



NTTA

NEPA and Section 106 Compliance for Broadband Projects on Tribal Lands 102

NTTA Tribal Broadband Summit

April 8-10, 2024

Wildhorse Pass Resort & Casino

Gila River Indian Community, Chandler AZ





THANK YOU

A special thank you to the Gila River Indian Community for hosting this conference and sharing their leadership, experience and beautiful facilities with this Summit. We look forward to learning more about the goals and plans of the Gila River Indian Community.

Thank you to the NTTA for providing this forum for Tribal Nation employees, businesses and consultants to share information regarding compliance with environmental regulations in Telecommunications projects on Tribal lands!



Determining Project Analysis

- To begin environmental, cultural, and biological analysis a complete project needs to be defined.
- Explanation of project implementation is important for analysis of effects.
- All potential disturbances associated with the proposed action will need to be analyzed.
 - Fiber route
 - Tower sites
 - Access roads
 - Any additional disturbances
- Individual project components cannot typically be separated for NTIA review.
- Changes to project routes or locations lead to additional analysis, ultimately effecting project timelines

Streamlining Timelines

Desktop Research

Environmental Surveys

Cultural Resource Surveys

Endangered Species Surveys

Consultation Time Frames

ROWs, Easements and Business Site Leases

Other Agency Permitting

National Environmental Policy Act (NEPA)

- *Requirements:*
 - Consider environmental factors of proposed action
 - Involve people and agencies who could be affected
 - Prepare environmental documentation
- NEPA is only applicable to federal actions, including projects and programs entirely or partially financed by federal agencies and/or that require a federal permit or other regulatory decision.



Streamlining NEPA

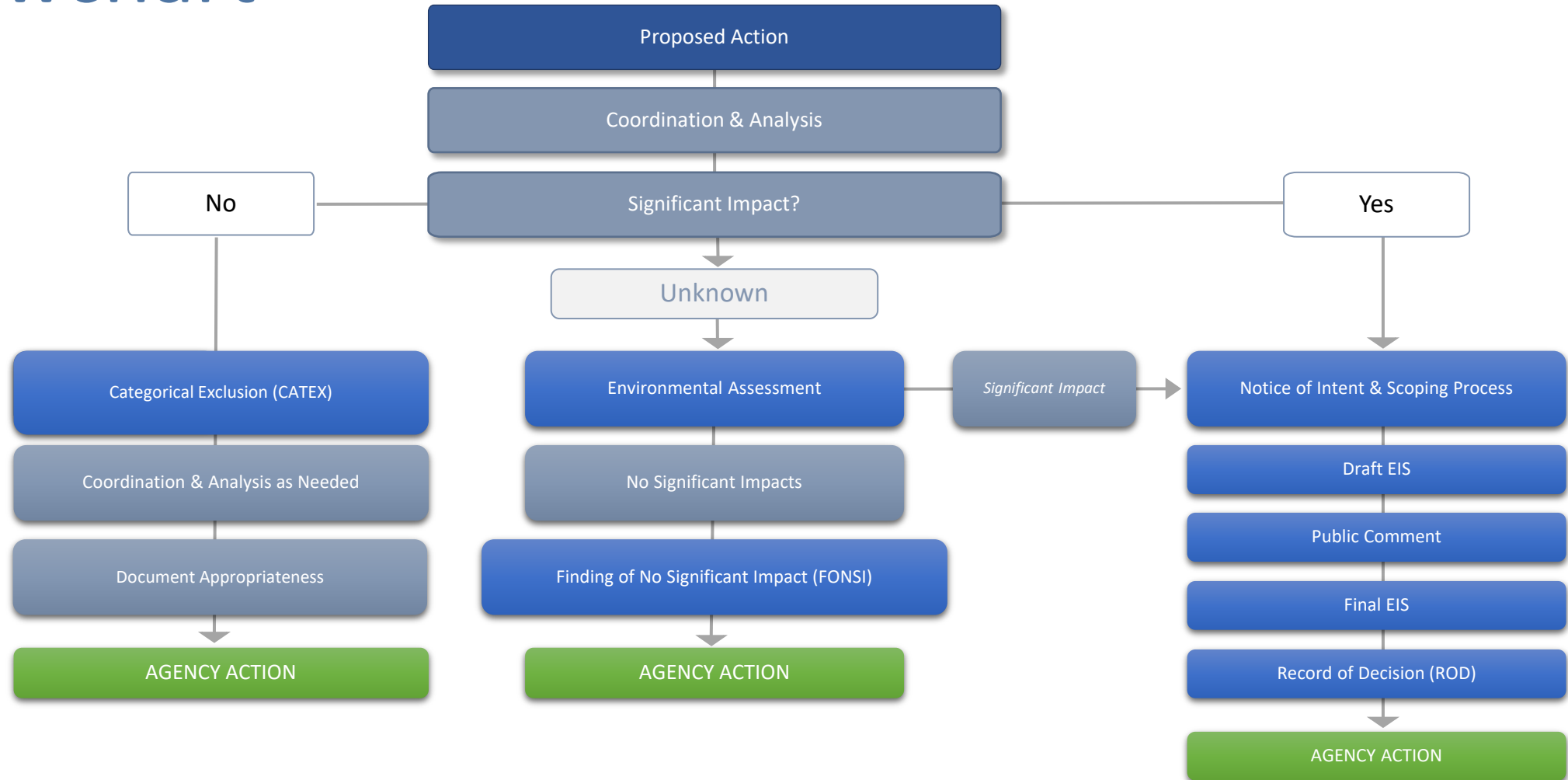
Categorical Exclusions

vs.

Environmental Assessments



NEPA Process Flowchart



Categorical Exclusions v. Environmental Assessments



Categorical Exclusion (CE or CATEX)

Issued for defined actions that the agency has determined do not individually or cumulatively have a significant effect on the environment.

Must provide details of all project components as well as information on the surrounding area

Typically take 30-45 days to develop.

All components of the project must meet the criteria for at least one CE or an EA is required.

Applicable CEs for the Department of Commerce can be found in 74 FR 33204

Environmental Assessment (EA)

Prepared for actions in which the significance of the environmental impact is not clearly established.

Analysis must provide details regarding:

- Purpose and need for the proposed action
- Reasonable alternatives
- Environmental effects
 - Significance of effects
 - Mitigation of any potential negative effects

Must give an opportunity for involvement to interested agencies, tribes, and the public.

Typically take 3-12 months to develop.

If the EA determines a project will have no significant environmental impacts, a Finding of No Significant Impact (FONSI) is issued.

Can you streamline by breaking up project components?



- NEPA and the CEQ regulations do not allow an agency to break a single project into multiple components (i.e., phased or staged) without completing environmental review for the entire project, whether by CE, EA, or EIS. In the rare cases where a grant includes multiple subgrantees/subrecipients proposing projects that are completely independent of each other, separate NEPA analyses are appropriate, NTIA may find sufficient “independent utility” to allow one segment to proceed while others are still receiving NEPA review.⁷
- NTIA assesses independent utility based on a project's independent function, absent the construction of other components of the project. Only component parts of a grant that could be constructed even if the other phases were not built and can functionally operate on their own can be considered as separate, single, and complete projects with independent utility. In contrast, component parts of a grant or a multi-phase project that depend upon other projects, phases, stages, or segments of the project do not have independent utility.

New NTIA Categorical Exclusions – Effective April 2, 2024



- [NOTICE OF NEWLY ADOPTED NEPA CATEGORICAL EXCLUSIONS | BroadbandUSA \(doc.gov\)](#)
- Approximately 30 new Categorical Exclusions have just become effective
- These Cat Exs will help streamline the NEPA process for NTIA Broadband projects.

Threatened and Endangered Species



- Use IPaC [IPaC: Home \(fws.gov\)](https://www.fws.gov/ipac) to determine all Special Status Species for your project.
- Habitat vs Presence/Absence surveys
- Effect Determinations
- Survey requirements and timeframes
- Informal versus Formal Consultation
- Mitigation measures



ROWs, Easements and Business Site Leases

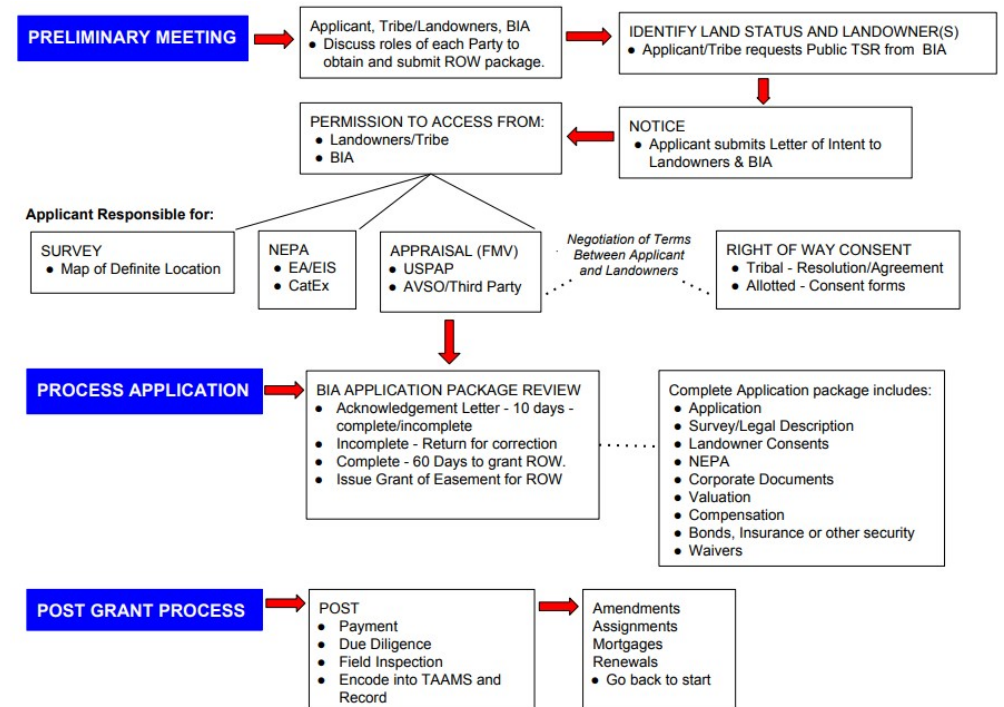
The Bureau of Indian Affairs Rights-of-Way Permitting Process requires additional steps beyond the environmental clearances under the NEPA process, including:

- Survey (Map of Definite Location)
- Appraisals (Fair Market Value)
- ROW Consent
 - Tribal (Resolution/Agreement)
 - Allotments (Consent Forms)
- Bonds/Insurance
- Waivers (if obtained)

Rights-of-Way Permitting

Office of Trust Services
 Environmental Services and Cultural Resources Management
 Forestry
 Wildland Fire Management
 Land Titles and Records
 Natural Resources
 Energy and Mineral Development
 Probate
 Real Estate Services
 Tribal Climate Resilience
 Water and Power
 Trust Land Consolidation
 Indian Energy Service Center
 Resource Integration Services

More information on obtaining [Rights-of-Way \(ROW\)](#) for broadband or other utilities can be provided by [Real Estate Services](#) or [Regional](#) staff. Below is flowchart of how the ROW permit process looks.



Land Ownership



- Once all routes and tower sites are planned, determine the land ownership and existing ROW for each element
- Use BIA records and county land records to determine the land ownership
- Contact owners of existing ROWs to determine if broadband can be added to the ROW and if any additional permitting requirements apply
- BIA may require business site leases or additional ROWs be filed



Other Permitting Entities

- Bureau of Reclamation (BOR)
- Bureau of Land Management (BLM)
- U.S. Forest Service (USFS)
- National Parks Service (NPS)
- U.S. Fish and Wildlife Service (USFWS)
- U.S. Army Corps of Engineers (USACE)
- Bureau of Indian Affairs (BIA)
- State Departments of Transportation (DOTs)
- Other state agencies that may have jurisdiction/land ownership or administration

Cultural Resources



Class I literature search

Class III pedestrian survey

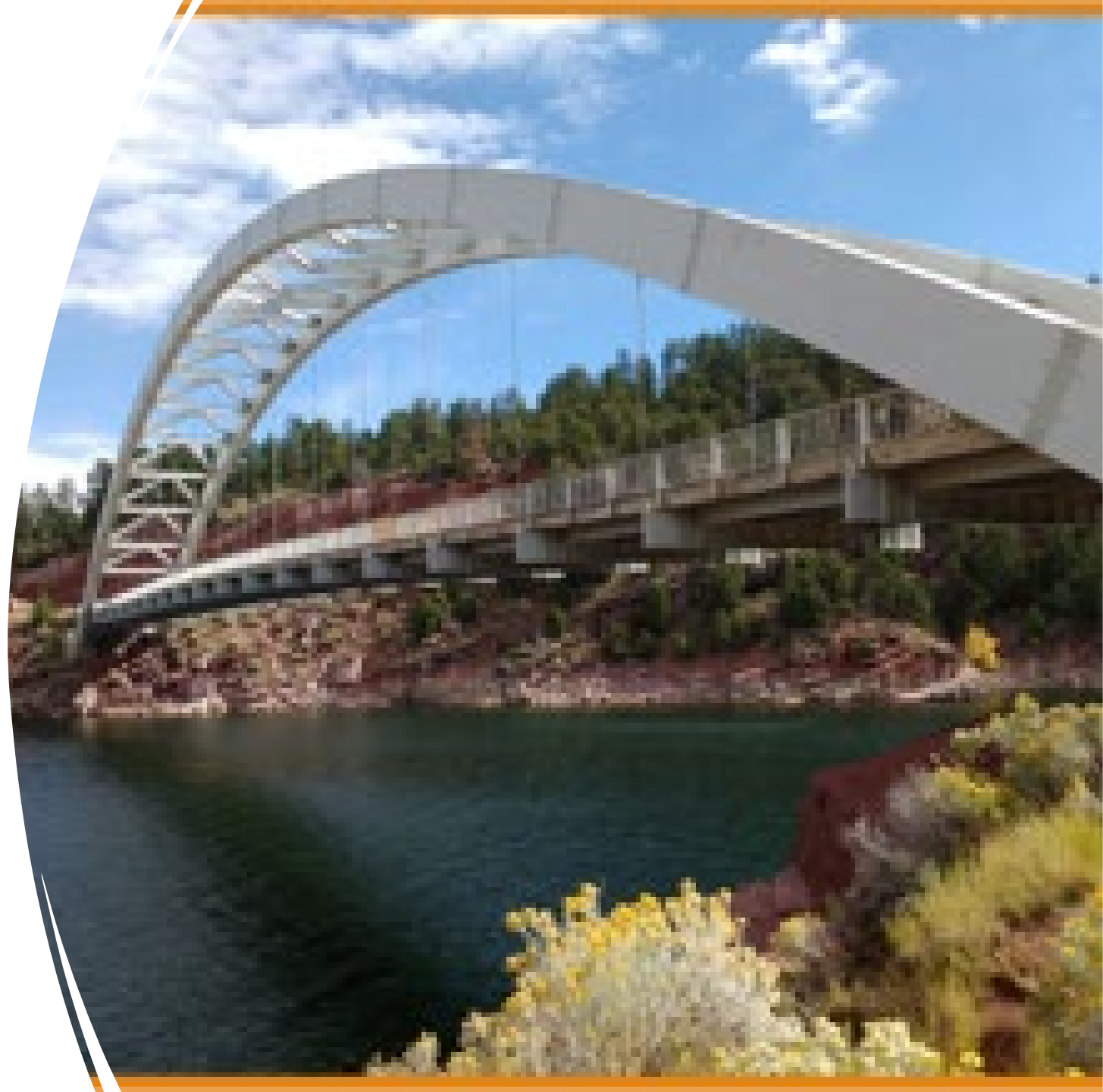
Traditional Cultural Properties (TCP)

SHPO/THPO consultation



Class I Literature Search

- Early search of existing databases can inform project managers about known cultural sites and/or potential for presence of new sites
- Recent surveys may eliminate/reduce the need for pedestrian survey
- Access to database limited to qualified professionals



Class III Pedestrian Survey

- Requires on-site physical survey by qualified professionals (archaeologist and/or historic architecture experts)
- Standard transect is 15 meters (50 feet); wider project areas may require multiple transects
- Certain federal agencies (BLM, USFS) may require fieldwork authorizations prior to conducting Class III survey work
- Private property may require obtaining permission to enter
- May require test pits (archaeology)



Determination of Eligibility for NRHP



The Section 106 review process requires cultural resources to be evaluated for eligibility for listing on the National Register of Historic Places (NRHP) based upon the following criteria:

- “the quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association”
- Whether or not they meet one or more of the NRHP criteria A, B, C, D:

NRHP Criterion	Characteristics
A	Associated with events that have made a significant contribution to the broad patterns of our history
B	Associated with the lives of persons significant in our past
C	Embody distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic value, or that represent a significant and distinguishable entity whose components may lack individual distinction
D	Yielded, or may likely yield, information important in prehistory or history

Finding of Effect

- **No Historic Properties Affected**
 - “[e]ither there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in §800.16(i)” (See 36 CFR §800.4(d)(1)).
- **No Adverse Effect**
 - “[w]hen the undertaking’s effects do not meet the criteria of paragraph (a)(1) of this section [see Adverse Effect definition] or the undertaking is modified or conditions are imposed... to ensure consistency with the Secretary’s standards for the treatment of historic properties (36 CFR §68) to avoid adverse effects” (See 36 CFR §800.5(b)).
- **Adverse Effect**
 - “[w]hen an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, and association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property’s eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative” (See 36 CFR §800.5(a) (1)).

Traditional Cultural Properties



- A **Traditional Cultural Property (TCP)** is a property that is eligible for inclusion in the National Register of Historic Places (NRHP) based on its associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community.
- TCPs are rooted in a traditional **community's history and are important in maintaining the continuing cultural identity of the community.** The cultural practices or beliefs that give a TCP its significance are, in many cases, still observed at the time a TCP is considered for inclusion in the NRHP. Because of this, it is sometimes perceived that the practices or beliefs themselves, not the property, make up the TCP.
- While the beliefs or practices associated with a TCP are of central importance, **the NRHP does not include intangible resources.** The TCP must be a physical property or place--that is, a district, site, building, structure, or object.

SHPO/THPO Consultation




- Section 106 requires consultation with State Historic Preservation Office/Tribal Historic Preservation Office
- Concurrence with Determinations of Eligibility and Findings of Effect
- SHPO required to be provided with a 30-day review period
- If no agreement on eligibility and effect determinations can be reached, the Advisory Counsel may need to be contacted
- An adverse effect on historic properties requires a Memorandum of Agreement on mitigation measures to be implemented.

Paleontological Resources

- The Paleontological Resources Preservation Act of 2009 protects paleontological resources on federal and state lands by requiring agencies to take into account the effects of a proposed project on paleontological resources.





Section 4(f) Resources (FHWA/FTA projects)

Section 4(f) of the Department of Transportation (DOT) Act of 1966, as modified by Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users and implemented in 23 CFR 774, **protects public parks and recreation areas, historic properties, and wildlife or waterfowl refuges** from use in a transportation facility.

A use occurs when:

- Land is permanently incorporated into a transportation facility;
- There is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose; or
- When there is a constructive use of a Section 4(f) property.

Section 4(f) Resources *(continued)*

For a **park, recreational area, or wildlife/ waterfowl refuge** to qualify for Section 4(f) protection:

- must be both publicly owned and open to the public
- major purpose and function must be that of a park, recreation area, or wildlife/waterfowl refuge. Officials with jurisdiction over the property must also have determined it to be significant.

Historic properties listed on or eligible for listing on the National Register of Historic Places (NRHP) qualify for Section 4(f) protection can include archaeological sites as well as historic structures.

Archaeological sites do not qualify for protection under Section 4(f) if they are important only for their potential to yield information or if they do not warrant preservation in place.



Section 4(f) Resources *(continued)*



- **Section 4(f) properties may not be used** (except for small, de minimis impacts)
 - unless there is no feasible and prudent avoidance alternative and
 - the action includes all possible planning to minimize harm to the property.
- **As per 23 CFR §774.17, a de minimis impact to historic site is**
 - where the project would have a “no adverse effect” or “no historic properties affected” determination under Section 106 of the National Historic Preservation Act.
 - This means that either the project would have no impact on the historic property (e.g., no right-of-way is required), or that the impacts to the historic property are minor (e.g., minor right-of-way acquisition).



Key Takeaways

Utilizing existing corridors and ROWs to reduce surface disturbance

Early planning of all elements of the project including tower locations is crucial to streamlining

Determine land ownership and permitting entities for all linear portions and tower sites

NEPA clearance is required before construction can begin

Resources

- Guidance on NTIA National Environmental Policy Act Compliance [https://broadbandusa.ntia.gov/sites/default/files/2024-04/Guidance on NTIA NEPA Compliance April 20 24.pdf](https://broadbandusa.ntia.gov/sites/default/files/2024-04/Guidance%20on%20NTIA%20NEPA%20Compliance%20April%2024.pdf)
- [NEPA Review: Categorical Exclusions \(doc.gov\)](https://www.doc.gov/NEPA/NEPA-Review-Categorical-Exclusions)
- An Introduction to Section 106 <https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106>
- Identifying Historic Properties <https://www.achp.gov/protecting-historic-properties/section-106-process/identifying-historic-properties>
- Endangered Species Act <https://www.fws.gov/law/endangered-species-act>



Monica Smith Griffin,
Principal Investigator and Archaeologist
msmith@reagansmith.com
3909 N. Classen Blvd, Ste. 100
Oklahoma City, OK 73118
405.286.9326

Blayne Housh,
Director of Natural Resources
and Regulatory Compliance
Bhoush@reagansmith.com
3909 N. Classen Blvd, Ste. 100
Oklahoma City, OK 73118
405.286.9326



Judy Imlay
Environmental Specialist
Judyl@horrocks.com
2162 West Grove Parkway, Ste 100
Pleasant Grove, UT 84062
801.3769.5173



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