

Tribal Consultation in Washington State

Part I: Summary of Tribal Relations Governance

The modern era of formal Tribal-State relations in Washington begins with the Centennial Accord, which was signed in 1989.¹ The Accord stated that the respective state agencies are directly accountable for implementation of the government-to-government relationship with Tribes.² This was reaffirmed in 1999 with the signing of the Centennial Accord Millennium Agreement, which was created to clarify the protocols and processes for implementing the Centennial Accord.³ The Agreement further committed Tribal and State leaders to strengthen their relationship and work cooperatively on issues of mutual concern.⁴ While the Centennial Accord set the foundation for Tribal relations, the Millennium Agreement provides a consistent approach for state agencies and Tribes to follow.⁵ Other consultation requirements have been set forth in legislation including the State/Tribal Relations Act, the State Environmental Policy Act, and the Growth Management Act.

Washington's executive branch contact for Tribal relations is the Governor's Office of Indian Affairs (GOIA).⁶ GOIA annually releases its "Centennial Accord Agency Highlights" report, which summarizes actions taken by the state agencies to strengthen relations with Tribal governments and enhance Tribal communities in the preceding year.⁷ Highlights from the 2023 report include the hosting of the inaugural Missing and Murdered Indigenous Women/People summit; the creation of the country's first Missing and Murdered Indigenous Women and People Cold Case Investigation Unit; the establishment of the Truth and Reconciliation Tribal Advisory Committee; the organization of the first State Tribal Opioid/Fentanyl Summit; the state prosecution of a criminal case that will result in a payment of over \$700,000 to the Puyallup Tribal Fisheries program; and, the successful defense of Tribal sovereignty in a federal court case.⁸

¹ Centennial Accord Between the Federally Recognized Indian Tribes in Washington State and the State of Washington, Aug. 4, 1989.

² *Id.* ("The parties recognize that in state government, accountability is best achieved when this responsibility rests solely within each agency. Therefore, it is the objective of the state that each particular agency be directly accountable for implementation of the government-to-government relationship in dealing with issues of concern to the parties.").

³ New Millennium Agreement, signed by leaders of American Indian Nations and the State of Washington (Nov. 1-3, 1999).

⁴ *Id.*

⁵ New Millennium Agreement, Government-to-Government Implementation Guidelines (Nov. 1-3, 1999).

⁶ Wash. Exec. Order No. 80-02, Establishing Governor's Office on Indian Affairs (Jan. 8, 1980); GOVERNOR'S OFFICE OF INDIAN AFFAIRS, <https://goia.wa.gov/> (last visited Aug. 16, 2024).

⁷ WASH. REV. CODE § 43.376.010 *et seq.*

⁸ GOV. OFFICE OF INDIAN AFFAIRS, 2023 CENTENNIAL ACCORD AGENCY HIGHLIGHTS (2023).

Part II: Environmental Review & Local Planning

Under Washington state law, environmental review is carried out under the State Environmental Policy Act (SEPA).⁹ While SEPA requires governments to ensure that environmental impacts and alternatives are properly considered, it does not require that governmental activities be environmentally benign, or that alternatives with the least environmental impacts be selected.¹⁰ SEPA's primary requirement is that state and local agencies "include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment," an environmental impact statement (EIS) describing the environmental impacts of and alternatives to the proposal.¹¹

Washington also regulates land use and zoning decisions through the Growth Management Act (GMA).¹² The GMA is Washington's basic land use statute that provides a comprehensive land use planning system that requires more rapidly growing areas to establish land use plans, development regulation, and project review procedures consistent with the GMA.¹³ Similarly to SEPA, the GMA requires that land use decisions consider environmental impacts, provide documentation, and provide an opportunity for public participation.¹⁴

Part III: State-wide Consultation Mandates

Consultation in Washington is prescribed through both agreements with Tribes as well as state legislation. The Centennial Accord and the Millenium Agreement and its implementation guidelines provide a consultation framework that was developed in partnership with the federally recognized Tribes of Washington. The State/Tribal Relations Act, the State Environmental Policy Act, and the Growth Management Act are each pieces of state law that require Tribal consultation with varying degrees of specificity.

A. Centennial Accord

The Centennial Accord is an agreement between the federally recognized Tribes of Washington and the State of Washington designed to commit the parties to implementation of the government-to-government relationship.¹⁵ The Accord provides for

⁹ WASH. REV. CODE § 43.21C.010 *et seq.*

¹⁰ *Save Our Rural Env't v. Snohomish Cty.*, 99 Wash. 2d 363 (1983).

¹¹ WASH. REV. CODE § 43.21C.030(c).

¹² WASH. REV. CODE § 36.70A.010 *et seq.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Centennial Accord Between the Federally Recognized Indian Tribes in Washington State and the State of Washington, Aug. 4, 1989.

an annual meeting at the state level, during which parties will establish goals and develop joint strategies and agreements to achieve such goals.

The Accord also establishes a governance structure through which consultation activities should take place between Tribes and state agencies. With regards to state management, it provides that the Governor's Chief of Staff is responsible to the Governor for the Accord's implementation and the Office of Indian Affairs will provide state agency directors with educational information needed to assist in the implementation of the government-to-government relationship.¹⁶ The Accord establishes that state agency directors are each accountable to the Governor through the Chief of Staff.¹⁷ State agency directors are instructed to initiate a procedure within their agency that requires staff responsible for addressing issues of mutual concern to respect the government-to-government relationship and establish a plan of accountability.¹⁸ It also provides that state agency directors may establish more detailed implementation procedures in subsequent agreements with Tribes.¹⁹

The Accord also provides that Tribes are responsible for ensuring that their organization and decision-making process is known to the state agency with whom they are working and for establishing a documented system of accountability.²⁰

B. Centennial Accord Millenium Agreement

The Centennial Accord Millenium Agreement is a reaffirmation of the Centennial Accord and served to clarify the protocols and processes for its implementation.²¹ In addition to its reaffirmation of the principles articulated in the Centennial Accord, it provides Government-to-Government Implementation Guidelines to provide a consistent approach for state agencies and Tribes to follow.²² The Implementation Guidelines for the Centennial Accord Millenium Agreement were prepared to promote consistency through implementation of the government-to-government relationship.²³ The Guidelines have

¹⁶ *Id.*

¹⁷ *Id.* ("The parties recognize that in state government, accountability is best achieved when this responsibility rests solely within each state agency. Therefore, it is the objective of the state that each particular agency be directly accountable for implementation of the government-to-government relationship in dealing with issues of concern to the parties.").

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ New Millenium Agreement, signed by leaders of American Indian Nations and the State of Washington (Nov. 1-3, 1999).

²² New Millenium Agreement, Government-to-Government Implementation Guidelines (Nov. 1-3, 1999).

²³ *Id.*

three key procedural sections: Consultation Process, Dispute Resolution Process, and provisions for State Centennial Accord Plans.

i. Consultation Process

This section of the Implementation Guidelines identifies guiding principles of the consultation process and critical elements in conducting consultation. The guiding principles are:

- (1) Commitment to consultation;²⁴
- (2) Communication and consultation is a two-way street;
- (3) Build upon already established and on-going relationships between Tribal and State officials;
- (4) State governments are assuming greater responsibility under the federal government's policy of increased delegation of programs;
- (5) Issues that require consultation should be identified as soon as possible in order to involve both parties early on in the process;²⁵
- (6) States/Tribes should make every effort to respond to and participate in the consultation process;
- (7) Parties should ensure that consultation occur through the interaction of officials with comparable governmental stature and authority; and
- (8) Honesty and integrity must be maintained by all parties in the consultation process.²⁶

The critical elements to conducting consultation are:

- (1) Identify the participants in the process;
- (2) Provide a clear description of the nature of the issue and/or conflict;
- (3) Allow ample time to review documents and respond to requests for consultation;
- (4) Establish and adhere to a schedule for consultation;²⁷
- (5) Recognize that Tribes are traditionally, culturally and administratively different from each other;²⁸

²⁴ "The state and tribes, and their agencies and departments, commit to consulting with each other on matters that directly affect the other."

²⁵ "As a general rule, any decision or action which would directly impact or involve Tribal governments, its land base and/or operation of its programs requires consultation."

²⁶ *Id.* § II (Consultation Process).

²⁷ "State and Tribal officials should jointly determine the protocols, timing, and number of meetings needed to consult."

²⁸ "It should be understood that some kinds of information are sensitive, especially regarding traditional religious practices. Further, in some cases, Tribal customary law or religious rules regarding issues of confidentiality may not be negotiable."

- (6) Use of workgroups and/or task forces to develop recommendations; and
- (7) Report on the outcome of the consultation.²⁹

ii. Dispute Resolution Process

The Implementation Guidelines provide that each Tribal government, state government, and state department or agencies should establish a process through which disputes can be identified and resolved.³⁰ Such a process should allow participants to tailor dispute resolution mechanisms to the issue at hand and may include tactics such as mediation or litigation within agreed-upon parameters.³¹ Additionally, the Implementation Guidelines provide that in situations where an agreement cannot be reached, the parties are free to pursue their interests through other appropriate means.³² This may include litigation, but the parties are required to confer beforehand to ensure the parties understand the positions and interests of the others and discuss methods for reducing the time and costs of a potential suit.³³

iii. State Centennial Accord Plans

The section of the Implementation Guidelines that addresses State Centennial Accord Plans clarifies the expectation that each state agency establish its own procedure “by which the government-to-government policy shall be implemented.”³⁴ It does so by identifying the key components that should be included in both Tribal and state agency Centennial Accord Plans.³⁵

Key components to be included in each state agency's Centennial Accord Plan:

- (1) Programs and services available to Tribes;
- (2) Funding distribution methods available to Tribes;
- (3) Definitions of relevant terms;
- (4) Consultation procedures that include policy development, program development, and fund distribution; and
- (5) Dispute resolution processes.³⁶

²⁹ *Id.* § II.

³⁰ *Id.* § III (Dispute Resolution).

³¹ *Id.* § III.

³² *Id.* § III.

³³ *Id.* § III.

³⁴ *Id.* § IV (State/Tribal Centennial Accord Plans) (quoting the Centennial Accord).

³⁵ *Id.* § IV.

³⁶ *Id.* § IV.

Key components to be included in each Tribe's Centennial Accord Plan:

- (1) Policy statement directing Tribal staff to communicate with state agencies in the spirit of the Centennial Accord and its Implementation Guidelines;
- (2) List of key Tribal staff and policy contacts;
- (3) Description of Tribe's organization and decision-making processes relevant to state agencies; and
- (4) Consultation procedures to be used for outreach to state agencies on Tribal actions that may impact state interests.³⁷

C. State/Tribal Relations Act

The State/Tribal Relations Act, codified as "Government-to-Government Relationship with Indian Tribes," outlines state agency duties in establishing a government-to-government relationship, creates a state agency Tribal liaison position, sets employee training requirements, and requires an annual meeting with state officials and Tribal leaders.³⁸ The Act also requires each state agency to submit an annual report to the Governor on state agency activities involving Tribes.³⁹ Such requirements are limited to relationships with federally recognized Tribes whose traditional lands and territories included parts of Washington.⁴⁰

In furtherance of the government-to-government relationship with Tribes, the Act requires that state agencies "make reasonable efforts to collaborate with Indian [T]ribes in the development of policies, agreements, and program implementation that directly affect Indian [T]ribes and develop a consultation process that is used by the agency for issues involving specific Indian [T]ribes."⁴¹ Additionally, the Act requires each state agency to have a Tribal liaison who reports to the head of the agency.⁴² The liaison is responsible for supporting the development and implementation of Tribal consultation policies, as well as serving as the contact person for Tribal governments, maintaining communication with Tribal governments, and coordinating state agency employee trainings on government-to-government relations.⁴³ Such education must include effective communication and collaboration between Tribes and the agency as well as cultural competency in providing services to Tribes.⁴⁴

³⁷ *Id.* § IV.

³⁸ WASH. REV. CODE § 43.376.010 *et al.*

³⁹ WASH. REV. CODE § 43.376.020(4).

⁴⁰ WASH. REV. CODE § 43.376.010(1).

⁴¹ WASH. REV. CODE § 43.376.020(1).

⁴² WASH. REV. CODE § 43.376.020(3).

⁴³ WASH. REV. CODE § 43.376.030.

⁴⁴ WASH. REV. CODE § 43.376.040.

D. State Environmental Policy Act

The State Environmental Policy Act (SEPA) does not require Tribal consultation for projects. However, it does require Tribal consultation in two nonproject instances: (1) when an energy facility site evaluation council is conducting a nonproject environmental review of an electrical transmission facility, and (2) when the department of ecology is preparing a nonproject environmental impact statement for a clean energy project.⁴⁵ In both situations, the relevant agency body must “offer early and meaningful consultation” with any affected recognized Tribe.⁴⁶ Additionally, SEPA requires local governments to notify impacted Tribes when engaging in certain land use planning activities.⁴⁷ However, meaningful consultation is not required under such circumstances.

i. Nonproject Environmental Review

Non-project actions are actions that involve decisions about policies or programs but are not projects themselves.⁴⁸ Nonproject environmental impact statements serve as the basis for the review of later projects. Consultation with Tribes at this stage may give Tribes an opportunity to shape development decisions before they are proposed. SEPA provides for nonproject environmental review of energy transmission facilities and clean energy projects.⁴⁹ Such environmental review includes the preparation of non-project environmental impact statements (EISs).⁵⁰ The Energy Facility Site Evaluation Council (Council) is responsible for preparing EISs for electrical transmission facilities with a nominal voltage of 230kV or greater, and the Department of Ecology is responsible for preparing EISs for clean energy projects.⁵¹ The Tribal consultation requirements are substantially the same for both types of nonproject environmental reviews.

⁴⁵ WASH. REV. CODE § 43.21C.405 (Nonproject environmental reviews of electrical transmission facilities); WASH. REV. CODE § 43.21C.535 (Clean energy projects—Nonproject environmental impact statements)

⁴⁶ WASH. REV. CODE § 43.21C.405(5); WASH. REV. CODE § 43.21C.535(5).

⁴⁷ WASH. REV. CODE § 43.21C.420 (Comprehensive plans and development regulations—Optional elements—Nonproject environmental impact statements—Subarea plans—Transfer of development rights program—Recovery of expenses); WASH. REV. CODE § 43.21C.440 (Planned action—Defined—Authority of a county, city, or town—Community meetings).

⁴⁸ *SEPA Checklist Guidance, Section D: Nonproject Actions*, WASH. DEP’T OF ECOLOGY, <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/SEPA-checklist-guidance/SEPA-Checklist-Section-D-Non-project-actions> (last visited Sept. 17, 2024).

⁴⁹ WASH. REV. CODE § 43.21C.405; WASH. REV. CODE § 43.21C.535.

⁵⁰ WASH. REV. CODE § 43.21C.405(1); WASH. REV. CODE § 43.21C.535(1).

⁵¹ WASH. REV. CODE § 43.21C.405(1); WASH. REV. CODE § 43.21C.535(1).

The scope of the EIS is to be defined with input from a wide variety of stakeholders that include federally recognized Tribes.⁵² Such an EIS must consider “probable, significant adverse environmental impacts to [...] cultural resources and elements of the environment relevant to [T]ribal rights, interests, and resources including [T]ribal cultural resources, and fish, wildlife, and their habitat” and must “identify measures to avoid, minimize, and mitigate” such impacts.⁵³

Additionally, “early and meaningful consultation” must be offered to affected federally recognized Tribes to determine potential impacts to Tribal rights and resources, which include Tribal cultural resources, archaeological sites, sacred sites, fisheries, Tribal lands or other lands in which Tribes have reserved or protected rights.⁵⁴ SEPA also includes protections for Tribal confidential information. In the context of transmission facilities, “maps may not include confidential information, such as locations of sacred cultural sites.”⁵⁵ Protections are broader for reviews of clean energy products, as “certain information obtained [through consultation] is exempt from disclosure.”⁵⁶

ii. Local Land Use Planning

SEPA also establishes a general framework for local planning activities. While it does not specifically prescribe Tribal consultation, it does identify circumstances under which a county, city, or town must provide notice to affected federally recognized Tribes before taking an action and in advance of holding community meetings.

When a local government is considering a proposal that is consistent with the existing planned action ordinance, additional environmental review is not required.⁵⁷ However, notice of the planned action and a required community meeting must be provided to all affected federally recognized Tribes.⁵⁸ Additionally, when a city adopts an optional comprehensive plan element, at least one community meeting must be held before notice for a nonproject environmental impact statement is issued.⁵⁹ Notice of the meeting must

⁵² Other stakeholders include agencies, industry, local governments, and the public. WASH. REV. CODE § 43.21C.405(4); WASH. REV. CODE § 43.21C.535(4). Additionally, the Council and the Department of Ecology, respectively, will “provide opportunities for the engagement of [T]ribes, overburdened communities, and stakeholders that self-identify an interest in participating in the process.” WASH. REV. CODE § 43.21C.405(4); WASH. REV. CODE § 43.21C.535(4).

⁵³ WASH. REV. CODE § 43.21C.405(3)(a)-(b); WASH. REV. CODE § 43.21C.535(3)(a)-(b).

⁵⁴ WASH. REV. CODE § 43.21C.405(5); WASH. REV. CODE § 43.21C.535(5).

⁵⁵ WASH. REV. CODE § 43.21C.405(6).

⁵⁶ WASH. REV. CODE § 43.21C.535(5) (citing WASH. REV. CODE § 42.56.300 (Archaeological sites)).

⁵⁷ WASH. REV. CODE § 43.21C.440(3)(b).

⁵⁸ WASH. REV. CODE § 43.21C.440(3)(b). The same notice must also be provided to agencies with jurisdiction over future development anticipated for the planned action.

⁵⁹ WASH. REV. CODE § 43.21C.420(4)(b).

be mailed to “all affected federally recognized [T]ribal governments whose ceded area is within one-half mile of the boundaries of the subarea.”⁶⁰

E. Growth Management Act

The Growth Management Act requires local governments to develop comprehensive plans and development regulations. In 2022, the Washington Legislature passed a series of amendments that incorporated new requirements for Tribal consultation.⁶¹ These new provisions provide opportunities for Tribes to voluntarily participate in local government’s planning activities, including comprehensive planning processes, designation of urban growth areas, and the development of countywide planning policies.

A planning policy is used for establishing a countywide framework from which county and city comprehensive plans are adopted.⁶² When a county is developing a countywide planning policy, it must invite federally recognized Tribes whose reservation or ceded lands lies within the county to participate in the process.⁶³ If a Tribe does choose to participate, then the resulting policy must address the protection of Tribal cultural resources.⁶⁴

Comprehensive plans are adopted pursuant to countywide planning policies.⁶⁵ A federally recognized Tribe whose reservation or ceded lands lie within a county may choose to participate in the county or regional planning process by providing notice to the relevant local government that the Tribe either has a planning process or intends to initiate a parallel planning process.⁶⁶ Once notice has been received, the local governments conducting the planning and the Tribe shall enter into “good faith negotiations” to develop a memorandum of agreement to guide Tribal collaboration and participation in the planning process.⁶⁷

⁶⁰ WASH. REV. CODE § 43.21C.420(4)(b). Notice must also be sent to all property owners within 150 feet of the boundaries of the subarea and agencies with jurisdiction over the future development anticipated within the subarea.

⁶¹ Wash. House Bill 1717, Concerning Tribal Participation in Planning Under the Growth Management Act (2022); see also *Tribal Planning Coordination for GMA*, WASH. DEPT OF COMMERCE, <https://www.commerce.wa.gov/serving-communities/growth-management/growth-management-topics/tribal-planning-coordination-under-the-growth-management-act/> (last visited Sept. 18, 2024).

⁶² WASH. REV. CODE § 36.70A.210(1).

⁶³ WASH. REV. CODE § 36.70A.210(4).

⁶⁴ WASH. REV. CODE § 36.70A.210(3)(i).

⁶⁵ WASH. REV. CODE § 36.70A.210(1).

⁶⁶ WASH. REV. CODE § 36.70A.040(8). Each county or city that is proposing the adoption of a comprehensive plan or development regulations must notify the Washington Department of Commerce at least sixty days before final adoption. WASH. REV. CODE § 36.70A.106(1). Federally recognized Tribes may request to receive copies of such notices. WASH. REV. CODE § 36.70A.106(3)(c).

⁶⁷ WASH. REV. CODE § 36.70A.040(8)(a).

More concrete consultation requirements are in place for Urban Growth Areas, which are included in comprehensive plans.⁶⁸ The Act provides that the county must engage in “meaningful consultation” with any federally recognized Tribe that “may be potentially affected” at the “earliest possible date.”⁶⁹ The consultation must include a discussion of “potential impacts to cultural resources and [T]ribal treaty rights.”⁷⁰ To initiate the consultation process, the county must use at least two methods to notify the Tribe.⁷¹ Upon receiving a notice, the Tribe may request consultation “to determine whether an agreement can be reached” as it pertains to the county’s urban growth area action.⁷² If an agreement cannot be reached, the local government and Tribe must enter a mediation process.⁷³

Additionally, federally recognized Tribes may request assistance from the Washington Department of Commerce to resolve issues related to proposed changes to local comprehensive plans and development regulations.⁷⁴ Once the Department receives a request from a Tribe, the Department must notify the city or county, who must delay any final action for at least sixty days. The Department will provide comments to the local government that include a summary and supporting materials regarding the Tribe’s concerns. The local government may either amend the plan in a manner consistent with the Department’s provided comments or enter a facilitated process with the Tribe. If the local government opts to enter a facilitated process, there is no requirement that it adopt any Tribal recommendations.

F. Climate Commitment Act

In 2021, the Climate Commitment Act was signed into law, creating a cap-and-invest program to reduce statewide greenhouse gas emissions.⁷⁵ In 2022, the legislature amended the Act by providing for Tribal consultation regarding the use of funding authorized by the Act.⁷⁶ It provides that agencies that administer grant programs appropriated from the accounts funded by the Climate Commitment Act must offer “early, meaningful, and individual consultation with any affected federally recognized [T]ribe on all funding decisions and funding programs that may impact [T]ribal resources.”⁷⁷ Tribal resources include “[T]ribal cultural resources, archaeological sites, sacred sites, fisheries, or

⁶⁸ WASH. REV. CODE § 36.70A.110. “Urban Growth Areas” are areas “within which urban growth is encouraged and outside of which growth can occur only if it is not urban in nature.” *Id.*

⁶⁹ WASH. REV. CODE § 36.70A.110(9)(a).

⁷⁰ WASH. REV. CODE § 36.70A.110(9)(a).

⁷¹ WASH. REV. CODE § 36.70A.110(9)(b). One method must be mail.

⁷² WASH. REV. CODE § 36.70A.110(9)(b).

⁷³ WASH. REV. CODE § 36.70A.110(9)(b). Mediation will take place pursuant to WASH. REV. CODE § 36.70A.040.

⁷⁴ WASH. REV. CODE § 36.70A.190.

⁷⁵ WASH. REV. CODE § 70A.65 *et seq.*

⁷⁶ Climate Commitment Act Funding-Tribal Consultation, House Bill 1753 (2022).

⁷⁷ WASH. REV. CODE § 70A.65.305(1).

other rights and interests in [T]ribal lands and lands within which a [T]ribe or [T]ribes possess rights reserved or protected by federal treaty, statute, or executive order.”⁷⁸

Additionally, applicants for funding from such accounts shall engage in a preapplication process that includes notifying all affected federally recognized Tribes within the project area and offering to discuss the project.⁷⁹ Discussions may include the project’s impact on Tribal resources, including “[T]ribal cultural resources, archaeological sites, sacred sites, fisheries, or other rights and interests in [T]ribal lands and lands within which a [T]ribe or [T]ribes possess rights reserved or protected by federal treaty, statute, or executive order.”⁸⁰

G. Executive Order 21-02 – Archaeological and Cultural Resources

Governor Jay Inslee’s Executive Order 21-02, Archeological and Cultural Resources, requires “all Executive Branch and Small Cabinet agencies” to “consult with DAHP [the Department of Archaeological and Historic Preservation] and affected tribes on the potential effects of projects on cultural resources proposed in state-funded construction or acquisition projects” that are outside of Section 106 review under the National Historic Preservation Act.⁸¹

Among the requirements are that:

- Agencies are to initiate consultation early in the process and conclude it before the expenditure of state funds for construction, demolition, or acquisition.
- Agencies “shall take all reasonable action to avoid, minimize or mitigate adverse effects to archeological and historic archaeological sites, historic buildings/structures, traditional cultural places, sacred sites or other cultural resources.”
- If DAHP or the Tribes notify the agency of the need to study a site or place, the agency shall consult with DAHP and the Tribe(s) as to the studies needed.
- If DAHP or the Tribes identify a site or place potentially impacted, the agency shall consult on avoidance or mitigation strategies.

⁷⁸ WASH. REV. CODE § 70A.65.305(1).

⁷⁹ WASH. REV. CODE § 70A.65.305(2). Project applicant must also notify the Department of Archaeology and Historic Preservation and the Department of Fish and Wildlife. Notification must include the project’s geographical location, scope, preliminary application details available to federal, state, or local governmental jurisdictions, and all publicly available materials, including public funding sources.

⁸⁰ WASH. REV. CODE § 70A.65.305(2). Project applicant must also offer to discuss with the Department of Archaeology and Historic Preservation and the Department of Fish and Wildlife.

⁸¹ WASH. EXEC. ORDER NO. 21-02 (April 7, 2021)

- For archaeological and historic archaeological sites or traditional and sacred places, the agency may only develop mitigation strategies after notifying Tribes that it cannot avoid the site or place.
- Agencies must develop mitigation strategies for archaeological, cultural and sacred sites in consultation with Tribes and DAHP.

The executive order also calls for government-to-government and cultural resource training for all staff who have not received it.

Agencies may delegate consultation to non-state funding recipients, but shall retain oversight and maintain records.

Part IV: Agency-specific Policy & Guidance

The Centennial Accord requires all state agencies to develop a Tribal consultation policy, known as a Centennial Accord Plan.⁸² These plans “establish a procedure by which the government-to-government policy shall be implemented.”⁸³ Centennial Accord Plans generally include a list of programs, funding distribution, definitions, consultation process, and dispute resolution process.⁸⁴ Plans vary among state agencies but the basic policy and guidance included in government-to-government implementation guidelines should steer the development of these Plans and “be embraced by both state and tribal officials.”⁸⁵

A. Department of Natural Resources

The Washington Department of Natural Resources (DNR)’s Tribal Government Consultation Policy supports the development of collaborative relationships by providing a process through which communication, consultation, coordination, and partnership can occur.⁸⁶ This policy builds on the Commissioner’s Order on Tribal Relations, which provides guidelines for government-to-government consultation when “proposed policies, programs or actions are identified by DNR as having an effect on a federally recognized [T]ribe.”⁸⁷

The policy defines consultation as “an open and continuous exchange of information that leads to mutual understanding and informed decision making between the agency and

⁸² Centennial Accord Between the Federally Recognized Indian Tribes in Washington State and the State of Washington, Aug. 4, 1989. This requirement is statutorily reinforced. WASH. REV. CODE § 43.376.020.

⁸³ *Id.*

⁸⁴ New Millenium Agreement, Government-to-Government Implementation Guidelines, § 4 (Nov. 1-3, 1999).

⁸⁵ *Id.*

⁸⁶ WASH. DEP’T OF NAT. RES., TRIBAL GOVERNMENT CONSULTATION POLICY (Jan. 2023).

⁸⁷ *Id.* (quoting Commissioner of Public Lands, Commissioner’s Order #201029, Tribal Relations 3 (Sept. 10, 2010)).

Tribal Governments.”⁸⁸ Additionally, the policy provides that communication must happen early in the process, and must include all relevant information, including information requested by the Tribe, in order to ensure that the consultation is meaningful.⁸⁹ In addition to early communication, the policy also notes that a second consultation, when the project is more fully developed, may be necessary to further promote meaningful engagement.⁹⁰

When DNR begins to develop a proposed policy or action, it must use the Washington State Department of Archaeological + Historic Preservation Tribal Consultation Map to identify and notify Tribes with interests known to overlap project areas, including when Tribal land or known Usual and Accustomed areas overlap with project areas.⁹¹ The contacted Tribes will determine whether their interests are affected by the proposed policy or action and may decide whether to participate in the consultation process.⁹² While the policy specifically provides that Tribal interests may include “any potentially impacted archaeology resources, cultural resources, traditional materials, traditional places, or areas of historical significance,”⁹³ it also provides that “only Tribes can ultimately determine what may affect them, therefore all DNR policies, agreements, or program implementation may be of interest to Tribes.”⁹⁴

B. Department of Fish and Wildlife

Signed in 1998, the Washington Department of Fish and Wildlife (WDFW) Commission’s Tribal Hunting Coordination policy directs the WDFW to work with Tribal nations on hunting issues.⁹⁵ The policy recognizes that a co-management relationship exists and acknowledges

⁸⁸ *Id.* at 8.

⁸⁹ *Id.* at 4.

⁹⁰ *Id.* at 4.

⁹¹ *Id.* at 4. Definition of Usual and Accustomed Areas: “Every fishing location where members of a Tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the Tribe, and whether or not other [T]ribes then also fished in the same waters.” *Id.* at 8.

⁹² *Id.* at 4.

⁹³ *Id.* at 4.

⁹⁴ *Id.* at 8.

⁹⁵ WASH. DEP’T OF FISH & WILDLIFE, POLICY C-3607, TRIBAL HUNTING COORDINATION (Apr. 2, 1998). Hunting cooperative management is also a directive of the WDFW’s Game Management Plans. Additionally, WDFW and some Tribal nations have entered into cooperative management agreements and Memorandums of Agreement and Understanding. *WDWF and Tribal Wildlife Management*, WASH. DEP’T OF FISH & WILDLIFE, <https://wdfw.wa.gov/hunting/management/tribal/wildlife> (last visited Sept. 18, 2024).

the sovereignty of federally recognized Tribes.⁹⁶ The Commission adopted five key policies designed to guide WDFW in developing relationships with Tribes:

- (1) Work cooperatively with Tribal government representatives in an effort to resolve issues through direct communication and negotiation;
- (2) Support Tribal self-determination, self-regulation, enforcement, and prosecution;
- (3) Engage Tribal representatives in wildlife management decision making processes that affect Tribal hunting;
- (4) Work with Tribes to develop an information and data exchange system that supports parties' ability to communicate and identify resource and hunting issues;
- (5) Develop enforcement protocols in cooperation with Tribal governments to guide WDFW officers in their contacts with Tribal hunters.⁹⁷

C. Attorney General's Office

In 2019, the Washington State Office of the Attorney General (AGO) incorporated "free, prior, and informed consent" (FPIC) language into its Centennial Accord Plan.⁹⁸ Unless prior consent is received, the AGO "will not initiate an AGO program or project that directly affects a Tribe that the AGO undertakes under the independent authority of the Attorney General."⁹⁹ However, "consent will not be requested on broad issues that impact many or all Washington Tribes, because a requirement for 'consensus' from all affected Tribal governments would be both impractical and inconsistent" with Tribal sovereignty.¹⁰⁰ Further, "consent will not be requested related to AGO investigations, litigation, employment and other internal business decisions."¹⁰¹ As such, the policy "only applies to procedures for requesting and obtaining consent for AGO-specific projects and initiatives."¹⁰²

The AGO will provide notice to a Tribe prior to proposing legislation that may directly affect the Tribe, its rights, or its Tribal lands, and also when filing an amicus brief affecting these rights.¹⁰³ The AGO will also provide notice to Tribes after filing a ballot title for a state initiative or referendum measure that directly affects Tribes, rights, or Tribal lands.¹⁰⁴ Further, the AGO will consult with a Tribe prior to filing civil litigation against a Tribe or

⁹⁶ WASH. DEP'T OF FISH & WILDLIFE, POLICY C-3607, TRIBAL HUNTING COORDINATION (Apr. 2, 1998).

⁹⁷ *Id.*

⁹⁸ WASH. STATE OFFICE OF THE ATTORNEY GENERAL, CENTENNIAL ACCORD PLAN (May 10, 2019).

⁹⁹ *Id.* § IV(A)(1).

¹⁰⁰ *Id.* § IV(A)(3).

¹⁰¹ *Id.* § IV(A)(1).

¹⁰² Bart J. Freedman et al., *U.S. Environment, Land and Natural Resources Alert*, K&L GATES (May 20, 2019) <https://www.klgates.com/Washington-Attorney-General-Announces-New-Policy-to-Seek-Tribes-Consent-05-20-2019>.

¹⁰³ WASH. STATE OFFICE OF THE ATTORNEY GENERAL, CENTENNIAL ACCORD PLAN § VII (May 10, 2019).

¹⁰⁴ *Id.*

Tribe-owned business, “[t]o the extent consistent with the Rules of Professional Conduct, and with the goal to avoid litigation.”¹⁰⁵ The AGO requests consultation by sending notice to a Tribe to accept or decline consultation, which the Tribe generally has 30 days to respond to.¹⁰⁶ If the Tribe does not respond within the 30 day period, the AGO may conclude the Tribe has declined consultation.¹⁰⁷ If a Tribe accepts consultation, the AGO must work in good faith to address the Tribe’s concerns and provide a detailed response to the Tribe’s feedback and concerns.¹⁰⁸

However, the AGO is not a permitting agency. Therefore, the FPIC policy does not apply to development projects that may affect a Tribe, its rights, or its Tribal lands.¹⁰⁹ One firm opines that, “the precise impact of [the FPIC] policy is unclear as agencies commonly consult with [T]ribes during the environmental review process [...], but absent a violation of treaty rights, [T]ribal consent is usually not required.”¹¹⁰

Part V: Local Consultation Policies

A general survey of cities and counties in Washington did not reveal any policies regarding Tribal consultation. However, the city of Seattle has a Tribal Relations Director responsible for “government-to-government consultation and coordination between area [T]ribes and the City of Seattle.”¹¹¹ The city partners with Tribes on “cultural and natural resource protection, fish and wildlife habitat, and other major projects.”¹¹² Further, the Tribal Relations Director works to ensure that tribal sovereignty and treaty rights are recognized throughout the city’s projects.¹¹³

In 2023, the city hosted a Tribal Nations Summit that included representation from Tribal Nations, Urban Indian Organizations, the City of Seattle, King County, and an Indigenous

¹⁰⁵ *Id.* § V; see *AG Ferguson Announces Historic Tribal Consent and Consultation Policy*, WASH. STATE OFFICE OF THE ATTORNEY GENERAL (May 10, 2019) <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-historic-tribal-consent-and-consultation-policy> (“The policy calls for the Attorney General or his or her Chief Deputy to personally participate in the consultation whenever feasible.”).

¹⁰⁶ WASH. STATE OFFICE OF THE ATTORNEY GENERAL, CENTENNIAL ACCORD PLAN § V(B) (May 10, 2019) (stating if a statute of limitations, court rule, or other factor requires the AGO to provide less than 30 days notice, the AGO will clearly identify the deadline in the notice and make every reasonable effort to consult within the time available).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* § V(C).

¹⁰⁹ Freedman, *supra* note 94.

¹¹⁰ Freedman, *supra* note 94.

¹¹¹ *Tribal Relations*, CITY OF SEATTLE, <https://www.seattle.gov/oir/tribal-relations> (last visited Sept. 18, 2024).

¹¹² *Id.*

¹¹³ *Id.*

Advisory Council.¹¹⁴ One of the key themes was the need for intergovernmental communication, consultation, and collaboration, which includes early and frequent engagement in consultation on any policy or action that may impact Tribal interests.¹¹⁵ Tribal leaders requested that the city develop a citywide Tribal consultation policy based on free, prior, and informed consent.¹¹⁶

Part VI: Substantive Consultation Requirements Analysis

A. Recognition of Tribal Sovereignty

The Centennial Accord was executed as an agreement between the State of Washington and the federally recognized Tribes of Washington as sovereign governments, and is founded on the authority provided by the respective sovereignty of the state and each federally recognized Tribe.¹¹⁷ Additionally, it provides that each party respects the sovereignty of the others, and the execution of the agreement does not constitute any waiving of rights, including treaty rights, immunities, or jurisdiction.¹¹⁸ This is reiterated in the Millenium Agreement Implementing Guidelines, which defines Tribal sovereignty as “inherent.”¹¹⁹ Both documents recognize the relationship between the parties as “government-to-government.”¹²⁰ These principles are reaffirmed in each of the agency policies developed pursuant to the Centennial Accord and the Millenium Agreement Implementing Guidelines.

B. Confidentiality

While confidentiality is not addressed in the Centennial Accord, the Millenium Agreement Implementing Guidelines recognizes that Tribes may be hesitant to share some information without a guarantee of confidentiality, and that in some cases confidentiality may not be negotiable.¹²¹ Notably, the state agency policies do not include confidentiality provisions. This may be because the Millenium Agreement Implementing Guidelines does not identify confidentiality as a key component of agency Centennial Accord Plans.¹²²

¹¹⁴ CITY OF SEATTLE, TRIBAL NATIONS SUMMIT SUMMARY REPORT (Aug. 2023).

¹¹⁵ *Id.* at 12.

¹¹⁶ *Id.* at 12. The city has affirmed these principles in a resolution supporting the Green New Deal.

¹¹⁷ Centennial Accord Between the Federally Recognized Indian Tribes in Washington State and the State of Washington, Aug. 4, 1989.

¹¹⁸ *Id.*

¹¹⁹ New Millenium Agreement, Government-to-Government Implementation Guidelines § I (Nov. 1-3, 1999).

¹²⁰ *Id.*; Centennial Accord Between the Federally Recognized Indian Tribes in Washington State and the State of Washington, Aug. 4, 1989.

¹²¹ New Millenium Agreement, Government-to-Government Implementation Guidelines § II (Nov. 1-3, 1999).

¹²² *Id.* § IV.

C. Subject of Consultation

The language used by the majority of the discussed policies is “issues of concern to the parties” or “issues of mutual concern.” The only policy to more specifically define the scope of what is subject to consultation is WDWF, whose policy provides that the agency will engage Tribes in its “decision making processes relative to wildlife management issues that affect Tribal hunting.”¹²³ However, it also provides that the WDWF will work with Tribal governments to resolve “all issues.”

D. Relationship Building

The Millenium Agreement Implementation Guidelines include “build[ing] upon already established and ongoing relationships between [T]ribal/state officials” as one of the guiding principles of the consultation process.¹²⁴ This is in recognition that ongoing relationships can improve the productivity of programmatic and policy development, as well as contributing to more efficient use of resources for all parties.¹²⁵

DNR’s policy speaks most directly to the fostering of ongoing relationships. The policy begins by addressing the broader context of the agency’s relationships with Tribes:

Tribal Nations are partners to the Washington State Department of Natural Resources (DNR) in stewardship and management of our shared public lands, waters, and resources. DNR recognizes that this partnership is situated within the context of a history of colonization and decisions and actions by the State which have and continue to harm Tribal communities and their traditional practices of resource management and their access to and exercise of Tribal rights and resources. This policy is written in an effort to foster mutual respect, and establish regular and meaningful consultation and collaboration with Tribal officials in the development of State policies that have Tribal implications. DNR seeks to strengthen the government-to-government relationship with Tribes that share territory with and have interests in Washington State.¹²⁶

¹²³ WASH. DEP’T OF FISH & WILDLIFE, POLICY C-3607, TRIBAL HUNTING COORDINATION (Apr. 2, 1998).

¹²⁴ New Millenium Agreement, Government-to-Government Implementation Guidelines § II (Nov. 1-3, 1999).

¹²⁵ *Id.*

¹²⁶ WASH. DEP’T OF NAT. RES., TRIBAL GOVERNMENT CONSULTATION POLICY 2 (Jan. 2023).

The policy also provides that DNR shall build upon on-going relationships, referencing the Implementation Guideline's principle that ongoing relationships can improve development activities and improve resource efficiency.¹²⁷ In order to strengthen such relationships, agency staff are encouraged to "communicate, collaborate, and partner" with the Tribes, either in coordination with formal consultation or before or after formal consultation activities.¹²⁸ The policy also recommends that agency staff look for partnership opportunities, as well as invite Tribes to co-develop policies and actions to proactively address potential issues.¹²⁹

The WDWF policy also addresses ongoing relationship building activities, providing that the agency and Tribes will jointly develop an information exchange system that supports collective identification of resource and hunting concerns and develop enforcement protocols that guide interactions between WDWF officers and Tribal hunters.¹³⁰

Part VII: Conclusion

Tribal consultation requirements can be found throughout various components of Washington's governance scheme, including agreements with federally recognized Tribes, state law, and agency policy documents. There is a wide variety with respect to how thorough the procedural requirements are and the level of deference granted to Tribes and their expertise. For example, the policy developed by the Attorney General's office has the strictest standard, requiring that the office obtain "free, prior, and informed consent." However, the office is not nearly as active in environmental, planning, and cultural resource protection activities as other agencies.

There is also variation between the different laws that require Tribal consultation. While the Growth Management Act prescribes opportunities Tribes to voluntarily participate in local government's planning activities, including comprehensive planning processes, designation of urban growth areas, and the development of countywide planning policies, the State Environmental Policy Act's sections on land use planning only require local governments to provide notice to Tribes, along with other stakeholders.

While significant strides have been made in strengthening government-to-government relationships with Tribes over the last forty years, there is still significant room to make improvements in expanding the circumstances under which the state and its agencies are required to consult, improving the enforceability of consultation requirements, and further integrating Tribal perspectives into decision-making.

¹²⁷ *Id.* at 4.

¹²⁸ *Id.* at 3.

¹²⁹ *Id.* at 3.

¹³⁰ WASH. DEP'T OF FISH & WILDLIFE, POLICY C-3607, TRIBAL HUNTING COORDINATION (Apr. 2, 1998).