



**NTTA**

# NEPA and Section 106 Compliance for Broadband Projects on Tribal Lands 101

NTTA Tribal Broadband Summit

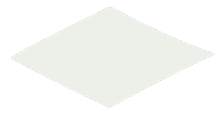
*April 8-10, 2024*

Wildhorse Pass Resort & Casino

Gila River Indian Community, Chandler, AZ

 REAGAN SMITH  Horrocks.





# 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!



# Overview



Basics of **environmental analysis and cultural resources management** under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act.



**Categorical Exclusions, Environmental Assessments, and Environmental Impact Statements** while also covering the **basics of cultural resource surveys and requirements.**



When and how these **documents apply to broadband implementation under the NTIA** grants and other sources of funding.



Knowledge of **how, when, and why environmental analysis and cultural resources surveys are required** prior to infrastructure implementation.

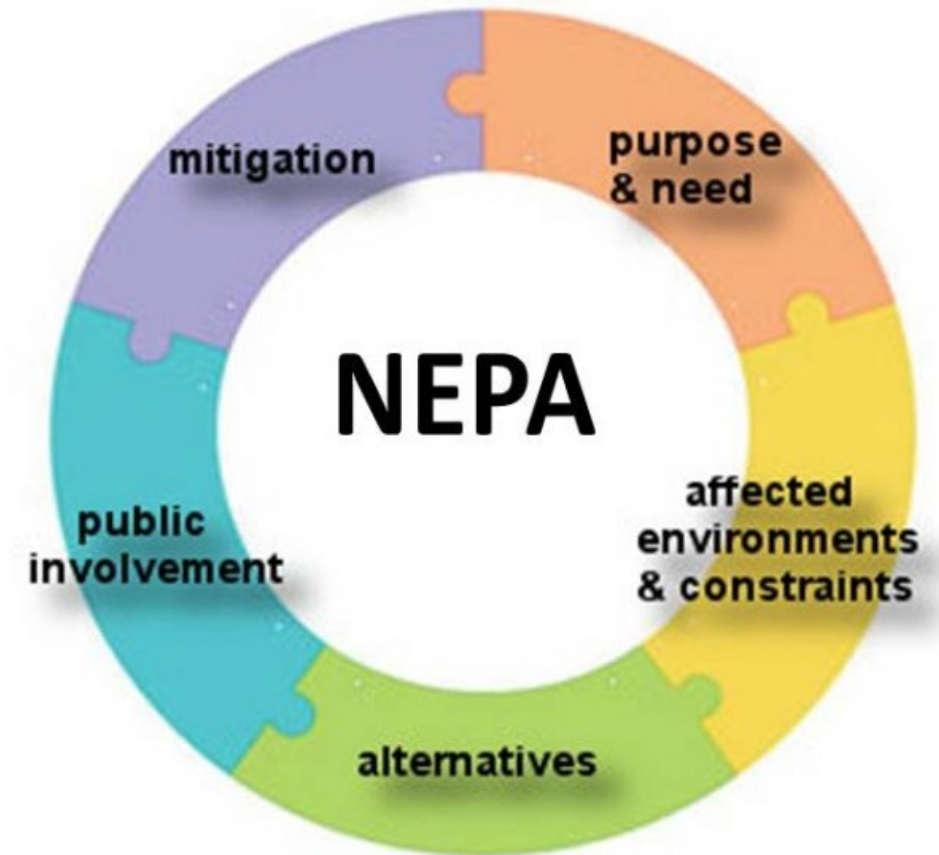


# National Environmental Policy Act (NEPA)

## *Requirements:*

- **Consider environmental factors in decision-making**
- **Involve people that could be affected**
- **Seek solutions that are less damaging to the environment**
- **Document the analysis process in plain language**

NEPA is only applicable to federal actions, including projects and programs entirely or partially financed by federal agencies and that require a federal permit or other regulatory decision.



# Federal Nexus



- NEPA analysis is required for “private actions” if a federal nexus exists.
- A Federal Nexus is likely if the Proposed Action:
  - occurs on federally managed surface.
  - produces or affects federally managed minerals.
  - could affect and/or result in “take” of a species protected by the Endangered Species Act, Migratory Bird Treaty Act, and/or the Bald and Golden Eagle Protection Act.
  - affects and/or traverses a Water of the US.
  - receives federal funding.
  - NTIA Grant Projects – the grant funding causes the federal nexus



# NEPA Documentation



**Categorical Exclusion** - Does not have significant environmental effects (individually or cumulatively)

Not a CE if:

- Significant environmental impacts
- Substantial controversy
- Significant impact on section 4(f) and section 106 properties
- Inconsistencies with any Federal, State, or local environmental requirements

**Environmental Assessment** - Significance of environmental impacts are unknown

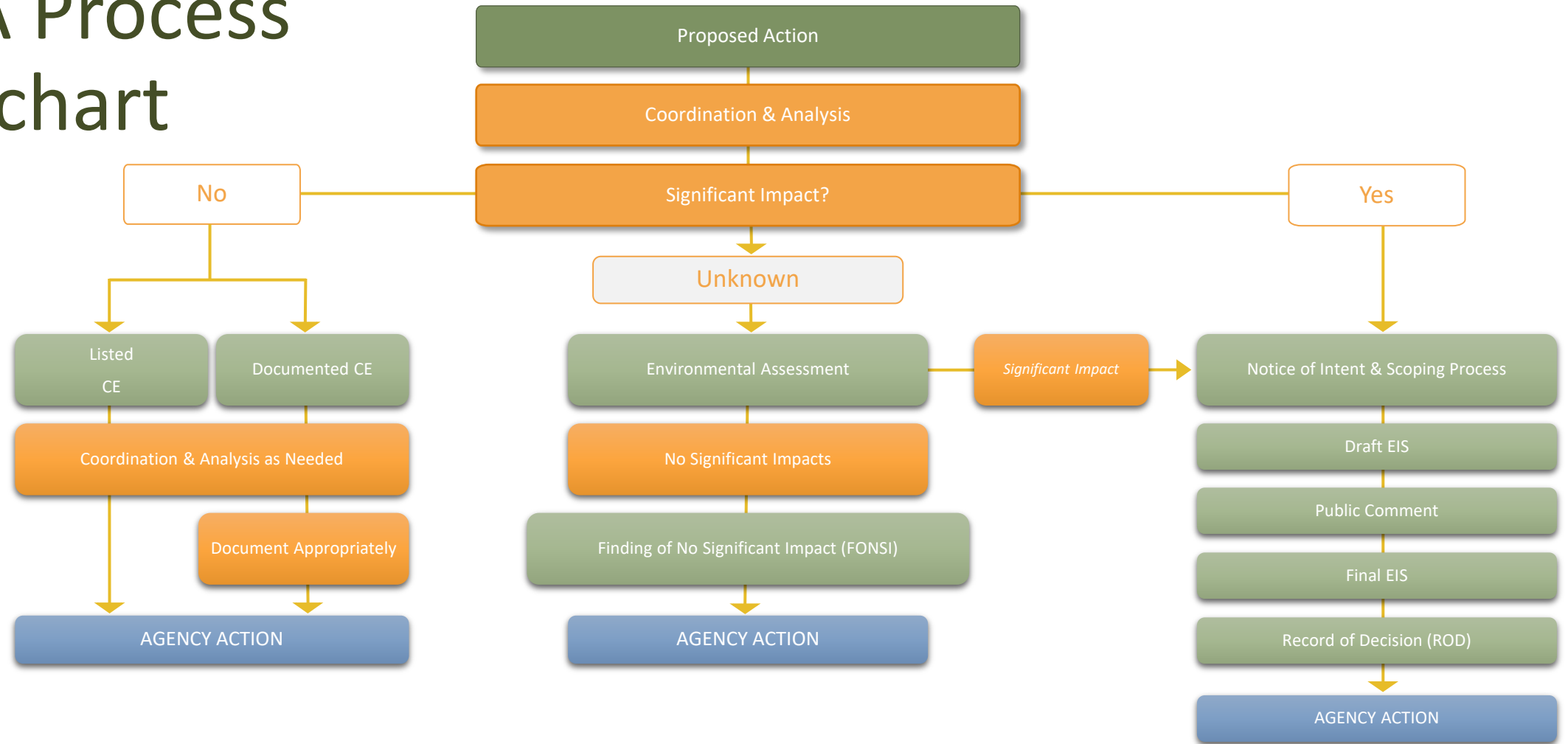
**FONSI** – Finding of No Significant Impact

**Environmental Impact Statement** - Major federal actions that significantly affect the quality of the human environment

**ROD** – Record of Decision



# NEPA Process Flowchart



# Waters of the US

Any crossings or fills within Waters of the US are reviewed by US Army Corps of Engineers

Check the USFWS National Wetland Inventory maps for preliminary planning

If potential issues arise a field delineation would be required

If not feasible to avoid:

- Attempt to utilize an existing USACE Nationwide Permit or General Permit
- Obtain an individual permit from U.S. Army Corps of Engineers.
- Permitting can take over a year.
- Mitigation will be required either in-kind or through offset mitigation credits.





# Endangered Species Act



- The **purpose of the Endangered Species Act (ESA)** is to provide a means to conserve the ecosystems upon which endangered and threatened species depend and provide a program for the conservation of such species.
- Section 7 of the ESA **requires Federal agencies to consult with the Service** to ensure that actions they fund, authorize, permit, or otherwise carry out will not jeopardize the continued existence of any listed species or adversely modify designated critical habitats.
- **Federal agencies must consult with the U.S. Fish and Wildlife Service** when the project or action may affect a listed species or designated critical habitat. The consultation process can vary depending on the complexity of the project or action.
- **Biological assessment or evaluation** will analyze and make determinations of effect on listed species. If a determination of "likely to adversely affect" is made for any species, formal consultation with USFWS will be required.



# T&E Species – Mitigation & Avoidance Measures

Requires consultation with the U.S. Fish and Wildlife Service (USFWS) and/or National Oceanic and Atmospheric Administration (NOAA)

- Monitoring and/or pre-construction surveys
- Fencing or other restrictions for construction areas
- Seasonal limitations on construction
- Noise and light restrictions
- Special infrastructure (i.e., raptor spikes on poles, bird exclusion netting, pump intake protection)
- May require special permits/clearances

# Special Status Species

- Certain species may have a special protection statuses
- Additional clearances, permits, or mitigation measures may be required.
- Timelines can be complicated due to survey seasons, avoidance periods, and other species-specific constraints.
- Surveys and/or assessments protocols often require surveyors to complete special trainings or hold specific permits associated with sensitive species.



# Examples of Special Status Species



- Federally Threatened or Endangered Species (ESA)
- Species that are Candidates or have been Proposed for Federal Listing
- Bald Eagles & Golden Eagles
- Migratory Birds
- Special Status or Sensitive Species tracked by other Federal agencies (BIA, BLM, USFS, etc.)
- State protected species



# Bald Eagle and Golden Eagle



- Both are protected by The Bald and Golden Eagle Protection Act, Migratory Bird Treaty Act, and The Lacey Act.
  - Federal offense to take, possess, kill, transport, sell, import and export, etc.
- Project should be designed to avoid habitat or include mitigation measure to avoid potential take.
- Take defined by Bald and Golden Eagle Protection Act as "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb".
- Survey method:
  - Pedestrian habitat survey and nest survey



# Migratory Bird Treaty Act

- The Migratory Bird Treaty Act (MBTA) of 1918 implements four international treaties created to ensure the sustainability of migratory bird species.
- The Migratory Bird Treaty Act (MBTA) prohibits take (including killing, capturing, selling, trading, and transporting) of protected migratory bird species.
- Analysis of potential effects should be included in **Biological Assessment/Evaluation**.
- Potential effects include loss of nesting or foraging habitat and take of individuals



# Section 106: National Historic Preservation Act



- Requires federal agencies to consider impacts to historic properties and consultation with State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO)
- Applies to any remains of human activity more than 50 years old.

*Includes:*

Historic homes, buildings, or other structures built within 50 years

Archaeological sites (Lithic Scatter, Pottery, Fossils, Irrigation Pipes, Bridges, Prehistoric Dwellings, Human Bones)

Paleontological sites (fossils)

- Traditional Cultural Properties (TCP)



# Tribal Historic Preservation Office Consultation (THPO)

- A designated officer of a Native American Indian Tribe with responsibility for the administration of certain National Historic Preservation Act, (NHPA), State Historic Preservation Officer (SHPO) responsibilities as amended in 1992 pursuant to Section 101 (d) (2), and listed in Section 101 (b) (3) of the act for which the tribe has assumed by request to the Secretary of the Interior.
- Not all tribes have a THPO officer.
- If a tribe does have a THPO office, then the proponent or agency should consult with the THPO officer.
- THPO and all tribes can request consultation on a project.





# SHPO Consultation/106 Review



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SHPO is the State Historic Preservation Office.

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Each state has one and all are under the Washington, D.C. SHPO

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Section 106 of the Act and the Council's regulations (36 CFR Part 800) requires all federal projects to have SHPO or 106 reviews.

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The Federal agency is responsible for the SHPO review but delegate this responsibility to applicants.

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If you are responsible you will need to send in a letter with details and maps of your project.

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SHPO review is 30 days.

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You or the agency will also need to consult the state archaeologist.



# Cultural Resources Components

- Historic Resources
- Literature Review
- Survey Methodology
- Eligibility for NRHP
- Consultation with THPOs and SHPOs
- Effect Determinations



# National Register Listing and Eligibility

A record search can determine if there are any listed or eligible sites within your project area.

If the area has not been completely surveyed before or if the survey is out of date a new survey may be required.

The archaeologist may determine there is an eligible site during field work and research.

This may cause your project to have to move or work with the agency and SHPO to develop mitigation.



# Cultural Resources



- *Includes:*

- Literature Search (Class I) and Pedestrian Survey (Class III)

- Determination of Eligibility and Finding of Effect

- A Memorandum of Agreement (MOA) may be needed if adverse impacts identified

- *Construction Issues:*

- Discovery During Construction

- Mitigation for impacts



# Preservation Considerations Take-Aways



- **Start early** in the permitting process to determine level of NEPA required by sharing proposed project details with NTIA environmental staff (Example)
- **Utilize consultants** to assist with NEPA surveys and reports
- **Be open to alternatives in route** and siting depending on results of desktop or field surveys
- **Include elders, landowners, THPOs** in consultations
- **Create reasonable budget and timelines** for surveys and environmental clearance



# Resources

- Guidance on NTIA National Environmental Policy Act Compliance [https://broadbandusa.ntia.gov/sites/default/files/2024-04/Guidance on NTIA NEPA Compliance April 2024.pdf](https://broadbandusa.ntia.gov/sites/default/files/2024-04/Guidance%20on%20NTIA%20NEPA%20Compliance%20April%2024.pdf)
- 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>
- [NOTICE OF NEWLY ADOPTED NEPA CATEGORICAL EXCLUSIONS | BroadbandUSA \(doc.gov\)](#)



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