

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)(1) specifies a requirement for concurrence by the official with responsibility over a historic property. For this Project, the South Dakota State Historic Preservation Office (SHPO) would need to concur in writing in a finding of “no adverse effect” or “no historic properties affected”.

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.

1.1 BACKGROUND

The South Connector Route – SD 20 to US 81 Project (Project) would provide an alternate route for traffic to and from the industrial and commercial areas south of US 212, and relieve traffic congestion on US 212 between SD 20 and 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 would 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 existing Burlington Northern Railroad track (Site 39CD2000) crosses the northwest corner of the Study Area. 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). Since Site 39CD2000 is considered eligible for the NRHP, it qualifies as a significant historic property protected under Section 4(f).

Pelican Lake Game Production Area (GPA) is located along Pelican Lake at the northwest corner of the study area. The main access to the GPA is from US 212 via 14th Street Southwest (approximately 1,200' west of SD 20). A secondary access is from US 212 via Fish Road. The GPA consists of two areas of State-owned property along the shores of Pelican Lake. The area of both parts of the GPA combined is 117 acres. The northern part of the GPA comprises of approximately 47 acres. The GPA is managed for the production and maintenance of wildlife species. The GPA is occasionally used by the public for hunting, so recreation is a purpose of this property. Therefore, the GPA is a Section 4(f) resource.

1.2 IMPACTS

Potential impacts associated with the Build Alternatives intersecting one historic railroad site and a portion of the Pelican Lake GPA are discussed below.

1.2.1 Railroad Sites

The Burlington Northern Railroad, Site 39CD2000, is located about ¼ mile east and ¼ mile south of the intersection of US 212 and SD 20. None of the Build Alternative Options would result in an adverse affect because the construction of a new at-grade crossing would not alter the characteristics that make that 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 39CD2000.

Even though the Build Alternative Options will not affect Site 39CD2000, 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". SHPO has formally concurred with the determination of "no adverse effect" for Site 39CD2000 as documented in Appendix D Item 12. Based on the "no adverse effect" concurrence, a *de minimus* impact is applicable under 23 CFR 774.5(b)(1) and satisfies Section 4(f) compliance.

1.2.2 Pelican Lake GPA

Build Alternative Option 2 would not have any encroachment on the GPA. Build Alternative Options 3 and 4 would pass through the extreme northeast corner of the Pelican Lake GPA, impacting about 0.25 acres of land within this area (about 0.2 percent of the GPA area). All Build Alternative Options would impact access to the GPA by occasionally closing Fish Road for brief periods of time during construction. Access to Pelican Lake and the GPA from the 14th Street Southwest would not be impacted by the Project.

Build Alternative Options 3 and 4 would have a minor impact on Pelican Lake GPA and would not adversely impact the activities, features, attributes, and functions of the GPA that qualify the

area for protection under Section 4(f). Access during construction would be maintained to the Pelican Lake GPA from 14th Street Southwest. The Project would have a *de minimis* impact on the GPA because it only affects a small area of the GPA. Based on these findings, FHWA determined that this is a *de minimis* impact. SDGFP has formally concurred with the *de minimis* impact as documented in Appendix D, Item 14.

A supplemental noise analysis was conducted in September 2009 to determine specific noise impacts of Option 3 on the Pelican Lake Game Production Area. The memo documenting the analysis is contained in Appendix C, Item 2. SDGFP has formally concurred with the finding of *de minimis* noise impacts in the Game Production Area as documented in Appendix D, Item 16.

1.3 MITIGATION

With the “no adverse effect” concurrence of SHPO, no mitigation is necessary for the historic site.

SDGFP has formally concurred with the Option 3 *de minimis* impact determinations for Pelican Lake GPA, therefore mitigation measures are not necessary.