

# KENTUCKY TRANSPORTATION CENTER

*College of Engineering*

**CASE STUDY OF 4(f)  
LITIGATION/RULINGS**





**UNIVERSITY OF KENTUCKY**

**College of Engineering**  
**Kentucky Transportation Center**

### *Our Mission*

We provide services to the transportation community through research, technology transfer and education. We create and participate in partnerships to promote safe and effective transportation systems.

### *We Value...*

Teamwork -- Listening and Communicating, Along with Courtesy and Respect for Others  
Honesty and Ethical Behavior  
Delivering the Highest Quality Products and Services  
Continuous Improvement in All That We Do

*For more information or a complete publication list, contact us*

### **KENTUCKY TRANSPORTATION CENTER**

176 Raymond Building  
University of Kentucky  
Lexington, Kentucky 40506-0281

(859) 257-4513  
(859) 257-1815 (FAX)  
1-800-432-0719  
[www.ktc.uky.edu](http://www.ktc.uky.edu)  
[ktc@engr.uky.edu](mailto:ktc@engr.uky.edu)

*The University of Kentucky is an Equal Opportunity Organization*

**Research Report  
KTC-04-13/SPR225-01-1F  
Case Study of 4(f) Litigation/Rulings**

**By**

**Lenahan O'Connell**  
Research Associate

and

**Theodore Hopwood II**  
Associate Engineer III, Research

**Kentucky Transportation Center  
College of Engineering  
University of Kentucky  
Lexington, Kentucky**

in cooperation with

**Kentucky Transportation Cabinet  
Commonwealth of Kentucky**

The contents of this report reflect the views of the authors, who are responsible for the facts and accuracy of the data presented herein. The contents do not necessarily reflect the official views or the policies of the University of Kentucky, nor the Kentucky Transportation Cabinet. This report does not constitute a standard, specification, or regulation.

June 2004

<b>1. Report No.</b> KTC-04-13/SPR225-01-1F		<b>2. Government Accession No.</b>		<b>3. Recipient's Catalog No.</b>	
<b>4. Title and Subtitle</b> Case Study of 4(f) Litigation/Rulings			<b>5. Report Date</b> June 2004		
			<b>6. Performing Organization Code</b>		
<b>7. Author(s)</b> Lenahan O'Connell and Theodore Hopwood II			<b>8. Performing Organization Report No.</b> KTC-04		
<b>9. Performing Organization Name and Address</b> Kentucky Transportation Center College of Engineering University of Kentucky Lexington, KY 40506-0043			<b>10. Work Unit No. (TRAIS)</b>		
			<b>11. Contractor Grant No.</b> KYSPR 01-225		
<b>12. Sponsoring Agency Name and Address</b> Kentucky Transportation Cabinet State Office Building Frankfort, KY 40622			<b>13. Type of Report and Period Covered</b> Final		
			<b>14. Sponsoring Agency Code</b>		
<b>15. Supplementary Notes</b> Prepared in cooperation with the Kentucky Transportation Cabinet, Federal Highway Administration, and U.S. Department of Transportation. Study Title: Case Study of 4(f) Litigation/Rulings					
<b>16. Abstract</b> This study addresses issues related to compliance with Section 4(f). It produced two deliverables: 1) a guidance manual to assist Cabinet personnel in the assessment and handling of projects that encounter 4(f) properties; and 2) a review of court cases to establish the standards used by the courts when evaluating a Section 4(f) situation. The latter is an appendix to the guidance manual. By referring to the manual Cabinet employees will be to: 1) Conduct an assessment of proposed alternatives to evaluate prudence and feasibility of a proposed project alternative; 2) Prepare 4(f) documentation to justify the taking of protected property; 3) Apply context-sensitive design principles to mitigate impacts and stakeholder concerns; 4) Identify potential 4(f) involvement on private properties; 5) Identify mitigation measures to minimize potential harm to 4(f) resources; 6) Develop a decision-making process where 4(f) impacts are unavoidable--the latter based on judicial rulings arising from 4(f) litigation; 7) Develop strategies to ensure implementation of 4(f) mitigation/ project commitments.  The guidance manual and annotated list of court cases were converted to Adobe Acrobat® format (Ver. 6.0). These provided a linkage function so users can navigate from the Table of Contents to both the Guidance Manual and the references in the Annotated List.					
<b>17. Key Words</b> Section 4(f), Section 4(f) Litigation, Section 4(f) Documentation, Alternatives Assessment, Section 4(f) Mitigation			<b>18. Distribution Statement</b> Unlimited with the approval of the Kentucky Transportation Cabinet		
<b>19. Security Classif. (of this report)</b> Unclassified		<b>20. Security Classif. (of this page)</b> Unclassified		<b>21. No. of Pages</b> 78	<b>22. Price</b>

# TABLE OF CONTENTS

TABLE OF CONTENTS.....	iii
ACKNOWLEDGEMENTS.....	iv
EXECUTIVE SUMMARY .....	v
Background.....	v
Description of Study Deliverables.....	vi
Conclusions.....	vii
Recommendations.....	viii
INTRODUCTION .....	1
Background.....	1
Study Objectives/Tasks.....	3
WORK ADDRESSING STUDY TASKS.....	4
Task 1 – Conduct an in-depth literature search on significant/recent 4(f) litigation including claims, rulings, circumstances and impacts. ....	4
Task 2 – Summarize and organize the information gathered under Task 1. ....	4
Section 4(f) Guidance Manual.....	5
Annotated List of Section 4(f) Cases.....	6
Tasks 3-5. Evaluation, Final Review and Final Report Preparation.....	7
CONCLUSIONS .....	8
RECOMMENDATIONS.....	8
REFERENCES .....	9
APPENDIX.....	10

## **ACKNOWLEDGEMENTS**

The authors would like to thank the members of the Study Advisory Committee, Chairmen Randall Thomas, John Mettelle, Becky Allen, Ananias Calvin, Marcie Mathews, and Daryl Greer of KYTC, Anthony Goodwin of the FHWA, and Craig Potts of the State Historic Preservation Office for their assistance in conducting this study.

# EXECUTIVE SUMMARY

## ***Background***

Section 4(f) is the most restrictive of all the environmental laws addressed by the Kentucky Transportation Cabinet (hereinafter referred to as the “Cabinet”) in implementing federally funded projects. Section 4(f) of the Department of Transportation Act of 1966 (set forth in Title 49 of the U.S. code (U.S.C.), Section 1653(f) and subsequent related and amending legislation (Title 23, U.S.C. Section 138 and title 49 U.S.C. Section 303, respectively)) has as its goal the preservation of publicly owned parks and recreation lands, wildlife and waterfowl refuges, and historic sites.

To address issues related to Section 4(f), an SPR study, KYSPR 01-225 “Case Study of 4(f) Litigation/Rulings” was initiated. Two study objectives were approved by the Study Advisory Committee. Those were:

1. Conduct a literature review of recent/significant 4(f) litigation.
2. Based upon this review and a literature review of related documents, identify the actions the Cabinet should consider to provide complete, effective 4(f) documentation, promote stakeholder/official consensus on 4(f) decisions, and preclude/limit the potential for litigation.

Five tasks were completed to meet those objectives. Those were:

Task 1. An in-depth literature search was conducted on significant/recent 4(f) litigation including claims, rulings, circumstances and impacts.

Task 2. The information gathered under Task 1 was reviewed and summarized.

Task 3. Those conclusions were reviewed by selected experts for evaluation and comments. The study team’s conclusions were modified based upon those comments.

Task 4. The reviewed findings and the study team’s conclusions derived in Task 3 were compiled and provided to the Cabinet officials and SAC members for final review and approval.

Task 5. A final report was prepared outlining the study objectives, work undertaken, sources of information and findings

This study has two deliverables: 1) a guidance manual to assist Cabinet personnel in the assessment and handling of projects that encounter 4(f) properties and 2) a review of court cases to establish the standards used by the courts when evaluating a Section 4(f) situation. The guidance manual identifies the following:

- The necessary mitigation to satisfy the requirement that harm be minimized;
- The privately held lands that might qualify as 4(f) properties;
- The parties/stakeholders to consult or include in the decision-making process.
- The conditions under which takings of section 4(f) property are ‘reasonable and prudent’.

The guidance manual is provided in the Appendix. The guidance manual is one of the two primary products of the research. The other is an annotated list of Federal Appeals Court rulings on Section 4(f). The annotated case reviews are in an appendix to the guidance manual. They were the basis for many of the recommendations in the guidance manual.

By referring to the manual Cabinet employees will be to:

1. Conduct an assessment of proposed alternatives to evaluate prudence and feasibility of a proposed project alternative;
2. Prepare 4(f) documentation to justify the taking of protected property;
3. Apply context-sensitive design principles to mitigate impacts and stakeholder concerns;
4. Identify potential 4(f) involvement on private properties;
5. Identify mitigation measures to minimize potential harm to 4(f) resources;
6. Develop a decision-making process where 4(f) impacts are unavoidable--the latter based on judicial rulings arising from 4(f) litigation;
7. Develop strategies to ensure implementation of 4(f) mitigation/ project commitments.

## ***Description of Study Deliverables***

*1. The Guidance Manual* -- The guidance manual provides a detailed description of Section 4(f) and a related law Section 106 related to historic properties. By referring to it, Cabinet personnel can accurately identify 4(f) impacts and take the necessary steps to either avoid a use or document the need to use a protected property. It contains the information Cabinet personnel need to make better decisions related to projects with potential 4(f) impacts. It provides specific steps to assess the prudence and feasibility of alternatives. This is a necessary part of the process when corridor/alignment options involve 4(f) trade-offs against other unfavorable project impacts. The guidance manual also addresses the range of problem areas related to Section 4(f), such as mitigation and stakeholder and resource agency consultation.

The guidance manual is written to support the Cabinet's context-sensitive design initiative and will generate greater public support for the Cabinet's actions. Used routinely by Cabinet personnel, it will facilitate expeditious Cabinet decision-making about projects with potential 4(f) impacts and will limit the potential for unnecessary litigation, delays and conflicts.

The guidance manual has five chapters. The Chapter 1 contains an overview of Section 4(f) and its interpretation by the courts.

Chapter 2 provides a method for distinguishing a 4(f) from a non-4(f) situation. It also discusses several uses of protected property. After consulting this chapter, Cabinet employees should be able to tell if Section 4(f) applies to a particular project.

Chapter 3 discusses individual 4(f) Evaluations, which must be completed to justify a major 4(f) taking. It details the material that must be presented in the documentation.

Chapter 4 reviews proposed Cabinet/FHWA programmatic for minor involvements with protected property. Chapter 4 also provides an example of the conditions that justify a minor use of property protected by Section 4(f).

Chapter 5 discusses issues related to the taking of historic property. Historic property requires consultation with the State Historic Preservation Office (SHPO) and requires the application of different methods.



This manual has four appendices. Appendix 1 contains four proposed 4(f) programmatic based on ones currently in use in Ohio. It is recommended that Kentucky consult with FHWA to create similar programmatic for the Commonwealth. Appendix 2 lists the information required for 4(f) documents. Appendix 3 has the list of annotated court cases. Appendix 4 contains a hyperlink to a Maryland DOT web site that has extensive reference material related to Section 4(f).

2. *The Review of Section 4(f) Cases* -- The literature review identified 30 articles that bear on the interpretation of section 4(f) in the courts. These articles are summarized with annotations in Appendix 3 in the Guidance Manual, which is entitled: "Annotated List of Section 4(f) Cases with Key Quotations from the Rulings." Other main points are identified. The case review begins with the one Supreme Court ruling on Section 4(f)—Citizens to Preserve Overton Park, Inc. v. Volpe. The literature review found five discrete conditions under which the courts are concluding that an alternative is not prudent and, therefore, protected property can be taken.

The literature review illustrates these five and provides direct quotes from the cases that illustrate the logic of the courts.

The literature review also illustrates the importance of following correct procedure. In fact, in the handful of cases in which an Appeals Court overturned a decision to use protected property, it did so most often, because there was a failure to fully document the problems with an alternative.

The review of cases is integrated into the Guidance Manual. The cases are cited at the points in the text where they are most relevant. Those using the CD format can link directly to a relevant case. These could be cited as part of the documentation in a 4(f) situation.

The guidance manual and annotated list of court cases were converted to Adobe Acrobat® format (Ver. 6.0) and presented to the Study Advisory Committee on March 15, 2004. Using a computer/video projector, KTC researchers demonstrated the linkage function using both the Table of Contents to navigate within the guidance manual and the references in the guidance manual to navigate into the annotated list.

## **Conclusions**

In most situations Section 4(f) is best complied with by avoiding the protected property. The guidance manual will facilitate quick recognition of properties protected by Section 4(f). And it will provide useful guidance for handling the details of the documentation and consultation process for the different types of protected properties. Such 4(f) situations are relatively simple and straightforward.

But, some situations can necessitate the taking of protected properties. With this guidance manual as a reference guide, Cabinet personnel will be able to grasp the practical and legal implications of their decisions and avoid costly delays and litigation. It will facilitate consultation with property owners, interested officials, and others to ensure that all decisions are in line with legal precedent and the requirements of Section 4(f) and thereby will contribute to decisions that reflect the broad interests of the citizens of the Commonwealth in efficient transportation and environmental protection.

## ***Recommendations***

The following actions are recommended for Cabinet consideration:

1. Distribute the current guidance manual/annotated list of court cases in Adobe Acrobat® format to Cabinet personnel and consultants involved in project decision-making where 4(f) involvement would be possible. Maintain a list of persons receiving the document to permit updates incorporating new case litigation/rulings or fundamental changes to 4(f) law (which is currently being promoted by AASHTO).
2. Revise the guidance manual/annotated list to incorporate the previously developed Cabinet materials intended to assist Cabinet personnel and consultants in preparing 4(f) documentation.
3. Cooperate with the FHWA to develop 4(f) programmatic similar to the ones developed for the Ohio DOT.
4. Periodically review 4(f) court rulings to update the annotated list and modify the guidance manual if the courts provide significant changes, interpretations or clarifications arising from future 4(f) litigation.
5. Prepare a half-day course that reviews Section 4(f) and demonstrates the use of the guidance manual/annotated list. Present the course at various locations in Kentucky for Central Office and District personnel and consultants.

# INTRODUCTION

## ***Background***

Section 4(f) of the Department of Transportation Act of 1966 (set forth in Title 49 of the U.S. Code (U.S.C.), Section 1653(f)) and subsequent related and amending legislation (Title 23, U.S.C., Section 138 and Title 49 U.S.C., Section 303, respectively) set U.S. Government policy to “*preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites*”. Section 4(f) also mandates that, “*the Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Developments, and Agriculture to maintain and enhance the natural beauty of lands crossed by transportation activities and facilities*”.

Section 4(f) is the most restrictive of all the environmental laws addressed by the Kentucky Transportation Cabinet (hereinafter referred to as the “Cabinet”) in implementing federally funded projects. Its primary goal is the preservation of the enumerated protected sites/properties. Implicit with that goal is the avoidance of 4(f) properties by federally funded transportation projects. The strict interpretation of Section 4(f) by the courts (compared to NEPA) is seen as a reflection of Congress’s desires not only to require procedural adherence, but also (and more importantly) to severely limit takings and impairment of protected sites/properties by transportation projects. Due to evolving definitions of 4(f) eligible properties, it is becoming increasingly more difficult for the Cabinet to develop projects without 4(f) involvement (and their related issues).

The term “Section 4(f)” comes from that section of the Department of Transportation Act of 1966 (set forth in Title 49 of the U.S. code (U.S.C.), Section 1653(f) and subsequent related and amending legislation (Title 23, U.S.C. Section 138 and title 49 U.S.C. Section 303, respectively). Although currently lodged in Section 303, it is still common usage to refer to the law as Section 4(f), or simply 4(f). This report will retain that practice.

Even though Section 4(f) is the most restrictive of all the environmental laws addressed by state highway agencies (SHAs) in implementing federally funded projects, it does not establish an absolute prohibition on the use of parkland and historic properties for federally funded transportation projects. But, it does establish a relatively high standard for the use of protected property, which is to be met prior to any use. The following is the statutory language:

*“[T]he Secretary [of Transportation] may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation areas, or wildlife or waterfowl refuge, or land of an historic site of national, state, or local significance (as determined by the Federal, State, or local officials who have jurisdiction over the park, recreation areas, refuge or site) only if:*

- (1) *there is no prudent and feasible alternative to using the land; and*
- (2) *the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuges or historic site resulting from the use.”*

The Secretary of Transportation must approve all 4(f) actions and ascertain that conditions (1) and (2) above have been satisfied.

Since any project that is technically possible is “feasible”, the contention and controversy surrounds the meaning of the word “prudent” when applied to property protected by Section 4(f). The primary controversy hinges on the conditions that render an alternative “imprudent” compared to a use of protected property. The FHWA has provided significant guidance to SHAs (1-3). However, decision-making has been complicated by the courts. They have permitted use of protected property under some circumstances and prohibited it under others. Stated Cabinet concerns related to Section 4(f) include the evaluations of alternatives, “feasibility and prudence” versus 4(f) takings and impairments, and private properties having an encumbered government interest. Cabinet concerns related to evaluation of alternatives arise in identifying situations that render alternatives not “feasible or prudent” compared to 4(f) impacts (e.g. unique problems, failure to address the purpose and need, or excessive: costs, environmental or community impacts). Additional issues such as constructive use and suitability of mitigation measures can (and have) been causes for litigation and were addressed as part of this study.

Court rulings have recognized congressional intent to severely limit or prevent takings of public lands, etc. In *Greer v. Federal Highway Administration*, the court noted that NEPA is not concerned with substantive decisions, but with adherence to the necessary process. The court found that with Section 4(f), “*the focus sharpens, and the perspective changes considerably*” and with Section 4(f), “*in addition to procedural concerns, Congress sought to establish an important substantive goal*”.

This study is designed to provide additional guidance for addressing 4(f) situations. It reviews Section 4(f) litigation and rulings to identify the following:

- The conditions under which 4(f) takings are “reasonable and prudent”;
- The necessary mitigation to satisfy the requirement that harm be minimized;
- The privately held lands that might qualify as 4(f) properties;
- The parties/stakeholders to consult or include in the decision-making process.

The knowledge gathered in the course of the study is summarized in a guidance manual provided in an Appendix. The guidance manual is one of the two primary study deliverables. The other is an annotated list of Federal Appeals Court rulings on 4(f). It can be found in appendix 3 to the guidance manual. These provided the basis for many of the recommendations in the guidance manual. Taken together, these two documents provide general guidelines for addressing 4(f) issues and necessary background information for understanding the recommendations provided by those guidelines.

## ***Study Objectives/Tasks***

To address issues related to Section 4(f), an SPR study, KYSPR 01-225 “Case Study of 4(f) Litigation/Rulings” was initiated. Study objectives were approved by the Study Advisory Committee. Those were:

1. Conduct a literature review of recent/significant 4(f) litigation including specific claims against the FHWA, case circumstances, resulting rulings and project impacts.
2. Based upon this review and a literature review of related documents, identify the actions the Cabinet should consider to provide complete, effective 4(f) documentation, promote stakeholder/official consensus on 4(f) decisions, and preclude/limit the potential for litigation. A focus of those actions will be centered on evaluation of alternatives to determine whether they are “feasible and prudent”; whether they would not address transportation problems; or they would result in substantial adverse social, environmental, or economic impacts when weighed against 4(f) takings and impairments. Another focus would be on actions to identify mitigation measures to minimize harm from 4(f) takings or impairment.

A series of tasks were proposed to meet those objectives by KYTC researchers in the study work plan. They were subsequently approved by the Study Advisory Committee. Those were:

Task 1. An in-depth literature search was to be conducted on significant/recent 4(f) litigation including claims, rulings, circumstances and impacts.

Task 2. The information gathered under Task 1 was to be reviewed and summarized. It was to be organized into logical categories and conclusions were to be extracted from those findings.

Task 3. Those conclusions were to be provided to sources identified by the Study Advisory Committee for evaluation and comments. The study team’s conclusions will be modified based upon those comments.

Task 4. The reviewed findings and the study team’s conclusions derived in Task 3 were to be compiled and provided to the Cabinet officials and SAC members for final review and approval.

Task 5. A final report was to be prepared outlining the study objectives, work undertaken, sources of information and findings. Additionally, recommendations were to be provided and the report organized to facilitate future 4(f) review by Cabinet officials allowing them to update the guidance based upon subsequent litigation and court rulings.

## **WORK ADDRESSING STUDY TASKS**

### ***Task 1 – Conduct an in-depth literature search on significant/recent 4(f) litigation including claims, rulings, circumstances and impacts.***

KTC researchers conducted an in-depth literature review in the Law Library at the University of Kentucky. They reviewed all 4(f) cases that reached the Federal Appeals Courts as well as the one case that reached the Supreme Court. They also reviewed other relevant transportation sources (e.g., legal briefs, websites, law review articles, FHWA guidance documents, AASHTO papers, and sources from state DOTs.) In addition, KTC researchers interviewed SHA officials in New York, Maryland, Ohio and Pennsylvania. They also consulted frequently with members of study advisory committee. The first author attended the Ohio DOT Section 4(f) training program for employees and consultants. It was an eight hour course, which provided useful information and documents. This material, along with material from the state of Maryland's website, was used to check the content and thoroughness of the information contained in the guidance manual.

The information gathered from the analysis of cases and interviews with experts was summarized in an article presented at the January 2002 Transportation Research Board meetings in Washington, D.C. This article, entitled "The Evolution of 4(f) in the courts: The circumstances and Conditions that Render Acceptable the Use of Protected Properties," analyzed the rulings and identified the circumstances under which an alternative to a taking of 4(f) protected property can be deemed imprudent and the taking of protected property therefore justifiable. It also demonstrated that many of the procedural requirements of 4(f) are less complex and cumbersome than often presumed by officials employed by state DOTs.

### ***Task 2 – Summarize and organize the information gathered under Task 1.***

The information gathered in Task 1 was initially summarized in a draft "white paper" type document, which included suggested guidance for dealing with specific 4(f) issues and applicable summaries of court rulings. That material was then incorporated into a guidance manual, which provides Cabinet end users with the added benefit of easy-to-use information about meeting the requirements of Section 4(f). In part, it was inspired by the Ohio DOT 4(f) material which was intended to assist officials of that DOT in addressing 4(f) issues. KTC researchers considered the guidance material developed by ODOT to be very useful and it was relatively simple to incorporate its useful information along with the KTC 4(f) case review material. Additional 4(f) material was gathered by KTC researchers in the course of their work and was also incorporated into the document.

The draft document was submitted to the Study Advisory Committee for review and the SAC members suggested that it be separated into 1) a guidance manual and 2) an annotated list of the case rulings. Those were to serve as the primary deliverables for the study.

## **Section 4(f) Guidance Manual**

The guidance manual provides a detailed description of Section 4(f) and a related law Section 106. It is intended to allow Cabinet personnel to accurately identify 4(f) impacts and take the necessary steps to either avoid a use or to document the need to use a protected property. It contains information to improve decision-making by Cabinet personnel related to projects with potential 4(f) impacts. The manual provides specific steps to assess the prudence and feasibility of alternatives. This is a necessary part of the process when corridor/alignment options involve 4(f) trade-offs against other unfavorable project impacts. The guidance manual also addresses the gamut of issues related to 4(f), including mitigation and stakeholder and resource agency consultation.

The guidance manual is written to support the Cabinet's context-sensitive design initiative intended to generate greater public involvement and support for proposed projects. Used routinely, it will expedite project decision-making with potential 4(f) impacts and will reduce the potential for controversy, unnecessary litigation, delays and conflicts.

The guidance manual consists of 5 chapters. Chapter 1 provides an overview of Section 4(f) and its interpretation by the courts. One of the goals of Chapter 1 is to impart an understanding of the concept of an "imprudent alternative." If an alternative is imprudent, it can be rejected. And, if all the alternatives that do not involve a 4(f) taking are imprudent, then a taking can be authorized--provided the amount of the taking is minimized and everything possible is done to minimize harm. Since occasions arise when it is not prudent to avoid a 4(f) property, Cabinet officials need to understand the factors that allow a taking of some property from a protected resource. Chapter 1 provides the necessary background information for the next four chapters, which offer practical guidance for addressing 4(f) involvement.

Chapter 2 provides a method for distinguishing 4(f) from non-4(f) situations. It also discusses several uses of protected property. It reviews some attendant issues that apply to specific types of property. The material in Chapter 2 will enable Cabinet employees to ascertain whether Section 4(f) applies to a particular project.

Chapter 3 discusses individual 4(f) evaluations, which must be completed to justify a major 4(f) taking. It details the material that must be presented in the documentation. Chapter 3 also discusses the role of the Purpose and Need Statement in determining the prudence of a proposed alternative to a taking. Last, Chapter 3 discusses the need to consult with the FHWA, local officials, and resource agencies and other stakeholders. This is especially important given the costs and delays associated with lawsuits that may arise if contentious issues are not resolved.

Chapter 4 reviews proposed FHWA programmatic for minor involvements with protected property. They are taken from Ohio DOT/FHWA documents designed to expedite the approval process. Chapter 4 discusses the circumstances under which use of a programmatic is appropriate and reviews the information needed to correctly complete the programmatic documentation. Chapter 4 also provides an example of conditions that justify a minor use of property protected by Section 4(f).

Chapter 5 addresses issues related to the taking of historic property. Project involvement with historic property requires consultation with the State Historic Preservation Office (SHPO) and the application of different procedures. It also requires knowledge of the consultation process mandated by Section 106 of the National Historic Preservation Act of 1966. The latter is discussed and differences between Sections 106 and 4(f) are explained.

This manual has four appendices. Appendix 1 contains four proposed 4(f) programmatic based on programmatic currently in use in Ohio. It is recommended that Kentucky consult with FHWA to create similar programmatic for the Commonwealth. Appendix 2 lists the information required for 4(f) documents. Appendix 3 has the list of annotated court cases. Appendix 4 contains a hyperlink to a Maryland DOT site that has extensive reference material related to Section 4(f).

## **Annotated List of Section 4(f) Cases**

The KTC literature review identified 31 articles that address the interpretation of section 4(f) in the courts. These articles are summarized with annotations in Appendix 3 of the guidance manual, which is entitled: “Annotated List of Section 4(f) Cases with Key Quotations from the Rulings.” Other main points are identified. The case review begins with the one Supreme Court ruling on Section 4(f)—Citizens to Preserve Overton Park, Inc. v. Volpe. It established the standards for the use of property protected by Section 4(f). In Overton Park, the Supreme Court articulated the following standard for the taking of park land—“*4(f) prohibits approving a route through a park or other protected property, except where alternative routes are not feasible or prudent.*” The central point of contention is “*prudence*”. The Supreme Court said an alternative is “*not prudent*” if it presents “*unique problems*” or “*unusual factors*” or “*the cost of community disruption would reach extraordinary magnitudes.*” The 30 subsequent cases in effect define the meaning of those three standards for defining what is or is not a *prudent* alternative.

The literature review identified five discrete conditions under which the courts are concluding that an alternative is not prudent and, therefore, protected property can be taken. Those are:

1. The courts add up (cumulate) a number of small problems associated with an alternative and conclude it then attains *extraordinary magnitude* or presents *unique problems or unusual factors*.



2. The courts cite environmental problems associated with an alternative to a 4(f) taking as *especially burdensome*. That is, they are reluctant to accept an alternative with environmental problems of its own.
3. The courts reject an alternative that fails to meet the purpose and need of a project such as traffic congestion relief or access to some specific destination.
4. The courts measure the cost associated with an alternative against the cost of the taking of a protected property (e.g., a small taking of a protected property can be justified when balanced against a larger cost from an alternative route, even though the larger cost is not huge absolutely, but only large when compared to the amount or quality of protected land taken.) In other words, the smaller the amount of land in the park or other protected resource to be used or the lower its value, the lower the threshold for concluding an alternative route has unique problems, unusual factors, or is extraordinarily costly compared to the route that uses protected property.
5. The courts accept mitigation that creates new parkland or amenities in exchange for the land taken.

The literature review discusses these points and provides direct quotes from the cases that illustrate the logic of the courts. The literature review also emphasizes the importance of following the correct procedure. In fact, in the handful of cases in which an appeals court overturned a decision to use protected property, it did so most often, because there was a failure to fully document the problems with an alternative. These cases were remanded to a lower court for a complete analysis.

The annotated list was integrated into the guidance manual. The cases were referenced at the points in the manual where they are most relevant. Cabinet personnel using the manual in Adobe Acrobat® format can click on a cited reference number and be linked to the relevant case in the annotated list. Those cases could be cited as part of the documentation necessary for a 4(f) involvement.

### ***Tasks 3-5. Evaluation, Final Review and Final Report Preparation***

The guidance manual and annotated list were converted to Adobe Acrobat® format (Ver. 6.0) and presented to the Study Advisory Committee on March 15, 2004. Using a computer/video projector, KTC researchers demonstrated the linkage function using both the Table of Contents to navigate within the guidance manual and the references in the guidance manual to navigate into the annotated list. The laying feature of Adobe Acrobat® (Ver. 6.0) was also discussed. John Mettillie mentioned that the Cabinet had developed a complimentary document to the guidance manual which was intended to provide Cabinet personnel with specific instructions on preparing 4(f) documentation. He thought that document could be “layered” in the Acrobat® version of

the guidance manual to provide a more useful document. The Study Advisory Committee stated that the guidance manual and annotated list met the objectives of the study. Mr. Mettillie asked to be furnished a copy of the two documents to provide to both the FHWA and Cabinet attorneys for review. Those comments were received by KTC researchers and the documents were amended as requested. Finally, this report was prepared to complete the final task and the study.

## **CONCLUSIONS**

In most situations Section 4(f) is best complied with by avoiding the protected property. The guidance manual will facilitate recognition of properties protected by Section 4(f). It will also provide useful guidance for handling the details of the documentation and consultation processes for the different types of protected properties. Such 4(f) situations are relatively simple and straightforward.

Where a taking of protected property is necessary, the guidance manual permits Cabinet personnel to grasp the practical and legal implications of their decisions and avoid costly delays and litigation. It will facilitate consultation with property owners, interested officials, and others to ensure that all decisions are in line with legal precedents and the requirements of Section 4(f). Thus, it will contribute to decisions that reflect the broad interests of the citizens of the Commonwealth promoting both efficient transportation project development and legal compliance.

The information provided under this study will enable Cabinet personnel to make better decisions related to projects with potential 4(f) involvement. It will assist them in determining when to consider 4(f) impacts instead of other less favorable alternatives. The information will also address other potential problem areas related to 4(f) and assist in improved assessments/stakeholder participation and mitigation plans to minimize harm from 4(f) takings and impairments. The information will be used to support/promote the Cabinet's context-sensitive design and construction initiatives and will generate greater public support for Cabinet actions. It will facilitate early Cabinet decision-making about projects with potential 4(f) impacts and will limit the potential for unnecessary litigation, delays and conflicts.

## **RECOMMENDATIONS**

The following actions are recommended for Cabinet consideration:

1. Submit the current guidance manual/annotated list in Adobe Acrobat® format to Cabinet personnel and consultants involved in project decision-making where 4(f) involvement would be possible. Maintain a list of persons receiving the document to permit updates incorporating new case litigation/rulings or fundamental changes to 4(f) law (which is currently being promoted by AASHTO).

2. Revise the guidance manual/annotated list to incorporate the previously developed Cabinet materials intended to assist Cabinet personnel and consultants in preparing 4(f) documentation.
3. Cooperate with the FHWA to develop 4(f) programmatic similar to the ones developed for the Ohio DOT.
4. Periodically review 4(f) court rulings to update the annotated list and modify the guidance manual if the courts provide significant changes, interpretations or clarifications arising from future 4(f) litigation.
5. Prepare a half-day course that reviews Section 4(f) and demonstrates the use of the guidance manual/annotated list. Present the course at various locations in Kentucky for Central Office and District personnel and consultants.

## **REFERENCES**

1. Section 4(f), Federal Highway Administration, p. 1, <http://www.fhwa.dot.gov/environment/4f.htm>.
2. Environmental Flow Charts, Section 4(f), Federal Highway Administration, p. 5, <http://www.fhwa.dot.gov/environment/guidebook/vol2/doc7m.pdf>.
3. Section 4(f) Policy Paper, Federal Highway Administration, pp. 1-3, <http://www.fhwa.dot.gov/environment/4fpol.htm>
4. O'Connell, Lenahan and Theodore Hopwood. 2002. "The Evolution of 4(f) in the courts: The circumstances and Conditions that Render Acceptable the Use of Protected Properties," Paper presented at TRB, January 2002.

## **APPENDIX**

### **Guidance Document for Addressing Section 4(f) Issues**

**Guidance for Addressing Section 4(f) Issues,  
Section 4(f) Programmatic &  
Annotated Bibliography of Section 4(f) Case Rulings**

By

Lenahan O'Connell

And

Theodore Hopwood II

Kentucky Transportation Center

# Table of Contents

Addressing 4(f) Issues.....	1
Preface.....	1
Chapter 1. Background Information .....	3
1.1.0 Introduction.....	3
1.1.1 The Statute .....	3
1.2.0 The Overton Park Decision.....	4
1.3.0 Recent Court Rulings and the Circumstances That Permit a Taking.....	4
1.4.0 New Definitions of Imprudent Alternatives .....	4
1.4.1 FHWA’s Response to the Court Rulings.....	5
Chapter 2. Identifying an Impact on a 4(f) Protected Property.....	6
2.1.0 Is There a 4(f) Resource Involved?.....	6
2.1.1 How Much of the Resource is Protected?.....	6
2.1.2 Planned Parks, Recreation Areas and Refuges .....	7
2.1.3 Wild and Scenic Rivers.....	7
2.1.4 Fairgrounds .....	7
2.2.0 Are Federal Funds Involved?.....	7
2.3.0 Is There a Use of Protected Property? .....	7
2.3.1 Permanent Use .....	8
2.3.2 Constructive Use.....	8
2.3.3 Temporary Use.....	8
2.3.4 Temporary Construction Easements and Section 4(f) .....	8
2.3.5 Air Rights and Use of a 4(f) Property .....	9
2.4.0 Is the Resource Significant to the Community? .....	9
2.5.0 Does the Resource Owner Provide Access to the Public?.....	9
2.5.1 School Recreational Facilities and Section 4(f).....	10
2.6.0 Determination of Non-Applicability of Section 4(f) .....	10
2.7.0 Questions to Ask When Determining the Applicability of Section 4(f).....	10
Chapter 3. Individual Section 4(f) Evaluations to Justify a Taking of Protected Property .....	11
3.1.0 The Role of the Purpose and Need Statement in Justifying a Use of Protected Property.....	11
3.2.0 How to Complete an Individual Section 4(f) Document .....	11
3.3.0 Mitigation and Context Sensitive Design (CSD).....	13
3.4.0 Mistakes to Avoid.....	14
3.4.1 Useful Considerations to Assess the Prudence of an Avoidance Alternative..	14
3.5.0 The Wisdom of Consultation with all Stakeholders .....	15
Chapter 4. Programmatic for Situations in Which Section 4(f) Applies and Minor Involvements Are Needed.....	16
4.1.0 Programmatic for Minor Involvements.....	16
4.2.0 Documents and Statements Needed to Complete Programmatic .....	16
4.3.0 When to Use the Three Types of Programmatic .....	17
4.3.1 Historic Property Programmatic .....	17

4.3.1.1 Conditions to Meet.....	17
4.3.1.2 Alternatives Analysis .....	17
4.3.2 Historic Bridges Programmatic.....	17
4.3.3 Minor Involvements with Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges Programmatic.....	18
4.4.0 An Example of the Logic for Justifying a Minor Taking .....	18
4.4.1. Alternative Analysis.....	19
4.4.2.Measures to Minimize or Mitigate Harm.....	19
4.4.3. Appropriateness of Programmatic .....	19
Chapter 5. The Special Case of Historic Properties and Archeological Sites .....	20
5.1.0 Section 106.....	20
5.2.0 How Section 4(f) differs from Section 106.....	20
5.3.0 Some Important Points about Specific Types of Resources .....	20
5.3.1 Historic Bridges and Highways .....	20
5.3.2 Archaeological Sites .....	21
5.3.3 Wild and Scenic Rivers.....	21
Appendices.....	22
Appendix 1: Section 4(f) Programmatic Forms.....	23
Appendix 1a. Proposed KYTC Programmatic Form for Section 4(f) Applicability. ....	24
Appendix 1b. Proposed KYTC Programmatic Form for Section 4(f) Temporary Use.	25
Appendix 1c. Proposed KYTC T Programmatic Form for Section 4(f) Historic Sites.	26
Appendix 1d. Proposed KYTC Programmatic Form for Section 4(f) Historic Bridges .....	29
Appendix 1e. Proposed KYTC Programmatic Form for Section 4(f) Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges .....	32
Appendix 2: Section 4(f) Documentation .....	36
Appendix 3: Annotated List of Section 4(f) Cases with Key Quotations from Rulings...	37
1. Citizens to Preserve Overton Park, Inc. v. Volpe .....	37
2. Finish Allatoona’s Interstate Right, Inc. v. Volpe .....	37
3. Louisiana Environmental Society v. Coleman.....	38
4. Druid Hills Civic Association v FHWA .....	38
5. Hickory Neighborhood Defense League v. Skinner .....	39
6. Eagle Foundation, Inc. v. Dole (1987).....	40
7. Ringsred v. Dole .....	41
8. Conservation Society of Southern Vermont v. Secretary of Transportation .....	41
9. Stop H-3 Association v. Dole .....	42
10. Citizen Advocates for Responsible Expansion v. Dole .....	43
11. Brooks v. Coleman.....	43
12. Sierra Club v. USDOT .....	44
13. National Wildlife Federation v Lewis.....	44
14. Communities Inc. v. Busey, Skinner & Regional Airport of Louisville.....	45
15. Committee to Preserve Boomer Lake Park v DOT .....	46
16. Concerned Citizens Alliance v. Slater .....	46
17. Citizens to Preserve Wilderness Park v. Adams.....	47
18. Nashvillians Against I-440 v. Lewis.....	47
19. Lake Hefner Open Space Alliance v. Dole.....	48

20. Conservation Law Foundation v. Federal Highway Administration .....	48
21. Coalition of Sensible Transportation Inc. v. Dole .....	48
22. Maryland Wildlife Federation v Dole.....	49
23. Society for the Protection of New Hampshire Forests v Brinegar.....	49
24. Mullin v. Skinner .....	50
25. Residents in Protest—I-35E v Dole.....	50
26. Town of Fenton v. Dole .....	51
27. Ashwood Manor Civic Association v. Dole .....	51
28. Davis v. Mineta.....	52
29. Corridor H Alternatives, Inc v. Slater.....	52
30. City of South Pasadena v. Slater.....	53
31. Sierra Club v. Dole .....	53
Appendix 4: Maryland DOT Web Link.....	55



## **Instructions about Using This Document**

This Section 4(f) Guidance Manual consists of three parts. The first part contains a guidance manual to assist KYTC officials and consultants working on KYTC projects in addressing Section 4(f) issues. It consists of five sections. There are three appendices. Appendix 1 contains Section 4(f) Programmatic Forms (currently from the Ohio DOT) which are intended to serve as the basis for similar KYTC forms in the future. Appendix 2 lists materials necessary to complete Section 4(f) documentation. Appendix 3 provides annotated court rulings on cases impact Section 4(f). It is intended to provide users with enhanced understanding of Section 4(f) issues covered in the guidance manual.

This document is intended to be used with the Adobe Acrobat Reader Ver. 6.0. It contains navigation aids including an addressable Table of Contents that will take the user to the appropriate page of interest within the document. Additionally, appendix references are “boxed” in portions of the guidance manual and by double clicking on these with the mouse; the user will be taken to the reference they desire to view. A third feature on the Adobe Acrobat Reader is a keyword search in the form of a “binocular” icon. When the user double clicks on that icon, a pane will open on the right side of the window allowing the user to search for key words in addressable format.

These features aid in fullest utilization of this document by a variety of users with different levels of involvement/interest in Section 4(f). While this document was intended to assist those working with Section 4(f), it can also serve as a useful guide for lay persons wishing to become familiarized with the topic and its impact on project development.

# Addressing 4(f) Issues

## Preface

Congress has passed several laws to protect parkland and historic properties from harm during the implementation of federally funded highway projects. Section 4(f) of the Department of Transportation Act of 1966 was set forth originally in Title 49 of the U.S. Code (and subsequently amended in Title 23, U.S.C., Section 138 and Title 49, U.S.C., Section 303.) It is commonly referred to as “4(f)” and this manual will adopt that practice.

Whenever possible, the Kentucky Transportation Cabinet must avoid a 4(f) property. However, situations may occur where the taking of a 4(f) property is necessary. For example, it may not be possible to meet the goals of the project as stated in the purpose and need statement without impacting some protected property. As explained in this manual, the law allows a taking when there is no feasible and prudent alternative that will avoid the 4(f) resource. In such circumstances, the Cabinet must follow the set of procedures and steps explained in this manual, which are designed to properly document the justification for any impact that occurs. The procedures are also designed to document the effort to minimize the impact on a protected property.

This manual provides a method for assessing the conditions that surround a proposed project to ensure that Cabinet officials satisfy the requirements of Section 4(f) as they apply in particular contexts. The circumstances that surround 4(f) situations can be quite complex. Therefore, it is imperative to proceed in a cautious and thorough manner, while adhering to all expected standards and procedures. When courts side with the plaintiffs who object to a taking of 4(f) protected property, they do so, for the most part, because highway officials failed to follow the correct procedures in their justification for that taking.

In addition to establishing compliance with the law, adherence to the procedures discussed herein will minimize public controversy, especially when all interested parties are consulted. In 4(f) situations cooperation with the public can expedite the completion of a project and eliminate the costs and delays associated with lawsuits.

This guidance manual has five chapters. Chapter 1 provides an overview of Section 4(f) and its interpretation by the courts. One of the goals of this chapter is to impart an understanding of the concept of an “imprudent alternative.” If an alternative is imprudent, it can be rejected. And, if all the alternatives that do not involve a 4(f) taking are imprudent, then the taking can be authorized. Another goal is to demonstrate that the courts are willing to be flexible about the factors that render an alternative route “imprudent.” If avoidance of a 4(f) property is determined to be imprudent, it is possible to take some of the protected property--provided the amount of the taking is minimized and everything possible is done to minimize harm. Since occasions arise when it is not prudent to avoid a 4(f) property, Cabinet officials need to understand the factors that

allow a taking of some property from a protected resource. Chapter 1 provides the necessary background information for the following chapters, which offer practical guidance for handling 4(f) situations.

Chapter 2 provides a method for distinguishing 4(f) from non-4(f) situations. It also discusses several uses of protected property. It reviews some attendant issues that apply to specific types of property. After consulting this chapter, Cabinet employees should be able to tell if Section 4(f) applies to a particular project.

Chapter 3 discusses Individual 4(f) Evaluations, which must be completed to justify a major 4(f) taking. It details the material that must be presented in the documentation. Chapter 3 also discusses the role of the Purpose and Need Statement in determining the prudence of a proposed alternative to a taking. Last, Chapter 3 discusses the need to consult with FHWA, local officials, and resource agencies and other stakeholders. This is especially important given the monetary costs and delays associated with lawsuits.

Chapter 4 reviews the FHWA programmatic for minor involvements with protected property. These are FHWA documents designed to expedite the approval process. Chapter 4 discusses the circumstances under which use of a programmatic is appropriate and reviews the information needed to correctly complete the programmatic documentation. Chapter 4 also provides an example of the conditions that justify a minor use of property protected by Section 4(f).

Chapter 5 discusses issues related to the taking of historic property. Historic property requires consultation with the State Historic Preservation Office (SHPO) and requires the application of different methods. It also requires knowledge of the consultation process mandated by Section 106 of the National Historic Preservation Act of 1966. The latter is discussed and the differences between Section 106 and 4(f) are explained.

The manual has three appendices. Appendix 1 list the information required for Section 4(f) documents. Appendix 2 contains the instructions for proposed 4(f) programmatic based upon those of the Ohio Department of Transportation. It is recommended that the Cabinet consult with the FHWA to create similar programmatic. Appendix 3 contains a paper summarizing the decisions of the nation's appeals courts on 4(f) cases.

# Chapter 1. Background Information

## 1.1.0 Introduction

The Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) administer Section 4(f) through regulations found at 23 CFR 771.135. Section 4(f) *applies to all projects that receive funding from or require approval by an agency of the U.S. Department of Transportation (DOT), including FHWA. Section 4(f) does not apply if a project is 100 percent state funded or 100 percent locally funded or is funded by a state/local split and does not require an action by a USDOT agency.*

FHWA consults with state DOT officials about a potential use of 4(f) property. But FHWA makes the 4(f) decision for highway projects. FHWA has the following duties: It

- Decides whether section 4(f) applies to a resource;
- Reviews assessments of each alternative’s impacts to 4(f) properties;
- Determines whether the law allows selection of an alternative that uses protected property.

### 1.1.1 The Statute

Section 4(f) calls for U.S. government policy to “preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” There is, however, an important distinction between the application of 4(f) to historic properties and the other protected categories. Historic properties can be either publicly or privately owned. In regard to the other types of protected properties, 4(f) is applicable only if the affected land is *publicly* owned and *designated or administered* as a public park, recreation area, or wildlife or waterfowl refuge. That is, one of its official purposes must be as a park or recreation area or wildlife or waterfowl refuge.

Section 4f does not establish an absolute prohibition on the use of parkland and historic properties for federally funded transportation projects. But, it does establish a relatively high standard for the use of protected property, which is to be met prior to use. The following is the statutory language:

*“[T]he Secretary [of Transportation] may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation areas, or wildlife or waterfowl refuge, or land of an historic site of national, state, or local significance (as determined by the Federal, State, or local officials who have jurisdiction over the park, recreation areas, refuge or site) only if:*

- (3) there is no prudent and feasible alternative to using the land; and*
- (4) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuges or historic site resulting from the use.”*

In short, if there is a prudent and feasible alternative that completely avoids 4(f) resources, it must be selected.

However, as the statutory language makes clear, Section 4(f) does not prohibit SHAs from ever building federally funded highway projects on parklands, historic, and other protected properties. But, to do so, they must meet the “no prudent and feasible alternative” standard. The courts have articulated the following definition of feasible: “an alternative is feasible if it can be accomplished as a matter of sound engineering.” Most potential alternatives to using protected land are feasible in the sense that they can be constructed successfully. Therefore, most controversy hinges on the standards for judging the *imprudence* of an alternative.

### **1.2.0 The Overton Park Decision**

In March 1971, the United States Supreme Court handed down its only ruling on 4(f): Citizens to Preserve Overton Park, Inc., et al v. Volpe, Secretary of Transportation, et al. In Overton Park, the Court articulated the following standard for the taking of park land—4(f) prohibits approving a route through a park, except where alternative routes are not feasible and prudent, because: 1) they present unique problems or unusual factors; or 2) the cost of community disruption would reach extraordinary magnitudes. The following is a direct quote from the Supreme Court decision: “[The S]ecretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems, inasmuch as Congress does not intend that public parks are to be lost unless there are truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reach extraordinary magnitudes requiring the use of parkland for such a project.” (Appendix 3, [Ref. 1](#))

### **1.3.0 Recent Court Rulings and the Circumstances That Permit a Taking**

Over the past 30 years, the courts have been defining the circumstances under which highway projects can lawfully impact protected lands. Another way to express this is that they have been defining the point where a proposed alternative route crosses the threshold from *prudent* into *imprudent* and therefore can be rejected. The court rulings have not removed all uncertainty from the 4(f) process, but they have made it clear that there are acceptable circumstances that permit a taking.

Overall, the courts have shown a great deal of flexibility in defining what constitutes *unique problems or unusual factors*, as well as in their understanding of the phrase—*costs or community disruptions that reach extraordinary magnitudes*. As a consequence, the standards that define an alternative as *imprudent* can vary depending on the circumstances surrounding a proposed project (i.e., depending upon the project’s *context and intensity*).

### **1.4.0 New Definitions of Imprudent Alternatives**

Even though the conditions under which 4(f) property can be taken are not entirely clear, there are some basic principles emerging from the various court rulings. Over the past two decades, appeals courts have refined their approach to the definition of *imprudent*. They have not repudiated the broad Overton Park definitions of *imprudent* as alternatives that present *unique problems or unusual factors or costs or community disruption of extraordinary magnitudes*. But they appear to have made it easier to describe a specific alternative as presenting *unique problems or unusual factors* or as imposing *costs or community disruption of extraordinary magnitudes*.

The courts appear to accept five discrete reasons for concluding that an alternative is not prudent.

1. They add up (cumulate) a number of small problems associated with an alternative and conclude it then attains *extraordinary magnitude* or presents *unique problems or unusual factors*. (Appendix 3, [Ref. 5](#), [Ref. 6](#), [Ref. 26](#) & [Ref. 27](#))
2. They cite the environmental problems associated with the alternative to the 4(f) taking as *especially burdensome*. That is, they are reluctant to accept an alternative with environmental problems of its own. (Appendix 3, [Ref. 4](#), [Ref. 6](#) & [Ref. 27](#))
3. They reject an alternative that fails to meet the purpose and need of a project such as traffic congestion relief or access to some specific destination. (Appendix 3, [Ref. 4](#), [Ref. 7](#), [Ref. 8](#), [Ref. 15](#), [Ref. 18](#), [Ref. 19](#) & [Ref. 27](#))
4. They measure the cost associated with an alternative against the cost of the taking of a protected property (e.g., a small taking of a protected property can be justified when balanced against a larger cost from an alternative route, even though the larger cost is not huge absolutely, but only large when compared to the amount or quality of protected land taken). (Appendix 3, [Ref. 5](#), [Ref. 8](#), [Ref. 13](#), [Ref. 15](#), [Ref. 20](#), [Ref. 21](#), [Ref. 22](#) & [Ref. 26](#))
5. They accept mitigation that creates new parkland or amenities in exchange for the land taken. (Appendix 3, [Ref. 7](#) & [Ref. 13](#))

#### 1.4.1 FHWA's Response to the Court Rulings

FHWA has responded to the court rulings by recognizing the emerging flexibility in reasons for rejecting an alternative as imprudent. It recommends that highway agencies look at the size and impact of a proposed use, as well as the measures taken to mitigate the impact. And, it now accepts a number of factors, including the project context and the severity of impacts to non-4(f) resources, in determining what is prudent.

## Chapter 2. Identifying an Impact on a 4(f) Protected Property

The first step in assessing the possibility of a 4(f) impact is to determine if 4(f) applies to a proposed project. To establish that Section 4(f) is applicable it is necessary to answer the first four of the following five questions in the affirmative for historic properties and all five questions in the affirmative for parks, recreational facilities, waterfowl and wildlife refuges.

1. Is there a park, recreational facility, waterfowl or wildlife refuge or historic property involved?
2. Are federal funds involved?
3. Is there a use?
4. Is the resource significant to the community?
5. Does the resource owner provide access to the public?

(Appendix 1a. [Proposed KYTC Programmatic Form for Section 4\(f\) Applicability](#))

### 2.1.0 Is There a 4(f) Resource Involved?

*Whether privately or publicly owned, historic properties on or eligible for the historic register are protected by Section 4(f).* For land used as a park, recreation area, or wildlife or waterfowl refuge to be a 4(f) resource it must be:

1. *publicly owned,*
2. *officially designated* as a park, recreation area, wildlife or waterfowl refuge; and
3. function as one of its major purposes as a park, recreation area, or wildlife or waterfowl refuge, as determined by officials having jurisdiction over the land.

Many situations that appear to involve 4(f) properties may not in fact be covered by Section 4(f). For example, with the exception of historic resources, *privately* owned land is not covered by Section 4(f) even when it is used as a park, recreation area or wildlife or waterfowl refuge. Therefore, churches, conservation and other private groups that own parks and refuges are not covered. The Nature Conservancy and the Audubon Society are not public entities, so their land holdings, no matter their use, are not protected by Section 4(f).

#### 2.1.1 How Much of the Resource is Protected?

As a general rule, 4(f) protection extends only to those areas of public land holdings that are designated to be parks, recreation areas, and refuges. Public lands such as state and national forests may be managed for multiple uses, such as mining, logging, a campground, etc. Only those areas designated for recreation (a campground or picnic area, for instance) are protected by Section 4(f). Moreover, incidental, occasional, or dispersed recreational activities do not constitute a designated use. In other words, section 4(f) does not apply to areas of multiple-use lands which function primarily for purposes not protected by Section 4(f). For instance, it would not apply to a publicly owned forest that is occasionally used for hunting.

When controversy develops over the primary purpose of an area, it is best to look at the management plan of the resource to identify its primary purpose. So, to be protected under Section 4(f), a wild life area must be designated as either a waterfowl or wildlife refuge.

### 2.1.2 Planned Parks, Recreation Areas and Refuges

Section 4(f) applies to publicly owned properties that are planned for park, recreation or refuge purposes even though they are not presently functioning for those purposes or have yet to be built, if the agency that owns the property has formally designated the properties for, and determined them to be significant for 4(f) purposes.

Section 4(f) does not apply to *proposed* publicly owned properties that are impacted by a planned transportation facility when the proposed park and facility are planned concurrently. (Appendix 3, [Ref. 12](#) & [Ref. 31](#))

### 2.1.3 Wild and Scenic Rivers

Publicly owned waters of rivers designated wild and scenic by the National Wild and Scenic Rivers Act are protected by Section 4(f). Publicly owned lands adjacent to the rivers may be subject to Section 4(f) if they are administered for recreation or other 4(f) purposes.

### 2.1.4 Fairgrounds

Publicly owned fairgrounds are not subject to 4(f) protection if they function primarily for commercial purposes. When fairgrounds are open to the public and function primarily for public recreation other than an annual fair, Section 4(f) applies to those portions of land determined significant for recreational purposes.

## **2.2.0 Are Federal Funds Involved?**

Section 4(f) applies to all projects that receive funding from or require approval by an agency of the U.S. DOT, including the FHWA. Keep in mind that MPOs (Metropolitan Planning Organizations) can receive County Engineer Association (CEA) monies allocated under the Federal-Aid Programs. Although these programs are often called “local funds”, they are indeed federal funds. Examples include Bridge (BR), State Transportation Plan (STP) and Transportation Engineering (TE) funds. Ignoring Section 4(f) could jeopardize future federal funding.

## **2.3.0 Is There a Use of Protected Property?**

For Section 4(f) to apply there must be a *use* of the property. The basic principle is this: Section 4(f) applies whenever the undertaking permanently or temporarily hinders the recreational or refuge use of a protected property or the preservationist purposes of an



historic protected property. There are three types of use: permanent, constructive, and temporary.

### 2.3.1 Permanent Use

Permanent use occurs when land is taken from a 4(f) site. This usually entails one or more of these:

1. a permanent incorporation of right of way from a 4(f) resource into a transportation project;
2. a fee simple transaction in which a public entity buys and owns the land; and
3. creation of a permanent easement, with permanent right of access.

### 2.3.2 Constructive Use

Though rare in practice, it is possible for there to be a *constructive use* of 4(f) property. *Constructive use* occurs when, without acquisition of any protected property, the proximity impacts of the project on the protected property are so great (e.g. from noise, dust, access restriction, blocking of viewshed etc.) that the purposes for which the section 4(f) site exists are substantially impaired. (Appendix 3, [Ref. 10](#), [Ref.12](#), [Ref. 14](#), [Ref. 21](#), [Ref. 24](#) & [Ref. 25](#))

### 2.3.3 Temporary Use

Section 4(f) can also block a temporary use of a 4(f) site, when the *temporary use* is so great that the site can no longer be used for the purpose for which it was intended during the temporary use. A temporary use will require the completion of either a programmatic or an individual 4(f) plan to explain and justify the use.

Temporary use occurs when at any time during the project the functionality of the park or protected property is restricted. In contrast, permanent use occurs when at the end of the project the parkland or protected property will look or function differently from how it previously looked or functioned.

There are ways to effectively mitigate use. For example, the temporary blocking of access can be eliminated by creating a detour or run-around that permits access to a park. In that case, park users would still have access during construction.

### 2.3.4 Temporary Construction Easements and Section 4(f)

Section 4(f) permits temporary occupancy of protected property during construction. However the officials having jurisdiction over the protected resource must agree that the following conditions have been met. The temporary occupancy of the protected resource will:

1. be of short duration and less than the time needed for construction of the project;

2. not change the ownership of the land or result in long-term use of the land for transportation purposes;
3. include only a minor amount of land; and
4. not result in any permanent or temporary adverse change to the activities, features or attributes that are important to the purposes or functions that qualify the resource for protection under 4(f).

The last condition [4.] means that a temporary use cannot prevent the public from using the property during construction. Thus while part of a park can be occupied, the rest of the park must still remain open for use by the public. In other words, a temporary use that blocks access to a resource is not acceptable under Section 4(f), unless there is no feasible and prudent alternative.

Minor use of a protected recreational facility may be acceptable, if there is no adverse effect on the public's ability to enjoy the facility for recreational purposes. However, prior to use, it is necessary to obtain a letter from the owner to show that the public's use of the facility is not affected.

(Appendix 1b. Ohio DOT Programmatic Form for Section 4(f) Temporary Use)

#### 2.3.5 Air Rights and Use of a 4(f) Property

The requirements of Section 4(f) apply to bridging over a publicly owned park, recreation area, wildlife or waterfowl refuge or historic site if piers or other appurtenances are placed on or in the section 4(f) property. Section 4(f) also applies if the bridge harms the purposes for which these lands were established or adversely affects the historic integrity of the historic site. (Appendix 3, [Ref. 24](#))

#### **2.4.0 Is the Resource Significant to the Community?**

For Section 4(f) to apply, a resource must be significant to the community. Significance occurs when the land in question plays an important role in the park, recreational and refuge objectives of the community. The determination of the significance of publicly owned parks, recreation areas or refuges is made by the federal, state or local officials with jurisdiction over the land. Usually, this will be the officials who own or administer the site. Determinations of significance are subject to review by FHWA for reasonableness.

#### **2.5.0 Does the Resource Owner Provide Access to the Public?**

Publicly owned facilities (e.g., school playgrounds) that, as a matter of policy, restrict the public's access to the facility are not protected by Section 4(f). That is, 4(f) would not apply when there are public access restrictions during the facilities normal hours of operation. Examples of restricted access include recreational facilities on military bases that are limited to military and their dependents and recreational facilities on the grounds of a publicly owned school, college or university that are limited to students, faculty and alumni of a college or university.

### 2.5.1 School Recreational Facilities and Section 4(f)

School playgrounds and other recreational facilities are covered under Section 4(f) if they are *publicly owned and open to the public*. In addition, the playground must be significant for recreational purposes. A recreational facility owned by a private school, even if open to the public, is not covered. Neither is a publicly owned playground that is not open to the public. If use of the facilities is restricted to students, faculty or alumni, then that is no public use and Section 4(f) would not apply.

### **2.6.0 Determination of Non-Applicability of Section 4(f)**

After studying a proposed project, the Cabinet with the FHWA's concurrence can determine that Section 4(f) does not apply. This occurs when the undertaking does not have the potential to affect protected properties. For example, a determination of non-applicability of Section 4(f) might be appropriate in a situation in which it is possible to build a bike path without acquiring any new right-of-way from a protected resource.

As noted at the beginning of this chapter, a determination of non-applicability is appropriate when one of the first four questions in the first paragraph cannot be answered in the affirmative for parks, recreational facilities, and wildlife and waterfowl refuges.

Historic resources do not have to be publicly owned or provide access to the public. In situations involving historic properties, the State Historic Preservation Office (SHPO) needs to be consulted. Thus, a determination of non-applicability of Section 4(f) would be appropriate in a situation, where a SHPO determines that a rehabilitation of an historic bridge with federal funds will not adversely affect the historic integrity of the bridge. The following statement should be included in the environmental document: "FHWA or FHWA's designee (if applicable) has determined that Section 4(f) is not applicable to this project." The statement needs to be dated. The SHPO concurrence letter should always be included in the environmental document and referenced in the appendix.

### **2.7.0 Questions to Ask When Determining the Applicability of Section 4(f)**

1. Is there a 4(f) resource involved?
2. Are federal funds involved?
3. Is there permanent, constructive or temporary use of a 4(f) resource?
4. Is the resource significant to the community?
5. Does the resource owner provide access to the public?
6. How much of the resource is under 4(f) protection

## Chapter 3. Individual Section 4(f) Evaluations to Justify a Taking of Protected Property

If at all possible, Section 4(f) requires that protected property not be used. However, there are times when avoidance is neither prudent nor feasible. When it is necessary to take some 4(f) property (and the conditions for a programmatic do not apply), an Individual Section 4(f) Evaluation must be written. (The programmatic are discussed in Chapter 4 of this manual. They are *only* appropriate for minor involvements.) The purpose of the Individual Section 4(f) Evaluation is to explain the reason that protected property must be taken. That is, it documents thoroughly that there is no prudent and feasible alternative to the use of a protected property.

Great care must be taken when writing the Individual Section 4(f) Evaluation to show that there is no feasible and prudent alternative to the proposed project and that all steps have been taken to minimize the impact on the protected resource. The courts have stopped projects that have failed to properly document the justification for a taking.

### 3.1.0 The Role of the Purpose and Need Statement in Justifying a Use of Protected Property

The purpose and need for a project is determined before an alignment is selected and designed. When assessing potential alternatives that avoid a protected property, it is necessary to refer to the project Purpose and Need Statement. In fact, the project Purpose and Need Statement drives the process for considering alternatives. An alternative that fails to meet the objectives laid out in the Purpose and Need Statement can be rejected as imprudent. (Appendix 3, [Ref. 8](#), [Ref. 15](#), [Ref. 18](#), [Ref. 19](#) & [Ref. 27](#))

When writing a Purpose and Need Statement it is useful to keep properties protected by Section 4(f) in mind. Appropriate refinements to the statement can reduce or limit the number of alternatives that could satisfy the project's purpose and need, thereby reducing the number and range of prudent alternatives to a manageable number for assessment. This can expedite the process. If an alternative does not serve the primary elements of the purpose and need statement, the alternative may be eliminated from future study. (Appendix 3, [Ref. 7](#)) One caveat is in order: the Purpose and Need Statement cannot be so narrowly written that it excludes all but the Cabinet's preferred alternative.

### 3.2.0 How to Complete an Individual Section 4(f) Document

The Individual Section 4(f) Evaluation document must include the following:

1. A description of the project. Describe the proposed project in detail. Include a discussion on logical termini and attach location maps, including USGS quadrangle map, and other illustrations to describe the project area. Discuss major issues associated with the project.

2. An explanation of the purpose and need of the project. The problem that the proposed action is designed to correct should be clearly described. (The purpose and need for determining the use of a section 4(f) property should be identical to that found in the CE or EA/EIS.)
3. A description of each 4(f) property. Describe each 4(f) resource and its type (park, refuge, etc.) that would be used by any alternative under consideration. Discuss the eligibility status, characteristics of the site and what criterion makes it an eligible or non-eligible site. Disclose the ownership of the property and any clauses affecting the ownership. Include a detailed map that shows the function of the property and its relationship to the alternatives. Describe the size and location of the affected 4(f) property. Describe the existing and planned facilities and their location on the property. Describe access to the facility and its usage (e.g., number of visitors per day). Describe the facility's relationship to other similarly used lands in the vicinity.
4. An account of the impacts to each 4(f) property. Discuss impacts to the 4(f) property (ies) for each alternative. Describe the amount of land to be used and characteristics that reduce or enhance its value; discuss the facilities and functions affected and the nature of the effects.
5. A discussion of the avoidance alternatives. Identify and evaluate the prudence and feasibility of alternatives that would avoid each 4(f) resource.
  - Study alternatives to either side of the 4(f) resource and impacts of minor alignment shifts. You can *reject alternatives that fail to meet the purpose and need* for the project.
  - Discussion of each alternative should specifically address the impact to the Section 4(f) property, justifying the necessity of impacting the property in order to solve the transportation problem.
  - Identify the costs associated with each alternative.
  - In regard to the number of alternatives evaluated, it is only necessary to demonstrate a reasonable methodology for narrowing the field of alternatives to a number sufficient to support a judgment that the study of additional alternatives is not worthwhile.
  - If all the “build” alternatives use some section 4(f) land, the alternative having the least overall impact to the resources must be selected unless it is not feasible and prudent. (Appendix 3, [Ref. 4](#), [Ref. 9](#), [Ref. 10](#) & [Ref. 17](#))
6. The basis for concluding that there is no prudent and feasible alternative that avoids use of protected property. Specify the costs, unique problems, and unusual factors associated with each alternative that meets the purpose and need. It is not sufficient to assert that an alternative is not prudent. Evidence for concluding imprudence must be presented. Small problems and costs may add up to unique problems and extraordinary costs. A *cumulation* of problems such as environmental impacts, safety and geometric problems, decrease in traffic services, etc. may be considered collectively. In your statements use the following language. “There are unique problems and unusual factors with an alternative” or “the cost, social, economic, and environmental, or community disruption of an alternative reaches

extraordinary magnitudes.” (Appendix 3, [Ref. 5](#), [Ref. 6](#), [Ref. 13](#), [Ref. 15](#), [Ref. 16](#), [Ref. 21](#), [Ref. 23](#), [Ref. 24](#), [Ref. 26](#), [Ref. 28](#) & [Ref. 29](#))

7. The basis for concluding that all possible planning to minimize harm has been completed. Discuss all possible measures that are available to minimize the impacts of the proposed action on the 4(f) property(ies). Detailed discussions of mitigation measures in the EIS or EA may be referenced and appropriately summarized rather than repeated. (Establish least harm by considering many factors, not just the acreage of the 4(f) resource used. Does the project shave an edge off a resource as opposed to cutting through the middle? Does it alter an historic building versus just altering surrounding land? Does it take a highly used portion of a park or a rarely used portion? FHWA and Cabinet officials must consider the net impacts of a use after mitigation is taken into account. Replacement of land, monetary compensation or replacement of facilities could be reasonable public expenditures in light of the severity of a project’s impact. (Appendix 3, [Ref. 2](#), [Ref. 13](#) & [Ref. 22](#))
8. Summary of Correspondence. Include copies of all formal correspondence including comments received and their responses.
9. A statement of formal coordination with other agencies and parties; and copies of formal coordination comments. Discuss coordination with officials having jurisdiction and discuss interagency coordination. When necessary discuss significance and primary use, Individual Section 4(f) Evaluations must be provided for coordination and comment to the officials having jurisdiction over the 4(f) property and to the Department of Interior, and as appropriate, to the Department of Agriculture and Department of Housing and Urban Development. A minimum of 45 days must be allowed for this coordination.
10. Concluding statement. Put the following into the document as a concluding statement: “Based on the above considerations, there is no feasible and prudent alternative to the use of land from the Section 4(f) property and the proposed action includes all possible planning to minimize harm to the Section 4(f) property resulting from such use.”

### **3.3.0 Mitigation and Context Sensitive Design (CSD)**

*When using protected property, it is important to document all efforts to minimize and mitigate harm. In this regard Section 4(f) is similar to the Cabinet’s other environmental policies that call for avoidance of harm, minimization of harm if avoidance is not possible, and mitigation of any harm that may be inflicted.*

Mitigation may include:

- replacement of the lands being used with lands of reasonably equivalent usefulness,
- replacement of any facilities that may be impacted,
- restoration and landscaping of disturbed area,
- design features that minimize impacts to the property,

- payment of fair market value, and
- additional measures that may be determined necessary based on consultation with the officials having jurisdiction. (Appendix 3, [Ref. 2](#), [Ref. 7](#) & [Ref. 27](#))

The Cabinet is committed to the broad principles of *Context-Sensitive Design/Solutions* which means discussion with the public and the creation of forums for public involvement on projects. These are entirely compatible with the spirit of Section 4(f) and public input should be noted in the materials pertaining to mitigation included in the Individual Section 4(f) Evaluation document. Public opposition can lead to law suits and other costly delays. Consulting with the public can expedite the overall process and reduce the possibility of litigation.

### **3.4.0 Mistakes to Avoid**

In a number of recent cases, the courts have rejected a 4(f) taking because of various procedural errors and asked that additional analysis be done before a taking proceeds. Litigation and delays are very expensive; therefore it is of paramount importance that the following procedural mistakes be avoided;

1. A failure to conduct a thorough analysis of the proposed alternatives. In addition to the no-build alternative, other alternatives must be described in detail and their problems and costs documented. To select an alternative with a 4(f) taking, it must be shown that problems with the other alternatives are unique or the costs are extraordinary. (Appendix 3, [Ref. 3](#), [Ref. 9](#), [Ref. 28](#) & [Ref. 30](#))

2. Lack of documentation showing that all relevant factors and impacts were considered and there was no error in judgment. (Appendix 3, [Ref. 10](#), [Ref. 12](#), [Ref. 28](#) & [Ref. 30](#))

3. Lack of documentation showing that all protected properties were identified and discussed. (Appendix 3, [Ref. 23](#) & [Ref. 29](#))

4. Lack of documentation showing that project minimizes harm to protected property.

#### 3.4.1 Useful Considerations to Assess the Prudence of an Avoidance Alternative

1. Does the alternative have environmental problems of its own?
2. Is there a way to mitigate for the various impacts of the taking on the protected property?
3. Does the taking impair the ability of the protected property to serve its main mission (i.e. as a park, historic property, etc.)?
4. Do the avoidance alternatives fail to meet the goals set down in the purpose and need statement?
5. Does the project impose less harm on the protected resource than the alternatives?
6. Are the combined costs associated with each alternative substantially greater than the costs associated with the use of the protected property?

### **3.5.0 The Wisdom of Consultation with all Stakeholders**

The 4(f) process can be lengthy and expensive, but no matter how protracted and costly, it is preferable to litigation. When highway officials try to expedite the process by failing to document the costs of an alternative or by not identifying and discussing impacts on all the protected resources, they are inviting lawsuits. As noted the courts will accept a taking when the feasible alternatives fail to meet the purpose and need statement or present unique problems or extraordinary costs. Moreover, the courts due to the presumption of regularity granted to government decision-makers are reluctant to reject an FHWA decision to take protected property. Nevertheless they do insist that all procedures be followed and the relative costs of impacts of proposed routes discussed in sufficient detail to warrant the conclusion that any other route would be neither feasible nor prudent.

One of the least costly ways to avoid litigation is to consult with all interested parties. Along with those mandated by law such as the SHPO and FHWA, it is advisable to discuss a project with interested environmentalists, historic preservationists, local residents, etc. Frequently, it is possible to reach an agreement that includes mitigation measures acceptable to all. As a general rule consultation will produce better projects as well as reduce the likelihood of litigation.



## Chapter 4. Programmatic for Situations in Which Section 4(f) Applies and Minor Involvements Are Needed

### 4.1.0 Programmatic for Minor Involvements

FHWA recognizes the need to expedite the 4(f) process. They have devised three programmatic for various types of projects in Ohio. (Proposed KYTC forms similar to those are presented in [Appendix 1](#)).. These are appropriate for projects that require minor takings of property. They are:

1. The Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites;
2. Programmatic Section 4(f) Evaluation and Approval for Federally-Aided Projects that Necessitate the Use of Historic Bridges;
3. Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges.

As is the case with any use of a protected property, it is necessary to minimize the impact and mitigate any and all harm inflicted.

### 4.2.0 Documents and Statements Needed to Complete Programmatic

1. The Programmatic Section 4(f) document, which is a separate, stand alone document.
2. Analysis of alternatives to a taking. This analysis requires data that demonstrates why the alternatives were not feasible and prudent. This is placed in the 4(f) document. The following alternatives must be discussed: the no-build or do-nothing; improvement without using the adjacent 4(f) lands; and an alternative on a new location. The document must clearly show that each alternative is either not feasible or not prudent.
3. A statement describing mitigation measures. This documents that every effort to mitigate the effect of the project on a protected resource was taken.
4. A concurrence letter from the agency with jurisdiction. Permanent acquisition of ROW from a 4(f) resource requires a letter stating concurrence from the officials with jurisdiction over the resource.

The concurrence letter must state that:

- A. The amount and location of the land to be used shall not impair the use of the remaining 4(f) land, in whole or in part, for its intended purpose.
- B. The proximity impacts of the project on the remaining 4(f) land shall not impair the use of such land for its intended purpose.
- C. The officials with jurisdiction over the 4(f) lands must agree in writing with the assessment of the impacts of the proposed project on (and the proposed mitigation for) the 4(f) land.

### 4.3.0 When to Use the Three Types of Programmatic

#### 4.3.1 Historic Property Programmatic

This programmatic applies to projects designed to improve an existing highway facility that will use minor amounts of land from adjacent historic sites that are listed on or are eligible for inclusion on the National Register of Historic Places (NRHP). The “Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites” can be used when the undertaking requires minor amounts of right-of-way from within the historic boundaries of a property listed on or eligible for the listing on the National Register of Historic Places (NRHP) and the SHPO determines that the undertaking will not adversely affect the historic qualities of the resource. The key here is the absence of an adverse effect.

##### **4.3.1.1 Conditions to Meet**

1. The SHPO must agree in writing with the assessment that there is either no effect or no adverse effect.
2. The project occurs on an existing highway.
3. There is no removal of historic buildings, structures or objects, or archaeological resources important for preservation in place.

##### **4.3.1.2 Alternatives Analysis**

The 4(f) document must discuss three alternatives to show they are not prudent and feasible:

1. Do nothing;
2. Improve without using lands from the adjacent historic site;  
and
3. Build on a new location.

*This programmatic cannot be used when the undertaking is on a new alignment.*  
(Appendix 1c. [Proposed KYTC Programmatic Form for Section 4\(f\) Historic Sites](#))

#### 4.3.2 Historic Bridges Programmatic

Use of a historic bridge occurs when the characteristics that qualify a bridge for inclusion in the National Register of Historic Places are impaired or altered. The “Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges” can be used:

- When the undertaking requires the removal and/or rehabilitation of a bridge, listed on or eligible for listing on the National Register of Historic Places (NRHP) and
- The SHPO determines that the proposed undertaking will adversely affect the historic integrity of the resource, but the structure is an integral part of the existing transportation system.
- In addition, the bridge cannot be a National Historic Landmark
- And the project includes all possible planning to minimize harm.

In other words, the SHPO can issue a no effect, no adverse effect, or even an adverse effect finding and the project can proceed. However, this programmatic requires that the SHPO and FHWA execute a Memorandum of Agreement, pursuant to Section 106 that includes all possible measures to minimize harm.

With this programmatic it is necessary to discuss these three alternatives and show they are not prudent:

1. No build;
2. Building a new bridge on a new location without using the historic bridge; and
3. Rehabilitating the historic bridge without altering its historic integrity.

(Appendix 1d. [Proposed KYTC Programmatic Form for Section 4\(f\) Historic Bridges](#))

#### 4.3.3 Minor Involvements with Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges Programmatic

A programmatic entitled “Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges” may be used for projects that improve *existing* highways only. That is, they must be on essentially the same alignment. This is for projects that use minor amounts of publicly owned park, recreation or refuge land or have minor proximity impacts. It occurs when some 4(f) land is permanently incorporated into a transportation project or when there is a temporary use or a proximity impact that substantially impairs the attributes, features or activities that qualify the resource for 4(f) protection.

Permanent acquisition of right of way or an increase of a permanent easement within a publicly owned park requires a concurrence letter from the agency with jurisdiction over the park. The issues to be addressed are listed above in the section on concurrence letters. (Appendix 1e. [Proposed KYTC Programmatic Form for Section 4\(f\) Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges](#))

#### **4.4.0 An Example of the Logic for Justifying a Minor Taking**

Consider a hypothetical project that is designed to improve sight distance at an existing intersection adjacent to a publicly owned park. It will require new pavement, minor widening, pavement markings, and new drainage. It will take 0.2356 acres of temporary ROW and 0.4588 acres of permanent ROW from the 43-acre park. The park contains a soccer field, a fishing pond, hiking trails, 2 shelter houses, an old log cabin and an herb garden. The permanent ROW is needed to accommodate profile changes and the relocation of a culvert headwall. The impacts on the park will include the temporary closing of a parking lot, the elimination of the north drive to the parking lot and the widening of the south drive to 24 feet. Two trees and a split-rail fence will be removed. A sign will be temporarily removed.

#### 4.4.1. Alternative Analysis

The no-build option is rejected because it would leave the sight distance problem uncorrected. An alternative that improves the intersection without using the adjacent 4(f) land would not be prudent, as it would require relocating the road to the north, which would result in the removal of an 8-unit apartment complex and pose a safety problem for motorists approaching from the north. Shifting to the East would involve removal of one, possibly two houses. An alternative at an entirely new location than the current one would not be prudent because it would create impacts much greater those from improving the intersection at its existing location--among the impacts of another location, displacement of families, disruption of travel patterns, and a substantial increase in project cost.

The amount and location of the 4(f) land to be used will meet the project purpose and need and will not impair the use of the remaining 4(f) land for its intended use, either in whole or in part. The amount of land to be taken (less than one acre in a 43-acre park) is a low intensity use. In addition, the proximity impact to the project on the remaining 4(f) land shall not impair the use of such land for its intended purpose. Therefore the proximity impact does not constitute a constructive use.

#### 4.4.2.Measures to Minimize or Mitigate Harm

Several measures will be taken to mitigate harm to the park. They are:

1. Payment of fair market value for the land acquired;
2. Landscaping to restore the property to a condition as good as or better than existed prior to construction; and
3. Maintenance of access to the parking lot between August 15 and November 30 to accommodate Pee Wee football games.

#### 4.4.3. Appropriateness of Programmatic

The programmatic is applicable to the proposed improvement of the intersection because it meets the following criteria:

1. The officials with jurisdiction over the 4(f) land have agreed in writing with the assessment of the proposed project on the 4(f) land, and with the proposed mitigation; and
2. An environmental impact statement is not required.

## **Chapter 5. The Special Case of Historic Properties and Archeological Sites**

Two laws apply to historic properties potentially impacted by transportation projects. They are: Section 4(f) of the DOT Act and Section 106 of the National Historic Preservation Act. Both laws protect historic properties listed on or eligible for listing on the National Register of Historic Places. (But FHWA can determine that Section 4(f) can be applied to a significant site that is not eligible for the NRHP. That criterion is the importance of the site in the community.)

### **5.1.0 Section 106**

Section 106 is part of the National Historic Preservation Act of 1966. Section 106 specifies the process to follow whenever there is a federal undertaking that might adversely impact historic resources. The Section 106 process is used to identify historic properties listed on or eligible for listing on the National Register of Historic Places. Section 106 requires FHWA or some other Federal lead agency to consider the effect of the undertaking on historic properties while affording the State Historic Preservation Office (SHPO) and/or the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on a proposed use. Other interested parties must be allowed to comment (e.g., local historic societies, private citizens, federally recognized Indian Tribes).

After consultation, the interested parties may reach a *memorandum of agreement* (MOA) to minimize harm may be developed. If an agreement cannot be reached, FHWA will determine what actions are required.

### **5.2.0 How Section 4(f) differs from Section 106**

They both call for the protection of historic properties. However, they differ in several respects:

- Section 4(f) is a substantive standard, while Section 106 requires consultation with the relevant parties, including the SHPO.
- Section 4(f) applies only to agencies within the USDOT (FAA, FTA, FRA, FHWA), while Section 106 applies to all federal agencies
- Under Section 4(f), the use of a historic property cannot be approved if there is a prudent and feasible alternative
- Section 106 requires consultation but does not limit alternatives.

### **5.3.0 Some Important Points about Specific Types of Resources**

#### 5.3.1 Historic Bridges and Highways

1. Section 4(f) does not apply to the rehabilitation, repair, or improvement of historic bridges and highways if the historic integrity is not adversely affected.
2. Section 4(f) does not apply to the construction of a replacement bridge when a historic bridge is left in place and the proximity impacts of the replacement bridge do not substantially impair the historic integrity of the historic bridge.

#### 5.3.2 Archaeological Sites

1. Section 4(f) applies to all archaeological sites that are: on or eligible for inclusion on the National Register, and which warrant preservation in place (including those discovered during construction.)
2. Section 4(f) does not apply to archaeological sites that have been determined by the SHPO not to be important for preservation in place but important for what may be learned by data recovery.

#### 5.3.3 Wild and Scenic Rivers

In addition, publicly owned lands in the immediate proximity of such rivers *may* be protected by Section 4(f).

## Appendices

## **Appendix 1: Section 4(f) Programmatic Forms**





**Appendix 1b. Proposed KYTC Programmatic Form for Section 4(f) Temporary Use.**



**Proposed Programmatic**

Kentucky Transportation Cabinet  
 On behalf of Federal Highway Administration- Kentucky Division <sup>3</sup>  
 Office Determination of Section 4 (f) Applicability Involving

Temporary Use

IDENTIFICATION OF SECTION 4 (f) RESOURCE:

Name of Section 4 (f) land:  
 Name and Title of agency official  
 with jurisdiction over the 4 (f) land:

APPLICABILITY DETERMINATION:

1. Is the projects classified at or below a Level 3 CE?  YES  NO
  
2. Is there documentation that the officials having jurisdiction over the Section 4 (f) resource agree the temporary occupancy will: answer all questions below
  - A. be of short duration and less than the time needed for construction of the project;  YES  NO
  - B. not change the ownership or result in the retention of long-term or indefinite interests in the land for transportation purposes:  YES  NO
  - C. not result in any temporary or permanent adverse change to the activities, features, or attributes which are important to the purposes or functions that qualify the resource for protection under Section 4 (f); and  YES  NO
  - D. be fully restored to a condition at least as good as that which existed prior to the project:  YES  NO
  
3. Is the documentation, mapping, and description of the project adequate?  YES  NO

NOTE: Any "NO" response indicates that additional coordination is required (as a minimum).

SUMMARY AND DETERMINATION:

The temporary occupancy of Section 4 (f) land does not constitute a use within the meaning of Section 4 (f). This determination meets all of the applicability criteria set forth in the March 1, 2000 programmatic agreement between FHWA and the Ohio Department of Transportation.

KYTC will provide a copy of this evaluation to the officials having jurisdiction over the involved Section 4 (f) area and KYTC will provide a copy of this evaluation to other parties upon request.

Concurrence by official with Jurisdiction over the Section 4 (f) Resource  
 (optional- other documentation may be used)

Date

Division of Environmental Analysis Administrator

Date

**Appendix 1c. Proposed KYTC Programmatic Form for Section 4(f) Historic Sites.**



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

**Proposed Programmatic**

Kentucky Transportation Cabinet  
On behalf of Federal Highway Administration-Kentucky Division Office  
Nationwide Section 4(f) Evaluation for Minor Involvements with  
Historic Sites

County                      Route                      Section                      PID                      SJN

IDENTIFICATION OF SECTION 4(f) RESOURCE:

Description of the Historic Site:

APPLICABILITY DETERMINATION:

1. Is the proposed project designed to improve the operational characteristics, safety, and/or physical condition of the existing highway facility on essentially the same alignment?                      YES                      NO
2. Is the scope of the project is one of the following?                      YES                      NO
  - a. 4R (resurfacing, restoration, rehabilitation, and reconstruction)
  - b. Safety improvement (e.g. shoulder widening, correction of substandard curves & intersections)
  - c. Traffic operation improvement (e.g. signalization, channelization, turning or climbing lanes)
  - d. Bicycle and pedestrian facilities
  - e. Bridge replacement
  - f. Addition of lanes
3. Is the site located adjacent to the existing highway?                      YES                      NO
4. The project does not require removal or alteration of historic buildings structures or objects on the historic site. (If it does, the programmatic 4(f) does not apply).                      YES                      NO
5. The project does not require disturbance or removal or archeological resource that are important for preservation in place. (If it does, the programmatic 4(f) does not apply).                      YES                      NO
6. The impact on the site must be considered "minor."

Has the project been determined to fall within one of the below categories in accordance with Section 106? Indicate which applies):                      YES                      NO

No Historic Properties Affected	36 CFR 800.4 (d)(1)	
Finding of No Adverse Effect	36 CFR 800.5 (b)	

7. Does the project require the preparation of a CE?                      YES                      NO

\* This Section 4(f) evaluation must be forwarded to FHWA if the project is not a CE. (The programmatic 4(f) does not normally apply to EIS documents.)

ALTERNATIVES CONSIDERED/FINDINGS:

1. Has the Do Nothing Alternative been documented not to be feasible and prudent?                      YES                      NO  
Because (Indicate all that apply. A minimum of one to be applicable):
  - It would not correct existing or projected capacity deficiencies.
  - It would not correct existing safety hazards.
  - It would not correct existing deteriorated conditions and maintenance problems.
 AND (Indicate all that apply. A minimum of one to be applicable):
  - Not providing such correction would constitute a cost or community impact of extraordinary magnitude when compared with the proposed use of the Section 4(f) lands.
  - Not providing such correction would result in truly unusual or unique problems when compared with the proposed use of the Section 4(f) lands.

Cont.

**Appendix 1c. Cont. Proposed KYTC Programmatic Form for Section 4(f) Historic Sites.**



**Proposed Programmatic**

Kentucky Transportation Cabinet  
 On behalf of Federal Highway Administration - Kentucky Division Office  
 Nationwide Section 4(f) Evaluation for Minor Involvements with

**Historic Sites**

County	Route	Section	PID	SJN
		2. Have improvements which do not use the adjacent Section 4(f) lands been considered?	YES	NO
		Has it been determined that it is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques?	YES	NO
		Because such measures would result in (indicate all that apply. A minimum of one to be applicable):		
		<input type="checkbox"/> Substantial adverse community impacts to adjacent homes, businesses or other improved properties. <input type="checkbox"/> Substantially increased roadway or structure cost. <input type="checkbox"/> Unique engineering, traffic, maintenance, or safety problems. <input type="checkbox"/> Substantial adverse social, economic, or environmental impacts. <input type="checkbox"/> The project not meeting identified transportation needs.		
		AND		
		It has been determined that the impacts, cost, or problems would be truly unusually or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands.	YES	NO
		3. Have alternatives on new location been considered?	YES	NO
		Has it been determined that it is not feasible and prudent to avoid Section 4(f) lands by construction on new alignment?	YES	NO
		Because (Indicate all that apply. A minimum of one to be applicable):		
		<input type="checkbox"/> The new location would not solve existing transportation, safety or maintenance problems. <input type="checkbox"/> The new location would result in substantial adverse social, economic or environmental impacts. <input type="checkbox"/> The new location would substantially increase cost or engineering difficulties.		
		AND		
		It has been determined that such problems, impacts, costs or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed Use of Section 4(f) lands.	YES	NO

MEASURES TO MINIMIZE HARM:

1. Does the project include all possible planning to minimize harm?

(Discuss the Mitigation measures below):

2. Have the mitigation measures been successfully coordinated per 36 CFR 800? YES NO

Cont.

**Appendix 1c. Cont. Proposed KYTC Programmatic Form for Section 4(f) Historic Sites.**



**Proposed Programmatic**

**Kentucky Transportation Cabinet**  
 On behalf of Federal Highway Administration - Kentucky Division Office  
 Nationwide Section 4(f) Evaluation      Minor Involvements with

**Historic Sites**

County	Route	Section	PID	SJN
--------	-------	---------	-----	-----

COORDINATION:

Coordination with the U.S., Coast Guard is required for bridge replacement projects requiring individual bridge permits. Is there evidence coordination?      N/A      YES      NO

\*\* This Section 4(f) evaluation must be approved by FHWA if the project requires an individual bridge permit.

DETERMINATION OF APPLICABILITY:

This programmatic Section 4(f) evaluation must be coordinated with FHWA if a "No" response was indicated in reply to any of the above questions. (Except for the CE-III question, one "No" response indicates that either an individual. 4(f) document is required or a different alternative must be selected.)

SUMMARY AND APPROVAL:

The project meets all of the applicability criteria set forth in the Final Nationwide Section 4(f) Evaluation issued on August 19, 1987, and the March 1, 2001 programmatic agreement between FHWA and the Kentucky Transportation Cabinet. All alternatives set forth in the programmatic have been evaluated and the findings made are clearly applicable to this project. There are no feasible and prudent alternatives to the use of the Section 4(f) land.

The project includes all possible planning minimize harm, FHWA will assure that the measures to minimize harm are incorporated into the project through its oversight of the Federal-aid highway program. KTC will include the measures to minimize harm as environmental commitments in the applicable NEPA document for the project. KTC will also provide a copy of this evaluation to other parties upon request.

This project and its involvement with the Section 4(F) land, fall within and satisfy all of the criteria as set forth in the Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites, dated August 19 1987.

Name and Organization of Preparer      Date

Division of Environmental Analysis Administrator      Date      FHWA (if applicable)      Date

**Appendix 1d. Proposed KYTC Programmatic Form for Section 4(f) Historic Bridges.**



Proposed Programmatic

Kentucky Transportation Cabinet

On behalf of Federal Highway Administration – Kentucky Division Office  
 Nationwide Section 4(f) Evaluation for Projects that Necessitate  
 The Use of Historic Bridges



U.S. Department  
 of Transportation  
**Federal Highway  
 Administration**

County	Route	Section	PID	SJN
--------	-------	---------	-----	-----

IDENTIFICATION OF SECTION 4(f) RESOURCE:

Description of Historic Bridge:

APPLICABILITY DETERMINATION:

- |  |     |    |
|--|-----|----|
| 1. Will the bridge be replaced or rehabilitated with Federal funds?  | YES | NO |
| 2. Will the project require the use of a historic bridge structure which is on or is eligible for listing or listed on the National Register of Historic Places?               | YES | NO |
| 3. Has the bridge been determined NOT to be a National Historic Landmark?<br>The programmatic Section 4(f) for Historic Bridges does not apply to National Historic Landmarks. | YES | NO |
| 4. Has an Memorandum of Agreement been executed pursuant to Section 106 of NHPA?   | YES | NO |

(If "NO" the Programmatic Section 4(f) must be approved directly by FHWA, assuming FHWA verified SHPO and ACHP agreement.)

ALTERNATIVES CONSIDERED/FINDINGS:

- |  |     |    |
|--|-----|----|
| 1. Has the Do Nothing Alternative been determined to ignore the basic transportation need?<br>It is not feasible and prudent because (Indicate all that apply. A minimum of one to be applicable): | YES | NO |
|--|-----|----|

Maintenance- The do nothing 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.

Safety - The do nothing 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. Have investigations been conducted to construct a bridge on a new location or parallel to the old bridge (allowing for a one-way couplet)? | YES | NO |
|---|-----|----|

Has it been determined that for one or more of the following reasons, that building on new location without using the old bridge is not feasible and prudent?	YES	NO
---	-----	----

Because (Indicate all that apply. A minimum of one to be applicable):

Terrain- A new bridge at another site will result in extraordinary bridge and approach engineering and construction difficulty or cost or extraordinary disruption to establish traffic patterns.

Adverse Social, Economic, or Environmental Effects- A new bridge away from the present site would result in social, economic, or environmental impact of extraordinary magnitude.

Engineering and Economy- 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 minimum design standards or requirements of various perm its such as involved with navigation, pollution, and the environment.

Preservation of 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 bridge is beyond rehabilitation for transportation or an alternative use, when no responsible party can be located to maintain and preserve the bridge, or when a permitting authority requires removal or demolition of the old bridge.

Cont.

**Appendix 1d. Cont. Proposed KYTC Programmatic Form for Section 4(f) Historic Bridges.**



**Proposed Programmatic**

**Kentucky Transportation Cabinet**  
 On behalf of Federal Highway Administration-Kentucky Division Office  
 Nationwide Section 4 (f) Evaluation for Projects that Necessitate  
 The Use of Historic Bridge

County	Route	Section	PID	SJN	
					3. Have rehabilitation measures been studied? YES NO

Has it been determined that for one or more of the following reasons, that rehabilitation without affecting the historic integrity of the bridge is not feasible and prudent? YES NO

Because (indicate all that apply. A minimum of one to be applicable):

The bridge is so structurally deficient that it cannot be rehabilitated to meet minimum acceptable load requirements without affecting historic integrity of the bridge.

The bridge is so seriously deficient geometrically and cannot be widened to meet the minimum required capacity of the highway system on which it is located without affecting the historic integrity of the bridge.

**MEASURES TO MINIMIZE HARM:**

1. Does the project include all possible planning to minimize harm? YES NO
2. For bridges that are to be rehabilitated, the historic integrity of the bridge is preserved, to the greatest extent possible, consistent with unavoidable transportation needs, safety, and load requirements. YES NO
3. For bridges where their historic integrity is affected, FHWA ensures that, in accordance with the Historic American Engineering Record standards, or other suitable means developed through consultation, full adequate records are made of the bridge. NA YES NO
4. For bridges that are to be replaced, the exiting bridge is made available for an alternative use, provided a responsible party agrees to maintain and preserve the bridge. NA YES NO
5. Are the measures to minimize harm from the Section 106 Memorandum of Agreement incorporated into the project? YES NO

(If an MOA is not executed, the Programmatic Section 4(F) must be approved directly by FHWA, assuming FHWA verified SHPO and ACHP agreement.)

**COORDINATION:**

Is coordination with the U.S. Coast Guard required because the project requires an individual permit? YES NO  
 (This Section 40(f) evaluation must be approved by FHWA if the project requires an individual bridge permit).

**DETERMINATION OF APPLICABILITY:**

KYC may not determined the applicability of this programmatic Section 4(f) evaluation if one "NO" responses was indicated in reply to any of the above questions, or if the project is not a CE. FHWA may determine that the programmatic section 4(f) applies when another type of document is being prepared. FHWA may also make this determination when agreement has been reached but an MOA has not yet been executed or when an individual bridge permit is required.

Cont.

**Appendix 1d. Cont. Proposed KYTC Programmatic Form for Section 4(f) Historic Bridges.**



**Proposed Programmatic**

Kentucky Transportation Cabinet  
 On Behalf of Federal Highway Administration—Kentucky Division Office  
 Nationwide Section 4(f) Evaluation for Projects that Necessitate

The Use of Historic Bridges

County	Route	Section	PID	SJN
--------	-------	---------	-----	-----

SUMMARY AND APPROVAL:

The subject project meets all of the applicability criteria set forth in the Programmatic Section 4(f) Evaluation issued on August 22, 1983 and the March 1, 2001 programmatic agreement between FHWA and the Ohio Department of Transportation. All alternatives set forth in the subject programmatic have been fully and evaluated and the finding made are clearly applicable to this project. There are no feasible and prudent alternatives to the use of the historic bridge,

The project includes all possible planning to minimize harm. FHWA will assure that the measures to minimize harm are incorporated into the project through its oversight of the federal-aid highway program. KTC will include the measures to minimize harm as environmental commitments in the applicable NEPA document for the project. KTC will also provide a copy of this evaluation to other parties upon request.

This project and its use of the historic bridge, fall within and satisfy all of the criteria as set forth in the Department of Transportation, Federal Highway Administration - Programmatic Section 4(f) Evaluation and Approval for FHWA A project that Necessitate the Use of Historic Bridges, dated August 22 1983.

Name and Organization of Preparer

Date

Division of Environmental Analysis Administrator Date

FHWA (it applicable)

Date



**Appendix 1e. Proposed KYTC Programmatic Form for Section 4(f) Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges.**



**Proposed Programmatic**

Kentucky Transportation Cabinet

**On Behalf of Federal Highway Administration - Kentucky Division Office  
Nationwide Section 4(f) Evaluation for Minor involvements with**

Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges

County                      Route                      Section                      PID                      SJN

**IDENTIFICATION OF SECTION 4(f) RESOURCE:**

Name of Section 4(f) land:  
Name and Title of agency official  
with jurisdiction over the 4(f) land:

**APPLICABILITY DETERMINATION:**

1. Is the proposed project designed to improve the operational characteristics, safety, and/or physical condition of the existing highway facility on essentially the same alignment?                      YES      NO

2. Is the scope of the project is one of the following?
- a. 4R (resurfacing, restoration, rehabilitation, and construction)
  - b. Safety improvement (e.g. shoulder widening, correction of substandard curves& intersections)
  - c. Traffic operation improvement (e.g. signalization, channelization, turning or climbing lanes)
  - d. Bicycle and pedestrian facilities.
  - e. Bridge replacement
  - f. Addition of lanes

3. Is the land to be affected publicly owned?                      YES      NO

Is the land located adjacent to the existing highway?                      YES      NO

4. The amount and location of the land to be used shall not impair the use of the remaining Section 4(f) land, in whole or in part, for its intended purpose.

Has the official having jurisdiction over the Section 4(f) land concurred in the above statement in writing?                      YES      NO

Does the documentation address the size, use, and/or other relevant characteristics?                      YES      NO

5. The total amount of land to be acquired does not exceed the criteria:  
The total site of the Section 4(f) site is: \_\_\_\_\_ hectare \_\_\_\_\_ acre  
The amount to be permanently acquired. is: \_\_\_\_\_ hectare \_\_\_\_\_ acre  
Does the size of take fall within one of the below categories? (Indicate which applies):                      YES      NO

<4.047 hectare (10 acre)	10 percent of site	
4.047 to 40.47 hectare (10 to 100 acre)	0.4047 hectare (1 acre)	
>40.47 hectare(>100 acre)	1 percent of site	

6. The proximity impacts of the project on the remaining Section 4(f) land shall not impair the use of such land lot its intended purpose.

Has the official having jurisdiction over the Section 4(f) land concurred in the above statement in writing?                      YES      NO

Does the documentation relative to this issue address noise, air and water pollution, wildlife and habitat effects, aesthetic values, and/or other impacts deemed relevant?                      YES      NO

**Appendix 1e. Cont. Proposed KYTC Programmatic Form for Section 4(f) Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges.**



**Proposed Programmatic**

Kentucky Transportation Cabinet  
 On behalf of Federal Highway Administration-Kentucky Division Office  
 Nationwide Section 4(f) Evaluation for Minor Involvements with

Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges

County	Route	Section	PID	SJN
7.	Has the official having jurisdiction over the Section 4(f) land agreed in writing with the assessment of impacts and proposed mitigation?			. YES . NO
8.	Does the project record document whether or not Federal funds have been used in the Acquisition of, or the for any improvements to the Section 4(f) site?			. YES . NO
	If Federal funds have been used in the purchase of, or for any improvements to the Section 4(f) site, has the appropriate Federal agency been coordinated with?			. N/A . YES . NO
	Is the Federal agency in agreement with the land conversion or transfer?			. N/A . YES . NO
9.	Does the project require the preparation of a CE			. YES . NO
•	This Section 4(f) evaluation must be forwarded to FHWA if a Federal Encumbrance is present or if the project is not a CE. (The programmatic 4(f) does not normally apply to EIS documents.)			

ALTERNATIVES CONSIDERED/DINDINGS:

1.	Has the Do Nothing Alternative been documented not to be feasible and prudent? Because (Indicate all that apply. A minimum of one to be applicable):			. YES . NO
	<input type="checkbox"/> It would not correct existing or projected capacity deficiencies. <input type="checkbox"/> It would not correct existing safety hazards. <input type="checkbox"/> It would not correct existing deteriorated conditions and maintenance problems. AND (Indicate all that apply. A minimum of one to be applicable): <input type="checkbox"/> Not providing such correction would constitute a cost or community impact of extraordinary magnitude when compared with the proposed use of the Section 4(f) lands. <input type="checkbox"/> Not providing such correction would result in truly unusual or unique problems when compared with the proposed use of the Section 4(f) lands.			
2.	Have improvements which do not use the adjacent Section 4(f) lands been considered?			. YES . NO
	Has it been determined that it is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques?			. YES . NO
	Because such measures would result in (Indicate all that apply. A minimum of one to be applicable):			
	<input type="checkbox"/> Substantial adverse community impacts to adjacent homes, businesses or other improved properties. <input type="checkbox"/> Substantially increased roadway or structure cost. <input type="checkbox"/> Unique engineering, traffic, maintenance, or safety problems. <input type="checkbox"/> Substantial adverse social, economic, or environmental impacts. <input type="checkbox"/> The project not meeting identified transportation needs.			
	AND			
	It has been determined that the impacts, cost or problems would be truly unusual or unique, or Of extraordinary magnitude when compared with the proposed use of Section 4(f) lands.			. YES . NO

**Appendix 1e. Cont. Proposed KYTC Programmatic Form for Section 4(f) Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges.**



U.S. Department of Transportation  
**Federal Highway Administration**

**Proposed Programmatic**

Kentucky Transportation Cabinet  
On Behalf of Federal Highway Administration – Kentucky Division Office  
Nationwide Section 4(f) Evaluation for Minor Involvements with

Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges

County	Route	Section	PID	SJN
--------	-------	---------	-----	-----

3. Have alternatives on new location been considered?  YES  NO

Has it been determined that it is not leasible and prudent to avoid Section 4(f) lands by construction on new alignment?  YES  NO

Because (Indicate all that apply. A minimum of one to be applicable):

- The new location would not solve existing transportation, safety or maintenance problems.
- The new location would result in substantial adverse social, economic or environmental impacts.
- The new location would substantially increase cost or engineering difficulties.

AND

It has been determined that such problems, impacts, costs or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands.  YES  NO

MEASURES TO MINIMIZE HARM:

1. Does the project include all possible planning to minimize harm?  YES  NO

Mitigation measures include one or more of the following:  YES  NO  
(Indicate all that apply. A minimum of one to be applicable):

- Replacement of lands used with lands of reasonably equivalent usefulness and location, and at least comparable value.
- Replacement of facilities impacted by the project including sidewalks, paths, benches, lights, trees, & other facilities.
- Restoration and landscaping of disturbed areas.
- Incorporation of design features; and habitat features; where necessary to reduce or minimize impacts.
- Payment of the fair market value of the land and implements taken or improvements to the remaining section 4(f) site equal to the fail market value of the land and implements taken.
- Other agreed to measures (please include):

COORDINATION:

Coordination with the U.S. Coast Guard is required for bridge replacement projects requiring individual bridge permits. Is there evidence of coordination? \*\*  N/A  YES  NO

\*\*This Section 4(f) evaluation must be approved by FHWA if the project requires an individual bridge permit.

DETERMINATION OF APPLICABILITY:

This programmatic Section f(f) evaluation must be coordinated with FHWA if a “No” response was indicated in reply to any of the above questions. Except for the CE question, one “No” response indicates that either an individual 4(f) document is required or a different alternative must be selected.

**Appendix 1e. Cont. Proposed KYTC Programmatic Form for Section 4(f) Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges.**



**Proposed Programmatic**

Kentucky Transportation Cabinet

On behalf of Federal Highway Administration-Kentucky Division Office  
 Nationwide Section 4(f) Evaluation for Minor Involvements with

Public Parks, Recreation Lands and Wildlife and Waterfowl Refuges

County	Route	Section	PID	SJN
--------	-------	---------	-----	-----

SUMMARY AND APPROVAL:

The project meets all of the applicability criteria set forth in the Final Nationwide Section 4(f) Evaluation issued On December 23, 1986, and the March 1, 2001 programmatic agreement between FHWA and the Kentucky Transportation Cabinet. All alternatives set forth in the programmatic have been evaluated and the findings made are clearly applicable to this project. There are no feasible and prudent alternatives to the use of the Section 4(f) land.

The project includes all possible planning to minimize harm. FHWA will assure that the measures to minimize harm are incorporated into the project through its oversight of the federal-aid highway program. KTC will include the measures to minimize harm as environmental commitments in the applicable NEPA document for the project. KTC will also provide a copy of this evaluation to the officials having jurisdiction over the involved Section 4(f) area and KTC will provide a copy of this evaluation to other parties upon request.

This project and its involvement with the Section 4(f) land, fall within and satisfy all of the criteria as set forth In the Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges, dated December 23, 1986.

Name and Organization of Preparer

Date

Division of Environmental Analysis Administrator

Date

FHWA (if applicable)

Date

## Appendix 2: Section 4(f) Documentation

### Information required for Section 4(f) documentation

The following information, *as applicable to the individual project*, should be included in all types of 4(f) documents. Additional information may be requested by the FHWA.

- USGS mapping showing the location of the project.
- A detailed map or drawing of the project of sufficient scale to allow the reviewer to identify the relationship of the project to the 4(f) property. This should include the established boundaries of parks, recreation areas, refuges and the location of historic properties.
- The size of the 4(f) property.
- The ownership of the 4(f) property.
- Type of protected property (recreation, park, refuge, historic).
- Description and location of all existing or planned recreational facilities located on the property.
- Types of recreational activities the property is used for.
- How is the facility accessed? Who uses it.
- Relationships to other similarly used properties in the area.
- Type of ownership (lease agreement, easement, etc.).
- Any unusual features of the property that might make it more or less valuable as a recreational facility.
- A statement of significance (if applicable) from the officials with jurisdiction over the property.
- For temporary occupancy of 4(f) land, a letter from the officials with jurisdiction concurring with the conditions in the discussion of temporary occupancy easements.
- For transportation facilities on or eligible for the National Register of Historic Places, a finding of no adverse effect coordinated with the SHPO/ACHP in accordance with 36 CFR 800.

Additional information may be requested by the FHWA.

### Programmatic and Individual Section 4(f) Evaluations must include:

- Project description
- Purpose and Need
- Description of the 4(f) resource
- Effects of the proposed project on the 4(f) resource
- Alternatives considered
- Findings of why the alternatives to the project are not feasible and prudent
- Measures to minimize harm
- Summary

## Appendix 3: Annotated List of Section 4(f) Cases with Key Quotations from Rulings

### 1. **Citizens to Preserve Overton Park, Inc. v. Volpe** (401 U.S. 402 (1971))

March 1971, the Supreme Court handed down its only ruling on 4(f): Citizens to Preserve Overton Park, Inc., et al v. Volpe, Secretary of Transportation, et al (5). The case arose from a decision to build an interstate expressway through Overton Park, a 342-acre park near the center of Memphis. The proposed route would have bisected the park, taking 26 acres of the park and separating a portion that contained the Memphis zoo from the section of the park that contained a golf course, an art academy, 170 acres of forest, and several recreational areas. The Supreme Court blocked the decision to build, ruling that the Department of Transportation had failed to show that there was no prudent alternative.

The Court explicitly rejected the argument that because the alternative to building in the park would be more expensive than using parkland, it was imprudent to circumvent the park. The Court reasoned that routing through a park would usually minimize the cost of acquisition. Consequently, Congress must have intended that 4(f) should provide greater protection for parkland than is afforded by subordinating it to the results of the standard cost-benefit analyses.

In Overton Park, the Court articulated the following standard for the taking of park land—4(f) prohibits approving a route through a park, except where alternative routes are not feasible and prudent, because: 1) they present unique problems or 2) the cost of community disruption would reach extraordinary magnitudes. What is more, the *no prudent and feasible alternative test* must be applied even when the local government prefers the park route, as was the case in Memphis.

### 2. **Finish Allatoona’s Interstate Right, Inc. v. Volpe** (355 F.Supp. 933 (1973))

This case was brought by a group that wanted to stop construction of the last segment of a portion of I-75 across a publicly owned lake and its surrounding parklands.

The court ruled that Secretary’s approval of the route across portion of lake was not an abuse of discretion, in view of the record of evidence indicating that a careful study was made with regard to construction of the highway in this area. The court said that both federal and state officials, *“considered relevant factors applicable to several alternative routes and, as a result of study, Secretary determined that feasible and prudent alternatives to using publicly owned land did not exist and Secretary determined that when suggested design measures were employed all possible attempts would have been made to minimize harm to the environment.”*

### **3. Louisiana Environmental Society v. Coleman (537 F. 2d 79 (1976))**

This case concerned an attempt to bridge Cross Lake, a recreational area. The appeals court ruled that 4f had not been complied with. Specifically, there was a failure to look at all routes to ensure the one selected minimized harm. This case offered the following procedural method to follow:

*“This requires a simple balancing process which would total the harm to the recreational area of each alternate route and select the route which does the least total harm. The secretary never articulated any such balancing of the relative harms to the lake from the various routes which went through different portions of the recreational area.”*

*“...any park use for federal highway project, regardless of its degree, invokes statute providing that no significant recreational area be used for federal highway project....”*

*“Alternate highway route through recreational area may be rejected because it does not minimize harm only for reasons relevant to the quantum of harm which will be done to the area; if it does minimize harm, a route may be rejected only for truly unusual factor other than its effect on the recreational area.”*

*“Displacements required by alternate routes for interstate bypass through recreational area, involving 120 single dwellings, seven businesses, one church and one lodge by one route, and 377 families, 1,508 persons, 21 businesses, and two churches by another route, could not be found to be an extraordinary magnitude, and unless the recreational area or unless other considerations were enunciated by Secretary of Department of Transportation which would show imprudence, Sec. could not reasonably give his approval to the route selected.”*

### **4. Druid Hills Civic Association v FHWA (722 Federal Reporter, 2cd Series 1985)**

This case was brought to enjoin construction of Presidential Parkway in Atlanta. The court remanded the case for further study of proposed routes, asserting that the law requires sufficient documentation to conclude that the route chosen is the one that minimizes harm to protected property. The Secretary had not compared the impacts of the various alternatives to see which one minimized harm.

The case laid out some important considerations.

*“It was reasonable for Secretary of Transportation to find with respect to construction of proposed Presidential Parkway that there was no alternative to use of particular properties since only alternate not using those properties failed to meet transportation needs of project and adversely impacted air quality in project area.”* ”The

*Marbut I alternative would probably violate National Ambient Air Quality Standards”*

*“Decision of Secretary of Transportation to approve construction because proposed Pres. Parkway would result in less harm to parks and historic sites than suggested alternatives which would have used more protected land and would have required use of certain contributing structures was based upon a consideration of relevant factors and, absent a clear error of judgment, was neither arbitrary, capricious, nor an abuse of discretion.”*

*“The only relevant factor in making a determination whether an alternative route minimizes harm is the quantum of harm to the park or historic site caused by the alternative.”*

### **5. Hickory Neighborhood Defense League v. Skinner (910 F.2d 159 (4<sup>th</sup> Cir. 1990))**

This case concerned the taking of an historic site property in Hickory, NC. The project was a three block widening in an historic district.

The case had a long history. *“The United States District Court of the Western District of North Carolina, Charlotte Division, 703 F.Supp. 1208, denied corporation’s (plaintiff’s) motion for injunctive relief and dismissed action. Corporation appealed. The court of Appeals, 893 F.2cd 58, affirmed in part, vacated in part, and remanded. On remand, the District Court, Robert D. Potter, chief Judge, 731 F. Supp. 207, denied corporation’s motions for hearing and injunction.”*

The Fourth Circuit Court of Appeals approved the taking of protected property. It articulated the principle that a number of problems could be cumulated into a problem that could be called unique. It also stated that a no-build alternative that fails to solve a problem may be rejected.

*“Secretary must have strong or powerful reason to approve taking of protected property.”*

*“Even though secretary’s evaluation did not expressly indicate finding of unique problems; Secretary conducted several public hearings, circulated draft environmental impact statement to several agencies, prepared mitigation measures, and engaged in engineering studies, traffic studies and traffic projections.” “Fact that secretary of transportation did not use terms “unique” and “extraordinary” when determining whether to approve highway project that would include taking of historic site property did not compel finding that secretary did not comply with act.”*

*“Secretary believed that it was not necessary to show that any single factor presented unique problems, but instead that cumulation of problems could be sufficient reason to take historic property, but only if it created truly unique problems.”*



The court also identified some of the problems that could be considered. *“Secretary’s evaluation noted that use of alternatives would limit access to two hospitals, alternatives would require two streets versus one, alternatives draw major portion of highway traffic through stable and quiet residential neighborhood rather than continuing to use existing major artery that was heavily traveled by commercial traffic, and two 90 degree turns would be required to reach existing highway.”*

*“Secretary of Transportation properly rejected as imprudent the construction of new four lane highway as alternative; Secretary found that neither alternative would provide access to areas adjacent to existing highway and would not significantly reduce flow of traffic.”*

No-build option was rejected as alternative, because, *“... it would not have alleviated traffic problems associated with existing highway.”*

*“Alternatives which will not solve or reduce existing traffic problems may properly be rejected as not prudent.”*

**6. Eagle Foundation, Inc. v. Dole (1987)**  
**(813 F. 2d 798 (7<sup>th</sup> Cir. 1987))**

This case concerned a four lane highway across the Illinois River. It went through a wildlife sanctuary and across an historic farm. The court allowed the taking of 4f land and appears to have created a standard for the “no prudent alternative” that allows consideration of many factors, none of which present unique obstacles when taken alone. Thus, this case also expressed acceptance of the cumulation of problems.

*“Cumulation of small problems for each alternative route may add up to sufficient reason to build highway through land covered by Department of Transportation Act” “It would be imprudent to build around the park if...the aggregate injuries caused by doing so exceeded those caused by reducing the size of the park.”*

*“All technically feasible alternatives to Napoleon hollow are imprudent—some would be unsafe because of sharp turns, all would be longer and more expensive to build, and most alternatives entail blasting through the bluff of the Illinois River, which would create an ugly “concrete canyon” for the highway and lead to the erosion of the loess soil remaining on the bluff nearby. Some of the other alignments would endanger roosting sites for eagles and expose other wildlife to injury.”*

The Court held that there must be a strong or powerful reason to use section 4(f) land. *“The reasons for using the protected land must be good ones, pressing ones, well thought out.”*

They defined prudent as follows: *“A “prudent judgment” by an administrative agency is one that takes into account everything important that matters.”*

*“Obligation....is to look at enough alternatives to make possible informed judgment about whether one alternative is likely to be feasible and prudent.”* The state highway agency looked at 10 routes and the conservation group did not offer one to show that a better alternative existed.

The incremental costs associated with an alternative are sufficient to render it imprudent. *“Incremental costs and benefits of decision under study, rather than the total costs of the entire highway, were the sole concern.”*

*“Route using the protected land was the least expensive. Impacts of alternatives on farmland were an allowable factor in decision. When attempting to minimize, impact on historic and wildlife refuge can be considered in aggregate.”*

*“Overton Park was being emphatic, not substituting unique for prudent in the text of 4f.”* Thus cost and other factors enter the decision concerning what is and is not prudent.

### **7. Ringsred v. Dole (828 F. 2cd 700 (8<sup>th</sup> Cir. 1987))**

Case involved an extension of a freeway through parkland property in Duluth, MN.

This case reaffirmed that an alternative must meet the purpose and need for a project. The Secretary of Transportation could reasonably reject no-build alternative as not prudent because it failed to fulfill the need for a highway. *“Alternative that does not effectuate project’s purpose is, by definition, unreasonable and Secretary need not evaluate it in detail.”*

The Court also ruled that impacts from constructive use could also be the basis for rejecting an alternative *“Harmful effects of increased noise levels, air pollution, decreased accessibility, and negative visual impact of terminating freeway at site near park was “use of Park” as much as was proposed extension of freeway through part of parkland, and thus Secretary’s decision to exclude from consideration alternative site that had equal or greater negative impact on aesthetic value of land was not arbitrary or capricious or abuse of discretion.”*

There were mitigation measures that increased amount of parkland. *“Although construction of the freeway will require the use of .2 acres of the 11.6 acre park, MINDOT will acquire an additional 2.3 acres of useable parkland from private owners, thus increasing the size of the park by 2.1 acres.”*

### **8. Conservation Society of Southern Vermont v. Secretary of Transportation (443 F. Supp. 1320 (1978))**

The court authorized a road project, which impacted a protected wilderness area.

They concluded that there was acceptable mitigation of a constructive use. The project was placed 200-300 feet away from a wilderness area to reduce noise impacts.

They rejected the no-build alternate as *“unacceptable because it fails to provide necessary, safe and efficient traffic service.”* The present road was too narrow, it had too many accidents, and the traffic volumes were projected to increase,

*“It is not possible to improve the existing road. Possible improvements would not meet state standards for width, disruption during construction; it would have to remain a nonlimited access road.”* (the proposed route is limited access). *“It would require acquiring land for turn lanes, it might not accommodate projected traffic; it would impact environmental resources and historic properties.”*

Other alternates would not sufficiently reduce traffic on the existing road.

### **9. Stop H-3 Association v. Dole (740 F.2cd 1442 (1984))**

This case involves a proposed highway that would impact a park in Hawaii. Ho’omaluhia Park is a 450-acre park on Oahu. It is the most significant non-ocean park on Oahu. The district court ruling was reversed by the appeals court, which concluded that the record did not establish that a no-build alternative had to be rejected as imprudent.

They based their decision on this aspect of the law: *“Parklands may be “used” for highway purposes only if there are truly unusual factors present in case, feasible alternative routes involving uniquely difficult problems, or if cost or community disruption resulting from alternative routes reach extraordinary magnitudes.”*

*“Although dislocation of one church, four businesses, and 31 residences was a community disruption of some magnitude, dislocation was not disruptive of extraordinary magnitude, which would have [allowed taking parkland.]...Increased cost of \$42 million was not a cost of extraordinary magnitude. ....Increased noise, air quality and visual impact to residences in general vicinity of proposed highway project did not represent disruption of extraordinary magnitude.”*

*“Mere fact that a “need” for a highway has been “established” does not prove that to not build the highway would be “imprudent”.*

The court concluded that there was not sufficient evidence to conclude that the alternatives were unsafe. *“We have conducted just this sort of review, and we find that the record before the secretary could not have provided a sufficient basis for him to conclude reasonably that the safety considerations of the Makai realignment were “truly unusual factors”, that they reflected “unique problems”, or that they represented cost or community disruption reaching ‘extraordinary magnitudes.’”*

Regarding the no-build option, the court noted decreases in projected traffic volumes, as well as sufficient capacity on existing roads. Plus they found that the Secretary did not look at the impact on congestion of banning trucks during peak traffic hours.

**10. Citizen Advocates for Responsible Expansion v. Dole  
(770 F.2d. 423(1985))**

This case concerns the failure to assess the environmental impact of a constructive use of a park. The project in question was an expansion of an overhead highway that would have moved it from 45 feet to within nine feet of a park—the Water Gardens, which is used for outdoor concerts by the Fort Worth Symphony. The park is located downtown and has only 4.3 acres.

The Appeals Court ruled that the District Court erred when it concluded that the proposed expansion of four-lane section of 30-foot elevated east-west highway called the “Overhead” would not “use” environmentally-sensitive property.

The problem was that there was no environmental impact evaluation of the Overhead expansion. That is, the 4(f) report was deficient because it gave no consideration to the effects that the expanded highway would have on the Water Gardens and the public’s ability to hear the concerts.

The judgment of the District Court was reversed and remanded for further review of the environmental impact on the park.

**11. Brooks v. Coleman  
(518 F.2d 17 (1975))**

This case concerns an appeal of a decision to build a highway in parkland. The court affirmed the original ruling that a viaduct was not a reasonable and feasible alternative and therefore a taking of protected property was permissible.

The following quote from the decision lays out the court’s reasons for rejecting the appeal and allowing construction to proceed.

*“As a basis for concluding that the Secretary could reasonably have believed that there were no feasible alternatives, the court identified several “truly unusual factors” and “unique problems” that would result from use of the German plan (the viaduct alternative): the additional impact created by the viaduct alternative on the Asahel Curtis picnic area and nature trail (also a parkland protected under the Department of Transportation Act), the absence of examples of successful use of the German method in the United States, the intensified problems of icing and snow removal expected to result under the German plan, and the unusual safety problems that would be presented during construction of the overhanging viaduct structure. Although appellants dispute many of these points, we find no grounds to disturb the factual conclusions drawn by the trial*

*court or its resulting evaluation of the Secretary's 4f determination."*

**12. Sierra Club v. USDOT  
(664 F. Supp. 1324 (1987))**

This case involved a proposed bypass route that was said to constructively use parkland, because it changed the view of the surrounding mountains. The constructive use concerned a change in aesthetics.

The Court granted an injunction, while a 4(f) statement regarding the constructive use was prepared. *"In this case, the preliminary injunction would simply prohibit the defendants from pursuing the bypass project until a section 4(f) Statement is prepared. Once that is accomplished, the project may be permitted to proceed if there is no feasible and prudent alternative..."*

The court argued that costs of delay do not constitute *"rare and unusual circumstances"* justifying denial of injunctive relief when an environmental statute has been violated.

The court also ruled that the park and highway were not jointly planned. The park came first. *"McNee Ranch State Park was designated as a park well before the land was acquired for transportation purposes."* Therefore 4(f) applied to the proposed project.

**13. National Wildlife Federation v Lewis  
(519 F. Supp. 523 (1981))**

This case concerned a decision to build a connector between two interstates in Connecticut. The 4f properties in question were two parks: Veterans Memorial Park, which would lose 27 acres or 53.6 percent of its area (including public facilities and nature trails that would be lost) and Laurel Lake Marsh, which is a marsh without public facilities. The connector would take 9.6 acres of its 116 total acres.

The Appeals Court concluded that use of protected property was permissible, because the agency followed correct procedures and included attention to problems. The following quotes present their argument.

*"When a court reviews agency action under NEPA and the DOT Act, its scrutiny of the facts is to be searching, but its standard of review is narrow...The issue is not whether, in the first instance, the court would have reached the same decision as the agency. The issue is whether, in reaching its decision, the agency followed the procedures imposed by law."*

*"Final environmental impact statement for proposed connecting highway...adequately considered possible ways of avoiding use of parkland so as to comply with sections of highway Act and Department of Transportation Act where respective agencies considered and rejected as unacceptable one option's alternatives"*

*which would have resulted in loss of about 60 single-family homes in surrounding neighborhood or would have created driving hazards for cars traveling at expressway speeds, rejected second option which would have increased construction and maintenance costs and created problems maintaining highway safety, considered six options other than taking property from local marsh, and represented that state and local officials would undertake measures to develop marsh property to increase public access and recreational opportunities.”*

Regarding mitigation, the Court cited the fact that local officials preferred taking the parkland to the options. But officials asked for and got a parcel of land to replace the Veterans Memorial land taken. They did the same with the Marsh and they improved access to it, as well as bike and hiking trails along its edge.

#### **14. Communities Inc. v. Busey, Skinner & Regional Airport of Louisville (956 F.2d 619 (6<sup>th</sup> Cir. 1992))**

This case involved an allegation that the expansion of the Louisville airport would have constituted a constructive use of nearby protected historic properties and not enough was done to minimize adverse impacts.

The Court allowed construction to proceed and offered the following justification:

*“Petitioners have failed to demonstrate how mere noise may “use” the primary 4f resources involved in this case. ...It was not arbitrary or capricious for the FAA to determine that an increase in noise levels would not affect the relevant characteristics of Old Louisville. ...although courts have recognized that noise alone may “use” a park and that noise combined with air pollution and elimination of view, resulting from the close location of a proposed highway, may use historic properties, the rationale for these cases does not provide support for petitioners here...Furthermore, petitioners have failed to propose an alternative that would not use 4(f) resources. Other circuits have held that an alternative route that causes substantially equal damage to 4(f) property is not a cognizable alternative within the meaning of 4(f). We agree with the D.C. Circuit that the burden of suggesting a cognizable alternative is properly placed on petitioners.”*

*“Federal Aviation Administration, in approving airport improvement plan, was not required to go beyond cumulative noise impact methodology in determining noise contour, despite contention that single event noise analysis revealed significant noise problems for areas outside contour. FAA was entitled to proceed so long as it undertook measures to mitigate impact on section 4f resources given that alternative which did not use section 4(f) resources was not suggested.”*

*“Lacking a feasible alternative under 4(f)1, the FAA is entitled to proceed, as long as it undertakes measures to mitigate the impact on 4(f) resources under 4(f)2.”* The latter refers to the numbered conditions under which land can be taken.

**15. Committee to Preserve Boomer Lake Park v DOT  
(4 F.3d 1543 (10<sup>th</sup> Cir. 1993))**

This case involved the construction of a four lane road to replace a two lane in a municipally owned park in Stillwater Oklahoma. The new road would go over a lake in the park. The park and lake have 347 acres. The new alignment which is straighter and safer than the existing one takes 3.3 acres of land and 2.4 acres of lake. It is an elevated causeway and bridge.

The Court delivered this understanding of the word prudent in regard to the phrase “no prudent and feasible alternative”: “*The term prudent....involves a common sense balancing of practical concerns.*”

It then gave this rationale for allowing a taking of protected property.

*“...alternatives to building federally funded highway through parkland involved unique problems that rendered them imprudent, where section of road through parkland was vital in linking area, alternative route avoiding park would have imposed higher user costs, caused more traffic congestion, had substandard curves raising safety concerns, required more intersection modifications and relocations of businesses and residences, and imposed higher construction cost.”*

*“Inability of alternative highway route to accommodate future traffic volume or otherwise fulfill purpose of project is justification for rejecting that alternative in favor of building federally funded highway through parkland.”*

*“Safety and cost concerns are valid considerations in rejecting alternative highway route...”*

*“Courts are not in a position to decide propriety of competing methodologies in transportation analysis context, but instead should determine simply whether challenged method used in determining whether to provide federal funding for highway to be constructed through parkland had rational basis and took into consideration all relevant factors.”*

**16. Concerned Citizens Alliance v. Slater  
(176 F.3d 686 (3<sup>rd</sup> Cir. 1999))**

This case concerned a bridge replacement that impacted an historic district. The plaintiffs argued that the alternative selected by the Secretary (the FSU alternative) was not the one with the least impact on the historic district.

The Court ruled against the plaintiffs and let the project proceed. It concluded that, “*the administrative record supports FHWA’s finding that the FSU alternative will minimize harm to the Danville Historic District.*”

*“In minimizing impact of replacement of bridge leading to street in historic district, it was not arbitrary to reject an alternative that would both replace the bridge in its present alignment and build a bypass around town, instead of chosen alternative of routing traffic to a different street in the district, partly in a cut and cover underpass, in view of low predicted use of the bypass, the community and environmental impact of building an additional 5500 feet of road, and the enormously increased costs.”*

It also described the role of the Advisory Council on Historic Preservation in 4(f) situations thusly: *“The total response required by [DOT] to the views of the Advisory Council on Historic Preservation is not great: while the Advisory Council on Historic Preservation’s recommendations do not control agency decision making, the relevant agency must take the ACHP’s comments into account when balancing alternatives, and must demonstrate that it gave the ACHP’s conclusion genuine attention, but need not agree with the ACHP’s determination that a given alternative is the least harm alternative.”*

*“Indeed, even the ACHP’s own regulations (C.F.R. Section 60.2(a)) state that after having given the ACHP an opportunity to comment, “the federal agency may adopt any course of action it believes is appropriate. While Advisory Council comments must be taken into account and integrated into the decision-making process, program decisions rest with the agency implementing the undertaking.”*

**17. Citizens to Preserve Wilderness Park v. Adams  
(543 F. Supp. 21 (1981))**

A lawsuit was brought challenging the approval of a highway project that took part of a park. The court ruled that the project could proceed.

The court held that, *“plaintiffs had not carried their burden of showing that environmental impact statement did not sufficiently describe and develop information about all reasonable alternatives or to enable the Secretary of Transportation to make a finding as to feasible and prudent alternatives to the use of park land; and decision of Secretary of Transportation approving project taking part of park and specifically finding that there were no prudent and feasible alternatives to taking of land from park was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.”*

*“The Secretary’s finding that the Westline is not a feasible and prudent alternative is entitled to a presumption of regularity. The administrative record before him carried sufficient data to support the decision he made.”*

**18. Nashvillians Against I-440 v. Lewis  
(524 F. Supp. 962 (1981))**

A lawsuit was brought to stop construction of an interstate highway through the city of Nashville seeking to delay or terminate the project. The route would impact an historic parkway. The judge dismissed the plaintiff’s complaint.



*“Secretary of Transportation did not act arbitrarily or capriciously in finding that no feasible and prudent alternative existed to use of land from an intersecting historic parkway.” “Secretary’s decision is entitled to presumption of regularity.”*

*“[W]ithout I-440 critical levels of traffic congestion will result on the major street network within the I-440 corridor and, in particular, on the inner loop.”*

He held that, *“mistakes in environmental impact statement were not departures from standards of reasonableness and practicality such as would require delay or abandonment of entire project.”*

**19. Lake Hefner Open Space Alliance v. Dole**  
**(871 F.2d 943 (10<sup>th</sup> Cir. 1989))**

The case involved the decision to use parkland to build a highway in Oklahoma City, OK. The judge held, *“defendants complied with requirement of statute governing preservation of parklands that parkland not be used unless there is no feasible or prudent alternative and decision of Federal Highway Administration that “no build” or “do nothing” alternative to highway project was not arbitrary, capricious, or abuse of discretion.”*

*“In this case, the no build alternative was rejected because the existing streets would not be able to accommodate future traffic volumes.”*

**20. Conservation Law Foundation v. Federal Highway Administration**  
**(24 F. 3d 1465 (1<sup>st</sup> Cir. 1994))**

Environmental groups brought an action to enjoin construction of four lane, divided highway across an island, protected by 4(f). They argued that the environmental analysis was not complete because one alternative was not considered. The Court ruled that the project could proceed with the following argument.

*“Plaintiffs’ contention does not justify a finding of an abuse of discretion or manifest error of law. Technical discrepancies may have existed between alternatives actually considered and an alternative, which, if considered, may have been found to be more practicable. The two alternatives considered, however, were somewhat similar [to the unconsidered alternative] in that they both contained an element of major concern to the Corps—an at-grade intersection which could lead to traffic congestion and safety problems. This similarity is sufficient to render the Corps’ substantive analysis acceptable.”*

**21. Coalition of Sensible Transportation Inc. v. Dole**  
**(826 F. 2d 60 (D.C. Cir. 1987))**

The case involved a proposed widening of an interstate highway that constituted a constructive use of adjacent parkland by leading to the removal of 50-year-old oak trees. The court allowed the widening to proceed.

*“Administrative determination that there was no feasible and prudent alternative to use of parkland was not an abuse of discretion.”*

*“Rejection of retaining walls alternative as imprudent was justified by aesthetic considerations.”*

*“In essence, the officials charged with the task concluded that the “use” alternative would do less harm to park values than would nominal “non-use”. Bearing in mind the concern for preservation of parklands at the core of 4(f), we think the facts here qualify as “truly unusual.”*

*“Section 4(f)’s requirement that harm be minimized does not constrain the Secretary’s choice between two plans causing substantially equal damage to 4(f) values.”*

## **22. Maryland Wildlife Federation v Dole (747 F.2d 229 (1984))**

The case involved the selection of a route for a national freeway in Maryland. The route took protected land. The court allowed a taking. Since all the alternatives took some land and the no build was not prudent and feasible, it reasoned thusly:

*“If the secretary chose the alternative which reasonably could be viewed as the one which minimized harm to the protected property, as required by 4(f)(2), then the Secretary acted within the scope of her authority.”* Section 4(f)2 states the requirement that the project contain all possible planning to minimize harm.

The court cited the documentation that justified the conclusion that the route taken minimized harm.

## **23. Society for the Protection of New Hampshire Forests v Brinegar (381 F. Supp. 282 (1974))**

The case involved the construction of a segment of I-93 through Franconia Notch State Park in New Hampshire. The Notch is famous for the “Old Man of the Mountain” natural wonder. The court granted an injunction stopping construction until an environmental impact statement was completed.

The Secretary approved the project based on the results of a flawed environmental impact statement that did not take into consideration the impact of the entire Interstate Highway on Franconia Notch and did not present alternatives the construction of I-93 through the Notch.

**24. Mullin v. Skinner**  
**(756 F. supp. 904 (E.D.N.C. 1990))**

The suit was brought by property owners who objected to the construction of a bridge on an island at Sunset Beach in North Carolina. The court ordered that a Section 4(f) review be completed prior to construction.

*“Viewing the beach at Sunset Beach as section 4(f) property, the only question left for this court to consider is whether the bridge-replacement project requires use of the beach. The word use in Section 4(f) is to be construed broadly and is not limited to a physical taking; even off-site activities are included if they could create sufficiently serious impacts that would substantially impair the value of the site in terms of its prior significance.”*

*“The court concludes that the beach at Sunset Beach will be “used” by the bridge replacement project...As such, the Secretary of the USDOT was required to make Section 4(f) findings before approving the project. Because he did not, his decision “was not in accordance with the law”*”

The Court ordered the completion of an “*environmental impact statement identifying and discussing in detail the direct, indirect, and cumulative impacts of and alternatives to the proposed project*” in accordance with Section 4(f).

**25. Residents in Protest—I-35E v Dole**  
**(583 F. Supp. 653 (1984))**

Action was brought for injunctive relief to prevent completion of segment of interstate highway along traffic corridor through downtown area of St. Paul, Minnesota. The plaintiff’s alleged that the route would impact two historic properties and transportation officials failed to look at all the alternatives. The court approved the project.

*“Thus, for section 4(f) to apply, plaintiffs are required to show that the incidental effects of I-35E will have a substantial impact upon the historical sites at issue. The plaintiffs failed to carry that burden.”*

*“In view of fact that there was very little, if any, testimony concerning extent to which proposed highway corridor through city would have an impact upon historical sites, statute providing that Secretary of Transportation may not approve any project requiring use of historical sites unless there is no feasible alternative to the use of the land and project includes all possible planning to minimize harm was not applicable.”*

*“To impose a pragmatic limit on the number of alternatives which must be discussed, courts have adopted a rule of reasonableness. The rule of reason requires an agency to consider any alternative which is reasonable under the circumstances. A reasonable alternative is one that will effectuate the purposes of the project.”*

**26. Town of Fenton v. Dole**  
**(636 F.Supp. 557 (N.D.N.Y. 1986))**

This case concerned the construction of an interstate connector in New York state. The approved route would take some parkland. The court rejected the plaintiff's contentions and allowed the project to proceed.

*“Failure of Secretary of Transportation to use words ‘unique problems’ in approving route which destroys parkland does not inexorably lead to conclusion that secretary failed to stay within boundaries of her statutory discretion.”*

*“Specific disadvantages individually considered as to each alternative route may suffice for Secretary of Transportation to properly find that alternative to interstate route which destroys parkland is not prudent.”*

*“Secretary of Transportation did not exceed scope of her authority in approving modified river crossing route which required taking of parkland based on finding that alternatives were not feasible and prudent; secretary rejected alternatives based on specified disadvantages including anticipated adverse effects on traffic and safety of other routes number of residential displacements, high cost of construction and “high detrimental” noise levels in adjoining populated areas, severe intrusion on surrounding rural environment of regional traffic on other routes.”*

**27. Ashwood Manor Civic Association v. Dole**  
**(619 F. Supp. 52 (D.C. Pa. 1985))**

Action was brought challenging administrative approval for construction of expressway project which required use of parkland and wetland. The court allowed the proposed taking of protected property.

*“In assessing alternatives to use of publicly owned parklands and historic sites for proposed expressway project, Federal Highway Administration regional director could reasonably conclude that not building expressway was not feasible and prudent, where major roads along path of proposed expressway were currently operating at capacity, situation was projected to worsen, and lack of adequate expressway service would have had stifling effect on local economy.”*

*“Federal Highway Administration regional director could have reasonably have found that alternative corridor for expressway project was not feasible and prudent, in light of strong public opposition voiced to that alternative and its severe adverse impacts, including cutting off large population of elderly residents from nearby shopping center, taking five acres of wetland, splitting cemetery in half, taking 67 homes in township, and relocating 10,600 feet of streams.”*

*“Under 49 U.S.C.A. section 303 (the new section number for 4(f)) Federal Highway Administration was not obligated to consider in detail each and every*

*conceivable variation of all alternatives to construction of expressway segment over parklands, but, in preparing its statement, only had to set forth alternatives sufficiently to permit a reasoned choice.”*

The Court laid out the measures taken to document the need for a taking. *“The FHWA has documented the need for the highway, providing data showing severe current congestion on existing major local roads. It has conducted an exhaustive, objective search for an alternative corridor that would meet the transportation needs of the area without using section 49f) land. The avoidance corridor analysis documents, in objective terms, the adverse impacts associated with any alternative to taking section 4(f) land. There is no evidence that any of the data considered by the section 4(f) decision-maker was inaccurate. The data provides an adequate basis for the decision-maker to conclude that there was no feasible and prudent alternative to building the highway in the Blue Route corridor.”*

**28. Davis v. Mineta**  
**(302 F. 3d 1104 (10<sup>th</sup> Cir. 2002))**

Opponents sought injunctive relief to stop a highway project through a park that would also use historic sites in Salt Lake County, Utah.

The project was stopped by the Court because the Court found that the EA/4(f) document was inadequate. It concluded that serious consideration was given only to the preferred alternative and contained inadequate analysis of the project impacts, including impacts of alternatives on the historic sites.

The Court remanded the case and called for an Environmental Impact Statement that addressed all the impacts of the proposed routes and alternatives. It also noted that:

*“Alternatives need not be studied, under the Department of Transportation Act’s provision limiting approval of transportation projects through parks, if they are remote, speculative, impractical or ineffective.”*

**29. Corridor H Alternatives, Inc v. Slater**  
**(166 F. 3<sup>rd</sup> 368 (D.C. Cir. 1999))**

Case involved a proposed highway project in West Virginia. The plaintiffs alleged that the 4(f) process was not complete, because the defendants did not identify all the historic properties along a proposed route before approving the project.

The Court ruled for the plaintiffs: *“We direct the [district] court to return the matter to the agencies with instructions to complete the section 4(f) process before proceeding further with the Corridor H project.”*

*“FHWA is required to complete evaluation process for entire highway project, under Department of Transportation Act section precluding approval of transportation*

*project using land of historic sites unless certain requirements were met, prior to issuing Record of Decision approving that project, rather than deferring investigation of historic sites through adoption of incremental, segment-by-segment approach to evaluation process.”*

**30. City of South Pasadena v. Slater  
(56 F. Supp. 2d 1106 (C.D. Cal 1999))**

Plaintiffs brought action to enjoin extension of the I 710 Freeway through Los Angeles, South Pasadena, and Pasadena. It was a 4.5 mile project.

The case centered on an evaluation of an alternative route which plaintiffs argued will significantly minimize the use of Section 4(f) resources. The alternative in question was the low-build or MMLB route. It was rejected as the Court ruled it was based on a faulty analysis of its impacts. The Court ordered that the project be stopped until an analysis of the MMLB route could be completed.

*“Following the quantitative analysis mandated by Druid Hills, the court concludes that the plaintiffs have shown a strong likelihood of proving the MMLB minimizes harm to section 4(f) resources.”*

*“Plaintiffs seeking to preliminarily enjoin freeway extension project were likely to prevail on claim that Secretary of Transportation when authorizing use of federal funds, did not objectively evaluate “low-build” alternative which would have minimized use of historic resources; state report on which he relied was based on erroneous assumptions and material mistakes of fact.”*

**31. Sierra Club v. Dole  
948 F.2d 568 (1991)**

This case involves a California highway and park, which were planned together. The park did not exist at the time of the planning for the road. Both were to be built as part of the same construction project. The Court allowed the project to proceed.

The court cited legislative history that suggests that congress wanted joint planning. But their key argument is in this paragraph

*“Section 4(f) provides, in part, ‘The Secretary of Trans. shall cooperate and consult with...the states, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities and facilities.’ ‘Since highway construction often spurs other development in its wake, one way to accomplish section 4(f)’s goal is through joint planning and development of parks and roads.”*

*“There is no constructive use of parkland by road, for purposes of DOT Act provision requiring study to determine if prudent and feasible alternatives to using*

*parkland existed, where road and park were jointly planned; Congress contemplated joint planning at time it considered provision and joint planning is sensible way to achieve provision's goal of preserving natural beauty of lands crossed by highways."*

## Appendix 4: Maryland DOT Web Link

The following link is to the Maryland DOT Website containing in-depth training/references for persons addressing 4(f) issues:

<http://www.kci.com/projects/4f/home.htm>