COALITION for TRIBAL SOVEREIGNTY

Introduction

Purpose of the Section 106 Toolkit

A practical advocacy guide for Tribal leaders and Native communities to understand proposed changes to the Section 106 process and advocate for meaningful Tribal consultation and the protection of sacred places and cultural resources.

Audience

Tribal Leaders, legislators, community advocates, and others seeking to understand the Section 106 process of protecting meaningful Tribal consultation under the National Historic Preservation Act.

Scope and Limitations

This is a living document that will be rapidly updated with resources and reshared as additional information and materials are developed.

Disclaimer: This toolkit is intended to provide general information and advocacy resources regarding the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), proposed changes to the National Historic Preservation Act, and the Section 106 review process. It is provided for informational purposes only and does not consitute legal advice. Tribal Nations and Tribal organizations are encouraged to consult legal counsel for guidance regarding specific projects, consultation matters, litigation risks, or other legal quesions before taking action.

Section 106 Toolkit Resources

1. **Frequently Asked Questions**
   Section 106 & BAAJA Title III
2. **Myth Buster**
   Section 106 & BAAJA Title III
3. **Talking Points**
   Section 106 & BAAJA Title III
4. **Congressional Leave-Behind**
   Section 106 & BAAJA Title III

Materials in Development

Prioritizing resource deployment as materials become available, this toolkit is rapidly being updated with additional content including:

- ACHP NHPA Proposed Rulemaking Advocacy Tools

CoalitionforTribalSovereignty.com

Section 106: The Current Process and What BAAJA Would Change

What Tribal Nations, Tribal Organizations, Tribal Communities, and legislators need to know about Congress's proposed changes to the National Historic Preservation Act under the Bipartisan American Affordability and Jobs Act of 2026 (S. 5653)

Tribal Nations are sovereign governments, not stakeholders. Through the taking of Tribal lands and resources, the United States incurred debt-based trust and treaty obligations that include assisting Tribal Nations in protection of our sacred places and cultural resources. The National Historic Preservation Act (NHPA) is a federal law that requires federal agencies to consider how their actions may affect historic and culturally significant places before moving forward, and Section 106 is the process through which that review occurs. Through the Section 106 process, Tribal Nations have a seat at the federal decision-making table and can guide the federal government in how to protect Tribal cultural heritage. In this way, Section 106 helps carry the government-to-government relationship into federal decision-making before actions affect sacred places, burial areas, cultural landscapes, traditional use areas, and other historic properties. That seat at the table is especially important because many places of religious and cultural significance lie outside present-day Tribal lands after generations of removal and dispossession.

Today, the Section 106 process faces two major threats at the same time: (1) a legislative threat from Congress via the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), S. 5653; and (2) a regulatory threat from the Advisory Council on Historic Preservation (ACHP). Although these proposals overlap in important ways, they are distinct and would operate through different legal mechanisms. Both proposals would significantly change, and in key respects narrow or nullify, the protections Tribal Nations rely on to advise the federal government before federal actions affect sacred places and cultural resources. Importantly, neither proposal has replaced the current Section 106 process yet, and there is still time for Tribal Nations and Tribal communities to add their voices to the opposition.

Section 106: *The Current Process*

THE BASELINE:

The Section 106 review process already operates under significant Tribal capacity constraints caused in large part by the federal government's continued failure to properly fund Tribal Historic Preservation Officers (THPOs) and programs. A THPO is the Tribal official or office responsible for administering a Tribal Nation's historic preservation program and may assume many of the historic-preservation responsibilities otherwise carried out by a state official on Tribal lands. The ACHP has acknowledged that budget shortfalls and increasing workloads often prevent THPOs and Tribal Nations from participating fully, and that federal THPO funding often does not cover basic operating costs resulting in many Tribal Nations having no THPO at all. In Fiscal Year (FY) 2025, for example, 227 THPOs received an average of only about $100,877 in federal Historic Preservation Fund funding to carry out these responsibilities.

Tribal Nations are already cut out of important Section 106 review steps, such as defining the Area of Potential Effect (APE) and required signatory status for undertakings not affecting current Tribal lands. Any changes to the Section 106 process, such as tighter deadlines, would be imposed on that existing baseline, not on a fully staffed and fully funded system. Any changes should bring Tribal Nations closer into the process, not push them farther away.

HOW THE MECHANISMS WORK:

Both Congress's BAAJA and the ACHP's proposed regulatory changes would narrow when the Section 106 process applies, what places and effects are reviewed, and the types of mitigation considered. Both would add unreasonable deadlines, give agencies new ways to close the process, and limit meaningful remedies. Both claim to provide for Tribal consultation, but the process offered under each proposal pales in comparison to true Tribal consultation, and places even stricter requirements on consultation efforts than the current process.

THE PRACTICAL EFFECT IS BURDEN SHIFTING:

Without Tribal cultural experts at the table the proposed changes shift the risk of speed onto Tribal Nations. The federal official and project applicant gain greater finality while Tribal communities bear the risk that a sacred place is left outside review, cultural information arrives too late, or irreversible harm occurs before an effective remedy is available.

FAQs | Section 106

Understanding the Section 106 review process and how BAAJA would change Tribal consultation, historic preservation protections, and federal decision-making.

HOW TO USE THIS FAQ:

Start with the current Section 106 process. Then review the BAAJA questions to see how the bill would change current law, including when Tribal Nations are consulted, what sacred places and cultural resources receive review, and what remedies remain available when federal agencies fail to comply.

While this FAQ does have references to the current ACHP Section 106 implementing regulations for better context and understanding, it only address BAAJA's proposed changes to the NHPA. A separate CTS briefing examining the ACHP's proposed regulatory changes to 36 C.F.R. Part 800, including how those changes differ from or overlap with BAAJA, is forthcoming.

SECTION 106 TODAY: How the Process Works

What is Section 106 review?

Section 106 is the federal historic-preservation review process required when a federal agency funds, permits, licenses, approves, or carries out a project that may affect historic properties. **Section 106 does not create a veto right, and it does not guarantee that every historic or sacred place will be preserved.** Its protection is the process itself. Before a federal agency authorizes an undertaking, they must identify historic properties, consider how the project may affect them, and attempt to address adverse effects through mitigation measures—all in consultation with Tribal Nations and others—before the federal decision is locked in.

Why does this process matter to Tribal Nations?

The Section 106 process is especially important because it brings Tribal Nations to the table to provide expertise and weigh in on federal decision making on infrastructure projects that could affect sacred places, including those on lands from which Tribal Nations were removed. The Section 106 process requires consultation when a Tribal Nation attaches religious and/or cultural significance to a historic property.Tribal Nations and our THPOs are the only authorities of Tribal cultural heritage, holding cultural knowledge that does not appear in an archaeological survey, federal database, or written record.Section 106 creates a legally recognized opportunity to bring that knowledge into federal decision-making before a sacred place or cultural resource is damaged. That protection matters because Tribal Nations have already experienced the historic and ongoing destruction of our sacred places and cultural resources, and once those places are damaged or destroyed they cannot be returned.

How does the Section 106 review process work in practice?

The ACHP's current regulations implementing the NHPA's Section 106 process organize the regular process into four sequential steps, and a federal agency considering an undertaking must comply with those regulations. A review may end at an earlier step if the federal agency, in consultation with Tribal Nations and others, lawfully finds there is no undertaking, no historic property, or no adverse effect. Each step depends on the thoroughness of the one before it, which is why early and meaningful consultation with Tribal Nations is so important.

STEP	FEDERAL PROCESS	WHAT HAPPENS IN PRACTICE
1	**INITIATE** the process	The federal agency determines whether Section 106 review is required, identifies the appropriate THPO or Tribal Nation and other consulting parties, and plans for public involvement.
2	**IDENTIFY** historic properties	The federal agency defines the Area of Potential Effects (APE), makes a reasonable and good-faith effort to identify potential historic properties within it, and determines whether those properties are listed in or eligible for listing in the National Register. The federal agency ***must*** consult Tribal Nations so that they can provide information about places of religious and cultural significance that may not appear in existing records.
3	**ASSESS** adverse effects	The federal agency examines whether those historic properties may be adversely affected, in consultation with the THPO and other consulting parties. If the federal agency finds no adverse effect, the review may conclude after the required review process.
4	**RESOLVE** adverse effects	The federal agency examines whether those historic properties may be adversely affected, in consultation with the THPO and other consulting parties. If the federal agency finds no adverse effect, the review may conclude after the required review process.

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If the federal agency draws the APE review area too narrowly or fails to identify a Tribal Nation's historic property at Step 2, for example, that omission can shape every decision that follows. Early Tribal consultation therefore is not a courtesy; it is an essential ingredient of a statutory-compliant Section 106 review process and carries out the United States' trust and treaty obligations. This consultation can determine what information is actually before the federal agency when it assesses harm and considers how to avoid or reduce it.

WHY EARLY CONSULTATION MATTERS:
Tribal Nations are the only source of information about a sacred place, cultural landscape, traditional route, burial area, water source, viewshed, or other culturally significant feature. And we are uniquely situated to understand potential effects on those sacred places. The process works best when that knowledge reaches the federal agency before routes, designs, and other project choices are locked in. This results in durable federal decision-making that avoids the loss of priceless cultural heritage.

BAAJA: WHAT THE BILL WOULD CHANGE

BAAJA would rewrite the statutory provisions supporting the Section 106 review process itself. It would keep the recognizable four step sequence in the bill. But it would change the rules that determine what enters and exits at each step, and it would drastically alter when and how Tribal Nations are allowed to participate. The concern is not that permitting would move faster. It is how the bill creates that speed and who bears the consequences when the process does not generate the type of deliberation that creates informed and durable federal decisions. Importantly, because these changes would be written into the NHPA itself, they would also be harder to reverse than changes made through agency rulemaking.

TOPLINE CONCERNS:

NARROWER SCOPE OF REVIEW—New definitions and exemptions would reduce when the section 106 process applies and what falls within review.

LESS TRIBAL PARTICIPATION, MORE AGENCY CONTROL—Key decisions about the review area, historic properties, effects, and whether preservation concerns are outweighed could be made without actual dialogue with Tribal Nations.

NEW FEDERAL OVERSIGHT OF THPO PROGRAMS—New deadlines and other imposed requirements could lead to suspension of agreements and Historic Preservation Fund grants and, after the statutory cure period, federal assumption of THPO functions.

WEAKER JUDICIAL REVIEW AND REMEDIES—New filing, standing, review, and remedy limits could leave a Tribal Nations without an effective way to stop a project even after a violation in the Section 106 process is found.

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Supporters of BAAJA claim the bill "protects Tribes" because it writes Tribal consultation into law. Is that true?

No, current law already expressly requires Tribal consultation, and the so-called Tribal consultation in BAAJA falls far short of meaningful, government-to-government Tribal consultation. BAAJA does not create a new statutory Tribal role in the Section 106 process, as Congress has already explicitly tied Tribal consultation directly to an agency's responsibilities under the Section 106 process. The NHPA at 54 U.S.C. § 302706(b) provides:

> In carrying out its responsibilities under Section [106] of this title, a Federal official shall consult with any Indian tribe . . . that attaches religious and cultural significance to property [of traditional religious and cultural importance].

BAAJA therefore does not create a new Tribal role or newly write Tribal consultation into the statute. Instead, BAAJA would change the way that existing right operates, weakening it so much that it should no longer be called "Tribal consultation."

The key question is not whether BAAJA mention Tribal Nations. It does. The question is whether the Section 106 process under the bill still brings Tribal Nations to the federal decision-making table early enough, and in every instance where an undertaking may affect a Tribal NAtion's sacred places, for their expertise to meaningfully inform the decision before harm occurs. The answer is no.

We're hearing BAAJA only adds reasonable deadlines. Are all of the 30-day deadlines new?

No, some 30-day review periods already exist. **However, BAAJA changes the number of deadlines written into the statute, where they appear, and the legal consequences attached to them.** The bill adds a 30-day window for requested information during the federal agency's initial APE and historic property identification, a 30-day response period for the federal agency's reports, and additional 60-, 90-, and 45-day consultation and commenting windows. A Tribal Nation unable to meet these deadlines faces new and dire consequences, including losing the ability to challenge the Section 106 process in court and even having the Department of the Interior take over the Tribal Nation's THPO program. If the work cannot be finished within the statutory windows, the federal agency may move forward, decline to revisit an earlier decision, or treat part of its consultation obligation as complete.

The consequences are even harsher when considering that these deadlines fall on already constrained systems. THPOs are egregiously underfunded and understaffed. And, apart from keeping up with the influx of THPO work, a THPO may need time to consult Tribal leadership, elders, cultural experts, and community members before providing a complete response.

The deadlines change more than timing. Changes to deadlines change who bears the consequence when there is not enough time or resources to meet the deadlines.

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Supporters of BAAJA claim that it guarantees Tribal Nations "a seat from the start of consulation through every major decision." Is that true?

No, BAAJA does not guarantee Tribal Nations a role in each of the major decisions of the Section 106 process. When the agency establishes the APE and identifies historic properties, the bill says the federal agency "may consult" with applicable THPOs, Tribal Nations, and others, but does not require it. Additionally, there is no mechanism for Tribal consultation while the federal agency assesses effects and considers mitigation. It is not until after the federal agency has already made these determinations and formalized them in a report that the agency is required to consult, and even then, the consultation period is too short to be considered meaningful and does not require Tribal agreement with the ultimate determinations.

Does BAAJA change which projects trigger Section 106?

Yes, BAAJA would narrow the threshold for when the Section 106 process applies and would continue narrowing what remains subject to review after a project enters the process. The comparison chart below shows what the curren NHPA provides, how the curren ACHP regulations implement them the Section 106 process, and how BAAJA would change the statutory rules governing the undertaking, the area reviewed, the Tribal places and effects considered, and the measures available to address harm.

Does BAAJA change what can qualify as a property of traditional religious or cultural importance?

Yes, BAAJA would create a new federal definition for these properties. Current law recognizes that properties of traditional religious or cultural importance may qualify for the National Register and requires consultation when Tribal Nations that attach significance to them, but it does not separately define the term. BAAJA would require an **"identifiable geographic location or feature"** where an **"event of continuing religious or cultural significance to a living community occurred."**

BAAJA does not expressly exclude cultural landscapes or natural features, but the new "event" requirement could create problems of places where significance comes from ongoing ceremony, gathering, cultural use, or relationships among natural features rather than a single identifiable past event. If a place does not qualify as a historic property, the Section 106 process would not require the federal agency to evaluate effects on it or consider measures to avoid, modify, or mitigate harm to it.

Supporters of BAAJA claim the bill simply focuses the Section 106 process on a project's "actual footprint." What does it actually do to the APE?

BAAJA does attempt to limit the area under review, as well as the effects under consideration. Those changes are related, but they are not the same. For the APE itself,

BAAJA would define the review area as the area where an undertaking may cause an adverse effect and would expressly exclude any geographic area affected solely by a portion of the project that is not subject to federal control or responsibility.

Separately, BAAJA would narrow what counts as an adverse effect. This narrowing matters because the bill defines the APE by reference to those effects, but the concepts should remain distinct: the **APE determines where the federal agency looks**, while the **adverse-effect standard determines what kind of harm count within the area.**

For projects such as a transmission line, pipeline, mine, road, or other large project crossing federal and non-federal land, that could divide a culturally connected place along federal jurisdiction lines. A federal boundary or construction footprint does not, and should not, define the cultural boundary of a Tribal place.

How would BAAJA narrow which effects count under the Section 106 process?

BAAJA would exclude indirect effects and substantially narrow consideration of cumulative effects. The current ACHP regulations implementing Section 106 expressly recognize that adverse effects may be direct or indirect and may occur later in time, farther away, or cumulatively—impacts Native populations keenly feel as we have watched our lands change over generations.

BAAJA would change which effects are considered. The current Section 106 process calls for consideration of effects to a property's setting and harm caused by visual, atmospheric, or audible changes. BAAJA would exclude those categories unless they have a direct impact that significantly diminishes the characteristics that make property eligible for the National Register.

For many Tribal places, visual, atmospheric, or audible changes to a place are not secondary concerns. A viewshed, landscape, quiet access route, ceremonial setting, or a relationship among natural features may be vital part of what makes the place sacred. A project can seriously damage a sacred Tribal place without putting a bulldozer directly on it.

BAAJA would also impose a stricter causation test. An effect to a historical place would have to share a reasonably close causal relationship with the undertaking and be proximately caused by it.This means it would not be enough that a project contributes to a harmful change; the effect would have to be closely traceable to that particular undertaking, without the causal chain becoming too indirect or dependent on other actions. BAAJA excludes effects the federal agency considers speculative or attenuated, as well as effects tied to unrelated prior, separate existing, or potential future undertakings. These changes give the federal agency another basis to exclude effects that are farther removed in distance or time when it views the causal chain as too attenuated.

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What happens under BAAJA if the federal agency decides there is no adverse effect?

The federal agency could end the Section 106 process on its own effects determination. If the federal agency determines there are no adverse effects, no potential to cause adverse effects, or no historic properties present, the bill says the official has "no further obligations" under the Section 106 process.

Providing the federal agency with such discretion differs from the current Section 106 process. Today, consulting parties receive a no-adverse-effect finding and have 30 days to object. If a Tribal Nation, applicable THPO, or other consulting party disagrees, the federal agency must either try to resolve the disagreement or seek ACHP review, and a consulting Tribal Nation may also take the disagreement directly to the ACHP.

BAAJA does not clearly preserve that same safeguard for a no-adverse-effect finding. BAAJA's formal ACHP-comment process applies later, after adverse effects have been found and consultation fails to produce agreement. As a result, a federal agency's threshold finding that there is no adverse effect could end the process before a Tribal disagreement receives the same ACHP review available under the current regulations.

How would BAAJA change the way adverse effects are resolved?

BAAJA would give the federal agency additional paths to complete the Section 106 process without Tribal Nation agreement. The current Section 106 process uses consultation to seek ways to avoid, minimize, or mitigate adverse effects. Under BAAJA, the federal agency report would identify only so-called "prudent and feasible" measures within the review area and would not identify mitigation outside that area unless the project applicant requests it.

Additionally, the bill allows the federal agency, "in the sole discretion of the Federal agency and as otherwise allowed by law," to decide that other considerations outweigh historic preservation and that the Section 106 process is complete for that reason.

If a Tribal Nation or THPO misses a BAAJA deadline, can it re-enter later?

Yes, but re-entry does not rewind the process. A Tribal Nation or THPO may re-enter after missing a deadline, but the bill expressly says the federal agency does not have to reconsider earlier reports or findings.The federal agency may also consult with the ACHP in place of the party that missed the deadline.

If the review area, historic-property determination, or other finding has already been made, the Tribal Nation may return to a process built on decisions the federal agency is not required to reopen. Participation after a decision is made is not the same as participation before the decision was made.

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How would BAAJA tie the Section 106 process to the broader federal permitting schedule??

The bill would also tie Tribal consultation in the Section 106 process to the NEPA schedule, even when that NEPA review schedule is fast-tracked. For projects requiring a NEPA environmental document, consultation must begin no later than the start of the environmental review and must be completed by the time that environmental document is finished, unless an extension is approved for extraordinary circumstances beyond the consulting parties' control. The federal agency may also use a draft NEPA document as the Section 106 report if the bill's requirements are met.

Coordination can make federal review more efficient. BAAJA makes completion of the Section 106 process track another permitting schedule even when Tribal identification or consultation needs more time in ways that may be unique to the Section 106 process. This change turns schedule pressure elsewhere in the permitting process into additional pressure on Tribal participation.

Could BAAJA prevent a Tribal Nation from challenging harm caused by implementation of a programmatic agreement it did not sign?

Yes, BAAJA goes beyond limiting who can enforce a programmatic agreement by providing that any party that is not a signatory may not bring a civil action challenging implementation of the agreement and expressly removes federal-court jurisdiction over those claims.

Stripping jurisdiction matters because a Tribal Nation may have independent Section 106 interests in affected historic properties without being a signatory to the governing agreement. For example, a programmatic agreement covering work in a historic river basin could affect an off-reservation sacred or cultural place important to multiple Tribal Nations. If even one of the Tribal Nations that hold this landscape as sacred are not a signatory to the agreement, BAAJA's language could prevent that Nation from challenging the federal agency's implementation of that agreement—not simply from suing to enforce an agreement it never signed. Congress should not use programmatic agreements to insulate agency implementation from otherwise available judicial review.

Supporters of BAAJA claim the bill approves $200 million per year for Tribal historic preservation. Is that accruate?

No, while BAAJA does authorize an increase in historic preservation fund monies, it does not mean that $200 million per year will flow to THPOs or Tribal Nations. It would authorize $200 million per year for the Historic Preservation Fund as a whole for Fiscal Years 2027 through 2036. However, BAAJA does not reserve that $200 million specifically for THPOs and, in fact, that funding would also flow to other entities.Additionally, BAAJA authorizes appropriations, it does not guarantee that any amount will be provided each year.Congress could provide the full amount, a smaller amount, or nothing at all in any given year.

Under the current law, $150 million is required to be deposited into the Fund through Fiscal Year 2026. BAAJA would replace that mandatory-deposit structure beginning in Fiscal Year 2027 with an authorization that depends on future congressional appropriations. Any money actually deposited under BAAJA would then be available without another appropriation. **This distinction matters because BAAJA's funding is uncertain even though, its harmful changes to the Section 106 process would be written into law.**

What is the separate $20 million per year THPO grant program mentioned in BAAJA?

The grant is voluntary, narrow, and tied to a database requirement that makes some Tribal Nations uncomfortable. BAAJA would authorize up to $20 million per year for Fiscal Years 2027 through 2030 for competitive THPO grants to build online databases containing program records and a comprehensive list of properties of traditional religious or cultural importance.

BAAJA's grant program protects certain information from required disclosure to the public, but it also requires a system through which relevant federal and state officials may access the database for Section 106 consultation. For Tribal Nations that intentionally limit written or centralized records of sacred places, the issue is broader than public disclosure. It includes who can access the information, how it is stored and protected, and whether the Tribal Nation retains control over sensitive cultural knowledge. Additionally, BAAJA is silent on how such data will be protected from breach.

Does BAAJA create new federal oversight of THPO programs?

Yes, BAAJA would create new federal leverage over Tribal Historic Preservation Officer programs. Tribal Nations' approved THPO programs would be evaluated at least every two years, and BAAJA expressly ties program review to meeting consultation timelines, completing consultation "expeditiously," and satisfying required metrics. BAAJA would also require fiscal audits of Tribal programs at least every four years and direct the Secretary of the Interior, in collaboration with applicable THPOs, Tribal leaders, and relevant nonprofit organizations, to develop new standard requirements for THPOs addressing traditional knowledge, expertise, and access to traditional cultural leaders.

If the Secretary of the Interior disapproves a THPO program, BAAJA requires suspension in whole or in part of covered contracts, cooperative agreements, and Historic Preservation Fund grants. If the program remains inconsistent or has not made acceptable progress within the two-year statutory period, the Secretary will assume all or part of the THPO's functions until the program is found consistent.

That is more than ordinary program oversight. Tribal Nations choose to assume historic preservation responsibilities through their own inherently sovereign governing authority and bring their unique cultural expertise to bare on said responsibilities.Allowing the federal government to commandeer those functions based, in part, on federal timeliness requirements shifts governmental authority away from the Tribal Nation and seriously threatens Tribal sovereignty and Tribal Nations' right to self-governance over their lands and cultural resources.

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What happens if a Tribal Nation's sacred place is identified or listed after the Section 106 process has already started?

BAAJA expressly states that later National Register activity does not require reopening the process. If a property is identified for, nominated to, or listed on the National Register after the federal agency begins its review under the Section 106 process, the bill says that development does not require the federal agency to delay, reopen, supplement, or otherwise modify the review or consultation process.

The opportunity to revisit the process can be crucial for Tribal places. Information about a sacred place may emerge only through consultation with elders, cultural experts, field review, or later research. If that information surfaces after the review has begun, BAAJA may not require the federal agency to reconsider any steps or determinations already made. The federal agency could, in their discretion, choose to consider the new information, but the Tribal Nation would not have a guaranteed mechanism to ensure that newly identified significance is incorporated before the project moves forward.

Supporters of BAAJA claim that the bill does not materially change enforcement because Tribal Nations can still sue. Is that true?

BAAJA would limit the ability to sue and change the remedy. It would change who can bring certain claims, where those claims are heard, how quickly they must be filed, and how the court reviews the federal agency's decision. Most covered claims would face a 150-day filing deadline and would begin in a U.S. Court of Appeals, rather than beginning in a federal district court under the Administrative Procedures Act (APA) as Section 106 challenges do today. **BAAJA would also require substantial deference to the federal agency and would bar the court from substituting its judgment for the federal agency's judgment.** Such a change would make it harder for Tribal Nations to get meaningful resolutions in court when a federal agency gets the Section 106 process wrong, increasing the risk that projects that are harmful to sacred places and cultural resources can move forward before violations are corrected.

BAAJA also imposes limits on who can bring a court challenge and what issues they can raise. In general, a person challenging a federal agency's decision would have to show direct harm and, where there was a public comment period, would be limited to issues they specifically raised during the comment process. Tribal THPOs are only exempt from those requirements if they gave the federal agency detailed written notice during consultation identifying the action and the issues they may later challenge. Because BAAJA separately gives applicable THPOs, Tribal Nations, and other entities only 30 days to respond to reports or findings, timely written participation becomes especially important for preserving concerns throughout the process.

Even if a court ultimately finds a violation of the Section 106 process, BAAJA says the "only remedy" is to send the decision back to the agency without vacating it or stopping the project, with the agency given no more than 180 days to correct the problem. Although a preliminary injunction is not completely out of the question, it cannot rest on a likely violation of those NHPA requirements or NEPA alone. At the same time, project applicants would have a separate right to sue over missed consultation deadlines and could receive injunctive relief. The result is a striking imbalance. A Tribal Nation could prove that the Section 106 process was unlawful and still be unable to stop the challenged action on that basis, while a project applicant would gain a new express right to go to court and force the agency to act on missed deadlines.

Supporters of BAAJA have used the phrase "paperwork mistakes" to describe problems with procedural review. Is that a fair way to describe violations in the Section 106 process?

No, calling these violations "paperwork mistakes" undervalues what can be learned during the Section 106 process and understates what can go wrong in the Section 106 process. A violation may mean the federal agency failed to consult the right Tribal Nation, never identified a sacred place, drew the review area too narrowly, overlooked an important cultural harm, or approved the project before meaningful consultation occurred, among other things.

Procedural review failures can have consequences that cannot be fixed later. The current Section 106 process—when done right—respects Tribal sovereignty by requiring federal agencies to consult Tribal Nations as governments, recognize their expertise in identifying and assessing harms to places of religious and cultural significance, and consider ways to avoid, minimize, or mitigate harm before decisions are final. A federal agency cannot restore a burial area, ceremonial setting, cultural landscape, or sacred place after it has been destroyed or irreversibly altered.

Additionally, **federal failures to identify concerns early, consult meaningfully, or follow the required process can themselves lead to project delays and litigation** by Tribal Nations and others. **BAAJA does not fix those failures; instead, it limits the process and remedies available when they occur.**

BAAJA IS NOT "GOOD FOR TRIBAL NATIONS"

In summary, while Title III of BAAJA includes some provisions that could be useful to Tribal Historic Preservation Officer programs if implemented properly, the benefits do not even come close to outweighing the egregious damage BAAJA would do to other aspects of the process. The Historic Preservation Fund provision authorizes future funding but does not guarantee that Congress will provide it, replacing the current mandatory-deposit structure with funding dependent on future appropriations. And the new funding is not promised to Tribal Nations.Additionally, the new THPO grant program is competitive and requires developing an online database that would include sensitive cultural information many Tribal Nations have been hesitant to preserve in this way. The codified THPO programmatic-agreement authority may also be useful in some instances, but BAAJA would potentially bar a Tribal Nation that was not a signatory from challenging implementation of the agreement in court—even where that Nation has cultural or religious interests in affected properties. These limited benefits do not offset the broader loss of protections, and BAAJA's changes to the existing legal rights and protections Tribal Nations rely on within the Section 106 process would be written into law regardless of whether the authorized funding ever materializes.

At the same time, BAAJA would make structural changes to the Section 106 process that hobble Tribal cultural preservation efforts. It would narrow what projects, areas, sacred places, harms, and mitigation measures receive review, place new deadlines and limits on Tribal participation, allow federal agencies to close parts of the process without Tribal agreement, create new federal oversight of THPO programs, and restrict the remedies available when the process is violated.

Taken as a whole, BAAJA is unacceptable on its face. It asks Tribal Nations to surrender existing, enforceable protections for contingent funding and limited new authorities while permanently narrowing the federal government's trust and treaty obligations under the Section 106 process.That trade would leave sacred places, ancestral landscapes, and Tribal cultural resources with fewer legal protections than currently in place which, once allowed to occur, may be impossible to undo. Bad regulations can be challenged, revised, or rescinded through future rulemaking; bad statutory language is far harder to unwind. BAAJA would write these losses into federal law, and therefore BAAJA cannot be allowed to pass.

How Would the Section 106 Review Process Work Under BAAJA?

BAAJA STAGE	DEADLINE	WHAT THE BILL DOES	WHEN AND HOW TRIBAL NATIONS PARTICIPATE	WHY THE TIMING MATTERS
1 DETERMINE UNDERTAKING	**30 days after a receipt of a request for review**	The federal agency determines whether the proposal is an "undertaking" subject to the Section 106 process. BAAJA also narrows the definition of undertaking and expressly excludes specified projects, activities, and portions of projects. *S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(a)(7)(A)–(B), (c)(2)(A)).*	The bill does not expressly require consultation with applicable THPOs, Tribal Nations, and other entities before the federal agency makes this threshold determination. If the federal agency determines the Section 106 process does not apply, Tribal participation never begins.	This threshold decision determines whether the proposal ever enters the Section 106 process at all.
2 REQUEST TRIBAL INFORMATION	**30 days after the federal agency requests information**	Before setting the APE or identifying historic properties, the federal agency must ask applicable THPOs, Tribal Nations, and others for information. However, the bill requires the official to discuss and incorporate that information only "as appropriate" and "as applicable," leaving the federal agency significant discretion over how the information is used. *S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(2)(B)(iv)).*	The federal agency must ask for information, but that is not the same as required consultation. Tribal Nations have 30 days to provide information about the proposed area.	This is the Tribal Nation's guaranteed chance to provide information before key decisions are made, but the bill does not guarantee that the information will shape those decisions. Missing the 30-day window may mean the information is left out entirely. This can affect what the federal agency considers when defining the review area and identifying historic properties—decisions that shape the remainder of the review.
3 ESTABLISH AREA OF POTENTIAL EFFECTS AND IDENTIFY HISTORIC PROPERTIES	**No separate deadline stated**	The federal agency sets the APE and identifies historic properties. During this phase, the federal agency "may consult" with applicable THPOs, Tribal Nations, and others, but consultation is not required. *S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(2)(B)(i)–(iii)).*	During this phase, participation by Tribal Nations is at the sole discretion of the federal agency.	The federal agency can decide where it looks and what historic properties it recognizes without participating in true, meaningful consultation with Tribal Nations.

4 DETERMINE EFFECTS	**No separate deadline stated**	If the proposal is an "undertaking," the federal agency determines whether there are adverse effects within the APE. A finding of no adverse effects, no potential for adverse effects, or no historic properties ends the Section 106 process. *S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(2)(D)(i)–(ii)).*	The bill does not expressly require, or even contemplate, Tribal consultation before the federal agency makes the effects determination.	This is another potential stopping point. A no-adverse-effect, no-potential-to-cause-adverse-effects, or no-historic-properties finding can end the process before the later consultation and mitigation stages are available.
5 AGENCY REPORT AND MITIGATION CONSIDERATION	**60 days after the undertaking determination if adverse effects are found**	If adverse effects are found, the federal agency prepares a report within 60 days of the undertaking determination. This report must not only identify the APE, historic properties, and adverse effects, but it must also consider mitigation measures. *S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(2)(D)(iii)).*	The federal agency must submit this report for review by applicable THPOs, Tribal Nations, and other entities, along with the project applicant.	The report sets out the APE, historic property, effects, and mitigation analysis before the 30-day response and objection window begins.
6 90-DAY REVIEW AND 30-DAY RESPONSE WINDOW	**90-day overall review period; 30 days for the Tribal Nation, applicable THPO, or other entity to respond to a report or finding; 30 days for the federal agency to respond to timely substantive objections**	After the report is submitted, the bill provides a 90-day review period unless the parties agree to a shorter timeline. By the end of that period, the federal agency must make one of the bill's specified determinations or reach an agreement. *S. 5653 § 2301(c) (proposed 54 U.S.C. §§ 306108(c)(3)(a), (c)(5)(C)(i)–(v)).*	Within that 90-day period, applicable THPOs, Tribal Nations, and other entities have 30 days after receiving a report or finding to respond and raise substantive objections. If they do not respond, or do not raise substantive objections within that window, the federal agency may proceed. If they re-enter later, the federal agency need not reconsider earlier reports or findings and may consult the ACHP instead. If timely substantive objections are raised to the report, the federal agency has 30 days to respond.	The 30-day response period sits inside the larger 90-day review period. Missing that shorter window allows the federal agency to proceed, and later re-entry does not require reconsideration of earlier reports or findings.

7 DETERMINATION	**By the end of the 90-day period after submission of the report, unless a shorter timeline is agreed to by the parties**	The federal agency may (1) conclude the effects do not diminish the property enough to make it ineligible for the National Register, (2) decide, in the federal agency's sole discretion, that other considerations outweigh historic preservation, or (3) reach an agreement with the applicable THPO, Tribal Nation, or other entity on avoidance, minimization, or mitigation. *S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(3)(A)(i)–(ii)).*	The first two paths allow the federal agency to complete the Section 106 process without Tribal participation, and only the last involves a Tribal Nation at the table. The federal agency acts "in consultation" with applicable THPOs, Tribal Nations, and other entities during this stage. But only the third determination path requires agreement. The first two determination paths allow the federal agency to satisfy its Section 106 obligations without obtaining Tribal agreement.	Consultation occurs during the determination stage, but Tribal agreement is not required for the federal agency to use either of the first two paths and end its obligations.
8 IF NO AGREEMENT	**Another 60 days of consultation; then 45 days for ACHP comments; then 30 days for the federal agency's final determination.**	If no agreement is reached between the federal agency and the applicable THPO, Tribal Nation, or other entity within the 90-day period, the bill provides another 60 days of consultation. If agreement still is not reached, the federal agency must request ACHP comments. The ACHP has 45 days to comment, and the federal agency then has 30 days to make a final determination explaining how the ACHP's comments were considered. *S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(3)(B)(i)–(ii)).*	Applicable THPOs, Tribal Nations, and other entities participate in the additional 60-day consultation period.	The additional consultation provides another opportunity to seek resolution, but the federal agency can ultimately complete the process after considering ACHP comments without obtaining Tribal agreement.

CROSS-CUTTING NEPA DEADLINE	**Consultation begins no later than initiation of NEPA review and must be completed by the NEPA environmental document deadline**	For NEPA-linked undertakings, BAAJA ties the Section 106 consultation schedule to the NEPA schedule. The Secretary may approve an extension only for qualifying extraordinary circumstances beyond the control of, and not due to any actions of, the consulting parties. *S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(5)(A)–(B)).*	Any consultation required under this subsection must begin no later than initiation of the NEPA environmental review and must be completed by the date the applicable NEPA environmental document is completed.	If consultation is not complete by the applicable deadline, each THPO and specified senior federal agency with a substantive role or responsibility in the consultation must devote at least 50 percent of the workweek to remedying the failure. A project applicant may also sue the federal agency over the missed deadline; if the court finds noncompliance, the court must provide injunctive relief, as appropriate, and retain jurisdiction to ensure compliance.

IMPORTANT RULES TO NOTE: This table shows BAAJA's default process. If an undertaking is governed by an authorized program alternative—including an alternate procedure, programmatic agreement, exempted category, standard treatment, or program comment—the federal agency may follow that alternative instead. Later identification, nomination, or listing of a property on the National Register after review begins also would not require the federal agency to delay, reopen, supplement, or modify the process. *S. 5653 § 2301(c) (proposed 54 U.S.C. §§ 306108(c)(2)(C), (d)).*

How BAAJA Narrows the Section 106 Process

Step in the Review	CURRENT NHPA	CURRENT SECTION 106 REGULATIONS	BAAJA
1. What projects enter the process?	"Undertaking" is defined broadly as a project, activity, or program under the direct or indirect jurisdiction of a federal agency, including projects carried out by an agency, receiving federal financial assistance, requiring a federal permit, license, or approval, or subject to federally delegated state or local regulation. Current law permits exemptions, but directs the ACHP, with the Secretary's concurrence, to establish them when consistent with the purposes of the NHPA and after considering the likelihood of harm to historic property. 54 U.S.C. §§ 300320, 304108(c).	The regulations use the same broad definition of "undertaking." If an undertaking is the type of activity that **"does not have the potential to cause effects on historic properties,"** the federal agency has no further Section 106 obligations. Exempted categories are also available, but only for undertakings whose effects are foreseeable and **"likely to be minimal or not adverse"** and where exemption is consistent with the NHPA. 36 C.F.R. §§ 800.3(a)(1), 800.14(c), 800.16(y).	BAAJA would replace the existing definition for purposes of § 306108 with one requiring **both** a federal permit, license, or approval **and** "substantial Federal control and responsibility." It then creates statutory exclusions, including any project where the only federal involvement is a loan, loan guarantee, grant, cost-share award, or other financial assistance not primarily for historic preservation. If a project falls outside of this definition or within an exclusion, the Section 106 process does not begin. S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(a)(7)).

2. How much of the surrounding area is reviewed?	The statute does not define an APE. Section 106 instead broadly requires an federal agency to "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108.	The regulations define the APE as the geographic area where an undertaking may **"directly or indirectly"** alter the character or use of historic properties. Its size depends on the scale and nature of the undertaking and may differ for different types of effects. 36 C.F.R. § 800.16(d).	BAAJA would put an APE definition into the statute and tie it directly to the bill's new definition of adverse effect. The APE would be only the area where the undertaking may cause a **reasonably foreseeable, direct alteration** meeting that standard. It also expressly excludes areas affected solely by portions of a project that are not subject to federal control or responsibility. S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(a)(1)–(2)).
3. What Tribal places are identified and considered?	"Historic property" means a prehistoric or historic district, site, building, structure, or object that is listed on or eligible for the National Register, including related artifacts, records, and material remains. The NHPA separately provides that property of **"traditional religious or cultural importance"** to a Tribal Nation may be eligible for the National Register and expressly requires consultation with Tribal Nations that attach significance to such property. 54 U.S.C. §§ 300308, 302706(a)–(b).	The regulations expressly include properties of traditional religious and cultural importance that meet National Register criteria. Agencies must make a **"reasonable and good faith effort"** to identify historic properties and gather information from Tribal Nations about culturally significant places, including those **off Tribal lands**. 36 C.F.R. §§ 800.4(a)–(b), 800.16(l).	BAAJA would **not replace the general definition of "historic property."** Instead, it adds a new statutory definition for a **"property of traditional religious or cultural importance,"** requiring an "identifiable geographic location or feature" at which an **"event of continuing religious or cultural significance to a living community occurred."** That additional definition would govern which Tribal places receive the specific protection provided by § 302706. S. 5653 § 2301(c) (proposed 54 U.S.C. § 302706(a)(1)).
4. What effects count?	The NHPA does not define "adverse effect." Section 106 broadly requires the federal agency to **"take into account the effect of the undertaking on any historic property."** 54 U.S.C. § 306108.	An "effect" is an alteration to characteristics that qualify a historic property for the National Register. An adverse effect exists when an undertaking may directly or indirectly alter qualifying characteristics in a way that diminishes integrity. Current regulations expressly contemplate reasonably foreseeable effects occurring **later in time, farther removed in distance, or cumulatively**, and identify visual,	BAAJA would define an adverse effect in the statute as a **reasonably foreseeable consequence that "directly alters"** characteristics of the historic property and diminishes its integrity of location, design, setting, materials, workmanship, or association. It defines foreseeability through a close causal relationship and proximate cause, and expressly limits visual, atmospheric, audible, temporary, and certain other effects. Notably, BAAJA's statutory list of integrity characteristics

		atmospheric, and audible changes as potential adverse effects. 36 C.F.R. §§ 800.5(a), 800.16(i).	does **not include "feeling,"** which is included in the current regulatory adverse-effect standard. S. 5653 § 2301(c) (proposed 54 U.S.C. §§ 306108(a)(1), (a)(4)).
5. What solutions can be considered?	Section 106 requires the federal agency to take effects into account and give the ACHP an opportunity to comment. Current law also provides that, where an undertaking adversely affects historic property and no agreement is reached, the agency head must document the decision; where an agreement is executed, that agreement governs the undertaking. 54 U.S.C. §§ 306108, 306114.	Once adverse effects are found, the federal agency **"shall consult"** with the SHPO/THPO and other consulting parties, including Tribal Nations, to **"develop and evaluate alternatives or modifications"** that could avoid, minimize, or mitigate adverse effects. The regulations do not confine those alternatives to the APE. 36 C.F.R. § 800.6(a)–(b).	BAAJA requires the federal agency's report to identify **"prudent and feasible"** avoidance, minimization, or mitigation measures **within the APE**. The report generally may not identify measures outside the APE unless the project applicant requests alternative mitigation. The federal agency may also decide, **"in [their] sole discretion,"** that other considerations outweigh historic preservation and later satisfy its obligations without reaching an agreement on mitigation. S. 5653 § 2301(c) (proposed 54 U.S.C. §§ 306108(c)(2)(D)(iii)(II)(ee)–(gg), (c)(3)(A)).

Other Express Exclusions from the New Undertaking Definition

EXCLUSION	WHAT IT MEANS
PORTIONS OUTSIDE FEDERAL CONTROL	A project portion over which the federal agency lacks substantial control or responsibility would fall outside the undertaking.
CERTAIN FEDERAL FINANCIAL ASSISTANCE	Loans, guarantees, grants, cost shares, and similar assistance would not trigger the Section 106 process when that is the only federal involvement and the assistance is not primarily for historic preservation.
CERTAIN NONDISTRETIONARY OR MINOR ACTIONS	The bill excludes nondiscretionary agency actions and specified repair, maintenance, safety, survey, and consultation activities when the statutory conditions are met.
SOME RENEWALS AND POST-REVIEW ACTIVITY	The bill also excludes certain unchanged special-use permit renewals and some continued operation or maintenance after the Section 106 process determination, unless a later discrete federal decision materially changes that determination.