

APPENDIX E

SECTION 4(F) TECHNICAL MEMORANDUM (2019)

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Date: January 9, 2019

To: Office of Environmental Analysis, Surface Transportation Board
Federal Railroad Administration, U.S. Department of Transportation

From: Connie Walker Gray, MUP, Senior Architectural Historian

Subject: **Port of Moses Lake, Northern Columbia Basin Railroad Project
Section 4(f) Compliance**

INTRODUCTION

This memorandum, prepared by Jacobs Engineering Group Inc. (Jacobs), provides the documentation required to comply with the provisions of Section 4(f) of the U.S. Department of Transportation Act of 1966 (hereinafter referred to as Section 4[f]; codified at 49 United States Code 303) for the Port of Moses Lake's (Port's) proposed Northern Columbia Basin Railroad Project (NCBRP or Project). The Project consists of three segments and requires authorization by the Surface Transportation Board (STB) and the Federal Railroad Administration (FRA).

The STB prepared an Environmental Assessment (EA) and authorized construction of the Project in 2009. The STB is an independent agency and its governing statute is the Interstate Commerce Act, not the Department of Transportation Act. Therefore, STB actions are not subject to Section 4(f) and Section 4(f) properties were not evaluated in the 2009 EA. Following STB's authorization, a severe economic downturn and other factors delayed the Project and complicated the Port's efforts at securing the necessary financing.

In 2017, the Project received grant funding under the 2015 Fixing America's Surface Transportation (FAST) Act, administered by the FRA, which enabled the Port to reinstate the Project. Due to land development and other changes that have occurred since the 2009 Project authorization, the Port is proposing limited route modifications that require preparation of a Supplemental EA. Regulations under the FAST Act require evaluation of Section 4(f) properties and apply to environmental impact statements and to projects for which the FRA is the lead agency. However, as a cooperating agency for the Project's Supplemental EA, the FRA has elected to comply with Section 4(f) requirements.

This Section 4(f) technical memorandum uses information regarding the Project location, description, and cultural resources within the Project's Area of Potential Effects (APE) as provided in Jacobs' *Port of Moses Lake Northern Columbia Basin Railroad Project Supplemental Cultural Resources Investigations for Draft Supplemental EA*, dated January 2019.

The use of a Section 4(f) resource may not be approved unless:

- There is no feasible and prudent avoidance alternative to the use of land from the property.
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- The action includes all possible planning to minimize harm to the property resulting from such use.

Section 4(f) protects the following basic types of properties: publicly owned parks and recreation areas that are open to the general public, publicly owned wildlife and waterfowl refuges, and public or privately-owned historic sites. In order to qualify as a park, recreation area, or refuge under the statute, a property must be publicly owned; open to the public; have its major purpose be for park, recreation, or refuge activities; and be significant as a park, recreation area, or refuge.

The Section 4(f) requirements are applicable to historic resources (buildings, objects, transportation facilities, historic sites, and archaeological sites) that are eligible for or listed on the National Register of Historic Places (NRHP), as determined by the federal, state, regional, or local officials having jurisdiction over the historical resource. Section 4(f) applies to archeological sites that are both listed on and eligible for listing on the NRHP and that warrant preservation in place but does not apply to those that are chiefly important because of what can be learned by data recovery.

The evaluation presented in this Section 4(f) memorandum does the following:

- Defines how a Section 4(f) use is determined.
- Identifies Section 4(f) properties in the NCBRP's APE.
- Discusses how the project elements would use Section 4(f) resources.
- Lists Section 4(f) resources that would qualify for a *de minimis* finding.

Only those Section 4(f) resources that are determined to be significant resources and potentially used by the Project are addressed in this analysis. They are the NRHP-eligible Columbia Basin East Low Feeder Canal system with three features in Segment 1: the East Low Canal Lateral 20 (EL20), the East Low Canal 20U1 (EL20U1), and the Rocky Coulee Diversion Drain Canal 180+182 (RCD 180+182).

As described in this technical memorandum, Jacobs recommends that the Project's Section 4(f) historic properties qualify for a determination of *de minimis* use and therefore would not require further Section 4(f) avoidance analysis. The Washington State Historic Preservation Officer (SHPO), the official with jurisdiction, is anticipated to concur.

SECTION 4(f) USE DEFINITIONS

Section 4(f) generally prohibits the "use" of eligible properties for transportation purposes. Use is defined in the sections below.

Permanent Incorporation/Permanent Easement

A permanent use of a Section 4(f) resource occurs when property is permanently incorporated into a proposed transportation facility. Permanent use may occur as a result of partial or full acquisition or a permanent easement allowing access onto the property for maintenance or other transportation-related purposes.

Constructive Use

A constructive use occurs when there is no permanent incorporation of land from the resource, but the project's proximity results in impacts that substantially impair the protected activities, features, or attributes that qualify the property for protection under Section 4(f).

Temporary Occupancy

Temporary use of a Section 4(f) property may trigger the application of Section 4(f). Five criteria must be met to determine that a temporary occupancy does not rise to the level of use for the purposes of Section 4(f):

- Duration is temporary (that is, the occupancy is shorter than the time needed for construction of the project, and there is no change in ownership of the property).
- Scope of work is minor (that is, the nature and magnitude of the changes to the Section 4(f) properties are minimal).
- There are no anticipated permanent adverse physical impacts on or permanent interference with the protected activities, features, or attributes of the property.
- The property is restored to the same or better condition that existed prior to the project.
- There is documented agreement from the appropriate federal, state, or local officials having jurisdiction over the property regarding the above conditions.

***De Minimis* Impact Determinations**

Section 4(f) restrictions do not apply to projects that have only *de minimis* impacts on properties protected by Section 4(f).

For parks, recreational areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that would not adversely affect the activities, features, or attributes qualifying the property for protection under Section 4(f). For historic sites, a *de minimis* impact means that the project would not have an adverse effect on the property in question as determined under Part 800 of Title 36 of the Code of Federal Regulations (36 CFR 800).

The following criteria must be met to make a *de minimis* finding:

- For parks and recreation areas:
 - There must be public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a National Environmental Policy Act (NEPA) document such as the Draft Supplemental EA.
 - The lead agencies must inform the official(s) with jurisdiction of its intent to make a *de minimis* impact finding. Following an opportunity for public review and comment, those official(s) must concur in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection.

- For historic sites:
 - The agencies must make a finding under the National Historic Preservation Act and obtain the written concurrence from the SHPO or Tribal Historic Preservation Officer (and the American Council for Historic Preservation in some circumstances) that the project will not adversely affect historic properties. The agencies must inform these officials that it intends to make a *de minimis* impact determination if they concur with the finding of “no adverse effect” or “no historic properties affected.”

An agency may include impact minimization measures as a condition of the project to avoid an adverse effect.

SECTION 4(f) RESOURCES

Park, Recreation, and Wildlife/Waterfowl Refuge Section 4(f) Resources

There are no parks, recreational areas, or refuges located within the study area. Therefore, there are no Section 4(f) park, recreation, or refuge resources and no further discussion of these resources is required.

Historic Section 4(f) Resources

Within the Project APE, the Columbia Basin East Low Feeder Canal system was determined eligible for listing on the NRHP, including canals EL20 (now known to be a lateral), EL20U1, and the RCD 180+182. Please see Jacobs' *Cultural Resources Supplemental Investigation* report, dated January 2019, for additional information about these resources.

Historic Section 4(f) Use Analysis

This section reviews the potential for the project to result in a temporary, constructive, or permanent use of Section 4(f) historic resources.

The Project would place reverse siphons (culverts) in small segments of historic canals EL20 and RCD 180+182, which are contributing elements to the NRHP-eligible Columbia Basin East Low Feeder Canal system. The culverts would affect, at maximum, 100 linear feet of each canal. Canals are utilitarian resources that require regular maintenance to sustain their operation, safety, and functionality. The Columbia Basin East Low Feeder Canal system is large, and only a small portion of canals EL20 and RCD 180+182 would experience a physical alteration. Such a limited modification would not diminish any aspect of the physical integrity of the Columbia Basin East Low Feeder Canal system, canals EL20 or RCD 180+182, or the ability to convey their historic significance. The proposed design refinements would not diminish integrity of location, setting, workmanship, feeling, or association, and would only cause a minor alteration to integrity of materials and design. Jacobs recommends a finding of “**no adverse effect**” to historic properties for these proposed Project design changes.

There would be no temporary use of historic properties during construction. None of the operational or construction activities would result in a constructive use of historic properties.

SUMMARY OF SECTION 4(f) *DE MINIMIS* FINDINGS

Jacobs recommends that the Section 4(f) historic properties qualify for a determination of *de minimis* use and therefore do not require further Section 4(f) avoidance analysis. SHPO (the official with jurisdiction) is anticipated to concur.

COORDINATION

The assessment of existing conditions of each Section 4(f) property included site visits, photographs, consultation with the Port and Grant County, and review of available planning documents and files. STB and FRA will continue consultation with the Department of Archaeology and Historic Preservation, the U.S. Bureau of Reclamation, and affected Tribes, including the Colville Confederated Tribes, the Confederated Tribes and Bands of the Yakama Nation, and the Confederated Tribes of the Warm Springs Reservation of Oregon.

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