Tribal consultation under the Bipartisan American Affordability and Jobs Act

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Executive Summary

The Bipartisan American Affordability and Jobs Act (BAAJA) would make some of the most substantial changes to Section 106 of the National Historic Preservation Act (NHPA) since its passage in 1966. Section 106 is a key procedural tool Tribes and Native Hawaiian Organizations (NHOs) use to protect sacred and culturally significant places located outside of Tribal lands.

Some Tribal organizations have been critical of the bill since it was introduced on September 30, 2026, and some called for its historic preservation title to be withdrawn (while other Tribes and Tribal organizations have endorsed the bill). The critiques focused on whether Tribes would be consulted at each stage of the review process; the lack of Tribal input on agency findings that a project would have no adverse effects on historic properties; an option for federal takeover of Tribal Historic Preservation Offices; and limits on court remedies. The Manager's Amendment released on November 6 responds to many of these concerns.

Our review of the relevant provisions of the bill, updated after the Manager's Amendment, reveals a nuanced picture. On balance, the amended bill is more favorable to Tribal interests than the realistic alternative — a status quo where the Advisory Council on Historic Preservation (ACHP) has voted to radically scale back Tribal involvement in the Section 106 process — and when compared to the bill as originally introduced.

Six conclusions follow from our analysis of the bill as amended:

1. **BAAJA does not change the legal foundations of Tribal consultation.** The NHPA's Tribal consultation requirement, Section 101(d)(6)(B), is unchanged in BAAJA. So, too, is Tribes' authority under NHPA to operate their own Tribal Historic Preservation Offices. And every source of federal obligations to Tribes outside the NHPA also remains the same: treaties, the trust responsibility, the government-to-government relationship, executive orders, and statutes like the Native American Graves Protection and Repatriation Act (NAGPRA) and the Religious Freedom Restoration Act (RFRA).

2. **BAAJA writes Tribal participation into the Section 106 process for the first time and authorizes new funding for Tribal Historic Preservation Officers (THPOs).** Today, the Tribal role at each stage of review exists only in regulations that ACHP can change by rule — and is now proposing to change in a way that cuts Tribes out. As amended, BAAJA requires agencies to solicit information from Tribes, to submit a report on every undertaking to Tribes for review (including findings that a project

would have no adverse effects), to respond in writing to Tribal objections, and to decide how to address adverse effects in consultation with Tribes. It starts consultation earlier, names and requires involvement by Tribes at each statutory step, and requires notice of the final decision to every consulting Tribe. It also directs significant resources to addressing two of the major problems Tribal Historic Preservation Officers have faced, including a new grant program for Tribal databases of culturally significant places (kept from public disclosure, and exempt from the Freedom of Information Act, to protect the sites and Tribal information preferences). BAAJA also authorizes $200 million a year for the Historic Preservation Fund for ten years and $20 million a year for four years for the Tribal databases, subject to annual appropriations.

3. **The Manager's Amendment responds directly to the most specific Tribal concerns.** The amendment strikes the provision that let agencies decide whether to consult Tribes when identifying historic properties; requires Tribal review of every finding (including findings of no adverse effect); extends the time to object from 30 to 45 days; replaces the much-criticized optional federal takeover of Tribal Historic Preservation Offices with a new provision allowing for corrective action plans and technical assistance; removes Tribal officials from the bill's requirement to work a fixed period of time in a given workweek if not in compliance with the statute; and gives every consulting Tribe notice of the final decision, with the deadline to sue beginning at that notice. The amendment also strikes the bill's definition of properties of traditional religious or cultural importance, which some critics read as too narrow, so the statute neither narrows nor expands which Tribal places qualify. Without a statutory definition, whether a Tribal place qualifies is decided under the National Register criteria (as it is today) as applied through National Park Service guidance on traditional cultural places. That guidance, updated in 2024, recognizes that natural places such as mountains, springs, and landscapes can be eligible. But it is not binding and could be revised directly or via ACHP action like the draft rule.

4. **BAAJA streamlines Section 106 generally, in ways that affect Tribal interests.** Under BAAJA, federally permitted projects on Tribal land, or federally permitted projects that may physically damage or alter a Tribal religious or cultural site, remain subject to Section 106, and the agency must consult with the affected Tribe (though under the bill's new deadlines and procedures). However, BAAJA limits indirect visual, audible, and cumulative effects agencies must consider, removes most federally funded projects that require no federal approval from review (still, projects receiving more than $10 million in Department of Transportation assistance remain covered), imposes deadlines, and limits court remedies. So a project whose only effect on a site is indirect or attenuated, such as being visible in the distance

from a Tribal site but not affecting the elements of the site that make it significant, would generally no longer have an adverse effect on that site under the Act, and so would not require the agency to resolve adverse effects on it; nonetheless, Tribes would still review the agency's finding and could propose mitigation measures. And BAAJA subjects Tribal Historic Preservation Officers to new timeliness requirements, backed by possible suspension of grants, if a program found inconsistent with the Act is not corrected within two years under a corrective action plan.

5. **BAAJA is more protective of Tribal consultation than the status quo.** The background context for BAAJA's statutory changes is critical. ACHP has voted to advance a proposed rule that would restrict Tribal involvement significantly: requiring human-made improvements for a place to qualify as historic — excluding natural sites like mountains, springs, etc. entirely — making Tribal participation in key stages discretionary, and deleting the regulations' recognition of Tribal sovereignty and ancestral lands. BAAJA's statutory protections for Tribal participation override many negative consequences of that rule. Without BAAJA, Tribes face a less protective rule now and years of regulatory reversal and litigation afterward, in a legal environment much less favorable to broad regulatory protections than the one that produced the current rules. Without BAAJA, Section 106 of the NHPA — on which ACHP's rules are based — is only two sentences long. This makes it very difficult for a future administration to go back to the Biden-era 106 rule that many Tribes prefer.

6. **BAAJA is a generational opportunity for Tribal clean energy and jobs.** Tribal communities and their culturally and religiously significant sites are among the most exposed to climate change. BAAJA is the most sweeping recent bill to advance clean energy and climate goals. The bill is also the best attempt to level the playing field for renewable energy in years. Tribal lands hold a disproportionate share of the nation's renewable energy potential. The bill's transmission, interconnection, and permitting reforms, together with new Tribal authority over rights-of-way and long-term leasing on Tribal land, address the barriers that have kept that potential — and the jobs and opportunities it brings — from being built.

Consultation between Tribes and the US

The National Historic Preservation Act is one important part of a larger legal tapestry that governs the relationship between federally-recognized Tribes and the Federal government. Treaties between the United States and Tribal governments are the supreme law of the land, and reserve rights that agencies must respect when they act, such as the right to hunt, fish, and gather on ceded lands.[1] The federal trust responsibility shapes how the United States manages Tribal lands and resources.[2] And by Executive Order 13175, the federal government has committed to consult affected Tribal governments on regulations and policies with substantial direct effects on them; nearly every agency has adopted a Tribal consultation policy to implement this Order.[3] A related Executive Order directs land management agencies to accommodate ceremonial use of sacred sites on federal land and to avoid adversely affecting them.[4]

Additional statutes also apply: the Native American Graves Protection and Repatriation Act (NAGPRA) sets federal standards for cultural items on federal and Tribal lands; the Archaeological Resources Protection Act (ARPA) requires permits for actions that may harm religious or cultural sites; the Religious Freedom Restoration Act (RFRA) prohibits the federal government from substantially burdening a Tribal member's exercise of religion unless it proves that the burden furthers a compelling governmental interest using the least restrictive means; and the American Indian Religious Freedom Act (AIRFA) declares a federal policy to respect American Indians' religious practice.[5]

Federal land management planning provides another opportunity for Tribal input on federal decisions that have implications for properties of cultural or religious significance to Tribes. When the Bureau of Land Management and the Forest Service develop or revise land management plans, they generally provide public notice and opportunities to comment, allowing Tribes to raise concerns about sacred sites, cultural resources, and

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[1] *See, e.g.*, *United States v. Winans*, 198 U.S. 371, 381 (1905) (treaty as "a grant of rights from" the Tribe, reserving those not granted); *Herrera v. Wyoming*, 587 U.S. 329 (2019) (treaty hunting rights survive statehood).
[2] *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942); *United States v. Mitchell*, 463 U.S. 206, 225 (1983).
[3] Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (consultation on "policies that have tribal implications," defined as regulations, legislative comments or proposed legislation, and other policy statements or actions with substantial direct effects on Tribes).
[4] Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).
[5] 25 U.S.C. § 3002(c)–(d) (NAGPRA); 16 U.S.C. § 470cc(c) (ARPA); 42 U.S.C. § 1996 (AIRFA); but see *Lyng*, 485 U.S. 439 (Free Exercise Clause did not bar road through sacred area of national forest); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc) (RFRA); *Apache Stronghold v. United States*, 101 F.4th 1036 (9th Cir. 2024) (en banc), *cert. denied* (2025).

traditional uses before individual projects are proposed.[6] None of these laws, orders, or regulations are repealed by BAAJA.

Of course, the executive orders expressly create no enforceable rights and thus cannot, standing alone, form the basis of an action-mandating lawsuit.[7] Nor can the bare trust responsibility do so, absent a treaty or statute that imposes specific obligations.[8]

NHPA presents a much broader right, applying to any federal "undertaking," and giving Tribes an enforceable procedural role in assisting federal agencies in their compliance with the Act by consulting about the historic properties that matter to them. For sacred places on ancestral and ceded lands, it is often the only federal process in which a Tribe has a guaranteed seat at the table during federal decisionmaking.

NHPA's Tribal consultation provisions were added in 1992. They provide that properties of traditional religious and cultural importance to a Tribe or Native Hawaiian organization may be eligible for inclusion on the National Register, and require agencies to consult Tribes that attach religious and cultural significance to such properties. The 1992 amendments also authorized Tribes to assume the State Historic Preservation Officer's role on their own lands through Tribal Historic Preservation Officers (THPOs).[9] Those provisions remain the statutory core of Tribal consultation rights under NHPA.[10]

But Section 106 itself is remarkably brief: only two sentences long. And it does not mention Tribes. Tribal involvement in the Section 106 process comes only from regulations the Advisory Council on Historic Preservation (ACHP) issued in 2000 and amended in 2004.[11] Those regulations recognize the government-to-government relationship; require consultation "in a manner respectful of tribal sovereignty"; give Tribes a role at each stage of the Section 106 process, from identification through resolution; recognize that sacred places are often on ancestral, aboriginal, or ceded lands; and acknowledge Tribes' "special expertise" in evaluating these properties.[12] Because the consultation and Tribal role flow

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[6] *See* 43 U.S.C. § 1712(a), (f) (requiring public involvement in BLM land-use planning, including notice and opportunities to comment and participate); 36 C.F.R. § 219.4(a) (requiring public participation in Forest Service planning, early and ongoing engagement with interested or affected Tribes, and opportunities for Tribal consultation consistent with Executive Order 13175). These processes also address Tribal governments' own planning priorities: FLPMA directs coordination with Tribal land-use planning and consideration of Tribal resource-management policies, 43 U.S.C. § 1712(b), (c)(9), and the Forest Service's planning rule requires coordination with Tribal planning efforts and review of relevant Tribal plans and policies, 36 C.F.R. § 219.4(b).
[7] Exec. Order No. 13,175 § 10; Exec. Order No. 13,007 § 4.
[8] *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011); *Arizona v. Navajo Nation*, 599 U.S. 555 (2023) (1868 treaty did not impose an affirmative duty to secure water for the Tribe). AIRFA likewise creates no cause of action. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988).
[9] Pub. L. No. 102-575, tit. XL, § 4006 (1992).
[10] 54 U.S.C. §§ 302702, 302706(a)–(b) (originally NHPA §§ 101(d)(2), (d)(6)(A)–(B)).
[11] 36 C.F.R. pt. 800; 65 Fed. Reg. 77,698 (Dec. 12, 2000); 69 Fed. Reg. 40,544 (July 6, 2004).
[12] 36 C.F.R. § 800.2(c)(2)(ii); § 800.4(a)(4), (c)(1).

from regulations, rather than the text of NHPA itself, ACHP can revise or remove them by rule, as it voted to do in 2026. The central question for Tribes and any interested parties who value Tribal participation in historic review is therefore **not only what BAAJA changes, but what the status quo without BAAJA changes as well, and how the two compare.**

What BAAJA does not change

BAAJA does not amend or repeal the Tribal consultation requirement in NHPA Section 101.[13] Nor does it amend or repeal the authorization for THPOs, nor the section that protects the confidentiality of information about the location and character of sensitive historic properties.[14] It does not amend any treaty, executive order, or statute discussed above. The manager's amendment also states expressly that its new oversight provisions for Tribal historic preservation programs do not relieve any federal agency of its duty to consult with Tribes under Section 101.[15]

The manager's amendment further leaves Section 101's description of the places Tribes are consulted about unchanged. As introduced, BAAJA would have changed "traditional religious and cultural importance" to "traditional religious or cultural importance" and added the first statutory definition of these properties. Some critics read that definition as narrowing eligibility, for example by requiring that an "event" have "occurred" at a place. The manager's amendment strikes both changes. Properties of traditional religious and cultural importance therefore remain eligible for the National Register as they are today, under the National Register criteria and National Park Service (NPS) guidance. The tradeoff is that BAAJA no longer writes into statute a protection for natural places that a future rule, like ACHP's draft, could exclude (discussed below).[16]

BAAJA preserves the express statutory duty to consult. It does make changes to the Section 106 process, including in which places consultation occurs, how it is carried out, and how it can be enforced, as will be discussed more below. But as to how BAAJA would affect the paradigmatic case of direct harm to an off-site Tribal property, a point bears emphasis:

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[13] 54 U.S.C. § 302706(b). The manager's amendment struck the introduced bill's conforming change to this provision, so BAAJA leaves § 302706 unchanged. Unless otherwise noted, citations to proposed sections of title 54 in this brief are to S. 5653 as amended by the manager's amendment released November 6, 2026.

[14] 54 U.S.C. §§ 302702, 307103. BAAJA's only change to § 302702 is a conforming amendment to its cross-references to the program-evaluation provisions. BAAJA § 2301(a)(3).

[15] 54 U.S.C. § 302707(b)(6)(B) (as proposed).

[16] The manager's amendment strikes the introduced bill's amendments to 54 U.S.C. § 302706. See 54 U.S.C. § 302706(a)–(b); 36 C.F.R. § 60.4; National Park Service, National Register Bulletin: Identifying, Evaluating, and Documenting Traditional Cultural Places (Dec. 2024).

Under BAAJA, any undertaking causing direct physical effects to Tribal sites, including sites located off of Tribal land, would require consultation as it does today, using the bill's new deadlines and procedures. In the bill's definition, an adverse effect is a reasonably foreseeable consequence that directly alters the characteristics of a historic property in a way that diminishes its integrity.[17] Destruction of, damage to, or alteration of a Tribal cultural site remains an adverse effect requiring consultation.[18]

What BAAJA adds

BAAJA writes Tribes into the Section 106 process for the first time

For the first time, Tribes and Native Hawaiian organizations appear in the text of Section 106 itself, at each stage of the new statutory Section 106 process. This is a change from a process that has only existed in ACHP's regulations:

- **At the start.** Tribes have long objected to consultations that begin well into a project's compliance, not at the same time as the National Environmental Policy Act (NEPA) review and even after NEPA review is complete. Under BAAJA, Section 106 consultation must begin no later than the start of the environmental review.[19]
- **At the identification stage.** Under BAAJA, the agency "shall seek, discuss, as appropriate, and incorporate, as applicable" information from Tribes in establishing the area of potential effects and identifying historic properties, if the information is communicated within 30 days of the agency's request.[20] The amended bill titles this requirement "Mandatory solicitation of information," and the manager's amendment deleted the provision that had made consultation at this stage optional.
- **At the report and determination stage.** For every undertaking that could affect historic properties, the agency must prepare a report identifying the area of potential effects, any historic properties, and any adverse effects (or a finding that there are none), along with measures to avoid, minimize, or mitigate them. Within 60 days of determining that a project is an undertaking, the agency must "initiate consultation by submitting the report" to Tribes. Tribes have 45 days to object, and the agency must respond in writing to substantive objections.[21] The agency's

[17] 54 U.S.C. § 306108(a)(1)(A) (as proposed).
[18] Though not an "undertaking," a project whose only federal involvement is unconditioned funding (other than projects receiving more than $10 million in Department of Transportation assistance), could be an exception (see "Which projects are reviewed" below).
[19] *Id.* § 306108(c)(5)(A); The regulations direct agencies to begin "early," but set no fixed trigger. See 36 C.F.R. § 800.1(c). See https://thebreakthrough.org/issues/environmental-regulatory-reform/modernizing-preservation.
[20] 54 U.S.C. § 306108(c)(2)(B)(ii) (as proposed).
[21] Id. § 306108(c)(2)(B)(i), (iii); id. § 306108(c)(5)(C)(iii)–(iv).

determination on how to resolve adverse effects is made "in consultation with" Tribes, and any agreement resolving adverse effects is reached with them.[22]

- **If no agreement on adverse effects is reached.** If no agreement is reached, there is a further 60-day consultation period that includes Tribes, before ACHP's formal comments.[23]
- **At the final decision.** The agency must notify each consulting Tribe of its final decision, and the 150-day deadline to challenge that decision in court runs from that notice.[24]

The significance of writing Tribal involvement into the text of Section 106 for the first time cannot be overstated. Statutory text cannot be removed by an ACHP rule. If ACHP finalizes a regulation that conflicts with these provisions, the statute controls. If BAAJA is enacted, removing the Tribal role outlined above would require amending NHPA once again — something that has happened rarely since its passage in 1966.

Funding for Tribal historic preservation

THPO capacity has long been limited by funding. In 2024, Congress appropriated $23 million for THPO grants from the Historic Preservation Fund, distributed among about 235 THPOs, with individual awards ranging from about $83,000 to $181,000.[25] Those amounts support review of every federal undertaking on Tribal lands and participation in consultations elsewhere. BAAJA authorizes $200 million a year for the Historic Preservation Fund for fiscal years 2027 through 2036, subject to annual appropriations.[26] It also authorizes a new $20 million per year competitive grant program, for fiscal years 2027 through 2030, to facilitate THPO databases of Tribal records and properties of traditional religious and cultural importance. The grant includes express protection against public disclosure of information that could harm a property or impede its use by practitioners.[27] The manager's amendment adds that database information shared with federal agencies or State Historic Preservation Officers is exempt from disclosure under the Freedom of Information Act.

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[22] *Id.* § 306108(c)(3)(A).
[23] *Id.* § 306108(c)(3)(B)(i).
[24] 54 U.S.C. § 306108(c)(5)(C)(vii), (c)(9)(D)(i)(I)(bb) (as proposed).
[25] National Park Service, FY2024 Historic Preservation Fund: Annual Tribal Historic Preservation Office Grants (notice of funding opportunity); see also NCSHPO, Historic Preservation Fund 2024 Annual Report (total FY2024 HPF appropriation of $188.7 million).
[26] BAAJA § 2302(a) (amending 54 U.S.C. § 303102 to authorize appropriations "from the unappropriated balance of the Historic Preservation Fund on September 30, 2026, or the general fund of the Treasury"). The manager's amendment struck the introduced bill's provision making deposited amounts available without further appropriation. Current law provides $150 million a year in deposits through fiscal year 2026. 54 U.S.C. § 303102.
[27] BAAJA § 2302(b) (adding 54 U.S.C. § 302703(b)); see 54 U.S.C. § 302703(b)(3), (5) (as proposed) (protection against public disclosure; exemption from disclosure under 5 U.S.C. § 552(b)(3)).

THPO qualification standards and technical assistance

The Secretary of the Interior must collaborate with THPOs, Tribal leaders, and relevant nonprofit organizations to develop qualification standards for THPOs that reflect "the traditional knowledge, expertise, and access to traditional cultural leaders required for a successful tribal historic preservation program."[28] In addition, at a Tribe's request, the Secretary must provide technical assistance, training, and capacity support to its historic preservation program.

How BAAJA changes Section 106, as practiced under the current regulations

While BAAJA codifies consultation and Tribal participation in the Section 106 process in several ways, it also narrows Section 106 in four respects that affect Tribal interests: the effects agencies must consider, the projects subject to review, the time available for consultation, and the remedies available in court.

Effects agencies must consider

BAAJA narrows the effects that are considered to adversely affect a historic property.[29] Visual, atmospheric, and audible elements are not excluded entirely from consideration and can still be a basis to find an adverse effect. However, that effect must be "direct" and it must "significantly diminish the eligible characteristics of the historic property." Indirect visual, atmospheric or audible effects, or such effects that had an insignificant effect on the characteristics of a historic property, would no longer be a basis for an adverse effect finding. Effects that are not permanent have the same result: temporary effects during construction and effects on portions of a property that are not character-defining are excluded. So, too, with cumulative effects of other projects. The area agencies must study is, in turn, defined by these narrower effects.[30]

Which projects are reviewed

BAAJA also changes which projects trigger Section 106 review in the first instance. Under BAAJA, Section 106 review would be required, as it is in the status quo, for projects that require a federal permit, license, or approval and are subject to substantial federal control.

[28] 54 U.S.C. § 306108(c)(8) (as proposed); id. § 302707(c)(2) (technical assistance).
[29] 54 U.S.C. § 306108(a)(1), (a)(4) (as proposed). Compare 36 C.F.R. § 800.5(a)(1)–(2) (adverse effects include indirect, later-in-time, more distant, and cumulative effects, and the introduction of visual, atmospheric, or audible elements that diminish integrity; aspects of integrity include "feeling").
[30] 54 U.S.C. § 306108(a)(2) (as proposed).

These cover the vast majority of federal actions. But projects whose only federal involvement is funding (unless the funding is for historic preservation, or the project receives more than $10 million in Department of Transportation financial assistance) would not be included.[31] The manager's amendment also broadens an existing exclusion for minor restoration, repair, and maintenance work to cover "minor or routine" work. For a project that requires no federal approval, permit, or license but receives some federal funding, the consultation duty in NHPA no longer applies; it attaches to agencies "carrying out [their] responsibilities under section 306108."

Timelines and endpoints

- **Identification.** The Manager's Amendment deleted the provision making consultation at this stage something the agency "may" do. Formal consultation now begins when the agency submits its report, after it has drawn the area of potential effects and identified properties. Before then, the agency is required to seek and incorporate information Tribes provide within 30 days of a request.[32]
- **Non-response.** If a Tribe does not respond within 30 days to a request for review of a report or finding, the agency proceeds. A Tribe that has entered consultation has 45 days to raise substantive objections to the report, which the agency must answer in writing. A Tribe that re-enters after missing the 30-day deadline cannot require reconsideration of earlier findings. The manager's amendment removed the agency's option to consult ACHP in place of a Tribe, though ACHP may still stand in for a THPO.[33] The current regulations' comparable default applies to SHPOs and THPOs.[34]
- **Closing consultation.** Section 106 has never given any party a veto, and under current regulations an agency may terminate consultation and proceed after considering ACHP's comments.[35] BAAJA does not change this, but does make concluding consultation available at the outset. Under BAAJA an agency may determine at the outset that the adverse effects would not make the property ineligible for the National Register, or that "other considerations outweigh the consideration of historic preservation," and its obligations are satisfied.[36] In this scenario, the agency must first send Tribes its report, give them 45 days to object,

[31] Id. § 306108(a)(7)(B)(ii)–(iii). Current law includes projects "carried out with Federal financial assistance." 54 U.S.C. § 300320(2).
[32] 54 U.S.C. § 306108(c)(2)(B)(ii)–(iii) (as proposed). As introduced, S. 5653 provided that the agency "may consult" at this stage. S. 5653, 119th Cong. § 2301(c) (as introduced) (proposed 54 U.S.C. § 306108(c)(2)(B)(iii)). Compare 36 C.F.R. § 800.4(a)(4) (agency "shall" gather information from Tribes to assist in identifying properties, including those off Tribal lands).
[33] 54 U.S.C. § 306108(c)(5)(C)(i)–(iv) (as proposed).
[34] 36 C.F.R. § 800.3(c)(4).
[35] 36 C.F.R. § 800.7.
[36] 54 U.S.C. § 306108(c)(3)(A)(i)(II)–(III) (as proposed).

respond in writing to substantive objections, and make the determination itself "in consultation with" Tribes.

Judicial remedies

If a court finds a Section 106 violation, the only remedy is to send the matter back to the agency to fix within 180 days (a remand), without vacating the approval or enjoining the project. Preliminary or permanent injunctive relief on the basis of an NHPA violation alone would not be authorized.[37] The manager's amendment leaves these limits in place, but it makes two changes relevant to Tribes. First, the 150-day deadline to sue now begins at the notice of the final decision to each consulting Tribe. Second, challenges go to the court of appeals for the circuit where the project is located. This benefits all parties to a dispute, including Tribes, since it would make these cases skip a district court review and thus be resolved sooner. Remedies under substantive laws (Clean Air Act, Endangered Species Act, etc.) are unchanged.

THPO management

BAAJA directs the Secretary of the Interior to evaluate THPO programs at least every two years to determine whether each is consistent with the Act. A program is not consistent if its THPO "does not regularly comply with timelines for consultation, complete consultation expeditiously, or meet required metrics." The manager's amendment removed the introduced bill's enforcement provisions, instead creating a process for a THPO to get back on track. Before disapproving a program or suspending agreements, the Secretary must give the Tribe and its THPO a written determination explaining the finding, offer technical assistance, allow at least 180 days to submit a corrective action plan, and give a reasonable opportunity to carry it out. Only if a major aspect of the program remains inconsistent two years after that determination must the Secretary suspend Historic Preservation Fund and THPO grants and related agreements. The Secretary must also establish a process to reinstate a program and restore its eligibility for funding.

The amendment deleted the provision that would have required the Secretary to "assume all or part of the functions" of a THPO, and it also states explicitly that nothing in the section authorizes the Secretary to consult on a Tribe's behalf.[38] The provision also directs the Secretary to establish oversight methods with THPOs "without imposing undue review

[37] 54 U.S.C. § 306108(c)(9)(C) (as proposed); see also id. § 306108(c)(5)(C)(vii), (c)(9)(D)(i)(I), (c)(9)(E)(i) (notice to consulting Tribes, limitations period, and venue).
[38] BAAJA § 2301(a)(2) (adding 54 U.S.C. § 302707(a)–(b)); see 54 U.S.C. § 302707(b)(3)–(6) (as proposed).

burdens," and allows audits under the Indian Self-Determination and Education Assistance Act to satisfy fiscal audit requirements.[39]

As the reference to Self-Determination and Education Assistance grants makes clear, THPO programs already operate within a federal approval and oversight framework. Current law authorizes Tribes to assume preservation functions subject to the program-evaluation provisions of 54 U.S.C. § 302302, which establish review at least every four years and provide for disapproval and suspension of contracts or cooperative agreements when a major aspect of a program is inconsistent with the NHPA, unless correction is expected within a reasonable period. NPS also requires THPOs to submit annual accomplishments reports describing their work, regardless of whether they receive Historic Preservation Fund grants; grant recipients have additional financial and performance reporting obligations.[40]

BAAJA would make this framework more frequent and detailed: it establishes a separate Tribal-program evaluation provision, requires evaluations at least every two years, expressly makes consultation timeliness a compliance criterion, and specifies that the correction period is two years. It also requires suspension of Historic Preservation Fund and THPO grants if a program remains inconsistent after the corrective-action period. However, the manager's amendment removes federal assumption of THPO functions.[41]

A related provision provides that if consultation is not completed by the NEPA deadline, each supervising federal Senior Executive Service employee with a role in the consultation must "spend not less than 50 percent of the workweek" remedying the failure. The manager's amendment removed SHPOs and THPOs from this requirement.[42]

Finally, if a THPO does not respond regarding a proposed NHPA agreement, the introduced version of BAAJA allowed the agency to enter the agreement with ACHP instead.[43] The manager's amendment narrowed this provision so that it no longer applies to Tribes, Native Hawaiian organizations, or local governments, but left it in place for THPOs. On Tribal land, that would allow an agreement without the Tribe's designated official.

[39] 54 U.S.C. § 302707(c)–(d) (as proposed).
[40] See 54 U.S.C. § 302702 (incorporating § 302302's program-evaluation framework); 54 U.S.C. § 302302(a)–(b). NPS requires annual accomplishments reports under THPO partnership agreements independently of grant participation.
[41] BAAJA § 2301(a)(1)–(3).
[42] 54 U.S.C. § 306108(c)(5)(B)(ii) (as proposed).
[43] Id. § 306108(c)(5)(C)(vi).

Tribal concerns and how the amended bill addresses them

Some Tribal Nations and organizations, preservation groups, and State Historic Preservation Officers criticized Title III as introduced. The most detailed critique is Cultural Heritage Partners' Claim vs. Fact paper (Oct. 16, 2026). The manager's amendment responds to several of these concerns. The table below lists each concern, how the bill as introduced treated it, how the amended bill treats it, and what remains open.

Concern	**Raised by**	**Bill as introduced**	**As amended**
Consultation on the area of potential effects and on identification is optional ("may consult")	CHP (CvF pp. 2–3, 10)	§ 306108(c)(2)(B)(iii)–(iv): agency "may consult"; must "seek, discuss, as appropriate, and incorporate, as applicable" Tribal information received within 30 days	"May consult" deleted. The agency must prepare a report on every undertaking (area of potential effects, historic properties, effects) and, within 60 days, "initiate consultation by submitting the report" to Tribes. Information solicitation is now titled "Mandatory" (§ 306108(c)(2)(B)(i)–(iii)).
No Tribal review of no-adverse-effect findings	CHP (CvF pp. 2–3, 12)	§ 306108(c)(2)(D)(ii): a no-adverse-effect finding ends the agency's obligations; no statutory review period	No-adverse-effect off-ramp deleted. No-adverse-effect and no-historic-properties findings go in the report, which Tribes review; substantive Tribal objections require a written agency response (§ 306108(c)(2)(B)(iii), (c)(5)(C)(iv)).
Definition may exclude natural places; "event … occurred" test is narrow; no savings clause for listed or eligible properties	CHP (CvF pp. 2, 12)	§ 302706(a)(1): "identifiable geographic location or feature at which an event of continuing religious or cultural significance … occurred"	Definition struck entirely; § 302706(a) reverts to current law (no statutory definition).

Concern	Raised by	Bill as introduced	As amended
Agency may decline avoidance or mitigation in its "sole discretion"	CHP (CvF pp. 1, 6, 12); NARF (Oct. 16); National Trust (Oct. 20)	§ 306108(c)(2)(D)(iii)(II)(ff), (c)(3)(A)(i)(II): "other considerations outweigh the consideration of historic preservation"	Unchanged. Retained in the report (§ 306108(c)(2)(B)(iii)(II)(cc)(DD)) and the 90-day determination ((c)(3)(A)(i)(III)).
30-day response windows; no reconsideration if a Tribe re-enters; ACHP may stand in	CHP (CvF p. 3)	§ 306108(c)(2)(B)(iv), (c)(5)(C)(i)–(ii)	Objection window extended from 30 to 45 days ((c)(5)(C)(iii)–(iv)). ACHP may stand in only for a SHPO or THPO, not for a Tribe, NHO, or local government ((c)(5)(C)(ii)(II)).
ACHP may sign an agreement in place of a non-responding THPO, including on Tribal land	CHP (CvF pp. 4, 10, 12)	§ 306108(c)(5)(C)(vi)	Narrowed: applies only when a SHPO or THPO fails to respond; Tribes, NHOs, and local governments removed ((c)(5)(C)(vi)).
Biennial THPO evaluation, mandatory suspension of grants, and federal assumption of THPO functions	CHP (CvF pp. 2, 4, 12–13)	§ 302707 (bill § 2301(b)(2)–(4)); parallel changes to § 302302 for SHPOs	Federal assumption of THPO functions deleted. Before disapproval or suspension: written determination with reasons, technical assistance, at least 180 days to submit a corrective action plan, and an opportunity to implement it; suspension only if still inconsistent two years later; reinstatement process; savings clause preserving § 302706(b) (§ 302707(b)(3)–(6), (c)(2)).
THPOs directed to spend half their	CHP (CvF p. 14 n.xxvi)	§ 306108(c)(5)(B)(ii)	SHPOs and THPOs removed; applies only to

Concern	Raised by	Bill as introduced	As amended
workweek remedying missed deadlines			federal Senior Executive Service employees ((c)(5)(B)(ii)).
Only "direct" effects count; visual, audible, and cumulative effects narrowed; "feeling" dropped	CHP (CvF pp. 2, 5)	§ 306108(a)(1), (a)(4)	Unchanged.
Projects whose only federal involvement is funding drop out of review	CHP (CvF p. 6)	§ 306108(a)(7)(B)(ii)	Exclusion no longer applies to projects receiving more than $10 million in DOT financial assistance ((a)(7)(B)(ii)). Exclusion for "minor" work broadened to "minor or routine" ((a)(7)(B)(iii)).
Remand is the only remedy; no NHPA-based injunctions	CHP (CvF pp. 2, 7, 12)	§ 306108(c)(9)(C); NEPA § 111 (bill § 1110)	Remedy unchanged. Venue is now the circuit where the undertaking is located; comment exhaustion applies only to post-enactment comment periods and to any substantive comment other than a form letter ((c)(9)(D)–(E)).
No reopening for places identified after review begins	CHP (CvF p. 5)	§ 306108(d)	Unchanged (§ 306108(d)).
Database grants require a comprehensive list accessible to federal and state officials	CHP (CvF p. 5)	§ 302703(b) (bill § 2302(c))	Information shared with agencies or SHPOs is exempt from FOIA (§ 302703(b)(5), via 5 U.S.C. § 552(b)(3)); cross-reference to the struck definition removed.

Concern	Raised by	Bill as introduced	As amended
Non-signatories, including consulted Tribes, cannot challenge programmatic agreement implementation	CHP (CvF p. 7)	§ 306108(c)(10)	Unchanged (§ 306108(c)(10)).
Funding is authorized, not appropriated	CHP (CvF p. 7)	Bill § 2302	Still an authorization, now payable from the HPF's unappropriated balance or the general fund; the "without further appropriation" provision is deleted.

ACHP's proposed rule and how BAAJA would limit its rollbacks

As the saying goes, "don't compare me to the almighty; compare me to the alternative." Even if the compromises in BAAJA are not the ones Tribes or preservationists prefer in a vacuum, it is clear that they are considerably more favorable than the alternative, the rewritten Section 106 regulations, and would protect against several of the rollbacks in those regulations.

On July 24, 2026, ACHP voted to advance a proposed rule that substantially revises the longstanding Section 106 regulations. The proposal is now under review at the Office of Information and Regulatory Affairs. The National Association of Tribal Historic Preservation Officers (NATHPO) voted against advancing the proposed rule, citing provisions that would weaken Tribal consultation, narrow consideration of places of religious and cultural significance, and expand unilateral agency decisionmaking. NATHPO's assessment is correct. The draft text would:[44]

- provide that a place qualifies as a historic property only if it "includes, or has included at some point in the past, tangible human improvements" and is "geographically compact," and that "noncompact, unimproved natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify";

[44] Draft revision of 36 C.F.R. pt. 800, §§ 800.1(c)(2), 800.2(c)(2)(ii), (d), 800.4, 800.5(b), 800.6, 800.7(b), 800.16(e), (j), (k) (July 2026 draft, on file with author). For public descriptions of the draft, see Davis Graham & Stubbs, ACHP Draft Rule Would Rewrite the Playbook for NHPA Section 106 Review; Holland & Knight.

- tie the duty to consult Tribes to that narrowed definition;
- limit the area of potential effects to "direct material alterations,"
- delete the regulations' examples of visual, atmospheric, and audible effects, and exclude effects of other projects;
- replace the current consultative step-by-step process with an agency-prepared "Section 106 Report";
- Make consultation before the report comes out entirely optional;
- require every memorandum of agreement to include a covenant not to sue;
- make public participation discretionary, and allow agencies to alter "any deadline" in the regulations;
- delete the regulations' references to the government-to-government relationship, Tribal sovereignty, Tribes' special expertise, and ancestral, aboriginal, and ceded lands.

While the draft would on the whole be an obvious reduction in Tribal opportunity for involvement and consultation, the draft retains several protections that matter to Tribes: THPOs continue to act in place of SHPOs on Tribal lands, Tribes without THPOs consult alongside the SHPO on their lands, a programmatic agreement cannot take effect on Tribal lands without the Tribe or THPO as a signatory, and Tribes that attach significance to affected properties must at least be invited to sign any memorandum of agreement.

Yet as a whole, ACHP's draft is much less protective than BAAJA. The table below compares Tribal protections under the current regulations, ACHP's draft, and BAAJA.

Protection	**Current regulations & current statute**	**ACHP draft regulations & current statute**	**BAAJA, including the manager's amendment**
Statutory duty to consult Tribes (§ 302706(b))	**Yes.** Statute	**Yes.** Statute; a rule cannot change it	**Yes.** Unchanged
Consultation begins early	**Yes.**	**No.** Agency "may" invite consultation before completing its 106 Report	**Yes.** Consultation must begin no later than environmental review

Protection	Current regulations & current statute	ACHP draft regulations & current statute	BAAJA, including the manager's amendment
Natural features can qualify as historic properties	**Yes.** Under the National Register criteria and NPS guidance (not binding)	**No.** Places must have human improvements and be compact; mountains, valleys, bodies of water, and landscapes are expressly excluded	**Yes.** Under the National Register criteria and NPS guidance
Agency must seek Tribal information to identify properties	**Yes.** By regulation (§ 800.4(a)(4))	**Yes.** But consultation before the agency's report is optional	**Yes.** Statute; must incorporate information provided within 30 days of a request
Tribes receive and can respond to the agency's findings	**Yes.** At each step, with 30-day review periods (§§ 800.4(d), 800.5(c))	**Yes.** 60 days to respond to the Section 106 Report	**Yes.** Statute, for every undertaking requiring a report, including no-adverse-effect findings; 45 days to object, with a written response required
Agency must consult toward an agreement on adverse effects	**Yes.** By regulation. Agency must consult, may end consultation only through termination after ACHP comment (§§ 800.6–800.7)	**No.** Agency may consult further, issue a memorandum of decision, or invite an agreement	**Partly.** Determination made "in consultation with" Tribes, but agency may conclude without agreement within 90 days
Regulations recognize government-to-government relationship,	**Yes.** By regulation §§ 800.2(c)(2)(ii), 800.4(c)(1)	**No.** Deleted	**Yes.** By regulation §§ 800.2(c)(2)(ii), 800.4(c)(1)

Protection	Current regulations & current statute	ACHP draft regulations & current statute	BAAJA, including the manager's amendment
sovereignty, special expertise, ancestral lands			
Protections durable against future rulemaking	**No.** Changeable by rule	**No.** Changeable by rule	**Yes.** Statutory provisions

On the questions about process that matter most to Tribes, such as whether Tribes are consulted at each step and review the agency's findings, BAAJA's statutory text is more protective than ACHP's draft and would override it, setting a statutory floor for Tribal participation.

What happens without BAAJA?

Without BAAJA, the status quo for historic preservation is unlikely to remain in place. ACHP has already voted to advance its new rule. If finalized in anything like its draft form, it would be a major rollback of protections to Tribal historic properties, as the above table illustrates, and would apply to every Section 106 review, with none of BAAJA's statutory protections for Tribal participation.

Tribes and preservation organizations would likely challenge the rule, and courts might in theory set aside parts of it. However, due to the extreme brevity of Section 106 itself, it is unlikely that the new regulations could be found to be inconsistent with what the current Section 106 statutorily requires.

A future administration could begin a new rulemaking. But rulemaking is slow: the current administration took about 18 months to reach a vote on a proposal, and has not yet published one.[45] A successor's rule would itself be challenged, too, leading to a cycle of uncertainty and litigation. We can look to the experience with NEPA regulations between 2020 and 2026 as an example. They were rewritten, partially restored, expanded, vacated

[45] The administration took office in January 2025; ACHP voted to advance its proposal in July 2026.

by a court, and finally rescinded, leaving years in which no one could be sure which rules applied.[46]

It is important to recognize as well that the current regulations were upheld in 2001 under *Chevron* deference, which is permissive to agencies' interpretation of the statutes they administer.[47] But *Chevron* has been overturned; now, courts do not defer to agencies' interpretation of statutes but rather decide the best reading of a statute for themselves.[48] A future ACHP seeking to restore or expand protections beyond Section 106's two sentences, for example by restoring indirect and cumulative effects or treating broad landscapes as single properties, would face challenges that the 2000 regulations never did — in part because the judiciary has become considerably more conservative and skeptical of broad grants of authority to agencies in the last 25 years. The current regulations are likely the most protective version of Section 106 Tribes will see from regulation alone.

BAAJA is an opportunity to put into statute — and thus render more durable — key Tribal participation provisions and funding for Tribal programs. A future administration and ACHP favorable to Tribal interests could build on that statutory floor through regulation, fortified by a longer Section 106 statute expanded by BAAJA. For Tribes and those who care about preservation of Tribal historic properties, the durable statutory floor offered in BAAJA is a better position than a narrower ACHP rule as the default status quo and, at best, years of regulatory tumult.

Benefits of BAAJA for Tribal self-determination, economic growth, and climate resilience

The proposed changes to Section 106 are only one part of BAAJA, and the bill's effects on Tribes go well beyond it. Several provisions outside the NHPA expand Tribal authority over Tribal lands and Tribal projects. BAAJA's funding for Tribal historic preservation, discussed above, addresses the capacity constraints THPOs have long faced. And its transmission, interconnection, and permitting reforms bear directly on two of the most pressing issues facing Tribal communities: developing their energy resources and adapting to climate change. A full assessment of the bill from a Tribal perspective should weigh these provisions alongside its changes to Section 106.

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[46] See CEQ, 85 Fed. Reg. 43,304 (July 16, 2020); 87 Fed. Reg. 23,453 (Apr. 20, 2022); 89 Fed. Reg. 35,442 (May 1, 2024); Iowa v. Council on Env't Quality (D.N.D. Feb. 3, 2025); CEQ, Removal of National Environmental Policy Act Implementing Regulations (Jan. 8, 2026). Of course, the exact situation that happened with NEPA and CEQ's authority will not occur as ACHP's rulemaking authority is clearer than CEQ's was. But the general pattern would likely still be similar.

[47] Nat'l Mining Ass'n v. Slater, 167 F. Supp. 2d 265 (D.D.C. 2001), aff'd in part, rev'd in part sub nom. Nat'l Mining Ass'n v. Fowler, 324 F.3d 752 (D.C. Cir. 2003).

[48] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

Benefits for Tribal self-determination

BAAJA expands Tribal authority in five areas, allowing Tribes to act with greater freedom and with less delay caused by federal agencies.

- **Rights-of-way over Tribal land.** Today, a right-of-way across Tribal land, whether for a transmission line, a road, or a water pipeline, requires an approval from the Secretary of the Interior, administered by the Bureau of Indian Affairs (BIA). What the Government Accountability Office (GAO) has aptly titled "Poor management" by BIA has been a recurring source of delay for Tribal energy and infrastructure projects.[49] BAAJA allows a Tribe to grant rights-of-way across its own land "for any purpose" without BIA approval, under Tribal regulations, modeled on the rules governing surface leasing (the HEARTH Act).[50] BAAJA also removes language that limits the statutory requirement of Tribal consent to rights-of-way to only include Tribes organized under the Indian Reorganization Act, so the consent requirement would apply to every Tribe.[51]
- **Long-term leasing.** Under current law, most Tribes may lease trust land for no more than 25 years, plus one 25-year renewal, unless Congress has individually authorized 99-year leases on their reservation. The manager's amendment extends 99-year leasing authority to land held in trust for every federally recognized Tribe, allowing the long lease terms that financing for energy and infrastructure projects often requires.[52]
- **Tribal environmental review.** Under BAAJA, Tribes can conduct their own environmental review as lead agencies under a Tribal environmental review statute, ordinance, resolution, regulation, or formally adopted policy; Tribal agencies may also serve as joint lead agencies and as cooperating agencies.[53]
- **Greater control over Tribal trust resources.** Historically, third party litigants could tie up a Tribe's decision to manage its own resources. Under BAAJA, only the beneficiary Tribe may bring a NEPA challenge to a federal action authorizing use of its trust lands, minerals, or other trust resources (except as to effects outside those resources).[54] And for actions a Tribe initiates on its trust resources, agencies for the

[49] GAO, *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, GAO-15-502 (June 2015).
[50] BAAJA § 2212 (adding Act of Feb. 5, 1948, § 8). Tribal regulations must provide for environmental review with public notice and comment and responses to substantive comments. The Secretary's approval of Tribal regulations is not subject to NEPA, Section 106, or the ESA. Id. § 8(b)(2). See Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150.
[51] BAAJA § 2212(2) (amending 25 U.S.C. § 324).
[52] BAAJA § 2212(a) (amending 25 U.S.C. § 415(a)).
[53] BAAJA § 1105(1)(D) (adding NEPA § 106(a)(5)); BAAJA § 1106 (adding NEPA § 107(a)(1)(A)(iii), (a)(2)(A)(i), (f)(2)).
[54] BAAJA § 1110 (adding NEPA § 111(c)(8)); BAAJA § 1106(1) (adding NEPA § 107(a)(1)(C)(viii)).

first time must presume that the effects of the no-action alternative would be negative, so the review starts from the premise that forgoing the Tribe's chosen use of its own resource is a cost in and of itself.[55]

- **Tribal program alternatives.** BAAJA authorizes THPOs to develop program alternatives, including programmatic agreements, exempted categories, and standard treatments, for routine categories of undertakings within their jurisdiction. Where a THPO and a federal agency both have an alternative for the same type of undertaking, the federal agency must apply the THPO's alternative unless the THPO agrees otherwise.[56] This gives Tribes a new tool to control routine historic review on their own lands.

Benefits for Tribal economic growth and jobs

Tribal lands contain among the country's richest clean energy resources, and Tribal governments and members benefit from the economic growth that those resources can bring. The National Renewable Energy Laboratory estimates that Tribal lands hold about 6.5 percent of the nation's utility-scale renewable energy technical potential on 5.8 percent of its land area.[57] Developing that potential brings construction and operations jobs, lease and ownership revenue, and in many cases power for Tribal communities themselves, which historically have lacked the energy access other parts of the country have enjoyed.

The binding constraint on developing Tribal energy resources is often the grid. For instance, the Oceti Sakowin Power Authority faced $48 million in interconnection and related costs for its wind projects, and the Confederated Salish and Kootenai Tribes' utility, Energy Keepers, has faced five-to-seven-year waits for solar and storage projects to clear interconnection queues.[58] BAAJA comprehensively addresses those barriers. The bill requires regional and interregional transmission planning; a consolidated planning process with planned interconnection locations, upfront, fixed costs and a single cluster study; directs the use of automation and artificial intelligence to speed interconnection studies; requires transmission providers to share the grid data those studies need; and strengthens federal backstop authority to site interstate transmission lines that states fail to act on.[59]

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[55] BAAJA § 1106 (amending NEPA § 107(a)(1)(C)(viii)).
[56] 54 U.S.C. § 306108(c)(7)(B) (as proposed).
[57] National Renewable Energy Laboratory, Techno-Economic Renewable Energy Potential on Tribal Lands (2018).
[58] Miranda Willson, Climate law boost for renewables hits barrier on tribal lands, E&E News (Dec. 22, 2022).
[59] BAAJA § 2103 (adding Federal Power Act § 225) (regional and interregional planning); § 2106 (adding FPA § 318) (consolidated interconnection and transmission planning); § 2110 (interconnection queue automation); § 2111 (adding FPA § 232) (grid data access); § 2101 (amending FPA § 216) (backstop siting).

BAAJA also opens wholesale electricity markets to aggregations of behind-the-meter (BTM) batteries, generators, and other resources, and funds technical assistance and prizes for streamlined permitting of rooftop solar, batteries, and vehicle chargers by state, local, and Tribal permitting authorities.[60]

These reforms are aimed mainly at utility-scale generation and transmission. They would also help Tribes that develop projects for sale to the grid, and they would make it cheaper to connect new load. They do not by themselves electrify Tribal households that remain off the grid, which also requires distribution lines and funding. But they remove barriers that have kept Tribal energy resources from producing revenue and electricity that can support those efforts.

Benefits for Tribal resilience to climate change

Tribal communities are among the most exposed in the country to climate change. The Fifth National Climate Assessment found that climate change threatens Indigenous Peoples' health, livelihoods, economies, and even "cultural continuance."[61] In Alaska, more than 70 of the state's roughly 200 Native villages face significant threats from erosion, flooding, or thawing permafrost — some have already been forced to relocate.[62] The historic properties that Section 106 is meant to protect are at risk from climate change as well: coastal erosion, wildfire, drought, and flooding can damage or destroy cultural sites, burial grounds, and the lands, plants, and animals on which traditional practices depend.

BAAJA is the biggest policy response to climate change in years. If passed, it would be a significant step towards addressing this complex global problem. The transmission and permitting reforms described above are the bill's main contribution. Interconnection and transmission limit how quickly new wind, solar, and storage can come online, and BAAJA is the most significant attempt in years to relax them.

Climate resilience and adaptation measures like shoreline protection, community relocation, and replacement of damaged infrastructure in Tribal communities are typically funded by federal grants. Projects whose only federal involvement is funding (other than projects receiving more than $10 million in Department of Transportation assistance) would

[60] BAAJA § 2108(a)–(d) (adding FPA §§ 3(30)–(31), 229–230); id. § 2108(e) (program for streamlined permitting by authorities having jurisdiction, defined to include Tribal offices and officials).
[61] Fifth National Climate Assessment, ch. 16, Tribes and Indigenous Peoples (2023) (Key Message 16.1: Indigenous Peoples face risks to well-being and livelihoods from climate change and barriers to energy sovereignty)
[62] U.S. Gov't Accountability Off., GAO-22-104241, Alaska Native Issues: Federal Agencies Could Enhance Support for Native Village Efforts to Address Environmental Threats (2022) (citing a 2019 statewide assessment); see also GAO-09-551 (2009).

no longer require Section 106 review, and many would fall outside NEPA as well under the bill's narrower definition of major federal action, allowing them to be built faster.[63]

Conclusion

BAAJA is a comprehensive, complex, and bipartisan bill that (like any comparable bill) involves difficult tradeoffs and both positive and negative changes from the perspective of any particular party. BAAJA changes Section 106 significantly, in ways that both help and hurt core Tribal interests. It narrows what is reviewed, sets deadlines, gives agencies clear endpoints, and limits court remedies, and some of those changes reduce Tribal influence over projects off of Tribal lands. It also places new performance obligations on THPOs, though the manager's amendment replaced federal takeover of THPO functions with a process to return to compliance and with technical assistance. But the bill does not abolish or override Tribal consultation rights. The NHPA's consultation requirement, THPO authority, treaty rights, the trust responsibility, and the executive orders on consultation and sacred sites all remain. The bill writes Tribal participation into Section 106 for the first time, expands Tribal authority in several provisions, and funds Tribal programs. The manager's amendment responds to many of the most specific Tribal concerns, although not all of them. Measured against the realistic alternative of a narrowed regulation followed by years of reversal, BAAJA is on balance a better outcome. And for Tribal communities on the front lines of climate change, with some of the country's best renewable resources and some of its least reliable access to the grid, the bill's permitting and transmission reforms offer a generational opportunity to build.

[63] BAAJA § 1102 (amending NEPA § 3(18)(B)(iii)) (excluding grants and other financial assistance where the agency does not exercise "predominant control and responsibility")