

Exhibit 1.5: Section 4(f) and Cultural Resources

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Exhibit 1.5: Section 4(f) and Cultural Resources

Introduction

For cultural resources, Section 4(f) of the 1966 U.S. Department of Transportation Act applies when there is USDOT funding or approvals and there is permanent or temporary incorporation into a transportation facility of any portion of a historic site. This is termed a “use” of the historic site. For the purposes of Section 4(f), “historic site” is defined as a historic property on or eligible for the NRHP. Briefly, the overall purpose of Section 4(f) is preservation, where “special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” (49 USC 303(a))(23 USC 138(a)).

General Section 4(f) guidance and information may be found at:

- [23 CFR 774](#), the implementing regulations for Section 4(f), as amended.
- FHWA’s [Section 4\(f\) Policy Paper](#) (revised July 20, 2012).
- FHWA’s Toolkit: Guidance for [Preparing and Processing Environmental and Section 4\(f\) Documents](#) (also known as Technical Advisory 6640.8A).
- Caltrans Training on Demand for Section 4(f)
- Caltrans SER Volume 1, Chapter 20, Section 4(f)
- Caltrans EIR/EIS Annotated Outline, Appendix A, Section 4(f)

Overview of Section 4(f) Process

The steps in Section 4(f) when there are historic properties in the project APE are as follow:

1. Determine the “use” of the property
2. Determine the impact to the property from the “use”
3. Determine the appropriate approval process

Section 4(f) Use

With Section 4(f), there are three kinds of use:

1. Permanent Incorporation
2. Temporary Occupancy
3. Constructive Use

For historic properties, the last two uses have either not been or rarely applied to historic properties in California, so the focus of this exhibit will be on the first use, or Permanent Incorporation. Refer to the FHWA 2012 Policy Paper for explanations of temporary occupancy and constructive use.

The most common form of use is when land is permanently incorporated into a transportation facility. This occurs when land from a historic property is either purchased outright as transportation right-of-way or when the applicant for federal-aid funds (Caltrans or a Local Agency) has acquired a property interest that allows permanent access onto the property, such as a permanent easement for maintenance or other transportation-related purpose.

In making any finding of use involving historic properties, it is required to have up-to-date right-of-way information and clearly defined property boundaries for the properties. The boundary for the purposes of Section 4(f) is generally the historic property boundary. If the historic property boundary of an eligible or listed site has not been previously established via Section 106 consultation, care should be taken in evaluating the site with respect to eligibility criteria. Depending upon its contributing characteristics, the actual legal boundary of the property may not ultimately coincide with the historic property boundary. The boundary of a historic property and its character-defining features are critical when determining whether there is a use under Section 4(f).

When considering historic districts/archaeological districts, the properties within the bounds of the district are assumed to be contributors, unless otherwise stated or formally determined to be non-contributing. Section 4(f) “use” applies to both contributing and individually eligible historic properties and features. The Section 106 documentation must be clear about the contributors and non-contributors to historic properties/districts.

If the 4(f) property (historic site/historic property) is already a part of a transportation facility, the definition of “use” changes: would the property be adversely impacted? If it is, then it is a “use” (See FHWA 2012 Policy Paper, question 8A).

Section 4(f) does not apply to archaeological sites that are important chiefly for their information value and have minimal value for preservation in place. This principle applies regardless of whether data recovery is undertaken. If an archaeological site is eligible for values beyond its information, Caltrans will consider whether 4(f) applies on a case-by-case basis. While disturbances to archaeological sites known or likely to have human burials would constitute an adverse effect under Section 106, such disturbance would not necessarily require a Section 4(f) evaluation. The key is whether the site merits preservation in place, considering its specific values. This determination is made by Caltrans in coordination with tribal partners, as appropriate, and with the SHPO/THPO. The Official with Jurisdiction (either the SHPO or THPO) does not need to concur with the determination; they simply must not object.

Impact from Use

A Section 4(f) evaluation may be required when there is a Section 106 finding of “Adverse Effect” or a “No Adverse Effect” when there is a full or partial take of the historic property or there are other indirect effects.

Caltrans may determine that Section 4(f) does not apply to restoration, rehabilitation, or maintenance of historic transportation facilities when:

- The work will not adversely affect the historical qualities of the facility.

SHPO and Council (if participating) do not object to this finding.

Approval Options

There are three approval options for Section 4(f).

1. De minimis determination
2. Programmatic Section 4(f) Evaluation
3. Individual Section 4(f) Evaluation

De minimis

Caltrans may make a de minimis determination under Section 4(f) for a minor use of a historic property (such as a sliver take) when the outcome of the Section 106 process resulted in a finding of No Historic Properties Affected, No Adverse Effect with Standard Conditions or No Adverse Effect without Standard Conditions.

Caltrans notifies the SHPO in the Section 106 consultation letter when Section 4(f) properties have been identified and Caltrans may make a de minimis determination under Section 4(f) based on SHPO's concurrence with the Section 106 finding. In accordance with a 2014 letter agreement with SHPO, Caltrans may treat the SHPO's non-response to No Adverse Effect findings as written concurrence for purposes of making a de minimis determination for Section 4(f).

Programmatic

FHWA has a nationwide programmatic Section 4(f) evaluation that applies to historic bridges. The Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges (Historic Bridges Programmatic) serves mainly to streamline the process and does not change the substantive requirements of Section 4(f), that is, the evaluation of avoidance and all possible measures to minimize harm. Under the Historic Bridges Programmatic, a historic bridge that is not an NHL may be demolished when there is no prudent and feasible way to save the bridge, and when SHPO, CSO and the Council, if participating, have entered into an MOA to resolve adverse effects under Section 106.

There is a second Programmatic Evaluation that applies to Historic Sites, "Minor Involvement with Historic Sites," that is rarely used since FHWA posted the de minimis regulations in 2005. This Programmatic Evaluation will not be addressed in this Exhibit for this reason.

Individual

The Section 4(f) evaluation usually is presented in the draft environmental document, but it may appear as a separate document. It must present alternatives that avoid the Section 4(f) property; all alternatives are evaluated as to whether or not they are feasible and prudent. If the Section 4(f) property cannot be avoided (i.e. the avoidance alternatives are not feasible and prudent), then the alternative with the least impact must describe the measures that will be taken to minimize harm to the Section 4(f) property.

Section 106 mitigation measures typically support a finding under Section 4(f) that all possible measures to minimize harm have been incorporated into the project. Caltrans is required to coordinate with the SHPO prior to making determinations on the use of historic sites. Caltrans coordinates with the SHPO through the Section 106 consultation process using concurrence with Section 106 effect findings as the basis for its subsequent Section 4(f) determinations.

Coordination with Environmental Document

The Section 4(f) analysis occurs during the NEPA/preliminary design, or the Caltrans “O”/PA&ED phase. Section 4(f), however, should be considered during the “K” phase since there may be a need for avoidance alternatives if historic properties are already identified.

Most often, there is a single Section 4(f) author, typically the project generalist/coordinator, who will need input from cultural resource specialists/PQS in order to understand the nuances of the Section 106 effects findings in relation to Section 4(f). In addition, the Section 4(f) determination/evaluation may require a consideration of the relative value of resources when Caltrans must select an alternative that would harm more than one Section 4(f) resource, including historic properties. The PQS will also need to work with the Section 4(f) author to determine the relative severity of remaining harm to historic properties, which will revolve around the suite of mitigation to resolve adverse effects. Information and documentation of the coordination with the Officials with Jurisdiction and interested parties will also be needed by the Section 4(f) author, who will rely on the PQS to provide the documentation.

Late Designation/Late Discovery

Late designation of a Section 4(f) resource is included in the exceptions in 23 CFR 774.13 (c). Specifically, determination of significance that is changed late in the development of a proposed action will be exempt from Section 4(f) analysis, as long as an adequate effort was made to identify properties. In this context, “adequate effort” is consistent with the “reasonable and good faith” effort required for Section 106. If a reasonable and good faith effort was made to identify properties under Section 106, then any potential Section 4(f) properties would have been identified prior to approving the undertaking. The re-evaluation of NRHP significance under

Section 106 because of the passage of time or changing events would apply in this context.

Late discovery, or post-review discovery, of archaeological sites during construction is addressed in 23 CFR 774.9(e). Caltrans must make the determination on whether the Section 4(f) archaeological site exception applies or whether the site warrants preservation in place. Key points to consider with a post-review discovery are: 1) Was the discovery unanticipated or was it reasonably expected; and 2) If the site was anticipated or suspected, would things have changed in relation to the effort to explore avoidance alternatives or additional mitigation? If it is determined that Section 4(f) applies, the process will be expedited. See the FHWA 2012 Policy Paper, Question 3B, for more explanation.