

## 6 SECTION 4(f)

### 6.1 Introduction

Section 4(f) of the Department of Transportation Act (codified at 49 U.S. Code [USC]<sup>1</sup> 303 and 23 USC 138) states that the FHWA may not approve the use of land from a significant publicly owned public park, recreation area, wildlife and waterfowl refuge, or any significant historic site unless a determination is made that there is no feasible and prudent alternative to use of land from the property and that the action includes all possible planning to minimize harm to the property resulting from such use, or unless the impact is determined to be a “*de minimis*” impact.<sup>2</sup> Use is defined as permanently incorporating land into a transportation facility or having proximity impacts that are so severe that the protected activities, features, or attributes are substantially impaired. The latter is termed “constructive use” and occurs only when the protected activities, features, or attributes are substantially diminished.

In order to comply with this regulation, the Department of Transportation and Public Facilities (DOT&PF) and Federal Highway Administration (FHWA) inventoried potentially protected sites in the project vicinity and determined Section 4(f) applicability. This section of this Final Supplemental Environmental Impact Statement (SEIS) details the step-by-step process followed and the applicability determinations made.

### 6.2 Parks and Recreation Areas

#### 6.2.1 Designated Parks and Recreation Areas

Section 3.1.1.7 provides general information on the parks and recreation areas in the project area. Municipal parks in the project area include Molly Walsh Park and Pullen Creek Shoreline Park, both in Skagway (Figure 3-5). State parks and recreation areas in the vicinity include Point Bridget State Park, Sullivan Island State Marine Park, Chilkat Islands State Marine Park, Chilkat State Park, Portage Cove State Recreation Site, and Chilkoot Lake State Recreation Site (Figures 3-1 and 3-2). The only federal park in the project area is the Skagway unit of the Klondike Gold Rush National Historical Park in downtown Skagway (Figure 3-5).

No park land would be required for any of the alternatives under consideration, nor would proximity impacts create a constructive use.

#### 6.2.2 Other Lands Managed for Recreation

Several alternatives would require State and/or federal land not specifically designated as parks or recreation areas, but administered under land management plans. These management plans were evaluated to determine if any of the land units were significant public recreation areas.

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<sup>1</sup> This SEIS is based on the 2014 Draft SEIS and substantive changes have been highlighted in gray for easy identification by the reader.

<sup>2</sup> The *de minimis* impact criteria and associated determination requirements are specified in Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). *De minimis* impacts related to historic sites are defined as the determination of either "no adverse effect" or "no historic properties affected" in compliance with Section 106 of the National Historic Preservation Act. *De minimis* impacts on publicly owned parks, recreation areas, and wildlife and waterfowl refuges are defined as those that do not "adversely affect the activities, features and attributes" of the Section 4(f) resource.

### 6.2.2.1 State Land

Alternative 3 would pass through three parcels in the Northern Southeast Area Plan, LT02, H28, and HT11. None of these lands are designated for or function as recreation other than dispersed activities. FHWA regulations (23 Code of Federal Regulations [CFR] 774.11) state that where public land is managed for multiple uses, Section 4(f) applies only to those portions of the land which function for, or are designated in the management plans as being for, significant park, recreation, or wildlife and waterfowl purposes. FHWA guidance, based in part on case law, further states that land designated or used for dispersed recreational activities is not protected by Section 4(f) [Section 4(f) Policy Paper, Question 1A, FHWA, 2012].

Alternative 3 would pass through a land management unit of the Haines State Forest, Unit 6. Unit 6 of the Haines State Forest is classified as Public Recreation Land. The Haines State Forest Plan (Alaska Department of Natural Resources [ADNR], 2002b) states that this land “will primarily be managed...for public recreational uses.” However, the plan also states “the Haines State Forest will be managed for multiple use, consistent with the establishment of the State Forest (AS 41.15.300).” The statute recognizes the importance of continuing traditional uses. The plan specifically allows personal timber harvest in sub-unit 6a and salvage timber harvest in both sub-units a and b. Mineral extraction is allowed under certain circumstances. Based on the review of the plan and the points noted above, FHWA has determined that this land is multiple use. Currently, the unit is used for dispersed recreation; the only specific significant recreation facility is a trail that was under construction at the time the Final EIS was issued. Construction of the trail, which would extend from the Lynn Canal shoreline to Davidson Glacier Lake, was not completed; however, it is still a planned facility (Josephson, 2012). FHWA has determined that the trail, once constructed and in use, would be subject to Section 4(f) protection. Alternative 3 would avoid use of land from this trail by bridging over the trail. No constructive use would occur. The trail would still provide access to the Davidson Glacier Lake, and although the trail experience would be altered, no substantial diminishment of its qualifying activities, features, or attributes would occur. A parking area and trail connection would be provided as an enhancement.

The ADNR has concurred that the only specific recreational facilities on State land in the project area are the Sturgill’s Landing Trail (near Skagway and distant from any alternative currently under consideration) and the Davidson Glacier Lake Trail (Irwin, 2004).

FHWA has determined that Alternative 3 would pass through State of Alaska land but would not require the use of any State of Alaska land protected by Section 4(f).

### 6.2.2.2 Federal Land

All build alternatives with highway segments would pass through federal land under management of the U.S Forest Service (USFS). As explained in Section 3.1.1.1, the 2016 Tongass Land and Resource Management Plan (TLRMP) assigns Land Use Designations (LUDs) to land to identify management goals and policies (Figure 3-3). Alternative 2B would pass through the following LUDs: Scenic Viewshed, LUD II, Semi-Remote Recreation, Old-growth Habitat, and Modified Landscape. Alternative 3 would pass through multiple LUDs, including Scenic Viewshed, LUD II, Semi-Remote Recreation, Modified Landscape, and Old-

growth Habitat. Alternatives 4B and 4D would pass through land designated as Scenic Viewshed, LUD II, and Semi-Remote Recreation.

A review of the management policies for these LUDs indicates that all of them meet the definition of multiple use areas and the recreation activities that occur and are envisioned as dispersed. Another aspect of the 2016 TLRMP further support the determination that none of the LUDs crossed are in themselves protected under Section 4(f). The TLRMP includes a LUD entitled Special Interest Area that specifically includes designated recreation areas (USFS, 2016a, p. 3-39). In instances when the USFS has determined that an area larger than a specific facility should be reserved for recreation or refuge purposes, the Special Interest Area LUD is used. No land in the project vicinity is designated as a Special Interest Area.

As with municipal and State land, after determining that the broad land designations are multiple use areas, further investigation and consultation with the land manager occurred to determine which portions or specific facilities, if any, function or are designated for significant recreation.

The TLRMP contains a Recreation Places Inventory that delineates “areas of small to moderate size that have one to several features that are particularly attractive to people engaging in recreation activities and receive recurring use.” (Although described as “small to moderate size,” in some cases the inventory identifies areas that include multiple LUDs; for instance, the area identified around Berners Bay covers approximately 150 square miles.) The inventory further identifies some of these areas as important for commercial recreation and tourism. Within Recreation Places, there are often specific sites such as cabins, shelters, picnic areas, trails, and campgrounds. The USFS has confirmed that Recreation Places as identified by the Inventory are areas of dispersed recreation, including hunting (Vaughan, 2004a; confirmed by Grossman, 2012). There are no specific recreational sites or facilities on USFS land on the west side of Lynn Canal. The only specific recreational sites or facilities on USFS land in the project study area on the east side of Lynn Canal are the Berners Bay cabin, Sturgill’s Landing Trail, and Sturgill’s Landing Day Use Area. The USFS has identified all of these features as significant for recreation purposes (Griffin, 2004; confirmed by Grossman, 2012), and the FHWA has determined them to be subject to Section 4(f) protection. None of the alternatives would impact the Sturgill’s Landing Day Use Area or the trail to it.

The USFS has indicated that the Berners Bay cabin is a water-oriented cabin, and therefore the zone of influence applies to the shoreline rather than the hillside behind the cabin (Ouderkirk, 2004). The USFS has also indicated that the recreation facility is the cabin itself, not the land it occupies, as the cabin could be relocated (Vaughan, 2004b), and in fact was placed with the knowledge that it may be moved in the future. The USFS determined that a handicap-accessible cabin on the Juneau road system would be a desirable development and requested that DOT&PF design the alignment of applicable alternatives such that a handicap-accessible trail could be constructed from the highway to the cabin. In its April 2006 Record of Decision (ROD) for the Juneau Access Improvements (JAI) Project identifying Alternative 2B as the selected alternative, the FHWA stated:

The highway will be located as far from the USFS cabin in Berners Bay as the topography allows, but no less than 100 feet from mapped use areas. A handicap-accessible trail will be constructed from the highway parking area to the cabin.

If Alternative 2B were selected, DOT&PF and FHWA would provide a trail from the highway to the cabin. However, since the 2006 ROD was issued, the alignment of Alternative 2B has been

shifted farther east and uphill from the cabin. The nearest point of disturbance (the toe of the highway fill slope) now would be more than 800 feet from discernible use areas (e.g., trails, outbuildings, cleared areas) at the cabin. The centerline of the alignment **would now be** approximately 1,000 feet east of the cabin at an elevation approximately 500 feet above the cabin, making construction of a handicap-accessible trail from the highway to the cabin impractical. Previously, the nearest point of disturbance (toe of slope) would have been approximately 100 feet from this boundary, resulting in approximately 200 feet between the highway and closest use area other than the access trail itself.

FHWA has determined that the construction of a highway in the vicinity of the cabin would not be a constructive use. The experience at the cabin would change, but this change would not be so severe as to create a substantial impairment of the protected activities, attributes, or features of the facility. Visitors could continue to access the site by small boat or float plane and could access the site by trail from the highway; however, the remote character of the site would be diminished by the presence of the road. Rather than hearing only boat, plane, or helicopter noise, visitors would also hear vehicle traffic noise. The fact that the USFS was interested in providing access to the cabin from the road is an indication that substantial impairment would not occur. As noted in Sections 5.11 and 5.12.1 **of the 2014 Draft SEIS**, if Alternative 2B were selected, DOT&PF would provide for a new water-accessed cabin to be owned and managed by the USFS at a location selected in consultation with the USFS as general mitigation for impacts to Berners Bay users desiring a remote, water-access experience.

The USFS concurred that the Berners Bay cabin, Sturgill's Landing Trail, and Sturgill's Landing Day Use Area are the only designated recreational sites on USFS land in the project study area (Griffin, 2004). The USFS also concurred that no alternatives would take land from a recreation site (Griffin, 2004).

FHWA has determined that Alternatives 2B, 3, 4B, and 4D would pass through USFS land but would not require use of land protected by Section 4(f).

### **6.3 Refuges**

There are no designated or functioning significant wildlife or waterfowl refuges in the project vicinity. As described in Section 3.1, State and federal land management plans applicable to the project area include designations such as Shoreline Use and Habitat (ADNR), Transportation and Habitat (ADNR), and Old-Growth Habitat LUD (USFS). Review of these designations indicates that these are multiple-use designations. No specific areas function as wildlife or waterfowl refuges. Both ADNR and USFS have concurred that no refuges exist in the project vicinity (Irwin, 2004; Griffin, 2004).

### **6.4 Significant Historic Sites**

Section 4(f) applies to significant historic sites. This includes all properties on or eligible for the National Register of Historic Places (NRHP).

#### **6.4.1 Berners Bay Historic Mining Districts**

Alternative 2B would pass through the Berners Bay Historic Mining District (BBHMD). This alternative also would pass through two smaller historic mining districts located within the BBHMD: the Jualin and the Comet/Bear/Kensington. The BBHMD also includes a third historic

mining district, the Ivanhoe/Horrible, as well as some contributing properties that are not part of any of the three smaller districts (Figure 3-6). No land would be required from any contributing property within these historic districts. Alternative 2B would bridge over the Jualin Mine Tram. The alignment of Alternative 2B has been shifted and no longer crosses the Comet/Bear/Kensington Railroad. With the exception of the crossing of the tram, the only lands affected within the districts are undeveloped natural areas and Comet Landing, an historic site determined to be ineligible for the **NRHP** (see Section 4.3.4).

To decide if land within a historic district is protected by Section 4(f), FHWA must first determine if the land is individually historic or contributes to the factors that make the district historic [Section 4(f) Policy Paper, Question 2B, FHWA, 2012]. FHWA has determined the undeveloped natural land areas that would be crossed are not individually historic, are not an integral part of the historic district, and do not contribute to the factors that make the district historic.

FHWA has determined that construction of a highway over the Jualin Mine Tram would not result in a constructive use. Although a highway bridge would have an effect on the property, the effect would not be so severe as to substantially impair its qualifying activities, features, or attributes. The Jualin Mine Tram does not derive a substantial part of its significance from its setting. In addition, the **State Historic Preservation Officer (SHPO)** concurred with the FHWA determination that Alternative 2B would have no adverse effect on this property (Bittner, 2005). In subsequent correspondence, the SHPO agreed that its concurrence remains valid (Bittner, 2012).

#### **6.4.2 Skagway and White Pass District National Historic Landmark**

The boundaries of the Skagway and White Pass District **National Historic Landmark (NHL)**; Figure 3-5) include natural areas surrounding Skagway and the Klondike Highway. As noted in Section 2.2.9, Alternatives 2, 2A, and 2C, which were evaluated in the 2005 Supplemental Draft EIS for the **JAI** Project, passed through natural areas within the NHL.

In its comments on the 2005 Supplemental Draft EIS, the Office of the Secretary, U.S. Department of the Interior, made clear the **National Park Service's (NPS)** position that all natural areas within the NHL contribute to the factors that make the landmark historic (Taylor, 2005). Furthermore, NPS believes that this contribution is documented in the Boundary Justification of the 1999 nomination. The Boundary Justification states, in part: "sufficient natural areas have been included so as to provide an understanding for the physical setting and cultural landscape that defined the historic corridor" (NPS, 1999). Based on this language, the NPS position on its meaning, and existing FHWA guidance, FHWA has determined that natural areas within the NHL are protected by Section 4(f). Because these natural areas within the NHL were integral to Alternatives 2, 2A, and 2C and could not be avoided by these alternatives, and because several other reasonable alternatives are under consideration and do not use Section 4(f) property, Alternatives 2, 2A, and 2C were dropped from the range of reasonable alternatives.

#### **6.4.3 Dalton Trail**

Alternative 3 would cross the Dalton Trail on Green Point north of Pyramid Harbor (Figure 3-1). This portion of the Dalton Trail is within the Haines State Forest in an area designated for dispersed recreation (see Section 6.2.2.1). The trail is not maintained as a hiking trail. A bridge would be constructed over the trail (continuing across Chilkat Inlet); neither the bridge abutment

to the west nor the first pier would require land from the trail. Only air rights would be acquired for the bridge above the trail.

FHWA has determined that construction of a highway associated with Alternative 3 would not result in a constructive use of the Dalton Trail. Although a highway bridge would have an effect on the trail, it would not be so severe as to substantially impair its activities, features, or attributes. This historic property does not derive a substantial part of its significance from its setting.