

August 2019

Section 4(f) Manual

Section 4(f) Evaluation Guidance and Requirements



Introduction

The Arizona Department of Transportation (ADOT) has developed this Section 4(f) Manual in compliance with the following laws, regulations, and policy:

- Section 4(f) of the Department of Transportation Act of 1966 **23 United States Code (U.S.C.) § 138** and **49 U.S.C. § 303**
- **National Environmental Policy Act (NEPA) of 1969**
- 23 Code of Federal Regulations (CFR) 774
- **Section 4(f) Policy Paper (FHWA, July 20, 2012)**

Section 4(f) applies to all U.S. Department of Transportation (USDOT) transportation projects requiring federal funding or another federal action by the Federal Highway Administration (FHWA) or other USDOT agency. The purpose of Section 4(f) is to consider historic sites, wildlife and waterfowl refuges, and park and recreation lands during the transportation project development process. This Manual identifies the appropriate steps to: identify Section 4(f) properties; determine the use(s) (if applicable) of the Section 4(f) property(ies); conduct the Section 4(f) analysis; coordinate with the Official With Jurisdiction (OWJ); and prepare an individual Section 4(f) evaluation or other Section 4(f) documentation as appropriate.

This Manual was developed with consideration that ADOT has been assigned the Federal Highway Administration's (FHWA) responsibilities under 23 U.S.C 326 for the State Assumption of Responsibility for Categorical Exclusions, also referred to as CE Assignment, and under 23 U.S.C 327 for the Surface Transportation Project Delivery Program, also referred to as NEPA Assignment. The environmental review, consultation, and other actions required by Section 4(f) are being carried out by ADOT pursuant to 23 U.S.C. 326 and an MOU executed by FHWA and ADOT on January 3, 2018 and pursuant to 23 U.S.C. 327 and an MOU executed by FHWA and ADOT on April 16, 2019.

In addition, this Manual provides an overview on how to prepare the ADOT Section 4(f) forms that outline the procedures ADOT has implemented to reduce processing time, and streamline documentation and approval for certain federal actions that involve Section 4(f) properties but do not require an individual Section 4(f) evaluation.

Table of Contents

Chapter 1 - Background	1-1
1.1 Section 4(f)	1-1
1.1.1 History	1-1
1.1.2 Applicability.....	1-1
1.1.3 Intent.....	1-2
Chapter 2 - Section 4(f) Process Overview	2-1
2.1 Identification of Section 4(f) Properties.....	2-1
2.2 Determination of a Section 4(f) Use	2-1
2.3 Section 4(f) Approval Options	2-2
2.4 Coordination and Documentation	2-2
2.5 Exemptions and Exceptions under Section 4(f)	2-2
Chapter 3 Identifying Section 4(f) Properties	3-1
3.1 Parks, Recreation Areas, and Wildlife and Waterfowl Refuges	3-1
3.1.1 Public Ownership	3-2
3.1.2 Primary Purpose.....	3-3
3.1.3 Open to the Public	3-4
3.1.4 Significance	3-5
3.2 Public Multi-Use Properties	3-6
3.3 Historic Sites.....	3-7
3.3.1 Historic Eligibility Determination	3-9
3.4 Applicability and Exceptions	3-9
3.4.1 Applicability.....	3-9
3.4.2 Exceptions	3-10
Chapter 4 – Types of Section 4(f) Use.....	4-1
4.1 Permanent Incorporation	4-1
4.2 Temporary Occupancy	4-2
4.3 Constructive Use	4-4
4.4 <i>De Minimis</i> Impact	4-7
4.4.1 De Minimis Impact	4-7
Chapter 5 - Applicability and <i>De Minimis</i> Impact Documentation	5-1
5.1 Use of the ADOT Section 4(f) Forms	5-1
5.1.1 Documentation in the Project File	5-2
5.2 No Section 4(f) Property/Use Form	5-2
5.2.1 When to Use the Form.....	5-2

5.2.2	Completing and Processing the No Section 4(f) Property/Use Form	5-3
5.3	Determination of Section 4(f) Applicability/Exceptions Form	5-3
5.3.1	When to Use the Form	5-3
5.3.2	Processing Section 4(f) Applicability/Exceptions Form	5-4
5.4	<i>De Minimis</i> Form	5-5
5.4.1	When to Use the Form	5-5
5.4.2	Completing and Processing the <i>De Minimis</i> Impact Form	5-5
Chapter 6	– Alternatives Analysis and Minimization of Harm	6-1
6.1	Is the Use a <i>De Minimis</i> Impact?	6-1
6.2	Alternatives Analysis Overview	6-1
6.3	Avoidance Alternatives in Section 4(f) Evaluations	6-2
6.3.1	Feasible and Prudent Avoidance Alternative	6-2
6.3.2	Measures to Minimize Harm	6-5
Chapter 7	- Programmatic Evaluations	7-1
7.1	Types of Programmatic Evaluations	7-1
7.2	Net Benefit Programmatic Section 4(f) Evaluation	7-4
7.3	Historic Bridges Programmatic Section 4(f) Evaluation	7-8
Chapter 8	- Individual Evaluations	8-1
8.1	Individual Section 4(f) Evaluation Content	8-1
8.1.1	Introduction	8-1
8.1.2	Description of Purpose and Need and the Proposed Action	8-1
8.1.3	Identification and Description of the Section 4(f) Properties	8-2
8.1.4	Description of Use and Impacts on Section 4(f) Properties	8-4
8.1.5	Avoidance Alternatives	8-4
8.1.6	Coordination with the Officials with Jurisdiction over the Section 4(f) Properties	8-10
8.1.7	Conclusion	8-10
8.1.8	Appendix	8-11
8.1.9	Project File	8-11
8.2	Individual Section 4(f) Evaluation Circulation and Approval Process	8-11
8.3	Individual Section 4(f) Evaluation and a CE	8-11
8.3.1	Draft Section 4(f) Evaluation	8-11
8.3.2	Final Section 4(f) Evaluation	8-12
8.4	Individual Section 4(f) Evaluation and an EA	8-12
8.4.1	Draft Section 4(f) Evaluation	8-12
8.4.2	Final Section 4(f) Evaluation	8-13

Section 4(f) Manual – Table of Contents

8.5	Individual Section 4(f) Evaluation and an EIS.....	8-13
8.5.1	Draft Section 4(f) Evaluation	8-13
8.5.2	Final Section 4(f) Evaluation.....	8-13
8.6	Tiered Projects and Section 4(f) Evaluation.....	8-14
Chapter 9	- Late Discovery of Section 4(f) Properties/Uses	9-1
Chapter 10	- How Does Section 4(f) Relate to Other Environmental Requirements?.....	10-1
10.1	Section 106.....	10-1
10.1.1	Identification of Properties Listed or Eligible for the National Register of Historic Places.....	10-2
10.1.2	Environmental Commitments.....	10-5
10.2	Section 6(f).....	10-5
10.3	Section 404 Permit LEDPA and Other Environmental Alternatives Analyses	10-6
10.4	Summary of Section 4(f) Relationship to Other Regulatory Requirements.....	10-6
Chapter 11	Case Studies	11-1
11.1	Case Study 1: No Section 4(f) Use	11-1
11.2	Case Study 2: No Section 4(f) Use	11-1
11.3	Case Study 3: Historic Bridge Exception	11-1
11.4	Case Study 4: Concurrent Use of the <i>De Minimis</i> and Nationwide Programmatic Forms.....	11-2
11.5	Case Study 5: Primary Purpose of Property within ADOT Right-of-Way	11-3
11.6	Case Study 6: Determination of Use for Multi-Use Properties.....	11-3
11.7	Case Study 7: Impacts to a Non-Contributing Element in a Historic District.....	11-4
11.8	Case Study 8: <i>De minimis</i> Impact of Historic Site	11-4
11.9	Case Study 9: Net Benefit of a Park	11-5
11.10	Case Study 10: Trails within Transportation Right-of-Way	11-5
Appendix	- 1 -
	Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects and the Section 4(f) Applicability/Exceptions Form.....	- 2 -
	Minor Use of Parks, Recreation Areas, and Refuges Programmatic Section 4(f) Evaluation	- 3 -
	Minor Use of Historic Sites Programmatic Section 4(f) Evaluation	- 5 -
	Suggested Support Documentation	- 8 -

Chapter 1 - Background

This Manual was developed with consideration that Arizona Department of Transportation (ADOT) has been assigned the Federal Highway Administration's (FHWA) responsibilities pursuant of the State Assumption for Responsibility for Categorical Exclusions and the Surface Transportation Project Delivery Program (*23 U.S.C. §§ 326 and 327*), also referred to as Categorical Exclusion (CE) Assignment and National Environmental Policy Act (NEPA) Assignment, respectively. The environmental review, consultation, and other actions required by Section 4(f) are being carried out by ADOT pursuant to 23 U.S.C. 326 and an MOU executed by FHWA and ADOT on January 3, 2018 and pursuant to 23 U.S.C. 327 and an MOU executed by FHWA and ADOT on April 16, 2019.

Section 4(f) requirements govern the use of land from publicly owned parks, recreation areas, refuges, and historic sites for transportation projects. For projects with federal funding or another federal action, Section 4(f) applies.

Purple boxes in this manual provide explanation and further guidance. Green boxes provide applicable examples throughout the text.

1.1 Section 4(f)

1.1.1 History

Section 4(f) was enacted as Section 4(f) of the Department of Transportation Act of 1966 (*Public Law 89-670, 80 Stat. 931*), sometimes referenced as the DOT Act of 1966 or the USDOT Act of 1966. It was originally set forth in 49 U.S.C. § 1653(f). In January 1983, as part of an overall recodification of the Act, Section 4(f) was amended and codified in 49 U.S.C. § 303. Similar language is contained at 23 U.S.C. § 138, which has been interpreted the same as 49 U.S.C. § 303. The FHWA and Federal Transit Administration (FTA) initially incorporated Section 4(f) into their NEPA regulations at 23 CFR 771.135. The provisions in Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, amended the original Section 4(f) legislation at 23 USC § 138 and 49 USC § 303, and directed a new rulemaking to clarify the Section 4(f) process. SAFETEA-LU simplified the processing and approval of projects that have only *de minimis* (negligible) impacts on lands protected by Section 4(f) and clarified the factors to be considered and standards to be applied in determining when an avoidance alternative is feasible and prudent. In response to SAFETEA-LU, Section 4(f) was removed from 23 CFR Part 771 and is now found at 23 CFR 774. Section 1302 of the FAST Act added that "Section 4(f)" requirements be codified as a reference to the original Act of 1966 and "Section 4(f)" is an acceptable reference for 23 U.S.C. 138 and 49 U.S.C. 303. Therefore "of the DOT/USDOT Act of 1966" is no longer required when referencing "Section 4(f)" requirements. Also from the FAST Act changes "Section 106" is an acceptable reference for 54 U.S.C. 306108 for taking into account the effects of federal undertakings on historic properties from the National Historic Preservation Act (NHPA).

1.1.2 Applicability

Section 4(f) applies only to agencies within the USDOT, such as FHWA, FTA, the Federal Aviation Administration (FAA), and the Federal Railroad Administration (FRA). Section 4(f) only applies to those projects that involve a USDOT action such as federal-aid funding or Change in Access approval for an Interstate Highway.

1.1.3 Intent

49 U.S.C. § 303(a) states “It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.”

The U.S. Secretary of Transportation may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge, or land from an historic site of national, state, or local significance (as determined by the Federal, state, or local officials having jurisdiction over the park, recreation area, refuge, or site) only if:

- There is no feasible and prudent alternative to using that land; *and*
- The program or project includes all possible planning to minimize harm to the public park recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.
or
- The use, including any measures to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) will have a *de minimis* impact on the property.

Use: Use is essentially the term used to describe an impact under Section 4(f). Use has a specific definition which is discussed in detail in **Chapter 4**. There are also exceptions where it is possible to impact a Section 4(f) property without it being considered a Section 4(f) use.

Chapter 2 - Section 4(f) Process Overview

To ensure the Section 4(f) analysis process is followed correctly, in conformance with the scope and context of a project, there are several components that must be addressed. First, Section 4(f) properties must be identified, and if present, then the impacts of the project on any property must be assessed in order to determine whether or not there is any Section 4(f) use resulting from impacts. Dependent on the type of use, further analysis is required that looks at total avoidance alternatives, minimization, and mitigation. Coordination with the official(s) with jurisdiction (OWJ) over a Section 4(f) property is essential. Documentation is an important element of the Section 4(f) process – ensuring that appropriate and thorough identification, analysis, and coordination was performed to support the Section 4(f) findings.

The following paragraphs summarize each of the components of the Section 4(f) process. Each of these components is then discussed in further detail in the subsequent chapters. **Figure 2.1 at the end of this chapter provides a visual flowchart of the Section 4(f) process.**

2.1 Identification of Section 4(f) Properties

“Section 4(f) property” means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance. Depending on the context of a project and the scope of work, Section 4(f) properties may need to be identified within a project area or study area. Since Section 4(f) requirements are driven by incorporation of Section 4(f) properties the projects in existing right-of-way (ROW) have a much lower likelihood of having impacts under Section 4(f) than larger projects that involve expanded ROW or ROW on new location. For most preservation projects the project description and location information provides sufficient information to complete a CE for a project in conformance with the definition of a CE that includes a review for “unusual circumstances” including Section 4(f). For major projects involving highway expansions with new ROW or facilities on new ROW, identifying Section 4(f) properties should be done as early as possible during the project planning process to allow for full and fair consideration of avoidance of the protected properties. See **23 CFR 774.11** for additional applicability criteria. In order to assess whether avoidance is possible and to determine the extent of use of a Section 4(f) property, the Section 4(f) boundaries must be clearly defined. **More specific criteria for the identification of Section 4(f) properties are discussed within Chapter 3.**

2.2 Determination of a Section 4(f) Use

If Section 4(f) properties have been identified in a project area, determination must be made of whether there is a Section 4(f) use of the property. As defined in **23 CFR 774.17** a use of a Section 4(f) property occurs if:

1. There is permanent acquisition or a permanent easement of property from within the Section 4(f) property boundary.
 - Note: Though not cited in the original Act or the US Code, FHWA has interpreted an adverse effect to a historic property under Section 106 to constitute a use under Section 4(f) based on the loss of integrity of the historic property. A determination that no historic property is affected by the project or that the project will have no adverse effect on the historic property in question is a Section 4(f) use with a *de minimis* impact.
2. There is a temporary encroachment of a Section 4(f) property for the project (e.g. construction easements) and that temporary encroachment cannot meet all of the criteria set forth in 23 CFR 774.13(d) there is a Section 4(f) use.

- If the project does not require land or permanent easement of a Section 4(f) property but creates such severe proximity impacts that the project would substantially impair the activities, features, and attributes of the Section 4(f) property, then there could be constructive use of a Section 4(f) property, although constructive use is extremely rare. **Refer to Chapter 4 for more specific guidance on determining Section 4(f) use.**

2.3 Section 4(f) Approval Options

Once a Section 4(f) use(s) for a project is/are determined, further analysis may be required depending on the Section 4(f) approval needed. Under **23 CFR 774.3**, ADOT may only approve a Section 4(f) use if:

- (a) It has been determined there is no feasible and prudent alternative to using the Section 4(f) property(ies) and that all possible planning to minimize harm to the Section 4(f) property(ies) resulting from the use has been incorporated, or;
- (b) The use, including any measures to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) will have a *de minimis* (negligible) impact on the property.

If a use of a Section 4(f) property is approved because its use has been determined to be *de minimis*, no avoidance alternatives analysis is required. An avoidance alternatives analysis is required if a Section 4(f) use is approved with a Programmatic Section 4(f) Evaluation or an individual Section 4(f) evaluation. If a total avoidance alternative is feasible to construct and prudent (meets the needs of project without causing other impacts of an extraordinary magnitude), then the total avoidance alternative must be selected. If there is no feasible and prudent total avoidance alternative then the project must include all possible planning to minimize harm to the Section 4(f) property(ies), meaning incorporating minimization and mitigation. As part of an individual Section 4(f) evaluation, a least overall harm analysis is performed to determine which alternative results in the least overall harm to Section 4(f) property(ies) and other resources in the project area. **Chapter 6 provides a detailed discussion on how to perform the Section 4(f) analysis.**

2.4 Coordination and Documentation

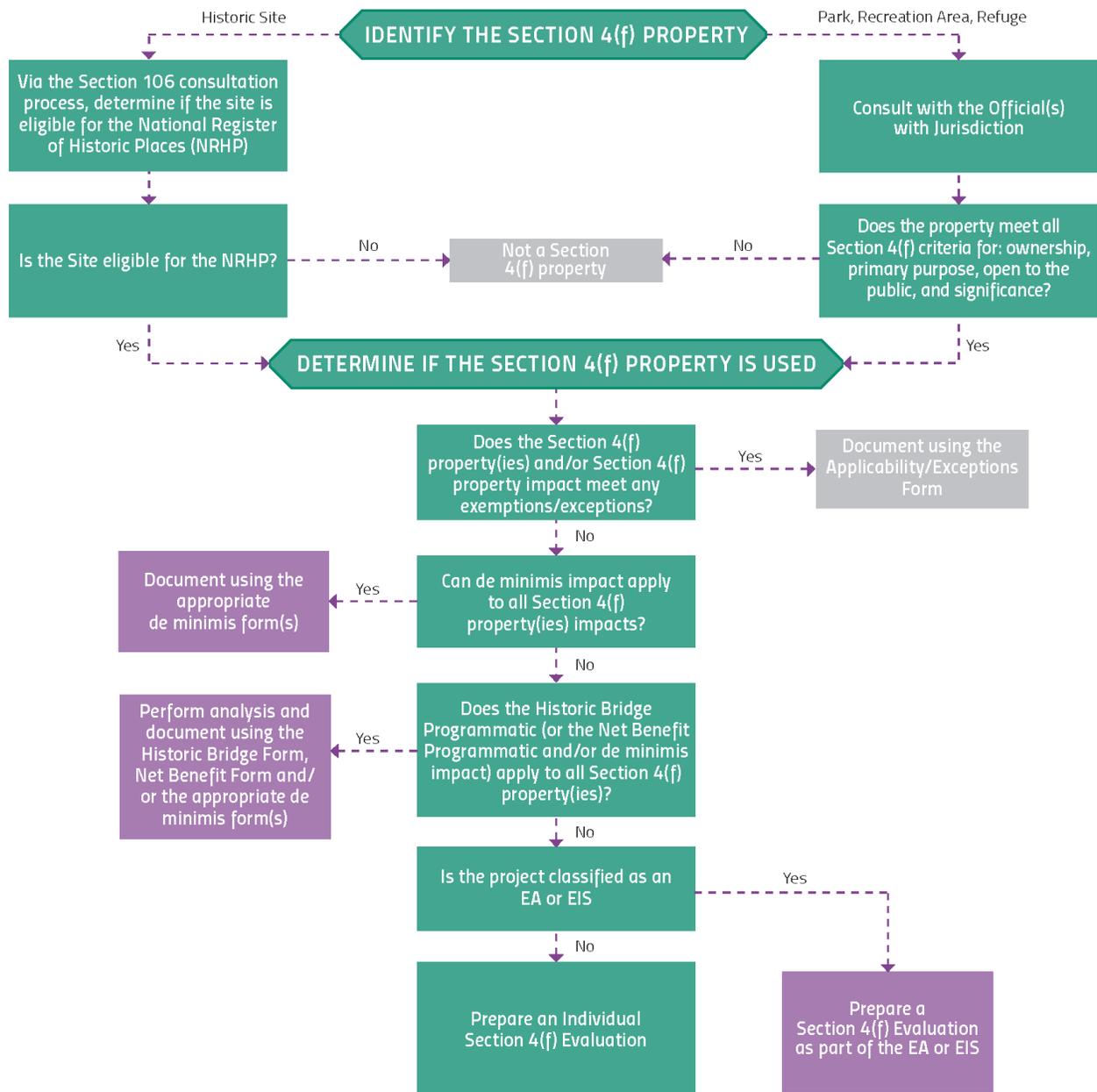
Coordination is an essential component of the Section 4(f) process and should include the OWJ over a Section 4(f) property, ADOT, the public (in cases of *de minimis impact* of a park/recreation area/refuge and applying the Net Benefit Programmatic Evaluation), federal agencies (U.S. Department of Interior (DOI), and U.S. Department of Agriculture (USDA) and/or U.S. Department of Housing and Urban Development (HUD) when required), etc. This coordination may be on-going throughout the Section 4(f) process and/or occur during documentation and approval. Section 4(f) documentation requirements are dictated by the type(s) and specifics of the Section 4(f) use(s).

ADOT has developed forms to assist in the documentation for non-applicability, no use, exceptions, temporary occupancy, *de minimis* impact, and Section 4(f) uses that meet the criteria of the nationwide programmatic Section 4(f) evaluations (programmatics). If *de minimis* and/or one or more of the programmatics cannot be applied to all the Section 4(f) uses on a project, an individual Section 4(f) evaluation must be prepared for that project.

2.5 Exemptions and Exceptions under Section 4(f)

23 CFR 774.11 and **23 CFR 774.13**, list several situations in which Section 4(f) is not applicable to a resource, or where the effect is not considered a use. **These situations are discussed in greater detail in Chapters 3 and 4.**

FIGURE 2.1: SECTION 4(f) PROCESS FLOW CHART



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Chapter 3 Identifying Section 4(f) Properties

As stated in Section 2.1 certain projects may require only a review of the project description and context to ascertain that a project will be consistent with the definition of a CE and that no unusual circumstances, including Section 4(f) properties, exist. For projects under which Section 4(f) may be applicable the first step in Section 4(f) analysis is to identify Section 4(f) properties within a project area. Section 4(f) properties should be identified as early as possible in the transportation project development process in order that avoidance of the protected properties can be given full and fair consideration (23 CFR 774.11).

Section 4(f) properties fall into three principal categories:

1. Publicly owned public parks, recreation areas, and wildlife and waterfowl refuges
2. Parts of public multi-use properties that are significant for park, recreation area, wildlife and waterfowl refuge purposes
3. Historic sites

Within each of these categories, there are specific criteria that a property must meet in order to be considered a Section 4(f) property. This chapter discusses how to identify the various types of Section 4(f) properties.

ADOT, after considering the views of the OWJ as appropriate, makes the final decisions on applicability of Section 4(f) to the above listed types of properties.

3.1 Parks, Recreation Areas, and Wildlife and Waterfowl Refuges

Parks, recreation areas, and wildlife and waterfowl refuges are Section 4(f) properties only if all applicability criteria are met. Each of these criteria have been interpreted and explained in regulation and guidance. For purposes of Section 4(f), properties identified in the official National Wildlife Refuge System are *always* considered wildlife and waterfowl refuges by FHWA in administering Section 4(f); therefore no individual determination of their Section 4(f) status is necessary.

The subsections that follow provide additional details on each of these criteria:

1. **Public Ownership.** The property is publicly owned through fee simple ownership, a public easement, or a long-term lease agreement.
2. **Primary Purpose.** The property is designated as a public park, recreation area, or wildlife and waterfowl refuge and the primary purpose of the property is for recreation activities or wildlife and waterfowl refuge.
3. **Open to the Public.** The property must be open to the general public. (*Refuges are the exception; they do not have to be open to the public.*)
4. **Significance.** The property serves a major recreational role. (Determined by the OWJ.)

Section 4(f) Policy Paper: refer to questions under #1, *Public Parks, Recreation Areas and Wildlife and Waterfowl Refuges*, for further guidance on the identification of these properties.

Boundary: If a property is determined to be a Section 4(f) park, recreation area or refuge, then the entire official property boundary is the Section 4(f) boundary. For example, Section 4(f) does not just apply to sections of a property that contain recreation facilities. The boundary for a city park is the entire park

NOTE: ADOT makes the final decision on whether a resource qualifies as a Section 4(f) property.

property, as defined in city mapping, deeds, etc. Look for possible Section 4(f) properties early in project development using Geographic Information System (GIS), online deed information, etc., preferably during the scoping phase of a project.

Official(s) with Jurisdiction: For parks, recreational areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction is the official(s) of the agency owning or administering the land. (See *Section 4(f) Policy Paper Question 9A, Who are the officials of jurisdiction for a park, recreation area, or wildlife and waterfowl refuge and what is their role in determining Section 4(f) applicability?*)

3.1.1 Public Ownership

A Section 4(f) property can be publicly owned through fee simple ownership, a public easement, or a long-term lease agreement.

- Properties owned by government agencies or public institutions are considered publicly owned.
- Public easements for Section 4(f) purposes and properties leased to public agencies, depending on the lease terms e.g., period of time covered by the lease and any cancellation clauses, may also meet the definition of publicly owned. Lease agreements must reflect long-term intent for property to remain in recreational or refuge use to be considered a Section 4(f) property.
- Land owned by private institutions (including non-profit organizations) or individuals and used as a park, recreation area, or wildlife/waterfowl refuge is not considered Section 4(f) property.

Example of Ownership: The Sierra Club owns land that is open to the public for recreational activities.

Determination: While serving a recreational purpose and being open to the public, the property is not publicly owned and would not be considered a Section 4(f) property.

Example of Ownership: A corporation owns a large amount of property. It leases 20 acres to the local municipality for use as ball fields (soccer and baseball).

Determination: If the lease is long-term, Section 4(f) could apply to the ball fields, given the property meets the other Section 4(f) criteria (fields open to everyone, etc.). If the lease terminates at the whim of the corporation, Section 4(f) may not apply.

Refer to the *Section 4(f) Policy Paper* for the following questions related to public ownership:

Question 1A: When is publicly owned land considered to be a park, recreation area or wildlife and waterfowl refuge?

Question 1B: Can an easement or other encumbrance on private property result in that property being subject to Section 4(f)?

Question 1C: When does a lease agreement with a governmental body constitute public ownership?

3.1.2 Primary Purpose

In order to qualify as a Section 4(f) property, the park, recreation area, or refuge property in question must be designated as such by the OWJ (e.g. is included in a comprehensive plan, or is noted as a park on their “parks and recreation plan”, etc.) and must serve a major recreational or refuge purpose. Incidental, secondary, occasional, or dispersed recreational activities do not constitute a primary purpose. Just because a property is designated as a park does not guarantee that it serves a major recreation purpose. If there are no visitors and noticeable recreational activities, it may not qualify as a Section 4(f) property. Determining whether a property serves a major Section 4(f) purpose is accomplished through coordination with the OWJ and research into any documentation that may exist for the property.

National Recreational Trails: Trails that are officially designated as National Recreational Trails can be found on <http://www.americantrails.org/nationalrecreationtrails/>. Trails on this list are designated and serve a major recreational purpose. Not all of these trails are located on publicly owned land, so only National Recreational Trails on publicly owned land are considered Section 4(f) properties.

Federal Wild and Scenic Rivers: A waterway designated as a wild or scenic river would only be treated as a Section 4(f) property if it is documented as managed for recreation in the wild and scenic river management plan so its recreational function is documented as being significant and designated officially.

Refer to the *Section 4(f) Policy Paper* for Question 1E related to wildlife and waterfowl refuges.

Refer to the *Section 4(f) Policy Paper* for Questions 21 B-D related to Wild and Scenic Rivers.

The *Section 4(f) Policy Paper* discusses the applicability of Section 4(f) to specific types of resources. Refer to FHWA’s response to questions regarding **trails and shared paths** (Question 15), **golf courses** (Questions 18A and 18B), **museums, aquariums and zoos** (Question 19), **fairgrounds** (Question 20), and **scenic byways** (Question 22).

Examples of Identifying Primary Purpose:

Example: A recreational trail managed and operated by the County traverses transportation ROW.

Determination: The primary purpose of the land within the ROW is transportation. The portion of the trail within the transportation ROW is not a Section 4(f) property.

Example: A small piece of property is officially designated as a park by a local municipality but contains no recreational amenities/facilities. The property is mainly rocky with patches of unmaintained vegetation. Local residents essentially do not use the property.

Determination: Since the recreational use is incidental or dispersed at best, it would not be considered a Section 4(f) property.

Examples of Identifying Primary Purpose:

Example: Land was donated to a municipality by a developer to be used as open space or a park.

Determination: This property would not be Section 4(f) property unless the municipality officially designates the property as a park and/or indicates their intent in their comprehensive plan or planning document to eventually develop it into a park or recreation site.

Example: Land purchased by ADOT for use as a stormwater management basin contains trails developed by the county. The trails are used for walking and horseback riding, but are within ADOT ROW.

Determination: The primary purpose of the land within the ADOT ROW is transportation – stormwater basin for the roadway. The trail is a secondary purpose to the land; and therefore the land is not considered Section 4(f) property.

Example: Land managed by the Bureau of Land Management (BLM) is located adjacent to ADOT ROW. A review of the BLM Resource Management Plan indicates the land is not a designated recreational area and has no recreational amenities/facilities. The land is designated as a Wilderness Area.

Determination: The primary purpose of this federal land has been identified as a wilderness area. Its primary purpose is not as a park and/or recreational area; therefore the land does not fall under the jurisdiction of Section 4(f).

3.1.3 Open to the Public

A Section 4(f) property must be open to the general public. The general public must be permitted visitation at any time when the publicly owned park or recreation area is open. Section 4(f) does not apply when visitation is permitted to only a select group and not the general public at large. Select groups could include, but are not limited to: residents of a public housing project; military and their dependents; organized sports teams/leagues; and students, faculty, and alumni of a school, college, or university.

What if there is a fee? A fee may be charged for visitation as long as that fee is reasonable. For example, a municipal golf course charging a fee that is in range with normal golf fees would be considered a Section 4(f) property.

Refer to the Section 4(f) Policy Paper Question 16, Does the charging of an entry fee or user fee affect Section 4(f) eligibility?

EXCEPTION: An exception to the public visitation criteria is afforded for **wildlife and waterfowl refuges** where visitation may be restricted in order to protect sensitive species habitat, nesting season, etc.

Refer to the Section 4(f) Policy Paper Question 1D related to Section 4(f) parks and recreation areas being open to the public:

Question 1D: Are significant publicly owned parks and recreation areas that are not open to the general public subject to the requirements of Section 4(f)?

Examples of Public Use Determination:

Example: A military golf course is publicly owned, but tee times are restricted to military personnel and their guests.

Determination: This property would *not* be considered to be a Section 4(f) property, since only military personnel and not the general public can obtain access.

Example: A ball field on school property is fenced and locked. The field is restricted to use by the school teams.

Determination: This property would *not* be considered to be a Section 4(f) property. School properties are considered multi-use properties since they are managed with different components. See the Public Multi-Use Properties section for an example of when a recreational portion of a school property would be considered Section 4(f).

Example: A county park is closed from dusk to dawn.

Determination: To be considered “open to the public”, there can be some restrictions of hours that normal use is permitted, so this property would be considered Section 4(f).

Example: A town keeps the gated tennis courts in its town park locked. To use the tennis courts, people must get the key at the town office across the street.

Determination: The park’s tennis courts are still “open to the public” as long as anyone in the public can retrieve the key and be allowed to use the courts. If only a specific component of the public can obtain the key, then Section 4(f) would not apply.

3.1.4 Significance

The "significance" of a publicly owned public park, recreation area, or wildlife and waterfowl refuge is assessed by the OWJ over the land. ADOT can assess reasonableness of such a determination in conformance with 23 CFR 774.11.

Significance means that in comparing the availability and function of the recreation area, park, or wildlife and waterfowl refuge area with the recreational, park, and refuge objectives of that community, the land in question plays an important role in meeting those objectives. For any public park, recreation area, or wildlife and waterfowl refuge, the significance determination must consider the significance of the *entire* property and not just the portion of the property being used/impacted by the proposed project.

For certain types of Section 4(f) property, more than one agency may have jurisdiction over the property. In these situations, additional information on significance from all parties involved in the administration of the land is needed. If information from the OWJ cannot be obtained, the Section 4(f) property will be presumed to be significant.

NOTE: There are situations where parks were planned concurrently with an anticipated transportation corridor. 23 CFR 774.11(i) defines “joint planning.” **Refer to the *Section 4(f) Policy Paper* for response to Question 24:**

Question 24: When a public park, recreation area, or wildlife and waterfowl refuge is established and an area within the Section 4(f) property is reserved for transportation use prior to or at the same time the Section 4(f) property was established, do the requirements of Section 4(f) apply?

3.2 Public Multi-Use Properties

If publicly owned lands are administered under statutes permitting management for multiple uses, and are actually managed for multiple uses, Section 4(f) may apply to at least parts of that property. **For properties being managed for multiple uses, Section 4(f) only applies to those portions that function as or are designated in the management plans of the administering agency as being for significant park, recreation, or wildlife and waterfowl refuge purposes.** The general public must be permitted visitation at any time that the facility is open.

Examples of multi-use properties include:

- National Forest Lands
- State Park Lands
- Bureau of Land Management lands
- US Army Corps of Engineers properties
- School grounds
- Military properties

How to determine what portions are or are not Section 4(f)? Contact the OWJ over the lands and discuss recreational management. Look for an official management plan and any mapping that exists that outlines recreational areas within the property. The OWJ will make the determination as to which portions of their land are significant park, recreation, or wildlife and waterfowl refuge areas. ADOT will review this determination to assure its reasonableness. **Section 4(f) does not apply to areas of multiple-use lands that function primarily for purposes not protected by Section 4(f).**

For publicly owned multi-use properties that do not have management plans (or where existing management plans are not current), Section 4(f) applies to those areas that function primarily for Section 4(f) purposes. Determine these areas through consultation with the OWJ and document discussions through emails or meeting minutes and delineations on mapping. ADOT has the final call on Section 4(f) applicability of multi-use properties.

Refer to the *Section 4(f) Policy Paper* for FHWA’s response to the following questions related to Section 4(f) multi-use properties:

Question 4: Are multi-use public land holdings (e.g., National Forests, State Parks, Bureau of Land Management lands) subject to the requirements of Section 4(f)?

Question 5: How are lands owned by federally recognized Tribes, and/or Indian Reservations treated for the purposes of Section 4(f)?

Example of a Potential Multi-Use Property: A substantial acreage of federal forest land exists in the project area. The OWJ has a management plan for the property. A portion of the property is designated in the plan for recreational use and has ball fields, benches, and picnic tables. A separate area contains a lake with a boat ramp. These two recreation areas are connected by a short hiking trail. The recreation areas and hiking trail are open to the general public, and are considered significant recreational facilities by the officials. The remaining portions of the property are designated in the management plan for timbering.

Determination: The ball fields, picnic area, trail, and boat ramp would fall under Section 4(f) jurisdiction; the timbering areas would not.

Example of a Potential Multi-Use Property: A public elementary school property contains an area with a playground, basketball courts, and an athletic field. None of the recreational amenities are gated. Families from the surrounding neighborhood take their children to use the playground in the evenings, weekends, and during the summer. Teens play pick-up basketball games on the courts. The local girls' softball teams practice on the field.

Determination: Those recreational components of the school property would likely be considered Section 4(f) because they meet the criteria (publicly owned, open to the public, etc.). The school building and other non-recreational areas of the school property would not be considered Section 4(f).

3.3 Historic Sites

Section 4(f) applies to historic sites that are individually eligible or listed in the *National Register of Historic Places (NRHP)*. Historic sites are evaluated and determined eligible for listing in accordance with the requirements and criteria in Section 106. Unlike parks, recreation areas, and refuges, it does not matter if a historic site is publicly owned or open to the public. Historic sites are also afforded Section 4(f) status if they are a contributing element in a *NRHP* eligible or listed historic district.

Section 4(f) Policy Paper: refer to questions under #2, *Historic Sites*, for further guidance on the identification of these properties and when there are unusual circumstances.

Pursuant to 23 CFR 774.11(e), historic sites must be identified in cooperation with the OWJ. For historic sites, the OWJ is the SHPO. In Arizona, the State Historic Preservation Office (SHPO) is a division of Arizona State Parks & Trails. If a historic site is on tribal land, then the OWJ is the Tribal Historic Preservation Office (THPO). If the property is located on tribal land but the tribe has not assumed the responsibilities of the SHPO, as provided for in the NHPA, then the representative designated by the tribe shall be recognized as an OWJ in addition to the SHPO. When the Advisory Council on Historic Preservation (ACHP) is involved in the consultation concerning a property under Section 106, the ACHP will also be considered an OWJ.

Official with Jurisdiction:
For historic sites, the OWJ is the SHPO, which is within Arizona State Parks & Trails. If the site is on tribal land, then the THPO is the OWJ. If a tribe does not have an established THPO, then the OWJ is a tribal representative with the SHPO. (Refer to **Section 4(f) Policy Paper Question 9B.**)

Boundary: The Section 4(f) boundary for a historic site is its *NRHP* historic boundary as determined during the Section 106 process. The historic boundary may or may not coincide with the property boundary/tax parcel.

Historic Districts: Section 4(f) applies to historic districts that are eligible or listed in the *NRHP*. Within the boundary of the historic district, contributing elements should be identified in consultation with SHPO/THPO since Section 4(f) only applies to contributing elements. Contributing elements can be properties or objects such as historic buildings, bridges, landscaping, etc.

Archaeological resources: Archaeological resources determined eligible for listing or listed in the *NRHP* may be considered Section 4(f) properties. Those sites that are determined by ADOT, through consultation with the SHPO/THPO, to be eligible and to be important for preservation in place must be treated as Section 4(f) properties. Section 4(f) approval is not required when there is an adverse effect to archaeological sites that are determined to be important chiefly because of what can be learned by data recovery and have minimal value for preservation in place. For these sites a Section 4(f) exception applies as outlined in 23 CFR 771.13(b). That a Section 4(f) approval is not required is documented on the Exceptions Form as described in Section 5.3.

National Historic Landmarks: Section 4(f) applies to National Historic Landmarks, which are designated by the Secretary of the U.S. DOI. Communication with ACHP is automatically triggered if any National Historic Landmarks are identified within the Area of Potential Effects (APE) for a project through the Section 106 Process. ADOT notifies the ACHP and provides ACHP with a project description and a statement of the potential for effect to the National Historic Landmark. ACHP will determine what level of involvement it will have in the project based upon the information provided.

Historic Boundaries: It is important that the boundary guidelines, which are contained at *National Register of Historic Places Bulletin 21*, U.S. Department of the Interior, National Park Service, be carefully followed during the determination of eligibility. Although using the tax parcel boundaries is generally acceptable as a *NRHP* standard, there may be other boundaries (either larger or smaller) that might be more appropriate in defining the historic or archaeological site, which would meet the boundary guidelines requirements. The boundaries of an historic or archaeological resource are key to determining whether the property is used (a Section 4(f) use) by one of the project alternatives.

Refer to the *Section 4(f) Policy Paper* for FHWA's responses to Questions 3A through 3C related to archaeological resources.

Refer to the *Section 4(f) Policy Paper* for FHWA's response to Question 2B, *How does Section 4(f) apply in historic districts that are on or eligible for the National Register?*

Refer to the *Section 4(f) Policy Paper* for FHWA's responses to Question 2E, *How are National Historic Landmarks (NHL) treated under Section 4(f)?*

Traditional Cultural Properties: Traditional Cultural Properties (TCPs) are resources whose significance is derived from the role they play in a community's historically rooted traditional beliefs, customs, and

practices. TCPs are usually, but not exclusively, associated with Indian tribes and Native Hawaiian organizations. TCPs are typically identified by the tribes and THPOs during the Section 106 process.

Refer to the *Section 4(f) Policy Paper* for FHWA’s responses to *Question 6; Are lands that are considered to be traditional cultural places (properties) subject to the provisions of Section 4(f)?*

Section 4(f) applies to TCPs that are eligible or listed in the *NRHP*. **Coordination with the tribe and THPO regarding TCPs is directed by ADOT.**

3.3.1 Historic Eligibility Determination

Historic and archaeological sites are identified using the Determination of Eligibility phase of the Section 106 process. Section 106 (54 U.S.C. § 306108) involves consideration of the effects of Federal undertakings on historic and archaeological resources. Section 106 requires coordination with the SHPO and/or THPO and other consulting parties as appropriate. Properties 50 years or older are evaluated to determine whether the properties meet one of the four following eligibility criteria *and* maintain integrity:

- Criterion A: Association with significant historic events and broad patterns of history
- Criterion B: Association with significant persons
- Criterion C: Architectural, design, or artistic significance
- Criterion D: Archaeological significance

Although the eligibility determinations made in the Section 106 process serve as input to the Section 4(f) process by identifying the *NRHP* eligible or listed historic and archaeological Section 4(f) properties, the Section 106 and Section 4(f) processes are separate processes dictated by separate laws and regulations.

3.4 Applicability and Exceptions

3.4.1 Applicability

23 USC 103(c)(5) and 23 CFR 774.11(e)(2) exempt the Interstate Highway System from Section 4(f) as follows:

1. **The Interstate Highway System is exempt from Section 4(f) consideration**, with the exception of those elements formally identified by FHWA as having national or exceptional historic significance. The *Final List of National and Exceptionally Significant Features of the Federal Highway System* is available on FHWA’s website.

In Arizona, the I-10 Deck Park Tunnel and I-15 Virgin River Gorge (MP13-MP22) are exceptions:

In Arizona, the I-10 Deck Park Tunnel and I-15 Virgin River Gorge (MP13-MP22) are included on the list of Interstate features that have Section 4(f) applicability.

NOTE: The Margaret T. Hance Park that sits on top of the Deck Park Tunnel is not a Section 4(f) protected park as per Intergovernmental Agreement between ADOT and the OWJ (City of Phoenix).

23 CFR 774.11(i) outlines what is commonly referred to as ‘joint planning.’

2. **Formally reserved or jointly developed or planned property is exempt from Section 4(f) requirements.** 23 CFR 771.11(h) outlines reserved ROW and 23 CFR 771.11(i) outlines the documentation needed for joint planning.

Note: 23 USC 138(e) and 49 USC 303(g) exempt from Section 4(f) common post-1945 concrete or steel bridges and culverts that are exempt from individual review under 54 U.S.C. 306108 (Section 106 review). **23 USC 138(f) and 49 USC 303(h)** state improvements to or rehabilitation of railroad and rail transit lines, or elements thereof, that are in use or that were historically used for the transportation of goods or passengers with the exclusion of bridges, except those on abandoned or discontinued lines, shall not be considered a use under Section 4(f).

3.4.2 Exceptions

As outlined in 23 CFR 774.13, there are various exceptions to the requirement for Section 4(f) approval. Section 4(f) approval **does not apply** to the following types of properties:

1. **Maintenance, preservation, rehabilitation, operation, modernization, reconstruction, or replacement of historic transportation facilities** where it is determined there is “No Adverse Effect” under Section 106 and the SHPO or THPO (as applicable) does not object.

Refer to the *Section 4(f) Policy Paper Question 8A: How does Section 4(f) apply to historic transportation facilities?*

2. **Archaeological sites** that are determined by ADOT, through consultation with the SHPO/THPO (as applicable), to be important chiefly because of what can be learned by data recovery and that have

Refer to the *Section 4(f) Policy Paper Question 3A: When does Section 4(f) apply to archeological sites?*

minimal value for preservation in place.

3. **Late Designations/Determinations** are situations where the designation of the Section 4(f) resource or the determination of significance of the resource is made or changed late in the project development process. This is not a common occurrence.
4. **Certain trails, paths, bikeways, and sidewalks** where:

Refer to the *Section 4(f) Policy Paper Question 26 related to late designation/ determinations.*

- 1) The trail-related project is funded under the Recreational Trails Program (23 U.S.C. 206(h)(2));
- 2) The trail is a National Historic Trail designated under the National Trails System Act (with the exception of segments that are historic sites) (16 U.S.C. 1241-1251);
- 3) The trail/path/bikeway/sidewalk occupies a transportation facility right-of-way and can be maintained somewhere within that right-of-way; or

- 4) The trail/path/bikeway/sidewalk is part of the local transportation system and functions primarily for transportation.

Trail Exceptions: Trails that match any one of the four situations described above are **not** Section 4(f) properties. **Refer to the *Section 4(f) Policy Paper Question 15 related to trails.***

5. **Transportation enhancement activities, Transportation Alternatives Projects and mitigation activities where the use serves** to preserve/enhance the activities/features/attributes that qualify the property as a Section 4(f) property and the OWJ agrees in writing.

Refer to the *Section 4(f) Policy Paper Question 17 regarding transportation enhancement*

6. **Temporary Occupancies of Section 4(f) Property** where all five criteria listed in 23 CFR 774.13(d) are met:
 - 1) The duration of the use is temporary (i.e., less than the construction period) and there is no change in the ownership of the land;
 - 2) The scope of the work is minor, i.e. both the nature and the magnitude of the changes to the Section 4(f) property are minimal;
 - 3) There are no permanent, adverse physical impacts anticipated and no interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis;
 - 4) The land being used is fully restored to a condition equal to or better than that which existed prior to the project;
 - 5) There is a written agreement with the appropriate Federal, state, or local OWJ over the property regarding the conditions listed above.

For historic and archaeological sites, the written agreement would come from the SHPO and/or THPO (if applicable).

Refer to the *Section 4(f) Policy Paper Question 7A regarding temporary occupancy. Also see Section 4.2 for examples of when a temporary occupancy exception applies and does not apply.*

Chapter 4 – Types of Section 4(f) Use

When there are Section 4(f) properties within the impact area of a project, and after considering applicability and exceptions as outlined in Chapter 3, the next step is to determine whether any of the identified Section 4(f) properties are "used" by the project. **To make this determination, the following must be known:**

- Section 4(f) property boundaries
- Preliminary engineering for the proposed project, including right-of-way boundaries and location of any necessary permanent and/or temporary easements

A **use** of Section 4(f) property, as defined in **23 CFR 774.17** occurs:

- When property from a Section 4(f) site is **permanently acquired** (fee simple or permanent easement) **and permanently incorporated*** into a transportation project; or
 - *Note; adverse effect under Section 106 is considered a permanent incorporation
- When there is **temporary occupancy of land** (i.e., construction access areas, detours, temporary bridges, etc.) **that is adverse** in terms of preserving the integrity of the Section 4(f) property. (See 23 CFR 774.13(d) for circumstances under which a temporary occupancy would not be considered a use.); or
- When the **proximity impacts** of a transportation project on a Section 4(f) property, without acquisition of land from that property, are so great that the characteristics that qualify the property as a Section 4(f) property are **substantially impaired**. This is considered a **constructive use** (23 CFR 774.15). **NOTE:** Constructive uses are very rare and require FHWA Headquarters involvement.

*For more information regarding Section 4(f) use, refer to Section 3.2 and Questions 7 and 8 of the **Section 4(f) Policy Paper**. Also refer to 23 CFR 774.15 (constructive use) and 23 CFR 774.17 (definition of use).*

4.1 Permanent Incorporation

Permanent incorporation is the most common and obvious way in which a Section 4(f) property is used. The permanent incorporation of a Section 4(f) property for transportation purposes takes place when any amount of an identified Section 4(f) property is incorporated into a proposed transportation project. This occurs when a portion of the Section 4(f) property is either purchased outright as transportation right-of-way or when property interest, such as a permanent easement for maintenance, is acquired.

All Local Public Agencies receiving federal funds must consult ADOT before initiating any work in regard to Section 4(f) including use determinations. All coordination with OWJ must be on ADOT letterhead and ADOT will make all use determinations.

NOTE: Historic Districts: When non-contributing elements have been identified within the boundary of a historic district and a project requires use of land from a non-contributing element, then there is no Section 4(f) use.

NOTE: Historic Sites within Transportation ROW: On some occasions there may be a historic site (object or feature) not associated with the roadway within the transportation ROW or whose *National Register* boundary crosses into transportation ROW (e.g. boundary goes to centerline of road or rock wall/fence associated with adjacent property allowed to remain in the ROW). In these situations, if the SHPO concurs in a “no historic properties affected” or “no adverse effect” then there is no Section 4(f) use. If there is an “adverse effect” determination, an evaluation should be done to determine if the adverse effect results in a Section 4(f) use. **See Question 7D of the Section 4(f) Policy Paper for more information. See Question 8A** for when the roadway or bridge within a transportation ROW is the historic property.

4.2 Temporary Occupancy

Temporary occupancy is a use of a Section 4(f) property only when the temporary occupancy is **adverse** in terms of the statute's preservationist purposes of preserving the integrity of the Section 4(f) property.

FHWA regulations (23 CFR 774.13(d)) specifically state that if **all** the following conditions are met, then such a temporary occupancy is an **exception** to the requirements of Section 4(f):

- Short duration
- Minor in scope
- No permanent adverse physical impacts or temporary/permanent interference with protected activities/features/attributes
- Land fully restored
- Documented OWJ (OWJ) agreement

For historic and archaeological sites, the written agreement would come from the SHPO and/or THPO (if applicable).

If one or more of the conditions above is not met, the temporary occupancy is not an exception and there is a use of the Section 4(f) property.

Example of Temporary Occupancy as an Exception: A project involves the replacement of a bridge in a historic district. Although no land needs to be acquired from any contributing elements in the historic district, a temporary construction easement is necessary for a large crane to sit in the parking lot of a contributing element of the district for three days.

- The duration of the use is temporary (less than construction duration), and there is no change in the ownership of the land;
- The scope of the work is minor, i.e. both the nature and the magnitude of the changes to the Section 4(f) property are minimal (*crane sitting on parking lot*);
- There are no permanent, adverse physical impacts anticipated and no interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis (*crane will not be located near the historic structure, only sit on its parking lot*);
- The land being used is fully restored to a condition equal to or better than that which existed prior to the project.
- There is a written agreement with the appropriate Federal, state, or local official(s) with jurisdiction over the property regarding the conditions listed above (*SHPO/THPO as OWJ for historic properties does not object*).

Example of Temporary Occupancy as an Exception: A roadway project will require a temporary construction easement of a portion of a city park for staging of construction materials and equipment. There are no recreational amenities within this particular area of the park, but it is nicely landscaped with shrubs and flower beds along the road.

- The duration of the use is temporary (*will be used for a large portion of the duration of the project, but shorter than the entire construction time*), and there is no change in the ownership of the land;
- The scope of the work is minor - both the nature and the magnitude of the changes to the Section 4(f) property are minimal (*staging of construction materials and equipment*);
- There are no permanent, adverse physical impacts anticipated and no interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis (*there are no recreational amenities in this portion of the park*);
- The land being used is fully restored to a condition equal to or better than that which existed prior to the project (*the impacted shrubs, flowers and grass will be replaced in-kind*);
- There is a written agreement with the appropriate Federal, state, or local official(s) with jurisdiction over the property regarding the conditions listed above. (*The city agreed in writing that they agree with the above items in an email to ADOT or by signing the form.*)

Example of Temporary Occupancy as a Use: A project involves the replacement of a bridge adjacent to a small municipal park. Although no land needs to be acquired from the park, a temporary construction easement is necessary for a crane to sit on grassy park property for approximately two weeks. There is currently playground equipment sitting in the corner of the park where crane placement is needed. The crane will sit only feet from the playground. Because of its close proximity to the crane, the playground area will be fenced off as a safety precaution while the crane is positioned in the park.

- The duration of the use is temporary (*two weeks*), and there is no change in the ownership of the land;
- The scope of the work is minor - both the nature and the magnitude of the changes to the Section 4(f) property are minimal (*crane sitting on grass*);
- There are no permanent, adverse physical impacts anticipated and no interference with the protected activities, features, or attributes of the property on either a temporary or permanent basis. (*This requirement cannot be met since the playground area will be closed for approximately two weeks*);
- The land being used is fully restored to a condition equal to or better than that which existed prior to the project (*the grass will be replanted as needed*);
- There is a written agreement with the appropriate Federal, state, or local official(s) with jurisdiction over the property regarding the conditions listed above. (*Because of the safety concerns and temporary closure of the playground area, the municipality cannot agree to a Section 4(f) temporary occupancy*)

This example would result in a use, most likely *a de minimis* impact. Often, a temporary occupancy that results in a use can be considered *de minimis* impact. (See **Section 4.4** for a discussion of *de minimis* impact)

NOTE: ADOT would likely determine that the condition for “no interference” with the park could not be met and therefore not send a request for concurrence of the exception conditions but instead send a request for concurrence of the conditions for a temporary use and *de minimis* impact.

4.3 Constructive Use

Even activities that do not require actual physical incorporation of land from Section 4(f) properties are governed by Section 4(f) if the activities create sufficiently serious **proximity impacts** that would **substantially impair** the value of the site in terms of its prior significance and enjoyment.

A constructive use occurs when the proximity impacts of a proposed project adjacent to or nearby a Section 4(f) property result in substantial impairment to the property’s activities, features, or attributes that qualify the property for protection under Section 4(f). Proximity impacts can include noise, access, visual/aesthetic, vibration, and ecological intrusion impacts. The determination of substantial impairment should be made in consultation with the OWJ over the property; however, FHWA Headquarters is the final decision-maker on whether there is a constructive use of a Section 4(f) property.

FHWA’s regulations at 23 CFR 774.15 provide specific situations where constructive use does and does not occur.

A constructive use does not occur when:

- Compliance with the requirements of Section 106 and its regulations (36 CFR 800) for proximity impacts of the proposed action on a site listed in or eligible for listing in the *NRHP* results in an agreement of "No Historic Properties Affected" or "No Adverse Effect".

NOTE: Due to the nature of its definition, constructive use is **rarely** determined to occur.

NOTE: An "Adverse Effect" determination based on proximity impacts/indirect impacts (no property acquisition) triggers an assessment of constructive use, but does not automatically constitute a constructive use. "Substantial impairment" under Section 4(f) is a separate assessment from "adverse effect" under Section 106; the criteria are different.

- The projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in Table 1, 23 CFR 772.
- The projected noise levels exceed the FHWA criteria noted in the previous bullet when existing noise levels are already high and the increase with the construction of the project is barely perceptible (3 dBA or less).
- There are proximity impacts (i.e., visual, noise, etc.) to a Section 4(f) property, but ADOT's approval of the final NEPA clearance document established the location for the proposed project before the designation, establishment, or change in the significance of the property. For example, a new roadway project is located in close proximity to a piece of land owned by the city. A short time after the project's Finding of No Significant Impact (FONSI) was issued the city established a park on that piece of land and constructed an amphitheater. Although there may now be proximity impacts to that park/amphitheater by the project, it cannot be a constructive use because the park was established after environmental clearance for the project was granted.
- Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a property for protection under Section 4(f).
- Proximity impacts will be mitigated to a condition equivalent to or better than that which would occur under a no-build scenario.
- Change in accessibility will not substantially diminish the utilization of the Section 4(f) property.
 - Vibration levels from the proposed construction activities are mitigated through advanced planning and monitoring of the activities to levels that do not cause a substantial impairment of the Section 4(f) property.

A constructive use occurs when:

- The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility within a Section 4(f) property. Examples of noise sensitive settings include hearing performances at an outdoor amphitheater; sleeping in the sleeping area of a campground; enjoyment of an historic site where a quiet setting is a generally recognized feature or attribute of the site's significance; enjoyment of an urban park where serenity and quiet are significant attributes; or viewing wildlife in an area of a wildlife and waterfowl refuge intended for such viewing.

- The proximity of the proposed project substantially impairs esthetic features or attributes of a property protected by Section 4(f), where such features or attributes are considered important contributing elements to the value of the property. Examples of substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility which results in the obstruction or elimination of the primary views of an architecturally significant historic building, or it substantially detracts from the setting of a Section 4(f) property which derives its value in substantial part due to its setting.
- The project results in a restriction of access that substantially diminishes the utility of a significant publicly owned park, recreation area, or an historic site.
- The vibration impact from operation of the project substantially impairs the use of a Section 4(f) property, such as vibration levels that are great enough to physically damage an historic building, or diminish its integrity (unless the damage is repaired/restored consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties).
 - The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical cycle processes, or substantially reduces the wildlife use of a wildlife or waterfowl refuge.

If a constructive use assessment is necessary:

- Identify the project activities that may result in proximity impacts to a Section 4(f) property.
- Identify the functions, activities, and qualities of the Section 4(f) property, that qualify the property for protection under section 4(f) that may be sensitive to proximity impacts.
- Analyze the proximity impacts on the Section 4(f) property. Quantify impacts such as noise, water runoff, etc. and qualify impacts such as visual intrusion, access, etc. If any of the proximity impacts will be mitigated, only the net impact must be considered in the analysis. The analysis should also consider the impacts that could reasonably be expected if the proposed project were not constructed, (e.g. noise and vibration impacts caused by projected no-build traffic).
- Consult with the Federal, state, or local OWJ over the park, recreation area, wildlife and waterfowl refuge, or historic site regarding the identification and analysis of impacts.
- Determine if the proximity impacts, after mitigation, will substantially impair the activities, features or attributes of the Section 4(f) property.

This analysis should be done for any eligible or listed historic site that is determined by ADOT to be adversely affected by an alternative through indirect impacts; and for any public park, recreation area, or wildlife and waterfowl refuge that is in close proximity to the proposed alternative (where there is no land being acquired) and indirectly affected.

If a *potential* constructive use is identified for the proposed project, a determination of Section 4(f) applicability should be made by the Environmental Planning Administrator. This request should include the information listed in the bullet points above. If ADOT determines that there is a potential constructive use ADOT will coordinate with FHWA Arizona Division in order to attain FHWA Headquarters concurrence before moving forward with a Draft Section 4(f) Evaluation. A Section 4(f) constructive use must be approved by FHWA Headquarters (through the FHWA Arizona Division Office).

If a constructive use assessment is warranted and it is determined that there is no constructive use, compile the information and facts supporting this determination and include the documentation in the Project File.

*For more information regarding constructive use, refer to Question 7A of the **Section 4(f) Policy Paper**.*

4.4 De Minimis Impact

4.4.1 De Minimis Impact

After a use is identified, consider whether that use is a *de minimis* impact. According to 23 CFR 774.17, a *de minimis* impact is an impact that would not adversely affect the features, attributes or activities that qualify parks, recreation areas, and wildlife and waterfowl refuges for protection under Section 4(f). For historic properties, a *de minimis* impact is one that results in a Section 106 determination of “no adverse effect” or “no historic properties affected”. *De minimis* determinations are made after taking into account reasonable measures to minimize harm (such as any avoidance, minimization, mitigation or enhancement measures). In other words, a *de minimis* determination is made for the net impacts to a Section 4(f) property.

The *de minimis* impact criteria can be applied to all projects regardless of the NEPA documentation processing option being undertaken (EIS, EA, CE). (See Question 13 of the **Section 4(f) Policy Paper**.)

4.4.1.1 De Minimis Impact for Historic Sites

NOTE: A de minimis impact is still a Section 4(f) use, not an exemption. Section 4(f) analysis and documentation must still be completed. The primary difference between a use that is a *de minimis* impact and a non-*de minimis* impact is that once consideration of reasonable measures to minimize harm (such as avoidance, minimization, and mitigation or enhancement measures) are completed as part of the *de minimis* impact finding, an analysis of avoidance alternatives, and assessment as to whether those avoidance alternatives are feasible and prudent, is not required for *de minimis* impacts.

The criteria for a *de minimis* impact of an historic site were defined in SAFETEA-LU Section 6009(a) and 23 CFR 774.5(b)(1). (Also see Question 12 of the **Section 4(f) Policy Paper**.) These criteria include:

1. No Adverse Effect or No Historic Properties Affected Effect Determination

In order to apply *de minimis*, a finding of no adverse effect or no historic properties affected with the concurrence of the SHPO and THPO (as applicable) during Section 106 consultation is required.

When a project is anticipated to have a Section 4(f) use of an historic site, early Section 106 coordination is advised. This coordination should include ADOT Historic Preservation Team (HPT), ADOT Environmental Planner, and ADOT and consultant project managers considering the possibility of incorporating measures into the project design that could offset impacts to the historic site so a no adverse effect (or no historic properties affected) finding might be made. A no adverse effect finding may be made based on a commitment that particular design elements will be incorporated into the project.

2. Notification of Intent to Make a *De Minimis* Impact Finding

The SHPO and/or THPO (if applicable) is informed of ADOT's intent to make a *de minimis* impact finding based on their written concurrence in the Section 106 determination. For a finding of no adverse effect, this can be accomplished as part of the consultation on the effect finding. For a finding of no adverse effect with standard conditions, which would typically be reported as part of a batched quarterly report, the intent to make a *de minimis* impact finding should be communicated to the OWJ at the time that the finding of effect is made. This can be done as informal email coordination provided the email is included in the project file as part of the project record. This process can also be used in the uncommon event that a *de minimis* impact finding is made in conjunction with a finding of no historic properties affected.

3. Consulting Party Coordination

ADOT must consider the views of any consulting parties participating in the Section 106 consultation. Coordination with identified consulting parties is required to gather the views of those consulting parties. This can be done through the Section 106 consulting process via a number of avenues including public meetings, public officials meetings, telephone calls, mailings, etc. as deemed appropriate. Consultation that takes place through meetings or telephone calls must be appropriately identified as such in advance, and must be documented in writing. The Section 106 process is conducted prior to Section 4(f) since eligibility and effects are determined before Section 4(f) properties are identified and use is analyzed.

NOTE: For *de minimis* impact findings on historic sites, Section 4(f) does not require public notice or opportunity for public review and comment. Only public involvement and consultation with the consulting parties as part of the Section 106 process is required.

4.4.1.2 *De Minimis Impact for Publicly Owned Parks, Recreation Areas, and Wildlife and Waterfowl Refuges*

The criteria for a *de minimis* impact of a park, recreation area, and/or wildlife and waterfowl refuge are defined in SAFETEA-LU Section 6009(a) and 23 CFR 774.5(b)(2). These criteria include:

1. Project Does Not Adversely Affect the Activities, Features, and Attributes that Qualify the Property for Protection Under Section 4(f)

The transportation use of the Section 4(f) property, together with any reasonable measures to minimize harm incorporated into the project, does not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f). Reasonable measures to minimize harm (such as avoidance, minimization, mitigation or enhancement measures) should be taken into account before the *de minimis* impact determination is made. There is no acreage use threshold for a *de minimis* impact determination.

Public Notification and Comment

The public must be afforded an opportunity to review and comment on the effects of the project on the protected activities, features, and attributes of the Section 4(f) property. This must be done before the OWJ agree in writing that the project will not adversely affect the “activities, features, and attributes” of the property. This allows public comments to be considered prior to making the final determination.

ADOT will conduct the public notification activity, and there are several methods that can be used to inform the public and gather comment on park/recreation area/refuge impacts. These methods can include providing/gathering information at a public meeting or public officials meeting or posting information at the park/recreation area; or on an ADOT project website. In many cases, the public involvement requirements related to the NEPA document/process will be sufficient to satisfy the requirements for the *de minimis* impact finding if the Section 4(f) use is specified. For example, if a public meeting or the public hearing for an EA or EIS is to be used to satisfy public notification regarding the effect on a public park or recreation area or refuge, the notice regarding the meeting/hearing should specify that the effect on the specific Section 4(f) property will be displayed for review/comment. For those actions that do not routinely require public review and comment (such as certain CEs or re-evaluations), a separate public notice and opportunity for review/comment is required. In these cases, the type/level of public involvement should be commensurate with the type and location of the Section 4(f) property(ies), impacts, and public interest. (See Question 11 of the **Section 4(f) Policy Paper**.)

NOTE: Public scoping is not sufficient to serve as opportunity for public review and comment on the effects of the project on the Section 4(f) property. Scoping occurs early in project development before the applicability criteria are fully vetted and use is fully known.

2. Notification of Intent and Concurrence from Official(s) with Jurisdiction of *De Minimis* Impact Finding

The OWJ over the park, recreation area or refuge property are informed of ADOT's intent to make the *de minimis* impact finding, and must then provide written concurrence that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f).

Once public input has been considered, and the OWJ have been notified of the intent to make a *de minimis* impact finding, the OWJ must then concur in writing that the project will not adversely affect the “activities, features, and attributes” of the property. Written concurrence can be on the *de minimis* form (see **Chapter 5**) or in a letter signed by the OWJ.

NOTE: The notification of the intent to make a *de minimis* impact finding can be done at any time. The official(s) with jurisdiction's written concurrence must occur after public input is received.

De Minimis Impact Example: A project requires acquisition of a corner piece of a municipal park, including removal of the existing playground. The park includes other facilities, such as a soccer field, two baseball fields, and a picnic area. The existing playground equipment is old and in need of major repair or replacement. There is room close to the picnic area to move the existing playground equipment or put in new equipment. After coordination with the municipality, (OWJ), it is agreed that the impact will be mitigated by providing new improved playground equipment and locating it adjacent to the picnic area. Parking and park access will not be affected. The public is then notified of the process through presentations at the municipal park, recreation board meetings, and the municipality monthly board meetings. Based on the impact and the proposed mitigation, the use of the park and its current activities/features will be maintained; therefore ADOT submits a form or letter to the official(s) with jurisdiction indicating their intent to make a *de minimis* impact finding. Requests for particular playground equipment were incorporated into the mitigation. After receipt of public input, the municipality provided a letter stating that they agree that there will be no adverse effect to the activities, features, and attributes of the park.

NOTE: Where a *de minimis* impact may not be achieved it is possible, in specific situations, that using a Section 4(f) property can ultimately result in an overall benefit to that property. Based on the concept developed for the *Nationwide Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property*, a “**net benefit**” is achieved when the transportation use, the measures to minimize harm and the mitigation incorporated into the project result in an overall enhancement of the Section 4(f) property.

The OWJ over the Section 4(f) property must agree with the net benefit determination in writing for net benefit to apply.

See **Section 7.2** for more information regarding net benefit

Chapter 5 - Applicability and *De Minimis Impact* Documentation

5.1 Use of the ADOT Section 4(f) Forms

This chapter outlines the procedures that ADOT has implemented to reduce processing time and streamline documentation and approval for certain federal actions that involve Section 4(f) properties but do not require a Section 4(f) evaluation. ADOT developed a series of forms to serve as documentation, when needed, for Section 4(f):

The most current versions of the Section 4(f) forms are located on the Environmental Planning website.

- No property/no use
- Exemptions and exceptions
- Use with *de minimis* impact

ADOT has a form to document when a property *in question* is determined not to be a Section 4(f) property or it is determined there is no Section 4(f) use and a separate form for when Section 4(f) does not apply based on applicability criteria (exemptions and exceptions in 23 CFR 774.11 and 774.13).

The following describes various situations involving Section 4(f) and reference to the appropriate form to use for the specific situation. Consult **Figure 2.1**, the *Section 4(f) process flowchart*, to guide the decision regarding the best documentation option for your project situation.

- If there is a situation where a property or project impact circumstance are *in question* complete the **No Section 4(f) Property/Use Form**. This form is not always required and what amounts to “negative declarations” are not required on every project to document that there is no Section 4(f) property or no Section 4(f) use.
- If there is a situation where a property or project circumstance meets the applicability criteria of 23 CFR 774.11, such as that for multi-use lands, or the exception criteria of 23 CFR 774.13, such as that for temporary occupancy, complete the **Section 4(f) Applicability/Exceptions Form**.
- If a *de minimis impact* applies to all Section 4(f) properties used by a project, then complete either the **Section 4(f) De Minimis Impact on Public Parks, Recreation Areas, and Wildlife and/or Waterfowl Refuges Form** and/or the **Section 4(f) De Minimis Impact on Historic Properties Form**, as appropriate. (See **Chapter 4** for *de minimis* impact criteria.)
- If potential Section 4(f) impacts and actual Section 4(f) uses occur on multiple properties on the same project, a combination of the forms identified above may be used. Forms for all properties are not required when those properties are included in a NEPA document.
- If there is any Section 4(f) use on a project that does not meet the criteria of an exception such as temporary occupancy, *de minimis*, or one of the programmatic Section 4(f) evaluations, then an **individual Section 4(f) evaluation** is required. If an individual Section 4(f) evaluation must be prepared, all Section 4(f) uses will be discussed in the individual Section 4(f) evaluation; it is not necessary to complete any of the Section 4(f) forms. If one of the Section 4(f) forms has been completed prior to determining the need to prepare an individual Section 4(f) evaluation, then the form can be included in the Project File and be referenced in the individual Section 4(f) evaluation. See **Chapter 8** for documentation guidance on individual Section 4(f) evaluations.

The following sections of this chapter discuss the criteria for the (applicability/no use) forms, and provide guidance on preparing and processing the forms.

NOTE: The documentation required to support a Section 4(f) determination should be commensurate with the impacts of the action and whether or not Section 4(f) is applicable under 23 CFR 774. There is no absolute prescription for what or how much documentation should be included. Projects in existing transportation ROW usually require no additional “Section 4(f) documentation” beyond what is included in a project description and included in a project CE. However, some level of documentation is necessary in order to support the application of certain exemptions, exceptions and any determination of a Section 4(f) use.

5.1.1 Documentation in the Project File

Since ADOT Environmental Planning does not maintain hard files with paper copies of all documentation and the projects are documented electronically all forms and correspondence are located in the same Section 4(f) sub-folder. This type of filing does not require all documents to be “attached” as with paper documents that are hard-copy filed. Documents that are submitted to any external agencies are combined electronically or attached as needed.

5.2 No Section 4(f) Property/Use Form

5.2.1 When to Use the Form

ADOT determines whether a property is a Section 4(f) property or not and whether or not a project has a use of a Section 4(f) property.

If any of the following situations apply, complete the *Form* (more than one can be applicable):

1. The project area includes a potential Section 4(f) property that is questionable but a determination is made that the property is not a Section 4(f) property. This is not a ‘negative declaration’ form that has to be used to document the exclusion of all non-Section 4(f) properties.
2. The project involves activities that require deliberative consideration of whether or not project impacts result in a Section 4(f) use. The form is used when the result of such deliberation is that there is no permanent incorporation or conversion of land into a transportation facility, no temporary occupancy, and does not result in a constructive use.

Note: The form does not need to be completed for all Section 4(f) properties within the project area that are not used. This form should be completed on a case-by-case basis to document that Section 4(f) was considered when a use is possible. The form does not need to be completed if it is clear that there would be no use. For example: a Section 4(f) property, a park, is located adjacent to the project area but is an adequate distance from project impacts which are contained to the existing ROW. Another example would be impacts to a historic resource within an existing transportation ROW when the Section 106 effects determination is no historic properties affected or no adverse effect (see [FHWA Policy Paper Question 7D](#)).

Do not complete a No Section 4(f) Property/Use Form in conjunction with an individual Section 4(f) evaluation. In the case where some Section 4(f) properties are used and some are not used within a project area/APE, and the project/undertaking would necessitate an individual section 4(f) evaluation, document the Section 4(f) uses and those Section 4(f) properties not used (avoided) in the individual Section 4(f) evaluation.

5.2.2 Completing and Processing the No Section 4(f) Property/Use Form

A concise description of the property and brief rationale are appropriate for documentation.

5.3 Determination of Section 4(f) Applicability/Exceptions Form

5.3.1 When to Use the Form

Use this form for documenting Section 4(f) applicability under **23 CFR 774.11** and applying exceptions under **23 CFR 774.13**. If any of the following situations apply, complete the *Form* (more than one can be applicable):

Applicability (exemption)

1. The project involves a **multi-use facility** (National Forest, State Park, BLM land, etc.) but does not impact an area that is managed for/functions as recreational or refuge. 23 CFR 774.11(d)
2. The project involves a **previously reserved ROW** or a **jointly planned ROW** and Section 4(f) property. (23 CFR 774.11(h) and (i)).

Note: The Interstate Highway System is exempt from Section 4(f) consideration in 23 USC 138 and 49 USC 303 and does not require project-level documentation of Section 4(f) applicability.

Exceptions

1. The maintenance, preservation, rehabilitation, operation, modernization, reconstruction, or replacement of **historic transportation facilities** that are on or eligible for the *National Register* and would not adversely affect the historic qualities of the facility that caused it to be on or eligible for listing and the official(s) with jurisdiction over the Section 4(f) resource have not objected to the Section 106 determination. (23 CFR 774.13(a)(3)).
2. The project involves an **archeological site** that is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken and where the Administration decides, with agreement of the official(s) with jurisdiction, not to recover the resource; and the official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding in regard to the resource, data recovery and preservation in place. (23 CFR 774.13(b))
3. The project involves certain **trails, paths, bikeways, and sidewalks** where (1) the trail-related project is funded under the Recreational Trails Program (23 U.S.C. 206(h)(2)); (2) the trail is a national historic trail designated under the National Trails System Act (with the exception of segments that are historic sites) (16 U.S.C. 1241-1251); (3) the trail/path/bikeway/sidewalk occupies a transportation facility right-of-way and can be maintained somewhere within that right-of-way; or (4) the trail/path/bikeway/sidewalk is part of the local transportation system

and functions primarily for transportation. (23 CFR 774.13(f)).

4. The project involves transportation **enhancement activities, transportation alternatives projects, or mitigation activities** where the use of the Section 4(f) property is solely for the purpose of preserving or enhancing the activities, features, or attributes that qualify the property for Section 4(f) protection. (23 CFR 774.13(g))
5. There is a **temporary occupancy** of a Section 4(f) property. See **Chapter 4** for temporary occupancy criteria. Consult with ADOT early on Section 4(f) temporary occupancy decisions if there is a questionable circumstance. (23 CFR 774.13(d))

Do not complete the temporary occupancy form in conjunction with an actual Section 4(f) use on the same resource. In this case, the temporary occupancy form should not be completed. Rather, complete the other form or individual Section 4(f) evaluation as appropriate for the use and discuss the temporary occupancy as part of the documentation.

5.3.2 Processing Section 4(f) Applicability/Exceptions Form

The form is to be completed by ADOT environmental staff and/or consultants working on a project to document any project circumstances that meet the criteria of certain exemptions or exceptions. The form outlines the level of detail and appropriate documentation necessary to support the determination. The following information may assist in completing the form.

Determination:

- Verify that the applicability criteria and/or exception criteria apply to the project by checking the box for those items that are true for the project.
- For temporary occupancy, all five criteria have to apply or temporary occupancy does not apply and the form cannot be used.
- Verify that the OWJ agrees that the project meets the criteria as required per the appropriate exemption and/or exception. Written agreement is required, either by the OWJ signing the form or providing other written documentation.

Official with Jurisdiction:

- Documentation of agreement is required for a determination of non-applicability for multi-use lands and for applying certain exceptions.
- The OWJ does not necessarily need to sign the form; other documentation such as letters, or emails can be used in place of the signature as long as there is specific agreement in regard to the relevant Section 4(f) criteria related to the property. Include any correspondence in the project file.
 - For temporary occupancy, documentation for the effects finding and posting with no objection by the SHPO's and/or THPO (if applicable) concurrence is acceptable with the No Effect or No Adverse Effect finding as long as the temporary occupancy was specifically described in the effects submission.
 - If a temporary construction easement was not identified at the time of the effects determination, separate coordination with the SHPO and/or THPO (if applicable) is

needed for their written agreement with the Section 4(f) temporary occupancy. If SHPO and/or THPO object to the finding, then temporary occupancy cannot be used.

Place the completed/signed copy of the form in the Section 4(f) folder located in the project file. If a CE is being prepared for the project, place the form in the project file. If an EA or EIS is being prepared, reference the form within the document and place the form in the file.

5.4 *De Minimis Form*

5.4.1 *When to Use the Form*

Complete a *De Minimis* form as documentation when a project has a *de minimis* impact. See Chapter 4 for guidance on determining a *de minimis* impact. Because the *de minimis* requirements are slightly different for parks, recreation areas, and refuges than for historic sites, two separate forms were developed.

Avoidance alternatives need not be examined if it is determined that a transportation project will have only a *de minimis* impact on a Section 4(f) property. The *de minimis* impact can be documented on the *De Minimis Impact forms*. Minimization, mitigation, and enhancement measures should be considered in making the *de minimis* determination.

If an individual Section 4(f) evaluation is being prepared for a project, document all *de minimis* impact(s) within that document; completion of the *de minimis* forms under these circumstances is unnecessary.

NOTE: If a single Section 4(f) property is both a park and historic site, use just the parks *de minimis* form and explain all requirements within that form. Add the effects determination and consulting party information within the form as appropriate.

5.4.2 *Completing and Processing the De Minimis Impact Form*

The *de minimis* forms are to be completed by ADOT environmental staff and/or consultants working on a project to document Section 4(f) *de minimis* impacts. The forms outline the level of detail and appropriate documentation necessary to support the determination. It is important to document the Section 4(f) property affected and be specific as to the extent of the use of that property.

Preparation of the Section 4(f) De Minimis Impact on Parks, Recreation Areas, and Refuges Form

Applicability Determination:

1. Provide a description of the Section 4(f) property and describe the use of the land by the project. Note the specifics of both temporary and permanent property acquisition or easement. This is important for the context of the use.
2. Check the box to confirm your verification that the project does not adversely affect the activities, features, and attributes of the Section 4(f) property that qualifies it for protection under Section 4(f). **If this is not true, do not check the box and *de minimis* cannot be applied for the project for this use.** Describe how the project's use of the Section 4(f) property will affect the qualities, activities and attributes that qualify it for protection. For example, in the specific location of the project within the property, are there any amenities? If so, how are they affected by the project? Does the project affect access to the property or parking facilities? If

something is affected and is being mitigated in order to make a *de minimis* determination, include the details of this mitigation.

3. Verify that the public was given the opportunity to review and provide comment on the effect the project will have on the protected activities, features, and attributes of the Section 4(f) property. This public opportunity can be provided as part of the general project public involvement plan as long as the *de minimis* impact is specifically highlighted in some way for review and comment. Separate public involvement is also acceptable and can be tailored to the population that typically would frequent the park, recreation area, or refuge. Identify the mechanism used to reach the public and collect comments and describe the input received. Include any notices, flyers, meeting minutes, comment letters, etc. related to this public involvement activity in the project file.
4. Verify that the OWJ over the Section 4(f) property agrees in writing with the *de minimis* determination. **This written concurrence is required in order to apply *de minimis*, and must be obtained after public input is gathered and the OWJ is given a chance to review the feedback prior to making a final decision on *de minimis* concurrence.** Identify the specific person concurring and the date of the written concurrence. If the written concurrence is separate from signing the *de minimis* form include this concurrence in the project file.
5. Note whether Section 6(f) or another recreational grant applies to the Section 4(f) property.

Include all environmental commitments/mitigation per the form and in the applicable NEPA document. A complete and signed copy of the *de minimis* form should be placed in the project file. If a CE is being prepared for the project, place the form in the file. If an EA or EIS is being prepared, reference the form within the document and place the form in the file.

Preparation of the Section 4(f) De Minimis Impact on Historic Properties Form

Applicability Determination:

1. Verify that the project results in a Section 106 finding of “no adverse effect” or “no historic properties affected” for the historic property. This effect finding is defined by the Section 106 process; contact the ADOT HPT for that information. Remember that any **temporary construction easements** must be identified as part of the effects finding. **If the project results in an adverse effect to the property, *de minimis* cannot be applied to this Section 4(f) use.**
 - Note the effects finding.
 - Describe the use of the historic property by the project, including temporary and permanent acquisition. **If any specific design features or mitigation was used when making the effects finding, describe the design features or mitigation.**
2. Indicate whether the SHPO and/or THPO (if applicable) has agreed in writing with the effects finding.
 - If “Yes”, note the date of concurrence.
 - If “No”, the *de minimis* form cannot be used.

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document. A complete and signed copy of the form should be placed in the project file. If a CE is being prepared for the project, place the form in the project file. If an EA or EIS is being prepared, reference the form within the document and place the form in the file.

Chapter 6 – Alternatives Analysis and Minimization of Harm

This chapter discusses the analysis required in making determinations regarding feasible and prudent total avoidance alternatives and minimizing harm if a use has more than a *de minimis* impact. Projects with a Section 4(f) use that is not a *de minimis* impact require a Section 4(f) *evaluation*. Note that summarizing Section 4(f) properties, applying applicability criteria and exceptions and documenting *de minimis* impacts are **not** “Section 4(f) evaluations.” Those determinations can be documented on forms and in appropriate chapters of NEPA documents.

The specifics of types of Section 4(f) evaluations and documenting Section 4(f) evaluations are provided in Chapters 7 and 8.

6.1 Is the Use a De Minimis Impact?

If the use of a Section 4(f) property meets the *de minimis* impact criteria in **Chapter 4**, ADOT can make a *de minimis* impact determination and approve the use of the property with no further alternatives analysis.

An avoidance alternatives analysis is not required for a *de minimis* impact because measures to minimize harm (avoidance, minimization, mitigation, and/or enhancement measures) must already be taken into account in making the *de minimis* determination and the OWJ concurs in writing that the activities, features and attributes that make the property eligible for Section 4(f) protection are not adversely affected.

Refer to **Chapter 5** for guidance on documenting *de minimis* uses.

6.2 Alternatives Analysis Overview

Section 4(f) requires the consideration of alternatives for a use that is not a *de minimis* impact. Additionally, a well-written, thought-out purpose and need for the project is essential for an effective Section 4(f) alternatives analysis as relating to defining what is prudent. Section 6.3 provides detailed information for the outline presented in Section 6.2.

The following analysis is required when a use is not a *de minimis* impact:

1. **Identify and Evaluate Total Section 4(f) Avoidance Alternative(s):** If a Section 4(f) property is used by a proposed transportation alternative, ADOT must determine if a feasible and prudent alternative(s) to using the property exists. Consider possible alternatives that would not result in any uses of Section 4(f) property. The total avoidance alternative must be selected if it is determined to be feasible and prudent.
2. **Identify all Measures to Minimize Harm:**
 - **All Possible Planning to Minimize Harm:** When no feasible and prudent total Section 4(f) avoidance alternative exists, and there is only one remaining alternative that uses Section 4(f) property(ies), discuss all possible measures which are available to minimize the impacts of the proposed action on the Section 4(f) property(ies). Detailed discussions of mitigation measures in the EIS or EA may be referenced and appropriately summarized, rather than repeated.

- **Make an Assessment of Least Overall Harm:** When no feasible and prudent total Section 4(f) avoidance alternative exists, and there is more than one remaining alternative that uses Section 4(f) property(ies), compare all remaining alternatives to determine which project alternative would result in the least overall harm. FHWA developed seven factors to assist in comparing the alternatives and making a decision (additional detail provided in Section 6.3.2).

The following sections explain each step of the analysis in greater detail.

6.3 Avoidance Alternatives in Section 4(f) Evaluations

6.3.1 Feasible and Prudent Avoidance Alternative

A total Section 4(f) avoidance alternative is an alternative that does not involve use of any Section 4(f) properties. **If a feasible and prudent total Section 4(f) avoidance alternative exists, it must be selected.** In order to dismiss a total Section 4(f) avoidance alternative, it must be shown that it is not feasible and prudent.

This can be done in the following ways:

- **Not Feasible** - An alternative is considered not feasible if it cannot be built as a matter of sound engineering judgment. (This is not often found to occur.)
- **Not Prudent** - An alternative is not prudent if any of the following are true:
 - It does not meet the project needs
 - It results in unacceptable safety or operational problems
 - It causes severe social, economic, or environmental impacts; severe disruption to established communities; severe disproportionate impacts to minority or low income populations; severe impacts to environmental resources protected under other Federal statutes; additional construction, maintenance, or operational costs; or other unique problems or unusual factors that individually or cumulatively cause unique problems or impacts of an extraordinary magnitude when compared to the value of the property and other alternatives.

NOTE: Thorough documentation as to why an alternative is not feasible and prudent is *critical* in preparing a legally sufficient Section 4(f) evaluation. Use factual, quantitative data in this documentation.

A “**Feasible and prudent avoidance alternative**” is defined at **23 CFR 774.17** as:

- (1) An alternative that avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.
- (2) An alternative is not **feasible** if it cannot be built as a matter of sound engineering judgment.
- (3) An alternative is not **prudent** if:

- (i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
- (ii) It results in unacceptable safety or operational problems;
- (iii) After reasonable mitigation, it still causes:
 - (A) Severe social, economic, or environmental impacts;
 - (B) Severe disruption to established communities;
 - (C) Severe disproportionate impacts to minority or low income populations; or
 - (D) Severe impacts to environmental resources protected under other Federal statutes;
- (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
- (v) It causes other unique problems or unusual factors; or
- (vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

Feasible: Modern technology is such that most engineering challenges can be overcome; therefore it is rare that an alternative can be shown to not be feasible. Engineering facts and figures will be required as documentation to support a statement indicating that an alternative is not feasible.

Examples of alternatives that would be considered not feasible:

- An alternative cannot be constructed to meet current design criteria within its roadway classification and a design exception cannot be applied for documented reason(s).
- An alternative on an Interstate for a new interchange is between two existing interchanges that does not allow for acceptable Interstate interchange spacing of on and off ramps and weaving distances.

Prudent: An alternative is not prudent if it would not meet the project needs. Project needs are identified during planning and programming and refined at the beginning of NEPA. An alternative is also not prudent if it results in unacceptable safety or operational problems.

In addition, an alternative is not prudent if there are "truly unusual factors" present in a particular case, the cost or community disruption resulting from the alternative reaches "extraordinary magnitude", or the alternative presents severe or unique problems. A number of problems may collectively add up to make an alternative not prudent.

Prudency Documentation: In dismissing an alternative because it does not meet the project needs, it is not sufficient to state, "Alternative X does not meet the needs of safety improvements and congestion relief". Explain *how* this is known.

"Alternative X, a widening alternative, does not meet the need for safety improvement because it would not separate the mix of local and through traffic in the study area. It also would not meet the need of congestion relief as shown by the Level of Service (LOS) analysis, which indicates that even after widening from two to four lanes, the road would operate at LOS E/F in the design year."

If an alternative is determined not to be prudent because of impacts of an extraordinary magnitude, the facts to support this determination need to be presented.

"Alternative X would impact the nesting grounds of a federally endangered bird, would displace 100 more homes than any other alternative (134 vs 32 or less), and would require acquisition of 15 more acres of tribal lands compared to any other alternative (16 acres versus one acre or less)."

Case law does not give clear guidelines on specific quantities that constitute "impacts of an extraordinary magnitude". It is important to present as much supporting data as possible and to look at the data in the context of the overall project. Hard facts should be used in this discussion. Do not state "greater" impacts or "substantial" impacts unless "greater" and "substantial" are quantified. As in the example above, "15 more acres of tribal lands compared to any other alternative", put these numbers into context. Fifteen more acres if the comparison is one acre versus 16 acres is different than 15 more acres if the comparison is 200 acres versus 215 acres.

Examples of Scenarios of Impacts of an Extraordinary Magnitude: These scenarios result in truly unusual or unique problems and are described below. These reasons must be characterized as truly unusual, or unique, or of an extraordinary magnitude (individually or collectively) and must substantially outweigh the importance of protecting the Section 4(f) property (e.g. the relative value of the property to the preservation goals of Section 4(f)):

- Based on the facts presented in the Section 4(f) document, the alternative would result in severe adverse community impacts to adjacent homes, businesses, or other improved properties that are of an extraordinary magnitude (divides the community in half, displaces 25% of the homes, displaces several community facilities/businesses considered vital to the community, the community is very close nit, lots of comments received from the residents in opposition);
- The new location would result in severe adverse social, economic, or environmental impacts, including such impacts as displacement of a substantial number of families or businesses, serious disruption of established travel patterns, substantial damage to sensitive natural areas (would cause a disproportionately high and adverse effect on EJ community, takes an additional 47 homes more than doubling the number of displacements, would impact habitat of an endangered bird);
- The new location would substantially increase costs or create a situation where the alignment cannot meet requirements of a permitting agency such as those involved with navigation, pollution, and the environment (would double the cost of the project from \$4M to over\$8M, US Coast Guard has expressed serious concerns with crossing the navigable channel at the new location).

Use environmental features mapping based on best available data to identify total Section 4(f) avoidance alternatives. These alternatives should be developed only to the point necessary to determine whether or not they are feasible and prudent. Clearly present the facts to support dismissing a total Section 4(f) avoidance alternative as not feasible and prudent.

NOTE: Total avoidance alternatives that could not/would not meet the project needs should not be developed in detail.

In general, a feasible and prudent total avoidance alternative does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. **When**

assessing the importance of protecting the Section 4(f) property, the relative value of the property to the preservation purpose of Section 4(f) is considered. [23 CFR 774.3(c)(1)]

Example: An historic building/property that has been condemned and has a history of a lack of maintenance may require a lesser standard under the feasible and prudent “test” because of the relative value of the resource to the preservation purpose of Section 4(f). The same could be said of a property that has approved development plans, because it would appear that the property would not be preserved in the future due to that development. On the other hand, an historic property that is the last example of its kind within a particular county may warrant a greater standard under the feasible and prudent test because of its value to the preservation purpose of Section 4(f).

6.3.2 Measures to Minimize Harm

A least overall harm assessment should be conducted if all alternatives for a proposed project use Section 4(f) properties and there is no feasible and prudent total Section 4(f) avoidance alternative. Do not carry dismissed alternatives into the least overall harm assessment.

The assessment of least overall harm involves one and possibly two activities:

1. All possible planning to minimize harm (required) [23 CFR 774.3(a)(2)]

Section 4(f) approval requires the consideration and documentation of all possible planning to minimize harm to a Section 4(f) property. Look at each Section 4(f) property used and explore reasonable measures to further minimize harm or mitigate for adverse impacts and effects to the Section 4(f) properties.

Begin by examining design modifications/shifts to avoid the use of each non-*de minimis* Section 4(f) property impact and determine whether or not these modifications/shifts are reasonable. Incorporate those that are reasonable into the design of the alternative; document and dismiss those that are not. Be sure to provide facts to support the determinations made.

De minimis uses do not require an evaluation of avoidance alternatives or shifts/modifications because the use was determined to be negligible.

NOTE: Do not dismiss a design modification/shift solely because it impacts other Section 4(f) properties. If this is the case, the modification/shift will need to be retained for comparison in the Least Overall Harm Assessment.

After assessing whether modifications/shifts are reasonable to avoid each Section 4(f) property, assess whether there are modifications/shifts or mitigation measures that would minimize effects on each Section 4(f) property. Mitigation measures should be determined through consultation with the official(s) with jurisdiction. These measures often include design modifications/shifts to minimize the use of the Section 4(f) property. The design modifications/shifts should be in the immediate vicinity of the Section 4(f) property and often include retaining structures, minor alignment shifts, a reduced facility, combinations of the above items, or other design features that would minimize the use as appropriate. In addition to design modifications, other minimization/mitigation measures for historic sites, public parks, recreation areas, and wildlife/waterfowl refuges can include (but are not limited to):

- **Mitigation of public parks, recreation areas, or wildlife or waterfowl refuges** may involve a replacement of land and/or facilities of comparable value and function, or monetary compensation to enhance the remaining land. There is no specific replacement land requirement for Section 4(f).
- **Mitigation of historic sites** usually consists of those measures necessary to compensate for the adverse effects to the historic integrity of the site as agreed to in accordance with the Section 106 process by ADOT, the SHPO/THPO, and other consulting parties as appropriate. Those measures can include context sensitive solutions (CSS), recordation, public education/displays, or other items as appropriate.

One key to identifying and incorporating all possible planning to minimize harm is that the measures must be reasonable. Reasonable measures, as defined in 23 CFR 774.17 should consider the preservation purpose of Section 4(f), along with:

- The views of the OWJ;
- Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the 4(f) property and the benefits of the measure to the property; and
- Any impacts or benefits of the measures to communities or environmental resources outside of the 4(f) property.

NOTE: The cost of mitigation should be commensurate with the severity of the impact on the Section 4(f) property.

2. Least Overall Harm Analysis (if needed) [23 CFR 774.3(c)(1)]

After design modifications/shifts to avoid each Section 4(f) property have been explored and all possible planning to minimize harm has been incorporated into the alternatives, compare the Section 4(f) uses of the alternatives along with impacts to other environmental resources to determine which alternative would result in the least overall harm.

FHWA developed seven factors to compare for determining least overall harm. These factors are set forth in 23 CFR 774.3(c)(1).

The first four factors relate to the net harm each alternative would cause to Section 4(f) properties:

1. The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property)
2. The relative severity of the remaining harm to the protected activities, features, or attributes that qualify each Section 4(f) property for protection
3. The relative significance of each Section 4(f) property
4. The views of the OWJ over each Section 4(f) property

Consider the number of Section 4(f) uses and the magnitude of the uses. For historic properties, consideration should be given to whether land is acquired from the property, or whether the actual structure is removed and how the integrity of the resource is affected. For parks, recreation areas, and wildlife and waterfowl refuges, the portion of the property taken, its existing function and the disruption

to the purpose of the property should be considered along with the ability to replace the acquired property or disrupted function in an adjacent area or in close proximity. Develop comparable mitigation measures when possible so alternatives can be compared fairly.

The remaining three factors of comparison developed by FHWA take non-Section 4(f) impacts and other issues with the alternatives under consideration as part of the least overall harm assessment:

5. The degree to which each alternative meets the purpose and need for the project
6. After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f)
7. Substantial differences in costs among the alternatives

The purpose of these seven factors is to allow consideration of all relevant concerns to determine which alternative would cause the least overall harm while keeping Section 4(f)'s preservation purpose as an essential part of decision-making.

NOTE: See *Chapter 8* for a template table of how to document and compare the above bulleted items in an individual Section 4(f) evaluation.

Example of Least Harm Analysis: An alternative that takes property from a park and demolishes an eligible historic building may be selected over an alternative that takes property from the park, avoids the eligible historic building, but costs \$500,000 more, results in 25 additional residential displacements, impacts habitat for threatened bird species, and requires acquisition of five additional acres of tribal land. The impacts would need to be documented and discussed, as well as put into proper context for the project (i.e., Are the 25 additional displacements two displacements versus 27, or 200 displacements versus 225?).

Example of Least Harm: Minor amounts of right-of-way (eg. Acquiring a 10-foot wide strip along the edge of a Section 4(f) property) from **two or three** historic properties may actually be determined to result in less harm than the removal of a ball field from **one** park property.

Chapter 7 - Programmatic Evaluations

7.1 Types of Programmatic Evaluations

Programmatic Section 4(f) evaluations have been developed by FHWA, based on experience with certain types of projects, over the years as a time-savings procedural option for certain minor uses of Section 4(f) property. Five nationwide programmatic Section 4(f) evaluations currently exist:

Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects (Federal Highway Administration (FHWA), May 23, 1977)

Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges (48 FR 38139, August 22, 1983)

Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges (52 FR 31116, August 19, 1987)

Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites (52 FR 31118, August 19, 1987)

Nationwide Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property (70 FR 20618, April 20, 2005)

Programmatic Section 4(f) evaluations are essentially pre-approved evaluations, in lieu of individual evaluations, as long as:

- The project facts match the programmatic Section 4(f) evaluation;
- The impacts are within the range specified in the programmatic Section 4(f) evaluation;
- The avoidance alternatives that are specified in the programmatic Section 4(f) evaluation have been evaluated;
- Agreements have been received in writing from the official(s) with jurisdiction; and
- All measures to minimize harm have been evaluated.

A programmatic Section 4(f) evaluation does not relax the Section 4(f) regulatory requirements. The analysis and justification to use Section 4(f) properties is the same with the programmatic Section 4(f) evaluation as it is with an individual Section 4(f) evaluation. It still must be demonstrated that:

- There is no feasible and prudent alternative to the use of Section 4(f) property, and
- The project includes all possible planning to minimize harm to the Section 4(f) property resulting from the use.

The same analysis is required for programmatic Section 4(f) evaluations as is required for individual Section 4(f) evaluations:

- The Section 4(f) properties still must be identified;
- The uses must be determined;
- Avoidance alternatives still must be evaluated to determine if they are feasible and prudent; and

- The impact to the Section 4(f) property still must be minimized (if not avoided).

NOTE: In most cases, if one of the minor use programmatic agreements is applicable, *de minimis* would also be applicable and in these situations it is preferable to use *de minimis* rather than either the Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges or the Minor Involvements with Historic Sites programmatic Section 4(f) evaluations.

The primary differences in applying a programmatic Section 4(f) evaluation instead of conducting an individual Section 4(f) evaluation are in the documentation required and the approval process.

- **A programmatic Section 4(f) evaluation is approved by ADOT; no legal sufficiency review is required.** An individual Section 4(f) evaluation is subject to a legal sufficiency review by the state Attorney General’s Office (AGO) for the Final Section 4(f) Evaluation.
- **Because they have been through federal rulemaking programmatic Section 4(f) evaluations do not go through a project comment period.** Individual Section 4(f) evaluations (the Draft Section 4(f) Evaluations) are provided to the official(s) with jurisdiction, DOI, and in some cases DOA and/or HUD for a 45-day comment period. Comments are addressed in the Final Section 4(f) Evaluation.

Development of a programmatic Section 4(f) evaluation generally involves the following process:

- Are any of the programmatic Section 4(f) evaluations applicable to the project? The nationwide programmatic Section 4(f) evaluations can be used in place of an individual Section 4(f) evaluation where uses are considered minor. Documentation related to the five nationwide programmatic Section 4(f) evaluations are as follows:
 - *Final Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property* – use the **Section 4(f) Evaluation and Approval for Transportation Projects that have a Net Benefit Form – Parks/Recreation Areas/Refuges** and/or the **Section 4(f) Evaluation and Approval for Transportation Projects that have Net Benefit Form – Historic Properties**, as appropriate.
 - *Historic Bridges Programmatic Section 4(f) Evaluation and Approval* – use the **Programmatic Section 4(f) Evaluation for Projects that Necessitate the Use of Historic Bridges Form**
 - *Final Nationwide Section 4(f) Evaluations and Approvals for Federally-Aided Highway Projects With Minor Involvement With Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges* (**Note: In most cases, *de minimis* should be applied instead of using this programmatic.**)
 - *Final Nationwide Section 4(f) Evaluations and Approvals for Federally-Aided Highway Projects With Minor Involvement With Historic Sites* (**Note: In most cases, *de minimis* should be applied instead of using this programmatic.**)

- *Statement and Determination for Independent Bikeway or Walkway Construction Projects* (**Note: In most cases, Exception 23 CFR 774.13(g) should be applied instead of using this programmatic.**)
 - Identify Section 4(f) properties and whether any of these properties will be used by the project alternatives.
 - Coordinate with the OWJ over the Section 4(f) property(ies) used.
 - Confirm that the programmatic Section 4(f) evaluation is applicable.
 - Evaluate avoidance alternatives as specified in the programmatic Section 4(f) evaluation and minimize impacts to the Section 4(f) properties where avoidance is not feasible and prudent.
 - Receive required written agreement from the OWJ over the Section 4(f) property(ies) regarding the assessment of impacts to the Section 4(f) property(ies) and the measures to minimize harm to the Section 4(f) property(ies). This is usually accomplished by having the OWJ sign the form but can include other documentation such as a letter or email.
 - Complete the appropriate programmatic Section 4(f) evaluation form for review and approval.
 - Provide the approved Net Benefit programmatic Section 4(f) form to the OWJ for informational purposes.

Notes Regarding Use of the Programmatic Section 4(f) Evaluation Forms:

1. Any of the programmatic Section 4(f) evaluation forms can be combined with the ***De Minimis Form*** and/or the **No Section 4(f) Property/Use Form** and/or the **Section 4(f) Applicability/Exceptions Form** to serve as documentation on a project as long as one of the uses fulfills the criteria of a programmatic Section 4(f) evaluation and the others meet the criteria for *de minimis* impact, an exception or non-applicability.
2. If more than one Section 4(f) property is involved in a project, multiple programmatic Section 4(f) evaluation forms may be completed to address the circumstance. A form should be completed for each resource covered under a separate programmatic Section 4(f) evaluation and submitted or presented together.
3. If the same programmatic Section 4(f) evaluation applies to multiple Section 4(f) properties, prepare a separate form for each Section 4(f) property.
4. Whenever there is a use of at least one property that does not fall within a programmatic Section 4(f) evaluation, *de minimis* criteria, an exception or non-applicability, an individual Section 4(f) evaluation must be prepared. The individual Section 4(f) evaluation discusses all Section 4(f) properties and uses of those properties.

The remainder of this chapter describes, in detail, the specifics regarding the applicability and required analysis, coordination and documentation for the programmatic Section 4(f) evaluations and forms that are likely to be used on an ADOT project. The other programmatic evaluations that are seldom used on a project are outlined further in the appendix.

7.2 Net Benefit Programmatic Section 4(f) Evaluation

The *Nationwide Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property* states that a “net benefit” is achieved when the transportation use, the measures to minimize harm and the mitigation incorporated into the project result in an overall enhancement of the Section 4(f) property. This overall enhancement is compared to both the future do-nothing or avoidance alternatives and the present condition of the Section 4(f) property. The present condition of the Section 4(f) property takes the activities, features and attributes that qualify the property for Section 4(f) protection into consideration. A project does not achieve a “net benefit” if it will result in a substantial diminishment of the function or value that made the property eligible for Section 4(f) protection.

Applicability

In order to qualify for a net benefit programmatic Section 4(f) evaluation, the following criteria must be satisfied:

- The proposed transportation project uses a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic site.
- The proposed project includes all appropriate measures to minimize harm and subsequent mitigation necessary to preserve and enhance those features and values of the property that originally qualified the property for Section 4(f) protection.
- For historic properties, the project does not require the major alteration of the characteristics that qualify the property for the *NRHP* such that the property would no longer retain sufficient integrity to be considered eligible for listing. For archaeological properties, the project does not require the disturbance or removal of the archaeological resources that have been determined important for preservation in-place rather than for the information that can be obtained through data recovery. The determination of a major alteration or the importance to preserve in-place will be based on consultation consistent with Section 106.
- For historic properties, consistent with Section 106, there must be agreement reached amongst the SHPO, THPO (if applicable), and ADOT on measures to minimize harm when there is a use of Section 4(f) property. These measures must be incorporated into the project.
- The OWJ over the Section 4(f) property agree in writing with the assessment of the impacts; the proposed measures to minimize harm; and the mitigation necessary to preserve, rehabilitate, and enhance those features and values of the Section 4(f) property; and that such measures will result in a net benefit to the Section 4(f) property.
- ADOT determines that the project facts match those set forth in the programmatic Section 4(f) evaluation.

The programmatic Section 4(f) evaluation must clearly demonstrate that each of the above criteria was satisfied for the proposed project. **If an agreement on net benefit cannot be reached between ADOT and the OWJ over the Section 4(f) property, the programmatic Section 4(f) evaluation cannot be used.**

ADOT will determine if the project meets the criteria of this programmatic Section 4(f) evaluation. This programmatic Section 4(f) evaluation can be used for any class of action under NEPA (EIS, EA, or CE).

Example for Determining Use of Net Benefit Programmatic: A bridge is a contributing element to a historic district, and the proposed project involves removal of the bridge. Through coordination with the SHPO, mitigation for construction of the new bridge would include context sensitive design, and by doing so there is overall improvement and enhancement to the historic district. Therefore, the project would be considered to have a net benefit, and a net benefit programmatic Section 4(f) form could be completed.

Example of missed opportunity: An historic property includes a stone wall as a contributing element along its perimeter. In several places, the wall is in a poor state of repair. In order to widen the roadway, a 12-foot strip of land is required from the frontage of the property and the wall along the front perimeter is within that strip of land, so would need to be removed. As mitigation, the wall will be reconstructed using the same stones just pushed back from the new roadway. In addition to rebuilding the wall along the front perimeter, other sections of wall in poor repair will also be reconstructed/repared. Without the project, the stone wall might not be repaired at all and might eventually just crumble and be hauled away rather than restored.

Avoidance Alternatives to be Considered

Even if the proposed project qualifies for a programmatic Section 4(f) evaluation for a net benefit to a Section 4(f) property, alternatives that avoid the use of the property must be evaluated. The following avoidance alternatives must be evaluated to determine if they are feasible and prudent:

- The do nothing (no-build) alternative;
- An alternative(s) to improve the highway facility without using the Section 4(f) property (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures); and
- An alternative(s) to construct the highway facility at a new location without using the Section 4(f) property.

The programmatic Section 4(f) evaluation must demonstrate that each of the above alternatives was fully evaluated. If a feasible and prudent alternative exists which totally avoids the use of Section 4(f) properties, this alternative must be selected. In order to select the alternative that uses the Section 4(f) property(ies), the do nothing alternative and the alternatives that do not use Section 4(f) properties, must be found not to be feasible and prudent. (See **Chapter 6** for guidance on feasible and prudent discussion.) In addition, for projects that qualify for the net benefit programmatic Section 4(f) evaluation, **an alternative can be found not prudent if it would result in a substantial missed opportunity to benefit a Section 4(f) property.** This concept stresses the importance of performing environmental stewardship whenever practicable.

Mitigation and Minimization of Harm to the Section 4(f) Properties

Once it has been shown that the avoidance alternatives are not feasible and prudent and/or would result in a substantial missed opportunity to benefit the Section 4(f) property, consider all possible planning to minimize harm to the Section 4(f) property. Also consider subsequent reasonable mitigation

measures necessary to preserve and enhance those features and values of the property that originally qualified it for Section 4(f) protection.

Coordination is needed with the OWJ regarding mitigation to offset and enhance the features and values of the property, ultimately resulting in a net benefit. Agreement in writing is needed from the official(s) with jurisdiction.

If the proposed project involves the use of a historic or archaeological site (warranting preservation in place), the mitigation plan should include measures necessary to preserve the historic integrity of the property as agreed to by ADOT, SHPO, THPO (if applicable), and as appropriate, the ACHP in accordance with the Memorandum of Agreement (MOA) or Programmatic Agreement (PA) developed during the Section 106 process.

Completing and Processing the Nationwide/Programmatic Section 4(f) Evaluation for Transportation Projects that have a Net Beneficial Use (Net Benefit) Forms

The appropriate form (parks/recreational area/refuge or historic property) is to be completed by ADOT environmental staff and/or consultants working on a project to document Section 4(f) net benefit use. The form outlines the level of detail and appropriate documentation necessary to support the determination. It is important to document the Section 4(f) property affected and be specific as to the extent of the use of that property.

You can find the FHWA Nationwide Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit Use (Net Benefit) [*here*](#)

Project Purpose and Needs: Include the project's established purpose and needs. These are the same as what was defined for the NEPA process. A properly defined purpose and need is important for the alternatives analysis later in the form.

Applicability Determination:

Parks/Recreational Area/Refuge:

1. Check the box to note the Section 4(f) property is a publicly-owned park, recreation area, or refuge.

Describe the use of each Section 4(f) property:

- The specific location and size/magnitude of the net benefit use (include in the file a map or plan sheet as needed).
 - Description of what the location of the Section 4(f) property is in that area, and how the project activity will interfere with any of the property's activities, features, and/or attributes. Include photos, maps, etc as needed.
2. Verify that all appropriate measures to minimize harm and mitigation to the Section 4(f) property (including its activities, features, and attributes qualifying it as a Section 4(f) property) have been incorporated into the project. List and describe the incorporated measures.
 3. Verify that the OWJ agrees in writing that the proposed project (and associated mitigation) will result in a benefit to the Section 4(f) property. The OWJ can conditionally agree, meaning the agreement comes with stipulations. The agreement can be by signature of the form or otherwise in writing (include in the project file). If the official signs the form, ADOT should review the language of the form prior. A letter can be provided to the OWJ to obtain written

concurrency. The letter should describe the project, how it will be impacting the Section 4(f) property (including mitigation), and explain why the project impact is a net benefit to the property. Include a statement that the OWJ agrees that it is a net benefit to their property and include a signature and date line for the official. Request that the OWJ to review, sign and return the letter.

Historic Properties:

1. Check the box to note the Section 4(f) property is a historic site.

Describe the use of each Section 4(f) property:

- The specific location and size/magnitude of the net benefit use (include in the project file a map or plan sheet as needed).
2. Verify that all appropriate measures to minimize harm and subsequent mitigation that preserves and enhances those activities, features, and attributes of the Section 4(f) property that originally qualified the resource for Section 4(f) protection have been incorporated into the project's design. List/describe the mitigation/minimization measures that enhance the Section 4(f) property that have been incorporated into the project's design.
 3. Verify that the project does not require the major alteration of the characteristics that qualify the property for the NRHP such that the property would no longer retain sufficient integrity to be considered eligible for listing. For archeological properties, the project does not require the disturbance or removal of the archaeological resources that have been determined important for preservation in-place rather than for the information that can be obtained through data recovery. The determination of a major alteration or the importance to preserve in-place will be based on consultation consistent with 36 CFR part 800.
 4. Verify that SHPO and/or THPO (if applicable) has concurred with a signed MOA or PA signature on the form, or other correspondence. This agreement must be in writing and specify that they agree to the project having a net benefit to the Section 4(f) property. Include the MOA or PA or other correspondence in the project file.

Alternatives Considered/Findings: To apply the net benefit programmatic Section 4(f) evaluation, consider the following alternatives and verify that they are not feasible and prudent:

1. Do nothing (no-build) alternative
2. Build alternative modified to avoid use of a Section 4(f) property by using engineering design or transportation design techniques such as minor location shifts, changes in engineering design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures
3. Avoidance alternative on new alignment

Carefully consider each of these and verify which statements that follow each alternative are true in the case of the project. **A minimum of one statement for each alternative considered must be selected or the net benefit programmatic Section 4(f) evaluation cannot be applied.**

Following each alternative considered, provide a full explanation and evidence to support statements why the alternative does not meet the needs of the project, is not feasible, would result in impacts to other resources, etc. These findings need to be supported by circumstances, studies, and consultations on the proposed project. The facts to fully support these conclusions must be presented or be

summarized and referenced in the form. Refer to technical files or studies where appropriate. The referenced materials should be included in the Project File.

Mitigation and Measures to Minimize Harm: Check each specific type of mitigation measures that have been applied to the project, and provide more information as prompted. Provide additional detailed information regarding the mitigation measure and how it minimizes harm and enhances the Section 4(f) property. Why is the measure a net benefit to the Section 4(f) property?

Include all environmental commitments/mitigation on the last page of the form and in the applicable NEPA document.

Coordination: Verify that the following is true for the project:

- The project has been coordinated with the OWJ over the Section 4(f) property.
- If applicable, any land encumbered by other federal or state actions or coordination required with the federal and state agency responsible for the encumbrance (i.e. Section 6[f]).
- The OWJ agrees that the project meets the requirements of the net benefit programmatic Section 4(f) evaluation. If the OWJ signs the form, have ADOT review the form contents prior.
- The required public involvement activities have occurred. If one or more public meetings or hearings were held for the project, the Section 4(f) use and proposed mitigation was communicated to the public.

A complete and signed copy of the Net Benefit form should be placed in the project file. If a CE is being prepared for the project, place the form in the project file. If an EA or EIS is being prepared, reference the form within the document and place the form in the file.

7.3 Historic Bridges Programmatic Section 4(f) Evaluation

Under FHWA's policy, the restoration, rehabilitation, or maintenance of an historic bridge structure does not constitute a "use" under Section 4(f), and would not require a Section 4(f) evaluation if the following are true:

- (1) The proposed project would not adversely affect the historic qualities of the historic bridge structure that make it eligible for the *NRHP*; and
- (2) SHPO/THPO (and ACHP if participating) has not objected to this finding.

However, if the proposed project impairs the historic integrity of the historic bridge structure resulting in an adverse effect under the Section 106 process, then a Section 4(f) evaluation must be performed for the proposed project. The ***Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*** may be completed for such projects.

NOTE: If a bridge is eligible under Criterion C for engineering significance, relocating the bridge can result in there not being a Section 4(f) use.

NOTE: This programmatic Section 4(f) evaluation can be used for bridges that are individually eligible and for those that simply contribute to a Historic District. (See ***Section 4(f) Policy Paper Question 8D.***)

Applicability

In order to use the historic bridges programmatic Section 4(f) evaluation, all of the following criteria must be satisfied:

1. The bridge is to be replaced or rehabilitated with federal funds.
2. The historic bridge structure is on or eligible for the *NRHP*.
3. The bridge is not a National Historic Landmark. (Note: none in Arizona)
4. ADOT determines that the facts of the project match those set forth in the sections of the PA form labeled "Alternatives/Findings and Mitigation".
5. Agreement among ADOT, SHPO, THPO (if applicable), and ACHP (if participating) has been reached through the Section 106 process —MOA or PA.

NOTE: With respect to historic bridges that only contribute to a historic district, early coordination with SHPO and/or THPO (if applicable) is recommended to determine whether the project can be designed to incorporate context sensitive solutions and other minimization and mitigation measures such that it would result in a finding of no adverse effect. If this Section 106 effect finding can be achieved, the project would qualify as a *de minimis* impact to the historic district. By applying the *de minimis impact* finding, an avoidance alternatives analysis would not be required, streamlining the process. The historic transportation facilities exception does not apply in this case because the Section 4(f) property is the historic district, not a historic bridge.

Processing the Historic Bridges Programmatic Section 4(f) Evaluation Along with Other Uses on a Project:

- If the project involves only a historic bridge and no other Section 4(f) properties, use the programmatic Section 4(f) evaluation for historic bridges.
- If the project has a historic bridge and another Section 4(f) property that falls under another programmatic Section 4(f) evaluation, *de minimis*, or temporary occupancy, use the form for historic bridges and an appropriate form for the other property.
- If, in addition to the qualifying historic bridge, the project involves a Section 4(f) property that does not fit another programmatic Section 4(f) evaluation, *de minimis*, or temporary occupancy, an individual Section 4(f) evaluation must be completed to cover all uses.

NOTE: For projects involving the use of a historic bridge, there may be situations when a historic bridge boundary needs to be defined around the footprint of the existing structure.

Example: A project involves the replacement of a historic bridge that is a contributing element to a historic district. Another contributing element of the district is located adjacent to the bridge, and a wing wall of the bridge is located within the tax parcel boundary of that other property. In this case, historic boundaries are drawn around the existing bridge as well as for the other contributing property. These boundaries would not overlap and differed from the tax parcel. Replacing the bridge within the same footprint was not considered a use of that other property, since the acquisition of property was only within the contributing boundary of the bridge. (See **Section 4(f) Policy Paper Question 8D.**)

Avoidance Alternatives to be Considered

For the programmatic Section 4(f) evaluation for a historic bridge structure, alternatives that avoid the use of the historic bridge structure must be evaluated. The following all-inclusive list of avoidance alternatives must be evaluated to determine if they are feasible and prudent:

1. The do nothing/no-build alternative;
2. An alternative(s) to construct a new structure at a different location without affecting the historic integrity of the structure; and
3. An alternative(s) to rehabilitate the historic bridge without affecting the historic integrity of the structure.

The programmatic Section 4(f) evaluation form must reflect that each of the above alternatives were fully evaluated. If a feasible and prudent alternative exists which totally avoids the use of Section 4(f) properties, this alternative must be selected (assuming the use is not *de minimis* or results in a net benefit).

The following findings regarding each of the above alternatives need to be made, or the programmatic Section 4(f) evaluation does not apply to the project:

1. The **do nothing/no-build alternative** must not be feasible and prudent based on one or more of the following reasons:
 - **Maintenance** — The do nothing/no-build alternative does not correct the situation that causes the bridge to be considered structurally deficient or deteriorated. These deficiencies can lead to sudden collapse and potential injury or loss of life. Normal maintenance is not considered adequate to cope with the situation.
 - **Safety** — The do nothing/no-build alternative does not correct the situation that causes the bridge to be considered deficient. Because of these deficiencies, the bridge poses serious and unacceptable safety hazards to the traveling public or places intolerable restriction on transport and travel.

2. The **alternative(s) to construct a new structure at a different location** without affecting the historic integrity of the structure must not be feasible and prudent based on one or more of the following reasons:
 - Terrain — The present bridge structure has already been located at the only feasible and prudent site, i.e., a gap in the land form, the narrowest point of the river canyon, etc. To build a new bridge at another site will result in extraordinary bridge and approach engineering and construction difficulty or costs, or extraordinary disruption to established traffic patterns.
 - Severe Social, Economic, or Environmental Effects — Building a new bridge away from the present site would result in severe social, economic, or environmental impacts that substantially outweigh the importance of protecting the Section 4(f) property. Such impacts include extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of established travel patterns, and access and damage to an extensive amount of sensitive resources such as wetlands, endangered species habitat, etc. These reasons may individually or cumulatively weigh heavily against relocation to a new site.
 - Engineering and Economy — Where difficulty associated with the new location is less extreme than those encountered above, a new site would not be feasible and prudent where cost and engineering difficulties reach extraordinary magnitude. Factors supporting this conclusion include significantly increased roadway and structure costs, serious foundation problems, or extreme difficulty in reaching the new site with construction equipment. Additional design and safety factors to be considered include an ability to achieve minimum design standards or to meet requirements of various permitting agencies such as those involved with navigation, pollution, and the environment.
 - Preservation of the Old Bridge — It is not feasible and prudent to preserve the existing bridge, even if a new bridge were to be built at a new location. This could occur when the historic bridge is beyond rehabilitation for a transportation purpose or an alternative use, when no responsible party can be located to maintain and preserve the bridge, or when a permitting authority requires the removal or demolition of the old bridge.

3. The **alternative(s) to rehabilitate the historic bridge without affecting the historic integrity** of the structure must not be feasible and prudent based on one or more of the following reasons:
 - Structurally Deficient — The bridge is so structurally deficient that it cannot be rehabilitated to meet minimum acceptable load requirements without affecting the historic integrity of the bridge.
 - Geometric Deficiencies — The bridge has serious geometric deficiencies and cannot be altered to meet the minimum requirements of the highway system on which it is located without affecting the historic integrity of the bridge. Flexibility in the application of the American Association of State Highway and Transportation Officials (AASHTO) geometric standards should be exercised as permitted in 23 CFR 625 during the analysis of this alternative.

These findings need to be supported by circumstances, studies, and consultations on the proposed project. The programmatic Section 4(f) evaluation form needs to include the applicable findings and the

factual support for these findings. References to technical files or studies may be made on the form where appropriate. When a feasibility analysis or individual assessment report is available under Section 106, which discusses the ability of the bridge to be rehabilitated, the information regarding rehabilitation should be referenced.

Minimization of Harm to the Section 4(f) Property

Once it is determined that avoidance of the historic bridge is not feasible and prudent, minimization must be considered. Minimization of harm is complete for bridges that are being rehabilitated or replaced when the following are satisfied:

- When the bridge is rehabilitated, the historic integrity of the bridge is preserved, to the greatest extent possible, consistent with unavoidable transportation needs, safety, and load requirements.
- When integrity is affected, or the bridge structure is moved or demolished, ADOT HPT arranges for documentation of the bridge by suitable means as developed through consultation with the SHPO, THPO (if applicable) and ACHP (if participating).
- The proposed project's mitigation plan includes reasonable measures necessary to minimize harm to the historic bridge structure as agreed to by ADOT, SHPO, THPO (if applicable), and as appropriate the ACHP in accordance with the Section 106 process (36 CFR Part 800).
- For bridges that are to be replaced and the existing bridge is made available for an alternative use, a responsible party must agree to maintain and preserve the bridge.

Completing and Processing the Nationwide/Programmatic Section 4(f) Evaluation for Projects that Necessitate the Use of Historic Bridges Form

The form is to be completed by ADOT environmental staff and/or consultants working with ADOT on the project to document Section 4(f) use of historic bridges. The form specifies the level of detail and appropriate documentation necessary to support the determination. It is important to document the Section 4(f) property affected, be specific as to the use of that property, and fully document the alternatives analysis.

Project Purpose and Needs: Include the project's established purpose and needs. These are the same as what was defined for the NEPA process. Properly defined purpose and needs are important for the alternatives analysis later in the form.

Applicability Determination: Verify that all of the following:

1. The bridge will be replaced or rehabilitated with federal funds.
2. The project requires the use of a historic bridge that is eligible or listed.
3. The bridge is not a National Historic Landmark.
4. ADOT has determined that the facts of the project match those set forth in the sections of the Form labeled Alternatives/Findings and Measures to Minimize Harm.
5. An MOA or PA has been executed.

Alternatives Considered/Findings: Verify that the following alternatives have been examined and indicate the reasons as to why the following are not feasible and prudent, being specific and explaining with facts and data:

1. The do nothing (No build) alternative.
2. Constructing a bridge on a new location/alignment or parallel to the old bridge without using the old bridge.
3. Rehabilitation of the existing bridge

Measures to Minimize Harm:

1. Verify that at least one of the required measures to minimize harm were included in the project and explain how the measure(s) was incorporated.
2. Verify that measures to minimize harm documented in the MOA or PA have been incorporated in the project or are included as environmental commitments.

Include all related environmental mitigation on the last page of the form and in the applicable NEPA document.

A complete and signed copy of the Historic Bridge form should be placed in the project file. If a CE is being prepared for the project, place the form in the project file. If an EA or EIS is being prepared, reference the form within the document and place the form in the file.

Chapter 8 - Individual Evaluations

Section 4(f) analysis should occur prior to the actual preparation of an individual Section 4(f) evaluation [short-hand as Section 4(f) evaluation]. The evaluation itself is purely the written document to support the analysis and decision making that has already occurred. As soon as Section 4(f) properties are identified within a project area, look to avoid then minimize use of those properties. If use cannot be avoided, or if the use is not *de minimis*, is not a temporary occupancy, or does not fall under the criteria of one of the nationwide Section 4(f) programmatic evaluations, prepare an individual Section 4(f) evaluation.

8.1 Individual Section 4(f) Evaluation Content

FHWA's Technical Advisory, **T6640.8A** (October 30, 1987), provides a suggested format for Section 4(f) evaluations.

Note; T6640.8A predates Least Overall Harm (SAFETEA-LU), so the Technical Advisory format was modified to add Least Overall Harm to the Measures to Minimize Harm.

Use the following outline to prepare an individual Section 4(f) evaluation:

- I. Introduction
- II. Description of Purpose and Need and the Proposed Action
- III. Identification and Description of Section 4(f) Properties
- IV. Description of Use and Impacts on Section 4(f) Properties
- V. Avoidance Alternatives Analysis
 - A. Evaluation of Avoidance Alternatives
 - B. Measures to Minimize Harm
 1. All Possible Planning to Minimize Harm (*if one feasible and prudent alternative*)
 2. Least Overall Harm Analysis (*if more than one feasible and prudent alternative - Includes all possible planning to minimize harm to selected alternative*)
- VI. Coordination with OWJ over the Section 4(f) Properties
- VII. Conclusion required only in a Final Section 4(f) Evaluation but included in the Draft Section 4(f) Evaluation when included in a combined Final EIS/Record of Decision (ROD))

Details regarding the content of each of the sections within the Section 4(f) evaluation are provided below.

8.1.1 Introduction

This introductory section should include a very brief description and overview of the Section 4(f) requirements.

8.1.2 Description of Purpose and Need and the Proposed Action

This section identifies the project purpose and need, as well as the proposed project alternatives.

Purpose and Need: Summarize the facts that led to the determination that transportation problems exist. The purpose and need statement should be consistent with that developed and included in the project’s NEPA documentation. The purpose and need discussion will be commensurate with the class of action. For a CE the purpose and need is typically rather simple and may be limited to just one or two needs. For the simplest CEs (e.g. FHWA safety funds have already been approved for the project) the purpose and need would be very simple. For EISs and EAs the purpose and need will be more complex and typically will involve multiple needs.

Proposed Action: In this subsection, discuss all alternatives that are considered reasonable in the NEPA process but are not total Section 4(f) avoidance alternatives. An alternative that does not satisfy the project purpose and need, cannot be engineered, or results in impacts of an extraordinary magnitude would not be considered further because the alternative would not be a reasonable alternative during the environmental review process. It would also not be a prudent and feasible alternative for Section 4(f) purposes. Note that the selection of a reasonable alternative that avoids all Section 4(f) property, excluding those with *de minimis* impact, would preclude the need for an individual Section 4(f) evaluation.

Describe each build alternative under consideration, as applicable:

- Type of alternative (upgrade, new alignment, etc.)
- Beginning and end points
- Typical section (if appropriate)
- Number of lanes with widths and shoulders
- Location of interchanges
- Any other pertinent design features

NOTE: For EISs, the number of alternatives studied is generally substantial. A multitude of preliminary alternatives (TSM, mass transit, upgrades, widenings, off-line alignments, and combinations of these) are analyzed early on, and many are dismissed early in the alternatives development and screening process (not prudent). Others move forward into the detailed alternatives analysis where they are refined, and in many cases options are evaluated which may develop into new alternatives. Because of the complexity of the alternatives development for EISs and more complex EAs, it may be helpful to add subheadings to this part of the alternatives analysis to group certain alternatives or to separate screening levels if the data used was from paper studies versus field studies, etc.

8.1.3 Identification and Description of the Section 4(f) Properties

This section of the Section 4(f) evaluation serves two purposes. First, identify all Section 4(f) properties within the project area. Second, provide a detailed description of the Section 4(f) properties used by the proposed project alternatives or used by shifts to avoid specific properties. It is important to know why these properties qualify as Section 4(f) properties, as well as what they look like, where their boundaries are located, and what they contain.

Identification of all Section 4(f) properties within the project area. Briefly list and provide a map of the Section 4(f) properties within the project area. For large/complex projects, such as EISs and some EAs, the project area is often large, and contains a vast number of Section 4(f) properties. For these projects, generate a broad-brush project area map illustrating the location of all of the known Section 4(f)

properties within the project area. The purpose of this map is to depict the known location of Section 4(f) properties in the project area.

Descriptions of the Section 4(f) properties used by one (or more) of the proposed alternatives or avoidance shifts. The historic sites described should include those located within the project area that are listed, or eligible for listing, in the *NRHP*. Also describe all Section 4(f) public parks, recreation areas, and wildlife and waterfowl refuges. Describe Section 4(f) properties and all types of uses, even if the use would be *de minimis* or could result in a net benefit. Also include a map of the locations of the Section 4(f) properties in relation to the project's alternatives and other project area features. Describe in detail the Section 4(f) property, including the following information, as appropriate:

- **Historic Sites:** Much of the following information results from the Section 106 process. Coordinate with the SHPO and/or THPO (if applicable) to obtain this information to include:
 - The historic name of the site.
 - Why the property is eligible for listing (do not simply reference the Section 106 Criteria A, B, C, or D).
 - The site's historic boundary, access, structures or elements of the site, and include a map of the site's elements, if appropriate.
 - For historic districts, any contributing and non-contributing elements (if they have been identified).
 - Any unusual characteristics of the Section 4(f) property that either reduces or enhances the value of all or part of the historic site (e.g., its location next to a heavily traveled roadway).
 - Photographs of the site.
 - References to Section 106 eligibility documentation.
- **Public Parks/Recreation Areas/Wildlife and Waterfowl Refuges:**
 - The ownership of the property (Federal/state agency, city, county, etc.).
 - The major purpose of the property, a description of significance and correspondence with the OWJ of the property regarding significance where appropriate.
 - Function of, or available activities on, the property (ball playing, swimming, golfing, etc.).
 - Description and location of all existing and planned facilities (ball diamonds, tennis courts, etc.). Include a map identifying facilities, if appropriate.
 - Description of access (pedestrian, vehicular, etc.).
 - Approximate number of users/visitors.
 - Fees associated with the use of the property.
 - Public access limitations.
 - Any unusual characteristics that either reduce or enhance the value of all or part of the property.
 - Photographs of the property.
 - If the property is a multi-use property (federal/state forest lands, BLM lands, tribal land, school property where a portion of the property contains ball fields/recreational fields open to the public, etc.), discuss any management plans that exist and identify where the recreational activities or refuge areas are in relation to the property boundaries.
 - If a management plan exists, identify key components.

8.1.4 Description of Use and Impacts on Section 4(f) Properties

Analyze and document the Section 4(f) uses associated with all alternatives considered. (See **Chapter 4** for more information about Section 4(f) use.)

- **Identify the uses of Section 4(f) properties.** Discuss the amount of land to be used, facilities and functions affected, noise, air quality impacts, visual effects, etc.
 - Some impacts can be quantified while others will need qualitative explanation.
 - If the use is considered *de minimis*, explain how it meets the criteria.
 - For projects where alternatives use land from more than one Section 4(f) property, develop a summary table to compare the various impacts of the alternatives.
 - Section 106 effects determinations can be utilized in some respects for discussion purposes in this section. Remember that an adverse effect in Section 106 does not necessarily equal a Section 4(f) use unless there is actual acquisition of property. The effects information can be important in Section 4(f) when applying *de minimis* and looking at how the acquisition of property affects the historic integrity of a property. (See **Chapter 10** for more information regarding the interaction of Section 106 and Section 4(f).)

NOTE: If there is a preferred alternative that totally avoids the use of Section 4(f) properties, a Section 4(f) evaluation need not be prepared. If a Section 4(f) evaluation is not prepared for the project, a statement should be included in the NEPA document explaining why a Section 4(f) evaluation was not prepared for the project. Section 4(f) properties, exceptions, use with *de minimis* impact etc. would be included in a 4(f) sub-section of the NEPA document.

- **Identify any proximity impacts that may rise to the level of a constructive use.** Although highly unusual, remember to always consider how a project will cause proximity impacts to Section 4(f) properties in the area. (See **Chapter 4** for further discussion on constructive use.)

8.1.5 Avoidance Alternatives

The alternatives analysis, including avoidance and minimization of harm, is the most critical part of the Section 4(f) evaluation. The theory of the analysis is discussed in **Chapter 6**, but this section provides guidance on how to document this analysis in an individual Section 4(f) evaluation.

The first step in the alternatives analysis is to examine whether a feasible and prudent total avoidance alternative exists. If there is a feasible and prudent total avoidance alternative, it must be selected. Remember that a preferred alternative that does not use Section 4(f) property precludes the need for an individual Section 4(f) evaluation. The avoidance alternatives here document why an avoidance alternative does not exist. If a feasible and prudent total avoidance alternative does not exist, then there is either a single feasible and prudent alternative that uses a Section 4(f) property or there are multiple feasible and prudent alternatives that use Section 4(f) property. If there are multiple alternatives that use Section 4(f) property then a least overall harm analysis must be performed.

Figures 8-1 and 8-2 provide sample documentation summaries. See **FHWA Section 4(f) Policy Paper** pages 17- 19 for project scenarios including a combination of *de minimis* impact and programmatic and individual evaluations.

Figure 8-1: Section 4(f) Alternatives Analysis Summary (Example 1)

Alternative	NEPA alternatives	All Possible Planning to Minimize Harm	Least Overall Harm Analysis ¹	Avoidance Alternative ²	Reason for Dismissal and/or Least Overall Harm Analysis
No Build				Yes	<i>Dismissed – Document why not feasible and prudent per 23 CFR 774.17</i>
1				No	Section 4(f) use alternative selected
2				Yes	<i>Dismissed – Document why not feasible and prudent per 23 CFR 774.17</i>
3				Yes	<i>Dismissed – Document why not feasible and prudent per 23 CFR 774.17</i>

Note¹ – no least overall harm analysis required for only one alternative with a Section 4(f) use.

Note² – avoidance alternatives may originate from multiple places in the development process including alternatives screening, detailed alternatives development and/or after a “use” alternative is identified.

Figure 8-2: Section 4(f) Alternatives Analysis Summary (Example 2)

Alternative	NEPA alternatives	All Possible Planning to Minimize Harm	Least Overall Harm Analysis ¹	Avoidance Alternative	Reason for Dismissal and/or Least Overall Harm Analysis
No Build				Yes	<i>Dismissed – Document why not feasible and prudent per 23 CFR 774.17</i>
1				No	Section 4(f) use alternative carried through least overall harm
2				No	Section 4(f) use alternative with least overall harm selected over Alt 1
3				Yes	<i>Dismissed – Document why not feasible and prudent per 23 CFR 774.17</i>

Note¹ – Alt 2 represents a new alternative developed as part of the avoidance analysis but it still uses Section 4(f) property. If Alt 2 had been a feasible and prudent avoidance alternative then it would be selected.

8.1.5.1 Evaluation of Avoidance Alternatives

Identify and describe in detail the location and design of any alternative that totally avoids the use of all Section 4(f) properties. Determine whether any of these alternatives are feasible and prudent. See **Chapter 6** for more information regarding determining if an alternative is feasible and prudent.

- **Feasible and prudent total Section 4(f) avoidance alternative - 23 CFR 774.3(a)(1).**
 - If a feasible and prudent total Section 4(f) avoidance alternative exists it must be selected. If there is more than one feasible and prudent total Section 4(f) avoidance alternative, select one of these alternatives for the project based on selection criteria.
- If one or more alternatives that totally avoid Section 4(f) properties are identified, but are not feasible and prudent, present facts supporting that the total Section 4(f) avoidance alternative(s) is/are not feasible and prudent. Make a statement that there is no feasible and prudent total Section 4(f) avoidance alternative.

8.1.5.2 Measures to Minimize Harm

Carry all alternatives that are determined to be reasonable during the environmental review process into the assessment of least overall harm for further analysis. This section compares the alternatives that use Section 4(f) properties, and identifies the alternative that results in the least overall harm.

NOTE: If there is only one reasonable alternative under consideration, and there is not a feasible and prudent avoidance alternative, then there is no need to continue analysis on Least Overall Harm. Do still include a discussion in the evaluation on All Possible Planning to Minimize Harm to Section 4(f) Properties.

Include an introductory paragraph identifying the alternatives still under consideration. Refer back to the “Identification and Evaluation of Other Alternatives Considered” section where the alternatives were described along with their uses of Section 4(f) properties.

1. All Possible Planning to Minimize Harm (required)- [23 CFR 774.3(a)(2)]

Discuss measures available for each alternative to **avoid** each non-*de minimis* impact of a Section 4(f) property. This would include minor alignment shifts and design modifications such as retaining walls, steepened slopes, etc. Include a discussion of whether the design modification is or is not reasonable.

If there are one or more reasonable design modifications that avoid the use of a Section 4(f) property, incorporate one of these design modifications into the alternative. If none of the design modifications are reasonable, document the reasons why they are not. Present facts to support that a particular shift or design modification is not reasonable.

NOTE: When evaluating design shifts/modifications for reasonableness, identify a common point from which the original alternative and any shifts/modifications diverge and a common point at which they rejoin. The impacts can then be assessed/compared between those common points, assessing the difference between the shift/modification and the original alignment.

NOTE: Avoidance shifts and design modifications do not need to be evaluated for *de minimis* impacts or Net Benefits.

If there are no reasonable, design modifications that would avoid Section 4(f) properties, then look at shifts/design modifications and other considerations that would minimize the effects on the Section 4(f) properties.

Incorporate all reasonable minimization/mitigation measures into the alternative. These measures should include strategies such as minor alignment shifts to reduce impacts, retaining structures, reducing the transportation facility size, noise walls, landscaping, replacement of park land, mitigation measures identified during the Section 106 process, and other items that minimize harm to the Section 4(f) properties.

2. Least Overall Harm Analysis (if necessary)- [23 CFR 774.3(c)(1)]

At this point, every effort has been made to avoid, minimize, and mitigate Section 4(f) impacts for each Section 4(f) property on each alternative. All reasonable design modifications to avoid Section 4(f) properties have been incorporated into the alternatives. Additionally, reasonable minimization and mitigation measures have been incorporated and consultation with the OWJ has been conducted. Compare these alternatives to determine which results in the least overall harm in light of the statute's preservation purpose.

Consider the following seven factors set forth in 23 CFR 774.3(c)(1) concerning the alternatives remaining under consideration;

1. The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
2. The relative severity of the harm to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
3. The relative significance of each Section 4(f) property;
4. The views of the OWJ over each Section 4(f) property;
5. The degree to which each alternative meets the purpose and need for the project;
6. The magnitude of any adverse impacts to resources not protected by Section 4(f); and
7. Substantial differences in costs among the alternatives.

Factors 5, 6, and 7 address and compare any substantial problems with any of the alternatives on issues and impacts beyond Section 4(f). When comparing the alternatives under the first four factors, develop comparable mitigation measures when possible. Do not skew analysis and over-mitigate one alternative over another alternative when the same mitigation could apply to both.

NOTE: *De minimis* impacts and uses that result in a net benefit should be included in the final Least Overall Harm Assessment.

De minimis impacts, by nature, do not cause substantial impairment, or an “adverse effect” to the Section 4(f) property. As such, a *de minimis impact* should be considered almost negligible (“a trifle”) when assessing harm to Section 4(f) properties.

Uses resulting in a net benefit would enhance the Section 4(f) property, and therefore should be considered to have a positive effect on the resource when assessing least overall harm. Because a net benefit is weighed as a positive effect, it is possible that a shift that avoids a Section 4(f) use could result in more harm to that property than an alternative that uses the property, if that use is determined to have a net benefit.

Balance the seven factors, four of which concern the degree of harm to Section 4(f) properties, to consider all relevant concerns to determine which alternative would cause the least overall harm. Through this balancing of factors, it could be that a serious problem identified in factors 5 through 7 outweighs relatively minor net harm to a Section 4(f) property. The least overall harm determination also provides a means to compare and select among alternatives that would use different types of Section 4(f) properties. Not all Section 4(f) use is equal depending on the significance of, and harm to, the property. In evaluating the degree of harm to Section 4(f) properties, consider the views expressed by the OWJ over each Section 4(f) property. ADOT ultimately can make its own independent judgment about the relative value of those properties in instances where there are conflicting assessments, or where the OWJ decline to provide any input.

Explain how the seven factors were compared to determine the least overall harm alternative. (See 23 CFR 774.7(c)) Discuss the various impacts to the different Section 4(f) properties and begin the balancing process. Note the relative differences among alternatives regarding non-Section 4(f) issues such as the extent to which each alternative meets the project purpose and need. The discussion of impacts should include both objective, quantifiable impacts and qualitative measures to provide a more complete assessment of harm.

An effective tool to help compare alternatives is with the use of a table. See **Table 7.1** for a comparison table template. This table should provide all the concise facts for each of the seven comparison factors and support statements and the conclusion of which alternative would result in the least overall harm. If all alternatives use the same Section 4(f) properties, one can just say “same for all alternatives.” In the comparison column, if there is a clear difference between the alternatives, state so and note why. If one alternative is not better than another for that comparison factor, note that this is the case.

NOTE: The content of the least overall harm assessment will vary from project to project since every project situation is different. Utilize the basic framework of **Table 7-1** to clearly demonstrate and highlight the differences in the seven comparison factors. **The comparison of the seven factors supports the decision determining which alternative results in the least overall harm. Additional information can be added to the text of the evaluation to further explain the weighing and balancing of these factors.** A bulleted version of the factors by alternative in place of a table is another format to present and discuss the comparison.

Section conclusion: After comparing the alternatives using the seven factors, conclude the least overall harm section with a paragraph that states which alternative is the least overall harm alternative and explain why based on the discussion of the information contained within the assessment of least overall harm table. In the Draft Section 4(f) Evaluation this conclusion will be the preliminary determination of the least overall harm alternative. After circulation of the Draft Section 4(f) Evaluation, consider comments received on the evaluation and finalize the comparison of all factors for the alternatives. The analysis and identification of the alternative that has the least overall harm must be documented in the Final Section 4(f) Evaluation. The final approval to use the Section 4(f) property is typically made in the decision document (ROD or FONSI) for EISs and EAs. The ROD may be combined with the FEIS and Final Section 4(f) Evaluation as a single document.

Table 8-1: Template, Assessment of Least Overall Harm				
Factors for Determining Least Overall Harm	Alternative X	Alternative Y	Alternative Z	Comparison
Impacts to Section 4(f) properties	<div style="border: 1px solid black; padding: 5px;"> <i>Provide a concise summary of each alternative's impacts to Section 4(f) properties, noting acres of use, structures and/or facilities taken or affected.</i> </div>			
1. The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property)	<div style="border: 1px solid black; padding: 5px;"> <i>Note how and to what extent adverse impacts can be mitigated for each Section 4(f) property used for all alternatives.</i> </div>			
2. What is the relative severity of the harm to the protected activities, attributes, or features that qualify each Section 4(f) property for protection?	<div style="border: 1px solid black; padding: 5px;"> <i>Provide a concise summary of each alternative's impacts to Section 4(f) properties, noting acres of use, structures and/or facilities taken or affected.</i> </div>			
3. What is the relative significance of each Section 4(f) property?	<div style="border: 1px solid black; padding: 5px;"> <i>Discuss the significance of each of the Section 4(f) properties used by the project. Not all Section 4(f) properties are created equal in their value.</i> </div>			

Table 8-1: Template, Assessment of Least Overall Harm				
Factors for Determining Least Overall Harm	Alternative X	Alternative Y	Alternative Z	Comparison
4. What is the view of the OWJ over each Section 4(f) property?	<p><i>If the official(s) with jurisdiction have expressed an opinion regarding the use of their Section 4(f) properties and/or whether they prefer one alternative over another, state so here.</i></p>			
5. What is the degree to which each alternative meets the purpose and need for the project?	<p><i>Not all alternatives meet a project's purpose and need to the same extent. If there are differences in the degree that one meets purpose and need more than another, note the differences here.</i></p>			
6. What is the magnitude of any adverse impacts to the resources not protected by Section 4(f)?	<p><i>If an alternative would result in adverse impacts to non-Section 4(f) properties, note those impacts and their magnitude here. These other impacts can be factored into the discussion of least overall harm.</i></p>			
7. What are the differences in costs among the alternatives?	<p><i>Provide a cost estimate for each of the alternatives. If there is a significant cost difference between alternatives, this can be used as a factor to support the least overall harm conclusion.</i></p>			

8.1.6 Coordination with the Officials with Jurisdiction over the Section 4(f) Properties

Summarize the coordination efforts with the OWJ over the Section 4(f) properties. In the Draft Section 4(f) Evaluation include emails, phone calls, meetings, letters, and other correspondence generated in identifying the Section 4(f) properties, as well as identifying *de minimis* impacts and/or those uses resulting in a net benefit in an appendix. The Final Section 4(f) Evaluation would additionally include comments received from the OWJ during the circulation period and correspondence generated in resolving any issues.

8.1.7 Conclusion

This section should conclude whether there is a feasible and prudent alternative to the use of Section 4(f) property (a feasible and prudent total Section 4(f) avoidance alternative). If there is no feasible and prudent alternative which avoids all Section 4(f) properties, conclude that a particular alternative is the alternative that results in the least overall harm, and that it incorporates all possible planning to minimize harm based on the previous discussion in the evaluation.

8.1.8 Appendix

Include copies of the correspondence from the OWJ over the Section 4(f) properties (i.e., SHPO/THPO, park authority, municipality, etc.) in the appendix of the Draft Section 4(f) Evaluation. Include in the appendix of the Final Section 4(f) Evaluation all formal comments received on the Draft Section 4(f) Evaluation from the OWJ over the Section 4(f) properties, DOI, USDA, and the Department of Housing and Urban Development (HUD), if applicable. In addition, include any information regarding public involvement, and/or consulting party and Section 106 coordination relative to final decisions on conditions of eligibility and effect. The signed, final MOA or PA must be included in the Final 4(f) Evaluation.

8.1.9 Project File

Maintain all background information used to develop the individual Section 4(f) Evaluation in the Project File.

Proximity Impacts Analysis: If constructive use is evaluated for one or more resources, and found not to occur, include the information that led to this conclusion in the Project File. (See **Chapter 4** for more information about proximity impacts and constructive use.) This documentation can be a memorandum to the file, a report, or other form of documentation. Provide ADOT with this documentation along with the pre-draft Section 4(f) evaluation for their review.

8.2 Individual Section 4(f) Evaluation Circulation and Approval Process

For individual Section 4(f) evaluations, prepare both a **Draft Section 4(f) Evaluation** and a **Final Section 4(f) Evaluation**.

8.3 Individual Section 4(f) Evaluation and a CE

8.3.1 Draft Section 4(f) Evaluation

Pre-Draft Section 4(f) Evaluation Development and Review: For projects classified as CEs, prepare the Draft Section 4(f) Evaluation as a separate document. A pre-draft Section 4(f) evaluation would undergo several levels of review.

Draft Section 4(f) Evaluation Circulation: After all comments received on the pre-draft Section 4(f) evaluation are addressed, the Draft Section 4(f) Evaluation would be provided to ADOT with a request for approval to distribute the document. Following approval by ADOT, send the Draft Section 4(f) evaluation to the following agencies/officials for a **45-day comment period**:

- All OWJ over Section 4(f) properties used by the project;
- U.S. DOI (Washington Headquarters Office);
- USDA (Forest Supervisor) (only provided if National Forest Lands are involved); and
- HUD (Regional Office) (only provided if the project uses land for/on which HUD funding was utilized).

DOI has requested that they be provided with one paper copy and an electronic version (CD or file-sharing link). Consult with ADOT regarding copies to other agencies and to the official(s) with jurisdiction.

Comments received on the Draft Section 4(f) Evaluation: Comments received on the Draft Section 4(f) Evaluation during the comment period must be addressed. Coordinate with any of the OWJ over the Section 4(f) properties who submit comments to resolve the issues they identify. Take reasonable efforts to resolve the issues identified in comments:

- Examine the issues
- Study and discuss with the agency making the comments options/actions to resolve the issues
- Implement those options/actions that are reasonable/practicable

8.3.2 Final Section 4(f) Evaluation

A copy of the Final Section 4(f) Evaluation is provided to the AGO for formal **legal sufficiency review**. The determination of legal sufficiency from ADOT is needed before final CE approval. Provide the Final Section 4(f) Evaluation to the same agencies and OWJ that received the Draft Section 4(f) Evaluation.

8.4 Individual Section 4(f) Evaluation and an EA

8.4.1 Draft Section 4(f) Evaluation

Include the Draft Section 4(f) Evaluation as a separate document bound into the EA as an "EA/Draft Section 4(f) Evaluation."

A pre-draft Section 4(f) evaluation and "draft" of the EA undergo several levels of review at the pre-draft stage. Provide both a hard copy and an electronic copy for review. At the discretion of ADOT, OWJ may be involved in the review of the pre-draft documents, but this is not mandatory.

EA/Draft Section 4(f) Evaluation Circulation: After all comments received on the draft version of the EA/Draft Section 4(f) Evaluation are addressed, the Draft EA/Draft Section 4(f) Evaluation is submitted to ADOT with a request for approval to advertise the Draft EA/Draft Section 4(f) Evaluation for availability for public review and comment.

Following approval of availability of the EA/Draft Section 4(f) Evaluation, the document is provided to:

- All OWJ over Section 4(f) properties used by the project;
- U.S. DOI (Washington Headquarters Office);
- USDA (Forest Supervisor) (only provided if National Forest Lands are involved); and
- HUD (Regional Office) (only provided if the project uses land for/on which HUD funding was utilized).

The availability/comment period for an EA, as required by the NEPA implementing regulations (23 CFR 771.119) is 30 days; however, a comment period of 45 days is required for Section 4(f) evaluations.

NOTE: Section 4(f) regulations state who shall receive the Section 4(f) Evaluation. Comments related to the Section 4(f) analysis received from these entities must be addressed. In cases where a Draft Section 4(f) evaluation is circulated with an EA, it is not necessary to respond to comments received on the Section 4(f) analysis from entities outside of the specified Section 4(f) recipients.

Comments received on the EA/Draft Section 4(f) Evaluation: Comments received on the EA/Draft Section 4(f) Evaluation during the comment period must be addressed. Coordinate with any of the OWJ

over the Section 4(f) properties who submit comments to resolve the issues they identify. Take reasonable efforts to resolve the issues identified in comments:

- Examine the issues
- Study and discuss with the agency making the comments options/actions to resolve the issues
- Implement those options/actions that are reasonable/practicable

8.4.2 Final Section 4(f) Evaluation

A paper copy of the Final Section 4(f) Evaluation is provided to ADOT for formal **legal sufficiency review**. The determination of legal sufficiency from ADOT is needed before the Finding of No Significant Impact (FONSI) is issued. Provide the Final Section 4(f) Evaluation to the same agencies and OWJ that received the Draft Section 4(f) Evaluation.

8.5 Individual Section 4(f) Evaluation and an EIS

8.5.1 Draft Section 4(f) Evaluation

The Draft Section 4(f) Evaluation is included as a separate chapter in the Draft .

Typically, a Pre-Draft EIS/Pre-Draft Section 4(f) Evaluation goes through several levels of review at the pre-draft stage.

Draft EIS/Draft Section 4(f) Evaluation Circulation: After all comments received on the Pre-Draft EIS/Pre-Draft Section 4(f) Evaluation are addressed, approval for circulation is given by ADOT and the Draft EIS/Draft Section 4(f) Evaluation is circulated. Both Draft EISs and Draft Section 4(f) Evaluations require a minimum 45-day comment period. The Draft EIS/Draft Section 4(f) Evaluation is circulated for at least 45 days to all appropriate agencies and persons required for an EIS, and to all agencies with jurisdiction over the Section 4(f) properties, DOI, and DOA (when National Forest lands are involved) and/or HUD (when project uses land for/on which HUD funding was utilized).

Comments received on the Draft EIS/Draft Section 4(f) Evaluation: Comments received on the Draft EIS/Draft Section 4(f) Evaluation during the comment period must be addressed. Coordinate with the OWJ over the Section 4(f) properties who submit comments to resolve the issues they identify. Take reasonable efforts to resolve the issues identified in comments:

- Examine the issues
- Study and discuss with the agency making the comments options/actions to resolve the issues
- Implement those options/actions that are reasonable/practicable

ADOT will make the final determination as to whether all reasonable efforts were made to address comments.

8.5.2 Final Section 4(f) Evaluation

Comments on the Draft Section 4(f) Evaluation are addressed in the Final Section 4(f) Evaluation, which is bound into the Final EIS. The Final EIS/Final Section 4(f) Evaluation is provided to ADOT for a **legal sufficiency review** that is conducted by the AGO. Distribution of the Final EIS/Final Section 4(f) Evaluation is similar to the Draft EIS/Draft Section 4(f) Evaluation. The final Section 4(f) approval is documented in the ROD. The FEIS/Final Section 4(f) Evaluation/ROD may be prepared as a single document.

8.6 Tiered Projects and Section 4(f) Evaluation

If a decision is made to take a tiered document approach to a project, Section 4(f) must be considered in the first tier EIS. At the Tier I stage, alternatives are examined on a broad scale often using available information rather than detailed field studies. As a result, much of the information typically collected for a Section 4(f) evaluation may not be known or available at this stage. The documentation should address at least the potential Section 4(f) uses of the proposed project and whether those uses would have bearing on the project decision. Discussion as to whether uses appear to be *de minimis* impacts or whether there are likely feasible and prudent avoidance options should be included.

Where sufficient information is available, a preliminary Section 4(f) approval may be made in the first Tier EIS. Sufficient information must be available when making a corridor selection as part of a Tier I EIS. The expectation will be not to go back and revisit a dismissed corridor alternative. The Section 4(f) approval would then be finalized in the second tier study after more detailed information is collected.

Where sufficient information is not available during the Tier I study, then the Tier I EIS may be completed without any preliminary Section 4(f) approval. The document should explain why no preliminary approval is possible during the first Tier stage and explain the process to be followed during Tier II to complete the Section 4(f) evaluation. This approach is not desirable for a Tier I if the goal of the Tier 1 EIS is to select a preferred corridor for long-range planning and the corridor alternative impact known Section 4(f) properties.

NOTE: Tiered NEPA documents and Section 4(f) are discussed in more detail under 23 CFR 774.7(e) and in Question 10 of the *Section 4(f) Policy Paper*.

Chapter 9 - Late Discovery of Section 4(f) Properties/Uses

Discovery of a Section 4(f) property and/or Section 4(f) use can occur in project development after Section 4(f) coordination/approval and NEPA approval have been granted.

A late discovery situation could be the result of the following scenarios:

- **New use of a previously avoided Section 4(f) property** - There is a proposed modification of the project alignment or design that would require use of a Section 4(f) property not previously used.
- **New identification of a Section 4(f) property that will be used by the project** - There is a determination that Section 4(f) now applies to a property previously not considered Section 4(f) and there is a use of that property. Sometimes a property can be overlooked despite good faith efforts to identify all Section 4(f) properties in a project area. New information may be learned late in project development that would change a decision regarding applicability of Section 4(f) to a specific property. (For example, it could be learned during right-of-way acquisition that a privately-owned property has a lease agreement with a public entity satisfying the “publicly-owned” criteria for Section 4(f) applicability.)
- **A more substantial use of a Section 4(f) property** - A proposed modification of the alignment, design, or measures to minimize harm would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm.

If any of the above situations occurs late in the project development process (after the NEPA decision/Section 4(f) finding has been made), a separate Section 4(f) approval is required (23 CFR 774.9(c)). Any project activity not directly affected by the separate Section 4(f) approval can proceed during this analysis. (See Question 26B of the **Section 4(f) Policy Paper**.)

If a late Section 4(f) discovery is made, prepare the applicable documentation for the Section 4(f) use. **Be aware that a late discovery Section 4(f) use can affect the project’s schedule.** Some of the analysis and processing requirements involve elements that take time to conduct. For example, to apply *de minimis* to a park, an appropriate level of public involvement must be conducted and the OWJ must concur in writing. For a historic site, Section 106 effects must have been determined in order to apply *de minimis*. If an individual Section 4(f) evaluation must be prepared, there are required review times that cannot be expedited (45-day review for a Draft Section 4(f) Evaluation followed by preparation of a Final Section 4(f) Evaluation and a legal sufficiency review by ADOT legal counsel).

See **Chapter 6** for guidance on analyzing the Section 4(f) use, and see **Chapters 7 and 8** for guidance on Section 4(f) documentation options.

The need for a separate Section 4(f) analysis and approval for late discoveries of Section 4(f) properties and/or use will not necessarily require the preparation of a new or supplemental NEPA document. Re-evaluate the NEPA document and decision to determine whether a supplemental NEPA document is needed.

Late Designation of Section 4(f) Properties: A late designation is different from a late discovery. A late designation is a property that is designated and meets the criteria of being a Section 4(f) property after the transportation project has begun. What if a property in the transportation right-of-way is designated as a park, recreation area, wildlife and waterfowl refuge, or historic site late in the development of a proposed project? Would Section 4(f) be applicable? A project may proceed without consideration under Section 4(f) if that land was purchased for transportation purposes prior to the designation or prior to a change in the determination of significance, and if an adequate effort was made to identify properties protected by Section 4(f) prior to the acquisition. (See 23 CFR 774.13(c) and Question 26A of the *Section 4(f) Policy Paper*.)

NOTE: Environmental commitments for Section 4(f) properties should include any avoidance measures. This avoidance should be carried through to construction contracts. If there is use of the property, Section 4(f) late discovery procedures will be followed before they are allowed to occupy the property.

Chapter 10 - How Does Section 4(f) Relate to Other Environmental Requirements?

Section 4(f) is one law among a number of laws governing the protection of environmental resources (e.g., wetlands, streams, threatened and endangered species, air quality, historic properties, environmental justice, etc.) that must be considered during project development and in reaching a decision under NEPA.

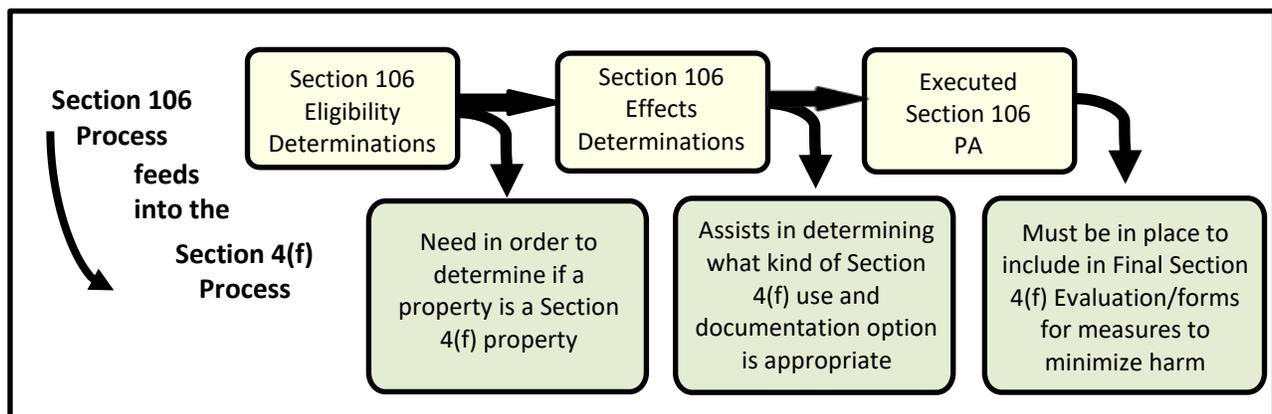
The following are the laws with a direct relationship to, or interaction with, Section 4(f):

- During project development, Section 4(f) relies on aspects of the **Section 106 process** for identification and use analysis purposes for historic sites. Mitigation for historic Section 4(f) properties most often results from the Section 106 process.
- For a Section 4(f) park and recreational area, **Section 6(f) of the Land and Water Conservation Fund Act** can also apply if Land and Water Conservation Fund (LWCF) grants were used to purchase land or supply amenities to a property. Section 4(f) and Section 6(f) require separate coordination due to the nature of their governing laws but both can be applicable to the same property.
- If a **Section 404 permit** is required for a project, a 404(b)(1) alternatives analysis is performed to determine the Least Environmentally Damaging Practicable Alternative (LEDPA) for impacts to wetlands. If the LEDPA is not the same alternative as the Least Overall Harm alternative under the Section 4(f) process then a conflict exists between regulations that must be resolved. Ultimately, only one alternative can be selected for a project, so if required alternatives analyses for different laws results in selection of different alternatives, there is a problem that must be resolved through agency coordination and dispute resolution, if necessary.

Each of these regulations and its relationship to Section 4(f) is discussed in more detail in the sections below.

10.1 Section 106

Section 4(f) relies on the Section 106 process for (1) eligibility determinations for identifying Section 4(f) historic properties (2) effect determinations for assessing whether there is a *de minimis impact* or constructive use, and (3) for mitigation/environmental commitments.



10.1.1 Identification of Properties Listed or Eligible for the National Register of Historic Places

Under the Section 4(f) regulations, historic properties listed in, or eligible for listing in, the *NRHP of Historic Places* are Section 4(f) properties. This includes archaeological sites listed or determined eligible for the *NRHP*, and for which preservation in place is warranted. Archaeological sites important chiefly for the information they contain and not warranting preservation in place are not Section 4(f) properties; see **Chapter 3**. As part of the Section 106 process, ADOT evaluates historic and archaeological resources 50 years or older to determine whether they meet at least one of the four *NRHP* eligibility criteria and if they maintain integrity.

ADOT HPT, or the environmental consultant, identifies properties in the project area that are listed in the *NRHP*, or which were previously determined eligible for listing. Depending on the passage of time and potential changes to the property/site/district, the eligibility and/or boundary of the property may warrant reconsideration. If the project area was not previously surveyed or there are properties newly 50 years old or older, then ADOT HPT or the environmental consultant prepares documentation identifying the properties within a project's APE that are being determined eligible for listing in the *NRHP*. ADOT HPT provides the documentation to the SHPO/THPO. The documentation includes the identified boundaries of the historic or archaeological resources and may or may not identify contributing and non-contributing elements of historic districts in the area of the project.

10.1.1.1 Section 106 Effects Findings

NOTE: It is important to carefully follow the boundary guidelines when determining eligibility. Although using the tax parcel boundaries may be appropriate in certain circumstances, there may be other boundaries (either larger or smaller) that might be more appropriate/precise in defining the historic or archaeological site, which would meet the boundary guidelines requirements.

An alternative results in a use of a Section 4(f) resource even when it only uses a sliver of a property located within the historic resource's boundaries and does not take a structure. Therefore, establishing the appropriate boundaries of historic and archaeological resources based on proper eligibility criteria is a key component to the Section 4(f) process.

For example, using the tax parcel when it shows the property line extending to the centerline of the road is probably not appropriate. Perhaps there is a swale, fence or tree line that could be used instead, or the edge of shoulder or pavement could possibly be used.

NOTE: Section 4(f) does not apply to archaeological sites which are determined at the completion of the Section 106 process to be important chiefly because of what can be learned by data recovery under Criterion D and have minimal value for preservation in place.

An adverse effect finding under the Section 106 process does not equate to use under the Section 4(f) process. It is possible to have a no historic properties affected or no adverse effect finding under Section 106 and still have a use under Section 4(f), although the Section 4(f) use would be a *de minimis* impact. It is also possible to have an adverse effect finding under Section 106 without having a Section 4(f) use.

The effects finding under the Section 106 process plays a role in the Section 4(f) process when determining whether there is a *de minimis* impact or constructive use of a Section 4(f) property. This role is summarized in the following table:

	Section 106 Effects Finding		
	No Historic Properties Affected	No Adverse Effect	Adverse Effect
Section 4(f) Property Acquired or Impacted	Use; <i>De minimis</i> impact	Use; <i>De minimis</i> impact	Use; not <i>de minimis</i>
No Section 4(f) Property Acquired or Impacted	No use	No use	Proximity impact analysis required

Effects and *De Minimis* Use: As discussed in **Chapter 4**, a Section 4(f) use of a historic resource (incorporation of property) is considered a *de minimis* impact if ADOT makes a Section 106 finding of no adverse effect or no historic properties affected and SHPO/THPO agrees to the Section 106 finding. The letter to the SHPO/THPO transmitting the effects finding states that if they concur with the no adverse effect finding, ADOT then intends to make a *de minimis* impact determination under Section 4(f). Views of the Section 106 consulting parties, including land managing agencies or Tribes on whose land the project and Section 4(f) property occur, must also be considered.

NOTE: When a project is anticipated to have a Section 4(f) use of a historic resource, early Section 106 coordination is advised. This coordination should look at the possibility of incorporating measures into the project design that could offset impacts to the historic resource such that a No Adverse Effect finding might be made. If a No Adverse Effect finding can be made based on a commitment that particular design elements will be incorporated into the project, the *de minimis* impact determination can be used.

***De Minimis* Example 1:** Constructed circa 1800, the Hemlock House is eligible for the *National Register* under Criterion C, as a good example of an early 19th century log farmhouse. The historic property includes 5 acres, and a total of 0.3 acre would be acquired for the roadway project. As per the Section 106 PA, a no adverse effect finding was made because the small use of the property occurs in the corner of the property that is furthest from the farmhouse, not diminishing the characteristics that qualify the property for inclusion in the *National Register*. Property is acquired, resulting in a use, but it is considered a *de minimis* impact because of the Section 106 no adverse effect finding.

***De Minimis* Example 2:** Sometimes design details can assist in reaching a no adverse effect finding if they are considered at the time that a Section 106 effect finding is made. For example, a commitment that a new roadway would have a depressed profile where it crosses an historic property and include new plantings to screen the visual effect on the property could potentially result in a no adverse effect. If these design details had not been considered early on, the finding may have resulted in an adverse effect on that particular property and *de minimis* could not then be used.

Effects and Constructive Use: Constructive use occurs when there is no incorporation of land from a Section 4(f) property but the proximity impacts would result in a substantial impairment of the features and attributes that make the historic site eligible for the *NRHP*. A historic Section 4(f) property in

NOTE: An adverse effect finding under the Section 106 process does not automatically result in a constructive use. It only triggers the need to analyze the property for a constructive use.

proximity to a proposed transportation project does not have to be analyzed for constructive use when the effects finding under Section 106 results in no historic properties affected or no adverse effect to the Section 4(f) property. If a Section 4(f) property has an adverse effect finding under Section 106, the property should be analyzed for constructive use under Section 4(f). Constructive use was discussed in detail in **Chapter 4**. Remember that the effect criteria under Section 106 are not the same as the criteria for determining constructive use (substantial impairment), and that constructive uses are rarely determined to occur.

Effects and Historic Transportation Facilities: Section 4(f) requirements do not apply to the restoration, rehabilitation, or maintenance of *NRHP* eligible or listed transportation facilities if the Section 106 process concludes with a finding that the historic transportation facility will not be adversely affected by the undertaking. Some examples of transportation facilities where this would be applicable are historic bridges, national roadways, and those elements of the Interstate Highway System included on the list of exceptions to the Interstate exemption and determined to be eligible.

NOTE: If a proposed project impairs the historic integrity of the historic bridge structure resulting in an adverse effect under the Section 106 process, then a Section 4(f) evaluation must be performed for the proposed project. The ***Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*** can be completed for such projects. See **Chapter 7** for more information regarding this programmatic Section 4(f) evaluation.

NOTE: The Interstate Highway System and individual elements of the Interstate Highway System are not subject to Section 4(f) or Section 106 review except for those elements formally designated by FHWA for national or exceptional historic significance. See discussion in **Chapter 3**, and the ***Final List of National and Exceptionally Significant Features of the Federal Highway System*** which is available on FHWA's website.

NOTE: When a historic bridge is relocated, the action may not constitute a Section 4(f) use provided that the state, locality or responsible entity that accepts the bridge enters into an agreement with ADOT to maintain the bridge and the features that contribute to its historic significance. This entity would also assume all future legal and financial responsibility for the bridge. (See **Section 4(f) Policy Paper Question 8C, How do the requirements of Section 4(f) apply to donations of historic bridges to a State, locality, or responsible private entity?**)

10.1.2 Environmental Commitments

The Section 4(f) process requires the inclusion of all measures to minimize harm to Section 4(f) properties. Consider the mitigation measures and environmental commitments developed in accordance with the Section 106 process when determining which alternative results in the least overall harm.

NOTE: Effects findings under Section 106 could be used to help determine which alternative results in the least overall harm in the minimization phase of the Section 4(f) evaluation process. For example, two alternatives are being compared, and each would use land from one Section 4(f) property. In both cases, the property is an historic resource. Alternative A has an adverse effect and Alternative B has a no adverse effect (*de minimis* impact determination). It would logically follow that Alternative B would result in the least overall harm to Section 4(f) properties.

Remember, all mitigation measures are included in the least overall harm analysis, and impacts to other resources and mitigation measures for those resources are also taken into consideration in assessing least overall harm. Alternative A with an adverse effect could still be determined to be the least overall harm alternative if Alternative B with the no adverse effect has much more severe impacts to other environmental resources such as wetland/stream impacts, threatened and endangered species involvement, large numbers of residential and/or commercial displacements, environmental justice impacts, etc.

NOTE: Mitigation for the loss of a historic resource should be commensurate with the value of the resource.

10.2 Section 6(f)

The Land and Water Conservation Fund (LWCF) Act of 1965 established a nationwide program to assist in preserving, developing, and assuring the availability of outdoor recreational resources. The program provides matching grants (up to 50%) to states and through states to local governments for the acquisition and development of public outdoor recreation sites and facilities. The LWCF program is administered by the National Park Service.

A Section 6(f) property will many times also be a Section 4(f) property due to the nature of the type of park and recreation properties benefiting from LWCF money. Section 6(f) and Section 4(f) require different coordination and analysis, but it is beneficial for those conducting the coordination and analysis to communicate. A Section 4(f) alternatives analysis may be also used for the Section 6(f) evaluation of alternatives to the Section 6(f) conversion.

NOTE: The mitigation for Section 6(f) can often be used as the mitigation for Section 4(f), so commitments should be coordinated between the two laws.

To use the “minor involvement” programmatic the Section 6(f) authorities’ position on land acquisition and or transfer must not object.

10.3 Section 404 Permit LEDPA and Other Environmental Alternatives Analyses

While NEPA requires that impacts to all resources be balanced together with engineering considerations, ability to meet needs, public input and agency consultation in reaching an informed decision on the alternative to be designed and constructed, other regulations require examination of avoidance alternatives and addressing specific criteria in making a determination.

If a Section 404 permit is required for a project, a 404(b)(1) alternatives analysis must be performed to determine the LEDPA for impacts to wetlands. Section 7 of the Endangered Species Act requires consultation to seek ways to avoid jeopardizing the continued existence of federally threatened and endangered species and their habitats.

Section 4(f) requires that an alternative that avoids all Section 4(f) properties be selected unless this avoidance alternative is proven not to be feasible and prudent or the use would result in a *de minimis* impact. If no feasible and prudent total Section 4(f) avoidance alternative exists, the alternative resulting in least overall harm is the alternative that must be selected. This determination is made based on weighing and balancing seven factors which look at both harm to Section 4(f) properties, as well as big-picture impacts that would result from the project. (See **Chapter 6** for further discussion of the least overall harm analysis.) While the “thumb on the scale” looks at overall impacts to Section 4(f) impacts, least overall harm analysis is a balancing exercise. Those more adverse impacts to other resources outside of Section 4(f) can weigh into Section 4(f) decision making.

10.4 Summary of Section 4(f) Relationship to Other Regulatory Requirements

All of the regulations discussed above as well as other federal, state and local regulations, as appropriate, must be considered in the development of alternatives to ensure that all regulatory requirements are met for a project. Only one alternative can be selected for a project, so agency coordination with the agencies with jurisdiction over the relevant resources should be conducted early and often so that input is received early and issues are resolved allowing an ultimate project decision to be reached in accordance with all environmental laws.

If there is conflict despite early coordination, it may be necessary to elevate coordination with the appropriate resource agency(ies). If conflicts cannot be worked out, dispute resolution procedures exist for some laws and decisions, such as Section 404(q) of the Clean Water Act for dispute resolution procedures for Section 404 decisions.

Chapter 11 Case Studies

11.1 Case Study 1: No Section 4(f) Use

Objectives

To gain an understanding for when there is a clear “no use” of Section 4(f) and how no separate “Section 4(f) documentation” is required. Section 4(f) applies to all USDOT projects. However, for routine preservation projects with no Section 4(f) property or potential impacts involved no separate “Section 4(f) documentation” outside of that contained in the NEPA documentation is required. The Section 4(f) regulations only require the documentation of Section 4(f) use and evidence of coordination with OWJs to apply certain applicability criteria and exceptions to a project.

Key Points

A routine pavement preservation project will be rehabilitating ten miles of highway. By way of the project description this project is minor in nature and all work contained within the existing transportation ROW.

Documentation

The Section 106 documentation in the project file contains a determination of no historic properties affected. The CE Checklist in the project file documents “No Section 4(f) use.” Also, all CEs document that “unusual circumstances,” as included in 23 CFR 771.117(b), have been considered. There is no additional Section 4(f) documentation prepared for the project file.

11.2 Case Study 2: No Section 4(f) Use

Objectives

To gain an understanding for when there is a question of potential impacts resulting in a Section 4(f) use and therefore Section 4(f) documentation is prepared to record the decision.

Key Points

The project includes work contained within the existing transportation ROW. Adjacent to the transportation ROW is a park, under the jurisdiction of the National Park System, which also has significant archaeological resources within the park which are important for preservation in place. This is a significant Section 4(f) property. During the project development there were questions of whether or not the work would extend outside of the existing ROW, adversely affecting the historic property and/or impact access to the park. It is ultimately determined that the project activities will be limited to within the existing ROW and there will be no impact to park access.

Documentation

A **No Section 4(f) Property/Use Form** is used to document the consideration of the application of Section 4(f) to the project and that there is no Section 4(f) use. The CE Checklist in the project file documents “No Section 4(f) use.”

11.3 Case Study 3: Historic Bridge Exception

Objectives

To gain an understanding of Section 4(f) use as it relates to historic bridges.

Key Points

The project includes deck rehabilitation of the Boulder Creek Bridge which is listed on the NRHP. The bridge deck has deteriorated due to direct effects of weather, the application of chemicals and/or abrasives, and the impacts of vehicular traffic across the bridge. During the Section 106 consultation process, it was determined that the project would have a “No Adverse Effect” on the historic integrity of the bridge, and the SHPO has concurred with this determination.

Documentation

The rehabilitation of an eligible or listed transportation facility (the bridge in this scenario) that does not result in an Adverse Effect to the facility is an exception to the requirements of Section 4(f) (23 CFR 774.13(a)). Because the project’s scope consists of rehabilitation of an eligible or listed transportation facility (bridge) that would not adversely affect the facility, there is no Section 4(f) use of the bridge. The SHPO’s concurrence with the determination of “No Adverse Effect” is the documentation to support the exception.

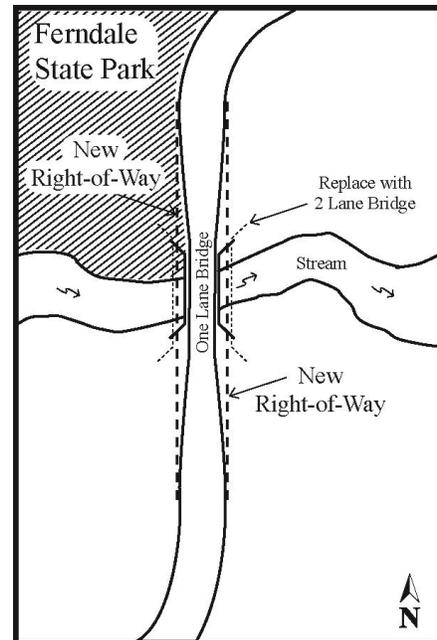
11.4 Case Study 4: Concurrent Use of the *De Minimis* and Nationwide Programmatic Forms

Objectives

To gain an understanding of using both the *de minimis* form and a nationwide programmatic Section 4(f) evaluation form.

Key Points

A one-lane bridge was built in 1914 and is individually eligible for the NRHP. This bridge needs to be replaced because of deterioration. The bridge will be replaced with a two lane structure, so some approach roadway work is necessary. ADOT found the project work would result in an adverse effect on the bridge and the SHPO agreed with this finding. The northwest quadrant adjacent to the bridge is part of a State park. The portion of the park located in the project area contains a portion of a popular hiking/biking trail. Approximately 0.7 acre of new permanent right-of-way will be acquired from the parkland, and the impacted trail will be relocated as part of the project. The State’s park officials (official(s) with jurisdiction) have agreed in writing that the project will not adversely affect the activities, features, or attributes that qualify the park for protection under Section 4(f).



Documentation

In this case the **Section 4(f) De Minimis Impact on Public Parks, Recreational Areas, and Wildlife and/or Waterfowl Refuges Form** should be completed for the park use. The undertaking will not adversely affect the activities, features, or attributes of the Section 4(f) property on a permanent or temporary basis and the State’s park officials (official(s) with jurisdiction) have agreed in writing. The public was notified of the project (information posted for review) and their comments were addressed.

The *Programmatic Section 4(f) Evaluation and Approval for Projects that Necessitate the Use of a Historic Bridge Form* should be completed for the use of the bridge. This project would require the major alteration of the characteristics (i.e. demolition) that qualify the bridge for the NRHP such that the property would no longer retain sufficient integrity to be considered eligible for listing.

11.5 Case Study 5: Primary Purpose of Property within ADOT Right-of-Way

Objectives

To gain an understanding of “primary purpose” within existing transportation right-of-way.

Key Points

The project consists of widening 10 miles of Interstate 40 (I-40) from two to three lanes. In order to widen, the existing stormwater management basins along the roadway will need to be shifted/reconfigured. One of these stormwater basins is currently used for hiking and horseback riding. ADOT owns the ROW for the SWM basin and has allowed the recreational activities to occur; however, the primary purpose of the SWM basin is to provide for collection of water from the transportation facility during storm events. Other activities that occur within the SWM basin are incidental and not part of the primary purpose.

Documentation

In order to qualify as a Section 4(f) property, the recreation area must serve a major recreational purpose. The primary purpose of the SWM basin within the ADOT right-of-way is transportation (collection of runoff during storm events). The SWM basin is therefore not a Section 4(f) property. Document this in the project file using the **No Section 4(f) Property/Use Form**.

11.6 Case Study 6: Determination of Use for Multi-Use Properties

Objectives

To gain an understanding of when the multi-use provision is applicable to a property and how this affects the determination of Section 4(f) use for those properties.

Key Points

The project consists of obtaining a Highway Easement Deed (HED) from the US Forest Service (USFS). In this case the existing road did not have an HED, which was essentially a decade-long oversight. The area of the National Forest in question was already serving a transportation purpose; the HED was just never officially dedicated.

Documentation

When Federal lands are managed for multiple uses, Section 4(f) only applies to those portions of the property that are designated by statute or identified in an official management plan of the administering agency (in this case the USFS) as being primarily for public park, recreation or wildlife/waterfowl refuge purposes and are determined to be significant for such purposes. (See 23 CFR 774.11(d) and FHWA Policy Paper question #4.) Under the circumstances described, coordination with the USFS would be undertaken. Assuming that USFS confirms that the area in question is not primarily serving a park/recreation/refuge function, the area would not fall under Section 4(f) jurisdiction. The **Section 4(f) Applicability/Exceptions Form** can be used for this project.

11.7 Case Study 7: Impacts to a Non-Contributing Element in a Historic District

Objectives

To gain an understanding of contributing and non-contributing elements within a historic district and how this affects determination of use under Section 4(f).

Key Points

The project consists of intersection improvements to add a left turn lane and improve geometry of the intersection. The southwest quadrant of the intersection is part of a historic district. To add the turning lane a 12-foot strip of land is needed from within the historic district. The property within the historic district from which this 12-foot strip of land would be acquired, was determined not to be a contributing element to the historic district and is not considered individually eligible for listing.

Documentation

FHWA’s long-standing policy is that Section 4(f) applies only to the contributing elements and/or individually eligible elements within a historic district. The Section 106 process would provide documentation as to whether or not a property within the historic district is or is not a contributing element or an individually eligible property. This documentation would be used to support the conclusion in this case that there is no Section 4(f) use (the property being acquired is from a non-contributing element of the district). (See FHWA Policy Paper questions 2B and 7C regarding historic districts.) The **No Section 4(f) Property/Use Form** can be used for this project.

It should be noted that if it is determined that there is an Adverse Effect on the historic district, even though no property is being acquired from contributing elements, consideration would then need to be given as to whether the proximity impacts represent a substantial impairment and rise to the level of a constructive use. Remember that constructive use is a very rare occurrence.

11.8 Case Study 8: *De minimis* Impact of Historic Site

Objectives

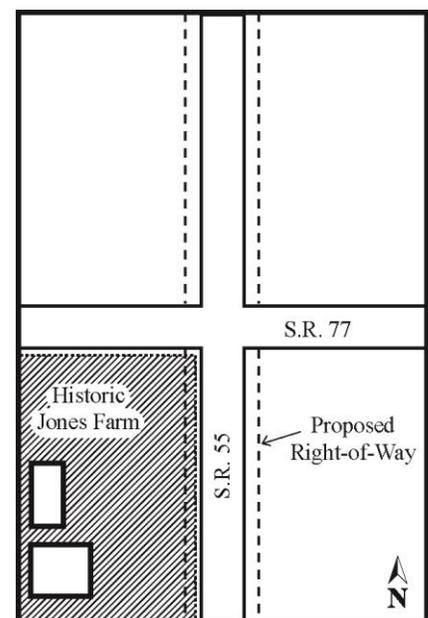
To gain an understanding of *de minimis* as it relates to an historic site.

Key Points

The project is to improve the intersection of S.R. 55 and S.R. 77. Minimal new right-of-way will be acquired from the four quadrants of the intersection and along the north and south approaches of S.R. 55. The Jones Farm, a 400 acre NRHP eligible property is adjacent to the southwest quadrant of the intersection. The project would acquire 0.5 acre from the historic farm property. A no adverse effect finding has been made and no objection was made by the SHPO.

Documentation

In this case the **Section 4(f) De Minimis Impact on Historic Properties Form** should be completed. The undertaking does not adversely affect the function/qualities of the Section 4(f) resource on a permanent or temporary basis and the SHPO (OWJ) has agreed that there is no adverse effect as a result of the project. Coordination must be undertaken with the consulting parties as part of the *de minimis* finding.



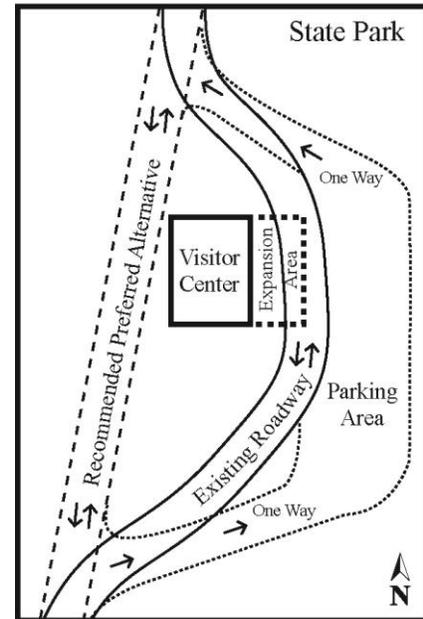
11.9 Case Study 9: Net Benefit of a Park

Objectives

To gain an understanding of net benefit as it relates to a publicly owned park, recreation area, or wildlife or waterfowl refuge.

Key Points

A state route through a heavily used, 500-acre state park does not meet current design criteria. The shoulders of the roadway are substandard and its vertical and horizontal geometry are poor. The road currently passes between the park's visitor center and the visitor center's parking lot. This means that visitors must use a pedestrian cross walk, which causes traffic back-ups. In order to bring the roadway up to current standards, and to improve safety for park visitors, the recommended preferred alternative would move the roadway to the opposite side of the visitor's center. Five acres of parkland right-of-way would be acquired from a wooded area of the park for the new roadway. Alternatives that would avoid the park property were analyzed and found not to be prudent and feasible. Park officials are very excited about the roadway relocation. It would allow them to expand their visitor's center to the east and improve the safety of the parking area and pedestrian access to the visitor center. As part of this project, ADOT will ensure that proper access is maintained to the parking area. The visitor center and existing roadway would remain open through construction, maintaining park access. The park officials submitted a written letter stating that the project would result in a net benefit to the park because the project would improve vehicle and pedestrian access to the park, the safety of the pedestrian would be improved, and the visitor's center would be able to expand closer to the parking lot. The park officials also indicated in writing that the project would not result in the substantial diminishment of the activities, features, or attributes for which the park is protected under Section 4(f).



Documentation

In this case the **Section 4(f) Evaluation and Approval for Transportation Projects that have Net Benefit to a Section 4(f) Property – Parks/Recreational Areas/Refuges** should be completed. The park officials (OWJ) agreed **in writing** that the project would result in a net benefit to the park. Also, it was demonstrated that there is no feasible and prudent alternative to the use of the Section 4(f) property. (A missed opportunity to improve the Section 4(f) facility can be used as a reason for the avoidance alternative to not be considered prudent.)

11.10 Case Study 10: Trails within Transportation Right-of-Way

Objectives

To gain an understanding of the exception applicable to recreational trails within transportation ROW and project measures taken to ensure the exception applies.

Key Points

A 5.0-mile-long recreational trail that has been identified immediately adjacent to and within the project area. The trail includes 1.6 miles of off-street trails, 2.0 miles of streets with sidewalks, and 1.4 miles of

trail along residential streets. In the project area, the trail is located completely within the transportation ROW and parallels the roadway.

Documentation

The sections of the trail located within transportation ROW would need to be relocated and/or rebuilt as part of the project, and would meet the exception for trails located within existing transportation ROW under 23 CFR 774.13(f)(3) which identifies an exception to the requirement for Section 4(f) approval for certain “trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained.” During construction, the trail would follow detour routes using local streets, ensuring that the continued use and continuity of the trail would not be impaired. Detour routes for sections of the existing trail could be needed during construction. The **Section 4(f) Applicability/Exceptions Form** can be used for this project.

Appendix

Programmatic Section 4(f) Evaluations Not Commonly Used

The following three nationwide programmatic Section 4(f) evaluations have been largely replaced by and exception for the bikeways and by the introduction of the *de minimis* impact in place of the two “minor use” programmatic:

Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects (Federal Highway Administration (FHWA), May 23, 1977)

Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges (52 FR 31116, August 19, 1987)

Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites (52 FR 31118, August 19, 1987)

The remainder of this chapter describes, in detail, the specifics regarding the applicability and required analysis, coordination and documentation for these three programmatic Section 4(f) evaluations for historical information and in the event they were to be utilized.

Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects and the Section 4(f) Applicability/Exceptions Form

The ***Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects*** is a programmatic Section 4(f) evaluation that can be applied to bikeway or walkway construction projects. These facilities are provided when bicycle or pedestrian traffic would have normally used a federal-aid highway route.

For this programmatic Section 4(f) evaluation to apply, the following must be true:

- The project requires the use of public recreation and park areas established and maintained primarily for active recreation, open space and similar purposes.
- All possible planning to minimize harm to the Section 4(f) property has been accomplished as approved by the OWJ over the Section 4(f) property.
- The proposed bikeway or walkway construction project will not affect noise and air quality, or require the displacement of families or businesses.
- Any temporary water quality impacts will be mitigated by erosion control measures during construction.
- Visual impacts will be mitigated by integrating the project into the surrounding conditions.
- There should be no significant or adverse social or economic impacts.
- Recreational potential of the parks or recreational areas should be enhanced, as well as the bikeway or walkway providing an alternative mode of transportation.

The Independent Bikeway or Walkway Programmatic Section 4(f) Evaluation cannot be used under the following situations:

- The bikeway or walkway would require the use of critical habitat of endangered species.
- The use of land from a publicly owned wildlife or waterfowl refuge is required.

- The use of land from an historic site of national, state, or local significance is required.
- The project has major impacts, adverse effects, or controversy.

This programmatic Section 4(f) evaluation cannot be used for a project processed as an EIS. The final decision on whether a proposed project meets the criteria of this programmatic is made by ADOT.

If the OWJ over the Section 4(f) property also have jurisdiction over the project facility (bikeway/walkway), there is no Section 4(f) use and the Section 4(f) Applicability/Exceptions Form is completed.

Minor Use of Parks, Recreation Areas, and Refuges Programmatic Section 4(f) Evaluation

There are two minor use programmatic Section 4(f) evaluations – one for parks, recreational areas, and refuges and one for historic sites (Section 6.11).

In most cases, a project that would qualify for the minor use of parks programmatic Section 4(f) evaluation could also qualify as a *de minimis* impact. ADOT applies *de minimis* whenever possible in place of this programmatic Section 4(f) evaluation.

Applicability

To qualify for either of the two minor use programmatic Section 4(f) evaluations, a proposed project must be designed to improve the operational characteristics, safety, and/or physical condition of an existing highway facility. A proposed project must be on essentially the same alignment.

The following types of improvements are examples of improvements that qualify for the minor use programmatic Section 4(f) evaluations:

- "4R" work (resurfacing, restoration, rehabilitation, and reconstruction);
- Safety improvements, such as shoulder widening and correction of substandard curves and intersections;
- Traffic operation improvements, such as signalization, channelization, and turning or climbing lanes;
- Bicycle and pedestrian facilities;
- Bridge replacements on essentially the existing alignment; and
- The construction of additional lanes along an existing alignment.

A minor use programmatic Section 4(f) evaluation cannot be used if:

- The proposed project involves the construction of a highway at a new location; or
- The proposed project requires preparation of an EIS under NEPA.

NOTE: The two minor use programmatic Section 4(f) evaluations **cannot** be used if the project is on **new location** or requires preparation of an **EIS**.

To qualify for this programmatic Section 4(f) evaluation, the following criteria must all be satisfied:

- The public park, recreation lands, or wildlife and waterfowl refuge that is impacted must be located adjacent to the existing highway.
- The amount of land taken from the Section 4(f) property may not exceed the following amounts:

Size of Section 4(f) Property	Maximum that can be acquired
< 10 acres	10% of Property
10-100 acres	1 acre
> 100 acres	1% of Property

- The proposed project's proximity impacts on the remaining Section 4(f) property cannot substantially impair the intended use of the property. These proximity impacts would include, but are not necessarily limited to, noise, air, water quality, wildlife and habitat effects, and esthetic values and/or other relevant factors. This determination regarding the impairment of the Section 4(f) property's intended use must be made by ADOT and the OWJ over the Section 4(f) property. The programmatic Section 4(f) evaluation form should include details on the proximity impacts to the remaining Section 4(f) property.

The OWJ over the Section 4(f) property must agree, in writing, (1) with the assessment of the impacts on the Section 4(f) property; and (2) on the mitigation for the Section 4(f) property.

Avoidance Alternatives to be Considered

The following avoidance alternatives must be evaluated to determine if they are feasible and prudent avoidance alternatives:

- The do nothing (no build) alternative;
- An alternative(s) to improve the highway without using the Section 4(f) property (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures); and
- An alternative(s) to construct an improved facility at a new location without using the Section 4(f) property.

Minimization of Harm to the Section 4(f) Property

Once it has been determined that there are no feasible and prudent alternatives that would avoid the Section 4(f) use(s), consideration must be given to measures that would minimize harm, and reasonable measures must be incorporated into the project.

One or more of the following mitigation measures can be considered as mitigation, if determined to be reasonable and appropriate, for the proposed project:

- Payment of the fair market value of the land taken or improvements to the remaining Section 4(f) site equal to the fair market value of the land taken.
- Replacement of facilities impacted by the project such as sidewalks, paths, benches, lights, trees, and other facilities.
- Restoration and landscaping of disturbed areas.
- Incorporation of design features and habitat features where necessary that will not adversely affect the safety of the highway.
 - Examples of design features: reduction in right-of-way width, modifications to the roadway section, retaining walls, curb and gutter sections, and minor alignment shifts.
 - Examples of habitat features: construction of new or the enhancement of existing wetlands or other special habitat types.
- Replacement of lands used with lands of reasonably equivalent usefulness and location and of at least comparable value.
- Additional or alternative mitigation measures as determined necessary based on consultation with the official(s) with jurisdiction.

Minor Use of Historic Sites Programmatic Section 4(f) Evaluation

There are two minor use programmatic Section 4(f) evaluations – one for historic sites and one for parks, recreational areas, and refuges and (previous section).

ADOT applies *de minimis* whenever possible in place of this programmatic Section 4(f) evaluation.

Applicability

To qualify for either of the two minor use programmatic Section 4(f) evaluations, a proposed project must be designed to improve the operational characteristics, safety, and/or physical condition of an existing highway facility. A proposed project must be on essentially the same alignment.

The following types of improvements are examples of improvements that qualify for the minor amounts programmatic Section 4(f) evaluations:

- "4R" work (resurfacing, restoration, rehabilitation, and reconstruction);
- Safety improvements, such as shoulder widening and correction of substandard curves and intersections;
- Traffic operation improvements, such as signalization, channelization, and turning or climbing lanes;
- Bicycle and pedestrian facilities;
- Bridge replacements on essentially the existing alignment; and

- The construction of additional lanes along an existing alignment.

A minor use programmatic Section 4(f) evaluation cannot be used if:

- The proposed project involves the construction of a highway at a new location; or
- The proposed project requires preparation of an EIS under NEPA.

NOTE: The two minor amounts programmatic Section 4(f) evaluations **cannot** be used if the project is on **new location** or requires preparation of an **EIS**.

To qualify for this programmatic Section 4(f) evaluation, the following criteria regarding the nature of the property acquisition from the historic or archaeological site impacted must all be satisfied:

- The historic or archaeological site must be listed in or be eligible for listing in the *NRHP* in accordance with the Section 106 process.
- The historic or archaeological site that is impacted must be located adjacent to the existing highway.
- The proposed project cannot require the removal or alteration of historic buildings, structures, or objects on the historic site.
- The project does not require the disturbance or removal of archaeological resources that are important to preserve in place.
- The SHPO and/or THPO (if applicable) must agree in writing that the impact on the Section 4(f) site is a minor impact. A minor impact is defined as either a "no historic property affected" or "no adverse effect" finding under Section 106. Concurrence is not required as per the Section 106 PA, so the effect finding and documentation to the quarterly report is sufficient as long as SHPO and/or THPO does not object.
- SHPO and/or THPO must agree in writing, (1) with the assessment of the impacts on the historic or archaeological site; and (2) on the mitigation for the historic or archaeological site.

NOTE: This programmatic Section 4(f) evaluation can be applied to historic districts when impacts to its contributing elements are minor (i.e. "no adverse effect" or "no historic properties affected"), and the involvement is limited to the use of land, and does not require the removal or alteration of historic buildings, structures, or objects.

NOTE: Both the minor use of historic sites programmatic Section 4(f) evaluation and the *de minimis impact* finding require a "no adverse effect" or "no historic properties affected" finding. In addition, the *de minimis impact* finding requires agreement (in writing) by the official(s) with jurisdiction on the *de minimis* finding. Any project which qualifies for the minor use of historic sites programmatic Section 4(f) evaluation would also qualify as a *de minimis* impact. There is an advantage to applying *de minimis impact* when applicable because it does not require an alternatives analysis.

Avoidance Alternatives to be Considered

The following avoidance alternatives must be evaluated to determine if they are feasible and prudent avoidance alternatives:

- The do nothing/no build alternative;
- An alternative(s) to improve the highway without using the Section 4(f) property (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversion or other traffic management measures); and
- An alternative(s) to construct an improved facility at a new location without using the Section 4(f) property.

Minimization of Harm to the Section 4(f) Property

Once it has been determined that there are no feasible and prudent alternatives that would avoid the Section 4(f) use(s), consideration must be given to measures that would minimize harm, and reasonable measures must be incorporated into the project. The project mitigation should include measures necessary to preserve the historic integrity of the property as agreed to by ADOT, SHPO, THPO (if applicable), and as appropriate, the ACHP in accordance with Section 106.

Suggested Support Documentation

Project Description on the Form: Provide a concise but thorough description of the proposed action. Provide enough information to allow reviewers to have a realistic snapshot of potential impacts to Section 4(f) properties.

Identification of Section 4(f) Property(ies) on the Forms: Depending on the situation the following may aid documenting Section 4(f) properties within the project area. Include photos and maps to show property location(s) in relation to the project limits, as appropriate.

For **historic sites**, may possibly include:

- The property's historic name.
- A brief description of why the property is listed or eligible for listing (do not simply reference the Section 106 Criteria A, B, C, or D).
- The historic boundary, including a map.
- A listing of contributing/non-contributing elements (important for historic districts).
- Any unusual characteristics of the Section 4(f) property that reduces or enhances the value of all or part of the historic site (e.g., its location next to a heavily traveled roadway, the condition of structures, etc.).
- Photos of the property.
- Reference Section 106 eligibility documentation.

For **public parks, recreation areas, and wildlife and waterfowl refuges**, may possibly include:

- The ownership of the property (federal/state agency, city, county, etc.).
- The primary purpose of the property and the determination of significance made by the official(s) with jurisdiction.
- Function of or available activities on the property (ball playing, swimming, golfing, etc.).
- Description and location of all existing and planned facilities (athletic fields, tennis courts, playgrounds, boat launches, trails, campsites, etc.).
- Description of access (pedestrian, vehicular, etc.).
- Approximate number of users/visitors.
- Any unusual characteristics that either reduce or enhance the value of all or part of the property (e.g., a quiet, wooded setting of a campground).
- Photos of the property.
- If the property is a multi-use property (federal/state forest lands, BLM lands, tribal land, school property where a portion of the property contains/is managed for recreational or refuge purposes), discuss any management plans that exist and identify where the recreational activities or refuge areas are in relation to the property boundaries.
- If a management plan exists, identify key components.

Form Supplements: The forms could include the following types of items, as appropriate, to complete the documentation and aid review of the form:

- Project location map
- Map of Section 4(f) property(ies) being discussed and other Section 4(f) properties in the project area
- Photos of the Section 4(f) property(ies)
- Project plan sheet to show impacts
- Public involvement information
- Correspondence with the official(s) with jurisdiction

Maps should be well labeled so Section 4(f) properties and their boundaries are clearly marked, as well

AMENDMENTS TO CE CHECKLIST MANUAL

Description of Modification

Version*	Change	Date	By
V1	Page 3-8 under Archaeological Resources: deleted “A No Section 4(f) Property/Use Form is used to document that there is no Section 4(f) use to an archaeological site with a no historic properties affected or no adverse effect finding.” Page 5-2 clarifying that no form is needed to document when there is a no historic properties affected or no adverse effect determination for historic resources within the transportation ROW. Pages 5-4 and 7-3 reference to meeting minutes for OWJ concurrence deleted.	10/08/21	PAO