SECTION 106: Protecting Sacred Places and Tribal Consultation

Remove BAAJA's NHPA / Section 106 Title

Problem. The Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), S. 5653, would bar Tribal Nations from the federal decision-making table, preventing Tribal Nations from helping the federal government avoid harm to sacred places. BAJAA would gut the National Historic Preservation Act (NHPA) provisions that support the Section 106 review process.

Tribal Nations Are Owed a Seat at the Table. Tribal Nations are sovereign governments, not stakeholders. Through taking Tribal lands and resources, the United States incurred debt-based trust and treaty obligations that include Tribal consultation and protection of our sacred places and cultural resources. The NHPA is a federal law that codifies the requirement that federal agencies, in consultation with Tribal Nations, 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. 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.

Why Section 106 Matters to Tribal Nations. Section 106 review brings Tribal Nations to the table to provide expertise and weigh in on federal decision making on infrastructure and other projects that could affect sacred places, including those on lands from which Tribal Nations were removed. It does not create a veto right. The Section 106 process requires a federal agency to consult with interested Tribal Nations in identifying potential historic properties within the geographic area of potential effect (APE) of the undertaking, assess the potential effects of that project on those historic properties, and then attempt to avoid, minimize, or mitigate adverse effects. Tribal Nations and applicable Tribal Historic Preservation Officers (THPOs) are the only arbiters of Tribal cultural heritage, holding cultural knowledge that does not appear in archaeological surveys, federal databases, or written records. Section 106 creates a legally recognized opportunity to bring that knowledge into federal decision-making before a sacred place or cultural resource is damaged. The vast majority of Section 106 reviews are resolved without elevated disputes, and early consultation helps identify and address concerns before they become project delays or conflicts.

BAAJA Substantially Weakens Tribal Participation. Despite claims that BAAJA codifies Tribal consultation, the NHPA already requires consultation with Tribal Nations that attach religious or cultural significance to potential historic properties, and it provides an even louder voice when an undertaking is occurring on or affecting Tribal land. BAAJA would weaken how that Tribal consultation right operates. Before setting the APE or identifying potential historic properties, BAAJA would require the federal agency to request information from applicable THPOs and Tribal Nations—but it would not require consultation at that stage. The bill would require the agency to discuss and incorporate Tribal information, but only as the federal agency deems "appropriate" and "applicable," leaving significant discretion over how that information is used. Before required consultation begins, the agency may already have decided: (1) whether Section 106 applies; (2) the APE; (3) which historic properties are identified; (4) whether they will be adversely affected; and (5) what mitigation measures should be considered. Only then is Tribal consultation required, and even still the federal agency is permitted to end the Section 106 review process without any real discussion or agreement with Tribal Nations.

BAAJA Narrows Which Sacred Places Get Reviewed and Protected. The bill would narrow: (1) what qualifies as an undertaking requiring Section 106 review; (2) the geographic area reviewed; (3) which properties of traditional religious or cultural importance qualify as historic properties; (4) consideration of indirect and cumulative effects; and (5) when visual, audible, atmospheric, and similar effects count. These narrowed thresholds can exclude sacred places and cultural resources from Section 106 review before Tribal Nations have a meaningful opportunity to be heard.

BAAJA Negatively Impacts Tribal Sovereignty by Creating New Federal Leverage Over Tribal Historic Preservation Officer Programs. BAAJA would punish underfunded THPOs for failing to meet unworkable deadlines, including by permitting a federal agency to take over a sovereign Tribal government's THPO functions. Tribal Nations' approved THPO programs would be evaluated at least every two years, and the bill expressly ties program review to meeting tight consultation timelines. BAAJA would also require fiscal audits of Tribal programs and direct the Secretary of the Interior, in collaboration with applicable THPOs and others, to develop new THPO standards. If the Secretary disapproves a THPO program, the bill will require suspension in whole or in part of covered contracts, cooperative agreements, and Historic Preservation Fund grants—removing funding from already underfunded THPOs. If the program has not made acceptable progress in the eyes of the Secretary within the two-year statutory period, the Secretary would assume all or part of the THPO's functions until the program is found consistent.

BAAJA Adds Burdensome Deadlines and Weakens Remedies. Tribal Nations would face short statutory response windows against a baseline of chronically underfunded and understaffed THPO programs. Missing an early deadline would allow the federal agency to move forward without revisiting earlier decisions and can create uncertainty about preservation of issues for later review by the courts. Even if a court ultimately finds that decisions made in the Section 106 process were unlawful, BAAJA would generally limit the solution to sending the review back to the agency without stopping the project—meaning a sacred place or cultural resource could be damaged while the agency corrects the process violation.

The Potential for Tribal Funding Is Not a Fair Trade. BAAJA authorizes future Historic Preservation Fund spending, but it does not guarantee the full amount—or any amount—of that funding will be appropriated. Even if it is, there are no promises about the amount that will flow to Tribal Nations. Additionally, BAJAA's separate THPO grants would be competitive, they would only be made available to develop new databases with problematic requirements for placing sensitive cultural information online. Limited, uncertain, and potentially harmful federal funding should not be exchanged for permanent statutory losses in consultation, cultural-resource protection, and judicial resolutions.

REQUEST: Congress Should Delay Considering This Bill, or at a minimum, Cut BAAJA's NHPA / Section 106 Title in Its entirety.

Any Section 106 reform should be considered separately from the other provisions of BAAJA and developed through meaningful government-to-government consultation with Tribal Nations.