

SENATE BILL REPORT

ESHB 1753

As of February 16, 2022

Title: An act relating to tribal consultation regarding the use of certain funding authorized by the climate commitment act.

Brief Description: Concerning tribal consultation regarding the use of certain funding authorized by the climate commitment act.

Sponsors: House Committee on Environment & Energy (originally sponsored by Representatives Lekanoff, Fitzgibbon, Valdez, Bateman, Ramel, Sullivan, Simmons, Ormsby and Young; by request of Office of the Governor).

Brief History: Passed House: 2/10/22, 94-1.

Committee Activity: Environment, Energy & Technology: 2/16/22.

Brief Summary of Bill

- Requires state agencies that administer funds from certain accounts created by the Climate Commitment Act (CCA) to offer consultation to federally recognized tribes whose tribal resources may be affected by the award of funds from the accounts.
- Requires applicants for funding from certain CCA accounts to engage in a preapplication process with all affected federally recognized tribes within the project area.

SENATE COMMITTEE ON ENVIRONMENT, ENERGY & TECHNOLOGY

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Background: Government-to-Government Relationship with Indian Tribes. Washington State has established several agreements with federally recognized Indian tribes to facilitate government-to-government relations, including the Centennial Accord (1989) and New

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Millennium (1999) agreements.

Under state law, in establishing a government-to-government relationship with federally recognized Indian tribes with traditional lands or territories in Washington, state agencies must:

- make reasonable efforts to collaborate with Indian tribes in the development of policies, agreements, and program implementation that directly affects Indian tribes, and develop a consultation process used by the agency for issues involving specific Indian tribes;
- designate a tribal liaison that receives specialized training; and
- submit an annual report to the Governor on the activities of the state agency.

Under environmental justice legislation passed in 2021, covered agencies must develop a consultation framework in coordination with tribal governments that includes best practices, protocols for communication, and collaboration with federally recognized tribes. Consistent with this framework, covered agencies must offer consultation with federally recognized tribes on:

- the inclusion or updating of an environmental justice implementation plan within the covered agency's strategic plan;
- the creation and adoption or updating of a community engagement plan; and
- significant agency actions that affect federally recognized tribes' rights and interests in their tribal lands.

The Department of Health must offer consultation with federally recognized tribes on the development of the environmental health disparities map.

Covered agencies include the departments of Ecology, Health, Natural Resources, Commerce, Agriculture, and Transportation, the Puget Sound Partnership, and any agency that opts to assume all of the obligations of covered agencies.

Governor's Office of Indian Affairs. The Governor's Office of Indian Affairs (GOIA) serves as liaison between state and tribal governments in an advisory, resource, consultation, and educational capacity.

Cap and Invest Program. In 2021, the Legislature directed the Department of Ecology (Ecology) to implement a cap and invest program (program), also known as the Climate Commitment Act, to reduce greenhouse gas (GHG) emissions consistent with the statewide statutory emissions limits. Starting on January 1, 2023, the program will cover industrial facilities, certain fuel suppliers, in-state electricity generators, electricity importers, and natural gas distributors with annual greenhouse gas emissions above 25,000 metric tons of carbon dioxide equivalent (CO₂e).

Covered entities must either reduce their emissions, or obtain allowances to cover any remaining emissions. The total number of allowances will decrease over time to meet

statutory limits. Some utilities and industries will be issued free allowances; other allowances will be auctioned. The program must track, verify, and enforce compliance through the use of compliance instruments. A compliance instrument is an allowance or offset credit issued by Ecology or a trading program that has linked with Washington's program. One compliance instrument is equal to one metric ton of CO₂e.

Following passage of the program by the Legislature, the Governor vetoed a provision of the bill that set forth tribal consultation requirements for projects or activities funded by allowance revenues.

Climate Commitment Act Accounts. Under the program, auction proceeds are distributed to three accounts: the Carbon Emissions Reduction (CER) Account, the Climate Investment (CI) Account, and the Air Quality and Health Disparities Improvement (AQHD) Account. Expenditures from the CER Account may only be used for transportation carbon emissions reducing purposes and may not be used for 18th amendment purposes, other than as specified for the account. The AQHD Account is established to fund an air monitoring network and reduce health disparities in overburdened communities.

Moneys in the CI Account may only be used for projects and program that achieve the purposes of the program. Beginning July 1, 2024, and annually thereafter, the state treasurer must distribute funds in the CI Account to two additional accounts as follows:

- 75 percent to the Climate Commitment Account, and
- 25 percent to the Natural Climate Solutions Account.

Climate Commitment Account distributions may go towards implementing the working families tax credit and environmental and clean energy programs, activities, or projects. Moneys distributed to the Natural Climate Solutions Account are intended to increase the resilience of the state's waters, forests, and other vital ecosystems to the impacts of climate change, conserve working forestlands at the risk of conversion, and increase their carbon pollution reduction capacity through sequestration, storage, and overall ecosystem integrity.

Summary of Bill: Tribal Consultation and Preapplication Process. State agencies that allocate funding or administer grants from the CI Account, the Climate Commitment Account, and the Natural Climate Solutions Account must offer early, meaningful, and individual consultation with any affected federally recognized tribe on all funding decisions and funding programs that may impact tribal resources. Such tribal resources include, but are not limited to, tribal cultural resources, fisheries, and archaeological sites.

The consultation is independent of, and in addition to, any public participation process that may otherwise be required by federal or state law, or by a federal or state agency.

At the earliest possible date prior to the submission of an application for funding from the CI Account, the Climate Commitment Account, or the Natural Climate Solutions Account, an applicant for funding must engage in a preapplication process with all affected federally

recognized tribes within the project area. The preapplication process must include:

- notification to the Department of Archaeology and Historic Preservation (DAHP), the Department of Fish and Wildlife (WDFW), and all affected federally recognized tribes within the project area;
- an offer by the applicant to discuss the project with DAHP, WDFW, and all affected federally recognized tribes within the project area; and
- an opportunity for all federally recognized tribes to submit a summary of tribal issues, questions, concerns, or other statements regarding the project.

Nothing in the act may be interpreted to require the disclosure of information that is exempt from disclosure pursuant to the archaeological site exemption within the Public Records Act (PRA) or pursuant to federal law, including the National Historic Preservation Act (NHPA) of 1966. Any information that is exempt from disclosure under the PRA or NHPA or other federal law does not become part of the official application file.

If any project or activity that may impact tribal resources is funded from the CI Account, the Climate Commitment Account, or the Natural Climate Solutions Account without the required consultation, the tribe may request that all further action on the project or activity cease until meaningful consultation is completed. Upon receipt of such a request by a funding agency, the agency must cease further action that would result in significant physical disturbance of tribal resources until the consultation has been completed.

Formal Review and Mediation. Upon completion of agency and tribal consultation, an affected federally recognized tribe may request a formal review of the consultation by submitting a request to GOIA and notifying the appropriate agencies and DAHP. The consultation must begin within 20 days of the request and the consultation must be conducted separately with each affected federally recognized tribe unless the tribes agree to joint consultation.

After the formal review process has been completed, an affected federally recognized tribe or state agency may request that the Governor and an elected tribal leader, or leaders of a federally recognized tribal government, meet to formally consider the recommendations from the parties. This meeting must occur within 30 days of the request for such a meeting unless extended by mutual agreement, except that a tribe may choose to opt out of the meeting.

After the recommendation meeting has occurred, the Governor or an elected tribal leader of a federally recognized tribal government may call for the state and tribe or tribes to enter into formal mediation, except that a tribe may choose to opt out of the mediation. An agreement between the Governor and a tribal leader or leaders resulting from the mediation is formally recognized and binding on the signatory parties. Absent an agreement, participation in mediation does not preclude any additional steps that any party can initiate, including legal review, to resolve a continuing disagreement.

While a formal review, recommendation discussion, or mediation is being conducted, the agency or agencies with the authority to allocate funding or administer grant programs from the Climate Commitment Act accounts in support of the proposed project may not approve or release funding, nor make other formal decisions, including permitting decisions, that advance the proposed project, except where required by law.

Tribal Consultation Training. By June 30, 2023, GOIA, in coordination with DAHP and federally recognized tribes, must develop a state agency tribal consultation process, including best practices for early, meaningful, and effective consultation, early notification, and engagement by applicants with federally recognized tribes as a part of the preapplication process, and protocols for communication and collaboration with federally recognized tribes. GOIA must provide training and other technical assistance to state agencies as they implement the required consultation process. The consultation process must be periodically reviewed and updated in coordination with federally recognized tribes.

Applicability to Local Governments. The requirements of the act also apply to local governments that receive funding from the CI Account, the Climate Commitment Account, or the Natural Climate Solutions Account, where that funding is disbursed to project and program applicants. Where requested, GOIA must provide training and other technical assistance to local government agencies as they implement the consultation requirements.

Tribal Capacity Grant Program. Ecology must establish a tribal capacity grant program to provide funding to federally recognized tribes for the costs of engaging in the tribal consultation process. Moneys in the CI Account may be used to fund the grant program.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 11, 2022.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.