BAAJA'S EMPTY PROMISES TO TRIBAL NATIONS
CLAIM vs. FACT

Nine claims about S. 5653, checked against the bill's text

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Tribal Nations are sovereign governments. Their relationship with the United States rests on treaties, on the federal trust responsibility, and on their inherent authority over their lands, their people, and their cultural heritage. Their sacred places, burial grounds, and cultural landscapes were here long before the United States, and only Tribal Nations hold the knowledge to identify them and to say what harms them. Section 106 of the National Historic Preservation Act (NHPA) is one of the few places where federal law puts that authority to work before construction begins. It requires federal agencies to consider how a project would affect historic and sacred places, and to consult with Tribal Nations, before approving it.

Title III of S. 5653 would strip that authority away. It narrows which sacred places count, which projects get reviewed, and how long Tribal Nations get to respond. It lets a federal official decide that other considerations outweigh harm to Tribal sacred places. It orders the Secretary of the Interior to take over Tribal Historic Preservation Offices (THPOs) that fall behind. And it takes away the power of the courts to stop a project that broke the law. These changes are unacceptable to Tribal Nations. Title III must be removed from the bill.[i]

Supporters of the Bipartisan American Affordability and Jobs Act (BAAJA) are telling Congress the bill is good for Tribal Nations. A widely circulated Searchlight Institute memorandum[ii] says BAAJA "protects tribes" and guarantees them "a seat from the start of consultation through every major decision." A newer Institute for Progress (IFP) report[iii] argues that Tribes need BAAJA to lock in protections before the Advisory Council on Historic Preservation (ACHP) finalizes a draft rule rolling them back. The bill's own sponsors say it protects "the ability of Tribes to formally consult."[iv]

This paper checks each of those claims against what the bill says, and the text tells a different story. Where supporters say the bill writes consultation into law, the bill says only that an agency "may consult" Tribal Nations when it identifies the places at stake.[v] It would let federal agencies unilaterally decide which sacred places count and whether a project harms them. It would let the federal government take over the Tribal Nation's historic preservation office. And it would bar Tribal Nations from even asking a court to stop a project that violates Section 106, all in exchange for funding the bill does not guarantee.

Congress should ask whose interests these assurances serve. The case for Title III is a case for building faster, and the cost of that speed falls on Tribal Nations. Searchlight Institute's budget has been reported to come from billionaire donors, including a hedge fund manager and a real estate investor, and its board includes a donor whose fortune comes largely from Nvidia, a company heavily invested in data center expansion.[vi] Its memorandum devotes an entire section to moving data centers onto the grid.[vii] Those interests gain speed under Title III. Tribal Nations pay for it: fewer sacred places protected, less time and less voice in consultation, and no court able to stop the destruction once it begins. Tribal sovereignty is never discretionary, and Tribal Nations should not be forced to pay the price of permitting reform.

AT A GLANCE

WHAT TITLE III TAKES FROM TRIBAL NATIONS

WHAT HAS BEEN LEFT OUT OF THE NARRATIVE

Federal officials, not Tribal Nations, would decide which places are sacred enough to protect, and could revisit places already on the National Register.

For the first time, federal law would define what makes a place sacred to a Tribe. Today, properties "of traditional, religious, and cultural importance to an Indian tribe" may be eligible for the National Register, and agencies must consult any Tribe that attaches such significance to these properties. BAAJA would narrow the definition to include only Tribal places that are "an identifiable geographic location or feature at which an event of continuing religious or cultural significance to a living community occurred."[viii] Supporters stress that the bill says "religious *or* cultural" and reaches any "feature." But the definition's own examples are a "district, site, building, structure, or object" and "artifacts or material remains," not a mountain, spring, or river. And the test requirement that an event "occurred" there is vague and likely underinclusive. Further, the consultation duty in § 302706(b) still says "religious *and* cultural," so the broader eligibility language carries no matching right to consultation.[ix] Places that matter for ongoing ceremony, gathering, or belief could fall outside the definition, and a place that is not eligible gets no Section 106 review at all. With no savings clause, agencies could use the new test to reevaluate places already listed or found eligible.

WHAT THE BILL AND ITS DEFENDERS ADMIT

ISSUE	WHAT IT MEANS FOR TRIBAL NATIONS
Sacred places	Mountains, springs, and landscapes lose any certainty of protection.
What counts as harm	Viewsheds and ceremonial landscapes can be degraded without the harm being counted, and whole categories of projects escape review.
Tribal review	The agency only "may" consult when it identifies sacred places, then decides harm alone. If it finds no harm, Tribal Nations get no guaranteed review. If it finds harm, they get 30 days.
Agency override	One official can decide that a project matters more than a sacred place.
THPO takeover	The Secretary must take over Tribal historic preservation offices that miss deadlines, delays rooted in chronic federal underfunding.
Courts	A court can find the law was broken and still not stop the bulldozer.

Nine national and regional Tribal organizations have called for Title III's "immediate rescission."

WILL IT SPEED ANYTHING UP? THE RECORD SAYS NO

98% of the 120,000 federal undertakings reviewed under Section 106 each year end with no adverse effect.	**2.5%** of manufacturers in the National Association of Manufacturers' own survey named Section 106 their longest approval.	**$62.15M** in SHPO grants, flat since FY 2023, for 101,200 reviews in FY 2025. Capacity, not consultation, is the bottleneck.

A seat at the table matters only if
the project, place, and potential harm remain on the table.

CLAIM 1	***"It writes tribes' role in historic preservation reviews into law, guaranteeing them a seat from the start of consultation through every major decision."***[x] ***"BAAJA writes Tribes into the Section 106 process for the first time."***[xi] ***The bill codifies tribal participation and protections in the Section 106 process for the first time, according to a spokesperson for Chairman Lee.***[xii]
FACT	**Tribes already have a seat at the table: agencies are legally mandated to consult Tribes. BAAJA turns that mandate into a "may": an agency "may consult" Tribes when it identifies historic properties. It lets the agency unilaterally decide whether a sacred place is harmed and lets the project move forward without Tribal input once the new, stringent deadline passes.** 54 U.S.C. § 302706 already requires consultation when a Tribal Nation attaches religious and cultural significance to a historic property. Even BAAJA's supporters concede that "a rule cannot change" that duty. But § 302706 applies "[i]n carrying out" Section 106, and the bill rewrites Section 106 itself, so the consultation guaranteed to Tribal Nations may be reduced to the new, weaker Section 106 consultation process that is: optional during the agency's determination of historic properties, absent when the agency decides whether there is harm, and limited to the agency's report afterward. Under the new Section 106 consultation process, an agency "may consult" with Tribes to establish the area of potential effects and identify historic properties—it doesn't have to.[xiii] The assurance that Tribal consultation is guaranteed under BAAJA is belied by the fact that consultation becomes optional at the first step and non-existent at the second. While an agency must request Tribal information, a request for information is no replacement for consultation, especially where the agency must incorporate information only "as applicable" and only where Tribal Nations provide information within 30 days,[xiv] which is a short window for consulting councils, elders, and cultural committees. The Government Accountability Office has already found that Tribes' primary complaints about consultation are that agencies start too late and do not consider Tribal input; BAAJA writes both problems into the statute.[xv] IFP's own comparison chart faults the ACHP draft rule for giving Tribes "only 60 days" to review agency findings, "with silence treated as waiver." BAAJA halves the time, with the same consequence.[xvi] If the agency finds that no historic properties are present, its Section 106 obligations end.[xvii] Further, Tribal Nations get no say in whether a proposed project would have an adverse effect on a historic property; the agency decides that unilaterally.[xviii] If the agency decides there are no adverse effects, its Section 106 obligations end. A Tribe that misses a 30-day response deadline is cut out: the agency proceeds without it, need not reconsider its findings if the Tribe returns, and may consult ACHP in the Tribe's place.[xix] A seat at the table means little when the agency alone has decided what is on the table.

CLAIM 2	***"BAAJA also protects tribes at a moment when the administration is trying to cut them out."***[xx] ***"[T]he NHPA's Tribal consultation requirement…is unchanged in BAAJA. So, too, is Tribes' authority under NHPA to operate their own Tribal Historic Preservation Offices."***[xxi]
FACT	**Far from protecting Tribes or leaving their preservation offices "unchanged," BAAJA penalizes Tribes that miss its deadlines: the federal government can terminate its preservation funding, usurp its preservation office, and sign agreements with ACHP in its place, even on Tribal land.** A new 54 U.S.C. § 302707 would require the Secretary to evaluate every Tribal historic preservation program at least every two years.[xxii] A program would be treated as deficient if its THPO "does not regularly comply with timelines for consultation,"[xxiii] and after two years the Secretary must "assume all or part of the functions of the Tribal Historic Preservation Officer."[xxiv] Before that, the Secretary must disapprove the program and suspend, in whole or in part, contracts, cooperative agreements, and Historic Preservation Fund grants to the Tribe.[xxv] None of the standards, including "expeditiously" and "required metrics," are defined. Tribal Nations assume these functions voluntarily, as sovereigns, on their own lands, and a federal takeover is a direct affront to that sovereignty. And in the hands of the administration Searchlight warns about, this gives the federal government a tool to displace Tribal preservation officers.[xxvi] If a THPO does not respond on a proposed agreement, the agency may enter it with ACHP instead, even on Tribal land. "Unchanged" is IFP's word for the one sentence the bill leaves alone, and that sentence now operates through a Section 106 process in which an agency only "may consult" Tribal Nations. Compromise is supposed to run both ways, yet the bill forces only Tribal Nations, State Historic Preservation Offices (SHPOs), and preservation organizations to give ground. IFP's own summary admits the bill "does narrow Section 106," "limits indirect visual and cumulative effects, excludes projects that are federally funded…sets deadlines, and limits remedies," and "includes compromises in some areas."[xxvii]

CLAIM 3	***BAAJA creates a grant program "to help tribes document cultural and sacred sites without having to disclose where they are."***[xxviii] ***"The grant includes express protection against public disclosure of information that could harm a property or impede its use by practitioners."***[xxix]
FACT	**The grants come with a catch. To be eligible, Tribes would first have to list their sacred places in databases that federal and state officials can access, with no real protection against disclosure.** Section 2302 creates competitive grants for THPO databases containing a comprehensive list of each Tribe's properties of traditional religious or cultural importance, and requires THPOs to coordinate with federal agencies and SHPOs on a system through which those officials can access it.[xxx] The bill's confidentiality language protects only against disclosure "to the public" by the grant recipient.[xxxi] Existing federal law lets agencies withhold site locations only on a case-by-case basis, and it does not reach state open records laws. Once the list is shared, Tribal Nations lose control over who sees it. And under the new rule that agencies need not reopen a review when a place is identified later, a sacred place that is not already in such a database may never be considered. Many Tribal Nations deliberately decline to record sacred places in advance, because disclosure itself can expose a site to harm.

CLAIM 4	***BAAJA "appropriately limits visual effects analysis[.]"***[xxxii] ***"Visual, atmospheric, and audible elements are not excluded entirely from consideration and can still be a basis to find an adverse effect."***[xxxiii]
FACT	**Far from "appropriately" limiting visual effects, the bill largely stops counting views, noise, setting, access, and feeling.** The bill excludes visual, atmospheric, and audible effects unless they significantly diminish eligible characteristics, and excludes effects to any part of a property other than its character-defining features, which the bill limits to features "such as contributing elements, cultural-use locations, or access points" that "significantly contribute" to National Register eligibility.[xxxiv] It also counts only effects that "directly alter" a property, drops "feeling" from the aspects of integrity a place can lose, and excludes effects tied to other past, existing, or future projects. Even a documented adverse effect does not require action unless it would make the property ineligible for the National Register. A small construction footprint does not mean a small cultural effect.

CLAIM 5	***"[A] paperwork mistake in a procedural review can't kill a project on its own."***[xxxv] ***The bill eliminates "the ability to use an open-ended review process to hold projects hostage indefinitely."***[xxxvi]
FACT	**And when an agency does find harm, in its "sole discretion" it may do nothing, and courts must defer to the agency. This is not a paperwork reduction. Section 106 has never held a project hostage: of 120,000 reviews a year, only about eight result in litigation.**[xxxvii] The bill lets an agency decline to avoid, minimize, or mitigate harm whenever, "in the sole discretion" of the federal official, "and as otherwise allowed by law, other considerations outweigh the consideration of historic preservation[.]"[xxxviii] The bill does not define or limit those "other considerations," instead directing courts to give the agency "substantial deference." Writing agency deference into Section 106 is not about streamlining the permitting process; it is about shielding an agency's decision to ignore harm.[xxxix] Section 106 gives no one a veto; it simply requires an agency to look, listen, and consult before it decides.
CLAIM 6	***"BAAJA focuses NHPA reviews on a project's actual footprint[.]"***[xl] ***"[A]ny undertaking causing direct physical harm to Tribal sites, including sites located off of Tribal land, would require consultation as under the status quo."***[xli]
FACT	**Focusing on the "actual footprint" means much of the harm would never be reviewed at all. Federally funded projects drop out of Section 106 entirely. For all other projects, agencies only look at the fragment of a sacred landscape inside their own lines, which means a place can be taken apart project by project.** The bill redefines an "undertaking" to require a federal permit, license, or approval and "substantial Federal control and responsibility[,]" and it excludes projects whose only federal involvement is a loan, grant, or other financial assistance.[xlii] It also excludes "non-discretionary" actions, renewals of special use permits without substantive changes, transfers of special use permits, and anything done under an agreement once one is signed.[xliii] The area of potential effects would exclude any area affected solely by a portion of a project not subject to federal control or responsibility,[xliv] the same logic that confined review of the Dakota Access Pipeline to its water crossings.[xlv] And where a sacred landscape extends beyond that area, the agency considers "only the portion of the property within the area of potential effects[.]"[xlvi] An agency reviewing only the slice inside its boundary could find no adverse effect while the project severs the relationships among features, setting, and ceremony that give the place its meaning.

CLAIM 7	***"It funds the Historic Preservation Fund, which tribal preservation offices depend on, at $200 million a year for a decade[.]"***[xlvii] ***"BAAJA authorizes $200 million a year for the Historic Preservation Fund for ten years and $20 million a year for the Tribal databases."***[xlviii] ***The bill authorizes millions in funding for Tribal Historic Preservation Offices, according to a spokesperson for Chairman Lee.***[xlix]
FACT	**Tribes get a promise, not funding: the $200 million is only "authorized," and the Tribal grants are worth less per office than THPOs receive today.** Through fiscal year (FY) 2026, $150 million a year is deposited in the Historic Preservation Fund automatically from offshore oil and gas revenues, and the bill replaces that automatic deposit. It says only that $200 million is "authorized to be appropriated" for FY 2027 through FY 2036.[l] An authorization is a ceiling, not a check. Nothing reaches the Fund unless Congress passes an appropriation each year.[li] The new Tribal grant program is the same: $20 million is "authorized to be appropriated" for FY 2027 through FY 2030,[lii] four years rather than a decade, to be split competitively among about 235 THPOs[liii]: at most about $85,000 a year per office. That is less than THPOs already receive: in FY 2024, the National Park Service split $23 million among 221 THPOs, about $104,000 per office, and the President's FY 2026 budget proposed eliminating it entirely. A promise of future appropriations is no substitute for protections written into law.[liv]

CLAIM 8	***"Courts can still stop a project on the merits[.]"***[lv]
FACT	**Courts cannot stop a project that violates Section 106; the only remedy is to reinitiate the review while construction continues. Developers, meanwhile, gain a new right to court orders against agencies that miss deadlines.** If a court finds an agency violated Section 106, the bill makes "the only remedy" a remand "without vacatur or issuance of an injunction[.]"[lvi] The only exception is a short-lived preliminary injunction for violations of laws other than the NHPA and NEPA. Searchlight claims a court can still "throw out the approval or halt the project." For Section 106, that claim is wrong: the bill bars both. That is no accident: the National Association of Manufacturers (NAM) asked for exactly this in its permitting agenda.[lvii] Yet the same bill gives project applicants a new right to sue agencies that miss consultation deadlines and directs courts to grant those applicants "injunctive relief."[lviii] The bill also imposes a 150-day deadline to sue,[lix] and sends challenges straight to the courts of appeals. Tribes consulted on a programmatic agreement but not invited to sign it could not sue to enforce it.

CLAIM 9	***"Historic preservation reviews hit clean energy especially hard."***[lx] ***"BAAJA is a generational opportunity for Tribal clean energy and jobs."***[lxi]
FACT	**The bill is not limited to clean energy. Uranium mines, oil and gas leases, and pipelines across sacred lands get the same pass, and the industries behind them are the ones lobbying for it.** Searchlight sells these changes as a fix for clean energy, but nothing in Title III limits its application to clean energy. The bill rewrites the NHPA itself, so every new definition, exclusion, and court limit it includes would apply to every federal undertaking: uranium mines, oil and gas leases, pipelines, highways, reservoirs, transmission lines, and data centers. The bill also accelerates permitting for natural gas pipelines. And the rollback is not confined to Title III. Elsewhere the bill eliminates Section 106 outright: no Section 106 consultation when the Army Corps reissues the nationwide permits that cover most pipeline water crossings, and no Section 106 review at all for transmission and gas pipeline work in existing corridors, including "looping," "compression," and new ground "adjacent to" the right-of-way. Even the NEPA title bars courts from issuing a preliminary injunction for a violation of the NHPA.[lxii] The bill's industry backers know it. On October 13, 2026, NAM and more than 100 trade groups, among them the American Petroleum Institute, the National Mining Association, the Independent Petroleum Association of America, the American Gas Association, the Natural Gas Supply Association, the Liquid Energy Pipeline Association, and the Institute of Makers of Explosives, wrote Senate leaders in "strong and unified support" of S. 5653. Their letter does not mention Tribal Nations, sacred places, or Section 106. A sacred place does not know whether the bulldozer is building a solar farm or a well pad, and neither does this bill. Tribal Nations are being asked to give up protections for their most sacred places to speed up fossil fuel and mining projects, with nothing in return.

LIVE PROJECTS SHOW WHY THIS MATTERS

MOUNT TAYLOR, NEW MEXICO: ROCA HONDA URANIUM MINE

On September 14, 2026, the Forest Service announced it will prepare a new environmental impact statement (EIS) for the proposed Roca Honda underground uranium mine, with the Bureau of Land Management (BLM) and the Environmental Protection Agency as cooperating agencies. The review covers National Forest, BLM, state, and private lands, and a draft EIS is expected in July 2027.[lxiii] The mine lies within the Mount Taylor landscape, a Traditional Cultural Property sacred to multiple Tribal Nations.

Under BAAJA, the portions of the project on state and private land could fall outside the area of potential effects.

BAHSAHWAHBEE, NEVADA: CROSS-TIE TRANSMISSION

BLM and the Forest Service approved the 214-mile Cross-Tie 500-kV transmission line in December 2025.[lxiv] The route crosses BLM, National Forest, state, and private land, and BLM's own environmental review flagged the Bahsahwahbee Traditional Cultural Property and the Swamp Cedars area near the corridor.[lxv]

Under BAAJA, post-approval implementation of a project like this would no longer be an undertaking at all, and review of long linear projects crossing federal and non-federal land would be confined to the federal segments.

AVI KWA AME / SPIRIT MOUNTAIN, NEVADA: RIGHTS-OF-WAY

BLM has processed right-of-way actions at the Christmas Tree Pass communications site on Spirit Mountain, including a 2024 NV Energy request for a new 405-foot underground distribution line with about 0.2 acres of new disturbance.[lxvi] Spirit Mountain has been listed on the National Register as a Traditional Cultural Property since 1999.[lxvii]

Under BAAJA, review of certain disturbances could ignore effects to a much larger sacred landscape.

GREATER CHACO, NEW MEXICO: MINERAL DEVELOPMENT

In July 2026, BLM released a draft environmental assessment proposing to revoke the 20-year mineral withdrawal protecting about 336,000 acres around Chaco Culture National Historical Park.[lxviii] The assessment documents at least 145 traditional cultural properties and more than 7,500 known historic properties, which BLM concedes are minimum counts, yet finds no adverse effect to historic properties.[lxix]

Future leases, drilling approvals, roads, and pipelines would each be reviewed separately, exactly where project-by-project review hides landscape-scale harm.

WHAT CONGRESS SHOULD DO NOW

VOTE NO ON S. 5653

AMENDMENTS CANNOT FIX IT

S. 5653 cannot be fixed with amendments. Its changes to the Section 106 process are not a stray provision a floor amendment can strike. They work together to decide which places count, who must be consulted, which harms matter, how much of a sacred landscape an agency reviews, whether the federal government can take over a Tribal Nation's preservation program, and what a court can do when the law is broken. Fix one piece and the rest still close the door.

AN AFFRONT TO TRIBAL SOVEREIGNTY

This bill is an affront to Tribal sovereignty. Tribal Nations are governments, not stakeholders. They took on preservation functions on their own lands as an exercise of that sovereignty, and the United States owes them a trust responsibility to protect the places where their people have prayed and buried their dead for generations. This bill lets federal officials define what is sacred, decide alone whether a sacred place is harmed, and take over a Tribe's preservation program if it misses federally imposed deadlines, all in provisions Tribal Nations were never consulted on, while promising them a seat at the table and saying only that agencies "may consult" them.

THE ACHP RULE IS A REASON TO FIGHT THE RULE, NOT TO PASS THIS BILL

BAAJA's supporters argue that Tribal Nations must accept this bill to escape ACHP's draft rewrite of the Section 106 regulations. ACHP's draft is harmful, and Tribal Nations should fight it. But it is only an unpublished redline that must survive public comment and can be challenged in court or reversed by a future administration. BAAJA would be permanent. It writes much of the same narrowing into statute and adds limits no rule could impose, such as excluding federally funded projects and barring injunctions. On some points the bill is worse: IFP notes the draft still bars a programmatic agreement on Tribal lands without the Tribe or THPO as a signatory, while BAAJA lets an agency sign with ACHP when a THPO does not respond. Supporters invoke *Loper Bright* to argue a future ACHP could not restore today's protections; by the same logic, none could undo BAAJA's cuts. IFP says Tribes are involved "at each step" and the bill is "durable."[lxx] Durable is the problem: Tribal Nations are involved only until a 30-day clock runs out, and the decisions that matter most, what counts as harm and what to do about it, belong to the agency alone. Trading a reversible bad rule for an irreversible bad statute is not protection.

START OVER, WITH TRIBES AT THE TABLE

Tribal Nations did not write these provisions and should not be asked to trade away protections for their most sacred places for funding the bill does not guarantee. The wins supporters cite, such as Tribal authority over rights-of-way, can move on their own. Congress should reject S. 5653 and start over, with Tribal Nations at the table as sovereigns from the first draft. Indian Country has already spoken with one voice: on October 9, 2026, the National Congress of American Indians, the Native American Rights Fund, the National Association of Tribal Historic Preservation Officers, and national and regional Tribal organizations called on Senate leaders to withdraw Title III and work with Tribal Nations on permitting reform that respects Tribal sovereignty and the trust responsibility. SHPOs oppose Title III too. Congress should strike Title III. If it stays in, vote no.[lxxi]

IN THEIR OWN WORDS

What the bill's sponsors and advocates have said, and what their words reveal.

WHO	WHAT THEY SAID	WHAT IT SHOWS
Sen. Heinrich and eight Energy and Natural Resources Committee Democrats, July 2026, on the administration's draft rule	"These draft regulations…are unacceptable" and would mean "eliminating Tribal consultation as we know it." "[T]here is a difference between making the consultation process work better and cutting Tribes out of the process."[lxxii]	Ten weeks later, Senator Heinrich cosponsored S. 5653, which gives Tribal Nations 30 days to respond to agency findings, half the time allowed under the draft he condemned.[lxxiii]
IFP, defending the bill	Faults the draft rule because Tribes review agency findings "only for 60 days, with silence treated as waiver."[lxxiv]	Title III gives Tribal Nations 30 days. If a Tribal Nation does not respond, the agency "shall proceed."[lxxv] IFP's chart never mentions that.
Searchlight Institute	"BAAJA also protects tribes at a moment when the administration is trying to cut them out."[lxxvi]	Nine national and regional Tribal organizations have called for the title's "immediate rescission."[lxxvii]
Searchlight Institute	Clean energy projects are "more than 8 times as likely to receive 'adverse effect' findings under NHPA."[lxxviii]	These projects harm historic and sacred places more often than others. The bill's answer is to narrow what counts as harm.
Searchlight Institute	BAAJA must pass "to ensure that if Democrats recapture the Presidency in 2028, we are able to get shovels in the ground."[lxxix]	Tribal Nations' sacred places are the price of someone else's election strategy.
NAM and 100+ trade groups	Permitting delays "cost manufacturers at least $8 billion every year."[lxxx]	The letter never mentions Section 106, the NHPA, Tribes, or sacred places.
Sen. Capito, lead sponsor, October 2026	"Red tape is about to get BAAJA Blasted."[lxxxi]	The "red tape" is a sixty-year-old law that requires federal agencies to consult before they build on burial grounds and places of worship.

WHAT THEY CONCEDE

The bill's own text and its defenders admit the harm. This is the parade of horribles, in their words.

ISSUE	WHAT THE BILL AND ITS DEFENDERS ADMIT	WHAT IT MEANS FOR TRIBAL NATIONS
Sacred places	A place significant solely because of beliefs about it, with no associated activity, "could be harder to qualify," and "feature" is only "likely broad enough" to capture springs and mountains.[lxxxii]	Sacred places, including mountains, springs, and landscapes, lose any certainty of protection.
What counts as harm	BAAJA "limits indirect visual and cumulative effects" and "excludes projects that are federally funded but require no permit from Section 106 review."[lxxxiii] It "appropriately limits visual effects analysis."[lxxxiv]	A ceremonial landscape or viewshed can be degraded without the harm ever being counted, and whole categories of projects escape review.
Tribal review	Tribes may respond to agency findings by statute only "where adverse effects are found," with "30-day response windows."[lxxxv]	The agency decides first. If it finds no harm, the statute guarantees Tribal Nations no review of that finding.
Agency override	An official may skip avoidance or mitigation when, in the official's "sole discretion," "other considerations outweigh the consideration of historic preservation."[lxxxvi]	One official can decide that a project matters more than a sacred place, with no check.
THPO takeover	The THPO provisions are "the bill's most direct burdens on Tribal governments, or at least those that may struggle with the timelines."[lxxxvii] After missed deadlines, the Secretary "shall assume all or part of the functions" of the THPO.[lxxxviii]	A federal takeover of a sovereign Tribal program, as punishment for delays caused by chronic federal underfunding.
Agreements without the Tribe	On Tribal land, signing with ACHP instead "would allow an agreement without the Tribe's designated official."[lxxxix]	Decisions about Tribal land can be made without the Tribal Nation's own official at the table.
Funding	Deposits to the Historic Preservation Fund "likely still require appropriation."[xc]	The money is a promise. The penalties on THPOs are mandatory.
Courts	"An NHPA violation alone can no longer support a preliminary or permanent injunction."[xci] Under BAAJA, "the agency fixes it while construction continues."[xcii]	A court can find the law was broken and still not stop the bulldozer. Suits must be filed within 150 days.[xciii] A destroyed burial ground cannot be remanded.

WILL BAAJA SPEED ANYTHING UP? THE RECORD SAYS NO

Supporters sell Title III as a fix for permitting delay. Their own data says Section 106 is not the problem.

WHAT THEY SAY	WHAT THE RECORD SHOWS
Permitting delays "cost manufacturers at least $8 billion every year."[xciv]	NAM's own report behind that figure finds that historic preservation and endangered species reviews are "neither the most burdensome nor the longest" manufacturers face. A quarter of respondents needed a Section 106 review in the past decade, and only 2.5 percent named it their longest approval. Air permits drive more than half of the estimated cost.[xcv]
It takes "80% longer to get a permit authorized" here than in any other free market economy.[xcvi]	NAM's report contains no such finding. The figure appears only in its CEO's claim, in the release announcing the report, that the U.S. takes "up to 80% longer than our peer nations."[xcvii] The report itself counts about 3,000 manufacturing Section 106 consultations over a decade.[xcviii]
A "paperwork mistake in a procedural review can't kill a project on its own."[xcix]	More than 120,000 federal undertakings go through Section 106 each year. Ninety-eight percent end with a finding of no adverse effect,[c] and on average fewer than eight a year produce an NHPA claim in federal court.
Section 106 review is what slows projects down.	What slows review is capacity. SHPOs reviewed 101,200 federal undertakings in FY 2025 on grants held at $62.15 million every year since FY 2023.[ci] Utah's office, fully digital since 2017, completes 98 percent of its reviews in seven days or less.[cii] Rewriting Tribal consultation does nothing about either problem.
The bill will bring certainty.	IFP calls Title III "some of the most substantial changes to Section 106" since 1966.[ciii] Sixty years of regulations, guidance, and case law that agencies and applicants rely on would become unreliable, and every new undefined term will be litigated for years before anyone knows what it means.
Deadlines and limits on courts will end delay.	Pushing Tribal Nations out early moves conflict downstream, where it costs far more. After the Standing Rock controversy, the total cost of the Dakota Access Pipeline ballooned to roughly $7.5 billion, nearly double its projected initial cost.[civ] Suspending or federalizing a THPO means fewer reviewers, not faster consultation.

[i] Letter from Affiliated Tribes of Northwest Indians, Association on American Indian Affairs, Midwest Alliance of Sovereign Tribes, National Association of Tribal Historic Preservation Officers, National Congress of American Indians, Native American Rights Fund, Rocky Mountain Tribal Leaders Council, Tribal Self-Governance, and United South and Eastern Tribes Sovereignty Protection Fund to Sens. Thune, Schumer, Lee, Capito, Heinrich, and Whitehouse (Oct. 9, 2026), https://www.ncai.org/news/ncai-joined-tribal-organizations-across-indian-country-in-calling-on-congress-to-withdraw-title-iii-of-the-bipartisan-american-affordability-and-jobs-act-baaja ("Tribal Organizations Letter").

[ii] Jane Flegal & Pavan Venkatakrishnan, Memorandum to Interested Parties, The Bipartisan American Affordability and Jobs Act (BAAJA) is a Good Deal; Here's What Democrats Have To Like (Searchlight Institute, undated), https://www.searchlightinstitute.org/wp-content/uploads/2026/10/MEMO-The-Bipartisan-American-Affordability-and-Jobs-Act-BAAJA-is-a-Good-Deal.pdf, at 2–3 ("Searchlight memo").

[iii] Ben Schifman, Inst. for Progress, Tribal Consultation Under the Bipartisan American Affordability and Jobs Act (Oct. 8, 2026) ("IFP report"). Page cites are to the report's printed page numbers.

[iv] Press Release, S. Comm. on Env't & Pub. Works, Capito, Lee, Whitehouse, and Heinrich Introduce Bipartisan American Affordability and Jobs Act of 2026 (Sept. 30, 2026), https://www.epw.senate.gov/public/index.cfm/2026/9/capito-lee-whitehouse-and-heinrich-introduce-bipartisan-american-affordability-and-jobs-act-of-2026 (statement of Ranking Member Heinrich).

[v] Bipartisan American Affordability and Jobs Act of 2026, S. 5653, 119th Cong. (as posted by S. Comm. on Env't & Pub. Works, Sept. 30, 2026). The historic preservation amendments are in title III, §§ 2301 and 2302. Page cites in these notes are to the posted text.

[vi] Chris Lehmann, The Latest New Democratic Think Tank Is a Dead End, The Nation (Sept. 23, 2025), https://www.thenation.com/?p=571374 (citing New York Times reporting); Katya Schwenk & Luke Goldstein, The "Moderate" Think Tank Backed by AI Money, The Lever (Apr. 7, 2026), https://www.levernews.com/the-moderate-think-tank-backed-by-ai-money/.

[vii] Searchlight memo, at 2.

[viii] S. 5653 § 2301(a) (proposed 54 U.S.C. § 302706(a)(1)), at 372.

[ix] *Id.*; 54 U.S.C. § 302706(b) (consultation duty tied to "religious and cultural significance," not amended).

[x] Searchlight memo, at 3.

[xi] IFP report, at 5.

[xii] Lindsey McPherson, Rush to Cut Permitting Red Tape Runs into Law to Protect America's Historic Sites, Wash. Times (Oct. 14, 2026), https://www.washingtontimes.com/news/2026/oct/14/rush-cut-permitting-red-tape-runs-law-protect-americas-historic-sites/ ("McPherson") (paraphrasing spokesperson for Chairman Lee).

[xiii] S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(2)(B)(iii)), at 387.

[xiv] *Id.* (proposed § 306108(c)(2)(B)(iv)), at 387–88.

[xv] U.S. Gov't Accountability Off., GAO-19-22, Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects (2019), https://www.gao.gov/products/gao-19-22 (based on interviews with 57 Tribes and 21 agencies and comments from 100 Tribes; key factors include agencies initiating consultation late and not adequately considering Tribal input).

[xvi] Ben Schifman, Inst. for Progress, BAAJA Protects Tribal Consultation From ACHP's Regulatory Rollback (Oct. 2026), at 2 (comparison table) ("IFP summary").

[xvii] S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(2)(D)(ii)(III)), at 389.

[xviii] *Id.* (proposed § 306108(c)(2)(D)(i)) (agency makes adverse effect determination unilaterally).

[xix] *Id.* (proposed § 306108(c)(5)(C)(i)–(ii)), at 400–01. Supporters also note that consultation must begin with environmental review, but the bill also requires it to end when the NEPA document is complete, with extensions only for "extraordinary circumstances." *Id.* (proposed § 306108(c)(5)(A)–(B)(i)), at 397–98.

[xx] Searchlight memo, at 3.

[xxi] IFP report, at 1.

[xxii] S. 5653 § 2301(b)(2)(A) (proposed 54 U.S.C. § 302707(a)), at 375.

[xxiii] *Id.* (proposed § 302707(b)(2)), at 376.

[xxiv] *Id.* (proposed § 302707(b)(4)), at 377.

[xxv] *Id.* (proposed § 302707(b)(3)), at 376–77.

[xxvi] Searchlight memo, at 3. If consultation runs past the NEPA deadline, the bill also directs each THPO involved to spend at least half the workweek remedying the delay. S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(5)(B)(ii)), at 398–99.

[xxvii] IFP summary, at 3.
[xxviii] Searchlight memo, at 3.
[xxix] IFP report, at 8.
[xxx] S. 5653 § 2302(c) (proposed 54 U.S.C. § 302703(b)(1)–(2)), at 415.
[xxxi] *Id.* (proposed § 302703(b)(3)), at 416.
[xxxii] Searchlight memo, at 3.
[xxxiii] IFP report, at 8.
[xxxiv] S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(a)(1)(B)), at 380–81.
[xxxv] Searchlight memo, at 4.
[xxxvi] McPherson (quoting spokesperson for Chairman Lee).
[xxxvii] McPherson (quoting spokesperson for Chairman Lee); Letter from Gregory A. Werkheiser & Marion F. Werkheiser, Co-Founders, Cultural Heritage Partners, PLLC, on behalf of the 106 Strong Coalition, to Members of Congress (Oct. 15, 2026), https://www.106strong.com/s/20261013-Draft-Letter-to-Congress-from-106-Strong-Re-Senate-Bill-weyr.pdf ("106 Strong letter") (more than 120,000 undertakings reviewed annually; "only about eight result in litigation").
[xxxviii] S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(2)(D)(iii)(II)(ff)), at 391.
[xxxix] *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168 (2025) (8–0) (courts must afford agencies "substantial deference" as to the scope and content of environmental review).
[xl] Searchlight memo, at 3.
[xli] IFP report, at 5.
[xlii] S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(a)(7)), at 383–84.
[xliii] *Id.* (proposed § 306108(a)(7)(B)(vi)–(viii)), at 384–85. The bill leaves the existing definition of "undertaking" in 54 U.S.C. § 300320 in place, so the two definitions will conflict until courts sort them out.
[xliv] *Id.* (proposed § 306108(a)(2)(B)), at 381.
[xlv] *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 13 (D.D.C. 2016) (Corps reviewed only DAPL's crossings of federally regulated waters; the pipeline ran almost entirely across private land requiring no federal approval).
[xlvi] S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(2)(D)(iii)(II)(cc)), at 390.
[xlvii] Searchlight memo, at 3.
[xlviii] IFP report, at 1.
[xlix] McPherson (paraphrasing spokesperson for Chairman Lee).
[l] S. 5653 § 2302(a) (proposed 54 U.S.C. § 303102), at 414; 54 U.S.C. §§ 303102–303103 (current law: $150,000,000 deposited annually for FY 2012–2023, available "only when appropriated by Congress"), amended by Pub. L. No. 118-42, div. E, tit. I, § 122, 138 Stat. 25, 249 (2024) (extending deposits through FY 2024), and Pub. L. No. 119-74, div. C, tit. I, § 121, 140 Stat. 124 (2026) (extending deposits through FY 2026).
[li] S. 5653 § 2302(a)–(b) (proposed 54 U.S.C. §§ 303102–303103), at 415–16. Once Congress deposits money, the bill lets it be spent without a second appropriation; that matters only if Congress makes the deposit in the first place.
[lii] S. 5653 § 2302(c) (proposed 54 U.S.C. § 302703(b)(5)), at 417.
[liii] Nat'l Ass'n of Tribal Historic Pres. Officers, Statement on Fiscal Year 2027 Appropriations to the Subcomm. on Interior, Env't, & Related Agencies of the S. Comm. on Appropriations (May 15, 2026), https://www.nathpo.org/federal-funding/fy27-nathpo-testimony-senate/ ("[a]s of January 2026, there are 235 NPS-recognized THPO programs nationwide").
[liv] Nat'l Park Serv., Historic Preservation Fund Annual Report FY 2025; Press Release, Nat'l Park Serv., National Park Service Announces $85.15 Million in Historic Preservation Grants to States and Tribes (May 6, 2024), https://www.nps.gov/orgs/1207/national-park-service-announces-%2485-15-million-in-historic-preservation-grants-to-states-and-tribes.htm ("NPS FY 2024 grants release") ($23,000,000 total award funding 221 THPOs); N.M. Indian Affairs Dep't, House Resolution 1: Resource Implications (2025) (President's FY 2026 budget recommends zeroing out HPF funding for THPOs); Nat'l Trust for Historic Pres., The Preservation Budget: Select Preservation Priorities, FY 2026 Appropriations (Oct. 2025), https://cdn.savingplaces.org/2025/10/07/15/40/49/a4852a67-9482-422e-8e9e-6a71dbc64a6b/Appropriations_FY2026_v5.pdf ($23 million THPO appropriation in each of FY 2023–2025; $0 in President's FY 2026 request).
[lv] Searchlight memo, at 4.
[lvi] S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(9)(C)(i)), at 406–07. Clause (ii) allows a time-limited preliminary injunction only where the action likely violates a federal law other than the NHPA or NEPA.

[lvii] National Association of Manufacturers & Foundation for American Innovation, America on Hold: How Permitting Delays Stall Manufacturing Progress (Mar. 19, 2026), https://nam.org/wp-content/uploads/securepdfs/2026/03/NAM-America-on-Hold-Report-vF.pdf, at 21 ("NAM & FAI, America on Hold") (reform no. 7: "Strengthen the threshold for stopping operations under procedural litigation," naming NEPA and Section 106).
[lviii] S. 5653 § 2301(c) (proposed 54 U.S.C. § 306108(c)(5)(B)(iii)), at 399.
[lix] *Id.* (proposed § 306108(c)(9)(D)(i)(I)), at 408.
[lx] Searchlight memo, at 3.
[lxi] IFP report, at 2.
[lxii] S. 5653 § 1204 (proposed Clean Water Act § 404(e)(5)(A)(iv)), at 127–28; § 2102(a) (proposed Federal Power Act § 216A(a)(2), (b)(1)(B)(ii)), at 201–02; § 2102(b) (proposed Natural Gas Act § 7(i)(1), (2)(B)), at 203–04; § 1110 (preliminary injunction unavailable for violation of "division A of subtitle III of title 54"), at 70.
[lxiii] U.S. Forest Serv., Notice of Intent to Prepare an Environmental Impact Statement, Roca Honda Mine Project, 91 Fed. Reg. 58056 (Sept. 14, 2026), https://www.govinfo.gov/content/pkg/FR-2026-09-14/pdf/2026-18765.pdf.
[lxiv] Bureau of Land Mgmt., BLM and Forest Service Approve Cross-Tie Transmission Project (Dec. 19, 2025); Bureau of Land Mgmt., Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Cross-Tie 500-kV Transmission Project, Fed. Reg. Doc. No. 2022-09397 (May 2, 2022).
[lxv] Bureau of Land Mgmt. & U.S. Forest Serv., Notice of Availability of the Final Environmental Impact Statement for the Cross-Tie 500-kV Transmission Project, 89 Fed. Reg. 77171 (Sept. 20, 2024), https://www.govinfo.gov/content/pkg/FR-2024-09-20/pdf/2024-21279.pdf.
[lxvi] Bureau of Land Mgmt., Avi Kwa Ame National Monument August 2024 Update (2024).
[lxvii] Honor Avi Kwa Ame, Welcome to Spirit Mountain (Mar. 21, 2023); Mary Manning, Sacred Spirit Mountain Listed Among Historic Places, Las Vegas Sun (Oct. 5, 1999), https://lasvegassun.com/news/1999/oct/05/sacred-spirit-mountain-listed-among-historic-place/.
[lxviii] Bureau of Land Mgmt., Evaluation of Potential Revocation of Chaco Withdrawal, DOI-BLM-NM-F010-2026-0002-EA (draft July 2026) ("Chaco EA"); BLM Proposes Full Revocation of Chaco Protections, Opens 14-Day Public Comment Period, Cibola Citizen (July 15, 2026).
[lxix] In Search of Oil and Gas, Trump Could Axe Biden-Era Buffer Around Chaco Canyon, KJZZ (July 23, 2026); New Study Could Allow Oil and Gas Companies into Chaco Canyon Land in New Mexico, KRQE (July 17, 2026); Chaco EA, at 32–33 (at least 145 TCPs and approximately 7,552 known historic properties in the withdrawal area; TCP figures are "minimum estimates").
[lxx] IFP summary, at 3; IFP report, at 12 (draft rule retains requirement that the Tribe or THPO sign any programmatic agreement on Tribal lands).
[lxxi] Nat'l Cong. of Am. Indians, NCAI Joined Tribal Organizations Across Indian Country in Calling on Congress to Withdraw Title III of the Bipartisan American Affordability and Jobs Act (Oct. 9, 2026), https://www.ncai.org/news/ncai-joined-tribal-organizations-across-indian-country-in-calling-on-congress-to-withdraw-title-iii-of-the-bipartisan-american-affordability-and-jobs-act-baaja; Nat'l Conf. of State Historic Pres. Officers, Senate Proposal Does More Than "Streamline" Section 106 (Oct. 2, 2026), https://ncshpo.org/2026/10/02/senate-proposal-does-more-than-streamline-section-106/.
[lxxii]Press Release, Sen. Martin Heinrich, Heinrich, ENR Members Release Statement Urging Advisory Council on Historic Preservation to Reject Rule Gutting Tribal Consultation (July 21, 2026) (joint statement of Sens. Heinrich, Wyden, Cantwell, Hirono, King, Cortez Masto, Hickenlooper, Padilla, and Gallego), https://www.heinrich.senate.gov/newsroom/press-releases/heinrich-enr-members-release-statement-urging-advisory-council-on-historic-preservation-to-reject-rule-gutting-tribal-consultation.
[lxxiii]S. 5653, 119th Cong. (as introduced Sept. 30, 2026) (introduced by Sen. Capito for herself and Sens. Lee, Whitehouse, and Heinrich).
[lxxiv]IFP summary, at 2.
[lxxv]S. 5653, 119th Cong. § 2301 (as introduced Sept. 30, 2026), https://www.govinfo.gov/content/pkg/BILLS-119s5653is/pdf/BILLS-119s5653is.pdf, at 400 ("GPO print").
[lxxvi]Searchlight memo, at 3.
[lxxvii] Tribal Organizations Letter.
[lxxviii] Searchlight memo, at 3.
[lxxix] Searchlight memo, at 1.
[lxxx] Letter from National Association of Manufacturers et al. to Sens. Thune and Schumer (Oct. 13, 2026), https://nam.org/100-manufacturing-business-groups-urge-congress-to-pass-bipartisan-permitting-deal/ ("NAM letter").

[lxxxi] Brad McElhinny, Capito Says Permitting Bill Would Blast Away Delays and Protect Approved Projects, WV MetroNews (Oct. 11, 2026), https://wvmetronews.com/2026/10/11/capito-says-permitting-bill-would-blast-away-delays-and-protect-approved-projects/ (quoting Sen. Capito's social media post).
[lxxxii] IFP report, at 7.
[lxxxiii] IFP summary, at 3.
[lxxxiv] Searchlight memo, at 3.
[lxxxv] IFP report, at 13.
[lxxxvi] S. 5653 § 2301 (GPO print), at 391.
[lxxxvii] IFP report, at 11.
[lxxxviii] S. 5653 § 2301 (GPO print), at 376–77.
[lxxxix] IFP report, at 11.
[xc] IFP report, at 7 n.26.
[xci] IFP report, at 10.
[xcii] Searchlight memo, at 3.
[xciii] S. 5653 § 2301 (GPO print), at 406–08.
[xciv] NAM letter.
[xcv] NAM & FAI, America on Hold, at 18, 22, 25 (25.0% needed NHPA § 106 consultation; air permits account for $42 billion of a $79.5 billion ten-year central estimate; 187 respondents).
[xcvi] NAM letter.
[xcvii] NAM Newsroom, $8 Billion a Year: The Cost of America's Broken Permitting System to Manufacturers (Mar. 19, 2026), https://nam.org/8-billion-a-year-the-cost-of-americas-broken-permitting-system-to-manufacturers/ (quoting NAM President and CEO Jay Timmons); NAM & FAI, America on Hold.
[xcviii] NAM & FAI, America on Hold, at 25.
[xcix] Searchlight memo, at 4.
[c] Nat'l Conf. of State Historic Pres. Officers, When the Facts Don't Fit the Narrative, Blame Section 106 (July 28, 2026), https://ncshpo.org/2026/07/28/when-the-facts-dont-fit-the-narrative-blame-section-106/ ("NCSHPO post") (citing ACHP Section 106 white paper: approximately 120,000 projects reviewed annually, about 2,000 with adverse effect findings).
[ci] Letter from 91 Members of the House of Representatives regarding FY 2027 Historic Preservation Fund appropriations (Mar. 20, 2026), https://preservationaction.org/wp-content/uploads/2026/03/FY27-Historic-Preservation-Fund-Appropriations-Letter-Final.pdf; National Trust for Historic Preservation, Funding Increase for Historic Preservation Fund, https://savingplaces.org/action-center/updates/funding-increase-for-historic-preservation-fund (FY 2023); NPS FY 2024 grants release (FY 2024); Nat'l Park Serv., Notices of Funding Opportunity P25AS00488 and P26AS00363 (FY 2025 and FY 2026 estimated program funding); NCSHPO post (citing Nat'l Park Serv., Historic Preservation Fund Annual Report: approximately 101,200 undertakings reviewed by SHPOs in FY 2025; SHPO funding at $62.15 million annually since FY 2023).
[cii] Written Testimony of Christopher W. Merritt, Utah State Historic Preservation Officer, before the S. Comm. on Energy & Natural Resources (Oct. 29, 2025), https://www.energy.senate.gov/services/files/515006BC-55F7-4E04-A065-344456DBFBDB.
[ciii] IFP report, at 1.
[civ] Univ. of Colo. Boulder, Dakota Access Pipeline Controversy Cost Companies at Least $7.5 Billion, Study Finds, CU Boulder Today (Nov. 26, 2018), https://www.colorado.edu/today/2018/11/26/dakota-access-pipeline-controversy-cost-companies-least-75-billion-study-finds; see Carla F. Fredericks et al., Social Cost and Material Loss: The Dakota Access Pipeline (First Peoples Worldwide, Nov. 2018).