

## Tribal Consultation on Climate-related Programs in Washington State

Recently passed legislation in Washington provides for Tribal consultation on several aspects of climate-related programs, including clean energy development projects, Tribal energy and climate resilience funding, pre-project coordination, clean energy project siting and county planning. Aspects of the legislation address the issues of providing funding for Tribes to participate in consultation, confidentiality, early involvement in planning and siting projects, and pathways for recourse for Tribes. In most cases, legislation has not been in place long enough to see results. However, consultation on clean energy and resilience funding has begun, and some grants awarded to Tribes.

### The Climate Commitment Act of 2021

Signed into law in 2021, Washington's Climate Commitment Act (CCA or the Act) created a cap-and-invest scheme for carbon offsets.<sup>1</sup> Pursuant to the Act, quarterly carbon allowance auctions are held in which emitters purchase carbon offsets and the money raised is placed into one of three program funds and then invested into climate resilience, clean transportation, or air quality and community health equity projects. The Act commits ten percent of funds generated by the CCA programs to Tribes<sup>2</sup> and contains programs designed to assist Tribes in clean energy development and participation in the carbon offset market.<sup>3</sup> A 2023 report issued by the state's Office of Financial Management estimated that nearly \$155 million, 7.3% of investments, had been allocated to Tribes, including \$16.4 million in grants for consultation capacity and \$500,000 for cultural resource surveys.<sup>4</sup>

### **Tribal Programs**

Grant programs created for Tribes under the CCA include the Tribal Climate Resilience Program, Tribal Carbon Offset Assistance Program, and the creation of Tribal Consultation Grants.<sup>5</sup> Tribal Climate Resilience Program grants are awarded to Tribes for up to \$2 million per climate resilience project, with a total of \$12 million available for the program per

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<sup>1</sup> Note that the entire CCA cap-and-invest scheme, including the Tribal grants and consultation requirement, is under threat by ballot initiative 2117 to be presented to Washington voters in November 2024. See Jerry Cornfield, *WA Decides: Initiative 2117 to Repeal the Climate Commitment Act*, WASH. STATE STANDARD (May 20, 2024), <https://washingtonstatestandard.com/2024/05/20/wa-decides-initiative-2117-to-repeal-the-climate-commitment-act/>.

<sup>2</sup> WASH. REV. CODE § 70A.65.230(10)(b).

<sup>3</sup> WASH. OFF. OF FIN. MANAGEMENT, 2023-25 BIENNium CLIMATE COMMITMENT ACT INVESTMENTS TO BENEFIT OVER-BURDENED COMMUNITIES AND TRIBES 1 (Oct. 2023).

<sup>4</sup> *Id.* at 3-4.

<sup>5</sup> WASH. DEP'T OF ECOLOGY, *Climate Commitment Act*, <https://ecology.wa.gov/air-climate/climate-commitment-act> (last visited Jun. 6, 2024).

year.<sup>6</sup> The Washington Department of Commerce has consulted with Tribes within the state to co-design a strategy for the distribution of tribal climate resilience funds.<sup>7</sup> The Tribal Carbon Offset Assistance Program is designed to help fund Tribes developing carbon offset and clean energy projects on federally recognized Tribes' land.<sup>8</sup> For the initial biennial cycle, \$5 million dollars were available to distribute to Tribes for such projects.<sup>9</sup> Early 2024 marked major steps in the implementation of the CCA Tribal investment programs. In March, the Washington state legislature approved \$25 million from the Natural Climate Solutions Account to the Quinalt Indian Nation, in partnership with The Nature Conservancy, to purchase 11,000 acres of what had been privately owned forest land on their reservation.<sup>10</sup> In May, the Washington Department of Commerce awarded the first five grants under the Tribal Clean Energy Grant Program, funded in part by the CCA.<sup>11</sup> Projects funded range from solar arrays on a Tribal community center to an innovative Tribal led wave-produced hydrogen energy demonstration project.<sup>12</sup>

### ***Tribal Consultation Under the CCA***

The original version of the CCA bill created a right of free, prior, and informed consent (FPIC) and Tribal consultation for any development proposed on culturally significant lands, including those interests located off reservation but protected by treaty, executive order, or other law. However, when signing the CCA, Governor Jay Inslee vetoed the portion of the bill that would have protected FPIC.<sup>13</sup> In 2022, lawmakers amended the vetoed provision to remove FPIC but retain government-to-government Tribal consultation requirements when

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<sup>6</sup> *Id.*

<sup>7</sup> WASH. DEP'T OF COMMERCE, *Tribal Climate Resilience Program Grants in Washington*, <https://www.commerce.wa.gov/program-index/tribal-climate-resilience-program-grants/#:~:text=The%20Washington%20State%20Department%20of,in%20the%202023%2D2025%20biennium> (last visited Jun. 6, 2024).

<sup>8</sup> WASH. DEP'T OF ECOLOGY, *Tribal Carbon Offset Assistance Program Grants*, <https://ecology.wa.gov/About-us/Payments-contracts-grants/Grants-loans/Find-a-grant-or-loan/Tribal-Carbon-Offset-Assistance-Program> (last visited Jun. 6, 2024).

<sup>9</sup> *Id.*

<sup>10</sup> NATURE CONSERVANCY IN WASHINGTON, *The 2024 Legislative Session: Reflections on Advancing Climate Action*, WASH. NATURE (Mar. 18, 2024), <https://www.washingtonnature.org/fieldnotes/2024/3/13/the-2024-legislative-session-reflections-on-advancing-climate-action>.

<sup>11</sup> Tim Clouser, *Washington Tribes Receive Millions in State Funding for Clean Energy*, NATIVE AMERICANS IN PHILANTHROPY & CANDID (May 29, 2024), <https://nativephilanthropy.candid.org/news/washington-tribes-receive-millions-in-state-funding-for-clean-energy/>.

<sup>12</sup> *Id.*

<sup>13</sup> AP, *Washington Governor Criticized Over Climate Bill Veto*, OPB (May 23, 2021), <https://www.opb.org/article/2021/05/23/washington-governor-criticized-over-climate-bill-veto/>.

projects draw from the climate resilience investment account created by the CCA and have the potential to impact Tribal resources.<sup>14</sup>

Formal government-to-government Tribal consultation is required when federally recognized Tribes will be affected by agency allocations of funds or administration of grant programs that draw from the climate investment, climate commitment, or the natural climate solutions accounts, all of which are part of the climate resilience program created by the CCA.<sup>15</sup> Tribes are affected when the agency action “may impact Tribal resources, including cultural resources, archeological sites, sacred sites, fisheries, or other rights or interests on Tribal lands or lands within which at least one Tribe possesses rights reserved or protected by federal treaty, statute, or executive order.”<sup>16</sup>

The agency taking a covered action must offer affected Tribes “early, meaningful, and individual consultation” regarding the funding decisions and programs.<sup>17</sup> Such consultation is independent of any other public participation requirements and must be offered even if a Tribe does not make a request for consultation.<sup>18</sup> Consultation is also required of local governments who receive covered funds when the funds will be distributed to projects affecting Tribes.<sup>19</sup> Consultation is intended to identify Tribal rights or resources potentially affected, assess effects, and seek ways to avoid, minimize, or mitigate adverse impacts.<sup>20</sup>

If the project would have Tribal impacts, the affected Tribe may request consultation on the project. While consultation takes place, the agency must halt any “further action on the decision, program, project, or activity . . . until meaningful consultation is completed.”<sup>21</sup>

The CCA includes provisions for recourse. If Tribal consultation for a covered project does not occur, the affected Tribe may submit a request to the administering agency that all further action cease until consultation is completed, at which point all agency action that would result in a physical disturbance of the Tribal right or resource must cease.<sup>22</sup> Additional provisions give Tribes pathways for review of the consultation itself. At the completion of consultation between the acting agency and the affected federally recognized Tribe, the Tribe may request a formal review of consultation.<sup>23</sup> Requests are

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<sup>14</sup> WASH. POL’Y CENTER, *2022 House Bill 1753: Concerning Tribal Consultation Regarding the Use of Certain Funding Authorized by the Climate Commitment Act*, <https://www.washingtonvotes.org/2022-HB-1753> (last visited Jun. 7, 2024).

<sup>15</sup> WASH. REV. CODE § 70A.65.305(1).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* § 70A.65.305(9).

<sup>20</sup> *Id.* § 70A.65.305(1).

<sup>21</sup> *Id.* § 70A.65.305(3).

<sup>22</sup> *Id.* § 70A.65.305(4-7).

<sup>23</sup> *Id.* § 70A.65.305(4).

submitted to the Governor's Office of Indian Affairs (GOIA), with notice sent to the agencies involved, as well as the Department of Archeology and Historic Preservation (DAHP).<sup>24</sup> The review must take place within twenty days.<sup>25</sup> Upon completion of the review, either Tribes or the agency may request a meeting between the governor and elected Tribal leaders to formally discuss the recommendations of the parties.<sup>26</sup> This meeting should take place within thirty days of the request, with extensions upon agreement by the parties and with Tribes having the ability to opt out of such meetings.<sup>27</sup> Following this meeting, either the governor or the elected Tribal officials may call for formal mediation, subject to the Tribes ability to opt out.<sup>28</sup> This mediation is to be conducted as a government-to-government proceeding with the parties jointly selecting mediators.<sup>29</sup> Any decision reached is binding on the signatory parties and failure to reach an agreement does not preclude other avenues, including legal review, to resolve the disagreement.<sup>30</sup> At no point during the formal review, governor's meeting, or mediation may the administrating agency take any action to further the project in question.<sup>31</sup> Implementation of the formal review and mediation process is complicated due to conflicting requirements of EFSEC adjudicatory review of projects when the Governor remands projects for alteration. This process is further complicated by privacy considerations arising out of Tribal sovereignty that often leaves potential effects of projects on Tribal resources out of the public record available to EFSEC in the adjudication process.

The CCA also creates a preapplication process that funding applicants must carry out with Tribes. Separate from the agency's government-to-government consultation requirements, applicants for funding from covered programs whose project may impact covered Tribal rights must at the earliest possible date prior to application carryout a preapplication process with the affected Tribe or Tribes.<sup>32</sup> As part of the process, the applicant must notify DAHP, the Department of Fish & Wildlife, and any affected federally recognized Tribes of the proposed project by providing the geographical location and detailed scope of the project, all preliminary application details provided to officials, and any publicly available information regarding the project, including sources of funding.<sup>33</sup> The applicant must also offer to discuss the project with the departments and affected Tribes. Discussions *may* include the project's impacts on covered Tribal rights and resources but a discussion of such impacts is not required out of deference to Tribal sovereignty.<sup>34</sup> In practice,

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* § 70A.65.305(5).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* § 70A.65.305(6).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* § 70A.65.305(7).

<sup>32</sup> *Id.* § 70A.65.305(2).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

developers often conduct or outsource a project review before including Tribes, which can leave out critical Tribal information, and many Tribes prefer formal government-to-government consultation with agency officials to the informal preapplication process with developers. As a possible solution, one DAHP official has informally recommended potential project developers to reach out to lead agencies with preapplication information and encourages lead agencies to then conduct early, formal consultation with affected Tribes. When Tribes do choose to take part in the informal preapplication process, they may submit a summary of any issues, questions, concerns, or other statements regarding the project which are then added to the public record associated with the project.<sup>35</sup> The applicant must include in the application record of the discussion with Tribes, or its reason for not conducting the discussion, and send a copy to the agencies involved and affected Tribes.<sup>36</sup>

GOIA, in consultation with DAHP and federally recognized Tribes, was directed by the Act to develop state agency Tribal relations processes, including best practices for consultation, early notification, and Tribal engagement by June 2023.<sup>37</sup> However, as of July 2024, consultation toward the development of best practices has not taken place.

Lack of funding can limit Tribes' capacity to participate in consultation. Addressing this issue, the Act established a Tribal Consultation Grant Program designed to fund Tribes' participation in the required consultations under the CCA outlined above.<sup>38</sup> The program is managed by the Department of Ecology.<sup>39</sup> So far, \$21 million has been made available to the non-competitive grant program.<sup>40</sup> The funds are distributed equally among those federally recognized Tribes in the state or those with lands or territories within the state that apply for the grant program.<sup>41</sup> Funds may be used for participation in consultation with agencies regarding funding for projects or clean energy siting studies or decisions, including related procurement and transportation costs; engaging in pre-application processes with project developers; submitting documents to agencies regarding questions, concerns, or comments on proposed projects; engaging in review, meetings, and mediation; developing Tribal clean energy projects; activities supporting climate resilience and adaptation; applying for state or federal grant funding; or any other activities deemed necessary to the Tribes and approved by Department of Ecology to carryout CCA

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 70A.65.305(3).

<sup>37</sup> *Id.* § 70A.65.305(8).

<sup>38</sup> *Id.* § 70A.65.305(11).

<sup>39</sup> Jordan Wildish and Kelsey Smith, WASH. DEP'T OF ECOLOGY, Publication 23-02-039, TRIBAL CONSULTATION GRANTS FOR CLIMATE COMMITMENT ACT FUNDING DECISIONS: GRANT GUIDELINES, FISCAL YEAR 2023-2025 6-7 (Mar. 2024).

<sup>40</sup> *Id.* at 6-7.

<sup>41</sup> *Id.* at 5.

activities.<sup>42</sup> Tribes may elect either a reimbursement or advanced payment option to receive funds.<sup>43</sup>

### ***Tribal Climate Resilience and Clean Energy Fund Grant Implementation***

The state's Department of Commerce ("DOC"), led by the director of its newly created Office of Tribal Relations ("OTR"), has taken steps to improve Tribal consultation, to streamline processes and achieve Tribal participation in the Tribal Climate Resilience Grant program and, in partnership with the state's Department of Energy, the Clean Energy Fund program.

The Director of OTR, herself a Tribal person, was given wide latitude to create effective systems to implement the Tribal programs managed by DOC.<sup>44</sup> The first step was to listen to Tribes, travelling frequently to meet with Tribal leaders to discuss their experience working with DOC in the past and their recommendations for the future. Using this information, OTR created an internal Tribal engagement training program for DOC officials and a Tribal consultation implementation policy that is meant to be a living document, adjustable according to effectiveness and Tribal feedback. Next, OTR overhauled DOC's contracting documents to fit the Tribal context and make the language more amenable to Tribes, doing away with a partial waiver of sovereignty and replacing it with an alternative dispute resolution agreement.

The success of the efforts of OTR is exemplified by the level of Tribal participation in the Tribal Climate Resilience Grant program. The Act directed DOC to consult with Tribes regarding the distribution of program funds. OTR began the process by sending a letter to each of all twenty-nine federally recognized Tribes and the five additional Tribes with territories extending into Washington inviting them to partake in planning. A group conversation was then facilitated in May of 2023 with the Affiliated Tribes of Northwest Indians (ATNI), with a follow-up virtual conversation with those who were unable to attend the initial event or wanted to participate again. From there, OTR held one-on-one virtual sessions with individual Tribal officials to answer further questions and hear concerns. Throughout the sessions, OTR took note of the top suggestions for how funds should be distributed. The Office then drew out the top three options and sent a letter describing them to all Tribes asking for their preference. Through that process, OTR and the Tribes were able to reach a near consensus for how funds would be distributed. In the end, funds were sent in direct distributions of \$750,000 to each participating Tribe, with thirty-three

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<sup>42</sup> WASH. DEPT OF ECOLOGY, *Tribal Consultation Grants*, <https://ecology.wa.gov/about-us/payments-contracts-grants/grants-loans/find-a-grant-or-loan/tribal-capacity-grants#:~:text=Tribal%20Consultation%20Grants%20are%20non,energy%20siting%20projects%20and%20decisions>. (last visited Jun. 26, 2024).

<sup>43</sup> WASH. DEPT OF ECOLOGY, PUBLICATION 22-02-023, GUIDELINES FOR TRIBAL CONSULTATION GRANTS 11 (Jun. 2022).

<sup>44</sup> [internal] [conversation with Michelle Gladstone-Wade, Director of Tribal Relations at DOC, July 2024]

out of thirty-four total Tribes participating, a participation rate of 97%. The remaining available funds were placed into a competitive grant pool available to Tribes based on demonstrated need, not limited to mere financial need but including vulnerability to climate change related impacts.

Continuing the success of the Climate Resilience Grant program, DOC and the OTR worked with the Washington Department of Energy to streamline the application process for available grants, including the Clean Energy Fund. They began by rolling all the disparate applications into a single application that could be applied to all available programs, reducing confusion, costs, and time spent on separate applications. Grants were then awarded to Tribes in stages, beginning with the five grant awards mentioned above. Following the distribution of the first round of grants, DOC provided technical assistance to any Tribe who requested help refining their project, assistance with grant writing, or anything else needed to help facilitate successful applications for future grant cycles. In part due to this assistance, DOC anticipates awarding all available grant funds in the second round of applications.

The high level of Tribal participation in the Tribal Climate Resilience Grant and Clean Energy Fund programs reflects the work of the government agency, through the Director of the Office of Tribal Relations, to engage in early and meaningful Tribal consultation in the process of designing and implementing the funding program.

### ***Hydrogen Hub Projects – implementation of Tribal consultation***

The Pacific Northwest Hydrogen Association (PNWH2) is a multi-stakeholder organization seeking the development of eight facilities across Washington, Oregon, and Montana to create hydrogen energy infrastructure (Hydrogen Hub) under the Department of Energy's Regional Hydrogen Hubs Program.<sup>45</sup> The Hydrogen Hub projects are primarily federally funded under the Infrastructure Investment and Jobs Act, but those being developed in Washington have received \$20 million appropriated from the CCA, triggering the Tribal consultation requirements.<sup>46</sup> Tribal participation is a stated priority of PNWH2 as they work toward approval and construction of the Hub's projects.<sup>47</sup> Fifteen Tribes have been identified as being among the more than two hundred stakeholders. At the outset of the process, letters were sent to the 29 federally recognized Tribes in Washington, inviting them to inviting interested tribes to join the Pacific Northwest Hydrogen Association, and participate in the development of a full proposal. Tribal organizations participated PNWH2 keeps a seat on its board of directors for Tribal representation, currently held by the Chief Operations Officer of the Cowlitz Indian Tribe, one of Washington's twenty-nine federally

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<sup>45</sup> PNWH2, *PNWH2: An Overview*, <https://pnwh2.com/about-us/> (last visited Jun. 18, 2024).

<sup>46</sup> WASH. GOVERNOR, JAY INSLEE, HOW THE CLIMATE COMMITMENT ACT INVESTS IN A POLLUTION-FREE WASHINGTON 2 (Mar. 29, 2024)

<sup>47</sup> PNWH2, *Tribal Relations*, <https://pnwh2.com/tribal-relations/> (last visited Jun. 18, 2024).

recognized Tribes.<sup>48</sup> Additionally, Tribal leaders and Tribal-led organizations have served on Planning and Advisory committees throughout the Hub's early phases of development.<sup>49</sup> In April 2022, all federally recognized Tribes in the state received a letter from PNWH2 leadership informing them of the intention to apply for funding. Leadership then met with those Tribes that requested more information.<sup>50</sup> Throughout 2022, Tribal-led organizations participated in project review pursuant to the hub.<sup>51</sup> PNWH2 has twice presented to ATNI.<sup>52</sup> The most recent Tribal relations event was March 18, 2024, when PNWH2 held a virtual conference with Tribal leaders and those representing Tribes to deliver information about the Hub, set expectations for community benefits and engagement, and answer questions.<sup>53</sup>

### ***Badger Mountain Solar Project***

Consultation requirements do not always result in positive outcomes for Tribes. Currently, Washington is considering approval of a solar energy project on Badger Mountain.<sup>54</sup> The project required consultation as part of the required permitting process due to potential impacts to Tribal resources under the CCA. The project will impact culturally important food sources and ritual sites for the Colville Confederated Tribes, among other federally recognized and unrecognized Tribes.<sup>55</sup> The initial cultural survey that the developer conducted was inadequate, omitting Tribal culturally significant places and resources. There had not been any contact with Tribes to receive their input. After the Colville Confederated Tribes were informed of the report, they provided input objecting to the location to the Energy Facility Siting Evaluation Council (EFSEC). Eventually, the state required a second cultural survey. In August 2024, the project developer paused the project, although it has already invested millions into it.<sup>56</sup> While many Tribal leaders support clean energy projects, some are disappointed that projects such as the one on

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<sup>48</sup> PNWH2, *Leadership*, <https://pnwh2.com/our-people/> (last visited Jun. 18, 2024).

<sup>49</sup> PNWH2, Slide Deck, *Pacific Northwest Hydrogen Hub: Tribal Engagement Meeting* (Mar. 18, 2024).

<sup>50</sup> *Tribal Relations*, *supra* note 45

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> ENERGY FACILITY SITE EVALUATION COUNCIL, STATE OF WASH., *Badger Mountain*, <https://www.efsec.wa.gov/energy-facilities/badger-mountain> (last visited Jun. 7, 2024).

<sup>55</sup> B. "Toastie" Oaster, *Washington State is Leaving Tribal Cultural Resources at the Mercy of Solar Developers*, PROPUBLICA (Jan. 19, 2024), <https://www.propublica.org/article/washington-state-is-leaving-tribal-cultural-resources-at-mercy-of-solar-developers>.

<sup>56</sup> High County News, *Washington solar project paused amid concern about Indigenous sites*, August 12, 2024; <https://www.hcn.org/articles/washington-solar-project-paused-amid-concern-about-indigenous-sites/>



Badger Mountain may be approved despite harm to Tribal interests and Tribes' expressed disapproval during Tribal consultation.<sup>57</sup>

## Clean Energy Project Siting

In 2023, in part to address conflicts like the one over the Badger Mountain project, the state legislature enacted H.B. 1216 amending portions of several statutes, including the State Environmental Policy Act (SEPA), with the intent of expediting clean energy buildout throughout Washington.<sup>58</sup> Included in the package was a least-impact assessment process and more detailed requirements for early Tribal consultation for project siting decisions to minimize impact on Tribal rights and resources, which will be discussed below.

The bill created the Interagency Clean Energy Siting Coordinating Council (“the Council”).<sup>59</sup> The Council is directed to work with GOIA to create a catalog of Tribal consultation laws, Tribal preferences for communication toward consultation, and other facilitative resources accessible by agencies and clean energy developers.<sup>60</sup> The Council is further directed to work with GOIA, DAHP, Department of Commerce, and EFSEC to develop and deliver Tribal consultation and engagement training to clean energy developers regardless of the project’s designation.<sup>61</sup> In their November and December 2023 monthly meeting, the Council discussed progress in implementing the mandates related to Tribal consultation. In November, the Department of Commerce was building out best practices guidance and GOIA was compiling its list of points of contact for Tribal engagement.<sup>62</sup> A guidance document to support the commerce department’s Tribal relations policy was published in August, 2024.<sup>63</sup> A Tribal directory is currently available on GOIA’s website.<sup>64</sup> In December, an official from DAHP highlighted the importance of early engagement with Tribes for project siting due to the mitigation challenges and irreplaceability of lost or damaged Tribal cultural resources, and expressed a preference for siting projects on previously disturbed land, such as existing industrial or contaminated sites.<sup>65</sup> The Coordinating Council is due to make its first formal recommendations to the legislature in October 2024.

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<sup>57</sup> B. “Toastie” Oaster, *Wenatchi-P’squosa People Target Solar Project on Washington’s Badger Mountain*, MOTHER JONES (Apr. 15, 2024), <https://www.motherjones.com/politics/2024/04/wenatchi-psquosa-tribe-protest-solar-development-badger-mountain/>.

<sup>58</sup> H.B. 1216, 68th Leg., Reg. Sess. (Wash. 2023).

<sup>59</sup> WASH. REV. CODE § 43.394.010(1).

<sup>60</sup> *Id.* § 43.394.020(1)(f).

<sup>61</sup> *Id.* § 43.394.020(1)(g).

<sup>62</sup> CLEAN ENERGY SITING COUNCIL, MEETING NOTES 1-2 (Nov. 8, 2023).

<sup>63</sup> WASH. ST. DEPT. OF COMMERCE, *Righting our Relations Resource Guide*, August, 2024

<sup>64</sup> GOVERNOR’S OFFICE OF INDIAN AFFAIRS, *Tribal Directory*, ACCESS WASH., <https://goia.wa.gov/tribal-directory> (last visited Jun. 26, 2024).

<sup>65</sup> CLEAN ENERGY SITING COUNCIL, MEETING NOTES 1-2 (Dec. 13, 2023).

For clean energy projects deemed to be of statewide significance, the Department of Commerce is directed to create a plan for Tribal engagement and information sharing with federally recognized Tribes affected by the project.<sup>66</sup> In deciding whether a project will receive a designation of statewide significance the Department of Commerce must consider potential positive or adverse near-term or long-term impacts to Tribal rights, interests, or resources, including cultural resources.<sup>67</sup>

For clean energy projects of statewide significance that are subject to a coordinated permitting process, the Department of Ecology, in conjunction with DAHP AND the Department of Fish and Wildlife, is required to conduct “early, meaningful, and individual consultation” with Tribes who will be affected by the project.<sup>68</sup> The goal of early consultation is “early identification of tribal rights, interests, and resources, including tribal cultural resources, potentially affected by the project, and identifying solutions, when possible, to avoid, minimize, or mitigate any adverse effects on tribal rights, interests, or resources, including tribal cultural resources, based on environmental or permit reviews.”<sup>69</sup>

For a fully coordinated permitting process, the Department of Ecology “shall engage in a preapplication process with all affected federally recognized Indian tribes potentially impacted by the project.”<sup>70</sup> It must notify potentially affected Tribes as well as agencies of the project. Details of the project, including the exact location and scope, and potential impacts to Tribal rights must be presented to the affected Tribes. Tribes are then given an opportunity to respond with any questions or concerns they may have regarding the proposed project. Tribes may submit “a summary of tribal issues, questions, concerns, or other statements regarding the project,” which becomes part of the public record, and the notification and discussion must be documented and delivered to the Department of Ecology.<sup>71</sup> The law provides some protection of Tribal information in that it does not require disclosure of “archaeological sites, historic sites, artifacts, or the sites of traditional religious, ceremonial, or social uses and activities of affected Indian tribes,” and prohibits including such information in public documents.<sup>72</sup> Developers may also prepare and enter into a community benefit agreement with Tribes. The community benefit agreement should identify Tribal benefits of the project and ways to mitigate potential impacts to the Tribal community or their rights and resources.<sup>73</sup> However, though an option, the bill does

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<sup>66</sup> WASH. REV. CODE § 43.158.020(2)(e).

<sup>67</sup> *Id.* § 43.158.030(2)(e)(iii).

<sup>68</sup> *Id.* § 43.158.150(1)(a)-(b)(i)-(ii).

<sup>69</sup> *Id.* § 43.158.150(1)(a)

<sup>70</sup> *Id.* § 43.158.010 (8) “Fully coordinated permit process” is “a comprehensive coordinated permitting assistance approach supported by a written agreement between the project proponent, the department of ecology, and the participating agencies;” § 43.158.150(1)(b)(i)-(ii).

<sup>71</sup> *Id.* § 43.158.150(1)(a)-(b)(i)-(ii).

<sup>72</sup> *Id.* § 43.158.150(1)(b)(v).

<sup>73</sup> *Id.* § 43.158.120(8).

not explicitly require agencies or developers to alter or cancel the proposed project as a result of impacts on Tribal rights nor as a response to Tribal concerns.

H.B. 1216 also amended portions of SEPA to direct the Department of Ecology to create “nonproject” or programmatic environmental impact statements (PEIS) as a scoping mechanism for certain kinds of clean energy production and storage facilities prior to any particular project development.<sup>74</sup> The completed PEIS then serves as a baseline EIS for future projects. The PEIS should consider probable direct, indirect, and cumulative adverse environmental impacts, including impacts on “cultural resources and elements of the environment relevant to Tribal rights, interests, and resources including Tribal cultural resources, and fish, wildlife, and their habitat.”<sup>75</sup> The Department of Ecology should consult with the affected Tribes, as well as the Department of Fish and Wildlife, to identify and mitigate adverse impacts to such rights and resources.<sup>76</sup> Tribal consultations should be “early and meaningful,” and seek to work with Tribes to identify and understand all potential impacts to Tribal rights and resources.<sup>77</sup> Tribes, among other stakeholders, are also invited to identify geographic areas appropriate for clean energy projects which are then used as guidance for the creation of preferred development zones.<sup>78</sup> A project-level EIS must identify any impacts not already identified in the PEIS.<sup>79</sup> If none are found the lead agency may adopt the PEIS to satisfy the requirements of SEPA, including Tribal consultation.<sup>80</sup>

Finally, H.B. 1216 directed Washington State University to begin research into potential hydropower pumped storage facilities throughout the state.<sup>81</sup> Scoping for such sites is to be developed in consultation with federally recognized Tribes in the state, among other stakeholders.<sup>82</sup> The information gathered will help to inform a future regulatory scheme, including programmatic environmental impact assessments, for the development of pumped storage infrastructure.<sup>83</sup>

The Department of Ecology is currently working to develop strategies for the implementation of the various measures laid out in H.B. 1216.<sup>84</sup> They have identified four

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<sup>74</sup> *Id.* § 43.21C.535(1).

<sup>75</sup> *Id.* § 43.21C.535(3)(a)(v).

<sup>76</sup> *Id.* § 43.21C.535(3)(b).

<sup>77</sup> *Id.* § 43.21C.535(5).

<sup>78</sup> *Id.* § 43.21C.535(4).

<sup>79</sup> *Id.* § 43.21C.538.

<sup>80</sup> *Id.*

<sup>81</sup> 2023 c 230 § 101(f).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> WASH. DEP'T OF ECOLOGY, *Clean Energy Coordination*, <https://ecology.wa.gov/regulations-permits/sepa/clean->

focus areas: developing PEIS for solar, onshore wind, and hydrogen energy projects, developing a coordinated permitting process for all clean energy projects, establishing the Interagency Clean Energy Siting Coordinating Council, and exploring how to consolidate clean energy project permitting processes statewide. The Department of Ecology is currently developing a PEIS for utility scale solar, onshore wind, and renewable hydrogen facilities, with drafts expected late summer 2024.<sup>85</sup> The legislative deadline for completing the finalized PEIS, including the required Tribal consultations, is June 30, 2025.<sup>86</sup>

### **Goldendale Energy Storage Project**

The PEIS requirement and least-impact assessment created by H.B. 1216 is designed to limit conflicts such as the one taking place over the siting of the Goldendale Energy Storage Project by identifying in advance areas with less potential impact to Tribal rights and resources. The Goldendale Energy Storage Project is an off-channel pumped storage facility that relies on a closed loop reservoir system to provide hydrologic energy in times of low wind and solar production.<sup>87</sup> While the project launched prior to the passage of H.B. 1216, it is illustrative of the tension between clean energy build out and Tribal consultation in the state of Washington. The project required an environmental impact statement (EIS) pursuant to SEPA because it was determined to have likely detrimental impact on Tribal resources.<sup>88</sup> The state's EIS incorporated information from Tribes as to significant impacts on their resources. However, the project developers did not engage in adequate consultation with Tribes at the outset. Complicating the matter, the Federal Energy Regulatory Commission (FERC) designated the private developer as the consulting partner, while providing no protections for Tribal confidential information.<sup>89</sup> In 2020, the Governor had designated the project of statewide significance, expediting the permitting process.<sup>90</sup> In 2022, the leaders of seventeen Tribal nations sent a letter to Governor Inslee requesting

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energy#:~:text=The%202023%20Legislature%20passed%20House,rights%2C%20interests%2C%20and%20resources (last visited Jun. 12, 2024).

<sup>85</sup> WASH. DEPT. OF ECOLOGY, *Programmatic EIS*, <https://ecology.wa.gov/regulations-permits/sepa/clean-energy/programmatic-eis> (last visited Jun. 26, 2024); See e.g., WASH. DEPT OF ECOLOGY, SCOPING SUMMARY REPORT: FOR PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON UTILITY-SCALE SOLAR ENERGY FACILITIES IN WASHINGTON STATE (Mar. 2024).

<sup>86</sup> *Id.*

<sup>87</sup> WASH. DEPT OF ECOLOGY, *Goldendale Energy Storage Project*, <https://ecology.wa.gov/regulations-permits/permits-certifications/industrial-facilities-permits/goldendale-energy> (last visited Jun. 25, 2024).

<sup>88</sup> *Id.*

<sup>89</sup> High Country News, B. "Toastie" Oaster, *In green energy boom, one federal agency made the Yakama Nation an offer they had to refuse* (June 24, 2024)

[https://www.hcn.org/issues/56-7/how-federal-rules-and-a-lack-of-protection-for-sacred-indigenous-sites-left-the-yakama-nation-with-an-impossible-choice/#:~:text=Problems%20arose%20when%20the%20Federal%20Energy%20Regulatory%20Com mission,](https://www.hcn.org/issues/56-7/how-federal-rules-and-a-lack-of-protection-for-sacred-indigenous-sites-left-the-yakama-nation-with-an-impossible-choice/#:~:text=Problems%20arose%20when%20the%20Federal%20Energy%20Regulatory%20Commission,)<sup>90</sup> *Id.*

better consultation on the project. The selected site will have significant impact on several archaeological and sacred cultural areas, culturally significant plants and animals, as well as reduced access to treaty-reserved hunting grounds and degradation of the landscape to a degree that will interrupt Tribal rituals.<sup>91</sup> Affected Tribes include the Yakama Nation and the Confederated Tribes of the Umatilla Indian Reservation, each of whom have maintained that no mitigation is possible for the damage the project will cause to their rights and resources.<sup>92</sup> Despite this staunch disapproval by affected Tribes, the state Department of Ecology has issued the Clean Water Act Section 401 water quality certification and FERC has issued its final environmental impact report, two steps in allowing the project to move forward.<sup>93</sup>

## Conclusion

Washington state has been a forerunner in creating a robust set of Tribal consultation requirements across agency programs, including in their commitment to climate resilience and clean energy development across the state. The Climate Commitment Act and H.B. 1216 are just two examples of climate initiatives that incorporate meaningful Tribal consultation and informal engagement requirements for program creation and management, funding allocation decisions, as well as project siting and development with an additional focus on consulting with Tribes in pre-project planning decisions. Though it is too early to tell what impact such robust consultation requirements will have on the protection of Tribal rights and resources, the state has taken the first steps in consultation with Tribes on climate programs, which represent a step forward in state-Tribal relations and more meaningfully respect Tribal sovereignty. Future work to follow the implementation of the early consultation requirements is needed to determine whether these requirements have the result of providing a more effective means for Tribal concerns to make a difference in early climate-related decision-making.

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<sup>91</sup> WASH. DEPT OF ECOLOGY, *supra* note 87; see also Courtney Flatt, *Controversial energy project in southern Washington state moves closer to breaking ground*, (February 10, 2024), <https://www.opb.org/article/2024/02/10/controversial-energy-project-moves-closer-to-breaking-ground/#:~:text=A%20controversial%20energy%20project%20in%20south%20central%20Washington,nsupra note 83.>

<sup>92</sup> Flatt, *supra* note 91.

<sup>93</sup> *Id*; [https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Industrial-facilities-permits/Goldendale-energy#:~:text=Free%20Flow%20Power%20Project%20101,%20LLC%20\(FFP%20Project\)](https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Industrial-facilities-permits/Goldendale-energy#:~:text=Free%20Flow%20Power%20Project%20101,%20LLC%20(FFP%20Project))