

WASHINGTON ATTORNEY GENERAL ANNOUNCES NEW POLICY TO SEEK TRIBES' CONSENT

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Washington Attorney General Bob Ferguson announced a new policy requiring "free, prior and informed consent" from tribes on Attorney General's Office ("AGO") projects or initiatives that could impact tribal interests, including tribal rights and lands. [1] Because the AGO is not a permitting agency, like the Department of Ecology or the Department of Natural Resources, the policy does not apply to development projects, unless an agency elects to follow it or adopts a similar policy. The precise impact of this policy is unclear as agencies commonly consult with tribes during the environmental review process under the State Environmental Policy Act, but absent a violation of treaty rights, tribal consent is usually not required.

The policy requires the AGO to seek written approval for AGO projects or initiatives that tangibly affect tribes. If an affected tribe does not provide written approval, the AGO will ask the tribe to consult to address the objections. The policy also requires "meaningful notice" to federally recognized tribes in the state "prior to proposing legislation or filing an amicus brief that may directly affect tribes or tribal lands, and after issuing a ballot statement on an initiative that may directly affect tribes or tribal lands." [2] Notably, Ferguson said he would propose a bill in 2020 "to memorialize and preserve this policy in statute." [3]

The consent requirement does not apply to investigations, litigation, employment or internal business decisions, or to "AGO actions on behalf of any other entity in the AGO's role as legal counsel to state officials, agencies, departments, boards and commissions." [4] The policy specifically exempts those AGO activities from consent. In a public statement announcing the policy, however, Ferguson suggested other state agencies should follow a similar path: "I hope other government agencies across the state and the country take notice and consider similar steps." Ferguson also announced that the AGO will "refrain from filing any litigation against a tribal government or tribal-owned businesses without first engaging in meaningful consultation to resolve the dispute, provided that doing so does not violate the rules of professional conduct." [5] This leaves open the possibility for state agencies the AGO represents in litigation to ask the AGO not to engage in tribal consultation before taking a dispute to court, like the Department of Ecology on environmental matters or the Department of Revenue on taxing issues.

The new policy was formed in collaboration with tribal governments. The Quinault tribe issued a statement saying that through the policy, "Attorney General Ferguson has listened to, learned from, and followed through on the advocacy of countless Native American leaders nationwide and Indigenous leaders globally who have defended the sovereignty and rights of their peoples." [6] Samish Indian National Chairman Tom Wooten said Ferguson "took a historic step forward in the relationship between Washington State and Washington's tribes." [7]

This policy is similar to other state and federal tribal consultation requirements. Pursuant to Executive Order 13175, for example, executive departments and agencies of the federal government are required to "engag[e] in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies

that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes." [8] While the language of the new policy seems stronger than the Executive Order because it requires consent, it is also more limited in scope, as it applies only to AGO projects and initiatives and excludes key functions of the AGO, such as investigations and litigation.

The policy is likely, at least in part, a response to Washington's high-profile battles with tribes in several cases in recent years, including the dispute over the state's obligation to replace culverts to protect tribal fishing. You can read more about this case in our previous alerts, available here: <http://www.klgates.com/scotus-affirms-ninth-circuit-culvert-case-06-15-2018/> and <http://www.klgates.com/implications-of-the-ninth-circuits-recent-culvert-case-for-government-and-private-entities-responsible-for-conditions-that-limit-salmon-runs-in-the-pacific-northwest/>.

Ultimately, the policy only applies to procedures for requesting and obtaining consent for AGO-specific projects and initiatives. It could, however, signal a shift in relations between the State of Washington and tribal governments that may have more concrete impacts in the future. We will continue to monitor the impacts of this policy and any upcoming legislative efforts that might be used to extend the policy to other agencies.

NOTES:

[1] The Tribal Consent & Consultation Policy is available at <https://www.atg.wa.gov/tribal-consent-consultation-policy>.

[2] AG Ferguson Announces Historic Tribal Consent and Consultation Policy, Washington 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>.

[3] Id.

[4] The Tribal Consent & Consultation Policy Section IV(A)(2), available at <https://www.atg.wa.gov/tribal-consent-consultation-policy>.

[5] Id.

[6] Id.

[7] Id.

[8] Memorandum for the Heads of Executive Departments and Agencies, Subject: Tribal Consultation, President Barack Obama, 74 Fed. Reg. 57881, 57881 (Nov. 5, 2009).

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