

3.5 Tribal Resources

For the purposes of this EIS, the term *tribal resources* refers to tribal fishing and gathering practices and treaty rights, specifically, the collective rights and access to traditional areas associated with a tribe’s sovereignty or formal treaty rights. These resources may include plants or fish used for commercial, subsistence, and ceremonial purposes.

This section describes tribal resources in the study area, including resources important to the Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of Warm Springs, Cowlitz Indian Tribe, and Nez Perce Tribe as identified by the tribes, Columbia River Inter-Tribal Fish Commission and Bureau of Indian Affairs. It then describes impacts on tribal resources that could result from construction and operation of the Proposed Action and under the No-Action Alternative. This section also presents the measures identified to mitigate impacts resulting from the Proposed Action and any remaining unavoidable and significant adverse impacts.

3.5.1 Regulatory Setting

Laws and regulations relevant to tribal resources are summarized in Table 3.5-1.

Table 3.5-1. Laws, Regulations, and Treaty Rights for Tribal Resources

Laws, Regulations, Court Cases, and Treaties	Description
Federal	
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.
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
United States v. Winans, 198 U.S. 371 (1905)	U.S. Supreme Court held that the Treaty with the Yakama of 1855, and similar treaties, protects tribal access rights to fishing, hunting, and other privileges on off-reservation lands.
United States v. Oregon 302 F. Supp. 899 (D. Or. 1969)	Ongoing federal court case that protects and implements the reserved fishing rights of Columbia River treaty tribes. The federal court continues to oversee the management of the Columbia River through the United States v. Oregon proceedings. Fisheries in the Columbia River and its tributaries are co-managed by the states of Washington, Oregon, and Idaho as well as four treaty tribes and other tribe’s traditional fishing areas.

Laws, Regulations, Court Cases, and Treaties	Description
Endangered Species Act of 1973 (16 USC 1531 et seq.)	NMFS is responsible for managing, conserving, and protecting ESA-listed marine and anadromous species. All state and treaty fisheries are subject to review by NOAA Fisheries for compliance with the Endangered Species Act.
United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) “Boldt Decision”	Federal district court interpreted the rights of treaty tribes to take fish in their “usual and accustomed places in common with all citizens” to mean that treaty tribes have a treaty-reserved right to harvest 50% of the harvestable portion of fish.
Lower Snake River Compensation Plan (1975)	Compensation plan for loss of downstream-migrating juvenile salmon and steelhead at each of the four federal dams on the Snake River.
John Day Mitigation (1978)	Authorized by Congress in 1978 to mitigate the losses in salmonid spawning and rearing habitat caused by the construction of The Dalles Dam and John Day Dam with hatchery facilities.
Pacific Salmon Treaty (1985)	Agreement between Canada and the United States to prevent overfishing and optimize production with fisheries and enhancement programs. Ensures both countries receive benefits commensurate to the salmon production originating in their waters. Treaty was renewed in 1999 and 2009.
Secretarial Order 3206 (1997)	Clarifies the responsibilities of the Department of the Interior and Department of Commerce to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species.
Final Determination to Acknowledge the Cowlitz Indian Tribe (2000)	Notice given that the Cowlitz Indian Tribe exists as an Indian tribe within the meaning of Federal Law – i.e., a Federally recognized Indian tribe (Final Determination, Federal Register Notice, 2000.02.18, 65 FR 8436-8438)
Executive Order 13175; Consultation and Coordination with Indian Tribal Governments (2000)	Establishes regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications
Reconsidered Final Determination to Affirm Decision to Acknowledge the Cowlitz Indian Tribe (2001)	Notice given to affirm the final determination that the Cowlitz Indian Tribe exists as an Indian tribe within the meaning of Federal Law – i.e., a Federally recognized Indian tribe (Reconsidered Final Determination, Federal Register Notice, 2002.01.04, 67 FR 607-608)
Columbia Basin Fish Accords (2008–2018) (2008)	Agreement between BPA, the Corps, Reclamation, the Confederated Tribes of Require adaptive management of dam operations to meet survival and passage needs of salmon.
Commerce Department Administrative Order (DAO 218-8) (2012)	Implements Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and describes the actions to be followed by the Department of Commerce concerning tribal self-government, trust resources, treaty, and other rights.
Federal Columbia River Power System Biological Opinion (Supp. 2014)	As a supplemental biological opinion to the 2008 BiOp, verifies improvements at federal dams on the Columbia and Snake Rivers, habitat restoration, and other actions were in fact benefiting affected salmon and steelhead.

Laws, Regulations, Court Cases, and Treaties	Description
Grand Ronde v. Jewell (2014)	Reaffirmed the Federal Government’s decision to acquire and hold in trust 152 acres in Clark County in the Cowlitz watershed for the Cowlitz Indian Tribe.
Public Law 100-581 – Nov. 1, 1988; Title IV – Columbia River Treaty Fishing Access Sites	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 for treaty tribes.
State	
Washington Department of Fish and Wildlife Hatchery and Fishery Reform (Policy C-3619) (2009)	Advances the conservation and recovery of wild salmon and steelhead by promoting and guiding the implementation of hatchery reform. Treaty fisheries are not subject to this policy, but this policy influences negotiations between the treaty tribes and Washington State on number of fish produced from hatcheries in the Columbia River, number of fish available for harvest, and fishing gear types.
Local	
No local laws, regulations, or treaties apply to tribal resources.	
<p>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</p>	

3.5.2 Study Area

The study area for direct impacts on tribal resources consists of tribal resources in and near the project area that could be affected by construction and operation of the Proposed Action.

The study area for indirect impacts includes tribal resources and access to those resources that could be affected during rail transport along the expected rail routes for Proposed Action-related trains in Washington State. The study area for indirect impacts from Proposed Action-related vessel transport is the route for Proposed Action-related vessels in the Columbia River from the project area to 3 nautical miles offshore. The indirect study area also includes the Columbia River upriver to McNary Dam, including the tribal commercial, subsistence, and ceremonial fishing zone on the Columbia River known as Zone 6 (Figure 3.5-1).

3.5.3 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 Action and No-Action Alternative.

Figure 3.5-1. Tribal Resources Study Area



3.5.3.1 Information Sources

The following sources of information were used to identify the potential impacts of the Proposed Action and No-Action Alternative on tribal fishing in the study areas. These sources focus on tribal fishing locations, times, and catch specifically to treaty harvest of salmon, steelhead and sturgeon.

- *SEPA Rail Transportation Technical Report* (ICF and Hellerworx 2017)
- *Final Environmental Impact Statement to Inform Columbia River Basin Hatchery Operations and the Funding of Mitchell Act Hatchery Programs* (National Marine Fisheries Service 2014)
- Information about Columbia River Treaty Tribes and Columbia River fishing sites (Columbia River Inter-Tribal Fish Commission 2015)
- Information about the Confederated Tribes of Warm Springs (Confederated Tribes of Warm Springs 2015)
- Columbia River treaties (U.S. Fish and Wildlife Service 2015)
- Information about Cowlitz Indian Tribe and fisheries (Cowlitz Indian Tribe 2015)
- Information about stock status and fisheries for chinook, coho, steelhead, and sturgeon (Washington Department of Fish and Wildlife and Oregon Department of Fish and Wildlife 2014, 2015)
- Conversation with Michael Broncheau, Columbia Treaty Fishing Site Manager, Columbia River Inter-Tribal Fish Commission, December 18, 2015

3.5.3.2 Impact Analysis

The following methods were used to evaluate the potential impacts of the Proposed Action and No-Action Alternative on tribal resources.

Impacts on tribal resources were assessed by evaluating how the Proposed Action and No-Action Alternative could affect access to tribal resources in the study areas. The analysis considered information about fishing, gathering, gear and tools, and traditional areas provided by the tribes and agencies, including practices and areas used by the four treaty tribes (Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of Warm Springs, and Nez Perce Tribe) west of Bonneville Dam to McNary Dam. Salmon are central to the spiritual and cultural identity of the four treaty tribes.

The impact analysis evaluated how construction and operation of the Proposed Action could reduce the amount of time available to fish, change the time when fishers could deploy gear, or exclude members from fishing areas typically fished by tribal members.

3.5.4 Existing Conditions

This section describes the tribes and tribal resources in the study areas that could be affected by construction and operation of the Proposed Action and No-Action Alternative. This section provides the general context for tribal resources in the study areas.

As stated in Section 3.5.2, *Study Area*, the study areas include a tribal commercial, subsistence, and ceremonial fishing zone known as Zone 6. Zone 6 is a 147-mile section of the river that stretches

from west of Bonneville Dam to McNary Dam, including tributaries (Columbia River Inter-Tribal Fish Commission 2015). Figure 3.5-2 presents an overview of Zone 6 and the five other zones along the Columbia River. Zone 6 is closed to non-treaty commercial fishing, but is open to sport fishers.

The Columbia River west of the Bonneville Dam is open to non-treaty commercial fishers and sport fishers. Tribal members may occasionally fish in the mainstem or tributaries west of Bonneville Dam to better access certain species or runs (*United States v. Oregon* 2008).

Salmon are central to the spiritual and cultural identity of the four Columbia River treaty 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.). Thirty-one sites were established by Congress (Public Law 100-581 – Nov. 1, 1988; Title IV – Columbia river Treaty Fishing Access Sites) along the Columbia River in Zone 6 on the Washington and Oregon sides of the river to replace traditional sites inundated by the three Columbia River dams (Bonneville Dam, The Dalles Dam, and John Day Dam). The sites are near historical fishing villages and sites used by the tribes.

3.5.4.1 Tribes

The federally recognized tribes in the study area are the Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of Warm Springs, Cowlitz Indian Tribe, and Nez Perce Tribe. The four treaty tribes that have reserved treaty rights for commercial, subsistence and ceremonial fishing are the Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of Warm Springs, and Nez Perce Tribe.

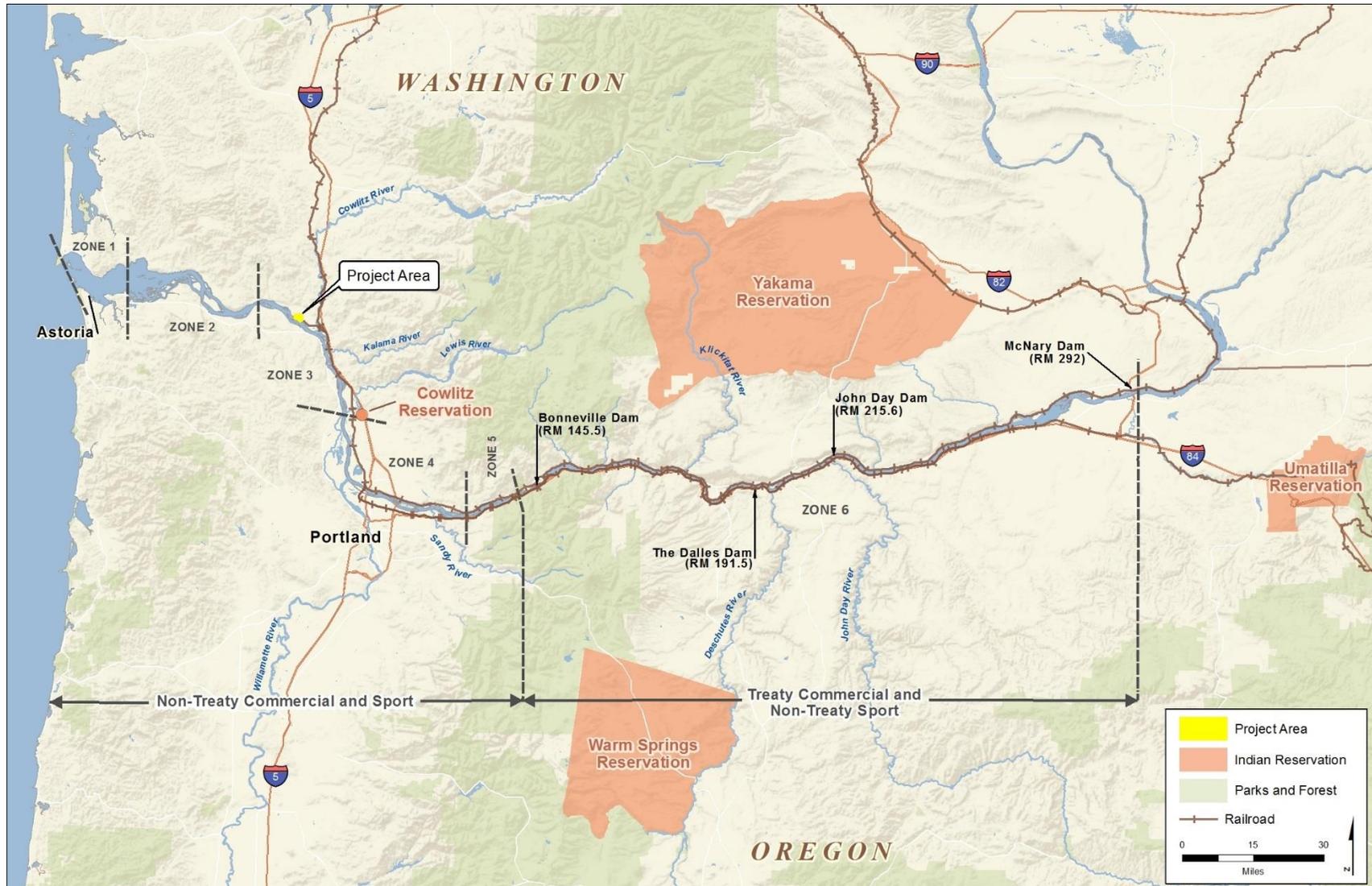
Columbia River Tribal Fisheries

The Columbia River Inter-Tribal Fish Commission (CRITFC) consists of the four treaty tribes (Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of Warm Springs, and Nez Perce Tribe) with reserved rights to fish in the Columbia River and its tributaries. The CRITFC mission is to “coordinate management policy and provide fisheries technical services” to the treaty tribes (Columbia River Inter-Tribal Fish Commission 2015).

All fisheries in the Columbia River are co-managed by the states of Washington, Oregon, and Idaho, the four treaty tribes, and other non-treaty tribes that traditionally fished in the Columbia River, such as the Cowlitz Indian Tribe. Fisheries are managed by the states and treaty tribes subject to the terms of the *2008–2017 United States v. Oregon Management Agreement*.

This agreement establishes tribal treaty harvest allocations and upholds the right of tribes to fish for salmon in their usual and accustomed fishing grounds. Non-treaty commercial fisheries in these waters are managed under the Columbia River Compact, a congressionally mandated process that adopts seasons and rules for Columbia River commercial fisheries. All fisheries are subject to review by NOAA Fisheries for compliance with the Endangered Species Act. Enforcement of treaty fisheries is handled by CRITFC. This arrangement was established in 1972 as a method to recover the damaged fisheries of the Columbia River (Columbia River Inter-Tribal Fish Commission 2015).

Figure 3.5-2. Columbia River Fishing Zones



Source: Oregon Department of Fish and Wildlife no date.

The Columbia River downstream of McNary Dam is divided into six zones for fisheries management. Zones 1 through 5 are west of Bonneville Dam (western extent is Beacon Rock west of Bonneville Dam) and are managed for non-treaty commercial and sport fisheries. Zone 6 is a 147-mile section of the river that stretches from west of Bonneville Dam to McNary Dam, including tributaries (Columbia River Inter-Tribal Fish Commission 2015). Zone 6 also includes a short section west of Bonneville Dam. Zone 6 is set aside for the exclusive use by treaty commercial fishers, meaning it is closed to non-treaty commercial harvest; however, it is open to non-treaty sport fishers. Treaty tribe fishers may fish in the mainstem Columbia River or tributaries west 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 Washington Department of Fish and Wildlife (WDFW) (e.g., eulachon/smelt fishery in the Cowlitz River).

Treaty catch of salmon, steelhead, sturgeon in commercial, ceremonial, and subsistence fisheries in Zone 6 of the Columbia River are reported in Table 3.5-2. Chinook salmon is the most abundant species in the reported catch. The largest portion being summer and fall run Chinook. Reported catch does not include salmon and steelhead harvested in tributaries entering the Columbia River in Zone 6, on the Columbia River upstream of McNary Dam, and on the lower Snake River. Catch in those fisheries are recorded by the tribes, but not centrally reported. Catch in the tributaries varies considerably across tributaries and the number of hatchery adults returning to the tributary. All tributaries entering the Columbia River between Bonneville Dam and McNary Dam have some tribal fishing.

Table 3.5-2. Annual Catch of Salmon, Steelhead, and White Sturgeon in Treaty Commercial, Ceremonial, and Subsistence Fisheries in Zone 6 of the Columbia River

Year	Chinook Catch (# fish)	Coho Catch (# fish)	Steelhead Catch (# fish)	White Sturgeon Catch (# fish)
2002	164,464	1,649	19,217	1,829
2003	147,344	5,670	20,553	1,539
2004	151,890	10,287	20,518	1,812
2005	128,509	5,413	17,413	2,052
2006	101,557	7,577	22,646	1,061
2007	54,380	8,035	22,416	1,285
2008	137,287	21,625	31,593	1,814
2009	137,602	15,675	38,255	1,837
2010	186,026	11,485	37,985	3,176
2011	169,819	25,998	31,848	3,818
2012	113,995	7,070	16,893	4,505
2013	255,815	8,850	21,418	3,051
2014	308,320	40,480	34,582	2,263
2015	333,040	2,956	19,781	1,368
Average	170,718	12,341	25,366	2,244

Notes:

Source: National Marine Fisheries Service 2014; Washington Department of Fish and Wildlife and Oregon Department of Fish and Wildlife 2014, 2015.

The Department of Interior through the Bureau of Indian Affairs has established 31 fishing access sites on the Columbia River between Bonneville Dam and McNary Dam for the exclusive use of the treaty tribal fishers (Public Law 100-581 – Nov. 1, 1988; Title IV – Columbia River Treaty Fishing Access Sites). The sites are managed by CRITFC for fishers from the four CRITFC member tribes. Three sites have shared-use facilities for the general public. These sites were set aside by U.S. Congress to provide fishing access to tribal fishers whose traditional fishing grounds were inundated by the Columbia River dams. The sites are culturally significant to the treaty tribes in that they are at or near traditional villages or fishing locations on the Columbia River. Of the 31 sites, 20 are located on the Washington side of the Columbia River. Many of the access points on the Washington side include a variety of amenities such as camping facilities, showers, and fish-cleaning stations. Four of the access sites are unimproved with no facilities. The sites are fenced, gated, and have signs stating they are not open to the general public. The general public may only enter a site to buy fish. Figure 3.5-3 provides a general overview of these access site locations.

Tribal fishers use the access sites to gather, camp, and to access fishing sites along the river by boat. Fishing sites are located along the entire 147-mile section of river on both sides of the river. Fishers also access fishing sites from the highway via unimproved dirt tracks at many other locations along the river (Broncheau pers. comm.).

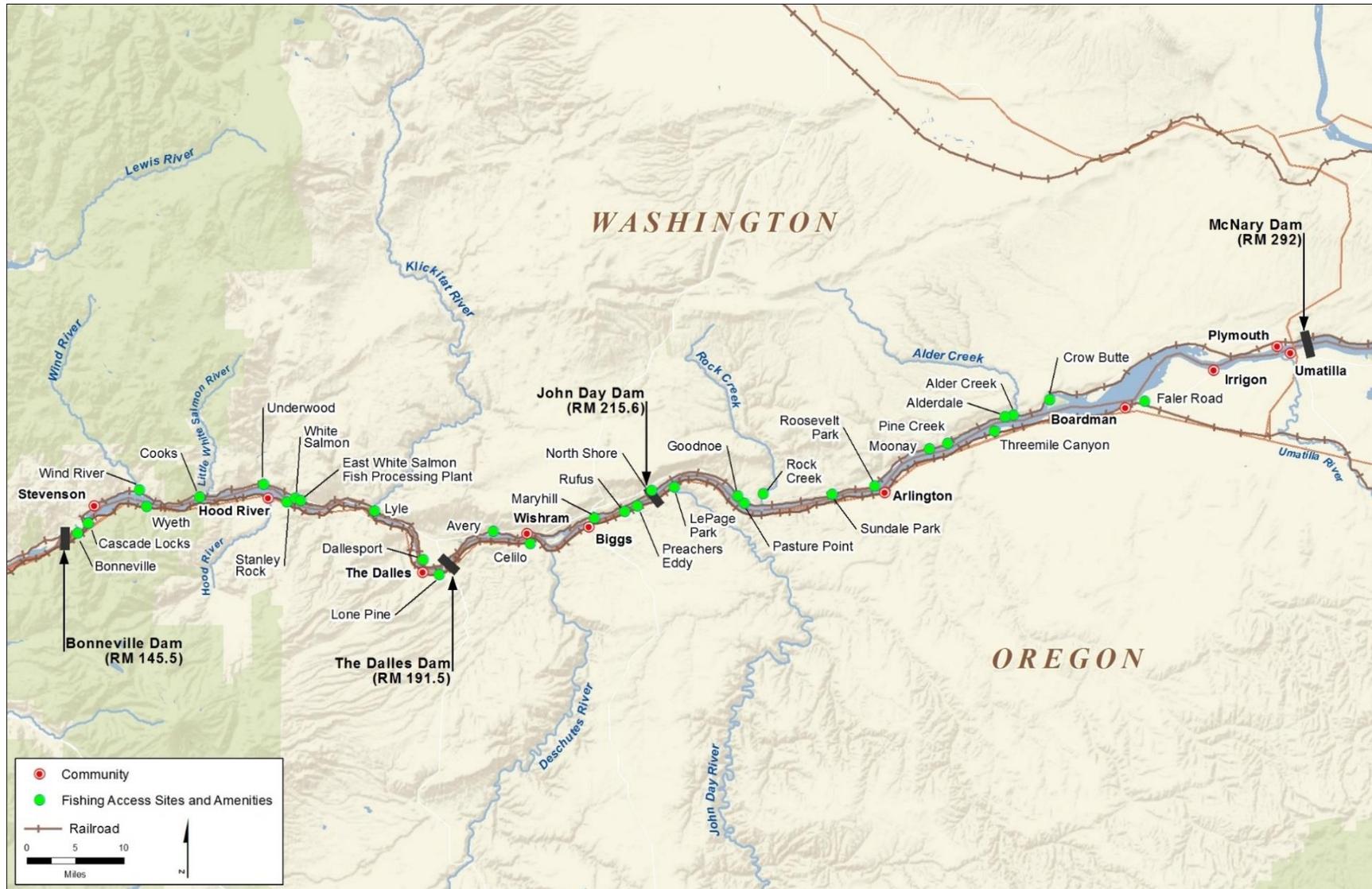
The fishing access sites are heavily used by tribal fishers from May to October. In the last decade salmon and steelhead populations in the Columbia River have increased to levels that allow a commercial treaty fishery during this period. Treaty fishers set up residence at the sites in May take part in commercial, subsistence, and ceremonial fisheries and will stay there into October (Broncheau pers. comm.). At times during this period there may be as many as 80 tribal members camping at a site.

Commercial sales to the public can be directly from the bank at one of the access sites, be from tribal members, who purchase fish from the fishers, who then sell along the highway or from a nearby town, or by delivery to a fish processing station for distribution to other markets.

Fish gear used by tribal fishers to harvest salmon and steelhead from the Columbia River mainstem and its tributaries are a combination of set gillnets, bank and platform hook and line, and platform dip net gear (Columbia River Inter-Tribal Fish Commission 2015). The platform and hook-and-line subsistence fisheries are open all year to provide harvest opportunities to the tribal members. Gillnet commercial fisheries are managed by season and fish entering the river. Fisheries are set by month long to several day openings to manage total catch by species and run. The spring Chinook fishery is typically from mid-May to mid-June. Summer fisheries are targeting summer Chinook, sockeye, and summer Steelhead. Fall fisheries are targeting fall Chinook, steelhead, and coho salmon.

Treaty harvest of sturgeon in Zone 6 is by hook and line, setlines (line of hooks anchored to the bottom), and gillnets (set gillnets anchored to the bank) (Washington Department of Fish and Wildlife 2014). Most sturgeon are harvested during the winter season (January to March). The length of time a fishery is open is adjusted depending on the number of fish available for harvest and cumulative catch. Fishing can occur all seven days in the week when the fishery is open. Depending on number of fish available for harvest there may be an additional commercial fishery in the fall on sturgeon with a fixed duration of days. Subsistence fisheries on sturgeon are open all year.

Figure 3.5-3. Zone 6 Access Locations



Source: Columbia River Inter-Tribal Fish Commission 2015.

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 west of Bonneville Dam. Eulachon return every year to the lower Cowlitz River to spawn. Their harvest is a culturally important part of the tribe's subsistence and ceremonial fisheries and in some years tribal fishers from the Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of Warm Springs, and Cowlitz Indian Tribe harvest this species from the lower Cowlitz River. Eulachon are harvested by dip net from the bank or from a boat.

Confederated Tribes and Bands of the Yakama Nation

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) is a federally recognized tribe that consists of 14 bands and tribes including Kah-milt-pah, Klickitat, Klinquit, Kow-was-say-ee, Li-ay-was, Oche-chotes, Palouse, Pisuose, 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 signed a treaty with the United States called the Treaty with the Yakama on June 9, 1855. This treaty reserved their inherent right to fish, hunt, and gather traditional foods and medicines throughout the ceded lands.

The Yakama Nation maintains a strong connection to salmon and the Columbia River. The tribes treaty "usual and accustomed lands" include the Columbia River and its tributaries and areas outside of the Columbia River Basin. Celilo Falls on the Columbia River near The Dalles, Oregon was an important gathering, fishing, and trading place for the tribe.

The Yakama Nation operates a fisheries program to protect their rights that were 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, lamprey, and sturgeon for commercial, subsistence, and ceremonial purposes. Fishing locations include the mainstem Columbia River from west of 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 is a participant in the Cowlitz River Hydroelectric Project license held by Tacoma Power (Tacoma Power 2000). 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 the Umatilla Indian Reservation

The Confederated Tribes of the Umatilla Indian Reservation are a federally recognized tribe that consists 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 that spans 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., 1855 on June 9, 1855. This treaty reserved their inherent rights to fish, hunt, and gather traditional foods and medicines throughout the ceded lands. The tribes still protect and exercise those rights within the 6.4 million acres of land in what is now northeastern Oregon and southeastern Washington (Columbia River Inter-Tribal Fish Commission 2015).

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.

They retain their rights to hunt and fish on “usual and accustomed” lands and work cooperatively with the 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 federally recognized confederation of 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 confederation’s rights to fish, hunt, and gather traditional foods and medicines throughout the ceded lands.

In addition to fishing the mainstem Columbia River, tribal members fish with dip nets 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 Tribe¹ was officially granted a reservation in Clark County in 2014 following a court decision issued by United States District Court on December 12, 2014. This decision dismissed an appeal by an opponent of the reservation and reaffirmed the Federal Government’s decision to

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).

take 152 acres in Clark County into trust for the Cowlitz Indian Tribe. 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, wildlife, plants, and habitat on their ancestral lands. The Cowlitz Indian Tribe signed a Memorandum of Understanding (MOU) with WDFW to maintain healthy populations of fish and wildlife in southwest Washington as a common interest for both parties (Washington Department of Fish and Wildlife and Cowlitz Tribe n.d.).

In 2014, the Cowlitz Indian Tribe was awarded a grant from the National Oceanic and Atmospheric Administration (NOAA) for a eulachon species recovery program in the Cowlitz River (National Oceanic and Atmospheric Administration 2010). 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 federally recognized tribe that inhabits 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 ensured the tribe's exclusive right of taking fish in all the streams that run through or border the reservation and the right for taking fish in usual and accustomed lands.

The Nez Perce Tribe was 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 retains its reserved right to hunt within the state and work cooperatively with WDFW to manage fish and wildlife resources. 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 co-management responsibilities for the Snake, Tucannon, Grande Ronde, Imnaha, Clearwater, and Salmon tributaries.

3.5.4.2 Tribal Resources in the Study Areas

The direct impacts study area consists of tribal resources in and near the project area. There are no known tribal resources in this study area. Adjacent aquatic or terrestrial habitat support culturally important species to tribes such as salmon, eulachon, and Columbian white-tailed deer. Lord Island is adjacent to the study area and is designated by WDFW as important Columbian white-tailed deer habitat.

Treaty tribal fishers access the Columbia River Zone 6 fishery at 31 established fishing sites in the section of river between west of Bonneville Dam and McNary Dam (Figure 3.5-3). Of the 31 sites, 20 are located on the Washington side of the Columbia River.

In addition to these managed sites, tribal fishers also access the river at many other unimproved points along the Zone 6 fishing area on the Columbia River (Broncheau pers. comm.).

3.5.5 Impacts

This section describes the potential direct and indirect impacts related to tribal resources that could result from the construction and operation of the Proposed Action and No-Action Alternative.

3.5.5.1 Proposed Action

This section describes the potential impacts that could occur in the study areas as a result of construction and operation of the Proposed Action.

Construction—Direct Impacts

As explained in Chapter 2, *Project Objectives, Proposed Action, and Alternatives*, construction-related activities include removing vegetation from the site, filling 24 acres of wetlands, demolishing existing structures and preparing the site, constructing the rail loop, driving piles and constructing docks, dredging Columbia River sediments, and constructing supporting infrastructure (i.e., conveyors and transfer towers). No tribal resource areas are in the direct impacts study area; therefore, construction of the coal export terminal including dock construction would not result in direct impacts on tribal resources. As described in Chapter 4, Sections 4.5, *Water Quality*, and 4.7, *Fish*, in-water construction-related activities such as dredging, pile-driving and dock construction could cause physical or behavioral responses in fish and would also affect and remove aquatic habitat. These impacts could reduce the number of fish surviving to adulthood and returning to areas east of Bonneville Dam as described below.

Construction—Indirect Impacts

Construction-related activities that could result in impacts on fish habitat, behavior, or survival are described in Chapter 4, Sections 4.5, *Water Quality*, and 4.7, *Fish*. As discussed in Section 4.7, *Fish*, underwater sound generated by impact pile-driving could affect fish in several ways, ranging from alteration of behavior to physical injury or mortality. However, pile-driving activities during construction would be conducted within an approved in-water work window, which would be defined as part of the permitting process for the Proposed Action. Adherence to the approved in-water work window would be protective of the most vulnerable life-history stages for affected fish and, thus, would minimize but not eliminate impacts on juvenile Chinook salmon, particularly subyearling fish. In addition, proposed mitigation measures presented in Section 4.7, *Fish*, would minimize but not eliminate impacts on fish, including injury as a result of pile-driving. Behavioral effects would likely occur to some individual fish if they were present in the area of effect. Construction-related activities could cause physical or behavioral responses in fish and would affect aquatic habitat, which could reduce the number of fish surviving to adulthood and returning to Zone 6, and could affect the number of fish available for harvest by the tribes.

Operations—Direct Impacts

Operations-related activities are described in Chapter 2, *Project Objectives, Proposed Action, and Alternatives*. Operation of the coal export terminal including dock operations would not result in direct impacts on tribal resources because tribal resource areas are outside the direct impacts study area.

Operations—Indirect Impacts

Operations-related activities are described in Chapter 2, *Project Objectives, Proposed Action, and Alternatives*. Operation of the Proposed Action would result in the following indirect impacts.

Potential to Affect Access to Columbia River Tribal Fishing Areas

Proposed Action-related trains would travel along the BNSF Railway Company (BNSF) main line adjacent to the Columbia River. Proposed Action-related trains could result in delays to tribal fishers' access to traditional fishing sites and delivery of fish to buyers. As described in Chapter 5, Section 5.1, *Rail Transportation*, approximately 34 trains per day traveled this route in 2015. By 2028, the number of trains is projected to increase to approximately 48 trains per day without Proposed Action-related trains. The Proposed Action would add 8 loaded trains per day by 2028, or an approximately 17% increase.²

Proposed Action-related trains would be approximately 1.3 miles long. The time for each Proposed Action-related train to pass at grade crossings would range from approximately 8.5 minutes at 10 miles per hour to 2.25 minutes if the train is traveling at 50 miles per hour. Proposed Action-related trains could increase delay of tribal fishers' access to the 20 managed fishing sites on the Washington side of the river as compared to conditions under the No-Action Alternative. While most of the access road crossings are not at-grade with the rail line, or the rail line is inland from the highway and river access site, trains could increase delay, which would affect tribal fishers' access to the established access sites managed by CRITFC.

In addition, tribal fishers access the Columbia River at multiple unmapped locations using unimproved, at-grade crossings (Broncheau pers. comm.). Proposed Action-related rail traffic could delay tribal fishers' ability to access these unmapped traditional fishing locations. The heaviest use of these sites is from May to October during summer salmon and steelhead season (Broncheau pers. comm.).

Potential to Affect Columbia River Fish Habitat and Fish Available for Harvest by Tribes

Potential impacts on aquatic habitat affecting fish behavior or resulting in physical injury from operations of the Proposed Action are described in Chapter 4, Sections 4.5, *Water Quality*, and 4.7, *Fish*. Fish stranding associated with wakes from Proposed Action-related vessels would likely occur, as discussed in Section 4.7, *Fish*. This potential impact is based on the understanding of the timing of outmigration of juvenile salmonids and genetic data that suggest the majority of the fish in the nearshore, shallow-water areas of the lower Columbia River (within the study area) tend to be subyearling Chinook salmon from the Lower Columbia River Evolutionarily Significant Unit, most of which likely originate below Hood River, mainly outside Zone 6. Nonetheless, operation of the Proposed Action could result in indirect impacts on tribal resources through Proposed Action-related activities causing physical or behavioral responses and by affecting aquatic and upland habitat. These impacts could reduce the number of fish surviving to adulthood and returning to Zone 6, and could affect the number of fish available for harvest by the tribes.

² Empty Proposed Action-related trains are expected to return via Stampede Pass and not through the Columbia River Gorge.

Potential to Affect Columbian White-Tailed Deer

Patches of potentially suitable, but mostly degraded, upland and wetland habitat in the undeveloped areas in the western portion of the project area, which could support foraging and cover for Columbian white-tailed deer, would be removed with construction of the Proposed Action. Because existing conditions currently hinder and create impediments for Columbian white-tailed deer movement along the Columbia River, construction of the Proposed Action would not have an impact on migration or movement of the species. During construction, project area noise levels would increase above ambient levels. Because wildlife in the terrestrial study area are likely habituated to noise levels associated with industrial areas and are generally mobile, construction-related noise could affect individuals of a species, but would not affect a species' whole population or the overall fitness of a population.

Mitigation would be required to compensate for the loss of wetlands and their habitat functions as part of the Clean Water Act Section 401 and Section 404 permit process. Columbian white-tailed deer and habitat are described in Chapter 4, Section 4.8, *Wildlife*. Habitat functions of wetlands in the project area are described in Chapter 4, Section 4.3, *Wetlands*.

Generate and Disperse Coal Dust in the Environment

Fugitive coal dust particles would be generated by the Proposed Action through the dispersal of coal dust during rail transport (Chapter 5, Section 5.7, *Coal Dust*). Maximum coal dust concentrations would occur within approximately 100 feet from the rail line, but total concentrations would not exceed applicable air quality standards, as described in Chapter 5, Section 5.7, *Coal Dust*. A review of the chemical composition of coal dust (U.S. Geological Survey 2007) suggests that the risk of exposure to concentrations of toxic materials (e.g., polycyclic aromatic hydrocarbons and trace metals) from coal dust are low because the concentrations are low and toxic materials are bound to coal and not easily leached.

As described in Chapter 4, Section 4.7, *Fish*, fugitive coal dust particles generated by the coal export terminal and Proposed Action-related trains would enter the aquatic environment through movement of coal into and around the project area and during rail transport. Fugitive coal dust and potential coal spills are not expected to significantly affect fish because the potential risk for exposure to toxic chemicals contained in coal would be relatively low (ranging from 1.99 grams per square meter per year adjacent to the project area to less than 0.01 gram per square meter per year approximately 2.4 miles from the project area). Fugitive coal dust entering the aquatic environment would be unavoidable, but would not be expected to affect behavior or survival of fish. Fugitive coal dust from operations of the Proposed Action would increase suspended solids in the Columbia River but is not expected to be at a level where there would be a demonstrable effect on fish distribution, abundance, or survival, or acute physical effects. Additionally, the potential risk for exposure to toxic chemicals contained in coal (e.g., polyaromatic hydrocarbons and trace metals) is expected to be relatively low because these chemicals tend to bind with coal and not quickly or easily leach. Coal particles would be transported downstream by river flow and either carried out to sea or distributed over a broad area.

3.5.5.2 No-Action Alternative

Under the No-Action Alternative, the Applicant would not construct the coal export terminal. The Applicant would continue with current and future increased operations in the project area. The project area could be developed for other industrial uses including an expanded bulk product terminal or other industrial uses. The Applicant has indicated that, over the long term, it would expand the existing bulk product terminal and develop new facilities to handle more products such as calcine petroleum coke, coal tar pitch, and cement. The Applicant's planned growth under the No-Action Alternative would require approximately two trains per day. If No-Action Alternative-related trains travel along the BNSF main line adjacent to the Columbia River in Washington State, access to tribal fishing areas along the Columbia River could be affected.

3.5.6 Required Permits

No permits related to tribal resources would be required for the Proposed Action.

Concurrent with the Washington State Environmental Policy Act (SEPA) review process, the Corps, as federal lead agency, is conducting a review of the Proposed Action under the National Environmental Policy Act (NEPA). Pursuant to NEPA, the Corps is assessing potential impacts of the Proposed Action on tribal resources, including potential impacts related to tribal sovereignty and treaty rights. The Corps published the NEPA Draft EIS on September 30, 2016. In addition, the Corps is consulting under Section 7 of the federal Endangered Species Act with the U.S. Fish and Wildlife Service and National Marine Fisheries Service. Additional measures may be identified under one or both of these processes that could further reduce potential impacts on fish, and therefore reduce potential impacts on tribal resources.

The Corps is also consulting under Section 106 of the National Historic Preservation Act. The Corps has initiated consultation with Cowlitz County, the Washington State Department of Archaeology and Historic Preservation, the City of Longview, the Bonneville Power Administration, National Park Service, potentially affected Native American tribes, and the Applicant regarding the Proposed Action and potential impacts on cultural resources. The Corps expects to sign a Memorandum of Agreement along with consulting parties, which will stipulate measures to help mitigate the Proposed Action's impacts on cultural resources.

3.5.7 Proposed Mitigation Measures

This section describes the proposed mitigation measures that would reduce impacts related to tribal resources from construction and operation of the Proposed Action. These mitigation measures would be implemented in addition to project design measures, best management practices, and with environmental permits, plans, and authorizations that are assumed as part of the Proposed Action.

3.5.7.1 Applicant Mitigation

The proposed mitigation measures identified in Chapter 4, Sections 4.5, *Water Quality*, and 4.7, *Fish*, to mitigate impacts on water quality and fish would also mitigate potential impacts on tribal fishing.

MM WQ-2. Develop and Implement a Coal Spill Containment and Cleanup Plan.

To limit the exposure of spilled coal to the terrestrial, aquatic, and built environments during coal handling, the Applicant will develop a containment and cleanup plan. The plan will be reviewed by Cowlitz County and Ecology and implemented prior to beginning export terminal operations. In the event of a coal spill in the aquatic environment by the Applicant during export terminal operations, action will be taken based on the specific coal spill, and the Applicant will develop a cleanup and monitoring plan consistent with the approved containment and cleanup plan. This plan will include water quality and sediment monitoring to determine the potential impact of the coal spill on the aquatic habitat and aquatic species. The Applicant will develop the cleanup and monitoring plan in coordination with Cowlitz County, Ecology, and the Corps. The cleanup and monitoring will be similar in scope to the monitoring completed for the Aquatic Impact Assessment (Borealis 2015) associated with a coal spill in British Columbia, Canada in 2014.

MM FISH-1. Implement Best Available Noise Attenuation Method for Pile-Driving.

To minimize underwater noise impacts on fish during pile-driving, the Applicant will employ the best available noise attenuation methods during pile-driving. These methods may include, but are not limited to, confined bubble curtain, temporary noise attenuation pile, double-walled noise attenuation pile, or other similar technology. The Applicant is currently proposing use of a confined bubble curtain, but other methods may be found to be better at attenuating noise impacts during the Endangered Species Act Section 7 consultation or by the time construction begins. Should other methods in the future prove to attenuate underwater noise better than a confined bubble curtain, those methods will be employed.

MM FISH-2. Implement a “Soft-Start” Method during Pile-Driving.

To minimize underwater noise impacts on fish during pile-driving, the Applicant will commence impact pile-driving using a “soft-start,” or other similar method. The “soft-start” method is a method of slowly building energy of the pile driver over the course of several pile strikes until full energy is reached. This “soft-start” method cues fish and wildlife to pile-driving commencing and allows them to move away from the pile-driving activity.

MM FISH-3. Monitor Pile-Driving and Dredging Activities for Distress to Fish and Wildlife.

To minimize the potential harm to marine mammals, diving birds, or fish, a professional biologist will observe the waters near pile-driving and dredging activities for signs of distress from fish and wildlife during these activities. If any fish or wildlife species were to show signs of distress during pile-driving, the biologist will issue a stop work order until the species are recovered, moved, or relocated from the area. The Applicant will immediately report any distressed fish or wildlife observed to the appropriate agencies (i.e., Washington Department of Fish and Wildlife, U.S. Fish and Wildlife Service, and National Marine Fisheries Service) and determine the appropriate course of action.

MM FISH-4. Conduct Eulachon Surveys.

Should in-water work be permitted to occur between December and May, the Applicant will conduct advance underwater surveys at least 1 year before in-water work would occur for eulachon (adult, eggs, and larvae) in those areas where in-water work would occur (i.e., Docks 2

and 3 and the dredge prism). Surveys would be conducted starting in December when water temperatures are near 40 degrees Fahrenheit (°F) in the lower Columbia River, which appears to trigger river entry for adults, and continue through May, when larval eulachon have generally hatched and drifted out of the system. Survey design and results would be provided to WDFW and National Marine Fisheries Service. If adult or larval eulachon or eulachon eggs are observed and in-water work is proposed, the Applicant would coordinate with the fish and wildlife agencies on the appropriate measures to avoid and minimize impacts on eulachon and implement those measures.

MM FISH-5. Conduct Fish Monitoring During Hydraulic Dredging Operations.

The Applicant will develop and implement fish community monitoring in coordination with WDFW, U.S. Fish and Wildlife Service, and National Marine Fisheries Service. Fish community monitoring will include surveys conducted prior to dredging to identify fish species and life-stages present in the area to be dredged. As part of the coordination with WDFW, U.S. Fish and Wildlife Service, and National Marine Fisheries Service, measures to reduce the entrainment of fish anticipated to be present during dredging will also be developed, which may include timing restrictions for hydraulic dredging.

The Applicant will also develop and implement dredge entrainment monitoring for hydraulic dredging, in coordination with WDFW, U.S. Fish and Wildlife Service, and National Marine Fisheries Service. Dredge entrainment monitoring will involve screening the dredge output at the point of discharge (i.e., barge) to determine the number, life-stage, and species of fish entrained by hydraulic dredging. The information gathered during dredge monitoring will be provided to WDFW, U.S. Fish and Wildlife Service, and National Marine Fisheries Service.

3.5.7.2 Other Measures to Be Considered

Other measures that could be implemented to mitigate impacts on tribal include the following.

- Proposed Action-related trains would travel along the Columbia River and could restrict use and access to tribal fishing areas in the river. To mitigate impacts on access to tribal treaty fishing areas, the Applicant could initiate a process with CRITFC officials to discuss and identify mitigation measures prior to beginning operations.
- BNSF and other stakeholders (such as the Federal Highway Administration, Federal Railroad Administration, Washington State Department of Transportation, Washington Utilities and Transportation Commission, and local jurisdictions) could coordinate with CRITFC to identify at-grade crossings or unimproved access points that are of particular concern to the treaty tribes and prioritize those crossings for potential improvements. Improvements at these locations could include tunneling under or bridging rail crossings for vehicle or foot access to sites. Improved access points could reduce the length of delays to tribal fishers attempting to access the Columbia River.
- As part of the federal consultation process, the Corps could continue consultations with treaty tribes to identify potential impacts and resolve conflicts related to the Proposed Action.

3.5.8 Unavoidable and Significant Adverse Environmental Impacts

Construction and operation of the Proposed Action could result in indirect impacts on tribal resources through Proposed Action-related activities causing physical or behavioral responses and by affecting aquatic habitat. These impacts could reduce the number of fish surviving to adulthood and returning to areas east of Bonneville Dam, which could affect the number of fish available for harvest by Native American tribes. Proposed Action-related trains would travel through areas adjacent to and within the usual and accustomed fishing areas of Native American tribes and could restrict access to tribal fishing areas in the Columbia River. Because other factors besides rail operations affect fishing opportunities, such as the number of fishers, fish distribution, timing, and duration of fish migration periods and seasons, the extent to which rail operations related to the Proposed Action would affect tribal fishing is difficult to quantify. Making a determination of significance related to treaty reserved rights is not part of this EIS.