

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION AND THE
NEBRASKA DEPARTMENT OF TRANSPORTATION CONCERNING THE
STATE OF NEBRASKA'S PARTICIPATION IN THE SURFACE TRANSPORTATION
PROJECT DELIVERY PROGRAM PURSUANT TO 23 U.S.C. § 327**

THIS MEMORANDUM OF UNDERSTANDING (MOU) entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (FHWA), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (USDOT), and the STATE OF NEBRASKA, acting by and through its NEBRASKA DEPARTMENT OF TRANSPORTATION (NDOT), hereby provides as follows:

WITNESSETH

Whereas, 23 U.S.C. § 327 establishes the Surface Transportation Project Delivery Program (Program) that allows the Secretary of the U.S. Department of Transportation (USDOT Secretary) to assign, and States to assume, the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. § 4321, *et seq.*) (hereinafter "NEPA"), and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other actions required by Federal environmental law with respect to highway, public transportation, railroad, and multimodal projects within the State; and

Whereas, FHWA has promulgated regulations implementing the Program at 23 CFR part 773; and

Whereas, Nebraska Revised Statutes (Neb. Rev. Stat.) § 39-1306.03 authorizes NDOT to participate in the Program; and

Whereas, on October 1, 2025 prior to submittal of its application to FHWA, NDOT published notice of, and solicited public comment on, its draft application to participate in the Program as required by 23 U.S.C. § 327(b)(3), and addressed the comments received as appropriate; and

Whereas, on November 18, 2025 the State of Nebraska acting by and through NDOT, submitted an application to FHWA with respect to highway projects in the State of Nebraska; and

Whereas, on December 12, 2025 FHWA published a notice in the *Federal Register* providing an opportunity for comment on its preliminary decision to approve NDOT's application and solicited the views of other appropriate Federal Agencies concerning NDOT's application as required by 23 U.S.C. § 327(b)(5); and

Whereas, the USDOT Secretary, acting by and through FHWA pursuant to 49 CFR 1.85(a)(3), has determined that NDOT's application meets the requirements of 23 U.S.C. § 327 with respect to the Federal environmental laws and highway projects identified in this MOU.

Now, therefore, FHWA and NDOT agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

- 1.1.1 Approval of application—This MOU officially approves NDOT’s application to participate in the Program and is the written agreement pursuant to 23 U.S.C. §§ 327(a)(2)(A) and 327(c). FHWA’s execution of this MOU is based on NDOT’s application dated November 18, 2025, and consideration of any comments received during the comment period. As such, this MOU incorporates the application. To the extent there is any conflict between this MOU and the application, this MOU will control.
- 1.1.2 Third party actions—Pursuant to 23 U.S.C. § 327(d), and subpart 3.3 of this MOU, third parties may challenge NDOT’s actions assigned under this MOU. Otherwise, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the State of Nebraska, its departments, agencies, or entities, its officers, employees, or agents. This MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the United States, its departments, agencies, or entities, its officers, employees, or agents.
- 1.1.3 Severability—The assignment of responsibilities under this MOU is made pursuant to the authority granted to the Secretary under 23 U.S.C. § 327. Any provision of this MOU, or any portion of any provision, that is deemed to be illegal, unenforceable, or beyond the scope of the Secretary’s authority will be severed from this MOU, without affecting the validity of the remainder of the MOU. In such event, all other provisions or parts of provisions of this MOU will remain in full force and effect.

PART 2. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY

2.1 Assignments and Assumptions of NEPA Responsibilities

- 2.1.1 Responsibilities assigned—Pursuant to 23 U.S.C. § 327(a)(2)(A), and subject to subpart 2.2.3 below, FHWA hereby assigns, and NDOT assumes, all of the USDOT Secretary’s responsibilities for compliance with the NEPA, 42 U.S.C. § 4321, *et seq.*, with respect to the highway projects specified under subpart 2.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal-aid highway projects.
- 2.1.2 Public disclosure—On the cover page of all environmental analyses prepared under the authority of this MOU, NDOT must insert the following language in a way that is conspicuous to the reader or include it in a categorical exclusion (CE) project record:

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by NDOT pursuant to 23 U.S.C. § 327 and a Memorandum of Understanding dated February 23, 2026 and executed by FHWA and NDOT.

2.1.3 NDOT shall disclose the disclosure to the public and agencies, as part of agency outreach and public involvement procedures, including any notice of intent or scoping meeting notice, the disclosure in subpart 2.1.2.

2.2 Assignments and Assumptions of Responsibilities to Comply with Federal Environmental Laws Other Than NEPA

2.2.1 Other Federal environmental authorities—Pursuant to 23 U.S.C. § 327(a)(2)(B), on the effective date of this MOU, FHWA assigns and NDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. § 327 and this MOU, all of the USDOT Secretary’s responsibilities for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects specified under subpart 2.3, required under relevant executive orders (E.O.) and all of the following Federal environmental laws related to highway projects:

Air Quality

- Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q, with the exception of project level conformity determinations (42 U.S.C. § 7506)

FHWA-Specific

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

Fisheries and Wildlife

- Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d
- Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667d
- Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712
- Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544

Hazardous Materials Management

- Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675
- Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 9671-9675
- Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k

Historic and Cultural Resources

- Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470(aa)-470(mm)
- Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013; 18 U.S.C. § 1170
- Archeological and Historic Preservation Act, 54 U.S.C. §§ 312501-312508
- National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 300101 *et seq.*

- Section 4(f) of the Department of Transportation Act of 1966 [Section 4(f)], 23 U.S.C. § 138, 49 U.S.C. § 303 and implementing regulations at 23 CFR part 774

Noise

- FHWA noise regulations in 23 CFR part 772
- Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918

Parklands and Other Special Land Uses

- Land and Water Conservation Fund Act, 54 U.S.C. §§ 200302-200310
- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138, 49 U.S.C. § 303 and implementing regulations at 23 CFR part 774

Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. § 1996
- Farmland Protection Policy Act, 7 U.S.C. §§ 4201–4209

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. §§ 1251-1387 (§§ 319, 401, 402, 404 and 408)
- Emergency Wetlands Resources Act, 16 U.S.C. § 3901 and § 3921
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. §§ 4001-4130
- General Bridge Act of 1946, 33 U.S.C. §§ 525-533
- Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-406
- Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26
- Wetland Mitigation, 23 U.S.C. §§ 119(g) & 133(b)(14)
- Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287

2.2.2 Projects and responsibilities not assigned—In accordance with 23 U.S.C. § 327(a)(2)(D), any highway project or responsibility of the DOT Secretary or FHWA that is not explicitly assumed by NDOT under this MOU remains the responsibility of the DOT Secretary or FHWA. This provision must not be interpreted to abrogate NDOT’s responsibilities to comply with the requirements of any Federal environmental laws that apply directly to NDOT independent of FHWA’s involvement (through Federal assistance or approval).

2.2.3 Government-to-Government consultation with Indian Tribes—The USDOT Secretary’s responsibilities for government-to-government consultation with Indian Tribes, as defined in 36 CFR 800.16(m), are not assigned to or assumed by NDOT under this MOU. The FHWA retains responsibility for government-to-government consultation, including initiation of government-to-government consultation consistent with E.O. 13175. A notice from NDOT to an Indian Tribe advising the Tribe of a proposed activity is not considered “government-to-government consultation” within the meaning of this MOU. At the request of the Tribe, FHWA may act as the main point of contact for a consultation related to NEPA or another Federal environmental law relating to a project. In such cases, NDOT will adhere to the results of any such consultation. This MOU does not prevent future agreements allowing NDOT to administer government-to-government

consultation, however, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.

- 2.2.4 Conformity determination–Nothing in this MOU must be construed to permit NDOT’s assumption of the USDOT Secretary’s responsibilities for conformity determinations required by Section 176 of the Clean Air Act (42 U.S.C. § 7506) or any responsibility under 23 U.S.C. §§ 134 or 135, or under 49 U.S.C. §§ 5303 or 5304 (23 U.S.C. § 327(a)(2)(B)(iv)(II)). FHWA’s Nebraska Division Office will restrict its review to only that data, analyses, applicable comments and responses, and other relevant documentation that enable FHWA to make the project-level conformity determination.
- 2.2.5 NDOT 326 MOU in effect–The assignment under this part does not alter the scope and terms of the Section 326 MOU signed on September 5, 2018, and most recently renewed September 17, 2021, and September 12, 2024, between NDOT and FHWA. As applicable NDOT will conduct all environmental reviews authorized under the terms of that MOU.
- 2.2.6 Consultation letter disclosure–Included in each consultation letter that is submitted with any biological assessment, historic properties or cultural resources report, Section 4(f) evaluation, or other analyses prepared under the authority granted by this MOU, NDOT shall insert the following language in a way that is conspicuous to the reader or include in a project record:
- The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by NDOT pursuant to 23 U.S.C. § 327 and a Memorandum of Understanding dated February 23, 2026 and executed by FHWA and NDOT.
- 2.2.7 Existing environmental commitments–NDOT will continue to adhere to the original terms of Biological Opinions, Memoranda of Agreement, Programmatic Agreements, other agreements with terms, and conditions, and any other commitments that were the result of the environmental review process and consultations prior to the execution of this MOU as long as these terms are not amended or revised. Any revisions or amendments to these agreements made after the effective date of this MOU are NDOT’s responsibility. NDOT agrees to assume FHWA’s environmental review role and responsibilities as identified in existing interagency agreements among NDOT, FHWA, and other Federal or State agencies, and/or negotiate new agreements, if needed. NDOT agrees to assume FHWA’s responsibilities of ongoing consultations as of the effective date of this MOU.
- 2.2.8 Section 4(f) Constructive Use–NDOT will not make any determination that an action constitutes a constructive use of a publicly owned park, public recreation area, wildlife refuge, waterfowl refuge, or historic site under Section 4(f) without first consulting with FHWA and obtaining FHWA’s approval of such determination.

2.3 Highway Projects

2.3.1 Highway projects covered—Except as provided in subpart 2.3.2 of this MOU or otherwise specified in this subpart, the assignments and assumptions of the USDOT Secretary’s and FHWA’s responsibilities shall apply with respect to the environmental review, consultation, or any other action pertaining to the environmental review or approval of the following classes of highway projects located within the State of Nebraska. The definition of “highway project” is found at 23 CFR 773.103, and for purposes of this MOU, “highway project” includes eligible preventative maintenance activities.

- A. Projects requiring an Environmental Impact Statement (EIS), both on the State highway system (SHS) and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
- B. Projects qualifying for a CE, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals, and that do not qualify for assignment of responsibilities pursuant to NDOT’s Section 326 MOU.
- C. Projects requiring an Environmental Assessment (EA), both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals.
- D. Projects funded by other Federal Agencies, or projects without any Federal funding, that also require FHWA approvals. For these projects, NDOT would not assume the NEPA responsibilities of other Federal Agencies. However, NDOT may use or adopt another Federal Agency’s NEPA analysis or documents consistent with applicable law, and the USDOT and FHWA regulations, policies, and guidance.
- E. FHWA will remain liable for the following projects and their associated construction packages through the end of the 150-day statute of limitations period pursuant to 23 U.S.C. § 139(1) (February 2, 2026). For these and other projects previously signed by FHWA, NDOT will approve re-evaluations as needed and assume liability:
 - Central City Viaduct RRZ-TMT-14-2(123)
 - Minatare US-385 NH-26-1(172)
 - US-81 York–Columbus S-81-2(1051)
 - Norfolk–Wisner S-275-6(1052)
 - North 33rd & Cornhusker LCLC-5233(4)
- F. FHWA will remain liable for the following projects and their associated construction packages through the final NEPA decision and end of the associated 150-day statute of limitations period pursuant to 23 U.S.C. § 139(1) (June 15, 2026). For these and other projects previously signed by FHWA, NDOT will approve re-evaluations as needed and assume liability:
 - BNSF, Bridgeport RRZ-TMT-26-1(161)
 - Lincoln West Beltway, US-77 S-77-2(1074)

2.3.2 Exceptions to highway projects covered—The following are specifically excluded from the list in subpart 2.3.1 of highway projects:

- A. Any Federal Lands Highway projects authorized under 23 U.S.C. §§ 202 (“Tribal Transportation Program”), 203 (“Federal Lands Transportation Program”), § 204 (“Federal Lands Access Program”), unless such projects will be designed and constructed by NDOT.
- B. Any project that crosses State boundaries and any project that crosses or is adjacent to international boundaries (23 CFR 773.105(c)). For the purpose of this MOU, a project is considered “adjacent to international boundaries” if it requires issuance of a new, or the modification of an existing, Presidential Permit by the U.S. Department of State.
- C. Recreational Trails (23 U.S.C. § 206)
- D. Programs and projects advanced by direct recipients of Federal-aid highway program funds other than NDOT, including but not limited to:
 - 1. Competitive grant programs;
 - 2. Direct recipient tribal projects; and
 - 3. Transportation Infrastructure Finance and Innovation Act Credit Program.

PART 3. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

3.1 Certifications

3.1.1 NDOT hereby makes the following certifications:

- A. NDOT has the legal authority to accept all the assumptions of responsibility identified in this MOU;
- B. NDOT has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
- C. NDOT has the legal authority to execute this MOU;
- D. The State of Nebraska has laws in effect that are comparable to the Freedom of Information Act at 5 U.S.C. § 552, and those laws are found in the Nebraska Public Records Law (Neb. Rev. Stat. § 84-712 *et seq.*); and
- E. The Nebraska Public Records Law provides that any decision regarding the public availability of a document under that act is reviewable by a Nebraska court of competent jurisdiction.

3.2 State Commitment of Resources

3.2.1 Financial Resources—As required by 23 U.S.C. § 327(c)(3)(D), NDOT will maintain the financial resources necessary to carry out the responsibilities it is assuming.

3.2.2 Personnel Resources—NDOT currently has and will maintain adequate organizational and staff capability, including competent and qualified consultants where necessary or desirable, to carry out the responsibilities it has assumed under this MOU effectively.

- 3.2.3 NHPA Standards—When carrying out the requirements of Section 106 of the National Historic Preservation Act (NHPA), as amended, NDOT staff (including consultants) must comply with 36 CFR 800.2(a)(1). All actions that involve identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation (including 36 CFR 800.11) of such actions in the form of reports, forms, or other records, must 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 (36 CFR part 61, Appendix A). NDOT must 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.
- 3.2.4 Environmental Toolkits—As part of its commitment of resources, NDOT will continue to develop, implement, and update its manuals and procedures which are not subject to FHWA review or approval, to support appropriate environmental analysis and decisionmaking under NEPA and associated laws and regulations. NDOT recognizes it is solely responsible for the manuals and procedures for compliance with responsibilities assigned in this MOU and for establishing policy and guidance to implement its program.

3.3 Federal Court Jurisdiction

- 3.3.1 As required under 23 U.S.C. § 327(c)(3)(B), and authorized by Neb. Rev. Stat. § 39-1306.03, NDOT hereby expressly consents, on behalf of the State of Nebraska, to accept the jurisdiction of the Federal courts in cases that involve the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by NDOT under this MOU. This consent to Federal court jurisdiction will remain valid after termination of this MOU, or FHWA’s withdrawal of assignment of the USDOT Secretary’s responsibilities, for any decision or approval made by NDOT pursuant to an assumption of responsibility under this MOU. NDOT understands and agrees that, in accordance with 23 U.S.C. § 327, this acceptance constitutes a waiver of the State of Nebraska’s immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of carrying out the USDOT Secretary’s responsibilities that have been assumed under this MOU.

PART 4. APPLICABILITY OF FEDERAL LAW

4.1 Procedural and Substantive Requirements

- 4.1.1 Same procedural and substantive requirements—As provided at 23 U.S.C. § 327(a)(2)(C), NDOT will be subject to the same procedural and substantive requirements as would apply if the responsibilities were carried out by FHWA including Federal statutes and regulations, E.O.s issued by the President of the United States, USDOT Orders, FHWA Orders, and official guidance and policy.
- 4.1.2 Policy and guidance notice—The FHWA will use its best efforts to ensure that any new or revised Federal policy or guidance relating to environmental review matters of national

application, which are final and applicable to FHWA's responsibilities under NEPA and other laws that are assumed by NDOT under this MOU, are posted online at FHWA's Website and sent in writing to NDOT electronically to NDOT.OfficialNEPA@nebraska.gov unless otherwise specified by the State within 10 business days of issuance. When FHWA is considering changes to the Program or changes that may or will impact NDOT's assumed responsibilities or resources, FHWA shall seek input from NDOT. In the event a new or revised FHWA policy or guidance is not made available to NDOT as described in this subpart, and if NDOT had no knowledge of such policy or guidance, then a failure by NDOT to comply with such Federal policy or guidance will not be a basis for termination of this MOU.

4.1.3 Coordination with other agencies—NDOT will seek early and appropriate coordination with Federal Agencies concerning the laws, guidance, and policies that such other Federal Agencies are responsible for administering and which relate to NDOT's responsibilities under this MOU. Within six (6) months of the effective date of this MOU, NDOT will work with FHWA and the resource agencies to determine whether any action should be taken with respect to such agreement. Such actions may include:

- A. Obtaining written consent to the continuation of an interagency agreement in its existing form, but with the substitution of NDOT for FHWA; or
- B. Amending an interagency agreement as needed to continue the interagency agreement continues but that NDOT assumes FHWA's responsibilities.

If an affected agency does not agree to modify an interagency agreement, then, to the extent permitted by applicable law and regulation, NDOT will carry out the assumed 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.

4.1.4 NDOT may enter into an interagency agreement with a Federal, State, Tribal, or local agency regarding appropriate processes and procedures to carry out the project-specific responsibilities assumed under this MOU. Although FHWA is not required to be a signatory, such an interagency agreement must conform with all provisions of this MOU, especially subpart 4.2.

4.1.5 Interagency Agreements—Upon termination of this MOU, NDOT and FHWA must contact the Federal resource agency to determine whether any interagency agreement should be amended or reinstated as appropriate.

4.2 Rulemaking

4.2.1 As provided under 23 U.S.C. § 327(f), nothing in this MOU allows NDOT to assume any rulemaking authority of the USDOT Secretary. In addition, NDOT may not establish policy and guidance on behalf of the USDOT Secretary or FHWA for highway projects covered in this MOU. NDOT's authority to establish State regulations, policy, and guidance concerning the State environmental review of State highway projects will not supersede applicable Federal environmental review regulations, policy, or guidance established by or applicable to the USDOT Secretary or FHWA.

4.3 Effect of Assumption

- 4.3.1 For purposes of carrying out the responsibilities assumed under this MOU, and subject to the limitations contained in 23 U.S.C. § 327 and this MOU, NDOT will be deemed to be acting as FHWA or USDOT Secretary, as applicable, with respect to the environmental review, consultation, and other related actions required under those responsibilities.

4.4 Other Federal Agencies

- 4.4.1 As provided under 23 U.S.C. § 327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of any Federal Agency other than USDOT (including FHWA), under applicable statutes and regulations with respect to a project.

PART 5. LITIGATION

5.1 Responsibility and Liability

- 5.1.1 NDOT solely responsible and solely liable—As provided in 23 U.S.C. § 327(e), NDOT will be solely liable and solely responsible for carrying out the responsibilities assumed under this MOU. The FHWA and USDOT will have no responsibility or liability for the performance of the responsibilities assumed by NDOT, including any decision or approval made by NDOT while participating in the Program.
- 5.1.2 Legal representation—NDOT shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, NDOT will provide qualified and competent legal counsel, including outside counsel if necessary. NDOT will provide the defense at its own expense, subject to 23 U.S.C. § 327(a)(2)(G) concerning Federal-aid participation in attorney's fees for NDOT's counsel. NDOT will 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.
- 5.1.3 Notice of settlement—NDOT will notify FHWA's Nebraska Division Office and the U.S. Department of Justice (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, unless a shorter time is dictated by the court, which may 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. NDOT 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 review period has expired, whichever occurs first.

- 5.1.4 Notice of litigation filings—Within seven (7) calendar days of receipt by NDOT, NDOT will provide notice to FHWA’s 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 NDOT has assumed under this MOU. NDOT must notify FHWA’s Nebraska Division Office and DOJ within five (5) calendar days of filing a notice of appeal of a court decision. NDOT must confer with FHWA and DOJ regarding the appeal at least forty-five (45) calendar days before filing an appeal brief in the case or any shorter time set by the court.
- 5.1.5 NDOT’s notifications to FHWA and DOJ in subparts 5.1.3 and 5.1.4 must be made by electronic mail to and NRS DOT.enrd@usdoj.gov unless otherwise specified by FHWA and DOJ. FHWA and DOJ’s comments under subparts 5.1.3 and 5.1.4 must be made by electronic mail to NDOT.OfficialNEPA@nebraska.gov unless otherwise specified by NDOT. In the event that regular mail is determined necessary, mail should be sent to:

For DOJ: Assistant Attorney General for the Environment and Natural Resources Division, 950 Pennsylvania Avenue, N.W., Room 2143, Washington, D.C. 20530

For FHWA: Division Administrator, Federal Highway Administration Nebraska Division, 100 Centennial Mall North, Room 220, Lincoln, N.E. 68508

For NDOT: Environmental Section Manager, Nebraska Department of Transportation, 1500 Nebraska Parkway, Lincoln, N.E. 68502

PART 6. INVOLVEMENT WITH FHWA

6.1 Generally

- 6.1.1 No project-level assistance—Except as specifically provided otherwise in this MOU, FHWA will not provide project level assistance to NDOT in carrying out the responsibilities it has assumed 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 process or program level assistance as described in subpart 6.1.4 of this MOU, including discussions concerning issues addressed in prior projects, interpretations of applicable law contained in Title 23 U.S.C. or Title 49 U.S.C., interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance.
- 6.1.2 No project-level intervention—The FHWA will not intervene, broker, act as intermediary, or otherwise be involved in any issue involving NDOT’s consultation or coordination with another Federal Agency with respect to NDOT’s discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, FHWA may attend meetings between NDOT and other Federal Agencies and submit comments to NDOT and the other Federal Agency upon request by either NDOT or the other Federal Agency and agreement by FHWA. The FHWA will notify both NDOT and

the relevant Federal Agency prior to attending any meetings between NDOT and such other Federal Agency.

- 6.1.3 Complaints by other Federal Agencies—The FHWA will review concerns regarding NDOT’s compliance with this MOU raised by other Federal Agencies. FHWA will notify NDOT of the potential compliance issue and will work with both NDOT and the relevant Federal Agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.
- 6.1.4 Request for assistance—At NDOT’s request, FHWA may assist NDOT in evaluating its environmental program and developing or modifying any of its processes or procedures to carry out the responsibilities it has assumed under this MOU.
- 6.1.5 Providing information to FHWA—As provided at 23 U.S.C 327(c)(4), NDOT will provide to FHWA any information FHWA reasonably considers necessary to ensure that NDOT is adequately carrying out the responsibilities assigned to NDOT. NDOT’s obligations and responsibilities under 23 CFR 1.5 are not altered in any way by executing this MOU.

6.2 MOU Monitoring and Oversight

- 6.2.1 FHWA will provide necessary and appropriate monitoring and oversight of NDOT’s compliance with this MOU.
- 6.2.2 Audit—As provided at 23 U.S.C. § 327(g)(1)(B), FHWA will conduct an audit each of the first 4 years of this MOU. The purpose of the audit will be to ensure compliance with this MOU and with all Federal laws for which responsibility is assumed under this MOU. The audit will be carried out by an audit team determined by FHWA in consultation with NDOT. FHWA will provide a reasonable opportunity for NDOT to provide feedback on the draft audit findings prior to publishing them in the *Federal Register*. FHWA shall publish the draft audit findings in the *Federal Register* for public comment. Within 60 days after the end of the public comment period FHWA will respond to public comments. The entire audit process, from initiation to completion (including public comment and responses to those comments) must not exceed 180 days in duration.
- 6.2.3 Internal quality controls review—In carrying out the responsibilities assumed under this MOU, NDOT agrees to carry out regular quality assurance and quality control (QA/QC) reviews to ensure that the assumed responsibilities are being conducted in accordance with applicable law and this MOU. At a minimum, NDOT’s QA/QC process will include the review and monitoring of its processes and performance relating to project decisions, completion of environmental analysis, project file documentation, checking for errors and omissions, and legal sufficiency reviews, and taking appropriate corrective action as needed. Within six (6) months of the effective date of this MOU, NDOT shall finalize a QA/QC process that satisfies the requirements in this subpart. In developing and implementing the QA/QC process, NDOT must consult with the FHWA Nebraska Division Office. NDOT agrees to cooperate with FHWA to consider recommendations FHWA may have made with respect to its QA/QC process.

6.2.4 Self-assessment—NDOT must perform annual self-assessments of its QA/QC process and performance to determine if its process is working as intended. If any process areas are identified as needing improvement, NDOT will take appropriate and timely corrective actions to address such areas. At least one month prior to the date of a scheduled FHWA audit, NDOT will transmit a summary of its most recent self-assessment to FHWA Nebraska Division Office. The summary will include a description of the scope of the self-assessment conducted and the areas reviewed, a description of the process followed in conducting the self-assessment, a list of the areas identified as needing improvement, any corrective actions that have been or will be implemented, and a statement from NDOT's Environmental Section Manager concerning whether the processes are ensuring that the responsibilities NDOT has assumed under this MOU are being carried out in accordance with this MOU and all applicable Federal laws and policies.

6.2.5 Upon the effective date of this MOU, NDOT will maintain a list of NEPA approvals and decisions (CE, EA, Finding of No Significant Impact, Draft EIS, Final EIS, Final EIS/Record of Decision (ROD), ROD) and Section 4(f) approvals it makes under this MOU. NDOT will provide an updated list to FHWA Nebraska Division annually.

6.3 Records Retention

6.3.1 NDOT will retain project files, and files pertaining to the discharge of its responsibilities under this MOU in accordance with 2 CFR 200.334 (3 years from the date of submission of the final Federal expenditure report) and the State of Nebraska's records retention requirements, whichever is longer.

6.4 Federal Register

6.4.1 For any documents that are required to be published in the *Federal Register*, such as the Notice of Intent under 23 CFR 771.123(a) and Notice of Final Agency Action under 23 U.S.C. § 139(l)(2), NDOT must transmit such document to FHWA's Nebraska Division Office, with a request for publication in the *Federal Register* on behalf of NDOT. The FHWA's Nebraska Division Office will submit such document to the *Federal Register* within five (5) calendar days of receipt of such document from NDOT. To the extent that the operating procedures of the U.S. Government Printing Office and the Federal Register permit, NDOT will take over the procedures described above from the FHWA Nebraska Division Office.

6.5 Participation in Resource Agency Reports

6.5.1 NDOT agrees to provide data and information requested by FHWA 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:

- A. Information on the completion of and duration to complete all NEPA classes of action(EIS, EA, CE);
- B. Archeology Reports requested by the National Park Service;
- C. Endangered Species Act Expenditure Reports requested by the U.S. Fish & Wildlife Service;
- D. Project status and information for EAs and EISs for use on the searchable Website maintained under section 41003(b) of the Fixing America’s Surface Transportation Act [FAST Act, 42 U.S.C. § 4370m-2(b) and 23 U.S.C. § 139(0)] (Federal Permitting Dashboard) to be submitted in accordance with current and any future reporting standard issued by USDOT pursuant to such provisions;
- E. NEPA Litigation Reports requested by Council on Environmental Quality (CEQ); and
- F. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ.

6.6 Certification of NEPA Compliance

6.6.1 Before executing any Federal-aid project agreement for a physical construction contract, an alternative delivery contract, or a contract for final design services, NDOT will continue to provide to the FHWA Nebraska Division, as part of the Construction Authorization Form or the Federal Obligation Request Form process, the NEPA classification and clearance date for the project as recorded in the Financial Management and Information System. This will serve as NDOT’s certification that NDOT has fulfilled all responsibilities under this MOU in accordance with relevant Federal laws, regulations, and policies.

PART 7. WITHDRAWAL OF ASSIGNED RESPONSIBILITIES

7.1 FHWA-Initiated Withdrawal of Assigned Projects

7.1.1 The FHWA may withdraw the assignment of all or part of the USDOT Secretary’s responsibilities assigned to NDOT for any highway project if:

- A. NDOT fails to comply with a material term of this MOU or applicable Federal laws or policies, and after being given reasonable notice and opportunity to correct, NDOT does not take satisfactory corrective action;
- B. The highway project or highway projects involve significant or unique national policy interests for which NDOT’s assumption of the USDOT Secretary’s responsibilities would be inappropriate; or
- C. NDOT cannot satisfactorily resolve an issue or concern raised in government-to-government consultation process, as provided in subpart 2.2.3.

Upon the FHWA’s determination to withdraw assignment of the USDOT Secretary’s responsibilities under subpart 7.1.1, FHWA will notify NDOT of FHWA’s

determination, including reasons for its determination. Upon receipt of this notice, NDOT may submit any comments that would resolve the compliance concern or objections to FHWA within 30 calendar days, unless FHWA agrees to an extended period of time. Upon receipt of NDOT's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify NDOT of its decision. In making its determination, FHWA will consider NDOT's comments or objections, the effect the withdrawal of assignment will have on the Program, the amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal Agencies, and the overall public interest. Following its final determination, when FHWA withdraws assignment for any project or projects, FHWA will assume sole responsibility and liability for the decisions and approvals it has re-assumed for the project or projects based on such determination. However, NDOT will remain responsible for other decisions and approvals for the project or projects, which FHWA has not reassumed responsibility or liability for, such as decisions and approvals beyond the scope of the USDOT Secretary's responsibilities under NEPA and related Federal environmental laws.

7.2 NDOT Initiated Withdrawal of Assignment of Projects

- 7.2.1 NDOT may request FHWA to withdraw all or part of the USDOT Secretary's or FHWA's responsibilities assigned to NDOT for any highway project(s).
- 7.2.2 Upon NDOT's decision to request FHWA withdraw the assignment of the USDOT Secretary's responsibilities under subpart 7.2.1, NDOT will informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. After informally notifying FHWA of its desire, NDOT will provide FHWA written notice of its desire, including the reasons for wanting FHWA to withdraw assignment of the responsibilities. Upon receipt of this notice, FHWA will have 30 calendar days, unless extended by FHWA for cause, to determine whether it will withdraw assignment of the responsibilities requested. In making its determination, FHWA will consider the reasons NDOT desires FHWA to withdraw assignment of the responsibilities, the effect the withdrawal of assignment will have on the Program, amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal Agencies, and the overall public interest.

PART 8. TRAINING

- 8.1 NDOT may request and, subject to FHWA's resource availability, FHWA will provide training with respect to the responsibilities being assigned to NDOT under this MOU. Such training may be provided to NDOT by either FHWA or another Federal Agency or other parties, as appropriate. NDOT may also conduct its own training for staff and consultants.

- 8.2 NDOT will continue to implement training necessary to meet its environmental obligations. NDOT will be solely responsible for the development, implementation, and review of its training program.

PART 9. TERM, TERMINATION AND RENEWAL

9.1 Term

- 9.1.1 This MOU has a term of five (5) years, effective upon the date of final execution by both parties.

9.2 Termination by FHWA

- 9.2.1 As provided by 23 U.S.C. § 327(j)(1), FHWA may terminate NDOT's participation in the Program, in whole or in part, if:
- A. FHWA determines that NDOT is not adequately carrying out the responsibilities assigned to NDOT;
 - B. FHWA provides to NDOT:
 - (i) A notification of the determination of noncompliance;
 - (ii) A period of not less than 120 days to take such corrective action as FHWA determines to be necessary to comply with this MOU; and
 - (iii) On request of the Governor of Nebraska, a detailed description of each responsibility in need of corrective action regarding an inadequacy identified under subpart 9.2.A above; and
 - C. NDOT, after the notification and period provided under subpart 9.2.B above, fails to take satisfactory corrective action, as determined by the Secretary.

9.3 Termination by NDOT

- 9.3.1 Notice of termination – As provided at 23 U.S.C. § 327(j)(2), NDOT may terminate its participation in the Program at any time by providing to FHWA a notice by not later than the date that is 90 days before the date of termination, and subject to such terms and conditions as FHWA may provide.
- 9.3.2 Transition period – In the event of a termination by NDOT, FHWA and NDOT shall develop a plan to transition the responsibilities that NDOT has assumed back to FHWA and the USDOT Secretary, as applicable, 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 must be approved by both FHWA and NDOT.

9.4 Validity of NDOT Actions

Any environmental approvals made by NDOT pursuant to the responsibilities NDOT has assumed under this MOU will remain valid after termination of NDOT's participation in the Program or withdrawal of assignment by FHWA.

9.5 Renewal

9.5.1 This MOU is renewable in accordance with 23 U.S.C. § 327 and implementing regulations in effect at the time of the renewal.

PART 10. AMENDMENTS

10.1 Generally

10.1.1 All parts of this MOU may be amended at any time upon mutual agreement by both FHWA and NDOT.

10.1.2 To the extent that NDOT seeks to amend its application (including this MOU) to request additional projects, classes of projects, or more environmental review responsibilities, such amendment will be subject to the procedures of 23 CFR 773.113(b).

IN WITNESS THEREOF, the parties hereto have caused this MOU to be duly executed in duplicate as of the date of the last signature written below.

U.S. DEPARTMENT OF TRANSPORTATION/FEDERAL HIGHWAY ADMINISTRATION



Steven Bradbury
Deputy Secretary
U.S. Department of Transportation

Dated: Feb. 23, 2020

STATE OF NEBRASKA



Jim Pillen
Governor
State of Nebraska

Dated: 2/23/20