

## **BAAJA protects Tribal consultation from ACHP's regulatory rollback**

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 harm 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.

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 Bipartisan American Affordability and Jobs Act (BAAJA) **protects against this regulatory rollback**: it codifies important protections for Tribes into Section 106 and would ensure natural features important to Tribes can be treated as historic properties under NHPA. For a detailed look at all the changes to Tribal consultation under NHPA, please see my in-depth report, available [here](#).

**The administration's draft rule would narrow Tribal protections 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” that Tribes have only 15 days to provide “early” consultation over, or waive;
- **remove 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;
- **write 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 to ancestral, aboriginal, and ceded lands.<sup>1</sup>

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<sup>1</sup> ACHP, [ACHP Votes to Move Forward with Notice of Proposed Rulemaking](#) (July 2026); NATHPO, [July 2026 Updates](#)

**BAAJA protects against this rollback in several respects – as the table below makes clear.**

| <b>Protection</b>                                                 | <b>Current regulations</b>                                                   | <b>ACHP draft rule</b>                                           | <b>BAAJA</b>                                                                                     |
|-------------------------------------------------------------------|------------------------------------------------------------------------------|------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|
| Statutory duty to consult Tribes (§ 302706(b))                    | <b>Yes.</b> Statute                                                          | <b>Yes.</b> Statute; a rule cannot change it                     | <b>Yes.</b> Unchanged                                                                            |
| Consultation begins early                                         | <b>Yes,</b> by regulation                                                    | <b>No,</b> optional before the agency's report                   | <b>Yes,</b> by statute: no later than the start of environmental review                          |
| Eligibility for natural features (mountains, springs, landscapes) | <b>Yes,</b> under non-binding National Parks Service guidance                | <b>No,</b> expressly excluded                                    | <b>Yes,</b> by statute: any “identifiable geographic location or feature”                        |
| Eligibility for places of religious or cultural importance        | <b>No.</b> Tribal site must be of “religious <i>and</i> cultural” importance | <b>No</b>                                                        | <b>Yes.</b> Either is enough – BAAJA is more protective than the current regulations and statute |
| Agency must seek and use Tribal information to identify sites     | <b>Yes,</b> by regulation                                                    | <b>Partly,</b> but consultation is optional                      | <b>Yes,</b> by statute                                                                           |
| Tribes review the agency's findings                               | <b>Yes,</b> by regulation                                                    | <b>Yes,</b> but only for 60 days, with silence treated as waiver | <b>Yes,</b> by statute                                                                           |
| Adverse effects resolved in consultation with Tribes              | <b>Yes,</b> by regulation                                                    | <b>No,</b> agency may end review by memorandum of decision       | <b>Yes,</b> by statute, plus a further 60-day consultation if no agreement                       |

If BAAJA becomes law, the executive branch does not have discretion – including in the current ACHP proposal – to reduce its protections: natural places stay eligible for listing

on the register of historic places and Tribes stay involved in the process at each step. And a new regulation could add additional protections.

**BAAJA also invests in Tribal capacity.** It authorizes \$20 million a year for creation of 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 qualification standards and authorizes \$200 million for THPOs and SHPOs.

**What BAAJA does and does not change.** NHPA's Tribal consultation requirement, THPO authority, or other sources of duties to Tribes (treaties, the trust responsibility, NAGPRA, and the 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, sets deadlines, and limits remedies. But on many Tribal priorities, through, including whether sacred natural places count and whether Tribes have a seat at every step in the process, BAAJA is more protective than ACHP's proposed rule — and it is durable.

**Without BAAJA,** Tribes face the narrowed ACHP rule now — ACHP has already voted in favor of it — then years of litigation and a new administration's rulemaking process to attempt to reverse it. Since *Loper Bright* 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 text that is only two sentences long.

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

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