

APPENDIX E

PROPOSED SECTION 4 (f) *De Minimis* IMPACT
FINDING

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The Federal Highway Administration (FHWA) issued guidance on December 13, 2005, for determining *de minimis*¹ impacts on Section 4(f) resources. This guidance came from an amendment of existing Section 4(f) legislation through adoption of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)² to simplify the processing and approval of projects that have only *de minimis* impacts on lands protected by Section 4(f). This is the first substantive revision of Section 4(f) legislation since passage of the U.S. Department of Transportation Act of 1966. This revision of Section 4(f) legislation provides that once FHWA determines that a transportation use of Section 4(f) property, after consideration of any impact avoidance, minimization, and mitigation or enhancement measures, results in a *de minimis* impact on that property, an analysis of avoidance alternatives is not required and the Section 4(f) evaluation process is complete. In other words, although some impacts may be unavoidable (and would be minimized or mitigated), avoidance alternatives would not need to be developed if a *de minimis* impact determination is made.

Additional guidance on Section 4(f) was published in the Federal Register on July 27, 2006, as a notice of proposed rulemaking for implementing Section 6009 of SAFETEA-LU (71 FR 42611). The notice included proposed regulations under 23 CFR 774 addressing *de minimis* applicability; 23 CFR 774.5(b) (2) specifies a requirement for public notice and opportunity for public review of a *de minimis* impact finding for a park, recreation area, or wildlife or waterfowl refuge.

Section 1.1 of this Section 4(f) *De Minimis* Impact Finding provides background information on the project and the Section 4(f) property in the project area. Sections 1.2 and 1.3 address impacts and mitigation, respectively, for the Section 4(f) property. Section 1.4 introduces the process proposed for review of and comment on this *de minimis* impact finding.

1.1 BACKGROUND

The South Connector Route- US 81 to 29th Street SE Project (Project) would consist of providing a wider and paved arterial route from 29th Street Southeast south of US 212, along 20th Avenue South from 29th Street Southeast of US 81. The preliminary impact area of the South Connector Route was evaluated for the presence of potential Section 4(f) resources. The preliminary impact area consists of the approximate right-of-way (ROW) needs of the preferred alternative based on the preliminary design completed to date and includes the area where construction activities could occur.

¹ “Black’s Law Dictionary (8th ed. 1999) defines *de minimis* as 1. Trifling, minimal. 2. (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case. 3. *De Minimis Non Curat Lex*, The law does not concern itself with trifles.” as cited in FHWA, December 19, 2005, Questions and Answers on the Application of the Section 4(f) *De Minimis* Impact Criteria.

² Section 6009(a) of SAFETEA-LU, Public Law 109-59, amended existing Section 4(f) legislation at 23 United States Code (USC) 138 and 49 USC 303. SAFETEA-LU replaces the term “Section 4(f)” with “Section 303” (referring to 49 USC 303, the current section of the Federal code dealing with “Section 4(f)” issues). However, this *de minimis* impact finding retains the term “Section 4(f)” in keeping with current guidance from FHWA and the state transportation departments.

The Build Alternative follows the existing alignment of 20th Avenue South from US 81 to 29th Street Southeast. The alignment shifts from the south side to the north side of existing 20th Avenue South to minimize impacts to existing features such as residences, flood protection items, river/creek channels, and updated utility installations.

The former Chicago and Northwestern Railroad is a Section 4(f) resource within the preliminary impact area of the Build Alternative. The railroad has been identified in the SHPO of historic properties inventory as Site 39CD2003. This site is considered potentially eligible for the NRHP due to its potential to yield, or having yielded, information important in history (Criterion D). The site could also be eligible under Criterion A for its association with events that have made a significant contribution to the broad patterns of our history (i.e. railroad development). However the portion of the railroad in the Study Area has been reclaimed and lacks the physical integrity that would contribute to its status as a Criterion D NRHP eligible property. Therefore, the railroad is eligible for the NRHP under Criterion A. Permanent incorporation of a portion of Site 39CD2003 into a transportation facility represents a direct use of Section 4 (f) property.

1.2 IMPACTS

The former Chicago and Northwest Railroad, Site 39CD2003, crosses the South Connector Route about ¼ mile west of 29th Street Southeast (See Figure 3-1).

1.2.1 Former Chicago and Northwestern Railroad

Site 39CD2003 extends northwest to southeast across the existing 20th Avenue South. Due to the location of the former Chicago and Northwestern Railroad, avoidance of the site is not possible for the construction of this Project. This portion of the Project has been reclaimed (removed) and is being used for cropland. Even though the lack of rail and grade impact the physical integrity of the proposed crossing area, the area is still considered eligible for the NRHP under Criterion A. Although potentially eligible under Criterion A, direct impacts from the Project, as well as indirect effects such as noise and a change in the visual environment, would not result in an adverse effect because the Project would not alter characteristics that make the property significant or diminish the property's integrity. Consequently, a proposed finding for compliance with Section 106 requirements is "no adverse effect". The eligibility and proposed finding of "no adverse effect" for Site 39CD2003 is awaiting concurrence from SHPO. Due to the proposed "no adverse effect" determination, a *de minimis* impact is also proposed for Section 4(f) compliance.

The Project will result in a physical encroachment of the former Chicago and Northwestern Railroad. Figure 3-1 shows the location of Site 39CD2003 and the proposed ROW area for the South Connector-US 81 to 29th Street SE. The proposed ROW of the Build Alternative will cross approximately 0.4 acre of the former Chicago and Northwestern Railroad.

1.3 MITIGATION

As the project design develops, the proposed ROW for the Build Alternative required in the area is minimal and would only impact Site 39CD2003 approximately 0.4 acre. The Project is expected to have no adverse effect on Site 39CD2003 due to the lack of integrity.

1.4 IMPACT FINDING REVIEW PROCESS

This proposed *de minimis* impact finding is being made available for public and agency review as required under proposed 23 CFR 774.5(b)(2), implementing Section 6009 of SAFETEA-LU (71 FR 42611). Public and agency comments on the proposed *de minimis* impact finding, either

through review of the EA or participation at the public hearing on the EA, will be analyzed. If the analysis introduces no significant controversy, the *de minimis* impact finding would be included in the final EA document (assuming no significant impacts are introduced through agency and public review) as an EA appendix and signed by FHWA. If there is significant controversy, the proposed *de minimis* impact finding will be re-evaluated to determine if the application is valid. Approval of the *de minimis* finding is required prior to signing the Final EA document.



Drawn by: B. Miller
 Date: 1-11-07
 Checked by: J. Unruh
 Date: 1-11-07
 Revision Date: Sep 2007



De Minimis Impacts
 Watertown South Connector, Codington County, SD
 Project EM 4411(01) PCN 00RV

Figure
E-1



Department of Transportation

Division of Planning/Engineering

Office of Project Development

700 E Broadway Avenue

Pierre, South Dakota 57501-2586 605/773-3721

FAX: 605/773-6608

FHWA-SD DIVISION

2008 DEC 30 AM 10: 04

December 24, 2008

John Rohlf
Division Administrator
Federal Highway Administration
Pierre, SD 57501

RE: EM4411(01) Codington County PCN 00RV
20th Avenue South from US81 to 29th Street SE and North on 29th Street from 20th
Avenue

Dear Mr. Rohlf:

This letter and the attachment constitute a request for review and concurrence on a finding of de minimis impact for the above referenced project. The former Chicago and Northwestern Railroad (39CD2003) site is within the project area. It is considered to be potentially eligible for the NRHP due to its potential to yield, or having yielded, information important in history (Criterion D) and could also be eligible under Criterion A for its association with events that have made a significant contribution to the broad patterns of our history (i.e., railroad development). However, the portion of the railroad in the study area has been removed, is being used for crop production, and lacks the physical integrity that would contribute to its status as a Criterion D NRHP eligible property. The railroad area is considered eligible for the NRHP under Criterion A.

Project Affects

This project will widen the current gravel 2-lane section on 20th Avenue South to a paved 3-lane section and sufficient right of way (ROW) to add two lanes in the future. The ROW will increase from the existing 66 feet to approximately 125 feet, depending on drainage. New 2-lane bridges will be constructed over the Big Sioux River and Willow Creek. These bridges will be expandable to 4-lane if traffic warrants in the future. Site 39CD2003 extends across the existing 20th Avenue South. Due to the location of the former Chicago and Northwestern Railroad, avoidance of the site is not possible for the construction of this project. Although potentially eligible under Criterion A, direct or indirect impacts from this project would not result in an adverse effect because the project would not alter characteristics that make the property significant or diminish the property's integrity. SDDOT and FHWA determined that the project impacts on the former Chicago and Northwestern Railroad would result in no adverse effect.

Finding of De Minimis Impact

Attached is the May 30, 2007 SHPO concurrence with the FHWA determination of a no adverse effect and Section 4(f) de minimis finding for the historic property 39CD2003.

Based upon the information included herein and in the attached documentation, SDDOT requests FHWA make a de minimis impact finding for the proposed impacts within this project area.

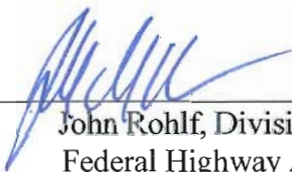
Sincerely,



Terrence G. Keller
Environmental Supervisor
Office of Project Development
773-3721

Enclosure

Approve: _____



John Rohlf, Division Administrator
Federal Highway Administration – South Dakota Division

1/6/09
Date



Department of Transportation
Office of Project Development
700 E Broadway Avenue
Pierre, South Dakota 57501-2586 605/773-3268
FAX: 605/773-6608

Ms. Amy Rubingh
Section 106 Review and Compliance
South Dakota State Historical Society
900 Governors Drive
Pierre, SD 57501-2217

Subject: Watertown South Connector Route – 20th Avenue South from US81 to 29th Street SE
and 29th SE from 20th Avenue to 1500' of US212 (Segment 1)
Codington County, South Dakota

Dear Ms. Rubingh:

An early coordination letter concerning the Watertown South Connector Route dated June 21, 2006 was sent to your office. To support the proposed project, a cultural resources survey was conducted by The Archeology Laboratory; the original report and addendum summarizing the findings and proposed effect determinations were submitted to you under separate cover. We are currently working on the Environmental Assessment (EA) for Segment 1 and are soliciting your feedback on the surveys and their conclusions. Below is a summary from the preliminary draft of the EA that addressed the findings of the survey.

A records search indicated that at least four known archeological sites were located within or near the Study Area of the South Connector Route. No new archaeological sites were found within the Study Area for Segment 1, and only one of the four known sites (the former Chicago and Northwest Railroad, Site 39CD2003) is within the boundaries of the Segment 1 Study Area. The site is considered potentially eligible for the NRHP due to its potential to yield, or having yielded, information important in history (Criterion D) and could also be eligible under Criterion A for its association with events that have made a significant contribution to the broad patterns of our history (i.e., railroad development). However, the portion of the railroad in the Study Area has been reclaimed (removed), is being used for crop production, and lacks the physical integrity that would contribute to its status as a Criterion D NRHP eligible property. No traces of railroad occupancy (tracks or grade) were observed during the field survey. Even though the lack of rail and grade (and lack of association with other railroad-related features) impact the physical integrity of the proposed crossing area, the area is still considered eligible for the NRHP under Criterion A.

A farmstead immediately south of 20th Avenue South at 23rd Street Southeast was evaluated for historic significance because relocation/acquisition of the house and some farm buildings was considered. The historic property survey determined that the property is not eligible for the NRHP. A modular home located north of 20th Avenue South is planned for relocation, but is of recent construction and is not a historic property.

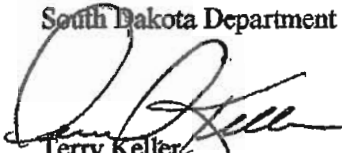
Construction of Segment 1 of the South Connector Route would impact the Chicago and Northwestern Railroad site. However, direct impacts from the Segment 1 Project, as well as

indirect effects such as noise and a change in the visual environment, would not result in an adverse affect because the Project would not alter characteristics that make the property significant or diminish the property's integrity. Consequently, the proposed finding for compliance with Section 106 requirements is "No Adverse Effect" to historic property 39CD2003.

FHWA intends to make a Section 4(f) de minimis finding based upon their concurrence in the Section 106 determination of "No Adverse Effect". Please review the submitted information and provide effect determinations for the Segment 1 portion of the South Connector Project. Feel free to call me with questions at my number listed below.

Sincerely,

South Dakota Department of Transportation


Terry Keller
Environmental Supervisor
(605) 773-3721

SECTION 106 DETERMINATION

Based upon the information provided to the South Dakota State Historic Preservation Office on 5/21/07 & 5/31/07 & 6/12/07 we concur with your agency's determination of "No Adverse Effect" for this undertaking.

Gay D. Vogt
State Historic Preservation Officer (SHPO)
By: Amy Rebeigh
7/06/07 090508/01F
Date SHPO Project #

cc Ginger Massie -- Federal Highway Administration

Pursuant to 36 CFR part 800.13, if historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the Section 106 process, the agency official shall avoid, minimize or mitigate the adverse effects to such properties and notify the SHPO/THPO, and Indian tribes that might attach religious and cultural significance to the affected property within 48 hours of the discovery.

SECTION 106 CONSULTATION
Concurrence of the State Historic Preservation Office does not relieve the federal agency official from consulting with other appropriate parties, as described in 36 CFR Part 800.2(c).