BAAJA SECTION 106 MYTH BUSTER

What Bill Supporters Are Saying Versus What the Bill Actually Does for Indian Country

Background

On September 30, 2026, the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), S. 5653, was introduced. Within this proposed legislation, the Section 106 National Historic Preservation Act (NHPA) Title is being described by supporters as a Tribal win and a common-sense effort to speed federal permitting. The bill text tells a different story. The following claims obscure the most harmful changes for Tribal Nations.

Myth vs. Reality

MYTH 1: BAAJA "protects Tribes" because it writes Tribal consultation into law.

REALITY: The NHPA already requires consultation with Tribal Nations that attach religious or cultural significance to potential historic properties. BAAJA would weaken how that right operates. For example, at key stages of Section 106 review, BAAJA requires a federal agency to request information from applicable Tribal Historic Preservation Officers (THPOs) and Tribal Nations, but it does **not *require* consultation** with Tribal Nations. Under BAAJA, the federal agency need only discuss an incorporate that information "as appropriate" and "as applicable," leaving significant discretion over how it is used. If adverse effects are found and a Section 106 report is issued, required consultation occurs later, after foundational decisions have already been made. Mentioning Tribal consultation in the statute is not the same as mandating real, meaningful consultation with Tribal Nations.

MYTH 2: BAAJA guarantees Tribal Nations "a seat from the start through every major decision."

REALITY: It does not. BAAJA does not guarantee Tribal Nations a seat at the table while the federal agency makes several major early decisions. The agency must request Tribal information before setting the APE and identifying historic properties, but actual consultation remains **optional** at that stage. Before required consultation begins, the federal agency may already have set the APE, identified historic properties, determined adverse effects, and developed its initial mitigation and analysis. An agency could also end review at an earlier step without ever issuing a Section 106 report, resulting in a Tribal Nation never participating in the process at all. Even later, there are several steps that allow the federal agency to complete the process without true Tribal Nation dialogue about appropriate mitigation measures.

MYTH 3: BAAJA only adds "reasonable deadlines" to make the Section 106 process faster.

REALITY: BAAJA adds new and unworkable statutory deadlines with drastic legal consequences for Tribal Nations. Missing a **30-day window** can allow the federal agency to move forward without reopening earlier decisions. It also creates uncertainty about a Tribal Nation's ability to raise those issues in court because BAAJA separately requires issues to be identified in writing during the consultation process or, where applicable, public comment. The Department of the Interior's new THPO oversight would be tied, in part, to timeliness, risking the Department taking over THPO

functions from Tribal Nations. The bill shifts the risk of speed onto already underfunded and understaffed Tribal preservation programs.

MYTH 4: BAAJA simply focuses review on a project's "actual footprint."
REALITY: The effects of a project are almost never limited to the physical footprint of the project, and the NHPA and Section 106 process have thus required consideration of the potential effects wherever located. While BAAJA maintains consideration of the Area of Potential Effect (APE), it limits what falls into that geographic area, and it similarly limits the types of effects that may be considered. BAAJA would substantially restrict consideration of indirect and cumulative effects and limit when visual, audible, atmospheric, and similar changes matter. A sacred place can be seriously harmed by changes to its setting, viewshed, sound, access, or surrounding landscape, even when construction never directly touches it. Additionally, cumulative and indirect effects are felt particularly uniquely by Tribal populations living on our homelands and experiencing how those effects are felt over generations.

MYTH 5: Tribal Nations can still sue, so enforcement is basically unchanged, and violations of the process are only "paperwork mistakes" anyway.
REALITY: BAAJA would impose new judicial filing and participation barriers, require substantial deference to the federal agency, and generally make remand the only remedy—without stopping the project during that remand. A Tribal Nation could prove the Section 106 process was unlawfully carried out and still be unable to stop the challenged action on that basis. A Section 106 violation could mean cultural resources or sacred places were never identified or potential effects were never discussed. This is not a paperwork error.

MYTH 6: BAAJA provides $200 million per year for Tribal historic preservation and strengthens THPO funding.
REALITY: The $200 million is an authorization for the Historic Preservation Fund as a whole, not guaranteed funding and not a Tribal set-aside. The separate THPO grants offered under BAAJA are competitive and tied to an online cultural-resource database that raises important concerns about maintaining the confidentiality of sensitive information. Additionally, BAAJA threatens the loss of THPO funding already flowing as a potential consequence of federal THPO evaluations. Even if BAAJA did provide the certainty of additional funding for THPOs, which it does not, funding does not offset permanent losses in legal protections resulting from BAAJA.

BOTTOM LINE

CTS POSITION: Congress should delay considering this bill, or at a minimum, remove the NHPA Section 106 Title from BAAJA in its entirety. Any Section 106 reform should be considered separately and developed through meaningful government-to-government consultation with Tribal Nations—consultation the United States owes as part of fulfilling its trust and treaty obligations. If passed, BAAJA would write significant Tribal losses into federal law, and undoing those harms would require Congress to pass another law—a difficult process with no guarantee of success.

**For additional details, see the CTS Section 106 FAQ and supporting comparison materials.*