SENATE BILL 5298

State of Washington   **67th Legislature**   **2021 Regular Session**

By Senator Stanford; by request of Attorney General

1   AN ACT Relating to requiring the attorney general to obtain free,
2 prior, and informed consent before initiating programs or projects
3 under his or her independent authority that affect tribes, tribal
4 rights, and tribal lands; adding new sections to chapter 43.10 RCW;
5 creating a new section; and providing an effective date.

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

7   NEW SECTION. **Sec. 1.** INTENT. The legislature finds that self-
8 determination is core to tribal sovereignty and must be integral in
9 decision making that affects a tribe, tribal lands, or tribal rights.
10 The legislature also finds that it is a priority to continue to
11 strengthen the government-to-government relationship established
12 between tribes and the state. As such, the legislature affirms that
13 establishing notice and consent requirements between the attorney
14 general and tribes is an important step toward furthering those
15 goals.

16   NEW SECTION. **Sec. 2.** DEFINITIONS. The definitions in this
17 section apply throughout this section and sections 3 through 6 of
18 this act unless the context clearly requires otherwise.

1 (1) "Affect" means an action has impacts on a tribe that are
2 different from or disproportional to the effects or impacts on the
3 state or its residents as a whole.
4 (2) "Consent" means a free, prior, and informed written assent in
5 response to a request from the attorney general.
6 (3) "Designated representative" means any person who a tribe
7 identifies to receive and respond to communications on behalf of the
8 tribe's chair or governing body. If a designated representative is
9 chosen, the tribe must provide the name, address, and contact
10 information in writing to the attorney general's tribal liaison.
11 (4) "Free" means all processes for requesting and obtaining
12 consent are voluntary and without coercion, intimidation, or
13 manipulation.
14 (5) "Independent authority" means authority solely held by the
15 attorney general and does not include the attorney general's
16 statutory duties as legal counsel to state officials, agencies,
17 departments, boards, and commissions and as legal representative for
18 the state.
19 (6) "Informed" means including the information necessary to
20 evaluate and respond to the request for consent as outlined by
21 section 4 of this act.
22 (7) "Notice" means any written communication, including
23 electronic communication, by the attorney general or the attorney
24 general's tribal liaison to the chair of a tribe's governing body or
25 a designated representative.
26 (8) "Prior" means before any final approval is granted by the
27 attorney general.
28 (9) "Tribal land" includes "Indian country" as defined in 18
29 U.S.C. Sec. 1151, trust lands, and lands which have been identified
30 by a tribe to the attorney general as containing cultural, historic,
31 or archaeological resources.
32 (10) "Tribal liaison" means the individual who the attorney
33 general designates to facilitate communication between the attorney
34 general and tribes. The name and contact information of the tribal
35 liaison must be displayed publicly on the attorney general's website.
36 (11) "Tribal rights" means those rights and protections found in
37 treaty, executive order, court decision, or state or federal law.
38 (12) "Tribe" means a federally recognized American Indian tribe
39 in Washington state or the governing body of that tribe.

NEW SECTION. **Sec. 3.** NOTICE. (1) The attorney general will provide notice to tribes:

(a) Prior to proposing legislation that if passed would affect tribes, tribal rights, or tribal lands;

(b) 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 attorney general will ensure that the tribe's attorney has been served with the amicus brief;

(c) After filing a ballot title for a state initiative or referendum measure with the secretary of state on an initiative or referendum measure that, if approved by the voters would affect tribes, tribal rights, or tribal lands; and

(d) After a request for a formal attorney general opinion has been accepted that affects tribes, tribal rights, or tribal lands.

(2) Notice must include information about the action, any relevant timelines associated with the action, and an opportunity for the tribe to contact the attorney general for additional information.

NEW SECTION. **Sec. 4.** CONSENT. (1) The attorney general shall not initiate any project or program, undertaken under the independent authority of the attorney general, that affects a tribe, tribal rights, or tribal lands without receiving consent from that tribe except as provided in subsections (2) and (3) of this section.

(2) This section does not apply to and consent will not be sought where doing so would be in conflict with the attorney general's statutory duties as legal counsel to state officials, agencies, departments, boards, and commissions and as legal representative for the state. Situations where consent will not be sought include but are not limited to:

(a) Actions on behalf of any other entity in the attorney general's role as legal counsel to state officials, agencies, departments, boards, and commissions;

(b) Actions related to the statutory duties and functions of the attorney general, including but not limited to issuing legal opinions and formulating ballot titles for state initiatives or referendum measures; and

(c) Investigations, litigation, employment, and other internal business decisions, or in circumstances where a failure to act may subject the attorney general to sanction from a court or would be in conflict with the rules of professional conduct for attorneys or

1 chapter 42.52 RCW and the rules adopted and opinions issued under
2 that chapter.

3   (3) Nothing in this chapter requires consensus among tribes.
4 Where an action affects more than one tribe, the attorney general
5 shall seek consent from all affected tribes through the process in
6 subsection (4) of this section. In the absence of consent of any
7 affected tribes, the attorney general shall request consultation with
8 all affected tribes. If, after consultation in good faith, consent of
9 all impacted tribes cannot be achieved, the attorney general may
10 proceed with the action.

11   (4) A request for consent by the attorney general is initiated by
12 sending a written request to the chair of the tribe's governing body
13 or designated representative, with a copy sent to each member of the
14 tribe's governing body. The request must include information about
15 the program or project and describe its potential impact to the tribe
16 and any relevant timelines that require consideration.

17   (5) If a tribe responds to a request for consent by objecting to
18 the project or program, the attorney general may request consultation
19 with the tribe to see if issues raised by the tribe can be addressed
20 or resolved.

21   NEW SECTION. **Sec. 5.** ANNUAL MEETING. The attorney general will
22 host an annual meeting inviting all tribes with the goals of ensuring
23 strong government-to-government relationships, promoting and
24 sustaining greater communication, and identifying opportunities to
25 collaborate on areas of mutual interest.

26   NEW SECTION. **Sec. 6.** RULE MAKING. The attorney general may
27 adopt rules to establish procedures to implement sections 2 through 5
28 of this act. The attorney general will seek input from tribes on rule
29 making under this section. In addition to the procedures required in
30 chapter 34.05 RCW, tribes or the attorney general may request
31 consultation regarding concerns arising from the rule-making process.

32   NEW SECTION. **Sec. 7.** EFFECTIVE DATE. This act takes effect July
33 1, 2022.

1   NEW SECTION. **Sec. 8.** CODIFICATION. Sections 2 through 6 of this
2   act are each added to chapter 43.10 RCW.

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