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. But our detailed review of the relevant provisions of the complex bill reveals a nuanced picture that is in fact considerably more favorable to Tribal interests than the status quo.

Five conclusions follow from a good-faith and detailed analysis of the bill:

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. So, too, is every source of federal obligations to Tribes outside the NHPA: treaties, the trust responsibility, the government-to-government relationship, executive orders, and statutes like the Native American Graves Protection and Repatriation Act (NAGPRA) or the Religious Freedom Restoration Act (RFRA).

BAAJA writes Tribal participation into the Section 106 process for the first time and provides millions in funding to THPOs. Today, the Tribal role at each stage of review exists only in regulations that the Advisory Council on Historic Preservation (ACHP) can change by rule — and is now proposing to change in a way that cuts Tribes out. BAAJA confirms that properties of religious or cultural significance to tribes, including likely natural "features" are covered, names Tribes at each statutory step, starts consultation earlier, and 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 to protect the sites). BAAJA authorizes $200 million a year for the Historic Preservation Fund for ten years and $20 million a year for the Tribal databases.

While BAAJA preserves consultation in Section 101 and writes Tribes into Section 106 it also streamlines Section 106 generally, in ways that affect Tribal interests. Under BAAJA, federally permitted projects on Tribal land, or 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 as in the status quo. However, BAAJA limits indirect visual, audible, and cumulative effects agencies must consider, removes federally funded projects from review, 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 trigger consultation about it. And BAAJA subjects Tribal Historic Preservation Officers to new requirements backed by grant suspension and federal assumption of their functions if they are unable to meet the Act's timelines for two years.

The status quo is worse for Tribes than BAAJA. 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 would survive that rule. Without BAAJA, Tribes face a narrowed rule now and years of regulatory reversal and litigation afterward, in a legal environment less favorable to broad regulatory protections than the one that produced the current rules.

BAAJA is a generational opportunity for Tribal clean energy and jobs. Tribal communities and their cultural and religiously significant sites are among the most exposed to climate change. BAAJA is the most sweeping bill to advance clean energy and climate goals in years. 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 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 such as the Native American Graves Protection and Repatriation Act (NAGPRA) sets federal standards for 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's (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

[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).

resources, and 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 suit.[7] Nor can the bare trust responsibility 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 come only from regulations 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," and give Tribes a role at each stage of the Section 106 process — from identification through resolution — and 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 from regulations, rather than the

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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).

text of NHPA itself, ACHP can revise or remove them by rule, as it is now proposing to do. 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.

BAAJA preserves the express statutory duty to consult. To be clear, it makes 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:

Under BAAJA, any undertaking causing direct physical harm to Tribal sites, including sites located off of Tribal land, would require consultation as under the status quo. Under the bill's new 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.[15] Destruction of, damage to, or alteration of a Tribal cultural site remains an adverse effect requiring consultation.

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, a process that used to only exist in ACHP's regulations:

- **At the start.** Tribes have long objected to consultations that begin well into a project's compliance, including even after NEPA review is complete. Under BAAJA,

[13] The only change to that provision is a conforming cross-reference to the restructured eligibility subsection. 54 U.S.C. § 302706(b) to refer to subsection (a)(2)).
[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(b)(3).
[15] 54 U.S.C. § 306108(a)(1)(A) (as proposed).

Section 106 consultation must begin no later than the start of the environmental review.[16]

- **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.[17]
- **At the determination of adverse effects stage.** Where there will be adverse effects, the agency must submit a report (identifying historic properties, adverse effects, and measures to avoid, minimize, or mitigate them) to Tribes for review.[18] The agency's determination on how to resolve adverse effects is made "in consultation with" Tribes, and any agreement resolving adverse effects is reached with them.[19]
- **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.[20]

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 passes, removing the Tribal role outlined above would require amending NHPA once again — something that has happened rarely since its passage in 1966.

BAAJA broadly defines properties of traditional religious or cultural importance for the first time

BAAJA makes two changes to Section 302706(a), both of which would have the effect of strengthening protections for properties of traditional cultural or religious significance compared to the status quo.

First, BAAJA changes what was previously in statute as "traditional religious *and* cultural importance" to "traditional religious *or* cultural importance."[21] With this change, a place need not have both religious and cultural significance to qualify. Second, it adds a definition for this term for the first time: "an identifiable geographic location or feature at

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[16] *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.
[17] 54 U.S.C. § 306108(c)(2)(B)(iv) (as proposed).
[18] *Id.* § 306108(c)(2)(D)(iii).
[19] *Id.* § 306108(c)(3)(A).
[20] *Id.* § 306108(c)(3)(B)(i).
[21] BAAJA § 2301(a)(1) (amending 54 U.S.C. § 302706(a)). The consultation provision, § 302706(b), continues to refer to Tribes that attach "religious and cultural significance."

which an event[22] of continuing religious or cultural significance to a living community occurred, including any prehistoric or historic district, site, building, structure, or object, and any existing artifacts or material remains."[23] Until BAAJA, agencies determining whether a property had "traditional religious and cultural significance" had no statutory foundation but looked to National Park Service guidance, most recently updated in December 2024, which is not binding and which a future administration could revise.[24]

BAAJA's definition expressly includes "feature[s]" which is likely broad enough to capture natural features like springs, mountains, etc, and this statutory definition would override a regulation imposing compactness or human-improvement requirements on these properties. As we will discuss in more detail below, writing this broad definition into statute is a safeguard against regulatory rollbacks like ACHP's draft rule, which would exclude natural features and landscapes outright (see Part 6).

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.[26] It also creates a new $20 million per year grant program to facilitate THPO databases of Tribal records and properties of traditional

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[22] The word "event" is fairly broad and in this context recurring ceremonies, seasonal gatherings, and events recounted in traditional narratives would likely be included. A future ACHP or National Park Service could adopt guidance applying the definition that way. A place significant solely because of beliefs about it, with no associated activity whatsoever could be harder to qualify, though many such places may still be eligible as sites or "districts" under the general National Register criteria.

[23] 54 U.S.C. § 302706(a)(1) (as proposed).

[24] National Park Service, National Register Bulletin: Identifying, Evaluating, and Documenting Traditional Cultural Places (Dec. 2024) (defining a traditional cultural place as a property eligible "for its significance to a living community because of its association with cultural beliefs, customs, or practices that are rooted in the community's history and that are important in maintaining the community's cultural identity"); see Request for Comments on Draft TCP Bulletin, 89 Fed. Reg. (Jan. 25, 2024). The 2024 bulletin replaced Patricia L. Parker & Thomas F. King, National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties (1990, rev. 1998). The binding eligibility test remains the National Register criteria, 36 C.F.R. § 60.4, and the ACHP regulations restate the statute without further definition, 36 C.F.R. § 800.16(l)(1).

[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)–(b) (amending 54 U.S.C. §§ 303102–303103). Because § 303102 authorizes amounts "to be appropriated for deposit," deposits likely still require appropriation. Current law provides $150 million a year in deposits through fiscal year 2026. 54 U.S.C. § 303102.

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]

THPO qualification standards

Finally, 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]

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. So, too, with effects that are not permanent: 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 turned, defined by these narrower effects.[30]

[27] BAAJA § 2302(c) (adding 54 U.S.C. § 302703(b)).
[28] BAAJA § 306108(c)(8).
[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).

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. These cover are the vast majority of federal actions. But projects whose only federal involvement is funding (unless the funding is for historic preservation) would not be included.[31] 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.** Consulting Tribes on the area of potential effects and on identifying properties becomes something the agency "may" do. Its obligation is to seek and incorporate information Tribes provide within 30 days of a request.[32] Information about sacred places is often shared through Tribal governmental processes, and sometimes confidentially, on timelines that 30 days may not accommodate.
- **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 re-enters cannot require reconsideration of earlier findings, and the agency may consult ACHP in its place.[33] The 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] But BAAJA makes concluding consultation available at the outset: within 90 days of its report, an agency may determine 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]

[31] Id. § 306108(a)(7). 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)(iii)–(iv) (as proposed). 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)–(ii) (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) (as proposed).

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, without vacating the approval or enjoining the project. An NHPA violation alone can no longer support a preliminary or permanent injunction.[37] These limits apply to all plaintiffs.

THPO management

BAAJA directs the Secretary of the Interior to evaluate THPO programs at least every two years to ensure it complies with the act's timelines. If a program after several years has not met them, the Secretary is authorized to suspend cooperative agreements and Historic Preservation Fund grants and, if the program is not made consistent within two years, "assume all or part of the functions" of the THPO.[38] The provision also directs the Secretary to establish oversight methods with THPOs "without imposing undue review burdens," and allows audits under the Indian Self-Determination and Education Assistance Act to satisfy its fiscal audit requirement.[39]

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. In practice, 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 prescriptive: it establishes a separate Tribal-program evaluation provision, requires evaluations at least every two years, expressly makes consultation timeliness a compliance criterion, and replaces the flexible correction period with a two-year period. It also expressly requires suspension of Historic Preservation Fund grants upon disapproval and directs the Secretary, upon the specified findings after that period, to assume some or all THPO functions until compliance is restored. The bill makes parallel changes for State preservation programs. For Tribes,

[37] 54 U.S.C. § 306108(c)(3)(A)(i) (as proposed).
[38] BAAJA § 2301(b)(2) (adding 54 U.S.C. § 302707(a)–(b)).
[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. See NPS,

however, federal performance of functions previously exercised by a Tribal official gives this enforcement mechanism particular significance for Tribal self-government.[41]

A related provision provides that if consultation is not completed by the NEPA deadline, each SHPO, THPO, and 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, though it is unclear how this would be enforced at all, let alone against Tribal officials.[42]

Finally, if a THPO does not respond regarding a proposed NHPA agreement, under BAAJA the agency is authorized to enter the agreement with ACHP instead.[43] On Tribal land, that would allow an agreement without the Tribe's designated official. These provisions are the bill's most direct burdens on Tribal governments, or at least those that may struggle with the timelines proposed in the bill.

ACHP's proposed rule and how BAAJA would prevent 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 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 under review at the Office of Information and Regulatory Affairs and has not been published. 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. NAATHPO'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";

[41] BAAJA §2301(b)(1)–(3).
[42] 54 U.S.C. § 306108(c)(5)(B)(ii) (as proposed).
[43] Id. § 306108(c)(5)(C)(vi).
[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.

The table compares Tribal protections under the current regulations, ACHP's draft, BAAJA, and BAAJA if ACHP also finalizes its draft.

Protection	**Current regulations & current statute**	**ACHP draft regulations & current statute**	**BAAJA**	**BAAJA + ACHP draft**
Statutory duty to consult Tribes (§ 302706(b))	**Yes.** Statute	**Yes.** Statute; a rule cannot change it	**Yes.** Unchanged	**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	**Yes.** Statutory requirement overrides ACHP's draft

Protection	Current regulations & current statute	ACHP draft regulations & current statute	BAAJA	BAAJA + ACHP draft
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.** Statute covers any "identifiable geographic location or feature"	**Yes.** Statutory definition overrides the draft's exclusions for these properties
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	**Yes.** Statute
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, where adverse effects are found; 30-day response windows	**Yes.** Statute
Agency must consult toward an agreement on adverse effects	**Yes.** By regulation. Agency must consult, may end consultation only through termination after ACHP	**No.** Agency may consult further, issue a memorandum of decision, or invite an agreement	**Yes.** Determination made "in consultation with" Tribes, but agency may conclude without	**Yes.** Statute

Protection	Current regulations & current statute	ACHP draft regulations & current statute	BAAJA	BAAJA + ACHP draft
	comment (§§ 800.6–800.7)		agreement within 90 days	
Regulations recognize government-to-government relationship, sovereignty, special expertise, ancestral lands	**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)	**No.**
Protections durable against future rulemaking	**No.** Changeable by rule	**No.** Changeable by rule	**Yes.** Statutory provisions	**Yes.** Statutory floor yes; regulatory details no

Two points bear emphasis upon review the specific differences between the current statute and regulations, the ACHP draft regulation, and the BAAJA scenarios it is clear that on the questions that often most significant to Tribes — such as whether natural places can qualify as historic properties, whether Tribes participate in identification and resolution — BAAJA's statutory text is more protective than ACHP's draft and would override it, locking in a statutory floor of protection for Tribes.

What happens without BAAJA?

Without BAAJA, the status quo for historic preservation is unlikely to remain static. 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 or its broader definition of eligible places.

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 would be found to be inconsistent with Section 106.

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 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 now 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, give natural places a statutory basis for eligibility, and fund Tribal programs. A future administration and ACHP favorable to Tribal interests could build on that statutory floor through guidance and regulation, for example by interpreting the definition of traditional religious or cultural properties broadly. For Tribes 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 and, at best, years of regulatory tumult.

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

Benefits for Tribal self-determination

BAAJA expands Tribal authority in four 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 a grant from the Secretary of the Interior, administered by the Bureau of Indian Affairs (BIA). What 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 subsurface leasing (the HEARTH Act).[50] BAAJA also removes language limiting the statutory requirement of Tribal consent to rights-of-way to Tribes organized under the Indian Reorganization Act so the consent requirement would apply to every Tribe.[51]
- **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.[52]

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[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 § 1105(1)(D) (adding NEPA § 106(a)(5)); BAAJA § 1106 (adding NEPA § 107(a)(1)(A)(iii), (a)(2)(A)(i), (f)(2)).

- **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).[53] And for actions a Tribe initiates on its trust resources, agencies for the 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.[54]
- **Tribal programmatic agreements.** BAAJA authorizes THPOs to develop programmatic agreement, and where a THPO and federal agency's agreement cover the same category, the THPO's agreement controls. 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.[55] Developing that potential brings construction and operations jobs, lease and ownership revenue, and in many cases the 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.[56] BAAJA 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.[57]

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[53] BAAJA § 1110 (adding NEPA § 111(c)(8)); BAAJA § 1106(1) (adding NEPA § 107(a)(1)(C)(viii)).
[54] BAAJA § 1106 (amending NEPA § 107(a)(1)(C)(viii)).
[55] National Renewable Energy Laboratory, Techno-Economic Renewable Energy Potential on Tribal Lands (2018).
[56] Miranda Willson, Climate law boost for renewables hits barrier on tribal lands, E&E News (Dec. 22, 2022).
[57] BAAJA § 2103 (adding Federal Power Act § 225) (regional and interregional planning); § 2106 (adding FPA § 318) (consolidated interconnection and transmission planning); § 2110 (interconnection queue

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.[58]

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 that can support that work.

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 continence."[59] 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.[60] 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 would no

automation); § 2111 (adding FPA § 232) (grid data access); § 2101 (amending FPA § 216) (backstop siting).

[58] 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).

[59] 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)

[60] 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).

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.[61]

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 Tribal lands. It also places new performance obligations on THPOs. 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, protects natural places in statute, and funds Tribal programs. Measured against the realistic alternative of a narrowed regulation followed by years of reversal, BAAJA is the better outcome for Tribes. 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.

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