BAAJA Protects Tribal Consultation from ACHP's Regulatory Rollback

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Section 106 of the National Historic Preservation Act (NHPA) and its current implementing regulations require federal government agencies to consult with Tribes over projects that may adversely affect religiously and culturally significant Tribal sites. But **key portions of Section 106 review exist today only in regulation, not in statute**. This gives the Trump Administration power over whether Tribes are consulted, and whether places important to them are protected.

The Bipartisan American Affordability and Jobs Act (BAAJA), especially after the changes in the Manager's Amendment, **protects against this regulatory rollback**: it codifies important protections for Tribes into Section 106 and requires agencies to involve Tribes at each step of review. For a more detailed look at all the changes to Tribal consultation under NHPA, please see our in-depth report.

The Manager's Amendment responds to concerns by Tribal groups and protects Tribal consultation from regulatory rollback by adding to BAAJA:

- **Mandatory involvement by Tribes at each step.** The bill now requires Tribal involvement at every stage of the Section 106 process, a process that under current law makes no mention of Tribes or Tribal consultation.
- **Tribal review of every agency finding.** Agencies must send Tribes a report on every undertaking, including findings that a project will have no adverse effects. Tribes have 45 days to object to such reports, and the agency must respond in writing.
- **Notice to every consulting Tribe.** Agencies must notify each consulting Tribe of a final decision, after which there is an opportunity to challenge the decision in court.
- **Data sovereignty for Tribal information.** Information in Tribal databases is exempt from disclosure under the Freedom of Information Act, protecting sacred or culturally important sites that Tribes prefer not to be disclosed.
- **No federal takeover of Tribal Historic Preservation Offices (THPOs).** Tribes objected to a provision requiring Interior to assume a THPO's functions. The amendment removes that provision with a mechanism for a corrective action plan instead.
- **No federal control over THPOs' workweek.** The amendment also removes THPOs from the bill's requirement to spend a percentage of the workweek on NHPA matters if not in compliance with the Act's timelines.

Regulatory rollback is happening right now. In July 2026, the Advisory Council on Historic Preservation (ACHP) **voted to change those regulations** — a move the National Association of Tribal Historic Preservation Officers called an "**affront to Tribal sovereignty.**"

The administration's draft rule would narrow Tribal involvement sharply. The draft rule:

- **Excludes natural sacred places entirely.** A historic property would have to include "tangible human improvements" *and* be "geographically compact." The draft expressly provides that "mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify."
- **Makes early Tribal consultation optional.** Agencies would write a "Section 106 Report," and consultation before it is finished would be optional. A Tribe invited to "early consultation" would have 15 days to confirm participation or it is waived.
- **Removes the requirement to seek agreement on mitigation or avoidance.** Agencies would be able to end historic preservation review with a "memorandum of decision" instead of an agreement, and every agreement must include a covenant not to sue.
- **Writes the government-to-government framework out of the regulation altogether.** The proposed rule would delete the regulations' references to Tribal sovereignty, Tribes' government-to-government relationship with the United States, Tribes' special expertise, and references to ancestral, aboriginal, and ceded lands.

BAAJA after the Manager's Amendment protects against this rollback in several respects:

Protection	**Current regulations**	**ACHP draft rule**	**BAAJA**
Statutory duty to consult Tribes (§ 302706(b))	**Yes.** Statute	**Yes.** Statute; a rule cannot change it	**Yes.** Unchanged
Consultation begins early	**Yes,** by regulation	**No,** optional before the agency's report	**Yes,** by statute: no later than the start of environmental review
Eligibility for natural features (mountains, springs, landscapes)	**Yes,** under non-binding National Park Service guidance	**No,** expressly excluded	**Same as current law,** under NPS guidance.
Agency must seek and use Tribal information to identify sites	**Yes,** by regulation	**Partly,** but consultation is optional	**Yes,** by statute

Protection	Current regulations	ACHP draft rule	BAAJA
Tribes review the agency's findings	**Yes,** by regulation	**Yes,** with silence treated as waiver	**Yes,** by statute, for every finding, including no adverse effect; 45 days to object, with a written agency response required
Adverse effects resolved in consultation with Tribes	**Yes,** by regulation	**No,** agency may end review by memorandum of decision	**Partly,** by statute: decided "in consultation with" Tribes, plus a further 60-day consultation if no agreement

If BAAJA becomes law, the executive branch will not have discretion (including in its current ACHP proposal) to reduce Tribal involvement and consultation under the statutory floor: Tribes will stay involved in the process at each step. And a new regulation could add additional protections or Tribal involvement mechanisms.

Without BAAJA, Tribes face the ACHP rule already voted on, then years of litigation and a new administration's rulemaking process to attempt to reverse it. **Since the *Loper Bright* Supreme Court case ended *Chevron* deference, a future ACHP will find it harder, if not impossible, to restore protections that go beyond what NHPA Section 106 spells out in its current text that is only two sentences long.**

BAAJA also invests in Tribal capacity. It authorizes $20 million a year for databases of religious or culturally significant places that would be protected from public disclosure. It also directs Interior to work with Tribes to develop THPO qualifications, and authorizes $200 million a year for the Historic Preservation Fund, which supports THPOs and SHPOs.

What BAAJA does and does not change. NHPA's Tribal consultation requirement, THPO authority, and other sources of duties to Tribes (treaties, the trust responsibility, Native American Graves Protection and Repatriation Act (NAGPRA) protections, and consultation executive orders) are unchanged in BAAJA. The bill does narrow Section 106 in other ways: it limits indirect visual and cumulative effects, excludes projects that are federally funded but require no permit from Section 106 review (but not Department of Transportation projects receiving more than $10 million), sets deadlines, and limits remedies. But on many Tribal priorities, including whether Tribes have a seat at every step in the process, BAAJA is more protective than ACHP's proposed rule — and it is durable.

While it includes compromises in some areas, BAAJA codifies Tribal protections and would stop the current administration from ending those protections.