

3.14. AMERICAN INDIAN TRADITIONAL RESOURCES AND TRIBAL TREATY RIGHTS

Protected tribal resources, as defined in DoD Instruction 4710.02, *DoD Interactions with Federally Recognized Tribes*, are “those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by or reserved by or for Indian Tribes through treaties, statutes, judicial decisions, or EOs, including tribal trust resources.” Tribal trust resources are defined as “Indian lands or treaty rights to certain resources.” These resources include plants, animals, and locations associated with hunting, fishing, and gathering activities for subsistence or ceremonial use. For the purposes of this section, the term “traditional resources” will be used to encompass protected tribal resources.

In accordance with DoD and Navy policies, the Navy invites government-to-government consultation with federally-recognized tribal governments when a proposed action may have the potential to significantly affect tribal rights, protected resources, or Indian lands. The Navy has completed government-to-government consultation with federally recognized tribes that use the resources in the vicinity of the project area.

American Indian traditional cultural properties and potential effects to any historic properties are discussed in Section 3.13 (Cultural Resources).

3.14.1. Affected Environment

The Navy consults with federally recognized American Indian tribes on actions with the potential to significantly affect protected tribal resources, tribal rights, or American Indian lands. The following tribes have tribal treaty rights in the project sites: Skokomish Indian Tribe, the Port Gamble S’Klallam Tribe, the Jamestown S’Klallam Tribe, the Lower Elwha Klallam Tribe, and the Suquamish Tribe.

3.14.1.1. EXISTING CONDITIONS

3.14.1.1.1. TRIBAL TREATY RIGHTS AND TRUST RESPONSIBILITIES; RESERVATION OF RIGHTS BY AMERICAN INDIANS

Treaties with American Indian tribes are considered government-to-government agreements, similar to international treaties, and preempt state laws. Tribal treaty rights are not affected by later federal laws (unless Congress clearly abrogates treaty rights). Treaty language securing fishing and hunting rights is not a “grant of rights (from the federal government to the Indians), but a grant of rights from them — a reservation of those not granted” (*United States v. Winans*, 25 S. Ct. 662, [1905]). This means that the tribes retain rights not specifically surrendered to the United States.

Furthermore, the United States has a trust or special relationship with American Indian tribes. This trust relationship provides the basis for legislation, treaties, and EOs that clarify the unique rights or privileges of American Indians. The trust responsibility has been interpreted to require federal agencies to carry out their activities in a manner that is protective of American Indian treaty rights. EO 13175, *Consultation and Coordination with Indian Tribal Governments*, affirms the trust responsibility of the United States and directs agencies to consult with American

Indian tribes and respect tribal sovereignty when taking actions affecting such rights. The Navy complies with this trust responsibility by complying with laws and regulations such as NEPA.

TREATIES OF POINT NO POINT AND POINT ELLIOT

The Treaty of Point No Point, “ signed by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory [of Washington], on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different villages of the S’Klallams..., and also of the Sko-ko-mish, To-an-hooch, and Chem-a-kum tribes, occupying certain lands on the Straits of Fuca and Hood’s Canal, in the Territory of Washington...” on January 26, 1855, secured these tribes the following:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purposes of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

The Skokomish, Port Gamble S’Klallam, Jamestown S’Klallam and Lower Elwha Klallam Tribes are signatories to this treaty. The U&A fishing grounds and stations for the Point No Point signatories encompass the co-use waterways and shorelines of Hood Canal and its tributaries, which include NAVBASE Kitsap Bangor (Point No Point Treaty Council [PNPTC] 2010).

The Suquamish Tribe secured the “right of taking fish at usual and accustomed grounds and stations” in the Treaty of Point Elliot, signed on January 22, 1855.

UNITED STATES V. WASHINGTON STATE

Known as the “Boldt Decision” after presiding U.S. District Court Judge George Boldt, *United States v. Washington* (384 F. Supp. 312 [W.D. Wash. 1974], aff’d, 520 F.2d 676 [9th Cir. 1975]) affirmed the rights of federally recognized Washington tribes (i.e., those who were party to the various treaties) to harvest fish in their usual and accustomed places, identified the U&A locations of various tribes, and also allocated 50 percent of the salmon and steelhead fishery to treaty tribes. The decision established that the Skokomish Indian Tribe, the Port Gamble S’Klallam Tribe, the Jamestown S’Klallam Tribe, the Lower Elwha Klallam Tribe, and the Suquamish Tribe have U&A fishing grounds and stations co-located in the project area.

At the heart of the decision was this interpretation of the treaty language from the Point No Point and Point Elliott treaties:

By dictionary definition and as intended and used in the Indian treaties and in this decision, ‘in common with’ means sharing equally the opportunity to take fish ... therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish ... and treaty right fishermen shall have the opportunity to take up to the same percentage. (U.S. District Judge George Boldt, *U.S. v. Washington*, 384 F. Supp. 312 [W.D. Wash. Feb 12 1974], aff’d, 520 F.2d 676 [9th Cir. 1975]).

In 1994, Federal District Court Judge Edward Rafeedie issued a decision regarding tribal treaty rights to take shellfish at U&A areas (United States v. Washington, 873 F. Supp 1422 [W.D. Wash. 1994]). This is commonly referred to as the “Rafeedie decision.” Judge Rafeedie ruled that the treaties’ “in common” language meant that the tribes had reserved harvest rights to half of all shellfish from all of the usual and accustomed places, except those places “staked or cultivated” by citizens – or those that were specifically set aside for non-Indian shellfish cultivation purposes.

“A treaty is not a grant of rights to the Indians, but a grant of rights from them,” Judge Rafeedie wrote in his December 1994 decision, adding that the United States government made a solemn promise to the tribes in the treaties that they would have a permanent right to fish as they had always done. Judge Rafeedie ruled that all public and private tidelands within the case area are subject to treaty harvest, except for shellfish contained in artificially created beds. His decision requires tribes planning to harvest shellfish from private beaches to follow many time, place, and manner restrictions on harvest.

The U.S. Supreme Court declined to hear the case.

The Skokomish Indian Tribe’s primary fishing rights in the waters of Hood Canal over those of other tribes granted rights under this treaty, particularly the Suquamish, was affirmed in a 1985 ruling by the Ninth Circuit Court of Appeals (*United States v. Skokomish Indian Tribe*, 764 F.2d 670 [9th Cir. 1985]). Since the 1985 court decision, the Suquamish Tribe must receive permission from the Skokomish Tribe to fish south of the Hood Canal Bridge; this permission has not been granted.

1993 CONGRESSIONAL LEGISLATION FOR PURCHASE OF TIDELANDS FOR NAVY MITIGATION OF TRIBAL TIDELAND ACCESS UNDER TREATIES IN PUGET SOUND

In 1993, pursuant to Public Law 102-396, § 9150 as amended, special legislation was enacted that authorized the Department of Defense to provide \$5,000,000 to the State of Washington for the purchase of 1,500 acres of tidelands. The purpose of the acquisition was to mitigate responsibilities related to tideland access guaranteed under treaties between the federal government and American Indian tribes in the Puget Sound region, i.e., the Skokomish Indian Tribe, the Port Gamble S’Klallam Tribe, the Jamestown S’Klallam Tribe, the Lower Elwha Klallam Tribe, and the Suquamish Tribe. The Navy, on behalf of the U.S. Government and the State, executed a Memorandum of Agreement (MOA) wherein the State agreed to obtain tribal releases of treaty rights “for access to, or harvest of shellfish” located on these tidelands as long as the Navy installations in Puget Sound continued to exist. Since the mid-1990s, the State has purchased over 1,000 acres of tidelands that had been in private cultivation and were not available for tribal harvest until being purchased by the State.

3.14.1.1.2. AMERICAN INDIAN ACCESS AND USE AT NAVBASE KITSAP BANGOR

The history of American Indians in Puget Sound and their use of the project area and Hood Canal are summarized in Section 3.13.1.1.1.

3.14.1.1.3. TRADITIONAL RESOURCES

NAVBASE Kitsap Bangor property and the controlled waterfront Navy restricted area are co-located in the adjudicated U&A fishing area for the Skokomish Indian Tribe, Port Gamble S’Klallam Tribe, Jamestown S’Klallam Tribe, and Lower Elwha Klallam Tribe. These tribes are signatory to the 1855 Treaty of Point No Point.

These Tribes currently have access to conduct shellfish harvests (clams and oysters) and shellfish seeding (clams and oysters). There have been no occurrences of the Tribes to gather cedar bark or medicinal plants even though this type of gathering has been offered to the Tribal staffs.

TRADITIONAL RESOURCES AT THE LWI PROJECT SITES

Devil’s Hole Beach at NAVBASE Kitsap Bangor is located at the south LWI project site. In 1997, the Navy and the Skokomish Indian Tribe, Port Gamble S’Klallam Tribe, Jamestown S’Klallam Tribe, and Lower Elwha Klallam Tribe entered into a cooperative agreement for access to Devil’s Hole Beach for shellfish harvesting (clams and oysters). The agreement gives the Tribes authority to manage the shellfish at the beach. This estimated 18-acre beach is located south of Delta Pier within the waterfront Navy restricted area and is known by the Tribes as “Bangor Beach.” The cooperative agreement was established in response to ongoing litigation regarding the treaty tribes’ rights to access and harvest shellfish in U&A areas referred to in the 1994 Rafeedie decision. At the time, all beaches at NAVBASE Kitsap Bangor were evaluated by the Navy and by the four Tribes, and Devil’s Hole Beach was determined to be the Tribes’ 50 percent share of the available, naturally occurring shellfish resources.

The Tribes harvest clams and oysters at Devil’s Hole Beach approximately four times per year. Typically, the three S’Klallam Tribes harvest on the same day(s), and the Skokomish Indian Tribe harvests separately on other days. Harvests usually occur during low tide. The Tribes have also seeded clams and oysters at Devil’s Hole Beach as recently as 2014 and 2015. Access to Devil’s Hole Beach by tribal members is allowed only by land, not by water, and is coordinated with Navy personnel to ensure compliance with Navy safety and security policies.

Tribal fisheries (shellfish and finfish) in Hood Canal and near the south and north LWI project sites are managed by the PNPTC for shellfish (discussed in Section 3.2) and salmonid species (discussed in Section 3.3). Tribal finfishing (or any recreational or commercial finfishing) is not allowed within the water area contained by the PSB of the waterfront Navy restricted area. In accordance with the 1997 Navy-Tribal cooperative agreement, no tribal fishing (e.g., finfishing, crabbing, shellfishing, subtidal geoduck, shrimping, etc.) occurs at the north LWI project site, which is inside the waterfront Navy restricted area.

Marine water resources associated with the LWI, including longshore sediment transport, are discussed in Section 3.1; marine vegetation and invertebrates are discussed in Section 3.2.

TRADITIONAL RESOURCES AT THE SPE PROJECT SITE

In accordance with the 1997 Navy-Tribal cooperative agreement, no tribal fishing (e.g., finfishing, crabbing, shellfishing, subtidal geoduck, shrimping, etc.) occurs at the SPE project site due to its location within the waterfront Navy restricted area.

Salmonid species that may be present in the vicinity of the SPE project site are discussed in Section 3.3; marine water resources, including longshore sediment transport, are discussed in Section 3.1; and marine vegetation and invertebrates are discussed in Section 3.2. No other known traditional resources are located at the SPE project site.

3.14.1.2. CURRENT REQUIREMENTS AND PRACTICES

3.14.1.2.1. DOD AND NAVY POLICIES REGARDING TRIBAL CONSULTATION

On October 21, 1998, DoD promulgated its Native American and Alaska Native Policy, emphasizing the importance of respecting and consulting with tribal governments on a government-to-government basis (explanatory text was added on November 21, 1999). The policy requires an assessment, through consultation, of the effects of proposed DoD actions that may have the potential to significantly affect protected tribal resources (including traditional resources such as shellfish and fisheries), tribal rights (such as access to fisheries), and American Indian lands before decisions are made by the DoD services.

In 2005, the Navy updated its policy for consultation with federally recognized Indian tribes. Secretary of the Navy Instruction (SECNAVINST) 11010, *Department of the Navy Policy for Consultation with Federally Recognized Indian Tribes*, implements DoD policy within the Department of the Navy and encourages ongoing consultation. Subsequent updates to SECNAVINST 5090.8a (*Policy for Environmental Protection, Natural Resources, and Cultural Resources Programs 2006*) also mandate American Indian consultation.

In 2009, Commander, Navy Region Northwest issued its *Policy for Consultation with Federally-Recognized American Indian and Alaska Native Tribes* (Instruction 11010.14 of November 10, 2009) which sets forth policy, procedures, and responsibilities for consultations with federally recognized American Indian and Alaska Native Tribes in the Navy Region Northwest area of responsibility. The goal of the policy is to establish permanent working relationships built upon respect, trust, and openness with tribal governments.

Under these policies, the Navy is required to consider tribal comments and concerns prior to making a Navy final decision on a proposed action. However, reaching formal agreement with a tribe or obtaining tribal approval prior to a Navy final decision is not required.

3.14.1.2.2. LAWS, EXECUTIVE ORDERS, AND MEMORANDA MANDATING CONSULTATION

In addition to the specific policy and SECNAVINST cited above, other federal laws, executive orders, and memoranda include policies requiring consultation with American Indians regarding concerns specific to Native interests. These include the following: NHPA, AIRFA, Archaeological Resources Protection Act, NAGPRA, EO 12898 *Environmental Justice*, EO 13007 *Indian Sacred Sites*, EO 13175 *Consultation and Coordination with Indian Tribal Governments*, the Presidential Memorandum dated November 5, 2009 emphasizing agencies' need to comply with EO 13175, and the Presidential Memorandum dated April 29, 1994, *Government-to-Government Relations with Native American Governments*.

3.14.1.2.3. GOVERNMENT-TO-GOVERNMENT CONSULTATION

In accordance with DoD policy and Navy instructions, the Navy invited government-to-government consultation regarding the Proposed Actions with the five federally recognized American Indian tribes that have treaty reserved rights and traditional resources in the project area: the Skokomish Indian Tribe, Port Gamble S’Klallam Tribe, Jamestown S’Klallam Tribe, Lower Elwha Klallam Tribe, and Suquamish Tribe.

The Navy and the Skokomish Indian Tribe have conducted government-to-government consultations to discuss the nature, scope, and schedule of the Navy’s Proposed Actions since May 2008 for the LWI project and July 2012 for the SPE project. The consultations have focused on measures to address the potential effects of the projects on reserved tribal treaty rights and resources. On March 3, 2016, the Navy and the Skokomish Indian Tribe completed a MOA to undertake treaty mitigation projects for LWI and SPE by contributing funding to support the Skokomish River Basin restoration, with the terms and conditions of the MOA to apply only after the Navy begins in-water construction. The Skokomish River Basin Ecosystem Restoration Project is described in Appendix C: Mitigation Action Plan, Section 9.1.1.

The Navy and the Port Gamble S’Klallam Tribe, Jamestown S’Klallam Tribe, and Lower Elwha Klallam Tribe have conducted government-to-government consultation to discuss the nature, scope, and schedule of the Navy’s Proposed Actions since 2008 for the LWI project and 2012 for the SPE project. Although the Navy and these Tribes were not able to reach formal agreement on treaty mitigation projects at the time of publication of this FEIS, the Navy carefully considered tribal concerns regarding the Proposed Actions and assessed the potential for significant impact to tribal rights and protected resources. Based on the Navy’s assessment, the Navy offered to fund one or more of the following treaty mitigation projects.

For LWI:

- Shellfish seeding and beach enhancement at locations off Navy property;
- Development and implementation of a floating upweller system (FLUPSY) management plan; and
- Kilisut Harbor Restoration Project.

For SPE:

- Shellfish seeding and beach enhancement at locations off Navy property; and
- Culvert replacement at Little Boston Road over Shipbuilders Creek.

The proposed treaty mitigation projects are described in Appendix C: Mitigation Action Plan, Section 9.2.

In addition to the Navy’s funding treaty mitigation projects to mitigate for potential impacts to tribal rights and protected resources, the Navy would also provide compensatory mitigation under the USACE/USEPA *Compensatory Mitigation Rule for Loss of Aquatic Resources* that will also mitigate for impacts to some of the same treaty protected marine aquatic resources.

3.14.2. Environmental Consequences

3.14.2.1. APPROACH TO ANALYSIS

The evaluation of impacts on traditional resources considers whether the resource itself is significantly affected or if there is a significant change in access to the resource. Impacts may be clearly identified, as when a known traditional resource is directly and significantly affected or access is significantly changed. Consultation with potentially affected tribal governments of federally recognized American Indian tribes is necessary so that the Navy can carefully consider and evaluate the extent of any significant adverse effects and to reach agreement on appropriate treaty mitigation projects and/or measures.

3.14.2.2. LWI PROJECT ALTERNATIVES

3.14.2.2.1. LWI ALTERNATIVE 1: NO ACTION

With the No Action Alternative, the LWI project would not be constructed and overall operations would not change from current levels. The Navy would continue to manage traditional resources located on NAVBASE Kitsap Bangor in accordance with Navy policies, laws and regulations and the Navy would continue coordination with the Tribes to access to Devil's Hole Beach for shellfish harvest in accordance with the 1997 cooperative agreement. There would be no change to the Tribes' access to Devil's Hole Beach. Therefore, there is no potential to significantly affect traditional resources at the LWI project sites.

3.14.2.2.2. LWI ALTERNATIVE 2: PILE-SUPPORTED PIER

CONSTRUCTION

The north and the south LWI project sites are located in the NAVBASE Kitsap Bangor waterfront Navy restricted area. At the north LWI project site, the Tribes do not have authorized access for fishing (finfish or shellfish) due to security and operational requirements. The south LWI project site is located at the north end of Devil's Hole Beach where the Tribes currently harvest shellfish (clams and oysters). The Navy would continue to coordinate with the Tribes for continued access to Devil's Hole Beach for shellfish harvests. During construction of the south LWI, there would be temporary loss of access to an estimated 0.68 acre (0.28 hectare) of shellfish resources for up to 2 years due to the safety zone established for construction activities and equipment. Recovery of shellfish resources in temporarily disturbed areas is expected to occur within 5 years after in-water construction activities have ceased. (Impacts to benthic resources are described in Section 3.2.2.2.2.) Current conditions at the NAVBASE Kitsap Bangor waterfront include ambient noise from everyday military operations; construction noise would include sounds from equipment, vessels, and pile driving. Since the Tribes would continue to access Devil's Hole Beach approximately four times a year, construction impacts are not expected to have a significant effect on traditional resources. (Impacts to cultural resources are described in Section 3.13.)

Tribal fisheries outside of the naval restricted area (i.e., where construction would occur as described in Chapter 2) are focused on salmonid species. As discussed in Section 3.3.2.2, construction within the in-water work window (between July 15 and January 15), with the

exception of non-pile driving in-water work, would minimize impacts on all juvenile salmonid species. Therefore, there are no anticipated significant impacts expected on juvenile salmonids from construction.

Adult salmonids return to Hood Canal during the in-water work window. Construction may impact adult salmon and steelhead that could be harvested by the tribes because pile driving (impact and vibratory) would be conducted during adult salmon and steelhead return to Hood Canal, which may cause the salmon and steelhead to move to a different location within Hood Canal. During construction, it is possible that adult salmon and steelhead could come within the injury zone of the impact hammer. No injury zone has been identified for vibratory hammers. Since juvenile salmon and steelhead are predominantly out of the area during the in-water work window, impacts on future salmon and steelhead populations are not anticipated. Although some adult salmon and steelhead could be injured during impact pile driving, the impact would be localized. Therefore, no significant impacts on the overall quantity of available adult salmon and steelhead in Hood Canal are expected during construction of the LWI project.

NAVBASE Kitsap Bangor waterfront construction and military activities are ongoing. While intermittent elevated noise (airborne noise and in-water sound) can be expected during construction, the highest intensity noise would be limited to the immediate vicinity of the construction activities. Non-military divers are not authorized to be in waters in the project area because of access restrictions associated with the Navy restricted areas. Divers in waters farther away from the construction areas and project area, including tribal divers engaged in resource harvest (e.g., geoduck harvests), may experience temporarily elevated noise conditions, but levels are not expected to differ appreciably from the range of noise typically generated in the heavily used waters of Hood Canal.

The transit of construction-related barges and vessels to and from NAVBASE Kitsap Bangor has the potential to interfere with tribal fishing in the co-use navigable marine waterways adjacent to NAVBASE Kitsap Bangor and along the transit route through Hood Canal. The Navy estimates that approximately 16 barge round-trips over the 2-year construction period could occur, or less than one round-trip per month. Considering that these transits would be inherently temporary, northern Hood Canal is over 2 miles wide on average, and vessel traffic in Hood Canal is sparse, it is expected that construction vessels would be able to avoid tribal fishing vessels in most instances. Therefore, this additional in-water traffic would not significantly affect tribal access to U&A fishing areas and traditional resources in Hood Canal during the 2-year construction time frame.

OPERATION/LONG-TERM IMPACTS

At the south LWI project site, construction of the LWI pier would divide Devil's Hole Beach into two sections (see figure 2.1). The Tribes would not be allowed to go around or under the pier and mesh barrier due to security restrictions. However, the Navy would continue to coordinate with the Tribes and Navy security personnel for access to both portions of Devil's Hole Beach for shellfish harvests. Approximately 0.043 acre (0.017 hectare) of shellfish resources would be permanently lost due to pilings installation. This equates to a loss of 0.023 percent of the overall estimated 18 acres of shellfish beach. This decrease is not expected to significantly impact tribal shellfish harvests. LWI Alternative 2 is not expected to alter water

flow or along-shore sediment transport (Section 3.1.2.2.2) to the extent that shellfish resources at Devil's Hole Beach or sediments at the north LWI project site would be affected. The Tribes harvest an average of approximately 30,000 dozen oysters per year at NAVBASE Kitsap Bangor, with an estimated commercial value of \$180,000. The \$2,208 annual loss (see Section 3.11.2.2.2) would represent approximately 1.2 percent of annual tribal income from this source. The toes of both abutments would be at or above the mean higher high water line. No other direct impacts would be anticipated for shellfish harvest at Devil's Hole Beach or fisheries as a result of operation and maintenance of the LWI at both the north and south project sites. The presence of the pier and mesh structures is expected to impede migration of juvenile salmon along the Bangor waterfront (Section 3.3.2.2.2). Considering the full life history and all mortality sources for the affected salmon species, however, an overall minimal effect on salmon populations and tribal harvest of salmon and steelhead is expected.

3.14.2.2.3. LWI ALTERNATIVE 3: PSB MODIFICATIONS (PREFERRED)

CONSTRUCTION

Impacts from construction of LWI Alternative 3 would be similar in nature to impacts from Alternative 2, with the notable exception that there would be no in-water pile driving and related impacts on tribal fisheries or non-military divers, and the impacts would be of lesser magnitude. In accordance with the 1997 Navy-Tribal cooperative agreement, no tribal fishing (e.g., finfishing, crabbing, shellfishing, subtidal geoduck, shrimping, etc.) occurs at the north LWI project site, which is inside the waterfront Navy restricted area.

The south LWI project site is located at the north end of Devil's Hole Beach where the Tribes currently harvest shellfish (clams and oysters). The Navy would continue to coordinate with the Tribes for continued access to Devil's Hole Beach for shellfish harvests. During construction of the south LWI, there would be temporary loss of access to an estimated 0.64 acre (0.26 hectare) of shellfish resources for up to 2 years due to the safety zones established for construction activities and equipment. Potential construction impacts to shellfish resources would be much less than under Alternative 2. Similar to Alternative 2, recovery of shellfish resources in temporarily disturbed areas is expected to occur within 5 years after in-water construction activities have ceased. (Impacts to benthic resources are described in Section 3.2.2.2.2.) Current conditions at the NAVBASE Kitsap Bangor waterfront include ambient noise from everyday military operations; construction noise would include sounds generated by equipment, vessels, and pile driving for abutments. Since the Tribes would continue to access Devil's Hole Beach approximately four times a year, potential construction impacts are not expected to have a significant effect on traditional resources. (Impacts to cultural resources are described in Section 3.13.)

Tribal fisheries in the vicinity of both the north and south LWI project sites are focused on salmonid species. As discussed in Sections 3.3.2.2 and 3.14.2.2.2, construction within the in-water work window (between July 15 and January 15), with the exception of non-pile driving in-water work, would minimize impacts on all juvenile salmonid species. Therefore, significant impacts on juvenile salmonids are not expected from construction.

The transit of construction-related barges and vessels to and from NAVBASE Kitsap Bangor has the potential to interfere with tribal fishing in the co-use navigable marine waterways adjacent to NAVBASE Kitsap Bangor and along the transit route through Hood Canal. The Navy estimates that approximately three (3) barge round-trips over the 2-year construction period could occur under Alternative 3. Considering that these transits would be inherently temporary, northern Hood Canal is over 2 miles wide on average, and vessel traffic in Hood Canal is sparse, it is expected that construction vessels would be able to avoid tribal fishing vessels in most instances. Therefore, this additional in water traffic would not significantly affect tribal access to U&A fishing areas in Hood Canal during the 2-year construction time frame.

OPERATION/LONG-TERM IMPACTS

As in Alternative 2, at the south LWI project site, construction of the LWI pier would divide Devil's Hole Beach into two sections (Figure 2.1). The Tribe would not be allowed to access shellfish directly under the PSB pontoons or under the observation post stairs due to security restrictions. However, the Navy would continue to coordinate with the Tribes and Navy security personnel for Tribal access to both sections of Devil's Hole Beach for shellfish harvests. Following construction, there would be a permanent loss of an estimated 0.043 acre (0.017 hectare) due to coverage by LWI structures (the area disturbed by the PSB pontoon feet and the area lost under the observation post stairs). This equates to a loss of 0.023 percent of the overall estimated 18 acres of shellfish beach. Recovery of harvestable shellfish in the temporarily disturbed areas is expected within 5 years after construction activities are complete. (Expected impacts to benthic resources are described in Section 3.2.2.2.3.) Tribal access to these resources would continue during recovery. LWI Alternative 2 is not expected to alter water flow or along-shore sediment transport (Section 3.1.2.2.2) to the extent that shellfish resources at Devil's Hole Beach or sediments at the north LWI project site would be affected. The \$2,208 annual loss (see Section 3.11.2.2.3) would represent approximately 1.2 percent of annual tribal income from this source. The toes of both abutments would be at or above the mean higher high water line. Should substantial changes to the shellfish habitat that are attributable to the LWI project be observed, the Navy would offer to consult with the Tribes to discuss additional possible mitigation. No other direct impacts would be anticipated for shellfish harvest as a result of LWI operation and maintenance. The presence of the floating PSB is expected to have minimal effects on juvenile salmon and steelhead migration, with no resulting impacts on tribal salmon harvest.

3.14.2.2.4. SUMMARY OF LWI IMPACTS

Impacts on American Indian traditional resources associated with the construction and operation and maintenance phases of the LWI project alternatives, along with treaty mitigation and consultation status, are summarized in Table 3.14–1.

Table 13.14–1. Summary of LWI Impacts on American Indian Traditional Resources

Alternative	Environmental Impacts on American Indian Traditional Resources
LWI Alternative 1: No Action	No impact. The Navy would continue coordination with the Tribes to access Devil’s Hole Beach for shellfishing in accordance with the 1997 cooperative agreement. There would be no change to the Tribes’ access to Devil’s Hole Beach.
LWI Alternative 2: Pile-Supported Pier	<p><i>Construction:</i> Restricted access to the immediate construction zone area for up to 2 years during construction but full access to remainder of Devil’s Hole Beach. No other changes to Tribal access to traditional resources. Temporary loss of 0.68 acre (0.28 hectare) of Tribal shellfish harvesting area near the south LWI project site. Minimal impact of construction noise on Tribal shellfish harvesters. No significant impacts on the overall quantity of available adult salmon and steelhead in Hood Canal are expected with construction. No potential for significant affects to Tribal fishers from 16 construction vessel roundtrips transiting in co-use navigable waterways of Hood Canal over a 2 year period.</p> <p><i>Operation/Long-term Impacts:</i> Permanent loss of shellfish resources (0.043 acre, 0.017 hectare). Tribal access to shellfish resources would remain in place but require increased coordination due to Navy security requirements. Minimal effect on tribal salmon harvest.</p>
LWI Alternative 3: PSB Modifications (Preferred)	<p><i>Construction:</i> Restricted access to the immediate construction zone for up to 2 years during construction but full access to remainder of Devil’s Hole Beach. No other changes to tribal access to traditional resources. Temporary loss of 0.64 acre (0.26 hectare) of tribal shellfish harvesting area at the south LWI project site. Minimal impact of construction noise on tribal shellfish harvesters. No significant impacts on the overall quantity of available adult salmon and steelhead in Hood Canal are expected with construction. No potential for significant affects to tribal fishers from 3 construction vessel roundtrips transiting in co-use navigable waterways of Hood Canal over a 2 year period.</p> <p><i>Operation/Long-term Impacts:</i> Permanent loss of shellfish habitat (0.043 acre, 0.017 hectare), 0.23% of the estimated 18 acre shellfish harvest area at Devil’s Hole Beach. Tribal access to shellfish resources would remain in place but require increased coordination due to Navy security requirements. No significant effect on tribal salmon harvest.</p>

Table 3.14-1. Summary of LWI Impacts on American Indian Traditional Resources (continued)

Alternative	Environmental Impacts on American Indian Traditional Resources
	<p>Mitigation: Current practices for government-to- government consultation with tribal governments of federally recognized American Indian tribes are described in Section 3.14.1.2. Under either action alternative, and in accordance with Department of Defense, and Navy federal policies, the Navy invited government-to-government consultation with the five Tribes in 2008.</p> <p>On March 3, 2016, the Navy completed a Memorandum of Agreement (MOA) with the Skokomish Indian Tribe to undertake treaty mitigation projects for LWI by contributing funding to support Skokomish River Basin restoration, with the terms and conditions of the MOA to apply only after the Navy begins in-water construction.</p> <p>Although the Navy and Port Gamble S’Klallam, Jamestown S’Klallam, and Lower Elwha Klallam Tribes were not able to reach formal agreement on treaty mitigation projects at the time of publication of this FEIS, the Navy offered to fund one or more of the following treaty mitigation projects:</p> <ul style="list-style-type: none"> • Shellfish seeding and beach enhancement at locations off Navy property; • Development and implementation of a floating upweller system (FLUPSY) management plan; and • Kilisut Harbor Restoration Project. <p>These proposed treaty mitigation projects are described in Appendix C: Mitigation Action Plan, Section 9, Treaty Mitigation.</p> <p>In addition to the Navy funding treaty mitigation projects to compensate for potential for significant impact to tribal rights and protected resources, the Navy is also providing compensatory mitigation under the USACE/EPA Compensatory Mitigation Rule for Loss of Aquatic Resources that will also mitigate for impacts to some of the same treaty protected marine aquatic resources.</p>
	<p>Consultation and Permit Status: MOA between the Navy and Skokomish Indian Tribe was signed March 3, 2016. The Navy will continue government-to-government consultation with the Port Gamble S’Klallam, Jamestown S’Klallam, and Lower Elwha Klallam Tribes. No permits are required for the Navy to fund the Tribal mitigation projects; however, when the Navy requests a permit for LWI under the Clean Water Act from USACE, USACE may also conduct government-to-government consultation with the Tribes.</p>

3.14.2.3. SPE PROJECT ALTERNATIVES

Because the activities associated with the SPE project alternatives are not within shellfish beds, there would be no impact to this traditional resource. Impacts to salmon would be minimal and not sufficient to affect tribal salmon harvest.

3.14.2.3.1. SPE ALTERNATIVE 1: NO ACTION

With the No Action Alternative, the SPE would not be built and overall operations would not change from current levels. The SPE project site is located in the NAVBASE Kitsap Bangor waterfront Navy restricted area. The Tribes do not have authorized access due to security and operational requirements. The Navy would continue to manage traditional resources located on NAVBASE Kitsap Bangor in accordance with Navy policies, laws, and regulations. Therefore, there is no potential to significantly affect traditional resources.

3.14.2.3.2. SPE ALTERNATIVE 2: SHORT PIER (PREFERRED)

CONSTRUCTION

The short pier alternative would have minimal construction-related impact on American Indian traditional resources. As discussed in Section 3.2.2.3, no shellfish harvest areas are within the SPE construction area. Further, the Tribes do not have authorized access to the SPE project site

due to security and operational requirements. However, any geoduck or other clams lost in the SPE pile footprints during construction would no longer be available to contribute as seed stock for future generations. As discussed in greater detail in Section 3.3.2.3, the effect of construction of SPE Alternative 2 on salmonid species is expected to be minimal, with localized impacts to individual salmon and steelhead. This impact would not be sufficient to result in population-level effects on salmonids or significant impacts on Tribal harvest of salmon.

The transit of construction-related barges and vessels to and from NAVBASE Kitsap Bangor has the potential to interfere with tribal fishing in the co-use navigable marine waterways adjacent to NAVBASE Kitsap Bangor and along the transit route through Hood Canal. The Navy estimates that approximately six (6) barge round-trips over the 2-year construction period could occur. Considering that these transits would be inherently temporary, northern Hood Canal is over 2 miles wide on average, and vessel traffic in Hood Canal is sparse, it is expected that construction vessels would be able to avoid tribal fishing vessels in most instances. Therefore, this additional water traffic would not significantly affect tribal access to U&A fishing areas in Hood Canal during the 2-year construction time frame.

OPERATION/LONG-TERM IMPACTS

Alternative 2 would have minimal operation-related impact on American Indian traditional resources. As discussed in Section 3.2.2.3, no shellfish harvest areas would be within the SPE installation area. Further, the Tribes do not have authorized access to the SPE project site due to security and operational requirements. As discussed in Section 3.3.2.3, the presence of SPE Alternative 2 structures would have minimal impact on salmonids and would not be sufficient to result in population-level impacts on salmon or significant impacts on the Tribal harvest of salmon.

3.14.2.3.3. SPE ALTERNATIVE 3: LONG PIER

CONSTRUCTION

Construction-related impacts of SPE Alternative 3 would be similar to those of Alternative 2, including the same project features on land but a larger footprint for the pier and associated overwater portion. As discussed in Section 3.3.2.3, the effect of construction of SPE Alternative 3 on salmonid species is expected to be minimal and would not be sufficient to result in population-level impacts on salmon or impacts on tribal harvest of salmon. Similar to Alternative 2, transit of construction vessels could potentially interfere with tribal fishing vessels (6 barge round trips per month); however, this additional water traffic during the 2-year construction time frame would not significantly affect tribal access to U&A fishing areas in Hood Canal.

OPERATION/LONG-TERM IMPACTS

SPE Alternative 3 would have minimal impact, similar to SPE Alternative 2, on traditional resources. As discussed in Section 3.3.2.3, a minimal effect from the presence of SPE Alternative 3 structures on salmonid species would not be sufficient to result in population-level impacts on salmon or impacts on the Tribal harvest of salmon. As noted in Section 3.14.2.3.2,

submarines in transit through Hood Canal could briefly affect access to U&A fishing and harvest areas.

3.14.2.3.4. SUMMARY OF SPE IMPACTS

Impacts on American Indian traditional resources associated with the construction and operation and maintenance phases of the SPE project alternatives, along with treaty mitigation and consultation status, are summarized in Table 3.14–2.

Table 13.14–2. Summary of SPE Impacts on American Indian Traditional Resources

Alternative	Environmental Impacts on American Indian Traditional Resources
SPE Alternative 1: No Action	No Impact. The Tribes do not have authorized access to the SPE project site.
SPE Alternative 2: Short Pier (Preferred)	<p><i>Construction:</i> Minimal Impact on salmon with no impact on tribal salmon harvest. No impact on tribal shellfish harvest areas but potential impacts on clam standing stock. Minimal potential for interference with tribal fishing vessels by construction vessels in Hood Canal.</p> <p><i>Operations:</i> No impact on tribal salmon or shellfish harvest. Potential for sporadic interference with tribal fishing vessels by transiting submarines.</p>
SPE Alternative 3: Long Pier	<p><i>Construction:</i> Minimal Impact on salmon with no impact on tribal salmon harvest. No impact on tribal shellfish harvest areas but potential impacts on clam standing stock. Minimal potential for interference with tribal fishing vessels by construction vessels.</p> <p><i>Operations:</i> No impact on tribal salmon or shellfish harvest. Potential for sporadic interference with tribal fishing vessels by transiting submarines.</p>
<p>Mitigation: Current practices for government-to-government consultation with tribal governments of federally recognized American Indian tribes are described in Section 3.14.1.2. Under either action alternative, and in accordance with Department of Defense and Navy policies, the Navy invited and has been in government-to-government consultation with the Skokomish Indian Tribe since 2012. On March 3, 2016, the Navy and the Skokomish completed a Memorandum of Agreement (MOA) to undertake treaty mitigation for LWI and SPE proposed actions by contributing funding to support Skokomish River Basin restoration, with the terms and conditions of the MOA to apply only after the Navy begins in-water construction. The Navy began government-to-government consultation with the Port Gamble S’Klallam, Jamestown S’Klallam, and Lower Elwha Klallam Tribes in 2012. Although the Navy and these Tribes were not able to reach formal agreement on treaty mitigation at the time of publication of this FEIS, the Navy offered to fund one or more of the following treaty mitigation projects.</p> <ul style="list-style-type: none"> • Shellfish seeding and beach enhancement at locations off Navy property; and • Culvert replacement at Little Boston Road over Shipbuilders Creek. <p>These proposed treaty mitigation projects are described in Appendix C: Mitigation Action Plan, Section 9, Treaty Mitigation.</p> <p>In addition to the Navy funded treaty mitigation projects to compensate for potential for significant impact to tribal rights and protected resources, the Navy is also providing compensatory mitigation under the USACE/EPA Compensatory Mitigation Rule for Loss of Aquatic Resources that will also mitigate for impacts to some of the same treaty protected marine aquatic resources.</p>	
<p>Consultation and Permit Status: MOA between the Navy and Skokomish Indian Tribe was signed March 3, 2016. The Navy has not yet reached formal agreement with the Port Gamble S’Klallam, Jamestown S’Klallam, and Lower Elwha Klallam Tribes on treaty mitigation projects. No permits are required for the Navy to fund the Tribal mitigation projects; however, when the Navy requests a permit for SPE under the Clean Water Act from USACE, USACE may also conduct government-to-government consultation with the Tribes.</p>	

3.14.3. Combined Impacts of LWI and SPE Projects

Construction of the LWI and SPE (all alternatives) are expected to have minimal combined impact on Hood Canal adult salmon and steelhead, which are tribal traditional resources. Although some adult salmon and steelhead could be affected by impact pile driving (LWI Alternative 2 and either SPE alternative, as explained in Section 3.3.2.4), the impact would be localized, and there would be minimal impact on the overall population of available adult salmon and steelhead in Hood Canal as a result of construction or operation of the LWI and SPE projects. Construction of the LWI structures could minimally interfere with migration of juvenile salmon, but the ultimate effect on tribal fish harvest would be minimal. There would be temporary loss (up to 2 years) of a very small area of shellfish resources within the construction zones, with some permanent loss due to displacement by LWI structures. Recovery in the temporarily disturbed shellfish areas is expected within 5 years after in-water construction activities have ceased. For safety purposes, access to shellfish beds in the immediate construction zone would be restricted for up to 2 years during construction, but tribal access to the majority of Devil's Hole Beach would continue in accordance with the 1997 cooperative agreement. The Navy would continue to coordinate access to both sections of Devil's Hole Beach once the LWI structures were in place. Implementation of both the LWI and SPE Proposed Actions would extend the period over which construction vessels could potentially interfere with tribal fishing vessels from approximately 2 years to approximately 4 years.

Treaty mitigation projects proposed for the LWI and SPE Proposed Actions are described in Appendix C: Mitigation Action Plan, Section 9, Treaty Mitigation, along with environmental impact assessments of the proposed treaty mitigation projects.

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