

SENATE BILL REPORT

SB 5298

As of January 27, 2021

Title: An act relating to requiring the attorney general to obtain free, prior, and informed consent before initiating programs or projects under his or her independent authority that affect tribes, tribal rights, and tribal lands.

Brief Description: Requiring the attorney general to obtain free, prior, and informed consent before initiating programs or projects under his or her independent authority that affect tribes, tribal rights, and tribal lands.

Sponsors: Senators Stanford, Hasegawa, Hunt, Nguyen and Wilson, C.; by request of Attorney General.

Brief History:

Committee Activity: Labor, Commerce & Tribal Affairs: 1/27/21.

Brief Summary of Bill

- Requires the Attorney General (AG) to provide notice to tribes prior to introducing legislation, and after filing an amicus brief, filing a ballot title, or accepting a request to issue a formal AG opinion that would affect tribes, tribal rights, or tribal lands.
- Prohibits, with certain exceptions, the AG from initiating any project or program that affects a tribe, tribal rights, or tribal lands without receiving consent from that tribe.
- Requires the AG to host an annual meeting inviting all tribes to ensure strong government-to-government relationships, promote and sustain greater communication, and identify opportunities to collaborate.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Staff: Jarrett Sacks (786-7448)

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.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

Staff: Jarrett Sacks (786-7448)

Background: The Attorney General (AG) represents the state, including state officials, departments, agencies, and boards and commissions. Additionally, the AG formulates ballot titles for state initiatives and referenda, and provides official opinions on questions of law to public officials.

In 2019, the Attorney General's Office (AGO) adopted a Tribal Consent and Consultation Policy. The policy requires the AGO to receive prior consent before initiating any program or project under the independent authority of the AG. The policy also establishes how the AGO must request and receive consent.

The policy requires the AGO to consult with a tribe prior to filing civil litigation against a tribe or a business owned by a tribe and establishes a process of consultation. Additionally, the policy requires the AGO provide notice to tribes prior to introducing legislation, and after filing an amicus brief or filing a ballot title that would affect tribes, tribal rights, or tribal lands.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Proposed Substitute): Notice. The AG must provide notice to tribes:

- prior to proposing legislation that, if passed, would affect tribes, tribal rights, or tribal lands;
- after filing an amicus brief addressing an issue that would affect tribes, tribal rights, or tribal lands—if a tribe is a party in the matter, the AG must ensure that the tribe's attorney is served with the amicus brief;
- after filing a ballot title for a state initiative or referendum that, if approved by voters, would affect tribes, tribal rights, or tribal lands; and
- after a request for a formal AG opinion is accepted that affects tribes, tribal rights, or tribal lands.

Notice must include information about the action, any relevant timelines associated with the action, and an opportunity for the tribe to contact the AG for additional information.

Consent. The AG may not initiate any project or program that affects a tribe, tribal rights, or tribal lands without receiving consent from that tribe.

The requirement to receive consent does not apply where doing so would be in conflict with the AG's statutory duties as legal counsel to state officials and agencies and as legal representative for the state. Situations where consent will not be sought include:

- actions on behalf of any other entity in the AG's role as legal counsel to state officials, agencies, departments, boards, and commissions;

- actions related to the statutory duties and functions of the AG, including issuing legal opinions and formulating ballot titles for state initiatives and referenda; and
- investigations, litigation, employment, and other internal business decisions, or in circumstances where failure to act may subject the AG to sanction from a court, rules for professional conduct, or state ethics laws.

Consensus among tribes is not required. If an action affects more than one tribe, the AG must seek consent from all affected tribes. In the absence of consent from any affected tribe, the AG must request consultation with all affected tribes. If, after consultation in good faith, consent of all impacted tribes cannot be achieved, the AG may proceed with the action.

A request for consent from the AG is initiated by sending a written request to the chair of the tribe's governing body or designated representative, with a copy sent to each member of the tribe's governing body. The request must include information about the program or project and describe its potential impact to the tribe and any relevant timelines.

Annual Meeting. The AG must host an annual meeting inviting all tribes with the goal of ensuring strong government-to-government relationships, promoting and sustaining greater communication, and identifying opportunities to collaborate on areas of mutual interest.

Tribe, Tribal Land, and Tribal Rights. Tribe means a federally recognized American Indian tribe in Washington, or the governing body of that tribe, or a tribe with usual and accustomed fishing rights in Washington.

Tribal land includes Indian country as defined by federal law, trust lands, and lands which have been identified by a tribe to the AG as containing cultural, historic, or archaeological resources.

Tribal rights means those rights and protections found in treaty, executive order, court decision, or state or federal law.

Appropriation: None.

Fiscal Note: Requested on January 20, 2021.

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

Effective Date: The bill takes effect on July 1, 2022.

Staff Summary of Public Testimony On Proposed Substitute: PRO: The bill lays out a concrete framework for respecting tribal sovereignty. Free, prior, informed consent is a principal that is being adopted globally as a way of preserving indigenous rights, but it is usually aspiration. This bill will be a leading policy globally and Washington can be a

leader both domestically and around the world. The policy in the bill is workable and realistic and formalizes what the AG is already doing in policy. The bill is a historic civil rights proposal. The adoption of the administrative policy at the AGO has improved relationships with tribes. The bill only encompasses what is within the AG's independent authority and does not impact other agencies.

OTHER: The bill should include narrowly-tailored language to preserve the treaty rights the Umatilla Tribe has in Washington. The Umatilla have a longstanding relationship with Washington and their treaty rights have long been recognized by the state and its courts.

Persons Testifying: PRO: Senator Derek Stanford, Prime Sponsor; Asa Washines, Washington State Office of the Attorney General; Kristen Mitchell, Washington State Office of the Attorney General; Fawn Sharp, Quinault Indian Nation/NCAI; Matthew Randazzo, Snoqualmie Indian Tribe.

OTHER: Naomi Stacy, Confederated Tribes of the Umatilla Indian Reservation.

Persons Signed In To Testify But Not Testifying: No one.