

# The I-70 Mountain Corridor Expansion Project: Does the Department of Transportation Act of 1966 Apply?

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## I. INTRODUCTION

The Colorado Department of Transportation (“C-DOT”) intends to widen the Interstate 70 (“I-70”) mountain corridor both in Dowd Canyon and from the Eisenhower-Johnson Memorial Tunnels to Floyd Hill.<sup>1</sup> The proposed project will take fifteen years to complete, from 2010 to 2025,<sup>2</sup> and involves widening thirty-seven miles of highway from four to six lanes.<sup>3</sup> Improvements will also be made to parts of I-70 that are located outside of the expansion area.<sup>4</sup> The project’s purpose is to increase the

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1. See COLO. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), EXECUTIVE SUMMARY, at ES-3 (2004) [hereinafter DRAFT PEIS EXECUTIVE SUMMARY], available at [http://www.i70mtncorridor.com/Webready/PEIS/00\\_Executive\\_Summary.pdf](http://www.i70mtncorridor.com/Webready/PEIS/00_Executive_Summary.pdf) (last visited Jan. 14, 2006).

2. *Id.* at ES-41.

3. See *id.* at ES-3 (“Termini of Project Alternatives” figure and index shows that the project will expand I-70 from mileposts 169 to 172 and from 214 to 248).

4. See, e.g., COLO. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), 3.16 SECTION 4(f) EVALUATION, at 3.16-3 (2004) [hereinafter DRAFT PEIS SECTION 4(f) EVALUATION], available at [http://www.i70mtncorridor.com/Webready/PEIS/3.16\\_Section\\_4f\\_Evaluation.pdf](http://www.i70mtncorridor.com/Webready/PEIS/3.16_Section_4f_Evaluation.pdf) (last visited Jan. 14, 2006) (“Upgrades to the Glenwood Springs westbound off-ramp are required due to traffic congestion onto I-70. Upgrade requirements include lengthening and widening the ramp.”).

capacity of the corridor, improve accessibility, increase mobility, and decrease congestion.<sup>5</sup>

Naturally, a project of this magnitude will have many repercussions. The expansion will undoubtedly affect travelers, residents along the I-70 corridor, business activities, nearby properties, the natural environment, and wildlife. Additionally, some of these impacts implicate protective statutes including section 4(f) of the Department of Transportation Act of 1966.<sup>6</sup>

In Part I, this Article will discuss the history and policy behind section 4(f). Part II summarizes the Act's statutory requirements, while Part III examines the case law and regulatory interpretations of use, the primary determinant of whether section 4(f) applies to a project. Part IV of this Article provides a cursory list of the protected resources located in the vicinity of the I-70 corridor. Part V discusses the projected adverse impacts that C-DOT recognizes in its preliminary study of the effects of the proposed, six-lane highway facility. Finally, in Part VI, this Article asserts that the I-70 expansion project will use protected resources under the statute. As a consequence, section 4(f) applies, forcing the consideration of route and means-of-transportation alternatives.<sup>7</sup> Furthermore, if one or more of the alternatives satisfies section 4(f)'s qualifications, C-DOT must facilitate construction of a qualifying alternative in lieu of the proposed project.<sup>8</sup>

5. DRAFT PEIS EXECUTIVE SUMMARY, *supra* note 1, at ES-1.

6. See Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1966) (current version at 49 U.S.C. § 303 (2000)); see also 23 U.S.C. § 138 (2000). The text of 49 U.S.C. § 303 provides in pertinent part:

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. (b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and 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 or facilities. (c) . . . The Secretary may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if: (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

*Id.*

7. See 49 U.S.C. § 303(c) (providing that "[t]he Secretary may approve a transportation program or project . . . only if: (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm . . ." (emphasis added)).

8. See *id.* (providing that "[t]he Secretary may approve a transportation program or pro-

## II. BACKGROUND

Two competing policies pervade federally funded roadway construction: (1) encouraging the development and improvement of interstate and state roadway systems and (2) protecting parklands and historic resources.<sup>9</sup> Naturally, the establishment of the federal highway aid program in 1916 and subsequent statutes aimed at creating a strong national highway system favored roadway construction.<sup>10</sup> These early laws had little or no consideration of the environment and historic properties.<sup>11</sup> As a result, the unbridled construction of thousands of miles of paved roadways led to massive destruction of public resources that can never be replaced.<sup>12</sup>

Preserving parklands and historic resources first became a consideration in the routing and funding of roadway projects in the 1960s with the following federal legislation:<sup>13</sup> section 4(f),<sup>14</sup> the National Historic Preservation Act of 1966,<sup>15</sup> the Federal Aid Highway Act of 1968,<sup>16</sup> and the National Environmental Policy Act of 1969 (“NEPA”).<sup>17</sup> These landmark statutes responded to increasing public concern for the preservation of the country’s natural splendor and historic legacy.<sup>18</sup>

Section 4(f) declares as national policy the making of a “special effort” to preserve the nation’s remaining parklands and historic resources.<sup>19</sup> This policy applies to proposed roadway construction and improvement projects that are funded by federal money distributed by the Federal Highway Administration (“FHWA”), pursuant to the Federal Aid Highway Act of 1968.<sup>20</sup> While NEPA dictates the procedure for federally funded construction projects affecting public resources,<sup>21</sup> section

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ject . . . only if: (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm . . .”).

9. Barbara Miller, Comment, *Department of Transportation’s Section 4(f): Paving the Way Toward Preservation*, 36 AM. U. L. REV. 633, 633-36 (1987).

10. *Id.* at 633-35 (citing and discussing the Act of July 11, 1916, ch. 241, 39 Stat. 355 (1916), the 1944 Congressional chartering of the Interstate Highway System, and subsequent statutes that were established to enable highway projects).

11. *Id.* at 634 (citations omitted).

12. *Id.* at 634-35.

13. *Id.* at 635-36 (citations omitted).

14. 49 U.S.C. § 1653(f) (current version at 49 U.S.C. § 303).

15. National Historic Preservation Act of 1966, 16 U.S.C. § 470 (2000).

16. *See generally* Federal Aid Highway Act of 1968, 23 U.S.C. §§ 101-156 (2000).

17. *See generally* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-4335 (2000).

18. Miller, *supra* note 9, at 638-39.

19. *Id.* at 639; 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 57 (2004).

20. *See* 23 U.S.C. §§ 101(d), 138.

21. *See* 42 U.S.C. § 4332 (setting forth the procedural requirements federal agencies must follow in order to promote the national policy of protecting the human and natural environments).

4(f) is substantive. It provides the Secretary of Transportation with explicit instruction of what considerations to make when the projected impacts use certain public resources.<sup>22</sup> If a project fails to meet section 4(f)'s requirements, it is ineligible to receive federal funding.<sup>23</sup>

Section 4(f)'s purpose, as interpreted by the Supreme Court of the United States in *Citizens to Preserve Overton Park v. Volpe*, is to protect certain types of public lands from destruction caused by federally funded roadway projects except in very unusual circumstances.<sup>24</sup> Because the statute's legislative history is ambiguous,<sup>25</sup> the Court determined that the underlying intent of the statute is ascertainable through an analysis of its language.<sup>26</sup> The preservation of public lands is of "paramount importance" when considered against projected cost and community disruption caused by the construction of a project's alternatives.<sup>27</sup> Therefore, cost and community disruption must reach "extraordinary magnitudes" in order to prevail over the preservation of public lands.<sup>28</sup>

### III. STATUTORY OVERVIEW OF SECTION 4(F)

Before inquiring into whether a proposed project satisfies the requirements of section 4(f), three threshold criteria must be met in order for the statute to apply. First, the project must directly or indirectly use<sup>29</sup> certain types of land.<sup>30</sup> Second, the land used must be public land that is utilized for at least one of the following purposes: park, recreation, wildlife or waterfowl refuge, or historic site.<sup>31</sup> Third, the public land must

22. See 49 U.S.C. § 303(c)(1), (2) (mandating that if a project uses protected lands, the Secretary must consider feasible and prudent alternatives to the use of such lands and must ensure that the project seeks to minimize harm to such lands).

23. *Id.* § 303(c); see also *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 411 (1971), *abrogated in part by* *Califano v. Sanders*, 430 U.S. 99, 101 (1977).

24. *Overton Park*, 401 U.S. at 411-13 & n.29 (citations omitted).

25. *Id.* at 413 n.29 (citing the disagreement between the Legislative Committee's view of the statute as merely a "general directive" to the Secretary, allowing for broad discretion, and the view of the Senate Committee emphasizing the Secretary's limited authority) (citations omitted).

26. *Id.* ("Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.")

27. *Id.* at 412-13 ("Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance.")

28. *Id.* at 413 ("The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.")

29. 49 U.S.C. § 303.

30. *La. Envtl. Soc'y v. Coleman*, 537 F.2d 79, 84-85 (5th Cir. 1976) (holding that section 4(f) applied to the project but there were no feasible or prudent alternatives to the use of parkland) (citations omitted).

31. 49 U.S.C. § 303; Michael J. Kaplan, Annotation, *Construction and Application of § 4(f) of Department of Transportation Act of 1966 (49 U.S.C.A. § 1653(f)), as Amended, and § 18(a) of*

have national, state, or local significance.<sup>32</sup> If these criteria are met, the Secretary of Transportation must conduct a section 4(f) evaluation of the proposed roadway project, which requires a study of alternatives and strategies to minimize harm to protected land.<sup>33</sup> Section 4(f) requires that the Secretary of Transportation disapprove funding to a proposed project unless: (1) “no prudent and feasible alternatives” to the use of the protected land exist and (2) all possible designing and planning has been conducted in an effort to minimize harm to the protected land.<sup>34</sup> Summaries of these requirements and the applicable standard of review for section 4(f) claims follow.

#### A. “FEASIBLE AND PRUDENT ALTERNATIVES”

Once it has been determined that a project will use a protected resource, section 4(f) requires the FHWA to determine whether there are feasible and prudent alternatives to the use of the land; if there are, the project must adopt one of the alternatives.<sup>35</sup> Since enactment of section 4(f), the FHWA promulgated 23 C.F.R. § 771.135 to address application of the statute.<sup>36</sup> However, section 771.135 provides little guidance concerning the meanings of the terms “feasible” and “prudent.”<sup>37</sup> Therefore, case law constitutes the vast majority of this body of jurisprudence.

##### 1. “Feasible”

“An alternative is infeasible only if a proposed project cannot be constructed as a matter of sound engineering.”<sup>38</sup> This definition was adopted by the United States Supreme Court in *Overton Park*,<sup>39</sup> and has become the universal method of determining feasibility.<sup>40</sup> Because few designs are technically infeasible, the majority of section 4(f) disputes focus on whether an alternative is prudent.<sup>41</sup>

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*Federal Aid Highway Act of 1968 (23 U.S.C.A. § 138) Requiring Secretary of Transportation to Determine that All Possible Planning for Highways has been Done to Minimize Harm to Public Park and Recreation Lands*, 19 A.L.R. FED. 90 (2004).

32. 49 U.S.C. § 303.

33. 23 C.F.R. § 771.135(i) (2005); Kaplan, *supra* note 31, § 2(a).

34. 49 U.S.C. § 303(c).

35. *Id.*; Andrea C. Ferster & Elizabeth S. Merritt, *Legal Tools for Fighting Freeways and Saving Historic Roads*, 14 F. J. 32, 39 (2000).

36. 23 C.F.R. § 771.135.

37. *See id.* § 771.135(a)(1)(i) (requiring that protected lands may not be used unless there are no prudent or feasible alternatives, but failing to explain the definitions of “feasible” and “prudent”).

38. Ferster & Merritt, *supra* note 35, at 39; *Overton Park*, 401 U.S. at 411.

39. *Overton Park*, 401 U.S. at 411.

40. *See, e.g.*, Ferster & Merritt, *supra* note 35, at 39; Kaplan, *supra* note 31, § 10 (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 411 (1971)).

41. Ferster & Merritt, *supra* note 35, at 39.

## 2. "Prudent"

Section 771.135 does little to explain the meaning of the term "prudent."<sup>42</sup> The regulation does, however, adopt language from the Supreme Court's opinion in *Overton Park*.<sup>43</sup> The case involved a proposed segment of interstate highway that would have been constructed through a city park in Memphis, Tennessee, destroying a portion of the land.<sup>44</sup> The Secretary of Transportation asserted that the determination of whether an alternative is prudent involved a "wide-ranging balancing of competing interests," weighing the detriment caused against the cost of alternative routes, community disruption, safety considerations, and other factors.<sup>45</sup>

However, the Supreme Court rejected this approach, stating that if the Secretary's balancing test was what Congress had intended, the test would always significantly weigh in favor of using public lands, making the statute meaningless.<sup>46</sup> Public lands are generally the cheapest lands to acquire, and use of public lands allows for minimal community disruptions.<sup>47</sup> Rather, section 4(f) contemplates that while cost, safety, and community disruptions are not negligible factors, they should not be on an "equal footing" with the preservation of protected resources.<sup>48</sup> The Court emphasized that protection of parkland is of "paramount importance,"<sup>49</sup> and section 4(f) imposes a "plain and explicit bar" on the construction of roadways that use protected resources.<sup>50</sup> Therefore, exceptions to this bar should only be made in truly unusual situations.<sup>51</sup>

*Overton Park*, thus, affirmed an overriding concern for the preservation of protected lands, which is the foundation of section 4(f), in stating that "[s]upporting information must demonstrate that there are *unique problems or unusual factors* involved in the use of alternatives that avoid

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42. See 23 C.F.R. § 771.135(a)(1)(i) (providing that protected lands may not be used unless there are no prudent or feasible alternatives, but failing to explain the definitions of "feasible" and "prudent").

43. *Overton Park*, 401 U.S. at 413. The Court states,

The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

*Id.*

44. *Id.* at 406.

45. *Id.* at 411.

46. *Id.* at 412.

47. *Id.*

48. *Id.*

49. *Id.* at 412-13.

50. *Id.* at 411.

51. *Id.*

[protected] properties or that the cost, social, economic, and environmental impacts, or the community disruption resulting from such alternatives reach *extraordinary magnitudes*.”<sup>52</sup> This weighted balancing test, allowing protected resources considerable deference, is the standard that must be implemented to determine whether an alternative is prudent.<sup>53</sup>

Since the *Overton Park* case, many of the lower federal courts have failed to follow the Supreme Court’s stringent directives.<sup>54</sup> Post-*Overton Park* cases appear to employ a more forgiving approach concerning the alleged imprudence of alternatives.<sup>55</sup> For example, courts have found “unique problems” extant in common highway conditions, such as traffic and congestion, whether existing or merely predicted.<sup>56</sup>

## B. “ALL POSSIBLE PLANNING TO MINIMIZE HARM”

Even if no feasible and prudent alternatives exist, a roadway construction or improvement project can still violate section 4(f). Under section 4(f), the FHWA must undertake “all possible planning to minimize harm” to protected resources before the Secretary of Transportation can approve a project.<sup>57</sup> This inquiry, which strengthens protection of section 4(f) resources, is triggered when a project and its proposed alternatives use a protected resource.<sup>58</sup> Section 771.135 does not provide guidance of

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52. 23 C.F.R. § 771.135(a)(2) (emphasis added).

53. Miller, *supra* note 9, at 643.

54. See Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N.Y.U. ENVTL. L.J. 691, 712-15 (1996) (citations omitted).

55. *Id.*; see, e.g., Comm. to Pres. Boomer Lake Park v. Dep’t of Transp., 4 F.3d 1543, 1548-53 (10th Cir. 1993) (upholding the district court’s grant of summary judgment and determination that alternatives were imprudent because they failed to accommodate the project’s purposes of eliminating congestion, accommodating projected traffic needs, increasing safety, and decreasing fire department response times. Alternatives also presented “unique problems” because of higher road user costs and higher construction costs.); *Druid Hills Civic Ass’n v. Fed. Highway Admin.*, 772 F.2d 700, 715-16 (11th Cir. 1985) (holding that a no-build alternative’s *failure to fulfill a project’s purpose* provided reasonable grounds to conclude that the alternative was imprudent (emphasis added)); *Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1455-58 (9th Cir. 1984) (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 411-13 (1971) in holding that a no-build alternative is not imprudent due to the mere fact that it failed to satisfy projected traffic needs); see also *La. Envtl. Soc’y*, 537 F.2d at 85 (holding that a ten-year delay resulting from the rejection of a project did not present a “unique problem”). The Ninth Circuit in *Stop H-3*, citing *Overton Park* as authority, stated,

The mere fact that a “need” for a highway has been “established” does not prove that not to build the highway would be “imprudent” under *Overton Park*. To the contrary, it must be shown that the implications of not building the highway pose an “unusual situation,” are “truly unusual factors,” or represent cost or community disruption reaching “extraordinary magnitudes.”

*Stop H-3*, 740 F.2d at 1455 n.21.

56. Burrington, *supra* note 54, at 713-14.

57. 49 U.S.C. § 303(c)(2).

58. Miller, *supra* note 9, at 643-44; see, e.g., *Citizens to Pres. Wilderness Park, Inc. v. Adams*, 543 F. Supp. 21, 28-29 (D. Neb. 1981) (failing to demonstrate that the Secretary’s action in

the requirements of this second course of examination.<sup>59</sup>

The lower federal courts have discussed what it means to undertake all possible planning to minimize harm.<sup>60</sup> Minimizing harm requires a weighing of total harm created by each alternative and choosing the one alternative that creates the least harm.<sup>61</sup> If an alternative does not minimize harm to a protected resource, the Secretary of Transportation does not have to accept it in lieu of the proposed project and is free to choose from “equal damage alternatives.”<sup>62</sup>

What makes an alternative imprudent is not relevant to determining whether an alternative would minimize harm to the value of protected land.<sup>63</sup> However, if an alternative that does minimize harm is also imprudent, the Secretary is not required to consider it as a viable alternative to the project.<sup>64</sup> Therefore, if one alternative minimizes harm above all others, the Secretary can only reject that alternative if it is infeasible, imprudent, or presents truly unusual factors.<sup>65</sup> In addition, this line of evaluation considers the mitigation measures of the project and its alternatives that reduce adverse impacts.<sup>66</sup>

The “all possible planning to minimize harm” line of questioning was clearly intended to provide an additional safeguard for protected resources.<sup>67</sup> However, in practice, most of the lower federal courts have been reluctant to overturn the Secretary of Transportation’s finding that all possible planning to minimize harm has occurred.<sup>68</sup> On the one hand, this may indicate a trend toward deference to the Secretary’s choice among alternatives that use a protected resource.<sup>69</sup> On the other hand, the trend may indicate the Department of Transportation’s improved sophistication in planning methodology, ensuring that every alternative uses the protected resource in question, therefore, enabling the Secretary to select the proposed project.<sup>70</sup>

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taking parkland over alternatives was not “arbitrary, capricious, an abuse of discretion, or otherwise contrary to law”).

59. See 23 C.F.R. § 771.135(a)(1)(ii) (providing the requirement of undergoing “all possible planning to minimize harm,” but not explaining what this entails).

60. See, e.g., *La. Envtl. Soc’y*, 537 F.2d at 86.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Miller, *supra* note 9, at 644.

67. *Id.* at 643.

68. Fred P. Bosselman, *Land Use Planning Requirements of Selected Federal Statutes*, C750 A.L.I.-A.B.A. 547, 563 (1992).

69. *Id.*

70. *Id.*



### C. STANDARD OF REVIEW

The United States Supreme Court in *Overton Park* determined that judicial review is available for alleged violations of section 4(f) and set forth the applicable standard of review.<sup>71</sup> The Court stated that because the language of section 4(f) provides “clear and specific directives,” the Secretary of Transportation’s decision is subject to judicial review.<sup>72</sup> The Secretary’s decision is not an action “committed to agency discretion.”<sup>73</sup>

Having established judicial review, the *Overton Park* Court looked to the Administrative Procedure Act (“APA”) to determine the applicable standard of review.<sup>74</sup> According to section 706(2)(A) of the APA, a reviewing court must set aside an agency’s action if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or if the action failed to satisfy statutory, procedural, or constitutional mandates.<sup>75</sup>

The Court further stated that although the Secretary’s decision is entitled to a “presumption of regularity,” the presumption should not “shield his action from a thorough, probing, in-depth review.”<sup>76</sup> Such a review consists of three basic inquiries. First, a reviewing court must determine “whether the Secretary acted within the scope of his authority.”<sup>77</sup> The Court noted that section 4(f)’s “clear and specific directives”<sup>78</sup> only permit the Secretary to make a small range of choices.<sup>79</sup> A reviewing court must decide whether the Secretary’s decision is reasonably within this limited range, considering specific facts of the case.<sup>80</sup> Second, a reviewing court must establish whether the Secretary’s actual decision is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” as required by the APA section 706(2).<sup>81</sup> The *Over-*

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71. *Overton Park*, 401 U.S. at 410-14 (citations omitted), *abrogated in part by* Califano v. Sanders, 430 U.S. 99, 101 (1977).

72. *Id.* at 410-11.

73. *Id.* at 410.

74. *Id.* at 413 (citing 5 U.S.C. § 706 (1964)).

75. *Id.* at 414 (citing 5 U.S.C. § 706(2)(A) (1964)).

76. *Id.* at 415.

77. *Id.* (citing *Schilling v. Rogers* 363 U.S. 666, 676-77, 680 (1960)).

78. *Id.* at 411.

79. *Id.* at 416.

80. *Id.* The Court in *Overton Park* noted two sub-issues within the first inquiry: “whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems[.]” and whether “the Secretary could have reasonably believed that in this case there are no feasible [or prudent] alternatives or that alternatives do involve unique problems.” *Id.* Further, in *La. Envtl. Soc’y*, the Fifth Circuit interpreted this line of inquiry to include a determination of whether the Secretary could have reasonably believed there was no use of Section 4(f) protected land. 537 F.2d at 83.

81. *Overton Park*, 401 U.S. at 416 (quoting 5 U.S.C. § 706(2)(A)). In addition, the *Overton*

*ton Park* Court recognized that to make this determination, a court must engage in a “searching and careful” inquiry into the relevant facts of a case, although, “the ultimate standard of review is a narrow one.”<sup>82</sup> Last, a reviewing court must determine “whether the Secretary’s action followed the necessary procedural requirements” mandated by section 4(f).<sup>83</sup>

#### IV. USE: CASE LAW AND REGULATORY INTERPRETATIONS

The mandates in section 4(f) that direct the FHWA to consider feasible and prudent alternatives and planning to minimize harm only come into play upon the determination that a proposed project will use protected resources.<sup>84</sup> Thus, use of protected resources is the principal issue and the single determinant of whether section 4(f) applies to a project. Perhaps it is because this issue is of such primary importance, together with the ambiguity of the term use, that the Department of Transportation promulgated section 771.135. The regulation facilitates a better understanding of the term use under section 4(f).<sup>85</sup>

Section 771.135(p) provides that use occurs when land is directly or constructively impacted, permanently or temporarily.<sup>86</sup> The Supreme Court has never addressed which scenarios constitute use of protected resources. However, the lower federal courts have created a rich precedent, providing considerable guidance to the nebulous term. For example, the Ninth Circuit Court of Appeals in *Adler v. Lewis* recognized that “[a] site is considered ‘used’ whenever land from or buildings on the site are taken by the proposed project, or whenever the proposed project has significant adverse air, water, noise, land, accessibility, esthetic, or other environmental impacts on or around the site, . . . .”<sup>87</sup>

##### A. DIRECT USE

Direct use of protected land and resources is not an issue in section 4(f) arguments because it involves the actual taking of land, which is indisputable. Simply, direct use arises when a program physically encroaches into a boundary of protected land and permanently incorporates

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*Park* Court stated that in making the second inquiry, a reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* (citations omitted).

82. *Id.*

83. *Id.* at 417.

84. See 49 U.S.C. § 303.

85. See 23 C.F.R. § 771.135(p) (providing examples of when use occurs).

86. See *id.*

87. *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982) (relying on *Stop H-3 Ass’n v. Coleman*, 740 F.2d 1442 (9th Cir. 1984)).

that land into a transportation facility.<sup>88</sup> Regardless of how small or insignificant the encroachment, if it is permanent, section 4(f) protection applies.<sup>89</sup>

## B. CONSTRUCTIVE USE

Section 4(f) also applies to constructive use. Constructive use occurs when a program indirectly impacts a protected resource.<sup>90</sup> The concept of constructive use was a product of the federal courts' attempt to consider the text of section 4(f) in conjunction with the spirit of *Overton Park*.<sup>91</sup> Relying on *Overton Park's* decision, which provides that the word use should be broadly construed, together with section 4(f)'s policy to protect certain lands and a presumption in favor of violation when use has occurred, a majority of courts have held that section 4(f) applies to constructive use.<sup>92</sup> Promulgation of section 771.135 confirmed the majority opinion.<sup>93</sup>

Section 771.135(p)(2) provides that constructive use arises when a "project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired."<sup>94</sup> Section 771.135(p)(2) further provides that "[s]ubstantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished."<sup>95</sup> Thus, a key disparity between direct and constructive use is in the level of impact required to trigger section 4(f).<sup>96</sup> Harm can be *de minimus* if it is the result of direct use; conversely, harm must be substantial if it results from constructive use.<sup>97</sup> Section 771.135(p)(4) and (5) provide a non-exclusive list of what constitutes constructive use.<sup>98</sup> The regulation recog-

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88. See 23 C.F.R. § 771.135(p) (using the language "permanent incorporation" which means direct use); Ferster & Merritt, *supra* note 35, at 39.

89. *La. Envtl. Soc'y*, 537 F.2d at 84 (recognizing that "[a]ny park use, regardless of the degree, invokes [section] 4(f).").

90. See 23 C.F.R. § 771.135(p)(2); *La. Envtl. Soc'y*, 537 F.2d at 85; Ferster & Merritt, *supra* note 35, at 39.

91. See *La. Envtl. Soc'y*, 537 F.2d at 84 (discussing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971) and section 4(f)).

92. Miller, *supra* note 9, at 637; see, e.g., *La. Envtl. Soc'y*, 537 F.2d at 84; *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) (holding that plaintiffs successfully demonstrated that the project would use parkland, despite the fact that no land would actually be taken).

93. See 23 C.F.R. § 771.135(p) (providing that use occurs "(iii) [w]hen there is a constructive use of land.>").

94. *Id.* § 771.135(p)(2).

95. *Id.*

96. See *Falls Rd. Impact Comm. v. Dole*, 581 F. Supp. 678, 693 (E.D. Wis. 1984).

97. *Id.* (holding that the noise level was not "significant enough to constitute a constructive taking.>").

98. See 23 C.F.R. § 771.135(p)(4)-(5).

nizes five proximity effects as constructive: noise, adverse esthetic impacts, vibration, restricting access to protected land, and ecological intrusions in wildlife or waterfowl refuges.<sup>99</sup> However, the regulation applies to all potential impacts of federally funded construction projects, specified and unspecified.<sup>100</sup>

Case law illustrates the various scenarios falling within and outside of the regulatory boundaries. Courts have enunciated two basic standards to determine whether protected land or resources have been constructively used: (1) proximity of the harm to the protected area and (2) impairment of a resource's value, significance, or utility.<sup>101</sup> Yet, even when individual impacts are not enough to constitute constructive use by these standards, a court may still conclude that a protected resource has been used if the cumulative effects of adverse impacts substantially impair the resource's utility.<sup>102</sup>

For example, in *Coalition Against a Raised Expressway, Inc. v. Dole*, the Eleventh Circuit Court of Appeals held that a project's anticipated air pollution, noise, and adverse esthetics constructively used neighboring historic landmarks.<sup>103</sup> In *Coalition Against a Raised Expressway*, the court examined a proposed raised freeway that would run in-between downtown Mobile, Alabama and the Mobile River.<sup>104</sup> The facility would stand adjacent to several visual and historic landmarks.<sup>105</sup> Referring to the nearness of the freeway to the landmarks, the court determined that the project's proximity effects constituted constructive use.<sup>106</sup> The freeway would add to the number of vehicles passing alongside the protected properties, causing an increase in air pollution and noise levels substantially in excess of the Environmental Protection Agency's ("EPA") guidelines.<sup>107</sup> The freeway would also impair the view between downtown and the Mobile River, and debris from the freeway "would lessen the beauty of the architecture itself."<sup>108</sup> The court noted that although, individually, the impacts may not rise to the level of use, the cumulative effect would significantly impair the utility of the protected sites.<sup>109</sup>

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99. *Id.* § 771.135(p)(4)(i)-(v).

100. *See id.* § 771.135(p)(4)-(5).

101. Miller, *supra* note 9, at 647 (citations omitted).

102. *See id.* at 648.

103. *Coal. Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803, 811-12 (11th Cir. 1988).

104. *Id.* at 805.

105. *Id.*

106. *Id.* at 811.

107. *Id.* at 811-12 ("The final EIS predicts that the noise level for these properties would rise to between seventy-five and eighty decibels. This is substantially greater than the Environmental Protection Agency's goal of fifty-five decibels.") (citations omitted).

108. *Id.* at 812.

109. *Id.*

Alternatively, in *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, the Fifth Circuit Court of Appeals held that esthetic impacts, alone, constituted constructive use.<sup>110</sup> The proposed project would widen an existing highway running adjacent to an urban park and a historic building in Fort Worth, Texas.<sup>111</sup> The project would expand the highway within five to twenty feet of the protected resources, and would create an “awning-like effect” upon the historic building, shading it and obstructing the view of its façade.<sup>112</sup> The court held that the program constructively used the protected sites, imposing an “uninviting” and “inhumane quality” upon the urban park.<sup>113</sup> The nearness of the highway would also “detract from [the] carefully conceived design” of the historic building.<sup>114</sup>

In *Brooks v. Volpe*, the Ninth Circuit Court of Appeals established the constructive use doctrine.<sup>115</sup> The *Brooks* court determined that the proposed highway, which would encircle a public camping site in Washington’s Cascade Mountain Range, would use the site.<sup>116</sup> The court stated, “The word ‘use’ is to be construed broadly in favor of environmental statements in cases in which environmental impact appears to be a substantial question.”<sup>117</sup> Years later, in *Stop H-3 Ass’n v. Dole*, the Ninth Circuit impliedly held that constructive use resulted from a project’s noise, pollution, and esthetic impacts.<sup>118</sup> The proposed highway construction project in Oahu, which would pass within 100 to 200 feet of an archeological landmark, would constitute a constructive use.<sup>119</sup> The court observed that it was irrelevant that the archeological landmark (a petroglyph rock) had been moved a few feet from its original location as it still formed the “basis of a historic site.”<sup>120</sup>

In *Sierra Club v. United States Department of Transportation*, the dis-

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110. See *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423, 436, 441-42 (5th Cir. 1985) (stating that the highway would give the park an “uninviting” and “inhumane quality” as well as create an “awning-like effect” to an adjacent building).

111. *Id.* at 426-27.

112. *Id.* at 427.

113. *Id.* at 435, 441-42.

114. *Id.* at 435-36.

115. See *Brooks*, 460 F.2d at 1194 (relying on *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971) in determining that the term use is to be broadly construed); *Miller, supra* note 9, at 647 (providing that “the Ninth Circuit first established the constructive use doctrine in *Brooks v. Volpe*.”).

116. *Brooks*, 460 F.2d at 1194.

117. *Id.* (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971)).

118. See *Stop H-3*, 533 F.2d at 445 (holding that the archaeological site, and “its immediate environs, qualify for protection under section 4(f)” and citing *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) in concluding that the proposed highway would use land from the nearby archeological site).

119. *Id.* at 439, 445.

120. *Id.* at 445.

district court held that esthetic impacts, alone, and impacts on recreation, wildlife, vegetation, and hydrology constituted constructive use.<sup>121</sup> The court examined a highway construction project located in close proximity to McNee Ranch State Park, a recreation and wilderness area in California.<sup>122</sup> The cuts and fills of a nearby mountain would be visible to park visitors from certain locations within the park, and re-vegetation efforts to hide these impacts were not expected to be successful.<sup>123</sup> In addition, the project's adverse impacts on recreation and wildlife would rise to the level of use.<sup>124</sup> The hiking trails would have to be rerouted, and the unspoiled wilderness would be interrupted by the highway.<sup>125</sup> The proposed highway would also cause noise levels to increase and would negatively affect the vegetation and hydrology within the protected area.<sup>126</sup>

Conversely, the district court in *Falls Road Impact Committee, Inc. v. Dole* held that a project's noise and esthetic impacts did not constitute constructive use of a neighboring park.<sup>127</sup> The proposed highway improvement project would run adjacent to Lime Kiln Park in Grafton, Wisconsin.<sup>128</sup> Although area residents testified that they believed the esthetics of Lime Kiln Park would be adversely affected, the court stated that increased traffic, alone, was not a serious enough impact.<sup>129</sup> The court observed that the projected noise increase would be below the design noise level (the upper level of acceptable noise), and the program would not widen the existing highway into the park.<sup>130</sup> The court noted that the project would improve access to Lime Kiln Park and increase safety by building sidewalks, mitigating any increased danger to park visitors.<sup>131</sup>

In *Concerned Citizens Coalition v. FHWA*, the district court concluded that a project's noise impacts did not rise to the level of constructive use.<sup>132</sup> The construction of the proposed highway improvement project on an existing right-of-way, in Lafayette, Louisiana, would not substantially impair the value of the surrounding park.<sup>133</sup> The court de-

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121. *Sierra Club v. U.S. Dep't of Transp.*, 664 F. Supp. 1324, 1330-31 (N.D. Cal. 1987) (citations omitted).

122. *Id.* at 1328.

123. *Id.* at 1330-31.

124. *Id.* at 1331.

125. *Id.*

126. *Id.*

127. *Falls Rd.*, 581 F. Supp. at 693-94.

128. *Id.* at 689.

129. *Id.* at 694.

130. *Id.* at 693.

131. *Id.*

132. *Concerned Citizens Coal. v. FHWA*, 330 F. Supp. 2d 787, 794 (W.D. La. 2004).

133. *See id.*

terminated that the noise increase attributable to the improved facility did not constitute a constructive use of the park because the highway's existing noise levels were already above the FHWA's upper limit.<sup>134</sup>

### 1. *The Tenth Circuit*

Because the I-70 mountain corridor is located in Colorado, courts in the Tenth Circuit will address any claims that the proposed expansion project violates section 4(f). Therefore, understanding the Tenth's Circuit's approach to use is essential. The Tenth Circuit tends to interpret use broadly, as exemplified by the following discussion of cases.

In *Davis v. Mineta*, the Tenth Circuit Court of Appeals held that esthetic and noise impacts constituted constructive use.<sup>135</sup> The court evaluated a plaintiff's motion to enjoin the construction of a highway that would bisect a public park located on the Jordan River in Utah.<sup>136</sup> The court granted the motion, concluding that the project would adversely affect the esthetic attributes of the park by disrupting "the natural setting and feeling of the park."<sup>137</sup> In addition, "noise levels [were] expected to increase at least ten decibels" in some areas and as much as twenty decibels in other areas, nearly tripling the noise levels in some areas of the park.<sup>138</sup>

Similarly, in *National Parks and Conservation Ass'n v. FAA*, the Tenth Circuit held that noise impacts constituted constructive use of a park.<sup>139</sup> The project would construct a new airport adjacent to the Glen Canyon National Recreation Area in Utah.<sup>140</sup> Although the FAA claimed that the project would not significantly impact the recreational utility of the park, the court concluded otherwise, recognizing that park visitors would have to experience double the amount of audible aircraft noise.<sup>141</sup> The court noted that a visitor would hear an additional fifteen to twenty-five minutes of traffic on some days.<sup>142</sup>

### C. TEMPORARY USE

Having addressed which permanent impacts constitute use under section 4(f), this Article will next discuss temporary impacts. Pursuant to

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134. *Id.* The highway's pre-improvement noise level was 71 dBA, four decibels higher than 67 dBA, the upper limit for noise in park areas established by the FHWA. The improved facility would have an anticipated noise level of 75 dBA. *Id.*

135. See *Davis v. Mineta*, 302 F.3d 1104, 1109, 1115-16 (10th Cir. 2002).

136. *Id.* at 1109, 1112.

137. *Id.* at 1115-16.

138. *Id.* at 1112, 1115, 1124-25.

139. See *Nat'l Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1532-33 (10th Cir. 1993).

140. *Id.* at 1525.

141. *Id.* at 1532-33.

142. *Id.* at 1532.

section 771.135(p)(7), temporary impacts resulting from a transportation project do “not constitute a ‘use’ within the meaning of section 4(f)” when: (i) duration of the impact is less than the time needed for construction; (ii) both the nature and magnitude of the work impacting the resource are minor; (iii) there is no interference with the purposes of the resource; (iv) the resource is fully restored; and (v) each condition is documented by the appropriate authorities.<sup>143</sup> Therefore, if any of the named conditions are *not* satisfied, a temporary impact may qualify as a use within the meaning of section 4(f).<sup>144</sup> To a small degree, case law supports this principle.

*Coalition on Sensible Transportation v. Dole* addressed the concept that temporary *actual* impacts can constitute uses of protected lands.<sup>145</sup> The proposed program, expected to last for only five years, would widen a strip of interstate highway that bordered four parks in Montgomery County, Maryland.<sup>146</sup> Although recognizing that none of the parks had popular facilities in the area of the highway, the Court of Appeals for the District of Columbia held that the project’s temporary construction easements constituted use of the parks.<sup>147</sup> The court noted that the project would grade the topography of the easements, leaving permanent slopes along the edges of the highway.<sup>148</sup> The project would kill and remove vegetation, including the removal of fifty-year-old oak trees in order to facilitate construction.<sup>149</sup> Even though the project would re-vegetate and re-landscape the easements prior to return to their government owners, the court stated that these mitigation measures would not change the fact that the project used the park.<sup>150</sup> In addition, the fifty-year-old oaks would take two generations to replace.<sup>151</sup> The court noted that this replacement period would seem permanent to most individuals.<sup>152</sup>

The concept of temporary constructive use has an even more tenuous relationship with section 771.135 and case law. However, support, albeit negative, does exist. Section 771.135(p)(7) does not distinguish between actual and constructive use in the context of temporary impacts.<sup>153</sup>

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143. 23 C.F.R. § 771.135(p)(7)(i)-(v).

144. *See id.* (using the connector term “and” not “or”).

145. *See Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d. 60, 63 (D.C. Cir. 1987) (emphasis added).

146. *Id.* at 62.

147. *Id.* at 63.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *See* 23 C.F.R. § 771.135(p)(7) (providing that when specific conditions are fulfilled a temporary use does not constitute a use within the meaning of section 4(f), but does not provide physical use of the land as one of the conditions).



Furthermore, the regulation's inventory of scenarios that *cannot* constitute constructive use does not list temporary conditions.<sup>154</sup> Thus, section 771.135 allows a temporary constructive impact to rise to the level of use, though the very nature of constructive use poses a significant hurdle for those seeking to invoke the doctrine for temporary impacts. For constructive use, proximity impacts of a program must substantially impair a protected resource's activities, features, or attributes that qualified the resource for section 4(f) protection in the first place.<sup>155</sup> Therefore, a temporary constructive use must satisfy this strict standard and fulfill section 771.135(p)(7)'s requirements for temporary use.<sup>156</sup>

*Falls Road Impact Committee v. Dole*<sup>157</sup> provides a cautionary tale of a failed invocation of temporary constructive use. Nevertheless, the case guides what could result in a successful assertion of the doctrine. As previously mentioned, in *Falls Road*, the program at issue would improve a highway running adjacent to a city park in Grafton, Wisconsin.<sup>158</sup> The court denied that restricted access to the park during construction amounted to use, acknowledging that construction would only limit the direction of approach to the park and would only last 80 to 100 days.<sup>159</sup> Further, the public could still use the park during construction.<sup>160</sup>

The Tenth Circuit case *Valley Community Preservation Commission v. Mineta*<sup>161</sup> also addresses temporary constructive use. The project at issue involved widening a portion of highway located in close proximity to historical structures located in the Hondo River Valley in New Mexico.<sup>162</sup> In its opinion, the court distinguished between impacts resulting from construction and permanent impacts from the operation of the facility.<sup>163</sup> Relying on section 771.135, the court opined that temporary vibration impacts from construction were not considered use, so long as the impacts were mitigated, "through advance planning and monitoring of activities," to ensure that the value of the historical structures were not substantially impaired.<sup>164</sup> Acknowledging that the FHWA had in fact adopted a monitoring and repair program, the court held that the project

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154. See *id.* § 771.135(p)(5) (listing situations that would prevent constructive impacts from rising to the level of use) (emphasis added).

155. *Id.* § 771.135(p)(5)(vi).

156. See *id.* § 771.135(p)(5)(vi), (7) (examining both sections 771.135(p)(5) and 771.135(p)(7) provides support for this conclusion).

157. *Falls Rd.*, 581 F. Supp. 678.

158. *Id.* at 689.

159. *Id.* at 694.

160. *Id.*

161. *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078 (10th Cir. 2004).

162. *Id.* at 1081-82.

163. *Id.* at 1092.

164. *Id.* (quoting 23 C.F.R § 771.135(p)(5)(ix)).

did not use the protected resources.<sup>165</sup>

## V. PROTECTED PROPERTIES ALONG THE I-70 CORRIDOR

Section 4(f) limits its application to historic sites, wildlife and waterfowl refuges, recreation areas, and parks that have local, state, or national significance.<sup>166</sup> Furthermore, section 771.135 provides, “The Administration may not approve the use of land from a significant publicly owned park, recreation area, or wildlife and waterfowl refuge, or any significant historic site . . . .”<sup>167</sup> Significance, therefore, is an essential requirement for the protection of all four of the enumerated resources in section 4(f).<sup>168</sup> Significance is presumed in the absence of a determination of insignificance of a particular wildlife or waterfowl refuge, park, or recreation area.<sup>169</sup> Conversely, historic resources require an official determination of significance, meaning that the property is either on or eligible for the National Register of Historic Places.<sup>170</sup> Historic resources are evidently presumed insignificant until an official determination is made otherwise.

Another restraint imposed by section 771.135 applies only to multiple-use public lands: “section 4(f) applies only to those portions of such lands which *function* for, or are *designated* in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl purposes.”<sup>171</sup> Therefore, entire state and national forests are generally not eligible for section (4)(f) protection if they are used for multiple purposes; only the portions that are used or designated for the purposes enumerated in the statute are entitled to protection.<sup>172</sup> The following discussion gives a non-exhaustive inventory of resources located in the vicinity of the I-70 mountain corridor expansion project that may be entitled to section 4(f) protection.

### A. PROPERTIES THAT HAVE HISTORIC AND CULTURAL SIGNIFICANCE

The proposed project will widen a portion of I-70 that passes

165. *Id.* at 1092.

166. 49 U.S.C. § 303(a).

167. 23 C.F.R. § 771.135(a)(1).

168. *See id.* (providing that the use of land from a “*significant* publicly owned public park, recreation area, or wildlife and waterfowl refuge.” (emphasis added)).

169. *Id.* § 771.135(c) (providing that section 4(f) permits either federal, state, or local authorities to determine whether a resource is significant and in the absence of such determination, section 4(f) land is presumed to be significant).

170. *Id.* § 771.135(e).

171. *Id.* § 771.135(d) (emphasis added).

172. *See id.* (providing that section 4(f) “only” applies to those portions of land that function as, or have been designated in the administering agency’s plans as significant park, recreation, or wildlife and waterfowl purposes).

through, or is in the vicinity of, a number of historic mining towns.<sup>173</sup> There are at least 741 public, historic sites within one mile of the corridor,<sup>174</sup> and of those, 184 sites are either on or eligible for the National Register of Historic Properties.<sup>175</sup> I-70 operates directly through two districts on the register: the Georgetown-Silver Plume National Historic Landmark (“NHL”) District, a five-mile stretch along I-70, and the Hot Springs National Historic District, located in Glenwood Springs.<sup>176</sup> A much larger district, the state designated “Silver Heritage Area,” surrounds the Georgetown-Silver Plume NHL District and extends fifteen miles along I-70.<sup>177</sup>

## B. AREAS USED FOR RECREATION

There are 224 recreation sites within six miles of the mountain corridor.<sup>178</sup> Of these recreation sites, there are six ski resorts, two congressionally designated wilderness areas, eighteen river access points, nine public campgrounds, and eighty-six trails.<sup>179</sup>

The proposed project will widen the I-70 mountain corridor segment operating through the Arapaho National Forest.<sup>180</sup> The project is also in close proximity to the White River National Forest.<sup>181</sup> These forests have been designated, at least partially, as recreation resources, where visitors engage in a variety of activities, including snowboarding and skiing, camping, hiking, fishing, and hunting.<sup>182</sup> In fact, the Forest Service has identified 110 section 4(f) public recreation areas of local, regional, and national significance located in the White River and Arapaho National

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173. COLO. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., REVISED RECONNAISSANCE SURVEY OF THE INTERSTATE 70 MOUNTAIN CORRIDOR, at 1-5 (2005) [hereinafter REVISED RECONNAISSANCE SURVEY], available at [http://www.i70mntncorridor.com/documents/recon\\_report\\_final.pdf](http://www.i70mntncorridor.com/documents/recon_report_final.pdf) (last visited Jan. 28, 2006).

174. *Id.* at 2-1.

175. *Id.*

176. DRAFT PEIS SECTION 4(F) EVALUATION, *supra* note 4, at 3.16-3, -4.

177. *Id.*

178. COLO. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), 3.14 RECREATION RESOURCES, at 3.14-3 (2004) [hereinafter DRAFT PEIS 3.14 RECREATION RESOURCES], available at [http://www.i70mntncorridor.com/Webready/PEIS/3.14\\_Recreation\\_Resources.pdf](http://www.i70mntncorridor.com/Webready/PEIS/3.14_Recreation_Resources.pdf) (last visited Jan. 29, 2006) (indicating in Table 3.14-1 the resource sites in the project area).

179. *Id.*

180. DRAFT PEIS EXECUTIVE SUMMARY, *supra* note 1, at ES-7, -8 (indicating in Figure ES-3 the relationship of the national forests to the I-70 mountain corridor).

181. *Id.*

182. U.S. Department of Agriculture, Forest Service, White River National Forest, [www.fs.fed.us/r2/whiteriver/recreation/](http://www.fs.fed.us/r2/whiteriver/recreation/) (last visited Mar. 21, 2006); U.S. Department of Agriculture, Forest Service, Arapaho and Roosevelt National Forests, Pawnee National Grassland, [www.fs.fed.us/r2/arnf/recreation/](http://www.fs.fed.us/r2/arnf/recreation/) (last visited Mar. 21, 2006).

Forests.<sup>183</sup> Of these recreation areas, eighty-six recreation resources are located within six miles of the project area.<sup>184</sup>

Flowing through the Arapaho National Forest and the towns of Idaho Springs and Georgetown, Clear Creek runs adjacent to and crosses under I-70 at various points in the project area.<sup>185</sup> People visit the river to go trout fishing and white water rafting.<sup>186</sup> In addition, Georgetown Lake Recreation Area is also located adjacent to the expansion area. Recreation activities on and around the lake include ice fishing and racing, fishing, hiking, picnicking, and wildlife viewing.<sup>187</sup> Located in the center of the expansion area, Clear Creek County has identified twenty-one public recreation resources within the vicinity of I-70.<sup>188</sup> These areas facilitate numerous recreation activities, such as biking, skiing, soccer, tennis, and fishing.<sup>189</sup>

A total of sixteen National Wilderness Preservation Areas are located in the Arapaho and White River National Forests.<sup>190</sup> Designated wilderness areas under this system are intended not only to maintain a close-to-pristine environment for wildlife, but also to provide many recreational, educational, and scientific opportunities.<sup>191</sup> These opportunities include star gazing, mountain climbing, camping, and studying animals in their natural habitat.<sup>192</sup> People also visit the wilderness areas for scenic and esthetic opportunities, such as experiencing the natural dark and

183. COLO. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), APPENDIX O: SECTION 4(f) & 6(f) EVALUATION—COORDINATION, at O-5 (2004) [hereinafter DRAFT PEIS APPENDIX O], available at [http://www.i70mtncorridor.com/I70PEIS\\_PEIS.asp?Doc\\_id=3](http://www.i70mtncorridor.com/I70PEIS_PEIS.asp?Doc_id=3) (last visited Feb. 3, 2006).

184. See DRAFT PEIS 3.14 RECREATION RESOURCES, *supra* note 178, at 3.14-3 (providing in "Table 3.14-1 Recreation Resources in the Inventory Area" that the Whiter River National Forest has seventy-three recreation resources within six miles of the corridor, and the Arapaho National Forest has thirteen recreation resources).

185. See generally REVISED RECONNAISSANCE SURVEY, *supra* note 173, at Figures 4-5, 4-6.

186. See Clear Creek County Recreation, [www.clearcreekcounty.org/clear-creek-county-recreation.htm](http://www.clearcreekcounty.org/clear-creek-county-recreation.htm) (last visited Mar. 21, 2006).

187. DRAFT PEIS APPENDIX O, *supra* note 185, at O-48 (identifying such uses in a copy of a letter from Cynthia Neely, Planning Coordinator, Town of Georgetown, to Teresa O'Neil, Environmental Planner, J.F.Sato & Assocs. (Aug. 9, 2001)).

188. *Id.* at O-41 (identifying the twenty-one public lands in a letter from Carol Wise, Planning Director, Clear Creek County, to Teresa O'Neil, J.F. Sato & Assocs. (Dec. 5, 2001)).

189. See *id.*

190. See U.S. Department of Agriculture, Forest Service, White River National Forest, *supra* note 182 (providing that eight wilderness areas are located in the forest); Wildernet, Colorado National Forests, Arapaho and Roosevelt National Forests, [http://areas.wildernet.com/pages/area.cfm?areaID=0210&CU\\_ID=1](http://areas.wildernet.com/pages/area.cfm?areaID=0210&CU_ID=1) (last visited Mar. 22, 2006) (stating that eight wilderness areas are located in the forest).

191. See Wilderness.net, The National Wilderness Preservation System: Values & Benefits of Wilderness, <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=values> (last visited Feb. 4, 2006).

192. *Id.*

quiet of wilderness, and the natural beauty and grandeur of the landscape.<sup>193</sup>

### C. WILDLIFE AND WATERFOWL REFUGES

Currently, no national- or state-designated wildlife and waterfowl refuges are located along the I-70 mountain corridor.<sup>194</sup> However, the Arapaho and White River National Forests are home for mule deer, coyote, elk, black bear, mountain lion, mountain goat, various species of trout, songbird, boreal toad, and big horn sheep.<sup>195</sup> In addition, the forests are critical habitat for endangered and threatened species, such as gray wolf, greenback cutthroat trout, and Canadian lynx.<sup>196</sup>

### D. PARKS

Sixty-four parks are located within six miles of the I-70 mountain corridor.<sup>197</sup> In particular, Clear Creek and Jefferson counties have a total of nineteen public parks within the six-mile zone.<sup>198</sup> There are no Colorado State Parks or National Parks proximately located to the project area.<sup>199</sup>

193. *Id.*

194. See U.S. Fish & Wildlife Service, Refuge List by State: Colorado, <http://refuges.fws.gov/profiles/ByState.cfm?state=CO> (last visited Feb. 4, 2006).

195. GORP, Parks, White River National Forest, Wildlife and Birding, [http://gorp.away.com/gorp/resource/us\\_national\\_forest/co/wild\\_wr.htm](http://gorp.away.com/gorp/resource/us_national_forest/co/wild_wr.htm) (last visited Mar. 29, 2006); U.S. Department of Agriculture, Forest Service, Arapaho & Roosevelt National Forests Pawnee National Grassland, Arapaho National Recreation Area, <http://www.fs.fed.us/r2/arnf/recreation/anra/index.shtml> (last visited Mar. 29, 2006).

196. See generally COLO. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), APPENDIX A: ENVTL. ANALYSIS & DATA, at A-6 (2004) [hereinafter DRAFT PEIS APPENDIX A], available at [http://www.i70mtncorridor.com/Webready/Appendices/Appendix\\_A\\_Env\\_and\\_Comm\\_Value\\_Analysis\\_and\\_Data.pdf](http://www.i70mtncorridor.com/Webready/Appendices/Appendix_A_Env_and_Comm_Value_Analysis_and_Data.pdf) (last visited Feb. 4, 2006) (assessing threatened and endangered species and species of special concern); Defenders of Wildlife, Wolf Recovery: Southern Rockies, <http://www.defenders.org/wolfrecovery/southrockies.html> (last visited Aug. 21, 2005); U.S. Fish & Wildlife Service, Species Profile for Canada Lynx, [http://ecos.fws.gov/species\\_profile/servlet/gov.doi.species\\_profile.servlets.SpeciesProfile?spcode=A073](http://ecos.fws.gov/species_profile/servlet/gov.doi.species_profile.servlets.SpeciesProfile?spcode=A073) (last visited Mar. 21, 2006) (providing information regarding the status of the Canada Lynx); U.S. Fish & Wildlife Service, Species Profile for Gray Wolf, [http://ecos.fws.gov/species\\_profile/servlet/gov.doi.species\\_profile.servlets.SpeciesProfile?spcode=A00D](http://ecos.fws.gov/species_profile/servlet/gov.doi.species_profile.servlets.SpeciesProfile?spcode=A00D) (last visited Feb. 4, 2006) (providing information on the recovery plans, special rules and critical habitat for the gray wolf).

197. See DRAFT PEIS 3.14 RECREATION RESOURCES, *supra* note 178, at 3.14-3 (indicating in Table 3.14-1 the recreation resources located in the project area).

198. *See id.*

199. See generally Colorado State Parks, Parks Map, <http://parks.state.co.us/default.asp?action=search&search=park> (last visited Feb. 3, 2006); National Park Service, Colorado, <http://data2.itc.nps.gov/parksearch/state.cfm> (last visited Feb. 3, 2006).

## VI. PROJECTED IMPACTS FROM THE PROPOSED SIX-LANE INTERSTATE HIGHWAY

By 2025, the anticipated end of the I-70 mountain corridor expansion project, C-DOT anticipates that the human populations in the Front Range and mountain corridor communities will increase by 46% and 101%, respectively.<sup>200</sup> C-DOT also projects a 65% increase in person trips through the corridor.<sup>201</sup> These increased trips will generate increased vehicle traffic along the corridor, which, in turn, will result in increased adverse impacts on the land surrounding the project area. Because the project is currently in the Tier 1 phase of investigation,<sup>202</sup> there is inadequate information addressing projected adverse impacts. C-DOT will not define specific effects until the end stages of Tier 1, when C-DOT has published its final programmatic environmental impact statement, and the FHWA has issued its record of decision.<sup>203</sup>

Following is a non-exhaustive overview of the project's impacts recognized in the draft programmatic environmental impact statement (Draft PEIS), its appendices, and the Reconnaissance Survey. This examination generally involves comparisons between the proposed six-lane highway facility and the no-build alternative. Discussion of the proposed six-lane highway facility amalgamates the impacts of the fifty-five and sixty-five miles per hour alternatives. This overview does not consider cumulative effects or induced growth and travel demand resulting from the project.<sup>204</sup>

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200. See *I-70 Mountain Corridor Draft PEIS*, PUBLIC HEARING (Colo. Dep't of Transp., Fed. Highway Admin., Aurora, Colo.), Dec. 10, 2004, at 4 [hereinafter PUBLIC HEARING], available at [http://www.i70mtncorridor.com/PresMats/PH\\_PPT/I-70\\_Draft\\_PEIS\\_Public\\_Hearing\\_Presentation.pdf](http://www.i70mtncorridor.com/PresMats/PH_PPT/I-70_Draft_PEIS_Public_Hearing_Presentation.pdf) (last visited Jan. 26, 2006).

201. *Id.* at 7.

202. I-70 Mountain Corridor, Draft PEIS, Draft PEIS - Comment Period has Ended, [http://www.i70mtncorridor.com/I70\\_Deadline.asp](http://www.i70mtncorridor.com/I70_Deadline.asp) (last visited Jan. 26, 2006).

203. See *id.*

204. See generally 40 C.F.R. § 1508.7 (2005) (defining "cumulative impact as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or non-Federal) or person undertakes such other actions."); Robert B. Noland & Lewison L. Lem, *A Review of the Evidence for Induced Travel and Changes in Transportation and Environmental Policy in the United States and the United Kingdom* (CENTRE FOR TRANSPORT STUDIES, London, Eng.), Feb. 6, 2001, at 2, available at <http://www.cts.cv.imperial.ac.uk/documents/publications/iccts00244.pdf> (last visited Jan. 26, 2006) (providing that "[a]ny increase in highway capacity (supply) reduces the generalized cost of travel, especially on congested highways, by reducing the time cost of travel. Travel time is the major component of variable costs experienced by those using private vehicles for travel. When any good (in this case travel) is reduced in cost, the quantity demanded of that good increases.").

## A. NOISE

Existing noise levels in parts of the I-70 mountain corridor already exceed FHWA and C-DOT noise abatement criteria.<sup>205</sup> The Draft PEIS indicates that the proposed facility will increase the corridor's noise levels two to three decibels during peak travel times.<sup>206</sup> The project's impacts are expected to be great in the Idaho Springs area due to the elevated nature of I-70 through the town and the close proximity of steep rock cliffs.<sup>207</sup>

## B. AIR QUALITY

In the mountain corridor, particulate matter and carbon monoxide emissions are the air-pollutants of most concern.<sup>208</sup> Particulate matter emissions come in the form of re-entrained road dust, dust and sand on the highway, and hazardous air pollutants, all of which are "resuspended in the air" by motor vehicle travel.<sup>209</sup> While these pollutants are harmful to one's health, they also impair visibility in the corridor.<sup>210</sup>

The Draft PEIS anticipates that the widened, six-lane transportation facility will adversely affect air quality in the vicinity of I-70.<sup>211</sup> C-DOT projects that in 2025, the use of the widened highway facility will result in carbon monoxide emissions 13% higher than those from the no-build alternative.<sup>212</sup> Particulate matter emissions will be 8% to 15% higher than if the project were not built.<sup>213</sup> In addition, visibility impacts from pollution will be approximately 11% higher than those of the no-build alternative.<sup>214</sup>

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205. COLO. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), 3.12 NOISE, at 3.12-1 (2004) [hereinafter DRAFT PEIS 3.12 NOISE], available at [http://www.i70mtncorridor.com/Webready/PEIS/3.12\\_Noise.pdf](http://www.i70mtncorridor.com/Webready/PEIS/3.12_Noise.pdf) (last visited Jan. 26, 2006) (providing in Table 3.12-2 that the C-DOT noise abatement criteria is fifty-six decibels on "[l]ands on which serenity and quite are of extraordinary significance . . . [.]" sixty-six decibels on outdoor recreation areas and residences, and seventy-one decibels on other developed lands).

206. *Id.* at 3.12-5.

207. *Id.* at 3.12-9.

208. DRAFT PEIS EXECUTIVE SUMMARY, *supra* note 1, at ES-25.

209. *Id.*

210. *Id.*

211. *See id.*

212. COLO. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), 3.1 CLIMATE & AIR QUALITY, at 3.1-6 (2004) [hereinafter DRAFT PEIS 3.1 CLIMATE & AIR QUALITY], available at [http://www.i70mtncorridor.com/I70PEIS\\_PEIS.asp?doc\\_id=1](http://www.i70mtncorridor.com/I70PEIS_PEIS.asp?doc_id=1) (last visited Jan. 26, 2006).

213. *Id.* at 3.1-7.

214. *See* DRAFT PEIS EXECUTIVE SUMMARY, *supra* note 1, at ES-25 (indicating in Chart ES-25 that the total gross emissions of the six-lane highway alternatives will be about fifty-nine units, as opposed to approximately fifty-three units from the no-build alternative).

### C. VISUAL BLIGHT

By its very nature, esthetic judgment concerning visual resources is subjective.<sup>215</sup> However, according to C-DOT, federal agencies have developed tools to assess esthetic qualities in objective terms.<sup>216</sup> Using these tools, the Draft PEIS indicates that impacts on visibility are expected to be significant.<sup>217</sup> In addition, the Revised Reconnaissance Survey also mentions possible visual impacts as a possible impact on historic properties.<sup>218</sup>

C-DOT anticipates that the project's landform changes and structural elements will disfigure the landscape in the project area.<sup>219</sup> The potential landform changes involve cuts and fills, retaining walls, and changing open medians to paved, closed medians.<sup>220</sup> The project's potential structural elements include bridges, piers, columns, elevated platforms, barriers, and fencing.<sup>221</sup> According to C-DOT, the project's anticipated landform changes will have "strong contrast[s]" with the existing landscape.<sup>222</sup> Further, some structural elements could have "very strong contrast[s]" with the land and its resources.<sup>223</sup> While these descriptions of the project's impacts may appear awkward, they are the method used to explain the potential "degree of dominance or discontinuity anticipated to occur within the landscape setting."<sup>224</sup> In other words, "contrast" is a method that measures the level of visual disruption the project will likely impose on the landscape.

### D. WATER QUALITY

Roadways generally contribute to water pollution, and the I-70 mountain corridor is not an exception. Because the I-70 segment in ques-

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215. COLO. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), APPENDIX L: VISUAL RESOURCES, at L-1 (2004) [hereinafter DRAFT PEIS APPENDIX L], available at [http://www.i70mntncorridor.com/Webready/Appendices/Appendix\\_L\\_Visual\\_Resources-SAU.pdf](http://www.i70mntncorridor.com/Webready/Appendices/Appendix_L_Visual_Resources-SAU.pdf) (last visited Jan. 27, 2006).

216. *Id.*

217. See PUBLIC HEARING, *supra* note 200, at 33.

218. REVISED RECONNAISSANCE SURVEY, *supra* note 173, at 2-2.

219. See DRAFT PEIS APPENDIX L, *supra* note 215, at L-15 (assessing in Table L-2 the anticipated landform changes and structural elements associated with the project alternatives).

220. See *id.* (providing in Table L-2 the landform changes).

221. See *id.* (providing in Table L-2 the structural elements).

222. See *id.* (providing that "[a] key tool in assessing the change associated with activities in a landscape is the concept of visual contrast. Contrast ratings compare project alternatives with existing conditions element by element, according to the degree of dominance or discontinuity anticipated to occur within the landscape setting[.]" and describing in Table L-2 the strong contrasts associated with the landform changes).

223. See *id.* (providing in Table L-2 the very strong contrasts associated with the structural elements).

224. *Id.*



tion runs through river and stream valleys, the highway is located in very close proximity to a number of waterways.<sup>225</sup> Pollution of these waterways results from a mixture of storm-water runoff and contaminants caused by normal highway use and maintenance activities.<sup>226</sup> Surface and structural erosion, re-surfacing and improvements, vehicle and tire wear, and oil and grease deposits represent typical highway runoff pollutant-inducing conditions.<sup>227</sup> The pollutants of concern in the I-70 mountain corridor are suspended solids, chloride, phosphorus, copper, and zinc.<sup>228</sup> C-DOT projects that each of these pollutants will increase at least 17% as a result of the proposed six-lane highway facility.<sup>229</sup>

The fact that the mountain corridor is subject to winter ice and snow conditions exacerbates the pollution problem.<sup>230</sup> In order to maintain safe driving conditions on I-70 during the winter months, C-DOT applies sand and deicers, containing sodium and manganese chloride, to roadway surfaces.<sup>231</sup> Naturally, these applications contribute to highway runoff pollution as sand, sodium and magnesium chloride gradually make their way into nearby rivers, lakes, and streams.<sup>232</sup> It seems intuitive that the project's goal of adding extra roadway surface to the mountain corridor would increase such contaminants. In fact, C-DOT acknowledges that increased sand and deicer application to accommodate a six-lane traffic facility will impact the Eagle River, Blue River, Clear Creek, and Upper South Platte River watersheds.<sup>233</sup> Depending on the watershed, application is anticipated to increase 7% to 62%.<sup>234</sup> C-DOT states that the most severe of these projected impacts of the six-lane highway alternatives will

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225. COLO. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), 3.4 WATER RESOURCES, at 3.4-1 (2004) [hereinafter DRAFT PEIS 3.4 WATER RESOURCES], available at [http://www.i70mtncorridor.com/Webready/PEIS/3.04\\_Water\\_Resources.pdf](http://www.i70mtncorridor.com/Webready/PEIS/3.04_Water_Resources.pdf) (last visited Jan. 27, 2006).

226. *Id.* at 3.4-2.

227. *See id.* (indicating in Table 3.4-2 the source of highway runoff pollutants of concern in the corridor).

228. *See id.* (indicating in Table 3.4-2 and Table 3.4-19 the type of pollutants).

229. *See id.* at 3.4-20 (summarizing in Table 3.4-19 the percent increase from existing conditions in stormwater runoff over three years that correspond to the project alternatives). The graph shows the following pollutant increases: total suspended solids will increase 17-19%; phosphorus will increase 18-20%; chloride will increase 19-20%; dissolved copper will increase 18-19%; and dissolved zinc will increase 18-20%. *Id.*

230. *See id.* at 3.4-1. "C-DOT winter maintenance crews apply sand and deicers to I-70 when necessary to maintain road traction and a safe ice- and snow-free road surface. Snow accumulates at higher elevations in the Corridor throughout the winter and must be removed from the highway to maintain mobility." *Id.* at 3.4-2.

231. *Id.* at 3.4-2.

232. *Id.*

233. *See id.* at 3.4-19 (summarizing in Table 3.4-18 the percent increase of winter maintenance impacts from project alternatives).

234. *See id.* (summarizing in Table 3.4-18 the percent increase of winter maintenance impacts from project alternatives).

be in the Clear Creek watershed, with projected sand and deicer applications increasing between 41% and 62%.<sup>235</sup>

### E. VEGETATION AND WILDLIFE

C-DOT projects that the I-70 mountain corridor project and its resulting six-lane facility will impose various adverse impacts on area vegetation and wildlife.<sup>236</sup> Among these potential impacts are loss of plant communities and animal habitat, barriers to wildlife movement, and impacts on fisheries.<sup>237</sup>

C-DOT anticipates that the proposed project will “permanently displace” fifty-eight to seventy-six acres of vegetation in the mountain corridor.<sup>238</sup> Direct impacts from construction will affect an additional fifty-six to sixty-one acres of vegetation.<sup>239</sup> These new disturbances will adversely impact various vegetation habitats identified in the project area: spruce-fir forest, sagebrush shrubland, ponderosa pine forest, piñon-juniper, mountain shrubland, lodgepole pine forest, grass/forb meadows, douglas-fir forest, and aspen forest.<sup>240</sup> Among these effects, the project will impact approximately ten to twenty-five acres of vegetation in the White River National Forest.<sup>241</sup> However, C-DOT anticipates that the project will only affect approximately one acre in the Arapaho and Roosevelt National Forests.<sup>242</sup>

In assessing wildlife impacts, C-DOT identified a number of potential direct and indirect impacts. However, it states that “the primary issue affecting wildlife in the corridor is the interference of I-70 with wildlife movement and animal-vehicle collisions (AVCs).”<sup>243</sup> C-DOT refers to this impact as the “barrier effect.”<sup>244</sup> Such barriers result from the structure and operation of the transportation facility,<sup>245</sup> combined with certain

235. *Id.* at 3.4-26.

236. COLO. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), 3.2 BIOLOGICAL RESOURCES, at 3.2-9 (2004) [hereinafter DRAFT PEIS 3.2 BIOLOGICAL RESOURCES], available at [http://www.i70mtn.corridor.com/Webready/PEIS/3.02\\_Biological\\_Resources.pdf](http://www.i70mtn.corridor.com/Webready/PEIS/3.02_Biological_Resources.pdf) (last visited Jan. 27, 2006).

237. *Id.* at 3.2-1; DRAFT PEIS EXECUTIVE SUMMARY, *supra* note 1, at ES-30.

238. DRAFT PEIS 3.2 BIOLOGICAL RESOURCES, *supra* note 236, at 3.2-9.

239. *Id.*

240. *See id.* (indicating in Chart 3.2-2 the vegetation types impacted).

241. *See id.* at 3.2-10 (indicating in Chart 3.2-3 the estimated number of acres affected by the six-lane highway (55 and 65 mph) alternatives in White River National Forest)

242. *See id.* at 3.2-10 (indicating in Chart 3.2-4 the estimated number of acres affected by the six-lane highway (55 and 65 mph) alternatives in Arapaho and Roosevelt National Forests).

243. *Id.* at 3.2-11.

244. *Id.*

245. *See id.* (“Barriers to wildlife movement include structural, operational, and behavioral impediments to wildlife trying to cross I-70.”).

animal behavior regarding territory, roaming, and migration.<sup>246</sup> While no method exists to accurately measure the relationship between barrier effect and the design of a transportation facility, C-DOT recognizes that “it is reasonable to assume that barrier effects would increase for all species with increased width and the addition of retaining walls, fences, raised medians, guardrails, and increases in volume and/or speed of traffic.”<sup>247</sup> Because the proposed six-lane facility will involve the construction of “two additional 12-foot-wide traffic lanes,” guardrails, and barriers, C-DOT projects an augmented barrier effect resulting from the project.<sup>248</sup>

Essential habitat loss poses a threat to wildlife in the project area.<sup>249</sup> C-DOT projects that the new, six-lane highway will permanently affect ninety-three to ninety-seven acres of key wildlife habitat.<sup>250</sup> Construction will affect an additional seventy-eight acres.<sup>251</sup> Even though the construction zone may be reclaimed, C-DOT impliedly recognizes that the temporary impacts of construction may have lasting effects because reclaimed habitat may be “altered” permanently.<sup>252</sup> Of the affected habitats, the proposed project will most greatly impact that of bighorn sheep.<sup>253</sup>

Further, C-DOT anticipates that the project will adversely impact Colorado Division of Wildlife’s designated “high-value” fisheries, Gold Medal fisheries, and fish “species of special concern.”<sup>254</sup> According to C-DOT, the proposed six-lane highway will impact “‘high value’ fisheries within the Eagle River, Blue River, and Clear Creek sub-basins.”<sup>255</sup> The project may also impact Gold Medal fisheries in the Eagle River and Blue River sub-basins.<sup>256</sup> Seven species of fish live in these fisheries,

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246. *See id.* at 3.2-5 (stating that “I-70, human population centers, increasing development, and human intrusion act as barriers to wildlife that historically crossed the Corridor in their migration.”).

247. *Id.* at 3.2-11.

248. *Id.* at 3.2-17.

249. *Id.*

250. *Id.* at 3.2-18.

251. *Id.*

252. *See id.* at 3.2-17, -18 (recognizing that “the construction disturbance zone . . . would be reclaimed, although habitat in this area would be altered.”).

253. *Id.* at 3.2-18.

254. DRAFT PEIS EXECUTIVE SUMMARY, *supra* note 1, at ES-30; *see also* COLO. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), 3.5 FISHERIES, at 3.5-1 (2004) [hereinafter DRAFT PEIS 3.5 FISHERIES], available at [http://www.i70mtncorridor.com/Webready/PEIS/3.05\\_Fisheries.pdf](http://www.i70mtncorridor.com/Webready/PEIS/3.05_Fisheries.pdf) (last visited Jan. 27, 2006) (providing that the Colorado Division of Wildlife determines “high value” fisheries “based on general observations of the quantity/quality of fish populations and recreational value[,] and Gold Medal fisheries “based on more formal studies of fish population and fish weight and on ‘exceptional’ recreation value.”).

255. DRAFT PEIS 3.5 FISHERIES, *supra* note 254, at 3.5-8.

256. *Id.* at 3.5-7.

which include fish that are indicator species, endangered species, or “species of special concern.”<sup>257</sup>

#### VI. DO THE PROJECT’S PROXIMITY IMPACTS RISE TO THE LEVEL OF USE?

Determining whether the I-70 mountain corridor expansion project’s proximity impacts constitute use as contemplated by section 4(f), requires a preliminary examination of whether the lands affected are protected resources. As discussed above, in order to qualify as protected, a resource must have these three characteristics: (1) public, (2) significant, and (3) used as a park, recreation area, wildlife or waterfowl refuge, or historic property.<sup>258</sup> An analysis of the nature of the lands adjacent to and in the vicinity of the project demonstrates that many of the lands are likely protected by the statute.

The segment of highway passing through the Georgetown-Silver Plume NHL District is protected under section 4(f). This is because section 4(f) applies to significant historic sites.<sup>259</sup> Section 771.135(e) explains that the significance of a historic site is determined by that site’s listing, or eligibility for listing, on the National Register of Historic Properties.<sup>260</sup> As a consequence, all of the structures within the Georgetown-Silver Plume NHL District are significant historic sites under section 771.135 and, therefore, protected under section 4(f). It also follows that section 4(f) protects all other sites in the project area that are listed on or eligible for the National Register.<sup>261</sup>

The question remains, however, whether the state-designated “Silver Heritage Area,” which is located in Clear Creek County and is much larger than the NHL district, is significant under section 771.135. While many individual historic properties within this area are listed on or eligible for listing on the National Register, the entire area has not been recognized as such.<sup>262</sup> Therefore, the entire Silver Heritage Area is probably not a protected resource at the present time. However, according to section 771.135(e), if the Colorado State Historic Preservation Officer has yet to consult with Clear Creek officials and the administration, the area’s inclusion on the National Register (or a determination that the

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257. See *id.* at 3.5-1 (indicating in Table 3.5-1 the types of fish species that inhabit the rivers, streams, and lakes of the corridor).

258. See 49 U.S.C. § 303(c).

259. See *id.*

260. 23 C.F.R. § 771.135(e).

261. *Id.*

262. See REVISED RECONNAISSANCE SURVEY, *supra* note 173, at 4-35 to -56 (listing the historic sites in Clear Creek County that have been or will be considered for National Register of Historic Properties eligibility status).

area is at least eligible for inclusion) may still occur.<sup>263</sup> This would establish the Silver Heritage Area as a protected property.

In addition, section 4(f) applies to the recreation areas within the Arapaho and White River National Forests because significant recreation areas are a classification of protected properties listed in the statute.<sup>264</sup> Therefore, the National Wilderness Preservation Areas within these national forests are also protected resources, as are all of the mountain corridor's public recreation areas. In the absence of an explicit determination that these areas are insignificant, there is a presumption of significance of all of the public lands that serve recreational purposes.<sup>265</sup>

Unfortunately, the areas of the Arapaho and White River National Forests that serve as wildlife habitat will probably not qualify, in their entirety, as protected resources because "wildlife habitat" is not enumerated in section 4(f).<sup>266</sup> Furthermore, neither the State of Colorado nor the federal government has designated these lands as wildlife or waterfowl refuges, which would trigger the statute's protection.<sup>267</sup> However, section 4(f) applies to significant recreation areas or parks within the national forests<sup>268</sup> that happen to serve as wildlife habitat. Section 4(f)'s application to significant parks also necessitates the protection of all of the public parks in the I-70 mountain corridor.<sup>269</sup>

#### A. USE OF PROTECTED RESOURCES

The I-70 mountain corridor expansion project will directly use only a handful of the protected resources in the corridor area. Unless the project actually takes land from the corridor's protected parks, recreation areas, or historical sites, and permanently incorporates it into the I-70 facility, the project will not directly use these resources.<sup>270</sup>

The Draft PEIS Section 4(f) Evaluation indicates that the project will directly use eleven protected resources, including the Hot Springs Historic District, Hot Springs Lodge and Pool, Glenwood Springs Viaduct, Georgetown-Silver Plume NHL District, Mendota Mine, Dunderberg Mine, Toll House, Darragh Placer, Big Five Mines, Loveland

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263. See 23 C.F.R. § 771.135(e) (providing, "In determining the application of section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the State Historic Preservation Officer (SHPO) and appropriate local officials to identify all properties on or eligible for the National Register of Historic Places (National Register).").

264. See 49 U.S.C. § 303(c).

265. See 23 C.F.R. § 771.135(c).

266. See 49 U.S.C. § 303(c) (not mentioning "wildlife habitat," or its equivalent, as a protected use for public lands).

267. See *id.*

268. See *id.*

269. See *id.*

270. See 23 C.F.R. § 771.135(p)(i).

Ski Area, USFS Visitor Center Parking Lot and Trailhead, and Charlie Tayler Water Wheel Park.<sup>271</sup> However, at this point in time, C-DOT has not addressed constructive use of these or other properties in its section 4(f) evaluation.<sup>272</sup> The following discussion will examine potential constructive use resulting from construction and operation of the proposed six-lane highway.

Concerning other protected resources located in the project's vicinity, the small amount of available data shows that the anticipated proximity impacts will probably constitute constructive use. This is due to the strong possibility that the project's indirect impacts will substantially impair protected resources.<sup>273</sup> An even stronger case for constructive use is made when one considers the broad interpretation of use applied by courts, including those in the Tenth Circuit, and the cumulative effect of multiple impacts.<sup>274</sup>

### 1. Air Quality

While section 771.135 does not provide specific examples or guidance addressing air quality impacts, it does not expressly reject the notion that increased air pollution can constitute constructive use.<sup>275</sup> *Coalition Against a Raised Expressway* determined that a project's projected air pollution increases, considered with other factors, constituted a use of adjacent historic buildings.<sup>276</sup> The court observed that the anticipated amounts of pollution would substantially exceed the EPA's goal.<sup>277</sup>

Constructive use may be possible as a result of the I-70 project's increased air pollution if considered in conjunction with other impacts. The Draft PEIS states that C-DOT projects increases in carbon monoxide and particulate matter emissions.<sup>278</sup> However, C-DOT anticipates that increased carbon monoxide emissions and particulate matter emissions will not exceed state and federal EPA standards.<sup>279</sup> Further, because an increase in air pollution may be less perceptible than other types of adverse proximity impacts, it may be difficult to demonstrate that the pollution substantially impairs the value of protected resources.

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271. See DRAFT PEIS SECTION 4(f) EVALUATION, *supra* note 4, at 3.16-13 (listing in Table 3.16-1 the 4(f) properties that the project will directly use).

272. *Id.* at 3.16-1 (stating, "This Tier 1 analysis of potential 4(f) use has focused on direct footprint uses and has not addressed the potential for constructive uses.").

273. See 23 C.F.R. § 771.135(p)(2).

274. See discussion *supra* Part III.B.

275. See 23 C.F.R. § 771.135(p)(2)-(5).

276. *Coal. Against a Raised Expressway*, 835 F.2d at 811-12.

277. *Id.* at 812.

278. DRAFT PEIS 3.1 CLIMATE & AIR QUALITY, *supra* note 212, at 3.1-6 to -7.

279. *Id.* (providing that "no exceedances of federal CO standards would occur in the Corridor for any of the alternatives . . .").

Air pollution from the project will probably impact forest recreation areas along I-70 more than other protected resources. Generally, those who engage in recreation activities in the Arapaho and White River National Forests enjoy the wilderness and seclusion from the urban world. A significant increase in air pollution may prevent this type of enjoyment, substantially impacting the value of the recreation area. However, for the reasons discussed above, air pollution, alone, does not constitute a strong basis for a section 4(f) violation claim. A consideration of air pollution combined with other impacts makes a much stronger case.

## 2. *Visual Blight*

Turning to potential visual impacts, section 771.135(p)(4)(ii) provides that constructive use occurs when

[t]he proximity of the proposed project substantially impairs esthetic features or attributes . . . , where such features or attributes are considered important contributing elements to the value of the resource. Examples of substantial impairment to . . . esthetic qualities would be the location of a . . . facility in such proximity that it obstructs . . . the primary views of an architecturally significant historical building, or substantially detracts from the setting of a park or historical site which derives its value in substantial part due to its setting.<sup>280</sup>

The courts in *Coalition Against a Raised Expressway, I-CARE*, and *Sierra Club* considered visual blight (adverse esthetic impacts) as a decisive factor in determining that the projects in question constructively used protected resources. In *Coalition Against a Raised Expressway*, constructive use resulted from a proposed highway that would impair the view from historic sites to a nearby river, and vice-versa, and debris from the highway would detract from the beauty of the historical buildings' architecture.<sup>281</sup> The *I-CARE* court held that constructive use occurred when a highway expansion project would impose an "uninviting" and "inhumane quality" upon an urban park and would "detract from the carefully conceived design" of a historic building.<sup>282</sup> Further, the *Sierra Club* court held that the esthetic impacts of a proposed highway, alone, constituted constructive use of a recreation area and wilderness park because the project's cuts and fills into a mountain would be visible to park visitors.<sup>283</sup>

The Draft PEIS anticipates both "strong" and "very strong" contrasts between the natural scenery surrounding I-70 and the project's

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280. 23 C.F.R. § 771.135(p)(4)(ii).

281. *Coal. Against a Raised Expressway*, 835 F.2d at 811.

282. *I-CARE*, 770 F.2d at 435, 441-42.

283. *Sierra Club*, 664 F. Supp. at 1330-31.

landform changes and structural elements.<sup>284</sup> In addition, the potential increases in entrained dust and pollution will impact visibility in the mountain corridor.<sup>285</sup> Considering the combined effect of these impacts, C-DOT indicates that visual blight may substantially impact protected resources. Because many significant historic resources are located adjacent to the highway, expansion of the highway will more than likely “detract from the carefully conceived design” and architectural beauty of these sites.<sup>286</sup> Constructive use may also result from impairing the view of the historic sites from the surrounding areas, and vice-versa.<sup>287</sup> Likewise, the project’s landform changes and structural elements will potentially interfere with the spectacular mountain and valley views along the corridor, as will decreases in visibility resulting from air pollution.

Expanding the highway will likely substantially impair fishing and white-water rafting activities in Clear Creek, which flows immediately adjacent to I-70 and the project area. The proximity impacts of the widened highway could conceivably impose an “uninviting” and “inhumane” quality upon the natural resource.<sup>288</sup> In this way, the project may also impair the visual attributes of other public parks located adjacent to the highway.

Visual blight could also substantially impair the value of the National Wilderness Preservation Areas and other recreation areas within the Arapaho and White River National Forests. Depending on the location and severity of cuts and other alterations to the landscape resulting from construction, the proposed facility could severely impact the ability to surround oneself in a truly natural setting. Further, increases in pollution resulting from the project may also be visible to visitors to the recreation areas within the National Forests.

### 3. Noise

Addressing potential noise impacts, section 771.135(p)(4)(i) provides that constructive use occurs when

[t]he projected noise level increase . . . substantially interferes with the use and enjoyment of a noise sensitive facility . . . , such as . . . sleeping in the sleeping area of a campground, enjoyment of a historic site where a quiet

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284. DRAFT PEIS APPENDIX L, *supra* note 215, at L-15 (listing in Table L-2 the types of anticipated landform changes and structural elements associated with the alternatives as well as their degree of visual contrast).

285. DRAFT PEIS EXECUTIVE SUMMARY, *supra* note 1, at ES-25.

286. *I-CARE*, 770 F.2d at 442.

287. See, e.g., *Coal. Against a Raised Expressway*, 835 F.2d at 812 (determining that the project would also impair the view between downtown and the Mobile River and, thus, constituted constructive use).

288. *I-CARE*, 770 F.2d at 435, 441-42 (holding that the project constructively used the protected sites where the project imposed an “uninviting” and “inhumane quality” upon the park).



setting is a generally recognized feature or attributable to the site's significance, or enjoyment of an urban park where serenity and quiet are significant attributes.<sup>289</sup>

However, section 771.135(p)(5)(ii) and (iii) moderates the impact of this statement by maintaining that a noise level increase from a transportation facility is not a constructive use if it does not exceed FHWA guidelines, or if noise levels exceed the guidelines, but the increase in noise is "barely perceptible."<sup>290</sup>

The holdings in *Coalition Against a Raised Expressway* and *Sierra Club* support the position that the projected noise impacts of the I-70 expansion project would likely constitute constructive use of nearby protected resources. In *Coalition Against a Raised Expressway*, the court cited projected noise levels in excess of the EPA's guidelines as one of the reasons why a proposed freeway would use nearby historic resources.<sup>291</sup> Similarly, the *Sierra Club* court stated that projected noise level increases from a proposed highway would adversely impact a nearby recreation and wilderness park.<sup>292</sup> It should be noted, however, that both courts relied on additional adverse impacts in order to arrive at their conclusions.<sup>293</sup>

Conversely, in *Falls Road*, the court determined that the projected noise impacts of increased traffic on an improved highway would not rise to the level of constructive use.<sup>294</sup> The court's ruling was tempered by the fact that the facility's projected noise increase would not exceed the design noise level.<sup>295</sup> In addition, the noise effects were only coupled with an unconvincing assertion of esthetic impact.<sup>296</sup>

Neither section 771.135 nor the cases surveyed in furtherance of this Article indicate that additional negative impacts to those created by noise *are required* for there to be a constructive use due to adverse noise levels. Nevertheless, a determination of constructive use based solely on noise impacts in the mountain corridor is improbable because the Draft PEIS indicates that the proposed six-lane facility will only increase noise levels by two to three decibels.<sup>297</sup> A reviewing court would more than likely

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289. 23 C.F.R. § 771.135(p)(4)(i).

290. *Id.* § 771.135(p)(5)(ii) to (iii).

291. *See Coal. Against a Raised Expressway*, 835 F.2d at 811-12 (determining that "[t]he final EIS predicts that the noise level for these properties would rise to between seventy-five and eighty decibels. This is substantially greater than the Environmental Protection Agency's goal of fifty-five decibels.").

292. *Sierra Club*, 664 F. Supp. at 1330-31.

293. *See supra* text accompanying note 103-09, 121-26.

294. *Falls Rd.*, 581 F. Supp. at 692-94.

295. *Id.* at 693.

296. *See id.* at 693-94.

297. DRAFT PEIS 3.12 NOISE, *supra* note 205, at 3.12-5.

consider the potential increase in noise as “barely perceptible” and, therefore, not a constructive use.<sup>298</sup>

Moreover, considering that I-70’s existing noise levels are already above FHWA and C-DOT noise guidelines,<sup>299</sup> the court’s opinion in *Concerned Citizens Coalition* is instructive.<sup>300</sup> The court held that the improved facility’s projected noise increases did not constitute constructive use because the existing noise levels were already above FHWA guidelines.<sup>301</sup> This precedent illustrates another obstacle to a noise-based determination of constructive use.

Yet, increased traffic noise in the Idaho Springs area may prove to be the one exception in this situation. Idaho Springs’ elevated highway and steep rock cliffs amplify the sound of the highway. These exacerbating circumstances may justify the finding of constructive use based solely on noise.

Even if noise level increases alone do not trigger protection in this case, noise level increases may be combined with other adverse impacts to constitute constructive use of protected properties.<sup>302</sup> As *Coalition Against a Raised Expressway* illustrates, the cumulative effect of the adverse impacts can significantly impair the utility of protected resources.<sup>303</sup> Therefore, the combination of the proposed project’s air pollution, visual blight, and noise impacts will more than likely constitute constructive use of the I-70 mountain corridor’s protected resources.

#### 4. Water, Vegetation, and Wildlife Resources

Section 771.135 does not specifically address constructive impacts on water, vegetation, and wildlife that do not occur in refuges.<sup>304</sup> As such, the regulation leaves open the possibility for these types of impacts to constitute uses under section 4(f). A constructive use claim based on water, vegetation, and wildlife impacts would find its strongest support in section 771.135(p)(2)’s general directive concerning constructive use.<sup>305</sup> The regulation makes clear that constructive use only occurs when a “project’s proximity impacts are *so severe* that the protected activities,

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298. See 23 C.F.R. § 771.135(p)(5)(iii).

299. DRAFT PEIS 3.12 NOISE, *supra* note 205, at 3.12-1.

300. *Concerned Citizens Coal.*, 330 F. Supp. 2d at 787.

301. *Id.* at 793-94.

302. See 23 C.F.R. § 771.135(p)(2) to (4).

303. *Coal. Against a Raised Expressway*, 835 F.2d at 812.

304. See 23 C.F.R. § 771.135(p)(2) to (4) (not specifically addressing ecological impacts in areas other than refuges).

305. See *id.* § 771.135(p)(2) (“Constructive use occurs when the transportation project does not incorporate land from a section 4(f) resource, but the project’s proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired.”).

features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired.”<sup>306</sup> Substantial impairment, in turn, only occurs when a resource’s “activities, features, or attributes” are “substantially diminished.”<sup>307</sup> *Sierra Club* lends further support to the notion that constructive use can result from impacts on wildlife and vegetation.<sup>308</sup>

Considering section 771.135(p)(2)’s instruction and *Sierra Club*, the impacts acknowledged in the Draft PEIS make a decent case for a constructive use claim based on impacts on water, wildlife, and vegetation resources. As previously discussed, the White River and Arapaho National Forests, Clear Creek, Blue River, Eagle River, and Georgetown Lake are fishing resources.<sup>309</sup> C-DOT estimates that harmful chemicals and substances resulting from the six-lane highway’s increased runoff and winter maintenance activities will pollute the water resources in these areas.<sup>310</sup> In fact, C-DOT acknowledges impacts on “high value” and Gold Medal fisheries in the Eagle River, Blue River and Clear Creek sub-basins.<sup>311</sup>

However, the question remains whether a court would determine that the value of the resources would be “substantially diminished” as required by section 771.135(p)(2).<sup>312</sup> Arguably, one of the attributes of a fishing resource, particularly a “high value” or Gold Medal fishery, is that there are plenty of healthy, native fish to catch. Another important attribute, especially to fly-fishermen, is that the fishing area is quiet, beautiful, and has clear water (in order to locate the “honey holes”). If the project’s pollution and other impacts substantially diminish these attributes, the impacts would likely constitute constructive use.

This line of reasoning can also apply to impacts on other species of wildlife and vegetation. Georgetown Lake is a recreation area in which wildlife viewing, including the viewing of bighorn sheep, is a significant attribute.<sup>313</sup> Because the lake is almost immediately adjacent to the project, constructive impacts from the six-lane facility are a strong possibility. As mentioned above, C-DOT estimates that the project will particularly impact bighorn sheep habitat, among those of other species.<sup>314</sup> Further, the barrier effect of the six-lane highway may also impair the survival of

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306. *Id.* (emphasis added).

307. *Id.*

308. *Sierra Club*, 664 F. Supp. at 1330-31.

309. *See* DRAFT PEIS 3.5 FISHERIES, *supra* note 254, at 3.5-1.

310. DRAFT PEIS 3.4 WATER RESOURCES, *supra* note 225, at 3.4-19 (summarizing in Table 3.4-18 the percent increase of winter maintenance impacts from project alternatives).

311. DRAFT PEIS 3.5 FISHERIES, *supra* note 254, at 3.5-7 to -8.

312. 23 C.F.R. § 771.135(p)(2).

313. *See* DRAFT PEIS 3.2 BIOLOGICAL RESOURCES, *supra* note 236, at 3.2-20 (providing that the key habitat of bighorn sheep would be most extensively affected near Georgetown).

314. *Id.*

wildlife species that roam and migrate in search of cover, food, water, and mates.<sup>315</sup> If these impacts substantially diminish the ability to view big-horn sheep or other wildlife from Georgetown Lake, a court may determine that the project has constructively used this recreation area.

In addition, a total of sixteen National Wilderness Preservation Areas are located in the White River and Arapaho National Forests.<sup>316</sup> The ability to view wildlife in its natural habitat and to experience the unaffected, natural beauty of wilderness are important attributes of these areas. Thus, if impacts on vegetation and wildlife, such as barrier effect, community and habitat loss, and noise substantially diminish a visitor's ability to engage in these activities, constructive use may occur.

### C. TEMPORARY USE

This Article establishes that constructive use resulting from permanent impacts will likely occur in the project area. This is especially clear when one considers the cumulative effect of proximity impacts and the courts' broad interpretation of use and the cumulative effect of proximity impacts. Additionally, temporary use of protected resources in the mountain corridor may also occur from the project's construction impacts. Section 771.135(p)(7) confirms that temporary use may occur when: the use's duration is as long as or longer than the duration of the construction project; the "nature and magnitude" of the use is not minor; there are permanent impacts; the project temporarily or permanently interferes with a protected resource's attributes; or the land used is not fully restored.<sup>317</sup> The holdings in *Valley Community Preservation, Coalition on Sensible Transportation*, and *Falls Road* guide for claims based on temporary impacts.<sup>318</sup>

The I-70 expansion project may temporarily use protected resources in the mountain corridor due to the project's extended fifteen-year duration, large scope, and location. Because temporary impacts generally re-

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315. See *id.* at 3.2-5 (stating that "I-70, human population centers, increasing development, and human intrusion act as barriers to wildlife that historically crossed the Corridor in their migration.").

316. See U.S. Department of Agriculture, Forest Service, White River National Forest, *supra* note 182 (providing that eight wilderness areas are located in the forest); Wildernet, Arapaho and Roosevelt National Forests, *supra* note 190 (stating that eight wilderness areas are located in the forest).

317. 23 C.F.R. § 771.135(p)(7).

318. See *Valley Cmty. Pres.*, 373 F.3d at 1092 (citing section 771.135(p)(5)(ix) in holding that temporary vibration impacts did not constitute constructive use because the impacts were mitigated "through advance planning and monitoring activities."); *Falls Rd.*, 581 F. Supp. 678 (providing a cautionary example of failed invocation of temporary constructive use); *but see Coal. on Sensible Transp.*, 826 F.2d at 63 (determining that the project's temporary construction easements constituted use of the parks even though none of the parks had popular facilities in the area of the highway).

sult from construction activities, the project will probably use historic sites, parks, and recreation areas located adjacent to and within the construction zone. C-DOT acknowledges that the project's construction will "displace" fifty-six to sixty-one acres of vegetation along the I-70 mountain corridor.<sup>319</sup> If any of the displaced vegetation is located within the boundaries of protected resources, the impact may constitute constructive use if the area is not fully restored or if the use lasts at least as long as the project's fifteen-year duration.<sup>320</sup> This analysis applies to all of the project's construction activities that actually occupy or take protected land.

Curiously, *constructive* temporary use may occur more often than direct temporary use. This is because most of the protected resources adjacent to I-70 are not so close that expanding the highway would actually encroach into the resources' lands. Because a large portion of the proposed expansion area is located in the valley, pollution, noise, and esthetic impacts from construction may be more noticeable and pronounced. If such temporary impacts do not satisfy the conditions provided in section 771.135(p)(7), then construction of the project may substantially impair nearby protected resources, even though the harm is only temporary.<sup>321</sup>

## VII. CONCLUSION

This Article establishes that section 4(f) of the Department of Transportation Act applies to the I-70 mountain corridor expansion project. Not only has C-DOT recognized that the proposed six-lane highway will directly use eleven section 4(f) resources, but this Article concludes that the project will likely constructively use protected parks, historic sites, and recreation areas located in the I-70 mountain corridor. Temporary impacts resulting from the proposed project's construction may also occur. This Article bases its conclusion on anticipated noise, air quality, water, esthetic, and ecological impacts, and the broad interpretation of use employed by the federal courts, including those in the Tenth Circuit. Further, even if the project's anticipated impacts, alone, cannot constitute constructive use of protected resources, the impacts' cumulative effect will more than likely significantly impair the value of protected resources. Therefore, because section 4(f) applies to the project, C-DOT and the

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319. DRAFT PEIS 3.2 BIOLOGICAL RESOURCES, *supra* note 236, at 3.2-9 (providing that the proposed project will permanently displace fifty-eight to seventy-five acres of vegetation as well as directly impact an additional fifty-six to sixty-one acres of vegetation within the construction zone).

320. See 23 C.F.R. § 771.135(p)(7)(i) (indicating that temporary use may constitute use within the meaning of section 4(f) if its duration is equal to or greater than the time needed for construction of the project).

321. See *id.*

FHWA are mandated to consider feasible and prudent alternatives in lieu of the proposed six-lane highway facility and undergo all possible planning to minimize harm to the protected resources located in the I-70 mountain corridor.