

### 3.8 TREATY AND TRADITIONALLY USED RESOURCES



*Traditionally used resources are important because of the role they play in, and their intrinsic value to, tribal lifeways and culture, and in the exercise of tribal treaty reserved rights. The proposed project and wetland mitigation sites are located in areas of special importance for Native American groups, in part, because of ready access to fish and intertidal resources. This is supported by evidence from archaeological sites in the region that demonstrate the importance of March Point (see Chapter 3.7 – Cultural Resources).*

#### STUDY AREA AND METHODOLOGY

The study area used to analyze direct and indirect impacts on access to treaty and traditionally used resources is comprised of the proposed project site, the proposed wetland mitigation site, and the Anacortes Subdivision. The study area also encompasses the surrounding lands and waters that may have been or are currently used by tribal entities for access to treaty and traditionally used resources. The cumulative impacts study area would be the same as described for direct and indirect impacts.

Although commenters asked for this environmental impact statement (EIS) to review how the increase in train traffic from the proposed project would affect the Columbia River tribes, this analysis is focused on treaty and traditionally used resources in the study area as defined above.

Select laws, regulations, and guidance applicable to treaty and traditionally used resources in the study area are summarized in Table 3.8-1.

Table 3.8-1 Laws, Regulations, and Guidance for Project-Related Treaties and Traditionally Used Resources

Laws, Regulations, and Guidance	Description
Federal	
Stevens Treaties (1854-1855)	A series of eight treaties establishing reservations for the exclusive use of the tribes. The tribes reserved their right to continue traditional activities on lands beyond these reserved areas and reserved the right to hunt, fish, and conduct other traditional activities on lands off of the reservations initiated by then Washington Territorial Governor and superintendent of Indian Affairs, Isaac Stevens. Not all of the tribes signed treaties with the federal government. Several of these tribes have reservations designated by executive order.

Laws, Regulations, and Guidance	Description
United States vs. Washington, 13-35474 (2016)	Ninth Circuit Court of Appeals affirmed the district court's order issuing an injunction directing the State of Washington to correct culverts, which allows streams to flow underneath roads, because they violated, and continued to violate, the Stevens Treaties, between Indian tribes in the Pacific Northwest and the Governor of Washington Territory.
Treaty of Point Elliott (1855)	A lands settlement treaty formed between the U.S. Government and the Native American tribes of the greater Puget Sound Region. Signatories to the Treaty of Point Elliott included Chief Seattle and Territorial Governor Isaac Stevens. Representatives from the Duwamish, Suquamish, Snoqualmie, Snohomish, Lummi, Skagit, Swinomish, and other tribes also signed.
United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974)	Federal District Court decision in 1974 upheld by the Supreme Court in 1979 reaffirming the reserved right of American Indian tribes in the State of Washington to act alongside the state as co-managers of salmon and other fish, and to continue harvesting them in accordance with the various treaties that the United States had signed with the tribes. The tribes of Washington had ceded their land to the United States but had reserved the right to fish as they had always done, including fishing at their traditional locations that were off the designated reservations.
Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979)	
"Boldt Decision" 1979	

In February 2016, a search of online data and ethnographic literature was conducted regarding current and traditional use of plants, fish, and shellfish within the study area as defined above. Research conducted to date included review of the following websites: Department of Archaeology and Historic Preservation (DAHP) Washington Information System for Architectural and Archaeological Records Data (WISAARD), the Swinomish Tribal Community, the Washington State Governor's Office of Indian Affairs, Washington State Department of Ecology (Ecology), and the United States Bureau of Indian Affairs (USBIA). Ethnographic literature includes studies of resources used by tribal members including Gunther (1945), Lane (n.d.), Suttles and Lane (1990), and Suttles (1974).



In an effort to augment these information sources, the co-lead agencies requested input on this EIS from potentially affected tribes. Affected tribes include those with lands in the study area as well as tribes who submitted comments during the EIS scoping process (Skagit County and Ecology 2015). Ecology sent letters to affected tribes on February 24, 2016, and follow up e-mails on March 25, 2016 and July 22, 2016, requesting information about traditional use of resources in the study area. The co-lead agencies offered to meet with affected tribes, if desired. To date, meetings with the potentially affected tribes have not been conducted.

In March 2015, the Swinomish Tribe filed a lawsuit in federal court against BNSF Railway for violating the terms of an easement agreement allowing trains to cross the Swinomish Reservation in Skagit County (Swinomish Indian Tribal Community 2015). At the time of writing this EIS, no decision has been made by the U.S. District Court.

## AFFECTED ENVIRONMENT

The study area lies within tribal Ceded Areas established by the *Treaty of Point Elliott in 1855*. That treaty and the *Boldt Decision* (below), which upheld tribal fishing rights in 1979, affirmed that the region and its resources would remain important to the tribes. The study area is adjacent to the Reservation of the Swinomish Indian Tribal Community (Swinomish Tribe), also established by the Treaty of Point Elliott (Goren 2012:3). The U.S. Government has a fiduciary **obligation “...to protect tribal** treaty rights regarding lands, assets, and resources...” (USBIA 2016). The study area is within the usual and accustomed lands of the Swinomish Tribe, which means the tribe manages tribal access to and use of resources. The co-lead agencies included treaty and traditionally used resources in this EIS to address concerns raised by commenters during the scoping process (Skagit County and Ecology 2015).

### Treaty of Point Elliott in 1855

In March 1853, Washington became a Territory, and two years later, a lands settlement treaty was formed between the U.S. Government and the Native American tribes of the greater Puget Sound Region. The Treaty of Point Elliott of 1855 (more commonly, the Point Elliott Treaty), was signed on January 22, 1855, at Point Elliott, now Mukilteo. It was the first of eight treaties between the U.S. and native nations in Washington State.

### What are “usual and accustomed lands?”

In the Stevens treaties, the tribes reserved the right to fish at “all usual and accustomed grounds and stations.” The court case *U.S. v. State of Washington*, referred to as the *Boldt Decision*, defined “usual and accustomed” as places where the Indians fished, excluding “unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions.”

In the treaties, the Indians retained some of their lands as reservations. And, according to the *Boldt Decision*, the treaties did not grant rights to the Indians but instead were a grant from them. Within the treaties, they reserved the rights, for instance, to fish at “all usual and accustomed grounds and stations” not granted.

—*United States v. State of Washington* 384 F. Supp. 312 at 331-332



As noted above, this area is currently considered the usual and accustomed land of the Swinomish Tribe, but has also been used by others in the past, such as the Sauk-Suiattle Indian Tribe, Upper Skagit Indian Tribe, Lummi Tribe, and Samish Indian Nation. They gathered plant materials for food, manufacturing, medicinal, and ceremonial purposes. These included, but were not limited to, cedar, hemlock, hazelnut, alder, and maple to manufacture canoes, nets, paddles, and basketry, among other things. Fern, grapes, gooseberry, thimbleberry, elderberry, salmonberry, and wild cherry were harvested for food and medicine (Gunther 1945).

These tribes gathered oysters and clams from tidal flats in nearby Fidalgo and Padilla bays (Goren 2012:3; Lane n.d.). Using gill nets made from vine maple, they also trapped crabs and fished for salmon in these bays, as well as in the Swinomish Channel and at the mouth of the Skagit River. They also used spears made of ironwood to gaff cod (Gunther 1945).

Today more modern equipment is used; however, members of the tribes still fish in the same areas. For many Native Americans within the region, these resources are a part of their culture and lifeways (Goren 2012). If the environment becomes degraded and inaccessible, the ability of the tribes to continue to be culturally intact and to impart cultural knowledge to their youth for the next seven generations, as is their tradition, could be affected.

As a continuation of Chapter 3.7 – Cultural Resources, this chapter briefly addresses concerns about access to traditionally used resources including Traditional Cultural Properties and Cultural Landscapes; terrestrial and aquatic plants; terrestrial animals; finfish and shellfish. Correspondence has been sent to the tribes to try to identify access issues, more clearly define current tribal uses of these resources, and to determine any other resource issues that might result from the proposed project.

## Proposed Project

### Traditional Cultural Properties and Cultural Landscapes

Traditional Cultural Properties are properties that are eligible for inclusion in the National Register of Historic Places (NRHP) based on their connections with cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community. Cultural Landscapes illustrate how humans have used and adapted natural resources or traditional Native American cultural practices to daily life. No Traditional Cultural Properties or Cultural Landscapes have been identified within the study area to date. Background research indicates that the Swinomish Tribe and other tribes used the area, so it is possible that specific Traditional Cultural Properties

The following tribes commented during the scoping process for this EIS:

- Swinomish Indian Tribal Community
- Stillaguamish Tribe of Indians
- Tulalip Tribes
- Suquamish Indian Tribe
- Confederated Tribes of the Umatilla Indian Reservation
- Confederated Tribes of The Warm Springs Reservation of Oregon

In addition, organizations including the Skagit River System Cooperative and the Columbia River Inter-Tribal Fish Commission provided comments during scoping (Skagit County and Ecology 2015).



and/or Cultural Landscapes not previously discovered could be identified during discussions or field visits with the tribes.

#### Terrestrial and Aquatic Plants

Background research indicates that members of the Swinomish Tribe have been gathering terrestrial and aquatic plants within the study area for food and medicinal purposes since ancient times (Goren 2012). It is possible that specific gathering areas or certain plants not previously identified, but important to the Swinomish or other tribes, could be identified during discussions or field visits with the tribes.

#### Terrestrial Animals

Background research indicates that members of the Swinomish Tribe have traditionally hunted terrestrial animals in the general area since ancient times (Goren 2012). It is possible that specific hunting areas or certain terrestrial animals not previously identified, but important to the Swinomish or other tribes, could be identified during discussions or field visits with the tribes.

#### Finfish and Shellfish

As with the plant gathering and hunting practices described above, Swinomish Tribe members have also been harvesting fish and shellfish within the study area since ancient times (Goren 2012). These resources are considered by the Swinomish to be culturally significant and represent their connection with the environment. Finfish species within the study area are described in Chapter 3.4 – Fish and Aquatic Species and Habitat. Several varieties of salmon are individually and commercially harvested by the Swinomish Tribe: coho salmon (*Oncorhynchus kisutch*); pink salmon (*Oncorhynchus gorbuscha*), also known as “humpback”; and chum salmon (*Oncorhynchus keta*). Shellfish traditionally harvested include Dungeness crab (*Metacarcinus magister*), littleneck clams (*Leukoma staminea*), and Manila clams (*Venerupis philippinarum*). All are a traditional mainstay of the Swinomish diet (Campbell and Donatuto 2014). The Tribe also owns and operates a seafood wholesaler, The Swinomish Fish Company at 11455 Moorage Way in LaConner, Washington within approximately 7 miles of the study area (Campbell and Donatuto 2014; Swinomish Tribal Community 2016).

## ENVIRONMENTAL IMPACTS

### No Action Alternative

Because no construction or operation would take place under the no action alternative, there would be no impacts to treaty and traditionally used resources. Existing conditions would remain the same unless affected by other projects in the future.

### Proposed Project

#### Traditional Cultural Properties and Cultural Landscapes

Because no Traditional Cultural Properties or Cultural Landscapes have been identified in the study area to date, no impacts from the proposed project on Traditional Cultural Properties or



Cultural Landscapes were identified. If Traditional Cultural Properties or Cultural Landscapes were identified through coordination with the tribes, it would be possible to assess impacts.

#### Terrestrial and Aquatic Plants

Because specific gathering areas or plants important to tribes have not been identified in the study area to date, no impacts from the proposed project were identified. If gathering areas or important plants were identified through coordination with the tribes, it would be possible to assess impacts.

#### Terrestrial Animals

Because specific hunting areas or certain terrestrial animals important to tribes have not been identified in the study area, no impacts from the proposed project were identified. If hunting areas or important animal species were identified through coordination with the tribes, it would be possible to assess impacts.

#### Finfish and Shellfish

The study area is located near tribal fisheries. The impacts to tribal fisheries would be the same as those described for fish and aquatic resources in Chapter 3.4 – Fish and Aquatic Species and Habitat. These impacts could include loss of or changes to riparian habitat, or changes in water quality that could impact fish. Depending on the degree of these impacts, treaty resources, traditional lifeways, health, and the culture of the Swinomish and other tribes could be affected due to degradation of their fisheries.

#### Cumulative Impacts

The proposed project would not disturb any known Traditional Cultural Properties or Cultural Landscapes; specific gathering areas or plants important to tribes, or specific hunting areas or certain terrestrial animals important to tribes; therefore, the proposed project would not contribute to cumulative impacts on these resources. Tribal fisheries are located near the study area. The cumulative impacts would be the same as described for fish and aquatic resources in Chapter 3.4 – Fish and Aquatic Species and Habitat.

## MITIGATION MEASURES

### Avoidance and Minimization

Measures to avoid or minimize potential impacts to fisheries are described in Chapter 3.4 – Fish and Aquatic Species and Habitat. These avoidance and minimization measures would apply to tribal fisheries, as well.

The identification of specific Traditional Cultural Properties and Cultural Landscapes important to the tribes requires the assistance and knowledge of those tribal governments and members. Receiving additional input from tribes would allow for the identification, proper treatment, and mitigation of impacts from the proposed project. Skagit County and Ecology respect the rights of



tribal sovereigns to engage on their terms with local, state, and federal governments as appropriate.

### Mitigation

No additional mitigation measures are proposed at this time beyond the avoidance and minimization measures described in Chapter 3.4 – Fish and Aquatic Species and Habitat. Should any additional tribal resources be made known, Skagit County and Ecology may reassess potential impacts and mitigation.



*This page intentionally left blank*

