

Proposed Substitute House Bill 1753

By Representative Fitzgibbon

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

Proposed Substitute (H-2386.2/22) compared to the House Bill 1753 (Z-0465.1):

- Provides that the goal of the preapplication tribal consultation process established in the bill is to identify tribal resources or rights potentially affected by the funding decisions and funding programs, assess their effects, and seek ways to avoid, minimize, or mitigate any adverse effects on tribal resources or rights.
- Requires the preapplication tribal consultation process to include the Department of Fish and Wildlife.
- Provides that, 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.

Committee: House Environment & Energy Committee
Staff: Robert Hatfield (786-7117), Office of Program Research
Date: January 26, 2022
Draft: H-2386.2

BILL REQUEST - CODE REVISER'S OFFICE

BILL REQ. #: H-2386.2/22 2nd draft

ATTY/TYPIST: ML:eab

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

1 AN ACT Relating to tribal consultation regarding the use of
2 certain funding authorized by the climate commitment act; and adding
3 a new section to chapter 70A.65 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 70A.65
6 RCW to read as follows:

7 (1) Agencies that allocate funding or administer grant programs
8 appropriated from the climate investment account created in RCW
9 70A.65.250, the climate commitment account created in RCW 70A.65.260,
10 and the natural climate solutions account created in RCW 70A.65.270
11 must offer early, meaningful, and individual consultation with any
12 affected federally recognized tribe on all funding decisions and
13 funding programs that may impact tribal resources, including tribal
14 cultural resources, archaeological sites, sacred sites, fisheries, or
15 other rights and interests in tribal lands and lands within which a
16 tribe or tribes possess rights reserved or protected by federal
17 treaty, statute, or executive order. The consultation is independent
18 of, and in addition to, any public participation process required by
19 state law, or by a state agency, including the requirements of
20 Executive Order 21-02 related to archaeological and cultural
21 resources, and regardless of whether the agency receives a request

1 for consultation from a federally recognized tribe. The goal of the
2 consultation process is to identify tribal resources or rights
3 potentially affected by the funding decisions and funding programs,
4 assess their effects, and seek ways to avoid, minimize, or mitigate
5 any adverse effects on tribal resources or rights.

6 (2) At the earliest possible date prior to submittal of an
7 application, applicants for funding from the accounts created in RCW
8 70A.65.250, 70A.65.260, and 70A.65.270 shall engage in a
9 preapplication process with all affected federally recognized tribes
10 within the project area.

11 (a) The preapplication process must include the applicant
12 notifying the department of archaeology and historic preservation,
13 the department of fish and wildlife, and all affected federally
14 recognized tribes within the project area. The notification must
15 include geographical location, detailed scope of the proposed
16 project, preliminary application details available to federal, state,
17 or local governmental jurisdictions, and all publicly available
18 materials, including public funding sources.

19 (b) The applicant must also offer to discuss the project with the
20 department of archaeology and historic preservation, the department
21 of fish and wildlife, and all affected federally recognized tribes
22 within the project area. Discussions may include the project's impact
23 to tribal resources, including tribal cultural resources,
24 archaeological sites, sacred sites, fisheries, or other rights and
25 interests in tribal lands and lands within which a tribe or tribes
26 possess rights reserved or protected by federal treaty, statute, or
27 executive order.

28 (c) All affected federally recognized tribes may submit to the
29 appropriate agency or agencies a summary of tribal issues, questions,
30 concerns, or other statements regarding the project, which must
31 become part of the official application file. The summary does not
32 limit what issues affected federally recognized tribes may raise in
33 the consultation process identified in subsections (1), (3) through
34 (7), and (9) of this section.

35 (d) The notification and offer to initiate discussion must be
36 documented with the application when it is filed, and a copy of the
37 application must be delivered to the department of archaeology and
38 historic preservation, the department of fish and wildlife, and to
39 the affected federally recognized tribe or tribes. If the discussions

1 pursuant to (b) of this subsection do not occur, the applicant must
2 document the reason why the discussion or discussions did not occur.

3 (3) If any funding decision, program, project, or activity that
4 may impact tribal resources, including tribal cultural resources,
5 archaeological sites, sacred sites, fisheries, or other rights and
6 interests in tribal lands and lands within which a tribe or tribes
7 possess rights reserved by federal treaty, statute, or executive
8 order is funded from the accounts created in RCW 70A.65.250,
9 70A.65.260, and 70A.65.270 without such a consultation with an
10 affected federally recognized tribe, the affected federally
11 recognized tribe may request that all further action on the decision,
12 program, project, or activity cease until meaningful consultation is
13 completed.

14 (4) Upon completion of agency and tribal consultation, an
15 affected federally recognized tribe may request a formal review of
16 the consultation by submitting a request to the governor's office of
17 Indian affairs and notifying the appropriate agencies and the
18 department of archaeology and historic preservation. The state
19 agencies and tribe must meet to initiate discussion within no more
20 than 20 days of the request. This consultation must be offered and
21 conducted separately with each affected federally recognized tribe,
22 unless the tribes agree to conduct a joint consultation with the
23 state.

24 (5) After the state agencies and tribe or tribes have conducted a
25 formal review under subsection (4) of this section, an affected
26 federally recognized tribe or state agency may request that the
27 governor and an elected tribal leader or leaders of a federally
28 recognized tribal government meet to formally consider the
29 recommendations from the parties. If requested, this meeting must
30 occur within 30 days of the request. This timeline may be extended by
31 mutual agreement between the governor and the tribal leaders.

32 (6) After the meeting identified in subsection (5) of this
33 section has occurred, the governor or an elected tribal leader of a
34 federally recognized tribe may call for the state and tribe or tribes
35 to enter into formal mediation. The mediation must be conducted as a
36 government-to-government proceeding, with each sovereign government
37 retaining their right to a final decision that meets their separate
38 obligations and interests. Mediators must be jointly selected by the
39 parties to the mediation. An agreement between the governor and a
40 tribal leader or leaders resulting from the mediation is formally

1 recognized and binding on the signatory parties. Absent an agreement,
2 participation in mediation does not preclude any additional steps
3 that any party can initiate, including legal review, to resolve a
4 continuing disagreement.

5 (7) During the proceedings outlined in subsections (4) through
6 (6) of this section, the agency or agencies with the authority to
7 allocate funding or administer grant programs from the accounts
8 listed in subsection (1) of this section in support of the proposed
9 project may not approve or release funding, or make other formal
10 decisions, including permitting, that advance the proposed project
11 except where required by law.

12 (8) The governor's office of Indian affairs, in coordination with
13 the department of archaeology and historic preservation and federally
14 recognized tribes, shall develop a state agency tribal consultation
15 process, including best practices for early, meaningful, and
16 effective consultation, early notification and engagement by
17 applicants with federally recognized tribes as a part of the
18 preapplication process in subsection (2) of this section, and
19 protocols for communication and collaboration with federally
20 recognized tribes. The consultation process must be periodically
21 reviewed and updated. The governor's office of Indian affairs must
22 provide training and other technical assistance to state agencies, as
23 they implement the required consultation. Notwithstanding the
24 governor's office of Indian affairs' ongoing work pursuant to this
25 subsection, the provisions of subsections (1) through (7) and (9) of
26 this section become effective as of the effective date of this
27 section.

28 (9) The requirements of this section apply to local governments
29 that receive funding from the accounts created in RCW 70A.65.250,
30 70A.65.260, and 70A.65.270, where that funding is disbursed to
31 project and program applicants. Where requested, the governor's
32 office of Indian affairs must provide training and other technical
33 assistance to local government agencies as they implement the
34 consultation requirements of this section.

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