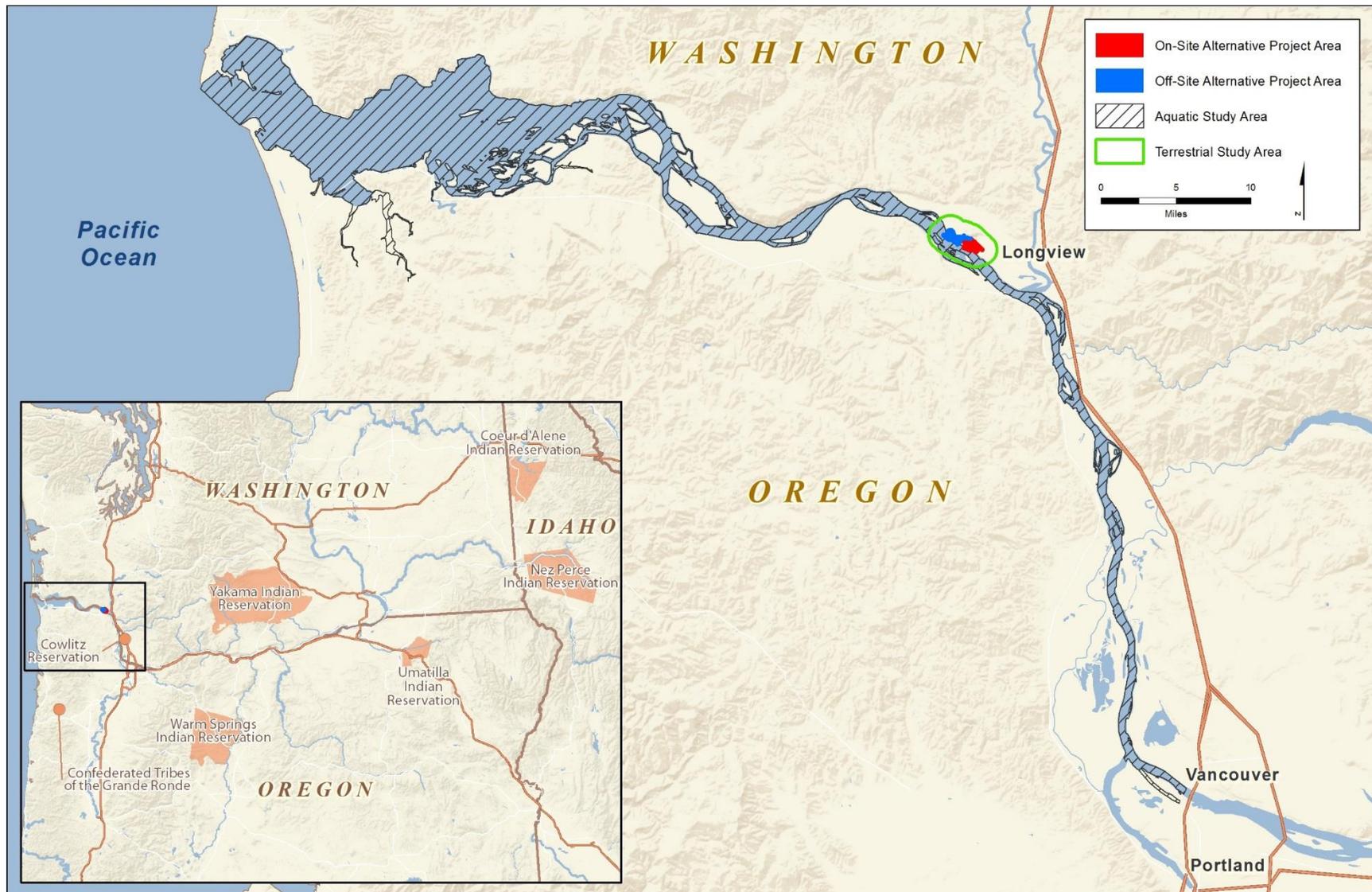
The geographic extent of the study area is represented by the compilation of the various study areas for the areas of concern (Figure 4.5-1). Different study areas for direct and indirect impacts have not been identified as either impacts could affect treaty resources. The environmental resources discussed in Chapter 5, *Natural Environment: Affected Environment and Project Impacts*, provide more detail about the individual study areas.

- **Fishing sites.** The study area for fishing sites mirrors the study area for the vessel analysis and includes the area surrounding the proposed docks where vessel maneuvering and loading would occur and the waterways used by, or could be affected by vessels calling at the project

areas. It also includes the lower Columbia River from the mouth of the river upstream to Vancouver, Washington, and the Willamette River upriver to the Port of Portland.

- **Fish and fish habitat.** The study area for impacts on fish and fish habitat includes the vicinity of the proposed export terminal where the noise from construction or operation could affect fish, plus the area of the Columbia River extending downriver from the project area to the landward line of the territorial sea (i.e., a line between the western-most end of the north and south jetties), from here on referred to as the mouth of the Columbia River. This study area includes shallow-sloping beaches along the river on which fish could be stranded by the wakes of passing vessels.
- **Vegetation.** The study area for impacts on vegetation is the project area and the area around the project area for a distance of 1 mile.
- **Wildlife.** Two study areas have been identified for the wildlife analysis:
 - *Terrestrial species and habitats.* The study area for terrestrial species consists of the project area, the area extending up to 0.5 mile beyond the project area, and the lands in the vicinity where project-related disturbance to wildlife and habitat could occur.
 - *Aquatic species and habitats.* The study area for impacts on aquatic wildlife species and habitats includes the main channel of the Columbia River and extends approximately 5.1 miles upriver and downriver to the mouth of the Columbia River to address potential impacts of increased vessel traffic on aquatic species and habitat in the lower Columbia River.
- **Water quality.** The study area for impacts on water quality is the project area, an area extending 300 feet from the project area into the Columbia River, the Consolidated Diking Improvement District (CDID) #1 stormwater system drainage ditches adjacent to the project area, the Columbia River up to 1 mile downstream of the project area, and potential in-river dredged material disposal sites plus an area extending 300 feet downstream of each disposal site.

Figure 4.5-1. Tribal Treaty Rights Study Area



4.5.3 Methods

This section describes the sources of information and methods used to evaluate the potential impacts on tribal resources associated with the construction and operation of the proposed export terminal.

4.5.3.1 Information Sources

The information presented in this section is based on the following materials.

- Review of legal authorities regarding tribal recognition, federal status, and comment by Indian tribes and individuals submitted during the formal scoping comment period for this Draft EIS.
- Technical reports of regional professional archaeological, historical, and ethnographic papers, articles, and monographs available as professional literature from regional university libraries and the records of the Washington Department of Archaeology and Historic Preservation (DAHP) in Olympia, Washington. Many of these reports and records are confidential or proprietary and not for public disclosure (per the Archaeological Resources Protection Act of 1979, National Historic Preservation Act of 1966, and Native American Graves Protection and Repatriation Act).
- Primary and secondary resources from local repositories, including the Cowlitz County Historical Museum.
- Historic maps, including U.S. Geological Survey (USGS) General Land Office plat maps and topographic quadrangle maps.
- Columbia River treaties.
- Oregon Department of Environmental Quality Columbia River water quality budget testimony by Louis Pitt, Jr., Director of Government Affairs, Confederated Tribes of Warm Springs Reservation of Oregon, March 25, 2015.
- Information about Columbia River Treaty Tribes and Columbia River fishing sites (Columbia River Inter-Tribal Fish Commission 2015; Broncheau pers. comm.).
- Biological information based on provisions of the federal Endangered Species Act (ESA) pertaining to species of tribal interest.
- Risk analysis information regarding Columbia River water quality for Indian treaty fishing and fish harvest as essential subsistence to treaty and non-treaty tribes.

Additional Information for this section was also extracted from the following technical reports prepared for this Draft EIS.

- *Identification of Historic Properties: Existing Information and Proposed Research, Millennium Coal Export Terminal, Cowlitz County, Washington—June 19, 2015* (AECOM 2015a)
- *Identification of Historic Properties: Existing Information and Proposed Research, Millennium Coal Export Terminal, Cowlitz County, Washington—August 18, 2015* (AECOM 2015b)
- *Historic and Cultural Resources Assessment, Millennium Coal Export Terminal, Cowlitz County, Washington—October 1, 2015* (AECOM 2015c)

- *Off-Site Alternative – Barlow Point Historic and Cultural Resources Assessment—April 22, 2016* (AECOM 2016)
- *NEPA Fish Technical Report* (ICF International 2016a)
- *NEPA Vegetation Technical Report* (ICF International 2016b)
- *NEPA Water Quality Technical Report* (ICF International 2016c)
- *NEPA Wildlife Technical Report* (ICF International 2016d)

4.5.3.2 Government-to-Government Consultation

As lead federal agency, the U.S. Army Corps of Engineers (Corps) has initiated consultation with potentially affected Indian tribes. The Corps will continue to consult with the tribes to identify those aspects of the proposed export terminal having the potential to significantly affect protected tribal resources, tribal rights, and Indian lands. Consultation is also occurring under Section 106 of the National Historic Preservation Act on historic properties and any properties of traditional religious and cultural importance to determine whether these properties would be potentially affected by the proposed export terminal (Section 4.4, *Cultural Resources*).

4.5.4 Affected Environment

This section describes the tribes and tribal resources in the study areas that could be affected by construction and operation of the proposed export terminal. This section also provides the general context for tribal resources in the study areas and describes tribal resources near the study area.

4.5.4.1 Northwest Indian Treaties and Federally Recognized Tribes

Northwest Indian Treaties and Federally Recognized Tribes for the study area include various tribal groups who used the Longview waterfront from historical to contemporary times. The ethnographic and archaeological records support a long and intensive record of habitation along the Columbia River in the Longview area, and are summarized in Section 4.4, *Cultural Resources*.

The study area is located within the territory occupied at the time of Euroamerican contact by two Indian groups, the Cathlamet and Upper Chinookan-speaking people, and the Cowlitz, a Salish-speaking group. From 1806 to 1829, the Skilloot, a subset of the Chinookan Cathlamet, resided along both sides of the Columbia River between Oak Point to the west and just above the Cowlitz River to the southeast (Lewis 2013; Mooney 1894), thus within the proposed export terminal location. The Cowlitz are a Salish-speaking group who also traditionally resided in the Longview area along the Cowlitz River from its mouth to below Mayfield Dam, as well as along segments of the Toutle, Newaukum, and South Fork of the Chehalis Rivers (Gibbs 1877; Curtis 1913; Hajda 1990; Silverstein 1990; Thorsgard et al. 2013). A village was located in the vicinity of the project area and recognized both by Chinookan and Cowlitz informants (Kincade 1997; Thorsgard et al. 2013). Several other villages were located along both banks of the Columbia River near the Cowlitz River confluence and highlight the dense population of the many peoples of the lower Columbia region (AECOM 2015a).

As a result of epidemics brought through contact with non-Indian peoples and reduced populations, many villages located at the mouth of the Cowlitz River that had been occupied by Cathlamet became Cowlitz (Hajda 1990:514). From about 1834 to 1854, abandoned villages along the Longview section of the Columbia River were repopulated by Clatskanie, Cowlitz and Tainapum (Upper Cowlitz) peoples who moved downstream to the Cowlitz River mouth, and Klickitat who

moved into former Skilloot territory along the Lewis River. By the time of the U.S. treaties in 1855, tribes were already affected by Euroamerican contact in terms of adjusted territories and reduced population numbers. Survivors were amalgamated and many local groups subsequently lost their ethnic identities (Minor and Burgess 2009). Many tribal peoples relocated to various reservations, discussed below, while others remained off-reservation in the local area and continued to utilize their ancestral sites of traditional importance.

In 1855, Washington Territorial Governor Isaac Stevens, representing the United States, negotiated treaties with many Indian tribes living in the Pacific Northwest, including those with ancestral ties to the project area. Tribes signing treaties at Territorial Governor Stevens' treaty councils included the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe of Idaho. Oregon Territory Superintendent of Indian Affairs Joel Palmer held a treaty council with the tribes of middle Oregon, negotiated a treaty in 1855, with the Middle Columbia River Tribes establishing the Confederated Tribes of Warm Springs, and provided for a reservation in 1860. Accordingly, these treaty tribes secured both reserved lands to live on, and off-reservation rights for access and subsistence, comprising the collection of fish, game, roots, berries, and forage for their horses.

After 1871, Congress made no further treaties with Indian tribes. Subsequent Indian reservations were generally made by Presidential Executive Order, and land adjustments in Indian lands and allotments were made by acts of Congress. The 1855 treaties with northwest tribes established tribal sovereignty status, and were sustained by the Indian Reorganization Act of 1933, when tribes were offered a road to self-governance.

Not all government-negotiated treaties with the tribes were ratified by Congress, so in the cases of most Oregon coastal tribes and the Chinookan tribes of the lower Columbia River, and the Cowlitz, most of their traditional lands were ceded to the government without compensation, and were not provided with tribal reservations (Zucker et al. 1983).

In Washington State there are 29 federally recognized Indian tribes. The treaty tribes with interest in the study area include the Yakama Nation in Washington, the Confederated Tribes of the Umatilla Indian Reservation and Confederated Tribes of Warm Springs in Oregon, and Nez Perce Tribe in Idaho. These four treaty tribes have reserved treaty rights for commercial, subsistence and ceremonial fishing at usual and accustomed fishing areas in the Columbia River and its tributaries and form the Columbia River Inter-Tribal Fish Commission (CRITFC), a nonfederally recognized tribal organization comprised of individual members of the four treaty tribes. The CRITFC mission is to "coordinate management policy and provide fisheries technical services" to the treaty tribes (Columbia River Inter-Tribal Fish Commission 2015).

The federally recognized tribes closest to the project areas are the Cowlitz Indian Tribe, located in Longview, Washington, and the Confederated Tribes of Grand Ronde on the western Oregon central coast. The Cowlitz Indian Tribe was only recently recognized as an Indian tribe in 2000. The Confederated Tribes of Grand Ronde consists of 27 tribes who received reinstated federal recognition in 1983. Some of the many tribal residents on the Grand Ronde Reservation had ancestors among the Chinookan tribes that once occupied parts of the Columbia River estuary and shoreline upstream to The Dalles, Oregon, including the project areas for the Oni-Site Alternative and Off-Site Alternative.

The following presents an overview of the tribes in the study areas.

Confederated Tribes and Bands of the Yakama Nation

The Yakama Nation is a treaty tribe consisting of 14 bands and tribes including Kah-milt-pah, Klickitat, Klinquit, Kow-was-say-ee, Li-ay-was, Oche-chotes, Palouse, Piquose, Se-ap-cat, Shyiks, Skinpah, Wenatshapam, Wishram, and Yakama. The Yakama Nation reservation is located in south central Washington State and spans across 1.2 million acres. The number of enrolled members as of 2011 was 10,200 (Columbia River Inter-Tribal Fish Commission 2015).

The Yakama Nation along with the United States signed the Treaty with the Yakama on June 9, 1855. This treaty reserved the tribe's exclusive right of taking fish in all the streams running through or bordering the reservation and the right of taking fish at all usual and accustomed places in common with the citizens of the United States.

The Yakama Nation maintains a strong connection to salmon and the Columbia River. Celilo Falls on the Columbia River near The Dalles, Oregon was an important gathering, fishing, and trading place for the tribe before it was inundated in the 1950s.

The Yakama Nation operates a fisheries program to protect their rights reserved by the 1855 Treaty, and to restore the Columbia River corresponding to their culture and traditions. The Yakama Nation Fisheries program includes over 11 subbasins, extending from the Willamette River upstream to the Methow River in the upper Columbia. The Yakama Nation people fish for salmon, steelhead, and sturgeon for commercial, subsistence, and ceremonial purposes. Fishing locations include the mainstem Columbia River from Bonneville Dam to McNary Dam (Zone 6) and the tributaries flowing into the Columbia River on the Washington State side of the river. The Yakama Nation also maintains their right to hunt, gather roots and berries, and pasture their horses on open and unclaimed land on and off reservation.

The Yakama Nation has an interest in the protection and restoration of salmon and steelhead in the upper Cowlitz River. Yakama Nation fishers are not known to fish for salmon in the Cowlitz River. The Yakama Nation Fish and Wildlife Commission does authorize limited fishery openings for smelt for ceremonial or subsistence harvest by tribal members (Yakama Nation 2016).

Confederated Tribes of Grand Ronde

The Confederated Tribes of Grand Ronde is a federally recognized tribe consisting of 27 groups with long historical ties to the northwestern Oregon and southwestern Washington coasts. The community has an 11,040-acre Indian reservation which was established in 1855 in Yamhill and Polk Counties. Confederated Tribes of Grand Ronde became a federally recognized Indian tribe in 1983. The Chinook, Clatsop, Wahkiakum, and Cathlamet are among their original constituent Indian groups, and they formerly occupied the area near the project areas. Their 19th century ceded territories to the United States include lands at the mouth of the Columbia River.

The Confederated Tribes of Grand Ronde has an interest in the study areas regarding historical use of Mount Coffin as a traditional cultural property as discussed in Section 4.4, *Cultural Resources* (Thorsgard et al. 2013, cited in AECOM 2015). The Confederated Tribes of Grand Ronde do not have treaty reserved fishing rights on the Columbia River or in the Cowlitz River. However, they maintain an active interest in protecting and restoring fish and wildlife on their ancestral lands.

Confederated Tribes of the Umatilla Indian Reservation

The Confederated Tribes of the Umatilla Indian Reservation are a treaty tribe consisting of three tribes. These tribes include the Umatilla, Cayuse, and the Walla Walla tribes (Columbia River Inter-Tribal Fish Commission 2015). They are located in northeastern Oregon and have a reservation spanning 172,000 acres. The enrolled population in 2011 was approximately 2,800 tribal members.

The Confederated Tribes of the Umatilla Indian Reservation and United States signed the Treaty with the Walla Walla, Cayuse, etc., on June 9, 1855. This treaty reserved the tribe's exclusive right of taking fish in all streams running through or bordering their reservation and the right for taking fish at all usual and accustomed stations in common with citizens of the United States. Traditionally the Confederated Tribes of the Umatilla Indian Reservation used the land for grazing their horses. They also gathered at hunting camps and to fishing sites to celebrate and trade. Traditional activities included travel to different areas to fish for salmon, to gather roots and berries at higher elevations in the summer and move to the lowlands to hunt in the fall and reside through the winter (Confederated Tribes of the Umatilla Indian Reservation 2015). Celilo Falls was an important fishing and trading area for the tribe.

The Confederated Tribes of the Umatilla Indian Reservation work cooperatively with the Washington Department of Fish and Wildlife (WDFW) to manage fisheries and wildlife. The tribe has focused their fish restoration activities on the Umatilla and Grande Ronde tributaries. In addition to the Columbia River, the tribe has co-management responsibilities for the Snake, Walla Walla, Tucannon, Grande Ronde, John Day, and Imnaha tributaries.

Confederated Tribes of Warm Springs

The Confederated Tribes of Warm Springs is a confederation of treaty tribes in Oregon (Columbia River Inter-Tribal Fish Commission 2015). It consists of the Warm Springs, Wasco, and Paiute tribes, and in 2011, the enrolled population was approximately 5,000 tribal members. The reservation is in Central Oregon and encompasses 640,000 acres. The Confederated Tribes of Warm Springs signed the Treaty with the Tribes of Middle Oregon, 1855 with the United States on June 9, 1855. The treaty reserved the tribe's exclusive right of taking fish at all the stream running through or bordering their reservation and the right of taking fish at usual and accustomed stations in common with citizens of the United States. In addition to fishing the mainstem Columbia River, tribal member's fish with dipnets and nets set with wooden scaffolding on the Deschutes River, a major tributary of the Columbia River, at the falls near Sherar's Bridge (Columbia River Inter-Tribal Fish Commission 2015). The economy of the confederation is based on natural resources, including hydropower, forest products, and ranching, as well as tourism and recreation (Confederated Tribes of Warm Springs 2015). In addition to the Columbia River, the Confederated Tribes of Warm Springs co-manages the Deschutes, Fifteenmile Creek, John Day and Hood River tributaries which are located in Oregon.

Cowlitz Indian Tribe

The Cowlitz Indian Tribe attended a treaty council at Chehalis in 1855, but they did not sign a treaty because the government-proposed reservation did not include lands in their traditional territory. Many Cowlitz moved to the Chehalis Reservation in 1863, or remained at St. Mary's Mission in Centralia, Washington, which supported an upriver Cowlitz tribal community for the next 110 years.

Federal recognition was acknowledged for the Cowlitz Indian Tribe in 2000. The Cowlitz Indian Tribe¹ was officially granted a reservation in Clark County following a court decision in December 2014. The reservation is located approximately 20 miles south of Longview near the Lewis River.

The Cowlitz Indian Tribe does not have treaty reserved fishing rights on the Columbia River or in the Cowlitz River. However, the Cowlitz Indian Tribe has an active interest in protecting and restoring fish and wildlife on their ancestral lands. The Cowlitz Indian Tribe signed a Memorandum of Understanding with WDFW to maintain healthy populations of fish and wildlife in southwest Washington as a common interest for both parties (Memorandum of Understanding n.d.).

In 2014, the Cowlitz Indian Tribe was awarded a grant from the National Oceanic and Atmospheric Administration for a eulachon species recovery program in the Cowlitz River. The Cowlitz Indian Tribe holds smelt, salmon, and river ceremonies on the Cowlitz River and participates with other tribes in canoe journeys on major waterways (Cowlitz Indian Tribe 2015).

Nez Perce Tribe

The Nez Perce Tribe is a treaty tribe inhabiting North Central Idaho (Columbia River Inter-Tribal Fish Commission 2015). Its reservation is 750,000 acres, and the enrolled population in 2011 was approximately 3,500 tribal members. The Nez Perce Tribe call themselves Nimi'ipuu - The People (Columbia River Inter-Tribal Fish Commission 2015). On June 11, 1855, the Nez Perce Tribe signed the Nez Perce Treaty with the United States. This treaty reserved the tribe's exclusive right of taking fish in all the streams running through or bordering the reservation and the right for taking fish in usual and accustomed places in common with citizens of the United States.

The Nez Perce Tribe was a historically nomadic and traveled from the Great Plains to hunt buffalo, to Celilo Falls in the Columbia River Gorge to fish for salmon. Although its reservation is located outside of Washington State, the Nez Perce Tribe retain its reserved right to hunt within the study areas. The Nez Perce Tribe has established the Nez Perce Fish and Wildlife Commission and the Nez Perce Department of Fisheries Resources Management to conserve, enhance, and manage the tribe's natural resources. In addition to the Columbia River, the Nez Perce Tribe has comanagement responsibilities for the Snake, Tucannon, Grande Ronde, Imnaha, Clearwater, and Salmon tributaries.

4.5.4.2 Treaty Fishing Rights

As stated, in 1855, the United States entered into treaties with the Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of Warm Springs, and the Nez Perce Tribe (Treaty Tribes). These treaties were ratified by the United States Senate and, as such, are laws of the United States. In these treaties, the Treaty Tribes reserved, in substantially similar provisions, their historic right to take fish on their respective reservations and off-reservation "at all usual and accustomed [U&A] places."

In 1968, individual Indians and the United States brought separate actions in the Oregon federal district court, in which the Treaty Tribes intervened, concerning the treaty right of taking fish at all U&A places on the Columbia River and its tributaries. The court issued an order in 1969, confirming

¹ The Cowlitz Indian Tribe became a federally recognized tribe on February 14, 2000 (Final Determination, Federal Register Notice, 2000.02.18, 65 FR 8436-8438 and Reconsidered Final Determination, Federal Register Notice, 2002.01.04, 67 FR 607-608).

the validity of the Treaty Tribes' rights under the Treaties. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). The court did not determine specific Columbia River U&A areas.

As encouraged by the district court, the parties signed a Columbia River Management Plan in 1977. The 1977 plan approved by the court did not establish fishing locations, times, or definite quotas. *United States v. Oregon*, 769 F.2d 1410 (9th Cir. 1985). In 1988, the court approved a Columbia River Fish Management Plan among the Treaty Tribes, Oregon, Washington and the United States for Treaty and non-Treaty fishing. *United States v. Oregon*, 699 F. Supp. 1465 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990). More recently, relevant parties agreed to, and the court approved, the 2008–2017 *United States v. Oregon Management Agreement* (2008–2017 Agreement). *United States v. Oregon* (Aug. 11, 2008). Under the 2008–2017 Agreement, the Treaty Tribes exercise Columbia River mainstem Treaty fishing rights in Zone 6, which extends from Bonneville Dam to McNary Dam.

The 2008–2017 Agreement also allows Treaty Tribes that have first reached an agreement with Oregon and Washington to take fish in the Columbia River below Bonneville Dam at locations specified in those agreements. Individual Treaty Tribes have entered into several such agreements with Washington and Oregon authorizing their members to take fish at Columbia River locations downstream from Bonneville Dam but upstream from the City of Vancouver. The project areas (at approximately river mile 63) are downstream from the City of Vancouver (approximately river mile 115). As such, harvest of fish by members of the Treaty Tribes under the Treaties is not known to occur in the Columbia River adjacent to or near the project areas.

4.5.4.3 Tribal Resources of Concern

The following discussion focuses on the areas of tribal concern regarding the proposed export terminal include potential impacts on fish, vegetation, wildlife, and water. Detailed information and analyses about these resources can be found in Section 4.4, *Cultural Resources*, and Chapter 5, *Natural Environment: Affected Environment and Project Impacts*, of this Draft EIS.

Fishing Sites

Salmon are central to the spiritual and cultural identity of all Columbia River tribes. Tribal members gather and camp at multiple sites along the Columbia River beginning in May and many stay until fall to harvest salmon and steelhead from the Columbia River and its tributaries (Broncheau pers. comm.).

The Columbia River downstream of McNary Dam is divided into six zones for fisheries management. Zones 1 through 5 are downstream of Bonneville Dam (upper extent is Beacon Rock downstream of Bonneville Dam) and are managed for non-treaty commercial and sport fisheries. Treaty tribe fishers may fish in the mainstem or tributaries of the Columbia River downstream of Bonneville Dam by special agreement to better access certain species or runs for commercial, subsistence, or ceremonial harvest (*United States v. Oregon* 2008). The Cowlitz Indian Tribe may schedule subsistence and ceremonial fisheries in coordination with WDFW (e.g., eulachon/smelt fishery in the Cowlitz River).

Zone 6 is a 147-mile section of the river stretching from just downstream of Bonneville Dam to McNary Dam, including tributaries, (Columbia River Inter-Tribal Fish Commission 2015). Zone 6 is set aside for the exclusive use of treaty commercial fishers, meaning it is closed to non-treaty commercial harvest; however, it is open to non-treaty sport fishers. Within Zone 6 there are 31 sites along the Columbia River established by Congress (Public Law 100-581 – Nov. 1, 1988 102 Stat.

2944 (1988)) near historical fishing villages and sites used by the tribes. These sites are operated and maintained by CRITFC. Several tribes have raised concerns about impacts to tribal members' ability to access Zone 6 for fishing because of the increased train traffic. The Corps does not have control or responsibility over the rail transportation of the coal along the existing mainline tracks, including the rail lines adjacent to Zone 6, and therefore, concerns about fishing access to Zone 6 are outside of the Corps' scope of analysis.

Eulachon (also known as Pacific or Columbia River smelt; scientific name *Thaleichthys pacificus*) return to the Columbia River to spawn in the mainstem Columbia River and its tributaries downstream of Bonneville Dam. Eulachon return every year to the lower Cowlitz River to spawn. Their harvest is a culturally important part of tribes' subsistence and ceremonial fisheries and in some years tribal fishers from the Yakama Nation, Confederated Tribes of Warm Springs, and Cowlitz Indian Tribe harvest this species from the lower Cowlitz River. Eulachon are harvested by dipnet from the bank or a boat.

Fish

Tribally significant fish resources include salmon, steelhead, eulachon (smelt), sturgeon, and lamprey. However, many common fish, like trout, sucker, and minnows are also harvested. These key fish species are of particular interest to tribes, and some are listed as Threatened or Endangered under the ESA. (Chapter 5, Section 5.7, *Fish*, Table 5.7-3, details the ESA status and harvest seasons for each species.) All fisheries in the Columbia River are comanaged by the states of Washington, Oregon, and Idaho, the four treaty tribes, and non-treaty tribes, such as the Cowlitz Indian Tribe, who traditionally fished in the Columbia River. Fisheries are managed by the states and treaty tribes subject to the terms of the *2008–2017 United States v. Oregon Management Agreement*. Chapter 5, Section 5.7, *Fish*, considers the potential impact of construction and operation of the proposed export terminal on salmon and steelhead migrations.

Columbia River eulachon (smelt) are one of the key native fish species important to tribes, and are listed as Threatened under the ESA on the lower Columbia River. Eulachon spawn in downstream tributaries below Bonneville Dam, including the Cowlitz, Kalama, Willamette, and Sandy Rivers, but, since 1994, their numbers have been declining sharply. In 2016, WDFW commercial and sport fishing seasons for eulachon on the lower Cowlitz River lasted 1 day for a duration of 6 and 5 hours, respectively, with a limit of 10 fish per person.

Vegetation

The majority of land in the study areas is developed, open water (primarily the Columbia River), or agricultural; the remainder consists of forest, shrub, herbaceous, wetlands, and barren lands. Dominant vegetation includes black cottonwood, Oregon ash, various willows, red osier dogwood, Himalayan blackberry, Scotch broom, and various grasses, including reed canarygrass. The upland forest on Mount Solo also included some native forest supporting Douglas fir, big leaf maple, red alder, and western hemlock. There is no documented occurrence of any plant species with federal or state status in the study area. The islands in the Columbia River have a more diverse vegetation cover and generally have more intact, less disturbed ecosystems. See Chapter 5, Section 5.6, *Vegetation*, for a more detailed discussion of the vegetation present in the study areas.

Culturally significant plants identified by the tribes include, but are not limited to, western red cedar, acorns from oak trees, camas, wapato, and huckleberries. To date, these plants have not been identified in the project areas. Therefore, annual seasonal excursions are generally required over

their traditional cultural landscape to harvest these plants from their natural habitats. This is likely to take individual families to places like Cowlitz Prairie for root foods or Mount St. Helens for huckleberries. See Chapter 5, Section 5.6, *Vegetation*, for information on specific vegetation in the proposed export terminal area.

Wildlife

A rich diversity of wildlife historically inhabited the waters of, and terrestrial habitat adjacent to, the Columbia River. Development along the river has altered the natural environment sufficiently to alter the distribution and population of species inhabiting these areas.

The On-Site Alternative is located on a disturbed industrial site with roads and industrial buildings. Many of the surrounding areas are also highly disturbed. In general, wildlife habitat in the project areas is degraded because of past industrial uses on the property. The patches of suitable habitat remaining support foraging and cover for small to large mammals; foraging and nesting for birds, including waterfowl, raptors, and passerine birds; and foraging, breeding, and nesting for amphibians. Larger and more mobile species habituated to disturbed environments may also be present in the study area, including coyote (*Canis latrans*), raccoon (*Procyon lotor*), striped skunk (*Mephitis mephitis*) and deer (*Odocoileus* sp.). Terrestrial habitat present in the Off-Site Alternative project area is generally similar to the On-Site Alternative project area. Columbian black-tailed deer (*Odocoileus hemionus columbianus*) have been observed in the forested wetland area at the northwest portion of project area. Higher quality habitat is available on Fisher, Walker, and Lord Islands.

Aquatic species present in the study areas are the same for the On-Site Alternative and the Off-Site Alternative. Three species of pinnipeds may be present in the aquatic study area within the Columbia River: harbor seal (*Phoca vitulina*), California sea lion (*Zalophus californianus*), and Steller sea lion (*Eumetopias jubatus*).

Tribally significant wildlife species located in the study areas include deer, bear, waterfowl and eagles. First hunts carried out by young men are ritually celebrated by tribal communities. Eagle feathers are also necessary each year for ceremonial and religious purposes. Wildlife present in the study areas include Columbian white-tailed deer, Columbian black-tailed deer, streaked horned lark, bald eagle, peregrine falcon, waterfowl, purple martin, Vaux's swift, pileated woodpecker, and pinnipeds. More information on wildlife species in the study areas is provided in Chapter 5, Section 5.8, *Wildlife*.

Water

Water is an important resource to the tribes because other natural resources, such as fish and wildlife, would not survive without it. Groundwater resources in the study areas include a shallow aquifer and a deeper confined aquifer from which industries, small farms, and domestic users withdraw groundwater. Surface water sources in the study areas include the Columbia River flowing along the entire south/southwest boundary of the project area and the CDID #1 stormwater system drainage ditches adjacent to the project areas. Of particular concern are threats to the quality of groundwater and surface water by contamination and pollution from various sources. See Chapter 5, Sections 5.4, *Groundwater*, and 5.5, *Water Quality*, respectively, for information on groundwater resources and water quality in the study areas and possible impacts that could result from construction and operation of the proposed export terminal.

4.5.5 Impacts

The following discussion focuses on summarizing the potential impacts on such resources of tribal concern as fish, vegetation, wildlife, and water. Detailed information and analyses about impacts related to these resources can be found in Chapter 4.4, *Cultural Resources*, and Chapter 5, *Natural Environment: Affected Environment and Project Impacts*, of this Draft EIS.

4.5.5.1 Fishing Sites

Impacts on tribal fishing in the study areas related to construction and operation of the proposed export terminal would be the same for the On-Site Alternative and the Off-Site Alternative. There would be a temporary increase in barge traffic related to the construction of the terminal. Operation of the proposed export terminal would result in up to 1,680 vessel transits annually in the lower Columbia River downstream of the project areas. However, tribal fishing generally occurs outside of the study areas, primarily upstream of the project areas starting just below Bonneville Dam (Zone 6), as provided in agreements among the tribes and the states of Washington and Oregon. Therefore, there should be no measurable impact on tribal fishing.

4.5.5.2 Fish

Impacts on fish would be the same for both the On-Site Alternative and Off-Site Alternative. Construction impacts would include underwater noise associated with the installation of steel piles and turbidity during dredging and disposing of dredged material. These impacts could result in behavioral responses or injury to fish.

The addition of new overwater structures and increased vessel traffic could also affect fish. In-river structures would increase overwater shading, which could affect primary productivity, fish behavior, predation, and migration. The noise and wakes generated by vessels could also affect fish. Noise levels, however, were found not to be injurious to fish. There would be an increased risk of fish stranding caused by the wakes of project-related vessels transiting the river during operation of the proposed export terminal.

4.5.5.3 Vegetation

Construction of the proposed export terminal at either the On-Site Alternative or Off-Site Alternative location would permanently remove forested, scrub-shrub, and herbaceous vegetation, including wetland vegetation. However, no culturally significant plant species are known to be present in these areas. Operation of the terminal would generate coal dust, which would likely be deposited on nearby vegetation. However, implementing best management practices would reduce coal dust emissions in the project area.

4.5.5.4 Wildlife

Impacts on wildlife would be the same for both the On-Site Alternative and Off-Site Alternative. Construction of the proposed export terminal would result in loss of both terrestrial and aquatic habitat. Noise from construction and operation could also affect both terrestrial and aquatic wildlife. Temporary impacts would also occur due to dredging and in-water disposal of dredged material. Operation of the terminal could generate coal dust, which could affect wildlife through physical or toxicological means. The proposed export terminal could affect culturally significant species.

4.5.5.5 Water

Impacts on groundwater and water quality would be the same for both the On-Site Alternative and Off-Site Alternative. Local groundwater quality in the study areas is good, with no identified pollutant concentrations above human health screening levels. Construction activities would not be an expected result in groundwater degradation. Construction and operation of the proposed export terminal could result in accidental releases of contaminants (e.g., fuel, oil, chemicals), introducing pollutant-laden runoff to surface waters and potentially degrading water quality. The Applicant would be required to obtain and comply with a National Pollutant Discharge Elimination System (NPDES) Industrial Stormwater Permit and an NPDES Construction Stormwater General permit and develop and comply with a site-specific construction Stormwater Pollution Prevention Plan. Impacts related to vessel transport could cause temporary, localized increases in turbidity, and could release fuel or hazardous materials as a result of a vessel incident or collision. Federal and state emergency response and cleanup programs would require cleanup actions if a spill were to occur.

4.5.5.6 No-Action Alternative

Under the No-Action Alternative, the Corps would not issue a Department of the Army permit authorizing construction and operation of the proposed export terminal. As a result, impacts resulting from constructing and operating the terminal would not occur. In addition, not constructing the terminal would likely lead to expansion of the adjacent bulk product business onto the export terminal project area. Potential impacts on fish, vegetation, wildlife, and water could occur under the No-Action Alternative and could be similar to those described for the On-Site Alternative, but the magnitude of any impact would depend on the nature and extent of the future expansion.