

HOUSE BILL REPORT

ESHB 1753

As Passed House:
February 10, 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:

Committee Activity:

Environment & Energy: 1/13/22, 1/27/22 [DPS];
Appropriations: 2/4/22, 2/5/22 [DPS(ENVI)].

Floor Activity:

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

Brief Summary of Engrossed Substitute 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 federally recognized tribes within the project area.
- Prohibits agencies from releasing funding from certain CCA accounts or making permitting decisions that advance the proposed project during the pendency of the preapplication process, except where required by law.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

- Requires the Governor's Office of Indian Affairs, in coordination with the Department of Archaeology and Historic Preservation, to develop a state agency tribal consultation process regarding the preapplication process.

HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Fitzgibbon, Chair; Duerr, Vice Chair; Dye, Ranking Minority Member; Klicker, Assistant Ranking Minority Member; Berry, Boehnke, Fey, Goehner, Harris-Talley, Ramel, Shewmake and Slatter.

Minority Report: Without recommendation. Signed by 1 member: Representative Abbarno.

Staff: Robert Hatfield (786-7117).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Environment & Energy be substituted therefor and the substitute bill do pass. Signed by 33 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Boehnke, Caldier, Chandler, Chopp, Cody, Dolan, Dye, Fitzgibbon, Frame, Hansen, Harris, Hoff, Jacobsen, Johnson, J., Lekanoff, Pollet, Rude, Ryu, Schmick, Senn, Springer, Steele, Stonier, Sullivan and Tharinger.

Staff: Dan Jones (786-7118).

Background:

Government-to-Government Relationship with Indian Tribes.

Indian tribal governments are sovereign, self-governing entities. Washington state has established several agreements with federally recognized Indian tribes to facilitate government-to-government relations, including the Centennial Accord (1989) and New 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.

Public Records Act.

The Public Records Act requires that all state and local government agencies make all records available for public inspection and copying unless they fall within certain statutory exemptions. Certain exemptions are made for the purpose of protecting archaeological sites from looting and depredation. One exemption applies to records and maps identifying the location of archaeological sites.

Climate Commitment Act.

Under the Climate Commitment Act (CCA) enacted in 2021, Engrossed Second Substitute Senate Bill 5126, the Department of Ecology (Ecology) must implement a cap on greenhouse gas emissions from covered entities and a program to track, verify, and enforce compliance through the use of compliance instruments (Cap and Invest Program, or Program), with the Program commencing by January 1, 2023.

The Program must consist of, among other things, annual allowance budgets that limit emissions from covered entities, and the creation of a Climate Investment Account for the deposit of receipts from the distribution of emission allowances.

Climate Commitment Act—Auctions of Allowances.

Except for directly distributed, no-cost allowances allocated to certain entities, allowances under the Cap and Invest Program must be distributed through auctions. Ecology must hold a maximum of four auctions each year, plus any necessary reserve auctions. An auction may include allowances from the annual allowance budget of the current year and allowances from the annual allowances budgets of prior years that remain to be distributed.

Climate Commitment Act—Auction Proceeds.

Upon completion and verification of auction results, the auction proceeds must be transferred to the State Treasurer for deposit each fiscal year into accounts created in the CCA, including the Climate Investment Account, the Climate Commitment Account, and the Natural Climate Solutions Account.

Climate Commitment Act—Tribal Consultation.

The version of the CCA that passed the Legislature contained a section that required tribal consultation regarding certain funding decisions made using proceeds from the auction of allowances. That section was vetoed by Governor Inslee when he signed the bill on May 17, 2021.

The vetoed section would have required agencies that allocate funding or administer grant

programs appropriated from the Climate Investment Account to develop a consultation framework in coordination with tribal governments that includes best practices, protocols for communication, and collaboration with federally recognized tribes. Under this consultation framework, before allocating funding or administering grant programs funded from the Climate Investment Account, agencies would have been required to offer consultation with federally recognized tribes on all funding decisions and programs that could impact, infringe upon, or impair the governmental efforts of federally recognized tribes to adopt or enforce their own standards governing or protecting the tribe's resources or other rights and interests in their tribal lands and lands within which a tribe or tribes possess rights reserved by treaty.

Under the vetoed section, if any funding decision, project, activity, or program that impacted land within which a tribe or tribes possessed rights reserved by federal treaty, statute, or executive order had been undertaken or funded under the Cap and Invest Program without consultation with a federally recognized tribe, an affected tribe could have requested that all further action on the decision, project, activity, or program cease until meaningful consultation with any directly impacted federally recognized tribe had been completed.

The vetoed section would have required that a project or activity funded in whole or in part from the Climate Investment Account be paused or ceased in the event that an affected federally recognized Indian tribe or the Department of Archaeology and Historic Preservation provided timely notice of a determination to Ecology that the project would adversely impact cultural resources, archaeological sites, or sacred sites. A project or activity paused at the direction of Ecology could not have been resumed or completed unless the potentially impacted tribe provided consent to Ecology and the proponent of the project or activity.

Summary of Engrossed Substitute Bill:

Tribal Consultation—Preapplication Process.

State agencies that allocate funding or administer grants from any of three accounts that were created pursuant to the Climate Commitment Act (CCA)—the Climate Investment 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 Climate Investment Account, the Climate Commitment Account, or the Natural Climate Solutions Account, an applicant for funding must engage in a preapplication process with

all federally recognized tribes within the project area. The preapplication process must include, among other things:

- notification of 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 the DAHP, the 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 bill 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 Section 304 of 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 funded by the Climate Investment Account, the Climate Commitment Account, or the Natural Climate Solutions Account impacts lands or fisheries within which a federally recognized tribe possesses rights reserved by federal treaty, statute, or executive order without the required consultation, the tribe may request that all further action on the project cease until meaningful consultation is completed. Upon receipt of such a request by a funding agency, the funding agency must cease further action that would result in significant physical disturbance of tribal resources until the consultation has been completed.

Tribal Consultation—Formal Review.

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 the Governor's Office of Indian Affairs and notifying the appropriate agencies and the 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.

Tribal Consultation—Recommendation Meeting.

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.

Tribal Consultation—Mediation.

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.

Prohibition on Actions During Preapplication Process.

During the pendency of the consultation, formal review, recommendation discussion, and mediation processes described above, the agency or agencies with the authority to allocate funding or administer grant programs from the CCA accounts in support of the proposed project may not approve or release funding, nor may the agency make other decisions, including permitting decisions, that advance the proposed project, except where required by law.

Tribal Consultation—Training.

The Governor's Office of Indian Affairs, in coordination with the DAHP and by June 30, 2023, 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 described above. The Governor's Office of Indian Affairs 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.

Tribal Consultation—Applicability to Local Governments.

The requirements described above also apply to local governments that receive funding from the Climate Investment Account, the Climate Commitment Account, or the Natural Climate Solutions Account where that funding is disbursed to project and program applicants. Where requested, the Governor's Office of Indian Affairs must provide training and other technical assistance to local government agencies as they implement the consultation requirements described above.

Rulemaking.

Any agency that is subject to or that implements the tribal consultation process may adopt rules in furtherance of its tribal consultation duties.

Tribal Capacity Grant Program.

Subject to the availability of funds appropriated for the purpose, the Department of Ecology is directed to 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 Climate Investment Account created pursuant to the CCA may be used to fund the grant program.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (Environment & Energy):

(In support) Tribes are essential partners in the fight against climate change. The bill accomplishes two key things: it requires early notice to affected tribes and the Department of Archaeology and Historic Preservation, and it creates a stronger, clearer process for government-to-government consultation. The process starts with consultation at the agency level, then moves on to dialogue between leaders. The goal is to mitigate impacts to tribal resources and rights.

This bill allows very helpful, constructive projects to move forward that are beneficial to all parties. The bill calls for meaningful, transparent consultation. Washington needs to continue its progressive government-to-government relationship with tribes. It would be good to pass the bill so that everyone can get on with the work of attacking climate change.

Everyone has a responsibility to find climate change solutions, and to start reversing its impacts. The work called for in the Climate Commitment Act (CCA) will help to restore Washington's environment for all future generations. It will produce strong, resilient ecosystems while reducing carbon emissions.

The bill ensures a meaningful role for tribes within the CCA. Tribes spent a lot of time working with the Governor's office on the language in the bill. There is an emphasis on early, meaningful consultation. The bill calls for a dispute resolution process, and holds everyone accountable at the highest levels. The Governor and tribes both made compromises in the bill.

There is support for the development of carbon-free industry, but it is important to ensure it is done in a responsible manner that protects tribal resources and cultural areas. It is important to ensure that natural areas are not destroyed in the course of developing projects to address climate change.

(Opposed) None.

Staff Summary of Public Testimony (Appropriations):

(In support) The Climate Commitment Act (CCA) is an important piece of legislation. The vetoed provision regarding consultation was an important piece of that legislation. It is important to have consultation early in order to address issues of concern, which is critical to the integrity of tribes' relationship with the state. There is support for the bill. The process set out in the bill will be very effective.

With climate change, environmental changes that used to take lifetimes now can take mere years. The consequences of climate change will fall squarely on the next generation. It took time to get to the current situation with regard to climate change, and to begin making changes and seeing results will also take time. Everyone has a responsibility to take action and start reversing the impacts of climate change. The CCA will provide significant resources to build strong, resilient ecosystems that reduce carbon emissions. This bill represents a collaborative process, which will facilitate a strong and respectful sovereign relationship between the Governor and tribes.

Without this bill, sovereign tribes will be left out when it comes to appropriating funds from the CCA. The bill allows for meaningful dialogue. This bill was a diplomatic compromise on the part of both the Governor and tribes.

(Opposed) None.

(Other) Under the original version of the CCA, it was understood that it would be a universal standard for tribes to have a say in what happens in sacred sites just like the state would not desecrate a cemetery or a house of worship. But that section of the CCA was vetoed, and tribes were promised an improved consultation process. But the process in this bill does not do that, and it undermines tribal sovereignty. The bill does not respect the inherent sovereign right of tribal nations to come to the table to talk. As written, the consultation provisions in the bill are based on treaties, executive orders, and statutes, but the right to talk should be based on inherent rights that predate treaties, executive orders, and statutes. Tribal sovereignty is not subject to negotiation; it is a right that cannot be diminished. There is openness to further discussions, and there are amendments that are available to be offered.

Persons Testifying (Environment & Energy): Representative Debra Lekanoff, prime sponsor; Becky Kelley, Office of the Governor; Ron Allen, Jamestown S'Klallam Tribe; Glen Gobin, Tulalip Tribes of Washington; Leonard Forsman, The Suquamish Tribe; Dana Miller, Yakama Nation Tribal Council; Craig Bill, Governor's Office of Indian Affairs; and Allyson Brooks, Department of Archaeology and Historic Preservation.

Persons Testifying (Appropriations): (In support) Ron Allen, Jamestown S'Klallam Tribe; Glen Gobin, Tulalip Tribes of Washington; and Leonard Forsman, The Suquamish Tribe.

(Other) Fawn Sharp, Quinault Indian Nation.

Persons Signed In To Testify But Not Testifying (Environment & Energy): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.