

FINAL BILL REPORT

ESHB 1753

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Synopsis as Enacted

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).

House Committee on Environment & Energy
House Committee on Appropriations
Senate Committee on Environment, Energy & Technology
Senate Committee on Ways & Means

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 affect Indian tribes;
- develop a consultation process used by the state agency for issues involving specific Indian tribes;
- designate a tribal liaison who reports directly to the head of the state agency; and
- submit an annual report to the Governor on the activities of the state agency.

Public Records Act.

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.

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. 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, the Department of Ecology (Ecology) must implement a cap on greenhouse gas emissions from covered entities and must operate a program to track, verify, and enforce compliance through the use of compliance instruments (CCA program). The CCA program must commence by January 1, 2023.

The CCA 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.

Auctions of Allowances.

Except for directly distributed, no-cost allowances allocated to certain entities, allowances under the CCA program must be distributed through 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.

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.

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 when the bill was signed on May 17, 2021.

Summary:

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 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). 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.

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 (GOIA) 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.

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.

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.

Training.

The GOIA, 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 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 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 requested, the GOIA 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 may be used to fund the grant program.

Votes on Final Passage:

House	94	1
Senate	48	0

Effective: June 9, 2022