

FIRST RENEWED MEMORANDUM OF UNDERSTANDING
between
Federal Highway Administration, Nebraska Division and
the Nebraska Department of Transportation
State Assumption of Responsibility for Categorical Exclusions
23 U.S.C. §326

THIS FIRST RENEWED MEMORANDUM OF UNDERSTANDING ("MOU"), made and entered into this 17th day of September, 2021, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of NEBRASKA, acting by and through its DEPARTMENT OF TRANSPORTATION ("State"), hereby provides as follows:

WITNESSETH:

Whereas, Section 326 of amended Chapter 3 of title 23, United States Code (23 U.S.C. §326) allows the Secretary of the United States Department of Transportation (DOT Secretary), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of title 40, Code of Federal Regulations (CFR) (as in effect on October 1, 2003); and

Whereas, if a State assumes such responsibility for making categorical exclusion (CE) determinations under the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq. (NEPA), the DOT Secretary also may assign and the State may assume all or part of certain Federal responsibilities for environmental review, consultation, or other related actions required; and

Whereas, on September 5, 2018, the FHWA and the State executed a MOU assigning responsibilities to the State pursuant to 23 U.S.C. §326 for a three-year period, expiring on September 4, 2021 ("Original §326 MOU") or upon execution of this renewal MOU, whichever is sooner; and

Whereas, Section 1312 of the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) amended 23 U.S.C. §326 to preserve the ability of States assuming responsibility to engage in project delivery methods that are otherwise permissible for highway projects, to terminate their participation in the program at any time by providing the DOT Secretary with a notice no later than 90 calendar days before such termination, and to allow States assuming responsibility to use funds apportioned to the State under section 104(b)(2) for reasonable attorney's fees directly attributable to eligible activities associated with the project; and

Whereas, FHWA and the State seek to extend the existing assignment of responsibilities to the State for an additional three-year period, pursuant to a new MOU ("First Renewed §326 MOU" or "MOU");

Whereas, on August 11, 2021, FHWA published a notice of the availability of the proposed First Renewed Section 326 MOU in the Federal Register and provided a 30-day opportunity for comment in the USDOT Docket Management System FHWA-2021-0012 and

Whereas, the State and FHWA have considered the comments received on the First Renewed Section 326 MOU and the State's overall performance in the Program evaluated through NDOT self-assessment and FHWA monitoring as required by 23 U.S.C. §326(c)(5); and

Whereas, the DOT Secretary, acting by and through FHWA, has determined that specific designated activities are CEs and that it will assign specific responsibilities with respect to CEs to the State in accordance with this MOU; and

Whereas, the State wishes to assume such Federal agency responsibilities in accordance with this MOU and applicable law; and

Whereas, FHWA and the State commit to work together to achieve a successful assignment program through State implementation, including proactively identifying and correcting deficiencies, and FHWA assisting the State through training and by providing program assistance; and

Now, therefore, FHWA and the State agree as follows:

STIPULATIONS

I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO THE STATE BY FHWA

- A. For the projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, subject to the terms and conditions set forth in 23 U.S.C. §326 and this MOU, the responsibility for determining whether a proposed Federal action is within a category of action that has been designated as a CE by the DOT Secretary, as specified in Stipulation I(B), and meets the definition of a CE as provided in 40 CFR 1508.1(d) as in effect on September 14, 2020 and 23 CFR 771.117(a) and (b). This assignment applies only to projects for which the State is the direct recipient of Federal-aid highway program funding or is the project sponsor or cosponsor for a project requiring approval by FHWA – Nebraska Division Office. This assignment does not apply to responsibilities carried out by other modal administrations of the US Department of Transportation (DOT) or the Office of the Secretary.
- B. This assignment pertains **only** to the designated activities described in this Stipulation I(B).
 - 1. The assignment includes the following:
 - a. Activities listed in 23 CFR 771.117(c);
 - b. The example activities listed in 23 CFR 771.117(d); and
 - 2. Any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU.
- C. This MOU transfers to the State all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. The State shall process all proposed projects that are CE candidates (CE projects), and any required reevaluations of CEs under 23 CFR 771.129 for all CE projects not completed prior to the date of this MOU, in accordance with the provisions of this MOU. With respect to matters covered by and subject to the terms of this MOU, this MOU supersedes any existing programmatic agreement that is solely between the State and FHWA concerning CEs.
- D. The State, when acting pursuant to 23 U.S.C. §326 and this MOU, holds assigned authority to make environmental decisions and commitments pertaining to only the individual proposed projects and activities within the scope of 23 U.S.C. §326 and this MOU. No action by the State shall bind FHWA to future action of any kind. No determination or agreement made by the State with respect to mitigation or other activities shall constitute a precedent for future determinations, agreements, or actions in the Federal-aid highway program unless FHWA consents, in writing, to such commitment.

II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO THE STATE AND RESPONSIBILITIES RESERVED BY FHWA

- A. For projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, the following FHWA responsibilities for environmental review, consultation, or other related actions required under Federal laws and Executive Orders applicable to CE projects. See Appendix A. This assignment includes the transfer to the State of the obligation to fulfill the assigned environmental responsibilities associated with any proposed projects meeting the criteria in Stipulation I(B) that were determined to be CEs prior to the effective date of this MOU, but the project has not been completed. Such projects are included in the term “proposed projects” in this MOU.
- B. The FHWA reserves any responsibility for any environmental review, consultation, or other

related action that is not expressly assigned under this MOU, including:

1. All government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m). Notice from the State to an Indian tribe advising the Indian tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If the State adequately resolves any project-specific Indian tribe issues or concerns, then FHWA's role in the environmental process shall be limited to carrying out the government-to-government consultation process. FHWA, per the terms of this MOU, shall enter into government-to-government consultation with any Indian tribe who contacts FHWA or NDOT (via written or oral communication) to make such a request. The parties shall notify each other of any government-to-government requests received. If FHWA determines through consultation with an Indian tribe, or an Indian tribe indicates to FHWA, that the proposed resolution of tribal issues or concerns by the State is not adequate, then Stipulation III(C) applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among the State, FHWA, and an Indian tribe under which the Indian tribe agrees to permit the State to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.
 2. Responsibility for the review and approval of repairs or projects funded under the Emergency Relief (ER) program, for review and approval of individual Section 4(f) evaluations, and for making project-level air quality conformity determinations remains with FHWA until such time as State staff responsible for approving such evaluations have completed air quality conformity, individual Section 4(f) and legal sufficiency workshop training(s) provided by FHWA, and air quality project-level conformity, Individual Section 4(f) and ER project review implementation guidance materials and procedures are complete. When such training(s), implementation guidance material and procedures have been completed, NDOT will notify FHWA of their intent to seek CE assignment of these activities. Upon review of NDOT's request, FHWA shall notify the State and an amendment under Stipulation VIII may occur. This modification for assignment shall be deemed an amendment under Stipulation VIII. In addition, the State will not make any determination that an action constitutes a constructive use of a publicly owned park, public recreation areas, wildlife refuge, or historic site under 49 U.S.C. §303/23 U.S.C. §138 (Section 4(f)) without first consulting with FHWA and obtaining FHWA's approval for such determination.
 3. The State and FHWA will work cooperatively to respond to a request for information on an assigned project for which one or more responsibilities have been excluded from assignment. FHWA or the State shall respond to the request within 5 business days. If FHWA or the State is unable to produce the information requested within 5 business days, the response shall state that additional time is required, an expected date of delivery, and that the parties may meet and confer if further coordination is required. (see also Stipulation 4 under Monitoring). Parties will ensure that:
 - a. The State provides any information necessary for FHWA to carry out its consultation, evaluation, or decision for Stipulation II(9B) activities;
 - b. The state shall consider any documented decision and any related information provided by FHWA and used for Stipulation II(B) decisions and needed by the State in order for the State to evaluate the project and make its decision whether the project qualifies as a CE; and
 - c. As part of any request for FHWA authorization for funding or other action, the State will provide to FHWA reasonable evidence that the CE processing and any other environmental responsibilities assigned under this agreement have been completed in accordance with this MOU.
- C. The State agrees that its execution of environmental review, reevaluation, consultation, and other related responsibilities for CEs assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by FHWA. This includes, but is not limited to, the responsibilities of FHWA under interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process for CE projects (see Appendix B). If such interagency agreements are between the State and FHWA

only, then the assignment occurs automatically upon the signing of this MOU for projects covered by this MOU. If the interagency agreement involves signatories other than FHWA and the State, then FHWA and the State will work to obtain any necessary consents or amendments. Such actions include:

1. Consulting with the other parties to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of the State for FHWA with respect to interagency agreement provisions applicable to CE projects;
 2. Negotiating with the other parties to amend the interagency agreement as needed so that the interagency agreement continues but that the State assumes FHWA's responsibilities with respect to CE projects.
 3. If a third party does not agree to the assignment or amendment of the interagency agreement, then to the extent permitted by applicable law and regulation, the State must carry out the assigned environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.
- D. The State shall carry out the assigned consultation, review and coordination activities in a timely and proactive manner. The State shall make all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, State and local agencies, Indian tribes as defined in 36 CFR 800.16(m), and the public during the consultation and review process.

III. **ACTIONS, CONDITIONS, DETERMINATIONS, OR PROGRAMS THAT EXCLUDE DESIGNATED ACTIVITIES FROM ASSIGNMENT OF RESPONSIBILITIES**

- A. Notwithstanding any other provision of this MOU, any activity that does not satisfy the criteria for the CEs categories described in Stipulation I(B) is **excluded** from this assignment. Exclusion also may occur at any time during the environmental process if the State determines that the project fails to meet the CE criteria or falls within Stipulation III(D). The provisions of Stipulation IV(C) apply to such cases.
- B. Because the State assumes responsibility for environmental processing of the CEs designated in this MOU, FHWA no longer will be responsible for conducting the environmental review, consultation or other related actions assigned under this MOU (see Stipulation XI). However, in furtherance of its stewardship and oversight responsibilities, FHWA will evaluate the State's environmental processing of any project if FHWA has any reason to believe that the State's performance with respect to the project does not satisfy the terms and conditions of this MOU. The scope of the evaluation will be commensurate with the potential problem and consistent with the terms of this MOU. If FHWA subsequently determines that the State's performance does not satisfy the terms and conditions of this MOU, then FHWA will take action to resolve the problem. Such action may include action to facilitate the State's compliance with the MOU, or action to exclude the project from assignment under this MOU. The provisions of Stipulation X apply in the event of FHWA-initiated exclusion or partial termination.
- C. If a project-related concern or issue is raised in the coordination of project review with an Indian tribe, as defined in 36 CFR 800.16(m), and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by the State as more specifically set forth in Stipulation II(B)(1), then, FHWA may reassume responsibility for processing the project or an individual responsibility assumed by the State. The FHWA shall notify the State that the project will be excluded from this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.
- D. Other programs that exclude a project from assignment to the State under this MOU are:
 1. Federal Lands program of projects administered by the Federal Lands Highway Division which are authorized under 23 U.S.C. §§202, 203, 204, and Section 1123 of the Fixing America's Surface Transportation Act (P.L. 114-94), unless such projects will be designed and constructed by the State.
 2. Recreational Trails program (23 U.S.C. §206)
 3. Programs and projects advanced by direct recipients of Federal-aid Highway Program funds other than the State, including but not limited to:
 - a. US DOT Discretionary grants (i.e., BUILD, RAISE, INFRA);

- b. Direct recipient tribal project;
- c. National Significant Freight and Highway Project Program.

IV. **PERFORMANCE REQUIREMENTS**

- A. Compliance with governing laws, regulations and MOU. The State shall make all determinations under this MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. All actions by the State in carrying out its responsibilities under this MOU shall comply with, and be consistent with, the coordination provisions of Stipulation II and all applicable Federal laws, regulations, Executive Orders, policies, and guidance. The State also shall comply with State and local laws to the extent applicable.
1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by FHWA to terminate this MOU pursuant to Stipulation IX(A) if FHWA determines, after good-faith consultation with the State, that there is an irreconcilable material conflict between a provision of State law, regulation, policy, or guidance and applicable Federal law, regulation, policy, or guidance, and FHWA reasonably determines that such conflict is preventing the State from meeting its Stipulation IV(A) obligations. The grounds for such decision may include, but are not limited to, the mere existence of the conflict (i.e., on its face) and/or the effect of the conflict on the State's decision(s) on proposed CE project(s) (i.e., as applied).
 2. Official DOT and FHWA formal guidance and policies relating to environmental review matters are posted online at FHWA's Web site or sent to the State electronically or in hard copy.
 3. FHWA will use its best efforts to notify the State within five business days of any Indian tribe requesting government-to-government consultation and the State shall provide FHWA any information pursuant to stipulation II(B)(3)(a).
 4. After the effective date of this MOU, FHWA will use its best efforts to ensure that any new or revised FHWA policies and guidance that are final and applicable to the State's performance under this MOU are communicated to the State within 10 business days of issuance. Delivery may be accomplished by email, mail, or notification of publication in the *Federal Register*, or by means of a publicly available online posting including at the sites noted above. If communicated to the State by email or mail, such material may be sent either to the party specified in this MOU to receive notices, or to the individual designated by the State.
 5. In the event that a new or revised FHWA policy or guidance is not made available to the State as described in the preceding paragraph, and if the State had no actual knowledge of such policy or guidance, then a failure by the State to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
 6. The State will work with all other appropriate Federal agencies concerning the laws, guidance, and policies relating to any Federal laws that such other agencies administer.
 7. In order to minimize the likelihood of a conflict as described in IV.A.1, after the effective date of this MOU the State will use its best efforts to provide notice to FHWA of proposed new or revised Nebraska laws, and State regulations, guidance, and written internal standard operating procedures that are applicable to the State's performance under this MOU. NDOT maintains the right to create its own policies, procedures, and best practices so long as they are compliant with applicable law, regulation, guidance, and policy. Furthermore, the State will use its best efforts to provide these materials to FHWA for review and comment before they become final. If the State had no actual advance knowledge of such new or revised Nebraska laws, then a failure by the State to provide FHWA with advanced notice of the proposed new or revised law will not be a basis for termination under this MOU.
 8. Deliveries required by this provision may be accomplished by email, mail, or personal delivery. If communicated to FHWA by email or mail, such material may be sent to the party specified in this MOU to receive notices for FHWA.
 9. At State's request, FHWA may assist the State in evaluating its environmental program to develop or modify its processes or procedures to carry out the responsibilities it has assumed under the MOU, including matters pertaining to emerging national policy issues, and those processes or procedures concerning the State's consultation, coordination, and

communication with other federal agencies. Implementation of specific processes or procedures suggested by FHWA resulting from a request for assistance shall be left to the discretion of the State, except where the State's proposed course of action constitutes a violation of Federal law, regulation, policy, guidance, or the MOU.

- B. Processing projects assigned under the MOU: State identification, documentation, and review of effects. For projects and other activities assigned under Stipulations I(A)-(B) that the State determines are included in the classes of CE assigned to the State under this MOU, the State shall:
1. Institute and maintain a process to identify and review the environmental effects, including Environmental Justice, of the proposed project;
 2. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity;
 3. Document in the project file the CE findings and completion of all applicable FHWA responsibilities assigned under Stipulations I and II;
 4. For CEs other than those designated in 23 CFR 771.117(c), carry out a review of proposed CE determinations, including consideration of the environmental analysis and project file documentation, prior to the State's approval of the CE determination. The process shall include, at a minimum, review of the documentation and proposed determination by a competent reviewer who is not a preparer of the CE documentation.
 5. Document its approval of the determination using, at a minimum, the printed name, title, and date of the State official approving the determination; and
 6. Include the following determination statement when documenting the CE findings: "The State has determined that this project has no significant impact(s) on the environment and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under the NEPA. The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to 23 U.S.C. §326 and a Memorandum of Understanding dated **September 17, 2021** executed between FHWA and the State."
 7. Document in the project file the specific categorically excluded activity, the CE finding, including the determination that the project has no significant impact(s) on the environment, there are no unusual circumstances (23 CFR 771.117(b)), and completion of all applicable FHWA responsibilities assigned under Stipulations I and II.
- C. Excluded projects: Determination and documentation. For projects that are candidates for CE classification but that the State determines should be excluded from processing under this assignment, the State shall:
1. Document the exclusion findings in the project file, including the reason for the finding;
 2. Notify FHWA; and
 3. Working with FHWA as the responsible party under NEPA, to proceed with documentation and review of the project under the appropriate NEPA procedures.
- D. Required State resources, qualifications, expertise, standards, and training.
1. The State must maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under this MOU. This includes, without limitation:
 - a. Using appropriate technical and managerial expertise to perform the functions required under this MOU and applicable laws, regulations, policy, and guidance;
 - b. Devoting adequate financial and staff resources to carry out the responsibilities assumed by the State; and
 - c. Demonstrating, in a consistent manner, the capacity to perform the State's responsibilities under the MOU and applicable Federal law.
 2. The State agrees that it shall maintain on its staff or through consultant services all of the environmental and other technical expertise needed to carry out its responsibilities under this MOU and 23 U.S.C. §326. Without limiting the foregoing, when carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, the State shall comply with 36 CFR 800.2(a)(1). All actions that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the

reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior's Professional Qualifications Standards (published at 48 FR 44738-44739). The State shall ensure that all documentation required under 36 CFR 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards.

E. State quality control.

1. The State agrees to carry out regular quality control activities to ensure that its CE determinations are made in accordance with applicable law and this MOU.
2. At a minimum, the State shall monitor its processes relating to project determinations, environmental analysis, and project file documentation, and check for errors and omissions. The State shall take corrective action as needed. The State shall document its quality control activities and any needed corrective actions taken.
3. If the State implements training to meet the capability requirements of this MOU or as a corrective action, the State shall be responsible for the training. The State shall provide notice of formal training to FHWA.

F. MOU performance monitoring and quality assurance. The FHWA and the State shall cooperate in monitoring performance under this MOU as set forth herein and each party shall modify its practices as needed to assure quality performance by the State and FHWA. Monitoring will include consideration of the technical competency and organizational capacity of the State, as well as the State's performance of its CE processing functions. Performance considerations will include, without limitation, the quality and consistency of the State's project determinations, adequacy and capability of the resources applied by the State, and the quality and consistency of the State's administration of its responsibilities under this MOU. In support of the monitoring efforts:

1. The State shall submit to FHWA a list of the CE determinations and Section 4(f) determinations that the State approved during the previous 6 months. The reporting period will conclude on September 6th and March 6th of each year, with the report submitted to FHWA within 15 business days after the end of each reporting period. Reporting shall be every six months unless reduced by FHWA. Reduction in reporting frequency and any revocation of such reduction by FHWA, shall not be deemed an amendment under Stipulation VIII. For each report, the State shall include the following information: 1) Control Number, 2) Project Number 3) Project Name, 4) CE Level, 5) CFR Action Class, 6) STIP/TIP project description and 7) Approval Date. For projects with Section 4(f) determinations, the following information would also be included: 1) Property name, 2) property type, 3) determination (including determinations made under 23 CFR 774.13), 4) approval date, and 5) legal sufficiency review date (individual Section 4(f) only). Further, in the 6-month report, project names, locations and decisions will be provided for all Environmental Justice analysis.
2. The State shall submit to FHWA (via electronic copy) a self-assessment report summarizing its performance under this MOU at least 30 days prior to a scheduled monitoring event by FHWA under Stipulation IV(F)(3). The report will identify any areas where improvement is needed and what measures the State is taking to undertake those improvements. The report will include actions taken by the State as part of its quality control efforts under Stipulation IV.
3. The FHWA periodically shall review the State's records and may conduct onsite or remote interviews of State staff to evaluate the State's performance under this MOU.
 - a. Monitoring Events should be coordinated with the review of the State's self-assessment report under Stipulation IV(F)(2). The FHWA shall provide notice 90 days prior to scheduling monitoring event interviews. During the Monitoring Event, parties will discuss the self-assessment report, the State's performance of the MOU, and FHWA's monitoring activities. Following the conclusion of a monitoring event, FHWA will provide the State with a draft written report summarizing the findings of the monitoring event. Any dispute regarding the draft findings shall be provided to FHWA in writing. No monitoring event shall be scheduled for a date less than 6 months from the date NDOT receives the draft written report from the previous monitoring event. The FHWA anticipates that under normal circumstances, its evaluation of the State's performance will be

based on a modified version of a typical FHWA CE process review (to view FHWA guidance on how monitoring should occur visit <https://www.fhwa.dot.gov/hep/guidance/6004stateassumpt.cfm>). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to the State pursuant to 23 U.S.C. §326, and will include performance measurements of compliance and timeliness.

- b. FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. The State, by its execution of this MOU acknowledges that it is familiar with FHWA CE Process Review procedures and with the expected modifications that will be adopted for the purpose of monitoring the State's MOU performance.
 - c. A "finding" is "a statement of partial or full non-compliance to a statute, regulation, FHWA guidance, FHWA or NDOT policy, NDOT procedures, agreements, and/or the MOU", and identified by citation to the applicable standard by FHWA within the Monitoring Event final report or other monitoring activity reports.
 - d. For any finding that requires corrective action, NDOT shall take corrective action on any findings in a Monitoring Event final report or other monitoring activity report in order to avoid possible termination of this MOU, pursuant to 23 USC 326(d)(B) see Stipulation IX below. NDOT and FHWA will meet within 30 days of issuance of the final report to discuss "findings" and a corrective action plan will be provided to FHWA within 120 days of the final report, or within an otherwise agreed upon timeframe by both parties. NDOT shall inform FHWA of corrective actions taken.
4. The State shall maintain project and administrative records pertaining to its MOU responsibilities and the projects processed hereunder as set forth in the State's record retention schedules approved by the Nebraska Secretary of State. The State will ensure that such records are reasonably available for inspection by FHWA at any time during normal business hours. The State shall provide FHWA with copies of any documents FHWA may request within 5 business days. The State shall retain those records, including all letters and comments received from governmental agencies, the public, and others about the performance of activities assigned under this MOU, for a period of no less than 3 years after completion of project construction. This 3-year retention provision does not relieve the State of its project or program recordkeeping responsibilities under 2 CFR 200.333 or any other applicable laws, regulations, or policies.
 5. The State shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. §552 (the Freedom of Information Act (FOIA), as amended in 2002) and NEPA.
 6. Nothing in this Stipulation shall prevent FHWA from undertaking other monitoring actions, including audits, with respect to the State's performance of the MOU.
 7. The FHWA, in its sole discretion, may require the State to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with this MOU, 23 U.S.C. §326, and other applicable Federal laws and regulations. Such requirement shall not be deemed an amendment under Stipulation VIII.
 8. The State and FHWA agree to cooperate in all quality assurance activities.
- G. State liability. The State agrees that it is solely responsible and solely liable for complying with and carrying out this MOU, for the performance of all assigned responsibilities as provided by applicable law and for any decisions, actions, or approvals by the State. The FHWA shall have no responsibility or liability for the performance of responsibilities assigned to the State, including without limitation any decision or approval made by the State. Where the State exercises any assigned authority on a proposed project which FHWA determined to be a CE prior to the execution of this MOU, the State assumes sole environmental review responsibility and liability for any subsequent substantive environmental review action it takes on that project.
- H. Litigation.
1. Nothing in this MOU affects the United States Department of Justice's (hereinafter "DOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation. In the event FHWA or any other Federal agency is named in litigation related to

matters under this MOU, the State agrees to coordinate with DOJ in the defense of that action.

2. The State shall defend all claims brought in connection with its discharge of any responsibility assigned to the State. In the event of litigation, the State shall provide qualified and competent legal counsel, including outside counsel if necessary. The defense shall be provided at the State's own expense, except as provided in 23 U.S.C. §326(f). The State shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.
 3. The State shall notify FHWA Nebraska Division Office and USDOJ Assistant Attorney General for the Environment and Natural Resources Division within seven (7) calendar days of the State's receipt of service of process of any complaint, concerning discharge of any responsibility assumed under this MOU. The State's notification to the FHWA and USDOJ shall be made prior to its response to the complaint. In addition, the State shall notify FHWA Nebraska Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU. The State will provide FHWA Nebraska Division Office and DOJ copies of any motions, pleadings briefs, or other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. The State will provide such copies to the FHWA and DOJ within seven (7) calendar days of service of any document, or in the case of any documents filed by or on behalf of the State, within seven (7) calendar days of the date of filing.
 4. The State will notify the FHWA Nebraska Division Office and DOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and DOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. The State will not execute any settlement agreement until: (1) FHWA and DOJ have provided comments on the proposed settlement; (2) FHWA and DOJ have indicated that they will not provide comments on the proposed settlement; or (3) the ten-day or otherwise agreed upon review period has expired, whichever occurs first.
 5. Within seven (7) calendar days of receipt by the State, the State will provide notice to FHWA Nebraska Division Office and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities the State has assumed under this MOU. The State shall notify FHWA's Nebraska Division Office and DOJ within five (5) days of filing a notice of appeal of a court decision. The State shall confer with FHWA and DOJ regarding the appeal at least forty-five (45) days before filing an appeal brief in the case.
 6. The State's notification to FHWA and DOJ in Stipulations IV(H)(3), (5), and (6) shall be made by electronic mail to FHWA_assignment_lit@dot.gov; FHWA.NE@dot.gov; and NRS DOT.enrd@doj.gov, unless otherwise specified by FHWA and DOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in Stipulation IV(H)(3) the State may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses:
FHWA_assignment_lit@dot.gov and efile_nrs.enrd@usdoj.gov. FHWA and DOJ's comments under Stipulation IV(H)(3) shall be made by electronic mail to NDOT.OfficialNEPA@nebraska.gov unless otherwise specified by the State. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:
For DOJ: Assistant Attorney General for the Environment and Natural Resources Division at 950 Pennsylvania Avenue, NW, Room 2143, Washington, DC, 20530.
For FHWA: Division Administrator, FHWA Nebraska Division, 100 Centennial Mall North Room 220, Lincoln, NE 68508-3803
- J. Federal Register. While the MOU is in effect, if any CE project or program documents are required to be published in the *Federal Register*, such as a Notice of Final Agency Action under 23 U.S.C. §139(l), the State shall transmit such document to the FHWA's Division Office and FHWA will publish such document in the *Federal Register* on behalf of the State. The State is

responsible for the expenses associated with the publishing of such documents in the *Federal Register*, in accordance with guidance issued by FHWA.

- K. Participation in Resource Agency Reports. The State agrees to provide data and information requested by the FHWA Office of Project Development and Environmental Review and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:
1. Archeology Report requested by the National Park Service;
 2. Endangered Species Act Expenditure Reports requested by the United States Fish and Wildlife Service and the National Marine Fisheries Service;
 3. NEPA Litigation Reports requested by the Council on Environmental Quality; and
 4. Environmental Conflict Resolution reports requested by the Council on Environmental Quality.

V. **STATE CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION**

- A. The State hereby certifies that it has the necessary legal authority and the capacity to:
1. Accept the assignment under this MOU;
 2. Carry out all of the responsibilities assigned to the State; and
 3. Agree to and perform all terms and conditions of the assignment as contained in this MOU and in 23 U.S.C. §326.
- B. The State consents to and accepts the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the DOT Secretary that the State assumes under this MOU and 23 U.S.C. §326. The State understands and agrees that this consent constitutes a waiver of the State's immunity under the 11th Amendment to the United States Constitution for the limited purposes of addressing the compliance, discharge, and enforcement of the DOT Secretary's responsibilities that that State assumes pursuant to this MOU and 23 U.S.C. §326. This consent to Federal court jurisdiction shall remain valid after termination of the MOU, or re-assumption of the DOT Secretary's responsibilities by FHWA, for any act or omission by the State relating to its compliance, discharge, or enforcement of any responsibility under this MOU or 23 U.S.C. §326. A valid, binding, and sufficient waiver of the State's sovereign immunity must be in effect at all times that the State acts under the authority of this MOU.
- C. In accordance with 23 U.S.C. §326(e), the State agrees that it shall be deemed to be a Federal agency for the purposes of the Federal law(s) under which the State exercises any responsibilities pursuant to this MOU and 23 U.S.C. §326.
- D. The State may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity. Without limiting the foregoing, the State understands and agrees that it must retain the environmental decision-making responsibilities assigned to it under this MOU and may not assign or delegate such decision-making responsibilities to consultants or others.
- E. With respect to the public availability of any document or record under the terms of this MOU or the State's open records law, Neb. Rev. Stat. §84-712 et. seq., the State certifies that the laws of the State provide that any decision regarding the release or public availability of a document or record may be legally challenged or reviewed in the courts of the State.
- F. The State certifies that the person signing this MOU is duly authorized to do so and has the legal authority to:
1. Waive the State's 11th Amendment rights pursuant to the authority in Neb. Rev. Stat. §39-1306.03;
 2. Consent to Federal court jurisdiction as specified above;
 3. Enter into this MOU on behalf of the State;
 4. Make the certifications set forth in this MOU; and
 5. Bind the State to the terms and conditions contained in this MOU.

The State's Attorney General, by issuing an opinion letter that is addressed to the FHWA Administrator and attached to this MOU, certifies that the foregoing is true and that upon execution of this MOU the certifications, terms, and conditions of the MOU will be legally binding

and enforceable obligations of the State.

VI. **PUBLIC NOTICE AND COMMENT**

- A. The execution of this MOU, and of any amendment or renewal, requires prior public notice and an opportunity for comment.
- B. The State shall publish notice, of the availability of the MOU, and any proposed amendment or renewal, for public review and comment in a newspaper of general circulation and upon the State's website.
- C. The FHWA Division Office shall publish in the *Federal Register* a notice of availability of the proposed MOU, and any proposed amendment or renewal, for public review and a 30-day comment period. The notice will expressly request comments on any proposed additional designation of activities as CEs, including any types of activities described in a MOU Appendix pursuant to Stipulation I(B)(3). The notice also must advise the public about how to learn about FHWA's final decision on the proposed MOU, including how to obtain a copy of any resulting final MOU. The FHWA will establish a docket in the Federal Docket Management System at <http://www.regulations.gov> to receive comments.
- D. The State and FHWA shall consider comments provided by the respondents to the notices before finalizing the MOU, or any proposed amendment or renewal agreement. Upon completion of the process, FHWA shall place in the Federal Docket Management System a brief summary of the results of the process and the availability of any final MOU executed by the State and FHWA, whether initial, amended, or renewed.
- E. The State agrees that at all times that this MOU is in effect, the State will post on its Website (www.dot.nebraska.gov) and make available to the public upon request, copies of the State's annual reports of the CE determinations under Stipulation IV(F)(1), the State's performance reports under Stipulation IV(F)(2), and FHWA performance monitoring reports pursuant to Stipulation IV(F)(3). The FHWA will arrange for the posting of a similar notice on the FHWA's Web site or create a link from the FHWA's Web site to the State's Web site.

VII. **INITIAL TERM AND RENEWAL**

- A. This MOU shall have an initial term of 3 years, beginning on the date of the last signature.
- B. This MOU is renewable for additional terms of 3 years each if the State requests renewal and FHWA determines that the State has satisfactorily carried out the provisions of this MOU. In considering any renewal of this MOU, FHWA will evaluate the effectiveness of the MOU and its overall impact on the environmental review process. The FHWA may decide not to renew the MOU if FHWA determines that the operation of the MOU has substantial adverse effects on the environmental review process. Such evaluation may include consideration of any effects from the assumption by the State of only some, but less than all, of FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II. **At least 6 months prior** to the end of the initial term and of any renewed term of this MOU, the State and FHWA shall meet to discuss the results of the monitoring and consider any amendments to this MOU. This meeting may be combined with a meeting to discuss performance under the monitoring provisions in Stipulation IV(F)(3) of this MOU.
- C. If the parties do not renew the MOU, then it shall expire at the end of the term then in effect. The provisions of Stipulation X(A)(4), and X(C)-(E) shall apply.

VIII. **AMENDMENTS**

- A. Any party to this MOU may request that it be amended or administratively modified to reflect non-substantive changes, whereupon the parties shall consult to consider such an amendment. Public notice and comment is not required for the parties to agree to a technical non-substantive change.
- B. If, after the required public notice and comment, the parties agree to amend the MOU, then FHWA and the State may execute an amendment with new signatures and dates of the signatures. The term of the MOU shall remain unchanged unless otherwise expressly stated in the amended MOU. Any amendment that extends the term of the MOU shall be treated as a renewal and FHWA must make the determinations required for a renewal under Stipulation VII.

IX. **TERMINATION OF THE PROGRAM**

- A. Termination by the FHWA
1. As provided at 23 U.S.C. 326(d)(1), FHWA may terminate the State's participation in the Program, in whole, at any time subject to the procedural requirements in 23 U.S.C. 326 and Stipulation IX(A)(2) below, if:
 - a. FHWA determines that the State is not adequately carrying out the responsibilities assigned to the State under this MOU. See Stipulation IV(F)(3)(d);
 - b. FHWA provides to the State a written notification of its determination;
 - c. FHWA provides the State a period of at least one-hundred twenty (120) calendar days to take corrective action to comply with this MOU;
 - d. If requested by the Governor of the State, FHWA provides a detailed description of each responsibility in need of corrective action regarding any inadequacy identified by FHWA; and
 - e. After the notification and after the expiration of the 120-day period provided under this provision, the State fails to take satisfactory corrective action as determined by FHWA.
 2. Failure to adequately carry out the responsibilities may include, but not be limited to:
 - a. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;
 - b. Failure to cooperate with FHWA in conducting an audit or any oversight or monitoring activity;
 - c. Failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed;
 - d. Substantial noncompliance with this MOU; or
 - e. Persistent failure to adequately consult, coordinate, and/or take the concerns of other Federal agencies and Indian Tribes, as well as SHPOs/THPOs, into account in carrying out the responsibilities assumed.
 3. If FHWA terminates the State's responsibilities under this MOU in accordance with 23 U.S.C. §326, FHWA shall provide written notice of that termination to the State, and such notice shall specify the date on which the termination becomes effective. Upon that effective date, the program responsibilities that have been assumed by the State of this MOU will transfer to FHWA.
- B. Termination by the State
1. The State may terminate its participation in the Program at any time by providing to FHWA a notice at least ninety (90) calendar days prior to the date that the State seeks to terminate its participation in this Program, and subject to such terms and conditions as FHWA may provide.
 2. The Nebraska Legislature and Governor may, at any time, terminate the State's authority granted to participate in this Program. In the event, FHWA and the State will develop a plan to transition the responsibilities that the State has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies. The plan will be approved by both FHWA and the State.
 3. In the event of termination of the program, the State and FHWA agree to cooperate to make the transfer of responsibilities back to FHWA effective in as orderly and administratively efficient manner as possible. The State promptly will provide to FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.
 4. Validity of the State Actions
 - a. Any environmental approvals made by the State pursuant to the responsibilities the State has assumed under this MOU will remain valid after termination of the State's participation in the MOU or withdrawal of assignment by FHWA. As among the USDOT Secretary, FHWA and the State, the State will remain solely liable and solely responsible for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

X. **PROCEDURES FOR TERMINATION OF SPECIFIC RESPONSIBILITIES OR FHWA-INITIATED**

PROJECT EXCLUSIONS

- A. The process for the partial termination of one or more specific responsibilities or the exclusion of a project by FHWA under Stipulation III(B)-III(C), is as follows:
1. The party wishing to exercise the partial termination or FHWA-initiated exclusion shall provide to the other party a written notice of intent. The notice should identify the proposed action and explain the reason(s) for the proposed action.
 2. Following the notice, the parties shall have a 30 calendar-day period during which FHWA and the state shall consult on amendments or other actions that would avoid partial termination or exclusion. By agreement, the parties may extend this consultation period, provided that such extension may not exceed the term of the MOU.
 3. Effective date.
 - a. Partial terminations shall be effective either 30 days after the date of the State's receipt of a FHWA notice of partial termination or 90 days after the date of FHWA's receipt of the State's partial termination notice. By agreement, the parties may modify the partial termination effective date, provided that no modification may exceed the term of the MOU.
 - b. Project exclusions shall be effective 30 days following the date of either execution of a post consultation agreement between the State and FHWA, or the date of the State's receipt of a FHWA notice of final determination of exclusion.
 - c. All responsibilities covered by the partial termination or exclusion shall revert to FHWA as of the effective date of either the partial termination or exclusion notice.
 4. In the event of partial termination or exclusion, the State and FHWA agree to cooperate to make the transfer of responsibilities back to FHWA effective in as orderly and administratively efficient manner as possible. The State promptly will provide to FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.
- B. The FHWA, in its sole discretion, may exclude a project from this MOU pursuant to Stipulation III(B)-III(C), without the 30-day consultation or final notice periods if FHWA determines that:
1. The State is not performing in accordance with this assignment; and
 2. Extreme circumstances exist that require immediate exclusion or termination and transfer back to FHWA of the responsibilities covered by the exclusion or termination.
- In such cases, FHWA shall notify the State in writing of its determination and action, and specify the reasons for the action.
- C. The State's liability for its acts and omissions under this MOU, and the provisions of Stipulation V, shall survive the MOU. This survival clause includes, without limitation, the provisions of Stipulations IV(G)-IV(H) relating to liability and litigation.
- D. Partial termination and exclusion actions, and any decision not to renew, do not require public notice and comment.
- E. Partial termination or other action by FHWA in accordance with the provisions of this MOU does not limit or otherwise affect FHWA's ability to seek any other remedy or to take action under other provisions of applicable law, including without limitation any appropriate remedies as provided in 23 CFR 1.36.

XI. STATE EXECUTION OF ASSIGNED RESPONSIBILITIES WITHOUT FHWA INVOLVEMENT

- A. The FHWA will not provide any project-level assistance to the State in carrying out any of the responsibilities assigned under this MOU. "Project-level assistance" includes advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, project-level assistance does not include discussions concerning issues addressed in prior projects, legal interpretations of any applicable law contained in titles 23 or 49 of the United States Code, legal interpretations of any FHWA or DOT regulation, or interpretations of FHWA or DOT policies or guidance. If a need for project-level assistance is identified as a result of the government-to-government consultation process described in Stipulation II(B)(1), then FHWA may reassume responsibility for the project as provided in Stipulation III(C).
- B. The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue

involving the State's consultation or coordination with another Federal, State, or local agency with respect to the State's discharge of any of the responsibilities the State has assumed under this MOU for any particular highway project. However, FHWA holds both monitoring and quality assurance obligations under this MOU and general oversight and stewardship obligations under the Federal-aid highway program. In furtherance of those obligations, FHWA occasionally may elect to attend meetings between the State and other Federal agencies, and will notify the state of FHWA's attendance. Based on its observations, FHWA may submit comments to the State and the other Federal agency in the following extraordinary circumstances:

1. The FHWA reasonably believes that the State is not in compliance with this MOU; or
2. The FHWA determines that an issue between the State and the other Federal agency has broad or unique policy implications for the administration of the national Federal-aid Highway Program.

XII. NOTICES

Any notice required by this MOU may be given electronically so long as a paper original of the notice also is delivered to the party. The effective date of the notice shall be the date of delivery of the paper original.

- A. Paper notices shall be delivered as follows:

State of Nebraska:

Nebraska Dept. of Transportation
ATTN: Project Development Engineer
PO Box 94759
Lincoln, NE 68509-4759

Federal Highway Administration:

Federal Highway Administration
Nebraska Division
100 Centennial Mall North
Room 220
Lincoln, NE 68508-3803

Department of Justice:

U.S. Department of Justice:
Office of the Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Avenue, NW
Room 2143
Washington, D.C. 20530

- B. Electronic notices shall be provided as follows, unless an alternative means is agreed upon by the parties (for example, an agreed upon ftp site):

State of Nebraska:

NDOT.OfficialNEPA@nebraska.gov

Federal Highway Administration:

Nebraska.FHWA@dot.gov

Department of Justice:

NRS DOT.enrd@doj.gov

Execution of this MOU and implementation of its terms by the State formally evidence that the parties have reviewed this MOU and determined that it complies with the laws, regulations and policies applicable to FHWA and the State. Accordingly, this MOU is approved and is effective upon the date of the last signature below.

FEDERAL HIGHWAY ADMINISTRATION

Joseph Werning
Nebraska Division Administrator

Date

STATE OF NEBRASKA

John Selmer
Director, Nebraska Department of Transportation

Date

Appendix A
List of FHWA Responsibilities Assigned

Air Quality

- Clean Air Act (CAA), 42 U.S.C. §§7401–7671q. *Including determinations for project-level conformity if required for the project*¹

Noise

- Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918
- Compliance with the noise regulations in 23 CFR Part 772 (except approval of the State noise policy in accordance with 23 CFR 772.7)

Wildlife

- Section 7 of the Endangered Species Act of 1973, 16 U.S.C. §§1531–1544, and 1536
- Fish and Wildlife Coordination Act, 16 U.S.C. §§661–667d
- Migratory Bird Treaty Act, 16 U.S.C. §§703–712
- Bald and Golden Eagle Treaty Act, as amended, 16 U.S.C. §§668– 668c

Historic and Cultural Resources

- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. §306108²
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm
- Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. §§312501-312508
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§3001–3013; 18 U.S.C. §1170
- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. §138 and 49 U.S.C. §303; 23 CFR Part 774¹

Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. §1996²
 - Farmland Protection Policy Act (FPPA), 7 U.S.C. §§4201–4209
-

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. §§1251–1377
 - Section 404
 - Section 401
 - Section 319
- Rivers and Harbors Act of 1899, 33 U.S.C. §403
- Wild and Scenic Rivers Act, 16 U.S.C. §§1271–1287
- Emergency Wetlands Resources Act, 16 U.S.C. §§3921, 3931
- Wetlands Mitigation, 23 U.S.C §§103(b)(6)(m), 133(b)(3)
- FHWA wetland and natural habitat mitigation regulations, 23 CFR Part 777
- Flood Disaster Protection Act, 42 U.S.C. §§4001–4128
- Safe Drinking Water Act (SDWA), 42 U.S.C. §§300f–300j–6

Parklands

- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. §138 and 49 U.S.C. §303; and 23 CFR Part 774¹
- Land and Water Conservation Fund (LWCF) Act, Pub. L. 88-578, 78 Stat. 897 (known as Section 6(f))

Hazardous Materials

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601–9675
- Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§9671–9675
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901–6992k

Land

- Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. §319
-

Executive Orders Relating to Highway Projects

- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 C.F.R. 650.113 and 650.115)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 11593, Protection and Enhancement of Cultural Resources²
- E.O. 13007, Indian Sacred Sites²
- E.O. 13175 Consultation and Coordination with Indian Tribal Governments²
- E.O. 13122 and E.O. 13751, Invasive Species

FHWA-Specific

- Planning and Environmental Linkages, 23 U.S.C. §168, except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135
- Programmatic Mitigation Plans, 23 U.S.C. §169 except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135

Notes:

1. Except as specified in Stipulation II.B.2 of this MOU
2. Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with federally recognized Indian tribes. The State will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. The State may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA remains responsible that this consultation occurs. Except as specified in Stipulation II.B.1 of this MOU.

Appendix B
List of NDOT Programmatic Agreements/Memoranda of Understanding
Statewide Agreements

Programmatic Agreement Among the Federal Highway Administration, US Fish and Wildlife Service, Nebraska Department of Roads (Transportation) and Nebraska Game and Parks Commission for the Determination of Effects to State and Federally Listed Species from the Federal-Aid Transportation Program.

Signatories: FHWA, USFWS, NDOT, NGPC

Effective Date: January, 2017

Nebraska Game and Parks Commission and Nebraska Department of Roads (Transportation), Endangered and Threatened Species Pre-Review Process for Material Source Sites, Plant Sites and Stockpile Sites

Signatories: NDOT, NGPC

Effective Date: July 29, 2015

Programmatic Agreement Among the Federal Highway Administration, the Nebraska State Historic Preservation Officer, the Advisory Council on Historic Preservation and the Nebraska Department of Roads to Satisfy the Requirements of Section 106 for the Federal-Aid Highway Program in the State of Nebraska as amended.

Signatories: FHWA, NSHS (now History Nebraska), ACHP, NDOT

Effective Date: July 31, 2015

Nebraska Department of Transportation Noise Analysis and Abatement Policy

Signatories: FHWA, NDOT

Effective Date: November 2, 2018

Nebraska Department of Transportation Public Involvement Procedures

Signatories: FHWA, NDOT

Effective Date: Approved by FHWA on August 21, 2020

Memorandum of Understanding, Air Quality Analysis for Environmental Documents

Signatories: NDOT, NDEQ (now NDEE)

Effective Date: Signed April 20, 2018 and effective upon execution of the Original §326 MOU, September 5, 2018

Final Statewide Umbrella Mitigation Banking Agreement

Signatories: USACE, USFWS, USDA- NRCS, FHWA, NGPC, NDEQ (now NDEE), NDOT

Effective Date: February 24, 2017

Memorandum of Understanding Among the Nebraska Department of Roads (Transportation) and the U.S. Department of the Interior Fish and Wildlife Service Relative to Priority Nebraska Transportation Project Reviews by the U.S. Fish and Wildlife Service in Nebraska.

Signatories: USFWS, NDOT

Effective Date: October, 2014

State of Nebraska - Historical Society, Statewide (Highway Archeology Program)

Signatories: NDOT, NSHS (now History Nebraska)

Effective Date: November 17, 2014

University of Nebraska, Statewide (Highway Paleontology Program)

Signatories: NDOT, NDEQ (now NDEE)

Effective Date: October 23, 2014

Memorandum of Understanding (MOU) Between Nebraska Department of Transportation and Nebraska Department of Environment and Energy: Clean Water Act Section 401 Permitting Certification and Nebraska Administrative Code, Title 117, Nebraska Surface Water Quality Standards

Signatories: NDOT, NDEE

Effective Date: September 3, 2019

Memorandum of Understanding MS4 Maintenance Responsibility Associated with State Highway System Classification

Signatories: NDOT, NDEQ (now NDEE)

Effective Date: May 31, 2018