MYTH BUSTING BAAJA

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On Wednesday, Senators Heinrich and Whitehouse put out a video to "do a little myth busting" about the Bipartisan American Affordability and Jobs Act (BAAJA).[1] Unfortunately, the Senators' myth busting video needs its own myth busting. So, in their own words, "let's talk about it."

CLAIM: Data centers are permitted under state and local laws; BAAJA doesn't change any of that.

FALSE

If a data center is being built on state or private land but is being built with federal financial assistance, such as a loan, grant, or direct federal investment, the federal agency providing that financial assistance is required to review the potential impacts of the data center under the National Environmental Policy Act (NEPA)[2] and Section 106 of the National Historic Preservation Act (NHPA).[3] Additionally, if the construction or operation or a data center might harm a threatened or endangered species, the U.S. Fish & Wildlife Service would need to permit the project under the Endangered Species Act (ESA).[4] If the construction or operation of the data center would affect surface water, groundwater, or wetlands, or would discharge pollutants into waters or the air, the U.S. Army Corps of Engineers and the Environmental Protection Agency would need to permit the project under the Clean Water Act (CWA) and the Clean Air Act.[5] This says nothing of data centers that could be built on federal public lands, where the specific land managing agency would need to permit the construction, or related infrastructure like energy generation, gas pipelines, and transmission lines.[6]

BAAJA weakens, not strengthens, accountability over data centers because it guts the review processes in laws like NEPA and NHPA and significantly weakens protections built into laws like ESA and CWA. In many instances, BAAJA would eliminate federal agencies' obligations to review these projects all together, it would weaken the protections built into these statutes, and it would eliminate the disclosure of effects and engagement with the public and Tribal Nations.[7]

CLAIM: BAAJA does not approve data centers on federal public lands or anywhere.

MISLEADING

While BAAJA itself does not approve data centers, today, their construction is subject to robust federal environmental review and safeguards, which involve robust public engagement and consultation with Tribal Nations.[8] BAAJA would remove the public and Tribal Nations from the process and allow projects to move forward with little review or disclosure of potential impacts to the environment and human health.[9] BAAJA would allow data centers to be built faster with less review, less disclosure, and less public and Tribal involvement.



CLAIM: There is no plausible reading of BAAJA that would encourage the building of more Immigration and Customs Enforcement (ICE) detention centers.

FALSE

BAAJA does not ease the permitting process and environmental compliance only for data centers and energy projects; it eases the permitting process and environmental compliance for every single action permitted, approved, funded, or undertaken by the federal government. There is no carve out for ICE or for the construction of detention centers. If ICE funds, permits, approves, or itself constructs detention centers, that construction will be subject to the same laxed environmental review and public disclosure and engagement as data centers, coal mines, natural gas pipeline projects, and wind farms.[10]

CLAIM: The changes to permitting in BAAJA matter far more to wind, solar, and battery generation.

FALSE

Changes to the permitting process matter to everyone wanting to build something that requires a federal permit, no matter what that is. BAAJA does not speed up the permitting process for only renewable energy projects; it speeds up the process for any project that needs a federal permit, approval, or funding, whether it is an ICE detention center, a data center, a uranium mine, an oil and gas pipeline, or a wind farm.[11] All projects benefit equally from BAAJA's reforms, and BAAJA's disparate treatment protection provision ensures that the federal government cannot shift away from fossil fuel development even when based on scientific evidence of climate change.[12]

It is also false that renewable energy projects will be permitted (faster or at all) under BAAJA. President Trump has stated that his Administration will not permit wind farms even if BAAJA were passed.[13] Instead of spurring the buildout of renewable energy projects, BAAJA will lock the United States into more fossil fuel development with little to no review or regulation.

CLAIM: BAAJA will lead the United States into a clean energy future.

FALSE

President Trump has already stated his Administration will not permit renewable energy projects even if BAAJA is passed. Instead, the Trump Administration will use BAAJA's evisceration of environmental laws to ram through as many fossil fuel development and generation projects as possible. BAAJA's limitations on judicial review and its provisions on "project certainty" will lock the United States into a fossil fuel future with little to no recourse to stop or undo these projects, even if they were permitted and built unlawfully.[14]

CLAIM: BAAJA only moves the permitting process forward so projects get approved (or denied) faster.

FALSE

BAAJA accelerates the permitting process and the expense of meaningful review, consideration, and disclosure of projects' potential impacts, and the involvement of Tribal Nations, local governments, and the public. Faster, secret permitting with no accountability or public review is not a better process. Combined with its restrictions on judicial review and project certainty provisions, BAAJA ensures bad, damaging projects are permitted faster and without public involvement.

CLAIM: BAAJA does not eliminate Tribal consultation, it mandates it in federal law for the first time by saying federal agencies "shall consult" with Tribal Nations.

FALSE

BAAJA all but eliminates Tribal consultation under Section 106 of the NHPA, which today, is the most important tool Tribal Nations have to protect their sacred places and inform federal decision-making.[15] BAAJA drastically changes the role of Tribal consultation from being essential to, and embedded within, each step of the Section 106 process to serving an extremely truncated, transactional notice-and-comment type role.[16] The existing Section 106 process mandates robust consultation throughout the federal agency's review process. BAAJA eliminates this entirely. BAAJA does not use the term "shall consult" anywhere in the NHPA title.

BAAJA also does not mandate Tribal consultation for the first time in federal law. The NHPA already mandates federal agencies to consult with Tribal Nations: "In carrying out its responsibilities under 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property" potentially affected by the undertaking."[17] Congress enshrined this mandatory consultation provision into law in 1992, 34 years ago.

CLAIM: The Trump Administration proposed eliminating Tribal consultation and replacing it with a single 30-day comment period; BAAJA fixed that.

FALSE

BAAJA simply changed the 30-day comment period to 45 days and added a second 60-day consultation period if no agreement is reached in response to initial comments.[18] It still eliminates the existing, robust consultation process and replaces it with a comment period. That period is just slightly longer.

CLAIM: There are no senators who care more about protecting the environment than Senators Heinrich and Whitehouse.

FALSE

BAAJA says otherwise. It guts the bedrock environmental laws—NEPA, NHPA, ESA, and CWA—that protect our irreplaceable natural and cultural resources, environment, and human health. Actions speak louder than words.

CLAIM: BAAJA goes out of its way to ensure that no environmental standards are weakened.

FALSE

BAAJA guts NEPA and NHPA and significantly weakens ESA and CWA. Where it does not "weaken" a standard, it limits when federal agencies must consider a project's impact, when and how to disclose impacts, and when and how to consult with Tribal Nations and involve the public. BAAJA also weakens judicial review of projects and its project certainty provisions make it all but impossible for unlawfully permitted projects to be stopped or undone.[19]

CLAIM: BAAJA will get more renewable energy projects approved faster.

FALSE

BAAJA accelerates the permitting process for all energy development and generation projects, whether they are renewable projects or fossil fuel projects. And the Trump Administration has already indicated that it would continue

to attempt to block certain forms of renewable energy projects, which suggests that renewable energy will still face permitting challenges, while fossil fuel projects will be able to proceed in the immediate future without any of the traditional protections for the environment and for Tribal communities. Thus, BAAJA will get more fossil fuel projects approved faster.

CLAIM: The next Congress can fix any problems with BAAJA.

FALSE

In arguing that BAAJA must be passed now, Senators Heinrich and Whitehouse assert that it cannot wait until next Congress because they will need Republican support to reach 60 votes to pass comprehensive permitting reform through the anti-public involvement tool of cloture. Apparently, the strategy is to compromise when you are in a position of weakness, rather than wait to negotiate from a position of power. Regardless, if these facts mean that it would be impossible to pass comprehensive permitting reform in the next Congress, those facts also mean it would be impossible to pass fixes to BAAJA.

CLAIM: Waiting two more years to address permitting reform means waiting two more years for renewable energy projects to come online.

FALSE

The next Congress is perfectly capable of passing comprehensive permitting reform. If permitting reform is truly bipartisan, it can be accomplished under a Democratic-controlled Congress. Moreover, the Trump Administration has already stated it will not permit certain types of renewable energy projects even if BAAJA were to pass,[20] meaning these projects will still have to wait two more years to be built, all at the expense of Indian County and the environment. By then, if BAAJA passes, it may be too late.

CLAIM: We cannot afford to wait any longer to address climate change and the cost of energy.

TRUE -- BUT BAAJA IS NOT THE ANSWER

BAAJA is not the solution for addressing climate change.[21] It only accelerates the buildout of fossil fuel infrastructure that will make the climate crisis worse.[22] Moreover, Indian County cannot afford BAAJA.[23] Indian County cannot be made to pay for BAAJA, permitting "reform," and everyone else's cheaper energy.



Endnotes

1. Senator Martin Heinrich et al, Instagram (Nov. 18, 2026), https://www.instagram.com/reels/Df51WaJFTpH/.
2. 42 U.S.C. § 4332(C).
3. 54 U.S.C. § 306108.
4. 16 U.S.C. §§ 1536, 1539(a).
5. 33 U.S.C. §§ 1342, 1344; 42 U.S.C. §§ 7475, 7661a
6. 43 U.S.C. §§ 1732(b), 1761, 1765; 30 U.S.C. § 185.
7. *See, e.g.,* Bipartisan American Affordability and Jobs Act, H.R. 2347, SA 6883, 119th Cong., § 1202 (2026) (BAAJA) (limiting Tribal Nations' review of water quality impacts of a proposed project); id. § 1303 (creating categorical exemptions from the ESA and NEPA's consultation framework); id. § 2301 (significantly diminishing requirements for Tribal consultation and the ability for Tribes to secure legal remedies to stop projects moving forward when they prevail on NHPA and NEPA claims).
8. *42 U.S.C. § 4332; 33 U.S.C. § 1344(a); 42 U.S.C. § 7475(a)(2).*
9. *See, e.g.,* BAAJA at § 1102 (excluding a much broader set of projects from any environmental review, including projects that receive federal loans, loan-guarantees or grants, as well as routine agency actions under $10M, lifeline infrastructure repairs that can add up to 20% capacity, and certain environmental infrastructure projects that receive up to $50M in federal funding); id. § 1303 (excluding projects in existing rights-of-way from ESA consultation obligations); id. § 2301 (limiting the types of federal actions that would require disclosure to Tribal Nations of impacts to cultural resources under NHPA).
10. *See The Bipartisan American Affordability and Jobs Act Will Accelerate the Expansion of Deadly Immigration Detention Facilities,* Detention Watch Network (Oct. 30, 2026), https://www.detentionwatchnetwork.org/sites/default/files/documents/BAAJA_%20Analysis%20of%20Impact%20on%20Detention%20Expansion.pdf.
11. *See* Annick Miller et al., *Senate Builds Momentum on Permitting Reform with Bipartisan Deal,* JD Supra (Oct. 6, 2026), https://www.jdsupra.com/legalnews/senate-builds-momentum-on-permitting-2503509/ ("The end result is a bill that would change the process and timeline for permitting anything that has a federal nexus, including energy infrastructure, roads, bridges and data centers to name a few." (emphasis added)).
12. BAAJA at *§ 1402.*
13. Rachel Frazin, Trump Says He "Will Not Approve Wind Turbines" Despite Support for Permitting Reform Bill, The Hill (Nov. 9, 2026), https://thehill.com/policy/energy-environment/6209267-trump-wind-turbines-permitting-reform-bill/.
14. *See, e.g.*, BAAJA at § 1401 (blocking agencies from revoking, suspending, or altering permits for a permitted project—even if it finds the permitting decision was flawed—except if required by a court order, for a permit violation, fraud, national security or defense threat, or at the sponsor's request, and allows a court to order reinstatement of a permit with injunctive relief prohibiting further actions to cancel or modify the permit or authorization, attorneys' fees, costs associated with delay, and punitive damages).
15. *Native Organizations to Congress: Our Position Has Not Changed. Reject BAAJA in its Entirety,* Nat'l Congress of Am. Indians (Nov. 17, 2026), https://www.ncai.org/news/reject-baaja-in-its-entirety
16. BAAJA at § 2301 (setting up a process in which the federal agency first unilaterally makes an initial set of determinations about identification of historic properties impacted by an action and the potential adverse effects on those properties and then is required to provide a report to applicable Tribal Nations and respond to substantive objections).
17. 54 U.S.C. § 302706(b) (emphasis added).
18. BAAJA at § 2301.
19. *See* Kate Groetzinger, *Problems with the Senate Permitting Bill, According to a Former Interior Department Lawyer*, Ctr. for W. Priorities (Nov. 12, 2026), https://westernpriorities.org/2026/11/problems-with-the-senate-permitting-bill-according-to-a-former-interior-department-lawyer/ ("The National Environmental Policy Act requires agencies to study the harm a project could cause before approving it. BAAJA keeps that requirement on paper but strips courts of the power to enforce it. If an agency skips or botches the analysis and gets sued, a judge can order the analysis be redone, but cannot halt the project . . . . A separate 'project certainty' provision in BAAJA locks in projects like drilling, mining, and data center development on public lands. Once a permit or approval is issued, agencies are barred from modifying it.").
20. *Frazin, supra, note 13.*
21. Lorne Stockman, *BAAJA's Epic Climate Fail,* Oil Change Int'l (Nov. 5, 2026), https://oilchange.org/blogs/baaja-emissions-fail/ ("The bill's potential emissions reductions offer no hope of fixing this situation. Slightly lower emissions in a world that needs to rapidly push emissions down to zero does nothing to end the climate crisis").
22. Lorne Stockman, *How the BAAJA Could Unlock a Massive Expansion of Data Center-Linked Gas Infrastructure*, Oil Change Int'l (Nov. 4, 2026), https://oilchange.org/blogs/how-the-baaja-could-unlock-a-massive-expansion-of-data-center-linked-gas-infrastructure/.
23. *Id.* ("Growth in U.S. gas production will exacerbate the suffering of communities on the frontlines of this fossil fuel expansion, which is disproportionately borne by Black, Brown, Indigenous, and poor communities").