OFFICE OF HAWAIIAN AFFAIRS

Native Hawaiian LEGAL CORPORATION

October 28, 2026

VIA ELECTRONIC MAIL

The Honorable Mazie K. Hirono
United States Senator
300 Ala Moana Boulevard, Room 3-106
Honolulu, Hawai‘i 96850

The Honorable Brian Schatz
United States Senator
300 Ala Moana Boulevard, Room 7-212
Honolulu, Hawai‘i 96850

Re: Opposition to S. 5653, the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), Including Title III (National Historic Preservation Act Amendments): Impacts on Native Hawaiians and Hawai‘i

Aloha e Senator Hirono lāua ‘o Senator Schatz:

The Office of Hawaiian Affairs (OHA) and Native Hawaiian Legal Corporation (NHLC) write to urge you to **oppose S. 5653, the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), and to vote against advancing the bill when the Senate takes it up, which OHA and NHLC understand is expected on November 9**. In particular, OHA and NHLC ask that you oppose Title III of Division B, which rewrites Section 106 of the National Historic Preservation Act (NHPA). OHA was established by article XII, section 5 of the Hawai‘i Constitution, and the NHPA expressly names OHA as a Native Hawaiian organization. 54 U.S.C. § 300314(b). Since 1974, NHLC has represented Native Hawaiians in protecting their ‘āina, iwi kūpuna, wahi pana, and traditional and customary practices. Section 106 consultation is one of few federal tools Native Hawaiians have to be heard before a federal decision irreparably damages cultural resources or culturally significant places.

Tribal Nations and national Tribal organizations, including the Native American Rights Fund, the National Congress of American Indians, the National Association of Tribal Historic Preservation Officers, and the United South and Eastern Tribes Sovereignty Protection Fund, have explained in detail how BAAJA would harm Indian Country. OHA and NHLC support tribes in their efforts to maintain sovereign authority over the treatment of cultural and historic sites which are among Indigenous People’s most

significant resources in maintaining continuity of practices over generations.

Much less attention has been paid to Native Hawaiians. Native Hawaiians have no reservations, no Tribal Historic Preservation Officers, and no Tribal lands on which to exercise their own preservation authority, so their reliance on Section 106 is even greater. Native Hawaiians rely heavily on consultation with federal agencies and the State Historic Preservation Division (SHPD) to protect Native Hawaiian cultural places. Together you represent the largest Native Hawaiian constituency in Congress and your opposition would make clear that the proposed changes negatively impact Indigenous Peoples's interests in ways that are unacceptable regardless of the other goals of the bill.

Given time constraints, our comments focus on Title III but that focus should not be read as acceptance of the rest of the bill. BAAJA also rewrites the National Environmental Policy Act (NEPA), the Clean Water Act, and the Endangered Species Act, and those changes will have full force and effect in Hawai'i. They would narrow the environmental reviews in which Native Hawaiian cultural concerns are most often raised, limit the State's authority to condition federal permits to protect streams and nearshore waters, and weaken protection of Hawai'i's listed species all of which are important cultural resources. **Therefore, OHA and NHLC object to BAAJA as a whole, and both organizations reserve the opportunity to provide further comment on them.**

Broadly stated, our principal concerns are that the bill would weaken meaningful Native Hawaiian consultation, narrow the projects and cultural impacts subject to review, and restrict the judicial remedies needed to prevent irreversible harm. Together, these changes increase the risk that cultural resources will be overlooked, Native Hawaiian concerns will go inadequately considered, and damage will occur before meaningful relief is available.The provisions of greatest concern in Title III are listed below. Quotations are from S. 5653 as introduced (Sept. 30, 2026). Section references are to the bill, followed by the proposed new provision of title 54 of the U.S. Code.

I. BAAJA Would Weaken the Existing Regulations to Identify, Assess, and Resolve Adverse Effects to Historic and Traditional Cultural Properties

A. **The bill makes consultation discretionary at critical stages of review.** § 2301(c) (proposed 54 U.S.C. § 306108(c)(2)(B)(iii)): In establishing the area of potential effects and identifying historic properties, "the applicable Federal official *may* consult with any applicable State Historic Preservation Officers, Tribal Historic Preservation Officers, Indian tribes, or Native Hawaiian organizations . . . ." (emphasis added).

Problem: Under current law, consultation with NHOs is mandatory at each major

step of the Section 106 process: (1) identifying and evaluating the historic properties a project could affect, (2) assessing effects, and (3) resolving adverse effects. The NHPA provides that a federal agency "shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to such property. 54 U.S.C. § 302706(b). The Section 106 regulations make such NHOs consulting parties and require the agency to give them "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. §§ 800.2(c)(2)(ii), (ii)(A). Identification must occur "in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects," 36 C.F.R. § 800.4(b), and eligibility is evaluated in the same consultation, 36 C.F.R. § 800.4(c)(1). Effects are assessed, and adverse effects resolved, in the same consultation. 36 C.F.R. §§ 800.5, 800.6.

However, BAAJA makes consultation at the critical identification stage discretionary. (Proposed 54 U.S.C. § 306108(c)(2)(B)(iii)). Under the bill, the agency has only to "seek," "discuss, as appropriate," and "incorporate, as applicable," NHO information that arrives within 30 days of a request (proposed § 306108(c)(2)(B)(iv)). An extremely time-limited request for information which may bar subsequent participation, *see* proposed §§ 306108(c)(5)(C)(i)–(ii), is not meaningful consultation. Further, and as discussed below, NHOs would have virtually no role in determining adverse effects or harm, or the appropriate measures to mitigate such harms, which are the heart of the Section 106 consultation process with respect to protecting properties of traditional religious and cultural significance. Although the bill retains the general mandatory consultation requirement in § 302706(b), the new procedures in the proposed section 306108 amendments expressly make consultation discretionary. That inconsistency creates uncertainty about agencies' obligations and undermines the clear consultation requirements NHOs currently rely on.

B. **The agency alone decides whether there is harm, and can end the process there.** Proposed §§ 306108(c)(2)(D)(i)–(ii): The official "shall determine whether there are any adverse effects," and "shall have no further obligations under this section" if it finds no adverse effects or that "historic properties are not present."

Problem: Contrary to currently mandated procedures, which agencies have implemented successfully for years, under the proposed amendments NHOs would have no guaranteed role in the effects determination. If the agency says "no historic properties" or "no adverse effects," the review ends, and the NHOs with

knowledge of cultural resources and the cultural significance of the place, such as iwi kūpuna or heiau, have no opportunity to demonstrate harm or seek additional review from other preservation experts. Under current law, an NHO is notified of a proposed finding of no adverse effect and may object within 30 days and request review from the Advisory Council on Historic Preservation ("Advisory Council" or "Council"). 36 C.F.R. §§ 800.5(c), (c)(2)(i), (iii).

C. **Resolving adverse effects is not required if a property retains National Register eligibility.** Proposed § 306108(c)(3)(A)(i)(I)(aa): Section 106 obligations are satisfied if the adverse effects "would not so diminish the integrity" of the property "to the extent that the historic property would be made ineligible for listing on the National Register[.]"

Problem: The proposed provision creates a new pathway for agencies to satisfy Section 106, despite identified adverse effects. Under existing regulations, adverse effects trigger consultation to avoid, minimize, or mitigate impacts, even when a property remains eligible for listing. 36 C.F.R. §§ 800.5(a), 800.6(b). The proposed threshold could allow significant damage and degradation to features or portions of larger cultural landscapes without requiring mitigation or further consultation because of the area's continued and oftentimes unalterable cultural significance (particularly as narrowly defined in proposed section (proposed 54 U.S.C. § 302706(a)(1)).

D. **The bill narrows protection against harm to cultural landscacpes, viewsheds, and ceremonial setting.** Proposed § 306108(a)(1): An adverse effect must "directly alter[]" a property, and the definition excludes "any visual, atmospheric, or audible element" unless it would "significantly diminish" eligible characteristics, along with effects on any portion of a property other than its "character-defining features," expressly excluding cultural-use locations and access points. The bill's list of protected aspects of integrity also omits "feeling." Proposed § 306108(a)(4)(B)(ii) excludes cumulative effects from "separate existing, or potential future" undertakings.

Problem: Native Hawaiian cultural landscapes are largely relational. Cultural meaning lies in sightlines between mauna and kai, the quiet needed for ceremony, and the integrity of the whole. Existing regulations recognize both direct and indirect effects and expressly consider impacts to a property's setting, feeling, and association. 36 C.F.R. § 800.5(a)(1). These changes could allow agencies to discount noise, visual intrusion, and disruption of setting that undermine a place's cultural significance. The changes would also leave impacts to traditional access routes, gathering, or ceremonial locations outside the adverse-effect determination, and consequently limit an agency's obligation to mitigate for these types of harms.

Further, the area of potential effects is also defined in a circular fashion related to the new, narrow definition of adverse effects, further limiting the scope of consultaiton from the outset. Proposed § 306108(a)(2).

E. **Agencies have broad discretion to prioritize "other considerations" over mitigation of adverse effects.** Proposed §§ 306108(c)(2)(D)(iii)(II)(ff) and (c)(3)(A)(i)(II): The agency may decline to avoid, minimize, or mitigate harm when, "in the sole discretion of the applicable Federal official and as otherwise allowed by law, other considerations outweigh the consideration of historic preservation," even when adverse effects have been identified.

Problem: Existing law requires consultation to avoid, minimize, or mitigate identified adverse effects. 36 C.F.R. §§ 800.5(a), 800.6(b). "Other considerations" is undefined and would essentially make the agency's own balancing determination an express alternative to resolving adverse effects. Combined with "substantial deference" on judicial review, this gives one official broad and difficult-to-review power to decide that a project matters more than a cultural resource or wahi pana. Hawai'i could see this provision invoked by military agencies, for example, to justify prioritizing national security over historic preservation even when adverse effects are acknowledged, and to declare their Section 106 obligations satisfied without requiring measures to avoid, minimize, or mitigate impacts. This would unnecessarily undermine years of ongoing work within agencies, including branches of the Armed Services, to build cultural preservation programs that honor NHO concerns with respect to the protection of cultural resources.

II. Specific Provisions Would Further Weaken Protection of Hawai'i's Cultural Resources and 'Āina

A. **A narrow federal definition of what is sacred and the area of potential effects.** § 2301(a) (proposed 54 U.S.C. § 302706(a)(1)): A "property of traditional religious or cultural importance" means "an identifiable geographic location or feature at which an event of continuing religious or cultural significance to a living community occurred."

Problem: For the first time, federal law would define, for National Register purposes, what qualifies as a "property of traditional religious or cultural importance," and to our knowledge the definition was developed without consultation with Native Hawaiian organizations. Many wahi pana are sacred because of mo'olelo, akua, genealogy, and ongoing practice, not because of a single historical "event" that "occurred" there. Mauna, springs, streams, nearshore waters, and entire ahupua'a could fail this test. Title III contains no savings clause, so properties already listed or found eligible could be reevaluated under the new

definition.

B. **Federally funded projects are removed from review.** Proposed § 306108(a)(7)(B)(ii): An "undertaking" excludes any project "for which the only Federal involvement is a loan, loan guarantee, grant (including a capitalization grant), cost-share award, or other form of financial assistance . . . ." Undertakings also exclude "non-discretionary" actions, renewals of special use permits with no substantive changes, and "post-approval implementation" (proposed §§ 306108(a)(7)(B)(vi), (vii), (ix)).

Problem: Much of the federal involvement in Hawai'i comes as funding, including infrastructure, research, and transportation dollars. Where funding is the only federal involvement, a project would receive no Section 106 review at all. That could include federally funded rebuilding in Lāhainā, an area rich in Native Hawaiian history, and federally funded research facilities on culturally significant summits.

C. **Iwi kūpuna or cultural sites discovered or nominated for the National Register after consultation concludes may go unprotected federally.** Proposed § 306108(c)(1) limits an agency's responsibilities to "historic properties within the area of potential effects identified by the Federal agency," and new § 306108(d) provides that later identification, nomination, or listing of a property on the National Register "shall not require the head of the Federal agency to delay, reopen, supplement, or otherwise modify the review."

Problem: If an important cultural site was not nominated for inclusion in the National Register before a project's Section 106 initiation, its subsequent nomination or discovery may not require additional review. In Hawai'i, burials are often found during construction and may be part of a larger National Register-eligible burial complex. Combined with the exclusion of "post-approval implementation" from the definition of undertaking, these provisions could leave no federal Section 106 obligation after an inadvertent discovery, limiting avoidance and project alterations as a form of mitigation for the protection of iwi kūpuna and significant cultural sites. Any discovered iwi kūpuna would be limited to the protections of state law, HRS § 6E-43.6, and, on federal land, the Native American Graves Protection and Repatriation Act.

D. **The bill limits the courts' ability to prevent irreversible harm to Native Hawaiian sites.** Proposed §§ 306108(c)(9)(B)–(D): Courts "shall afford substantial deference to the agency"; "the only remedy the court may order is to remand, without vacatur or issuance of an injunction"; and claims are barred unless filed within 150 days. A preliminary injunction remains available only where the action

likely violates a federal law other than the NHPA or NEPA (proposed § 306108(c)(9)(C)(ii)). Claims go directly to the courts of appeals (proposed § 306108(c)(9)(E)). The bill exempts an NHO from the direct-harm and prior-comment requirements only if it "provided detailed notice in writing during the consultation process" (proposed § 306108(c)(9)(D)(ii)), even though the bill no longer guarantees consultation before the agency identifies historic properties or finds no adverse effect. In contrast, proposed § 306108(c)(5)(B)(iii) gives project proponents the right to challenge missed consultation deadlines with injunctive relief.

Problem: Even if a court finds that an agency violated Section 106, the project may continue while the agency corrects the violation on remand. Harm to a burial or sacred site cannot be undone on remand, and damage could continue while the agency completes corrective review. Ultimately, the bill preserves a judicial remedy to make the Section 106 process move faster while restricting remedies to prevent harm to cultural sites. Sending claims directly to the courts of appeals compounds the problem. The NHPA's fee-shifting provision applies to a "civil action brought in any United States district court," 54 U.S.C. § 307105, so an NHO that prevails in a court of appeals may be unable to recover its attorney's fees, expert witness fees, and costs under that provision. Hawai'i NHOs would also have to immediately litigate before the Ninth Circuit rather than the U.S. District Court for the District of Hawai'i.

E. **NHOs that do not sign a programmatic agreement cannot enforce it.** Proposed § 306108(c)(10)(A): "A party that is not a signatory to a programmatic agreement . . . may not bring a civil action to challenge the implementation of the programmatic agreement."

Problem: In Hawai'i, many large and long-running federal programs, including military training and installation programs, are governed by programmatic agreements. NHOs often participate in these agreements as consulting or concurring parties rather than as signatories, and under the proposed response timelines, NHOs may also be excluded from signing (proposed § 306108(c)(5)(C)(vi)). Under the bill, the commitments made to them in future programmatic agreements, and arguably in existing ones, could not be enforced by affected NHOs in court

F. **Hawai'i's State Historic Preservation Office could be suspended or taken over.** § 2301(b)(1) (amending 54 U.S.C. § 302302): A state program "shall not be considered consistent" if the SHPO "does not regularly comply with timelines for consultation, complete consultation expeditiously, or meet required metrics," in

which case the Secretary "shall require the suspension" of Historic Preservation Fund grants and, after two years, "shall assume all or part of the functions of the State Historic Preservation Officer."

Problem: Critical Native Hawaiian participation in historic preservation of cultural resources and culturally significant places runs through SHPD. The bill responds to capacity shortfalls by suspending funding and transferring review to federal staff; the Historic Preservation Fund reauthorization in § 2302(a) is an authorization only, not a guarantee of the resources SHPD needs. None of the bill's standards ("expeditiously," "required metrics") are defined.

G. **The bill cuts back other federal environmental protections that Native Hawaiian ʻāina depends on.** In NEPA litigation, the NEPA title bars a preliminary injunction based on an NHPA violation: a court may enjoin only where an authorization likely "violates a Federal law other than— (aa) this Act; or (bb) division A of subtitle III of title 54" (§ 1110). The NHPA title contains the parallel bar (proposed § 306108(c)(9)(C)(ii)). Under the Clean Water Act amendments, the Army Corps may reissue nationwide permits, so long as the reissued permit does not narrow or eliminate pre-construction requirements or raise their threshold, with "no consultation under section 306108 of title 54" and no Endangered Species Act Section 7 consultation (§ 1204(b)). The bill also narrows "water quality requirements" to Clean Water Act sections 301, 302, 303, 306, and 307 and the federal, state, or Tribal laws "implementing" those sections "that are applicable to discharges into waters of the United States" (§ 1202).

Problem: Hawaiʻi's streams, wetlands, loko iʻa, and nearshore waters sustain kalo cultivation, fishing, and gathering rights protected by article XII, section 7 of the Hawaiʻi Constitution. Hawaiʻi also has more federally listed threatened and endangered species than any other state, many of them culturally significant. Narrowing the State's Section 401 certification authority under the Clean Water Act and removing Section 106 and Section 7 of the Endangered Species Act review from nationwide permits would weaken protection of the ʻāina and of the resources Native Hawaiian practices depend on.

III. OHA and NHLC's Requests

Native Hawaiians generally support efficient, well-planned infrastructure and clean energy designed consistent with pono ʻāina stewardship, protection of Native Hawaiian cultural resources and sacred places, and respect for traditional and customary practice protections. BAAJA is inconsistent with each of those considerations. It reduces the Native Hawaiian role in the Section 106 process and weakens the environmental laws that protect the ʻāina. In July, Senator Hirono joined colleagues on the Energy and

Natural Resources Committee in calling the Advisory Council on Historic Preservation's draft Section 106 rule "unacceptable" because it would eliminate "Tribal consultation as we know it." Title III of BAAJA would write similar changes into statute, where they would be far more difficult to revisit. OHA and NHLC therefore respectfully ask that you:

A. **Oppose S. 5653 and vote against advancing it**, and urge your colleagues to do the same.

B. **Insist that Title III (NHPA amendments) be removed in its entirety** from any permitting package, and that any future changes to Section 106 be developed through meaningful consultation with Tribal Nations and the Native Hawaiian community.

C. **If you support any version of the bill, condition that support on amendments that protect Native Hawaiian rights and the ʻāina,** at a minimum:

   i. require mandatory consultation ("shall consult") with NHOs at every stage, including the area of potential effects, identification of historic properties, and determination and resolution of adverse effects ;

   ii. strike the new definition of "property of traditional religious or cultural importance," or revise it to include places significant because of ongoing belief, practice, and cultural landscapes, and add a savings clause for existing listings and eligibility determinations;

   iii. strike the exclusions for federally funded projects and for visual, atmospheric, audible, indirect, and cumulative effects, and restore "feeling" as an aspect of integrity;

   iv. strike the allowance for agencies to disregard adverse effects solely because a historic property remains eligible for the National Register;

   v. strike the "sole discretion" and "other considerations" override for the obligation to mitigate adverse effects through practicable measures;

   vi. replace the 30-day forfeiture provisions for NHOs with reasonable, extendable timelines;

   vii. preserve federal obligations for post-review discoveries, especially iwi kūpuna;

   viii. strike the remand-only remedy, the bar on injunctions, the 150-day limitations period, the routing of claims directly to the courts of appeals,

and the bar on non-signatory enforcement of programmatic agreements;

ix. strike the SHPO/THPO suspension and federal takeover provisions, and instead guarantee capacity funding to SHPOs and THPOs alike; and

x. strike the nationwide-permit exemptions from Section 106 and Section 7 consultation, and the narrowing of "water quality requirements" under Clean Water Act Section 401.

Mahalo for your many years of advocacy for Native Hawaiians and for Hawai'i's natural and cultural resources. OHA and NHLC would welcome the opportunity to meet with you or your staff before November 9 and can provide additional detail on any of the provisions above.

Me ka ha'aha'a,

Kaiali'i Kahele
Chair, Board of Trustees
Office of Hawaiian Affairs

Makalika Naholowa'a
Executive Director
Native Hawaiian Legal Corporation

cc:
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